

Conveyance of prisoner

(8) An order under subsection (7) shall be addressed to the person who has custody of the prisoner and on receipt thereof that person shall deliver the prisoner to the peace officer who is named in the order to receive him.

Return

(9) When the purposes of any order made under this section have been carried out, the prisoner shall be returned to the place where he was confined at the time the order was made.

R.S., 1985, c. C-46, s. 527; R.S., 1985, c. 27 (1st Supp.), ss. 92, 101(E), 203; 1994, c. 44, s. 50; 1995, c. 22, s. 10; 1997, c. 18, s. 62; [2015, c. 3, s. 52\(F\)](#).

Endorsement of Warrant

Endorsing warrant

528 (1) Where a warrant for the arrest or committal of an accused, in any form set out in Part XXVIII in relation thereto, cannot be executed in accordance with [section 514](#) or [703](#), a justice within whose jurisdiction the accused is or is believed to be shall, on application and proof on oath or by affidavit of the signature of the justice who issued the warrant, authorize the arrest of the accused within his jurisdiction by making an endorsement, which may be in Form 28, on the warrant.

Copy of affidavit or warrant

(1.1) A copy of an affidavit or warrant submitted by a means of telecommunication that produces a writing has the same probative force as the original for the purposes of subsection (1).

Effect of endorsement

(2) An endorsement that is made on a warrant pursuant to subsection (1) is sufficient authority to the peace officers to whom it was originally directed, and to all peace officers within the territorial jurisdiction of the justice by whom it is endorsed, to execute the warrant and to take the accused before the justice who issued the warrant or before any other justice for the same territorial division.

R.S., 1985, c. C-46, s. 528; R.S., 1985, c. 27 (1st Supp.), s. 93; 1994, c. 44, s. 51.

Powers to Enter Dwelling-houses to Carry out Arrests

Including authorization to enter in warrant of arrest

529 (1) A warrant to arrest or apprehend a person issued by a judge or justice under this or any other Act of Parliament may authorize a peace officer, subject to subsection (2), to enter a dwelling-house described in the warrant for the purpose of arresting or

apprehending the person if the judge or justice is satisfied by information on oath in writing that there are reasonable grounds to believe that the person is or will be present in the dwelling-house.

Execution

(2) An authorization to enter a dwelling-house granted under subsection (1) is subject to the condition that the peace officer may not enter the dwelling-house unless the peace officer has, immediately before entering the dwelling-house, reasonable grounds to believe that the person to be arrested or apprehended is present in the dwelling-house.

R.S., 1985, c. C-46, s. 529; 1994, c. 44, s. 52; 1997, c. 39, s. 2.

Warrant to enter dwelling-house

529.1 A judge or justice may issue a warrant in Form 7.1 authorizing a peace officer to enter a dwelling-house described in the warrant for the purpose of arresting or apprehending a person identified or identifiable by the warrant if the judge or justice is satisfied by information on oath that there are reasonable grounds to believe that the person is or will be present in the dwelling-house and that

(a) a warrant referred to in this or any other Act of Parliament to arrest or apprehend the person is in force anywhere in Canada;

(b) grounds exist to arrest the person without warrant under [paragraph 495\(1\)\(a\)](#) or [\(b\)](#) or [section 672.91](#); or

(c) grounds exist to arrest or apprehend without warrant the person under an Act of Parliament, other than this Act.

1997, c. 39, s. 2; [2002, c. 13, s. 23](#).

Reasonable terms and conditions

529.2 Subject to [section 529.4](#), the judge or justice shall include in a warrant referred to in [section 529](#) or [529.1](#) any terms and conditions that the judge or justice considers advisable to ensure that the entry into the dwelling-house is reasonable in the circumstances.

1997, c. 39, s. 2.

Authority to enter dwelling without warrant

529.3 (1) Without limiting or restricting any power a peace officer may have to enter a dwelling-house under this or any other Act or law, the peace officer may enter the dwelling-house for the purpose of arresting or apprehending a person, without a warrant referred to in [section 529](#) or [529.1](#) authorizing the entry, if the peace officer has reasonable grounds to believe that the person is present in the dwelling-house, and the conditions for obtaining a warrant under section 529.1 exist but by reason of exigent circumstances it would be impracticable to obtain a warrant.

Exigent circumstances

(2) For the purposes of subsection (1), exigent circumstances include circumstances in which the peace officer

(a) has reasonable grounds to suspect that entry into the dwelling-house is necessary to prevent imminent bodily harm or death to any person; or

(b) has reasonable grounds to believe that evidence relating to the commission of an indictable offence is present in the dwelling-house and that entry into the dwelling-house is necessary to prevent the imminent loss or imminent destruction of the evidence.

1997, c. 39, s. 2.

Omitting announcement before entry

529.4 (1) A judge or justice who authorizes a peace officer to enter a dwelling-house under [section 529](#) or [529.1](#), or any other judge or justice, may authorize the peace officer to enter the dwelling-house without prior announcement if the judge or justice is satisfied by information on oath that there are reasonable grounds to believe that prior announcement of the entry would

(a) expose the peace officer or any other person to imminent bodily harm or death; or

(b) result in the imminent loss or imminent destruction of evidence relating to the commission of an indictable offence.

Execution of authorization

(2) An authorization under this section is subject to the condition that the peace officer may not enter the dwelling-house without prior announcement despite being authorized to do so unless the peace officer has, immediately before entering the dwelling-house,

(a) reasonable grounds to suspect that prior announcement of the entry would expose the peace officer or any other person to imminent bodily harm or death; or

(b) reasonable grounds to believe that prior announcement of the entry would result in the imminent loss or imminent destruction of evidence relating to the commission of an indictable offence.

Exception

(3) A peace officer who enters a dwelling-house without a warrant under [section 529.3](#) may not enter the dwelling-house without prior announcement unless the peace officer has, immediately before entering the dwelling-house,

(a) reasonable grounds to suspect that prior announcement of the entry would expose the peace officer or any other person to imminent bodily harm or death; or

(b) reasonable grounds to believe that prior announcement of the entry would result in the imminent loss or imminent destruction of evidence relating to the commission of an indictable offence.

1997, c. 39, s. 2.

Means of telecommunication

529.5 An application for a warrant under [section 529.1](#) or an authorization under [section 529](#) or [529.4](#) may be submitted, and the warrant or authorization may be issued, by a means of telecommunication, and [section 487.1](#) applies for those purposes with any necessary modifications.

1997, c. 39, s. 2; [2022, c. 17, s. 34](#).

PART XVII

Language of Accused

Language of accused

530 (1) On application by an accused whose language is one of the official languages of Canada, made not later than the time of the appearance of the accused at which their trial date is set, a judge, provincial court judge, judge of the Nunavut Court of Justice or justice of the peace shall grant an order directing that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak the official language of Canada that is the language of the accused or, if the circumstances warrant, who speak both official languages of Canada.

Idem

(2) On application by an accused whose language is not one of the official languages of Canada, made not later than the time of the appearance of the accused at which their trial date is set, a judge, provincial court judge, judge of the Nunavut Court of Justice or justice of the peace may grant an order directing that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak the official language of Canada in which the accused, in the opinion of the judge, provincial court judge, judge of the Nunavut Court of Justice or justice of the peace, can best give testimony or, if the circumstances warrant, who speak both official languages of Canada.

Accused to be advised of right

(3) The judge, provincial court judge, judge of the Nunavut Court of Justice or justice of the peace before whom an accused first appears shall ensure that they are advised of their right to apply for an order under subsection (1) or (2) and of the time before which such an application must be made.

Remand

(4) If an accused fails to apply for an order under subsection (1) or (2) and the judge, provincial court judge, judge of the Nunavut Court of Justice or justice of the peace before whom the accused is to be tried, in this Part referred to as “the court”, is satisfied that it is in the best interests of justice that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language of

Canada that is the language of the accused or, if the language of the accused is not one of the official languages of Canada, the official language of Canada in which the accused, in the opinion of the court, can best give testimony, the court may, if it does not speak that language, by order remand the accused to be tried by a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak that language or, if the circumstances warrant, who speak both official languages of Canada.

Variation of order

(5) An order under this section that a trial be held in one of the official languages of Canada may, if the circumstances warrant, be varied by the court to require that it be held in both official languages of Canada, and vice versa.

Circumstances warranting order directing trial in both official languages

(6) The facts that two or more accused who are to be tried together are each entitled to be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak one of the official languages of Canada and that those official languages are different may constitute circumstances that warrant that an order be granted directing that they be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak both official languages of Canada.

R.S., 1985, c. C-46, s. 530; R.S., 1985, c. 27 (1st Supp.), ss. 94, 203; 1999, c. 3, s. 34; [2008, c. 18, s. 18](#); [2019, c. 25, s. 237](#).

Translation of documents

530.01 (1) If an order is granted under [section 530](#), a prosecutor — other than a private prosecutor — shall, on application by the accused,

(a) cause the portions of an information or indictment against the accused that are in an official language that is not that of the accused or that in which the accused can best give testimony to be translated into the other official language; and

(b) provide the accused with a written copy of the translated text at the earliest possible time.

Original version prevails

(2) In the case of a discrepancy between the original version of a document and the translated text, the original version shall prevail.

[2008, c. 18, s. 19](#).

If order granted

530.1 If an order is granted under [section 530](#),

(a) the accused and his counsel have the right to use either official language for all purposes during the preliminary inquiry and trial of the accused;

(b) the accused and his counsel may use either official language in written pleadings or other documents used in any proceedings relating to the preliminary inquiry or trial

of the accused;

(c) any witness may give evidence in either official language during the preliminary inquiry or trial;

(c.1) the presiding justice or judge may, if the circumstances warrant, authorize the prosecutor to examine or cross-examine a witness in the official language of the witness even though it is not that of the accused or that in which the accused can best give testimony;

(d) the accused has a right to have a justice presiding over the preliminary inquiry who speaks the official language of the accused or both official languages, as the case may be;

(e) the accused has a right to have a prosecutor — other than a private prosecutor — who speaks the official language of the accused or both official languages, as the case may be;

(f) the court shall make interpreters available to assist the accused, his counsel or any witness during the preliminary inquiry or trial;

(g) the record of proceedings during the preliminary inquiry or trial shall include

(i) a transcript of everything that was said during those proceedings in the official language in which it was said,

(ii) a transcript of any interpretation into the other official language of what was said, and

(iii) any documentary evidence that was tendered during those proceedings in the official language in which it was tendered; and

(h) any trial judgment, including any reasons given therefor, issued in writing in either official language, shall be made available by the court in the official language that is the language of the accused.

R.S., 1985, c. 31 (4th Supp.), s. 94; 2008, c. 18, s. 20.

Language used in proceeding

530.2 (1) If an order is granted directing that an accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak both official languages, the justice or judge presiding over a preliminary inquiry or trial may, at the start of the proceeding, make an order setting out the circumstances in which, and the extent to which, the prosecutor and the justice or judge may use each official language.

Right of the accused

(2) Any order granted under this section shall, to the extent possible, respect the right of the accused to be tried in his or her official language.

2008, c. 18, s. 21.

Change of venue

531 Despite any other provision of this Act but subject to any regulations made under [section 533](#), if an order made under [section 530](#) cannot be conveniently complied with in the territorial division in which the offence would otherwise be tried, the court shall, except if that territorial division is in the Province of New Brunswick, order that the trial of the accused be held in another territorial division in the same province.

R.S., 1985, c. C-46, s. 531; R.S., 1985, c. 27 (1st Supp.), s. 203; [2008, c. 18, s. 21](#).

Saving

532 Nothing in this Part or the [Official Languages Act](#) derogates from or otherwise adversely affects any right afforded by a law of a province in force on the coming into force of this Part in that province or thereafter coming into force relating to the language of proceedings or testimony in criminal matters that is not inconsistent with this Part or that Act.

1977-78, c. 36, s. 1.

Regulations

533 The Lieutenant Governor in Council of a province may make regulations generally for carrying into effect the purposes and provisions of this Part in the province and the Commissioner of Yukon, the Commissioner of the Northwest Territories and the Commissioner of Nunavut may make regulations generally for carrying into effect the purposes and provisions of this Part in Yukon, the Northwest Territories and Nunavut, respectively.

R.S., 1985, c. C-46, s. 533; 1993, c. 28, s. 78; [2002, c. 7, s. 144](#).

Review

533.1 (1) Within three years after this section comes into force, a comprehensive review of the provisions and operation of this Part shall be undertaken by any committee of the Senate, of the House of Commons or of both Houses of Parliament that may be designated or established by the Senate or the House of Commons, or by both Houses of Parliament, as the case may be, for that purpose.

Report

(2) The committee referred to in subsection (1) shall, within a year after a review is undertaken under that subsection or within any further time that may be authorized by the Senate, the House of Commons or both Houses of Parliament, as the case may be, submit a report on the review to Parliament, including a statement of any changes that the committee recommends.

[2008, c. 18, s. 21.1](#).

534 [Repealed, 1997, c. 18, s. 63]

PART XVIII

Procedure on Preliminary Inquiry

Jurisdiction

Inquiry by justice

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

R.S., 1985, c. C-46, s. 535; R.S., 1985, c. 27 (1st Supp.), s. 96; [2002, c. 13, s. 24](#); [2019, c. 25, s. 238](#).

Remand by justice to provincial court judge in certain cases

536 (1) Where an accused is before a justice other than a provincial court judge charged with an offence over which a provincial court judge has absolute jurisdiction under [section 553](#), the justice shall remand the accused to appear before a provincial court judge having jurisdiction in the territorial division in which the offence is alleged to have been committed.

Election before justice — 14 years or more of imprisonment

(2) If an accused is before a justice, charged with an indictable offence that is punishable by 14 years or more of imprisonment, other than an offence listed in [section 469](#), the justice shall, after the information has been read to the accused, put the accused to an election in the following words:

You have the option to elect to be tried by a provincial court judge without a jury and without having had a preliminary inquiry; or you may elect to be tried by a judge without a jury; or you may elect to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. If you elect to be tried by a judge without a jury or by a court composed of a judge and jury or if you are deemed to have elected to be tried by a court composed of a judge and jury, you will have a preliminary inquiry only if you or the prosecutor requests one. How do you elect to be tried?

Election before justice — other indictable offences

(2.1) If an accused is before a justice, charged with an indictable offence — other than an offence that is punishable by 14 years or more of imprisonment, an offence listed in [section 469](#) that is not punishable by 14 years or more of imprisonment or an offence over which a provincial court judge has absolute jurisdiction under [section 553](#) —, the justice shall, after the information has been read to the accused, put the accused to an election in the following words:

You have the option to elect to be tried by a provincial court judge without a jury; or you may elect to be tried by a judge without a jury; or you may elect to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. How do you elect to be tried?

Procedure where accused elects trial by provincial court judge

(3) Where an accused elects to be tried by a provincial court judge, the justice shall endorse on the information a record of the election and shall

(a) where the justice is not a provincial court judge, remand the accused to appear and plead to the charge before a provincial court judge having jurisdiction in the territorial division in which the offence is alleged to have been committed; or

(b) where the justice is a provincial court judge, call on the accused to plead to the charge and if the accused does not plead guilty, proceed with the trial or fix a time for the trial.

Request for preliminary inquiry

(4) If an accused referred to in subsection (2) elects to be tried by a judge without a jury or by a court composed of a judge and jury or does not elect when put to the election or is deemed under [paragraph 565\(1\)\(a\)](#) to have elected to be tried by a court composed of a judge and jury, or if an accused is charged with an offence listed in [section 469](#) that is punishable by 14 years or more of imprisonment, the justice shall, subject to [section 577](#), on the request of the accused or the prosecutor made at that time or within the period fixed by rules of court made under [section 482](#) or [482.1](#) or, if there are no such rules, by the justice, hold a preliminary inquiry into the charge.

Endorsement on the information — accused referred to in subsection (2)

(4.1) If an accused referred to in subsection (2) elects to be tried by a judge without a jury or by a court composed of a judge and jury or does not elect when put to the election or is deemed under [paragraph 565\(1\)\(a\)](#) to have elected to be tried by a court composed of a judge and jury, the justice shall endorse on the information and, if the accused is in custody, on the warrant of remand, a statement showing

(a) the nature of the election or deemed election of the accused or that the accused did not elect, as the case may be; and

(b) whether the accused or the prosecutor has requested that a preliminary inquiry be held.

Endorsement on the information — other accused charged with an offence punishable by 14 years or more of imprisonment

(4.11) If an accused is before a justice, charged with an offence listed in [section 469](#) that is punishable by 14 years or more of imprisonment, the justice shall endorse on the information and, if the accused is in custody, on the warrant of remand, a statement showing whether the accused or the prosecutor has requested that a preliminary inquiry be held.

Endorsement on the information — accused referred to in subsection (2.1)

(4.12) If an accused referred to in subsection (2.1) elects to be tried by a judge without a jury or by a court composed of a judge and jury or does not elect when put to the election or is deemed under [paragraph 565\(1\)\(a\)](#) to have elected to be tried by a court composed of a judge and jury, the justice shall endorse on the information and, if the

accused is in custody, on the warrant of remand, a statement showing the nature of the election or deemed election of the accused or that the accused did not elect, as the case may be.

Preliminary inquiry if two or more accused

(4.2) If two or more persons are jointly charged in an information and one or more of them make a request for a preliminary inquiry under subsection (4), a preliminary inquiry must be held with respect to all of them.

When no request for preliminary inquiry

(4.3) If no request for a preliminary inquiry is made under subsection (4), the justice shall fix the date for the trial or the date on which the accused must appear in the trial court to have the date fixed.

Jurisdiction

(5) Where a justice before whom a preliminary inquiry is being or is to be held has not commenced to take evidence, any justice having jurisdiction in the province where the offence with which the accused is charged is alleged to have been committed has jurisdiction for the purposes of subsection (4).

R.S., 1985, c. C-46, s. 536; R.S., 1985, c. 27 (1st Supp.), s. 96; [2002, c. 13, s. 25](#); [2004, c. 12, s. 9](#); [2019, c. 25, s. 239](#).

Remand by justice — Nunavut

536.1 (1) If an accused is before a justice of the peace charged with an indictable offence mentioned in [section 553](#), the justice of the peace shall remand the accused to appear before a judge.

Election before judge or justice of the peace in Nunavut — 14 years or more of imprisonment

(2) If an accused is before a judge or justice of the peace, charged with an indictable offence that is punishable by 14 years or more of imprisonment, other than an offence mentioned in [section 469](#), the judge or justice of the peace shall, after the information has been read to the accused, put the accused to an election in the following words:

You have the option to elect to be tried by a judge without a jury or to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. If you elect to be tried by a judge without a jury or by a court composed of a judge and jury or if you are deemed to have elected to be tried by a court composed of a judge and jury, you will have a preliminary inquiry only if you or the prosecutor requests one. How do you elect to be tried?

Election before judge or justice of the peace in Nunavut — other indictable offences

(2.1) If an accused is before a judge or justice of the peace, charged with an indictable offence — other than an offence that is punishable by 14 years or more of imprisonment,

an offence listed in [section 469](#) that is not punishable by 14 years or more of imprisonment or an offence mentioned in [section 553](#) —, the judge or justice of the peace shall, after the information has been read to the accused, put the accused to an election in the following words:

You have the option to elect to be tried by a judge without a jury or to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. How do you elect to be tried?

Request for preliminary inquiry — Nunavut

(3) If an accused referred to in subsection (2) elects to be tried by a judge without a jury or by a court composed of a judge and jury or does not elect when put to the election or is deemed under [paragraph 565\(1\)\(a\)](#) to have elected to be tried by a court composed of a judge and jury or if an accused is charged with an offence listed in [section 469](#) that is punishable by 14 years or more of imprisonment, the justice or judge shall, subject to [section 577](#), on the request of the accused or the prosecutor made at that time or within the period fixed by rules of court made under [section 482](#) or [482.1](#) or, if there are no such rules, by the judge or justice, hold a preliminary inquiry into the charge.

Endorsement on the information — accused referred to in subsection (2)

(4) If an accused referred to in subsection (2) elects to be tried by a judge without a jury or by a court composed of a judge and jury or does not elect when put to the election or is deemed under [paragraph 565\(1\)\(a\)](#) to have elected to be tried by a court composed of a judge and jury, the justice or judge shall endorse on the information and, if the accused is in custody, on the warrant of remand, a statement showing

- (a)** the nature of the election or deemed election of the accused or that the accused did not elect, as the case may be; and
- (b)** whether the accused or the prosecutor has requested that a preliminary inquiry be held.

Endorsement on the information — other accused charged with an offence punishable by 14 years or more of imprisonment

(4.01) If an accused is before a judge or justice of the peace, charged with an offence listed in [section 469](#) that is punishable by 14 years or more of imprisonment, the justice or judge shall endorse on the information and, if the accused is in custody, on the warrant of remand, a statement showing whether the accused or the prosecutor has requested that a preliminary inquiry be held.

Endorsement on the information — accused referred to in subsection (2.1)

(4.02) If an accused referred to in subsection (2.1) elects to be tried by a judge without a jury or by a court composed of a judge and jury or does not elect when put to the election or is deemed under [paragraph 565\(1\)\(a\)](#) to have elected to be tried by a court composed of a judge and jury, the justice shall endorse on the information and, if the accused is in custody, on the warrant of remand, a statement showing the nature of the

election or deemed election of the accused or that the accused did not elect, as the case may be.

Preliminary inquiry if two or more accused

(4.1) If two or more persons are jointly charged in an information and one or more of them make a request for a preliminary inquiry under subsection (3), a preliminary inquiry must be held with respect to all of them.

Procedure if accused elects trial by judge — Nunavut

(4.2) If no request for a preliminary inquiry is made under subsection (3),

(a) if the accused is before a justice of the peace, the justice of the peace shall remand the accused to appear and plead to the charge before a judge; or

(b) if the accused is before a judge, the judge shall

(i) if the accused elects to be tried by a judge without a jury, call on the accused to plead to the charge and if the accused does not plead guilty, proceed with the trial or fix a time for the trial, or

(ii) if the accused elects or is deemed to have elected to be tried by a court composed of a judge and jury, fix a time for the trial.

Jurisdiction — Nunavut

(5) If a justice of the peace before whom a preliminary inquiry is being or is to be held has not commenced to take evidence, any justice of the peace having jurisdiction in Nunavut has jurisdiction for the purpose of subsection (3).

Application to Nunavut

(6) This section, and not [section 536](#), applies in respect of criminal proceedings in Nunavut.

1999, c. 3, s. 35; [2002, c. 13, s. 26](#); [2004, c. 12, s. 10](#); [2019, c. 25, s. 240](#).

Elections and re-elections in writing

536.2 An election or a re-election by an accused in respect of a mode of trial may be made by submission of a document in writing without the personal appearance of the accused.

[2002, c. 13, s. 27](#).

Procedures before Preliminary Inquiry

Statement of issues and witnesses

536.3 If a request for a preliminary inquiry is made, the prosecutor or, if the request was made by the accused, counsel for the accused shall, within the period fixed by rules of

court made under [section 482](#) or [482.1](#) or, if there are no such rules, by the justice, provide the court and the other party with a statement that identifies

(a) the issues on which the requesting party wants evidence to be given at the inquiry; and

(b) the witnesses that the requesting party wants to hear at the inquiry.

[2002, c. 13, s. 27](#); [2011, c. 16, s. 3\(F\)](#).

Order for hearing

536.4 (1) The justice before whom a preliminary inquiry is to be held may order, on application of the prosecutor or the accused or on the justice's own motion, that a hearing be held, within the period fixed by rules of court made under [section 482](#) or [482.1](#) or, if there are no such rules, by the justice, to

(a) assist the parties to identify the issues on which evidence will be given at the inquiry;

(b) assist the parties to identify the witnesses to be heard at the inquiry, taking into account the witnesses' needs and circumstances; and

(c) encourage the parties to consider any other matters that would promote a fair and expeditious inquiry.

Agreement to be recorded

(2) When the hearing is completed, the justice shall record any admissions of fact agreed to by the parties and any agreement reached by the parties.

[2002, c. 13, s. 27](#).

Agreement to limit scope of preliminary inquiry

536.5 Whether or not a hearing is held under [section 536.4](#), the prosecutor and the accused may agree to limit the scope of the preliminary inquiry to specific issues. An agreement shall be filed with the court or recorded under [subsection 536.4\(2\)](#), as the case may be.

[2002, c. 13, s. 27](#); [2019, c. 25, s. 241\(E\)](#).

Powers of Justice

Powers of justice

537 (1) A justice acting under this Part may

(a) adjourn an inquiry from time to time and change the place of hearing, where it appears to be desirable to do so by reason of the absence of a witness, the inability of a witness who is ill to attend at the place where the justice usually sits or for any other sufficient reason;

(b) remand the accused to custody for the purposes of the [Identification of Criminals Act](#);

- (c)** except where the accused is authorized pursuant to Part XVI to be at large, remand the accused to custody in a prison by warrant in Form 19;
- (d)** resume an inquiry before the expiration of a period for which it has been adjourned with the consent of the prosecutor and the accused or his counsel;
- (e)** order in writing, in Form 30, that the accused be brought before him, or any other justice for the same territorial division, at any time before the expiration of the time for which the accused has been remanded;
- (f)** grant or refuse permission to the prosecutor or his counsel to address him in support of the charge, by way of opening or summing up or by way of reply on any evidence that is given on behalf of the accused;
- (g)** receive evidence on the part of the prosecutor or the accused, as the case may be, after hearing any evidence that has been given on behalf of either of them;
- (h)** order that no person other than the prosecutor, the accused and their counsel shall have access to or remain in the room in which the inquiry is held, where it appears to him that the ends of justice will be best served by so doing;
- (i)** regulate the course of the inquiry in any way that appears to the justice to be desirable, including to promote a fair and expeditious inquiry, that is consistent with this Act and that, unless the justice is satisfied that to do so would be contrary to the best interests of the administration of justice, is in accordance with any admission of fact or agreement recorded under [subsection 536.4\(2\)](#) or agreement made under [section 536.5](#);
- (j)** if the prosecutor and the accused consent, allow the accused to appear by counsel for any part of the inquiry, other than a part in which the evidence of a witness is taken; and
- (j.1)** permit, on the request of the accused, that the accused be out of court during the whole or any part of the inquiry on any conditions that the justice considers appropriate.
- (k)** [Repealed, 2022, c. 17, s. 35]

Power provided under paragraph (1)(i)

(1.01) For the purpose of paragraph (1)(i), the justice may, among other things, limit the scope of the preliminary inquiry to specific issues and limit the witnesses to be heard on these issues.

Section 715 or 715.01

(1.02) If a justice grants a request under paragraph (1)(j.1), the Court must inform the accused that the evidence taken during their absence could still be admissible under [section 715](#) or [715.01](#).

Inappropriate questioning

(1.1) A justice acting under this Part shall order the immediate cessation of any part of an examination or cross-examination of a witness that is, in the opinion of the justice, abusive, too repetitive or otherwise inappropriate.

Change of venue

(2) Where a justice changes the place of hearing under paragraph (1)(a) to a place in the same province, other than a place in a territorial division in which the justice has jurisdiction, any justice who has jurisdiction in the place to which the hearing is changed may continue the hearing.

(3) and (4) [Repealed, 1991, c. 43, s. 9]

R.S., 1985, c. C-46, s. 537; 1991, c. 43, s. 9; 1994, c. 44, s. 53; 1997, c. 18, s. 64; 2002, c. 13, s. 28; 2008, c. 18, s. 22; 2019, c. 25, s. 242; 2022, c. 17, s. 35.

Organization

538 Where an accused is an organization, [subsections 556\(1\) and \(2\)](#) apply with such modifications as the circumstances require.

R.S., 1985, c. C-46, s. 538; [2003, c. 21, s. 8](#).

Taking Evidence of Witnesses

Order restricting publication of evidence taken at preliminary inquiry

539 (1) Prior to the commencement of the taking of evidence at a preliminary inquiry, the justice holding the inquiry

(a) may, if application therefor is made by the prosecutor, and

(b) shall, if application therefor is made by any of the accused,

make an order directing that the evidence taken at the inquiry shall not be published in any document or broadcast or transmitted in any way before such time as, in respect of each of the accused,

(c) he or she is discharged, or

(d) if he or she is ordered to stand trial, the trial is ended.

Accused to be informed of right to apply for order

(2) Where an accused is not represented by counsel at a preliminary inquiry, the justice holding the inquiry shall, prior to the commencement of the taking of evidence at the inquiry, inform the accused of his right to make application under subsection (1).

Failure to comply with order

(3) Every one who fails to comply with an order made pursuant to subsection (1) is guilty of an offence punishable on summary conviction.

(4) [Repealed, 2005, c. 32, s. 18]

Taking evidence

540 (1) Where an accused is before a justice holding a preliminary inquiry, the justice shall

- (a)** take the evidence under oath of the witnesses called on the part of the prosecution, subject to [subsection 537\(1.01\)](#), and allow the accused or counsel for the accused to cross-examine them; and
- (b)** cause a record of the evidence of each witness to be taken
 - (i)** in legible writing in the form of a deposition, in Form 31, or by a stenographer appointed by him or pursuant to law, or
 - (ii)** in a province where a sound recording apparatus is authorized by or under provincial legislation for use in civil cases, by the type of apparatus so authorized and in accordance with the requirements of the provincial legislation.

Reading and signing depositions

(2) Where a deposition is taken down in writing, the justice shall, in the presence of the accused, before asking the accused if he wishes to call witnesses,

- (a)** cause the deposition to be read to the witness;
- (b)** cause the deposition to be signed by the witness; and
- (c)** sign the deposition himself.

Authentication by justice

(3) Where depositions are taken down in writing, the justice may sign

- (a)** at the end of each deposition; or
- (b)** at the end of several or of all the depositions in a manner that will indicate that his signature is intended to authenticate each deposition.

Stenographer to be sworn

(4) Where the stenographer appointed to take down the evidence is not a duly sworn court stenographer, he shall make oath that he will truly and faithfully report the evidence.

Authentication of transcript

(5) Where the evidence is taken down by a stenographer appointed by the justice or pursuant to law, it need not be read to or signed by the witnesses, but, on request of the justice or of one of the parties, shall be transcribed, in whole or in part, by the stenographer and the transcript shall be accompanied by

- (a)** an affidavit of the stenographer that it is a true report of the evidence; or

(b) a certificate that it is a true report of the evidence if the stenographer is a duly sworn court stenographer.

Transcription of record taken by sound recording apparatus

(6) Where, in accordance with this Act, a record is taken in any proceedings under this Act by a sound recording apparatus, the record so taken shall, on request of the justice or of one of the parties, be dealt with and transcribed, in whole or in part, and the transcription certified and used in accordance with the provincial legislation, with such modifications as the circumstances require mentioned in subsection (1).

Evidence

(7) A justice acting under this Part may receive as evidence any information that would not otherwise be admissible but that the justice considers credible or trustworthy in the circumstances of the case, including a statement that is made by a witness in writing or otherwise recorded.

Notice of intention to tender

(8) Unless the justice orders otherwise, no information may be received as evidence under subsection (7) unless the party has given to each of the other parties reasonable notice of his or her intention to tender it, together with a copy of the statement, if any, referred to in that subsection.

Appearance for examination

(9) The justice shall, on application of a party, require any person whom the justice considers appropriate to appear for examination or cross-examination with respect to information intended to be tendered as evidence under subsection (7).

R.S., 1985, c. C-46, s. 540; R.S., 1985, c. 27 (1st Supp.), s. 98; 1997, c. 18, s. 65; [2002, c. 13, s. 29](#); [2019, c. 25, s. 243](#).

Hearing of witnesses

541 (1) When the evidence of the witnesses called on the part of the prosecution has been taken down and, if required by this Part, has been read, the justice shall, subject to this section and [subsection 537\(1.01\)](#), hear the witnesses called by the accused.

Contents of address to accused

(2) Before hearing any witness called by an accused who is not represented by counsel, the justice shall address the accused as follows or to the like effect:

“Do you wish to say anything in answer to these charges or to any other charges which might have arisen from the evidence led by the prosecution? You are not obliged to say anything, but whatever you do say may be given in evidence against you at your trial. You should not make any confession or admission of guilt because of any promise or threat made to you but if you do make any statement it may be given in evidence against you at your trial in spite of the promise or threat.”

Statement of accused

(3) Where the accused who is not represented by counsel says anything in answer to the address made by the justice pursuant to subsection (2), the answer shall be taken down in writing and shall be signed by the justice and kept with the evidence of the witnesses and dealt with in accordance with this Part.

Witnesses for accused

(4) Where an accused is not represented by counsel, the justice shall ask the accused if he or she wishes to call any witnesses after subsections (2) and (3) have been complied with.

Depositions of witnesses

(5) Subject to [subsection 537\(1.01\)](#), the justice shall hear each witness called by the accused who testifies to any matter relevant to the inquiry, and for the purposes of this subsection, [section 540](#) applies with any modifications that the circumstances require.

R.S., 1985, c. C-46, s. 541; R.S., 1985, c. 27 (1st Supp.), s. 99; 1994, c. 44, s. 54; [2019, c. 25, s. 244](#).

Confession or admission of accused

542 (1) Nothing in this Act prevents a prosecutor giving in evidence at a preliminary inquiry any admission, confession or statement made at any time by the accused that by law is admissible against him.

Restriction of publication of reports of preliminary inquiry

(2) Every one who publishes in any document, or broadcasts or transmits in any way, a report that any admission or confession was tendered in evidence at a preliminary inquiry or a report of the nature of such admission or confession so tendered in evidence unless

(a) the accused has been discharged, or

(b) if the accused has been ordered to stand trial, the trial has ended,

is guilty of an offence punishable on summary conviction.

(3) [\[Repealed, 2005, c. 32, s. 19\]](#)

R.S., 1985, c. C-46, s. 542; R.S., 1985, c. 27 (1st Supp.), s. 101(E); [2005, c. 32, s. 19](#).

Remand Where Offence Committed in Another Jurisdiction

Order that accused appear or be taken before justice where offence alleged to have been committed

543 (1) If an accused is charged with an offence alleged to have been committed out of the limits of the jurisdiction in which they have been charged, the justice before whom they appear or are brought may, at any stage of the inquiry after hearing both parties, order the accused to appear or, if the accused is in custody, issue a warrant in Form 15 to

convey the accused before a justice who, having jurisdiction in the place where the offence is alleged to have been committed, shall continue and complete the inquiry.

Transmission of transcript and documents and effect of order or warrant

(2) Where a justice makes an order or issues a warrant pursuant to subsection (1), he shall cause the transcript of any evidence given before him in the inquiry and all documents that were then before him and that are relevant to the inquiry to be transmitted to a justice having jurisdiction in the place where the offence is alleged to have been committed and

(a) any evidence the transcript of which is so transmitted shall be deemed to have been taken by the justice to whom it is transmitted; and

(b) any appearance notice, undertaking or release order issued to or given or entered into by the accused shall be deemed to have been issued, given or entered into in the jurisdiction where the offence is alleged to have been committed and to require the accused to appear before the justice to whom the transcript and documents are transmitted at the time provided in the order made in respect of the accused under paragraph (1)(a).

R.S., 1985, c. C-46, s. 543; [2019, c. 25, s. 245](#).

Absconding Accused

Accused absconding during inquiry

544 (1) Notwithstanding any other provision of this Act, where an accused, whether or not he is charged jointly with another, absconds during the course of a preliminary inquiry into an offence with which he is charged,

(a) he shall be deemed to have waived his right to be present at the inquiry, and

(b) the justice

(i) may continue the inquiry and, when all the evidence has been taken, shall dispose of the inquiry in accordance with [section 548](#), or

(ii) if a warrant is issued for the arrest of the accused, may adjourn the inquiry to await his appearance,

but where the inquiry is adjourned pursuant to subparagraph (b)(ii), the justice may continue it at any time pursuant to subparagraph (b)(i) if he is satisfied that it would no longer be in the interests of justice to await the appearance of the accused.

Adverse inference

(2) Where the justice continues a preliminary inquiry pursuant to subsection (1), he may draw an inference adverse to the accused from the fact that he has absconded.

Accused not entitled to re-opening

(3) Where an accused reappears at a preliminary inquiry that is continuing pursuant to subsection (1), he is not entitled to have any part of the proceedings that was conducted in his absence re-opened unless the justice is satisfied that because of exceptional circumstances it is in the interests of justice to re-open the inquiry.

Counsel for accused may continue to act

(4) Where an accused has absconded during the course of a preliminary inquiry and the justice continues the inquiry, counsel for the accused is not thereby deprived of any authority he may have to continue to act for the accused in the proceedings.

Accused calling witnesses

(5) If, at the conclusion of the evidence on the part of the prosecution at a preliminary inquiry that has been continued under subsection (1), the accused is absent but their counsel is present, the counsel shall be given an opportunity to call witnesses on behalf of the accused, subject to [subsection 537\(1.01\)](#), and [subsection 541\(5\)](#) applies with any modifications that the circumstances require.

R.S., 1985, c. C-46, s. 544; 1994, c. 44, s. 55; [2019, c. 25, s. 246](#).

Procedure where Witness Refuses to Testify

Witness refusing to be examined

545 (1) Where a person, being present at a preliminary inquiry and being required by the justice to give evidence,

- (a)** refuses to be sworn,
- (b)** having been sworn, refuses to answer the questions that are put to him,
- (c)** fails to produce any writings that he is required to produce, or
- (d)** refuses to sign his deposition,

without offering a reasonable excuse for his failure or refusal, the justice may adjourn the inquiry and may, by warrant in Form 20, commit the person to prison for a period not exceeding eight clear days or for the period during which the inquiry is adjourned, whichever is the lesser period.

Further commitment

(2) Where a person to whom subsection (1) applies is brought before the justice on the resumption of the adjourned inquiry and again refuses to do what is required of him, the justice may again adjourn the inquiry for a period not exceeding eight clear days and commit him to prison for the period of adjournment or any part thereof, and may adjourn the inquiry and commit the person to prison from time to time until the person consents to do what is required of him.

Saving

(3) Nothing in this section shall be deemed to prevent the justice from sending the case for trial on any other sufficient evidence taken by him.

R.S., c. C-34, s. 472.

Remedial Provisions

Irregularity or variance not to affect validity

546 The validity of any proceeding at or subsequent to a preliminary inquiry is not affected by

- (a)** any irregularity or defect in the substance or form of the summons or warrant;
- (b)** any variance between the charge set out in the summons or warrant and the charge set out in the information; or
- (c)** any variance between the charge set out in the summons, warrant or information and the evidence adduced by the prosecution at the inquiry.

R.S., c. C-34, s. 473.

Adjournment if accused misled

547 Where it appears to the justice that the accused has been deceived or misled by any irregularity, defect or variance mentioned in [section 546](#), he may adjourn the inquiry and may remand the accused or grant him interim release in accordance with Part XVI.

R.S., c. C-34, s. 474; 1974-75-76, c. 93, s. 59.1.

Inability of justice to continue

547.1 Where a justice acting under this Part has commenced to take evidence and dies or is unable to continue for any reason, another justice may

- (a)** continue taking the evidence at the point at which the interruption in the taking of the evidence occurred, where the evidence was recorded pursuant to [section 540](#) and is available; or
- (b)** commence taking the evidence as if no evidence had been taken, where no evidence was recorded pursuant to [section 540](#) or where the evidence is not available.

R.S., 1985, c. 27 (1st Supp.), s. 100.

Adjudication and Recognizances

Order to stand trial or discharge

548 (1) When all the evidence has been taken by the justice, he shall

- (a)** if in his opinion there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction, order the accused to stand trial; or

(b) discharge the accused, if in his opinion on the whole of the evidence no sufficient case is made out to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction.

Endorsing charge

(2) Where the justice orders the accused to stand trial for an indictable offence, other than or in addition to the one with which the accused was charged, the justice shall endorse on the information the charges on which he orders the accused to stand trial.

Where accused ordered to stand trial

(2.1) A justice who orders that an accused is to stand trial has the power to fix the date for the trial or the date on which the accused must appear in the trial court to have that date fixed.

Defect not to affect validity

(3) The validity of an order to stand trial is not affected by any defect apparent on the face of the information in respect of which the preliminary inquiry is held or in respect of any charge on which the accused is ordered to stand trial unless, in the opinion of the court before which an objection to the information or charge is taken, the accused has been misled or prejudiced in his defence by reason of that defect.

R.S., 1985, c. C-46, s. 548; R.S., 1985, c. 27 (1st Supp.), s. 101; 1994, c. 44, s. 56.

Order to stand trial at any stage of inquiry with consent

549 (1) Notwithstanding any other provision of this Act, the justice may, at any stage of a preliminary inquiry, with the consent of the accused and the prosecutor, order the accused to stand trial in the court having criminal jurisdiction, without taking or recording any evidence or further evidence.

Limited preliminary inquiry

(1.1) If the prosecutor and the accused agree under [section 536.5](#) to limit the scope of a preliminary inquiry to specific issues, the justice, without taking or recording evidence on any other issues, may order the accused to stand trial in the court having criminal jurisdiction.

Procedure

(2) If an accused is ordered to stand trial under this section, the justice shall endorse on the information a statement of the consent of the accused and the prosecutor, and the accused shall after that be dealt with in all respects as if ordered to stand trial under [section 548](#).

R.S., 1985, c. C-46, s. 549; R.S., 1985, c. 27 (1st Supp.), s. 101; [2002, c. 13, s. 30](#); [2019, c. 25, s. 247](#).

Recognizance of witness

550 (1) Where an accused is ordered to stand trial, the justice who held the preliminary inquiry may require any witness whose evidence is, in his opinion, material to enter into a recognizance to give evidence at the trial of the accused and to comply with such reasonable conditions prescribed in the recognizance as the justice considers desirable for securing the attendance of the witness to give evidence at the trial of the accused.

Clarification

(2) A recognizance entered into under this section may be set out at the end of a deposition or be separate from it.

Sureties or deposit for appearance of witness

(3) A justice may, for any reason satisfactory to him, require any witness entering into a recognizance pursuant to this section

(a) to produce one or more sureties in such amount as he may direct; or

(b) to deposit with him a sum of money sufficient in his opinion to ensure that the witness will appear and give evidence.

Witness refusing to be bound

(4) Where a witness does not comply with subsection (1) or (3) when required to do so by a justice, he may be committed by the justice, by warrant in Form 24, to a prison in the territorial division where the trial is to be held, there to be kept until he does what is required of him or until the trial is concluded.

Discharge

(5) Where a witness has been committed to prison pursuant to subsection (4), the court before which the witness appears or a justice having jurisdiction in the territorial division where the prison is situated may, by order in Form 39, discharge the witness from custody when the trial is concluded.

R.S., 1985, c. C-46, s. 550; R.S., 1985, c. 27 (1st Supp.), s. 101; [2019, c. 25, s. 248](#).

Transmission of Record

Transmission of record by justice

551 If a justice orders an accused to stand trial, the justice shall immediately send to the clerk or other proper officer of the court by which the accused is to be tried, any information, evidence, exhibits, or statement of the accused taken down in writing in accordance with [section 541](#), any appearance notice, undertaking or release order given by or issued to the accused and any evidence taken before a coroner that is in the possession of the justice.

R.S., 1985, c. C-46, s. 551; R.S., 1985, c. 27 (1st Supp.), s. 102; [2019, c. 25, s. 249](#).

PART XVIII.1

Case Management Judge

Appointment

551.1 (1) On application by the prosecutor or the accused or on his or her own motion, the Chief Justice or the Chief Judge of the court before which a trial is to be or is being held or the judge that the Chief Justice or the Chief Judge designates may, if he or she is of the opinion that it is necessary for the proper administration of justice, appoint a judge as the case management judge for that trial at any time before the jury selection, if the trial is before a judge and jury, or before the stage at which the evidence on the merits is presented, if the trial is being heard by a judge without a jury or a provincial court judge.

Conference or hearing

(2) The Chief Justice or the Chief Judge or his or her designate may order that a conference between the prosecutor and the accused or counsel for the accused or a hearing be held for the purpose of deciding if it is necessary for the proper administration of justice to proceed with the appointment.

(3) [Repealed, 2019, c. 25, s. 250]

Same judge

(4) The appointment of a judge as the case management judge does not prevent him or her from becoming the judge who hears the evidence on the merits.

2011, c. 16, s. 4; 2019, c. 25, s. 250.

Role

551.2 The case management judge shall assist in promoting a fair and efficient trial, including by ensuring that the evidence on the merits is presented, to the extent possible, without interruption.

2011, c. 16, s. 4.

Powers before evidence on merits presented

551.3 (1) In performing their duties before the stage of the presentation of the evidence on the merits, the case management judge, as a trial judge, exercises the powers that a trial judge has before that stage in order to assist in promoting a fair and efficient trial, including by

- (a)** assisting the parties to identify the witnesses to be heard, taking into account the witnesses' needs and circumstances;
- (b)** encouraging the parties to make admissions and reach agreements;
- (c)** encouraging the parties to consider any other matters that would promote a fair and efficient trial;
- (d)** establishing schedules and imposing deadlines on the parties;

- (e) hearing guilty pleas and imposing sentences;
- (f) assisting the parties to identify the issues that are to be dealt with at the stage at which the evidence on the merits is presented;
- (g) subject to [section 551.7](#), adjudicating any issues that can be decided before that stage, including those related to
 - (i) the disclosure of evidence,
 - (ii) the admissibility of evidence,
 - (iii) the [Canadian Charter of Rights and Freedoms](#),
 - (iv) expert witnesses,
 - (v) the severance of counts, and
 - (vi) the separation of trials on one or more counts when there is more than one accused; and
- (h) ordering, in each case set out in [subsection 599\(1\)](#), that the trial be held in a territorial division in the same province other than that in which the offence would otherwise be tried.

Hearing

(2) The case management judge shall order that a hearing be held for the purpose of exercising the power referred to in paragraph (1)(g).

Power exercised at trial

(3) When the case management judge exercises the power referred to in paragraph (1)(g), he or she is doing so at trial.

Decision binding

(4) A decision that results from the exercise of the power referred to in paragraph (1)(g) is binding on the parties for the remainder of the trial — even if the judge who hears the evidence on the merits is not the same as the case management judge — unless the court is satisfied that it would not be in the interests of justice because, among other considerations, fresh evidence has been adduced.

[2011, c. 16, s. 4](#); [2019, c. 25, s. 251](#).

Information relevant to presentation of evidence on merits to be part of court record

551.4 (1) When the case management judge is of the opinion that the measures to promote a fair and efficient trial that can be taken before the stage of the presentation of the evidence on the merits have been taken — including adjudicating the issues that can be decided — he or she shall ensure that the court record includes information that, in his or her opinion, may be relevant at the stage of the presentation of the evidence on the merits, including

- (a) the names of the witnesses to be heard that have been identified by the parties;
- (b) any admissions made and agreements reached by the parties;
- (c) the estimated time required to conclude the trial;
- (d) any orders and decisions; and
- (e) any issues identified by the parties that are to be dealt with at the stage of the presentation of the evidence on the merits.

Exception

(2) This section does not apply to a case management judge who also hears the evidence on the merits.

[2011, c. 16, s. 4.](#)

Trial continuous

551.5 Even if the judge who hears the evidence on the merits is not the same as the case management judge, the trial of an accused shall proceed continuously, subject to adjournment by the court.

[2011, c. 16, s. 4.](#)

Issues referred to case management judge

551.6 (1) During the presentation of the evidence on the merits, the case management judge shall adjudicate any issue referred to him or her by the judge hearing the evidence on the merits.

Powers at stage of presentation of evidence on merits

(2) For the purposes of adjudicating an issue, the case management judge may exercise the powers of a trial judge.

[2011, c. 16, s. 4.](#)

Decision whether to hold joint hearing

551.7 (1) If an issue referred to in any of [subparagraphs 551.3\(1\)\(g\)\(i\) to \(iii\)](#) is to be adjudicated in related trials that are to be or are being held in the same province before a court of the same jurisdiction, the Chief Justice or the Chief Judge of that court or his or her designate may, on application by the prosecutor or the accused or on his or her own motion, determine if it is in the interests of justice, including ensuring consistent decisions, to adjudicate that issue at a joint hearing for some or all of those trials.

Considerations

(2) To make the determination, the Chief Justice or the Chief Judge or his or her designate

- (a) shall take into account, among other considerations, the degree to which the evidence relating to the issue is similar in the related trials; and

(b) may order that a conference between the prosecutor and the accused or counsel for the accused or a hearing be held.

Order for joint hearing

(3) If the Chief Justice or the Chief Judge or his or her designate determines that it is in the interests of justice to adjudicate the issue at a joint hearing for some or all of the related trials, he or she shall issue an order

(a) declaring that a joint hearing be held to adjudicate the issue in the related trials that he or she specifies;

(b) naming the parties who are to appear at the hearing;

(c) appointing a judge to adjudicate the issue; and

(d) designating the territorial division in which the hearing is to be held, if the trials are being held in different territorial divisions.

Limitation — indictable offence

(4) However, the order may only be made in respect of a trial for an indictable offence, other than a trial before a provincial court judge, if the indictment has been preferred.

Order in court record and transmission to parties

(5) The Chief Justice or the Chief Judge or his or her designate shall cause a copy of the order to be included in the court record of each of the trials specified in the order and to be provided to each of the parties named in it.

Transmission of court record

(6) If one of the specified trials is being held in a territorial division other than the one in which the joint hearing will be held, the officer in that territorial division who has custody of the indictment or information and the writings relating to the trial shall, when he or she receives the order, transmit the indictment or information and the writings without delay to the clerk of the court before which the joint hearing is to be held.

Order to appear at joint hearing

(7) The judge appointed under the order shall require the parties who are named in it to appear at the joint hearing.

Removal of prisoner

(8) The order made under subsection (2) or (3) is sufficient warrant, justification and authority to all sheriffs, keepers of prisons and peace officers for an accused's removal, disposal and reception in accordance with the terms of the order, and the sheriff may appoint and authorize any peace officer to convey the accused to a prison for the territorial division in which the hearing, as the case may be, is to be held.

Powers of judge

(9) The judge appointed under the order may, as a trial judge and for the purpose of adjudicating the issue at the joint hearing, exercise the powers of a trial judge.

Adjudication at trial

(10) When the judge adjudicates the issue, he or she is doing so at trial.

Decision in court records and return of documents

(11) Once the judge has adjudicated the issue, he or she shall cause his or her decision, with reasons, to be included in the court record of each of the related trials in respect of which the joint hearing was held and, in the case of a trial for which an indictment, information or writings were transmitted by an officer under subsection (6), the judge shall have the documents returned to the officer.

[2011, c. 16, s. 4.](#)

PART XIX

Indictable Offences — Trial Without Jury

Interpretation

Definitions

552 In this Part,

judge means,

(a) in the Province of Ontario, a judge of the superior court of criminal jurisdiction of the Province,

(b) in the Province of Quebec, a judge of the Court of Quebec,

(c) in the Province of Nova Scotia, a judge of the superior court of criminal jurisdiction of the Province,

(d) in the Province of New Brunswick, a judge of the Court of Queen's Bench,

(e) in the Province of British Columbia, the Chief Justice or a puisne judge of the Supreme Court,

(f) in the Province of Prince Edward Island, a judge of the Supreme Court,

(g) in the Province of Manitoba, the Chief Justice or a puisne judge of the Court of Queen's Bench,

(h) in the Provinces of Saskatchewan and Alberta, a judge of the superior court of criminal jurisdiction of the province,

(h.1) in the Province of Newfoundland and Labrador, a judge of the Trial Division of the Supreme Court,

(i) in Yukon and the Northwest Territories, a judge of the Supreme Court, and

(j) in Nunavut, a judge of the Nunavut Court of Justice. (*juge*)

magistrate [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 103]

R.S., 1985, c. C-46, s. 552; R.S., 1985, c. 11 (1st Supp.), s. 2, c. 27 (1st Supp.), s. 103, c. 27 (2nd Supp.), s. 10, c. 40 (4th Supp.), s. 2; 1990, c. 16, s. 6, c. 17, s. 13; 1992, c. 51, s. 38; 1999, c. 3, s. 36; 2002, c. 7, s. 145; 2015, c. 3, s. 53.

Jurisdiction of Provincial Court Judges

Absolute Jurisdiction

Absolute jurisdiction

553 The jurisdiction of a provincial court judge, or in Nunavut, of a judge of the Nunavut Court of Justice, to try an accused is absolute and does not depend on the consent of the accused where the accused is charged in an information

(a) with

(i) theft, other than theft of cattle,

(ii) obtaining money or property by false pretences,

(iii) unlawfully having in his possession any property or thing or any proceeds of any property or thing knowing that all or a part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from the commission in Canada of an offence punishable by indictment or an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment,

(iv) having, by deceit, falsehood or other fraudulent means, defrauded the public or any person, whether ascertained or not, of any property, money or valuable security, or

(v) mischief under [subsection 430\(4\)](#),

where the subject-matter of the offence is not a testamentary instrument and the alleged value of the subject-matter of the offence does not exceed five thousand dollars;

(b) with counselling or with a conspiracy or attempt to commit or with being an accessory after the fact to the commission of

(i) any offence referred to in paragraph (a) in respect of the subject-matter and value thereof referred to in that paragraph, or

(ii) any offence referred to in paragraph (c); or

(c) with an offence under

(i) [section 201](#) (keeping gaming or betting house),

- (ii) [section 202](#) (betting, pool-selling, book-making, etc.),
- (iii) [section 203](#) (placing bets),
- (iv) [section 206](#) (lotteries and games of chance),
- (v) [section 209](#) (cheating at play),
- (vi) [\[Repealed, 2019, c. 25, s. 251.1\]](#)
- (vii) [\[Repealed, 2000, c. 25, s. 4\]](#)
- (viii) [section 393](#) (fraud in relation to fares),
- (viii.01) [section 490.031](#) (failure to comply with order or obligation),
- (viii.02) [section 490.0311](#) (providing false or misleading information),
- (viii.1) [section 811](#) (breach of recognizance),
- (ix) [subsection 733.1\(1\)](#) (failure to comply with probation order), or
- (x) [paragraph 4\(4\)\(a\)](#) of the *Controlled Drugs and Substances Act*.
- (xi) [\[Repealed, 2018, c. 16, s. 219\]](#)

R.S., 1985, c. C-46, s. 553; R.S., 1985, c. 27 (1st Supp.), s. 104; 1992, c. 1, s. 58; 1994, c. 44, s. 57; 1995, c. 22, s. 2; 1996, c. 19, s. 72; 1997, c. 18, s. 66; 1999, c. 3, s. 37; 2000, c. 25, s. 4; [2010, c. 17, s. 25](#); [2012, c. 1, s. 33](#); [2018, c. 16, s. 219](#); [2019, c. 25, s. 251.1](#).

Provincial Court Judge's Jurisdiction with Consent

Trial by provincial court judge with consent

554 (1) Subject to subsection (2), if an accused is charged in an information with an indictable offence other than an offence that is mentioned in [section 469](#), and the offence is not one over which a provincial court judge has absolute jurisdiction under [section 553](#), a provincial court judge may try the accused if the accused elects to be tried by a provincial court judge.

Nunavut

(2) With respect to criminal proceedings in Nunavut, if an accused is charged in an information with an indictable offence other than an offence that is mentioned in [section 469](#) and the offence is not one over which a judge of the Nunavut Court of Justice has absolute jurisdiction under [section 553](#), a judge of the Nunavut Court of Justice may try the accused if the accused elects to be tried by a judge without a jury.

R.S., 1985, c. C-46, s. 554; R.S., 1985, c. 27 (1st Supp.), ss. 105, 203; 1999, c. 3, s. 38; [2002, c. 13, s. 31](#).

If charge should be prosecuted by indictment

555 (1) If in any proceedings under this Part an accused is before a provincial court judge and it appears to the provincial court judge that for any reason the charge should be prosecuted by indictment, the provincial court judge may, at any time before the

accused has entered a defence, decide not to adjudicate and shall then inform the accused of the decision.

Election before justice

(1.1) If the provincial court judge has decided not to adjudicate, the judge shall put the accused to an election in the following words:

You have the option to elect to be tried by a judge without a jury or you may elect to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. If you elect to be tried by a judge without a jury or by a court composed of a judge and jury or if you are deemed to have elected to be tried by a court composed of a judge and jury, you will have a preliminary inquiry only if you are entitled to one and you or the prosecutor requests one. How do you elect to be tried?

Continuing proceedings

(1.2) If the accused is entitled to a preliminary inquiry and they or the prosecutor requests one, the provincial court judge shall continue the proceedings as a preliminary inquiry.

If subject matter is testamentary instrument or exceeds \$5,000 in value

(2) If an accused is before a provincial court judge, charged with an offence prosecuted by indictment mentioned in [paragraph 553\(a\)](#) or subparagraph 553(b)(i), and, at any time before the provincial court judge makes an adjudication, the evidence establishes that the subject matter of the offence is a testamentary instrument or that its value exceeds \$5,000, the provincial court judge shall put the accused to their election in accordance with [subsection 536\(2.1\)](#).

Continuing proceedings

(3) If an accused is put to their election under subsection (1.1) or (2), the following provisions apply:

(a) if the accused elects to be tried by a judge without a jury or a court composed of a judge and jury or does not elect when put to their election, the provincial court judge shall endorse on the information a record of the nature of the election or deemed election; and

(b) if the accused elects to be tried by a provincial court judge, the provincial court judge shall endorse on the information a record of the election and continue with the trial.

R.S., 1985, c. C-46, s. 555; R.S., 1985, c. 27 (1st Supp.), ss. 106, 203; 1994, c. 44, s. 58; [2002, c. 13, s. 32](#); [2019, c. 25, s. 252](#); [2022, c. 17, s. 36](#).

If charge should be prosecuted by indictment — Nunavut

555.1 (1) If in any criminal proceedings under this Part an accused is before a judge of the Nunavut Court of Justice and it appears to the judge that for any reason the charge should be prosecuted by indictment, the judge may, at any time before the accused has

entered a defence, decide not to adjudicate and shall then inform the accused of the decision.

Election before justice

(1.1) If the judge has decided not to adjudicate, the judge shall put the accused to an election in the following words:

You have the option to elect to be tried by a judge without a jury or to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. If you elect to be tried by a judge without a jury or by a court composed of a judge and jury or if you are deemed to have elected to be tried by a court composed of a judge and jury, you will have a preliminary inquiry only if you are entitled to one and you or the prosecutor requests one. How do you elect to be tried?

Continuing proceedings

(1.2) If the accused is entitled to a preliminary inquiry and they or the prosecutor requests one, the judge shall endorse on the information a record of the nature of the election or deemed election and continue the proceedings as a preliminary inquiry.

If subject-matter is testamentary instrument or exceeds \$5,000 in value — Nunavut

(2) If an accused is before a judge of the Nunavut Court of Justice, charged with an offence prosecuted by indictment mentioned in [paragraph 553\(a\)](#) or subparagraph 553(b) (i), and, at any time before the judge makes an adjudication, the evidence establishes that the subject matter of the offence is a testamentary instrument or that its value exceeds \$5,000, the judge shall put the accused to their election in accordance with [subsection 536.1\(2.1\)](#).

Continuing proceedings — Nunavut

(3) If an accused is put to their election under subsection (1.1) and no preliminary inquiry is requested, or is put to an election under subsection (2), and elects to be tried by a judge without a jury or a court composed of a judge and jury or does not elect when put to the election, the judge shall endorse on the information a record of the nature of the election or deemed election and continue with the trial.

Application to Nunavut

(4) This section, and not [section 555](#), applies in respect of criminal proceedings in Nunavut.

1999, c. 3, s. 39; [2002, c. 13, s. 33](#); [2019, c. 25, s. 253](#).

Organization

556 (1) An accused organization shall appear by counsel or agent.

Non-appearance

(2) Where an accused organization does not appear pursuant to a summons and service of the summons on the organization is proved, the provincial court judge or, in Nunavut, the judge of the Nunavut Court of Justice

(a) may, if the charge is one over which the judge has absolute jurisdiction, proceed with the trial of the charge in the absence of the accused organization; and

(b) shall, if the charge is not one over which the judge has absolute jurisdiction, fix the date for the trial or the date on which the accused organization must appear in the trial court to have that date fixed.

Preliminary inquiry not requested

(3) If an accused organization appears and a preliminary inquiry is not requested under [subsection 536\(4\)](#), the provincial court judge shall fix the date for the trial or the date on which the organization must appear in the trial court to have that date fixed.

Preliminary inquiry not requested — Nunavut

(4) If an accused organization appears and a preliminary inquiry is not requested under [subsection 536.1\(3\)](#), the justice of the peace or the judge of the Nunavut Court of Justice shall fix the date for the trial or the date on which the organization must appear in the trial court to have that date fixed.

R.S., 1985, c. C-46, s. 556; R.S., 1985, c. 27 (1st Supp.), s. 107; 1999, c. 3, s. 40; [2002, c. 13, s. 34](#); [2003, c. 21, ss. 9, 22](#).

Taking evidence

557 If an accused is tried by a provincial court judge or a judge of the Nunavut Court of Justice in accordance with this Part, the evidence of witnesses for the prosecutor and the accused must be taken in accordance with the provisions of Part XVIII, other than [subsections 540\(7\) to \(9\)](#), relating to preliminary inquiries.

R.S., 1985, c. C-46, s. 557; R.S., 1985, c. 27 (1st Supp.), s. 203; 1999, c. 3, s. 41; [2002, c. 13, s. 35](#).

Jurisdiction of Judges

Judge's Jurisdiction with Consent

Trial by judge without a jury

558 If an accused who is charged with an indictable offence, other than an offence mentioned in [section 469](#), elects under [section 536](#) or [536.1](#) or re-elects under [section 561](#) or [561.1](#) to be tried by a judge without a jury, the accused shall, subject to this Part, be tried by a judge without a jury.

R.S., 1985, c. C-46, s. 558; R.S., 1985, c. 27 (1st Supp.), s. 108; 1999, c. 3, s. 41.

Court of record

559 (1) A judge who holds a trial under this Part shall, for all purposes thereof and proceedings connected therewith or relating thereto, be a court of record.

Custody of records

(2) The record of a trial that a judge holds under this Part shall be kept in the court over which the judge presides.

R.S., c. C-34, s. 489.

Election

Duty of judge

560 (1) If an accused elects, under [section 536](#) or [536.1](#), to be tried by a judge without a jury, a judge having jurisdiction shall

(a) on receiving a written notice from the sheriff or other person having custody of the accused stating that the accused is in custody and setting out the nature of the charge against him, or

(b) on being notified by the clerk of the court that the accused is not in custody and of the nature of the charge against him,

fix a time and place for the trial of the accused.

Notice by sheriff, when given

(2) The sheriff or other person having custody of the accused shall give the notice mentioned in paragraph (1)(a) within twenty-four hours after the accused is ordered to stand trial, if the accused is in custody pursuant to that order or if, at the time of the order, he is in custody for any other reason.

Duty of sheriff when date set for trial

(3) Where, pursuant to subsection (1), a time and place is fixed for the trial of an accused who is in custody, the accused

(a) shall be notified forthwith by the sheriff or other person having custody of the accused of the time and place so fixed; and

(b) shall be produced at the time and place so fixed.

Duty of accused when not in custody

(4) Where an accused is not in custody, the duty of ascertaining from the clerk of the court the time and place fixed for the trial, pursuant to subsection (1), is on the accused, and he shall attend for his trial at the time and place so fixed.

(5) [\[Repealed, R.S., 1985, c. 27 \(1st Supp.\), s. 109\]](#)

R.S., 1985, c. C-46, s. 560; R.S., 1985, c. 27 (1st Supp.), ss. 101(E), 109; 1999, c. 3, s. 42; [2002, c. 13, s. 36](#).

Right to re-elect

561 (1) An accused who elects or is deemed to have elected a mode of trial other than trial by a provincial court judge may re-elect,

(a) if the accused is charged with an offence for which a preliminary inquiry has been requested under [subsection 536\(4\)](#),

(i) at any time before or after the completion of the preliminary inquiry, with the written consent of the prosecutor, to be tried by a provincial court judge,

(ii) at any time before the completion of the preliminary inquiry or before the 60th day following the completion of the preliminary inquiry, as of right, another mode of trial other than trial by a provincial court judge, and

(iii) on or after the 60th day following the completion of the preliminary inquiry, any mode of trial with the written consent of the prosecutor; or

(b) if the accused is charged with an offence for which they are not entitled to request a preliminary inquiry or if they did not request a preliminary inquiry under [subsection 536\(4\)](#),

(i) as of right, not later than 60 days before the day first appointed for the trial, another mode of trial other than trial by a provincial court judge, or

(ii) any mode of trial with the written consent of the prosecutor.

Right to re-elect

(2) An accused who elects to be tried by a provincial court judge may, not later than 60 days before the day first appointed for the trial, re-elect as of right another mode of trial, and may do so after that time with the written consent of the prosecutor.

Notice of re-election under paragraph (1)(a)

(3) If an accused intends to re-elect under paragraph (1)(a) before the completion of the preliminary inquiry, they shall give notice in writing of their intention to re-elect, together with the written consent of the prosecutor, if that consent is required, to the justice presiding at the preliminary inquiry who shall on receipt of the notice,

(a) in the case of a re-election under subparagraph (1)(a)(ii), put the accused to their re-election in the manner set out in subsection (7); or

(b) if the accused intends to re-elect under subparagraph (1)(a)(i) and the justice is not a provincial court judge, notify a provincial court judge or clerk of the court of the accused's intention to re-elect and send to the provincial court judge or clerk any information, appearance notice, undertaking or release order given by or issued to the accused and any evidence taken before a coroner that is in the possession of the justice.

Notice of re-election under paragraph (1)(b) or subsection (2)

(4) If an accused intends to re-elect under paragraph (1)(b) or subsection (2), they shall give notice in writing that they intend to re-elect together with the written consent of the prosecutor, if that consent is required, to the provincial court judge before whom the accused appeared and pleaded or to a clerk of the court.

Notice and transmitting record

(5) If an accused intends to re-elect under paragraph (1)(a) after the completion of the preliminary inquiry, they shall give notice in writing, together with the written consent of the prosecutor, if that consent is required, to a judge or clerk of the court of the accused's original election. The judge or clerk shall, on receipt of the notice,

- (a)** notify the judge or provincial court judge or clerk of the court by which the accused wishes to be tried of the accused's intention to re-elect; and
- (b)** send to that judge or provincial court judge or clerk any information, evidence, exhibits and statement of the accused taken down in writing in accordance with [section 541](#), any appearance notice, undertaking or release order given by or issued to the accused and any evidence taken before a coroner that is in the possession of the first-mentioned judge or clerk.

Time and place for re-election

(6) Where a provincial court judge or judge or clerk of the court is notified under paragraph (3)(b) or subsection (4) or (5) that the accused wishes to re-elect, the provincial court judge or judge shall forthwith appoint a time and place for the accused to re-elect and shall cause notice thereof to be given to the accused and the prosecutor.

Proceedings on re-election

(7) The accused shall attend or, if in custody, shall be produced at the time and place appointed under subsection (6) and shall be put to a re-election after

- (a)** the charge on which the accused has been ordered to stand trial or the indictment, if an indictment has been preferred under [section 566](#), [574](#) or [577](#) or is filed with the court before which the indictment is to be preferred under section 577, has been read to the accused; or
- (b)** the information, in the case of a re-election under paragraph (1)(a), before the completion of the preliminary inquiry, or under paragraph (1)(b) or subsection (2), has been read to the accused.

The accused shall be put to their re-election in the following words or in words to the like effect:

You have given notice of your intention to re-elect the mode of your trial. You now have the option to do so. How do you intend to re-elect?

R.S., 1985, c. C-46, s. 561; R.S., 1985, c. 27 (1st Supp.), s. 110; [2002, c. 13, s. 37](#); [2019, c. 25, s. 254](#).

Right to re-elect with consent — Nunavut

561.1 (1) An accused who has elected or is deemed to have elected a mode of trial may re-elect any other mode of trial at any time with the written consent of the prosecutor.

Right to re-elect before trial — Nunavut

(2) An accused who has elected or is deemed to have elected a mode of trial but has not requested a preliminary inquiry under [subsection 536.1\(3\)](#) or is not entitled to make such a request under that subsection may, as of right, re-elect to be tried by any other mode of trial at any time up to 60 days before the day first appointed for the trial.

Right to re-elect at preliminary inquiry — Nunavut

(3) An accused who has elected or is deemed to have elected a mode of trial and has requested a preliminary inquiry under [subsection 536.1\(3\)](#) may, as of right, re-elect to be tried by the other mode of trial at any time before the completion of the preliminary inquiry or before the 60th day after its completion.

Notice of re-election under subsection (1) or (3) — Nunavut

(4) If an accused wishes to re-elect under subsection (1) or (3), before the completion of the preliminary inquiry, the accused shall give notice in writing of the wish to re-elect, together with the written consent of the prosecutor, if that consent is required, to the justice of the peace or judge presiding at the preliminary inquiry who shall on receipt of the notice put the accused to a re-election in the manner set out in subsection (9).

Notice at preliminary inquiry — Nunavut

(5) If at a preliminary inquiry an accused intends to re-elect under subsection (1) or (3) to be tried by a judge without a jury but does not intend to request a preliminary inquiry under [subsection 536.1\(3\)](#), the presiding justice of the peace shall notify a judge or a clerk of the Nunavut Court of Justice of the accused's intention to re-elect and send to the judge or clerk any information, appearance notice, undertaking or release order given by or issued to the accused and any evidence taken before a coroner that is in the possession of the justice of the peace.

Notice when no preliminary inquiry or preliminary inquiry completed — Nunavut

(6) If an accused who has not requested a preliminary inquiry under [subsection 536.1\(3\)](#), who has had one or who was not entitled to make such a request under that subsection intends to re-elect under this section, the accused shall give notice in writing of the intention to re-elect together with the written consent of the prosecutor, if that consent is required, to the judge before whom the accused appeared and pleaded or to a clerk of the Nunavut Court of Justice.

(7) [Repealed, 2002, c. 13, s. 38]

Time and place for re-election — Nunavut

(8) On receipt of a notice given under any of subsections (4) to (7) that the accused wishes to re-elect, a judge shall immediately appoint a time and place for the accused to re-elect and shall cause notice of the time and place to be given to the accused and the prosecutor.

Proceedings on re-election — Nunavut

(9) The accused shall attend or, if in custody, shall be produced at the time and place appointed under subsection (8) and shall be put to a re-election after

(a) the charge on which the accused has been ordered to stand trial has been read to the accused or, if an indictment has been preferred under [section 566](#), [574](#) or [577](#) or is filed with the court before which the indictment is to be preferred under section 577, the indictment has been read to the accused; or

(b) the information — in the case of a re-election under subsection (1) or (3), before the completion of the preliminary inquiry, or under subsection (2) — has been read to the accused.

The accused shall be put to their re-election in the following words or in words to the like effect:

You have given notice of your intention to re-elect the mode of your trial. You now have the option to do so. How do you intend to re-elect?

Application to Nunavut

(10) This section, and not [section 561](#), applies in respect of criminal proceedings in Nunavut.

1999, c. 3, s. 43; [2002, c. 13, s. 38](#); [2019, c. 25, s. 255](#).

Proceedings following re-election

562 (1) If the accused re-elects under [subparagraph 561\(1\)\(a\)\(i\)](#) before the completion of the preliminary inquiry, under paragraph 561(1)(a) after the completion of the preliminary inquiry or under paragraph 561(1)(b), the provincial court judge or judge, as the case may be, shall proceed with the trial or appoint a time and place for the trial.

Proceedings following re-election

(2) If the accused re-elects under [subparagraph 561\(1\)\(a\)\(ii\)](#) before the completion of the preliminary inquiry, or under [subsection 561\(2\)](#), and requests a preliminary inquiry under [subsection 536\(4\)](#), the justice shall proceed with the preliminary inquiry.

R.S., 1985, c. C-46, s. 562; R.S., 1985, c. 27 (1st Supp.), s. 110; [2019, c. 25, s. 256](#).

Proceedings following re-election — Nunavut

562.1 (1) If the accused re-elects under [subsection 561.1\(1\)](#) to be tried by a judge without a jury and does not request a preliminary inquiry under [subsection 536.1\(3\)](#), or if the accused re-elects any other mode of trial under [subsection 561.1\(2\)](#) but is not entitled to make a request for a preliminary inquiry under subsection 536.1(3), the judge shall proceed with the trial or appoint a time and place for the trial.

Proceedings following re-election — Nunavut

(2) If the accused re-elects under [section 561.1](#) before the completion of the preliminary inquiry to be tried by a judge without a jury or by a court composed of a judge and jury,

and requests a preliminary inquiry under [subsection 536.1\(3\)](#), the justice of the peace or judge shall proceed with the preliminary inquiry.

Application to Nunavut

(3) This section, and not [section 562](#), applies in respect of criminal proceedings in Nunavut.

1999, c. 3, s. 44; [2002, c. 13, s. 39](#); [2019, c. 25, s. 257](#).

Proceedings on re-election to be tried by provincial court judge without jury

563 Where an accused re-elects under [section 561](#) to be tried by a provincial court judge,

(a) the accused shall be tried on the information that was before the justice at the preliminary inquiry, if applicable, subject to any amendments to the information that may be allowed by the provincial court judge by whom the accused is tried; and

(b) the provincial court judge before whom the re-election is made shall endorse on the information a record of the re-election.

R.S., 1985, c. C-46, s. 563; R.S., 1985, c. 27 (1st Supp.), s. 110; [2019, c. 25, s. 258](#).

Proceedings on re-election to be tried by judge without jury — Nunavut

563.1 (1) If an accused re-elects under [section 561.1](#) to be tried by a judge without a jury and does not request a preliminary inquiry under [subsection 536.1\(3\)](#) or is not entitled to make such a request under that subsection,

(a) the accused shall be tried on the information that was before the justice of the peace or judge at the preliminary inquiry, if applicable, subject to any amendments that may be allowed by the judge by whom the accused is tried; and

(b) the judge before whom the re-election is made shall endorse on the information a record of the re-election.

Application to Nunavut

(2) This section, and not [section 563](#), applies in respect of criminal proceedings in Nunavut.

1999, c. 3, s. 45; [2002, c. 13, s. 40](#); [2019, c. 25, s. 259](#).

564 [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 110]

Election deemed to have been made

565 (1) If an accused is ordered to stand trial for an offence that, under this Part, may be tried by a judge without a jury, the accused shall, for the purposes of the provisions of this Part relating to election and re-election, be deemed to have elected to be tried by a court composed of a judge and jury if

(a) the justice of the peace, provincial court judge or judge, as the case may be, declined to record the election or re-election of the accused under [section 567](#) or

[subsection 567.1\(1\)](#); or

(b) the accused does not elect when put to an election under [section 536](#) or [536.1](#).

(1.1) [Repealed, 2019, c. 25, s. 260]

When direct indictment preferred

(2) If an accused is to be tried after an indictment has been preferred against the accused on the basis of a consent or order given under [section 577](#), the accused is, for the purposes of the provisions of this Part relating to election and re-election, deemed to have elected to be tried by a court composed of a judge and jury and not to have requested a preliminary inquiry under [subsection 536\(4\)](#) or [536.1\(3\)](#), if they were entitled to make such a request, and may re-elect to be tried by a judge without a jury without a preliminary inquiry.

Notice of re-election

(3) If an accused intends to re-elect under subsection (2), the accused shall give notice in writing to a judge or clerk of the court where the indictment has been filed or preferred. The judge or clerk shall, on receipt of the notice, notify a judge having jurisdiction or clerk of the court by which the accused wishes to be tried of the accused's intention to re-elect and send to that judge or clerk any indictment, appearance notice, undertaking or release order given by or issued to the accused, any summons or warrant issued under [section 578](#) and any evidence taken before a coroner that is in the possession of the first-mentioned judge or clerk.

Application

(4) [Subsections 561\(6\)](#) and [\(7\)](#), or [subsections 561.1\(8\)](#) and [\(9\)](#), as the case may be, apply to a re-election made under subsection (3).

R.S., 1985, c. C-46, s. 565; R.S., 1985, c. 27 (1st Supp.), s. 111; 1999, c. 3, s. 46; [2002, c. 13, s. 41](#); [2008, c. 18, s. 23](#); [2019, c. 25, s. 260](#).

Trial

Indictment

566 (1) The trial of an accused for an indictable offence, other than a trial before a provincial court judge, shall be on an indictment in writing setting forth the offence with which he is charged.

Preferring indictment

(2) Where an accused elects under [section 536](#) or re-elects under [section 561](#) to be tried by a judge without a jury, an indictment in Form 4 may be preferred.

What counts may be included and who may prefer indictment

(3) [Section 574](#) and [subsection 576\(1\)](#) apply, with such modifications as the circumstances require, to the preferring of an indictment pursuant to subsection (2).

Indictment — Nunavut

566.1 (1) The trial of an accused for an indictable offence, other than an indictable offence referred to in [section 553](#) or an offence in respect of which the accused has elected or re-elected to be tried by a judge without a jury and in respect of which no party has requested a preliminary inquiry under [subsection 536.1\(3\)](#) or was not entitled to make such a request under that subsection, must be on an indictment in writing setting out the offence with which the accused is charged.

Preferring indictment — Nunavut

(2) If an accused elects under [section 536.1](#) or re-elects under [section 561.1](#) to be tried by a judge without a jury and one of the parties requests a preliminary inquiry under [subsection 536.1\(3\)](#), an indictment in Form 4 may be preferred.

What counts may be included and who may prefer indictment — Nunavut

(3) [Section 574](#) and [subsection 576\(1\)](#) apply, with any modifications that the circumstances require, to the preferring of an indictment under subsection (2).

Application to Nunavut

(4) This section, and not [section 566](#), applies in respect of criminal proceedings in Nunavut.

1999, c. 3, s. 47; [2002, c. 13, s. 42](#); [2019, c. 25, s. 261](#).

General

Mode of trial when two or more accused

567 Despite any other provision of this Part, if two or more persons are jointly charged in an information, unless all of them elect or re-elect or are deemed to have elected the same mode of trial, the justice, provincial court judge or judge may decline to record any election, re-election or deemed election for trial by a provincial court judge or a judge without a jury.

R.S., 1985, c. C-46, s. 567; R.S., 1985, c. 27 (1st Supp.), s. 111; [2002, c. 13, s. 43](#).

Mode of trial if two or more accused — Nunavut

567.1 (1) Despite any other provision of this Part, if two or more persons are jointly charged in an information, unless all of them elect or re-elect or are deemed to have elected the same mode of trial, the justice of the peace or judge may decline to record any election, re-election or deemed election for trial by a judge without a jury.

Application to Nunavut

(2) This section, and not [section 567](#), applies in respect of criminal proceedings in Nunavut.

Attorney General may require trial by jury

568 Even if an accused elects under [section 536](#) or re-elects under [section 561](#) or [subsection 565\(2\)](#) to be tried by a judge or provincial court judge, as the case may be, the Attorney General may require the accused to be tried by a court composed of a judge and jury unless the alleged offence is one that is punishable with imprisonment for five years or less. If the Attorney General so requires, a judge or provincial court judge has no jurisdiction to try the accused under this Part and a preliminary inquiry must be held if requested under [subsection 536\(4\)](#), unless one has already been held or the re-election was made under subsection 565(2).

R.S., 1985, c. C-46, s. 568; R.S., 1985, c. 27 (1st Supp.), s. 111; 2002, c. 13, s. 43; 2008, c. 18, s. 24.

Attorney General may require trial by jury — Nunavut

569 (1) Even if an accused elects under [section 536.1](#) or re-elects under [section 561.1](#) or [subsection 565\(2\)](#) to be tried by a judge without a jury, the Attorney General may require the accused to be tried by a court composed of a judge and jury unless the alleged offence is one that is punishable with imprisonment for five years or less. If the Attorney General so requires, a judge has no jurisdiction to try the accused under this Part and a preliminary inquiry must be held if requested under [subsection 536.1\(3\)](#), unless one has already been held or the re-election was made under subsection 565(2).

Application to Nunavut

(2) This section, and not [section 568](#), applies in respect of criminal proceedings in Nunavut.

R.S., 1985, c. C-46, s. 569; R.S., 1985, c. 27 (1st Supp.), s. 111; 1999, c. 3, s. 49; 2002, c. 13, s. 44; 2008, c. 18, s. 24.1.

Record of conviction or order

570 (1) If an accused who is tried under this Part is determined by a judge or provincial court judge to be guilty of an offence on acceptance of a plea of guilty or on a finding of guilt, the judge or provincial court judge, as the case may be, shall endorse the information accordingly and shall sentence the accused or otherwise deal with the accused in the manner authorized by law and, on request by the accused, the prosecutor, a peace officer or any other person, a conviction in Form 35 and a certified copy of it, or an order in Form 36 and a certified copy of it, shall be drawn up and the certified copy shall be delivered to the person making the request.

Acquittal and record of acquittal

(2) If an accused who is tried under this Part is found not guilty of an offence with which the accused is charged, the judge or provincial court judge, as the case may be, shall immediately acquit the accused in respect of that offence, an order in Form 37 shall be drawn up and, on request, a certified copy shall be drawn up and delivered to the accused.

Transmission of record

(3) Where an accused elects to be tried by a provincial court judge under this Part, the provincial court judge shall transmit the written charge, the memorandum of adjudication and the conviction, if any, into such custody as the Attorney General may direct.

Proof of conviction, order or acquittal

(4) A copy of a conviction in Form 35 or of an order in Form 36 or 37, certified by the judge or by the clerk or other proper officer of the court, or by the provincial court judge, as the case may be, or proved to be a true copy, is, on proof of the identity of the person to whom the conviction or order relates, sufficient evidence in any legal proceedings to prove the conviction of that person or the making of the order against that person or his acquittal, as the case may be, for the offence mentioned in the copy of the conviction or order.

Warrant of committal

(5) If an accused other than an organization is convicted, the judge or provincial court judge, as the case may be, shall issue a warrant of committal in Form 21, and [section 528](#) applies in respect of a warrant of committal issued under this subsection.

Admissibility of certified copy

(6) If a warrant of committal is signed by a clerk of a court, a copy of the warrant of committal, certified by the clerk, is admissible in evidence in any proceeding.

R.S., 1985, c. C-46, s. 570; R.S., 1985, c. 27 (1st Supp.), ss. 112, 203, c. 1 (4th Supp.), s. 18(F); 1994, c. 44, s. 59; [2003, c. 21, s. 10](#); [2019, c. 25, s. 262](#).

Adjournment

571 A judge or provincial court judge acting under this Part may from time to time adjourn a trial until it is finally terminated.

R.S., 1985, c. C-46, s. 571; R.S., 1985, c. 27 (1st Supp.), s. 203.

Application of Parts XVI, XVIII, XX and XXIII

572 The provisions of Part XVI, the provisions of Part XVIII relating to transmission of the record by a provincial court judge where he holds a preliminary inquiry, and the provisions of Parts XX and XXIII, in so far as they are not inconsistent with this Part, apply, with such modifications as the circumstances require, to proceedings under this Part.

R.S., 1985, c. C-46, s. 572; R.S., 1985, c. 27 (1st Supp.), s. 203.

PART XIX.1

Nunavut Court of Justice

Nunavut Court of Justice

573 (1) The powers to be exercised and the duties and functions to be performed under this Act by a court of criminal jurisdiction, a summary conviction court, a judge, a provincial court judge, a justice or a justice of the peace may be exercised or performed by a judge of the Nunavut Court of Justice.

Status when exercising power

(2) A power exercised or a duty or function performed by a judge of the Nunavut Court of Justice under subsection (1) is exercised or performed by that judge as a judge of a superior court.

Interpretation

(3) Subsection (2) does not authorize a judge of the Nunavut Court of Justice who is presiding at a preliminary inquiry to grant a remedy under [section 24](#) of the *Canadian Charter of Rights and Freedoms*.

R.S., 1985, c. C-46, s. 573; R.S., 1985, c. 27 (1st Supp.), s. 113; 1999, c. 3, s. 50.

Application for review — Nunavut

573.1 (1) An application for review may be made by the Attorney General or the accused, or by any person directly affected by the decision or order, to a judge of the Court of Appeal of Nunavut in respect of a decision or order of a judge of the Nunavut Court of Justice

- (a)** relating to a warrant or summons;
- (b)** relating to the conduct of a preliminary inquiry, including an order under [subsection 548\(1\)](#);
- (c)** relating to a subpoena;
- (d)** relating to the publication or broadcasting of information or access to the court room for all or part of the proceedings;
- (e)** to refuse to quash an information or indictment; or
- (f)** relating to the detention, disposal or forfeiture of any thing seized under a warrant or order.

Limitation

(2) A decision or order may not be reviewed under this section if

- (a)** the decision or order is of a kind that could only be made in a province or a territory other than Nunavut by a superior court of criminal jurisdiction or a judge as defined in [section 552](#); or
- (b)** another statutory right of review is available.

Grounds of review

(3) The judge of the Court of Appeal of Nunavut may grant relief under subsection (4) only if the judge is satisfied that

(a) in the case of any decision or order mentioned in subsection (1),

(i) the judge of the Nunavut Court of Justice failed to observe a principle of natural justice or failed or refused to exercise the judge's jurisdiction, or

(ii) the decision or order was made as a result of an irrelevant consideration or for an improper purpose;

(b) in the case of a decision or order mentioned in paragraph (1)(a), that

(i) the judge failed to comply with a statutory requirement for the making of the decision or order,

(ii) the decision or order was made in the absence of any evidence that a statutory requirement for the making of the decision or order was met,

(iii) the decision or order was made as a result of reckless disregard for the truth, fraud, intentional misrepresentation of material facts or intentional omission to state material facts,

(iv) the warrant is so vague or lacking in particularity that it authorizes an unreasonable search, or

(v) the warrant lacks a material term or condition that is required by law;

(c) in the case of a decision or order mentioned in paragraph (1)(b), that the judge of the Nunavut Court of Justice

(i) failed to follow a mandatory provision of this Act relating to the conduct of a preliminary inquiry,

(ii) ordered the accused to stand trial when there was no evidence adduced on which a properly instructed jury acting reasonably could convict, or

(iii) discharged the accused when there was some evidence adduced on which a properly instructed jury acting reasonably could convict;

(d) in the case of a decision or order mentioned in paragraph (1)(c) or (d), that the judge of the Nunavut Court of Justice erred in law;

(e) in the case of a decision or order mentioned in paragraph (1)(e), that

(i) the information or indictment failed to give the accused notice of the charge,

(ii) the judge of the Nunavut Court of Justice did not have jurisdiction to try the offence, or

(iii) the provision creating the offence alleged to have been committed by the accused is unconstitutional; or

(f) in the case of a decision or order mentioned in paragraph (1)(f), that

(i) the judge failed to comply with a statutory requirement for the making of the decision or order,

(ii) the decision or order was made in the absence of any evidence that a statutory requirement for the making of the decision or order was met, or

(iii) the decision or order was made as a result of reckless disregard for the truth, fraud, intentional misrepresentation of material facts or intentional omission to state material facts.

Powers of judge

(4) On the hearing of the application for review, the judge of the Court of Appeal of Nunavut may do one or more of the following:

(a) order a judge of the Nunavut Court of Justice to do any act or thing that the judge or any other judge of that court failed or refused to do or has delayed in doing;

(b) prohibit or restrain a decision, order or proceeding of a judge of the Nunavut Court of Justice;

(c) declare invalid or unlawful, quash or set aside, in whole or in part, a decision, order or proceeding of a judge of the Nunavut Court of Justice;

(d) refer back for determination in accordance with any directions that the judge considers to be appropriate, a decision, order or proceeding of a judge of the Nunavut Court of Justice;

(e) grant any remedy under [subsection 24\(1\)](#) of the *Canadian Charter of Rights and Freedoms*;

(f) refuse to grant any relief if the judge is of the opinion that no substantial wrong or miscarriage of justice has occurred or that the subject-matter of the application should be determined at trial or on appeal; and

(g) dismiss the application.

Interim orders

(5) If an application for review is made, a judge of the Court of Appeal of Nunavut may make any interim order that the judge considers appropriate pending the final disposition of the application for review.

Rules

(6) A person who proposes to make an application for review shall do so in the manner and within the period that may be directed by rules of court, except that a judge of the Court of Appeal of Nunavut may at any time extend any period specified in the rules.

Appeal

(7) An appeal lies to the Court of Appeal of Nunavut against a decision or order made under subsection (4). The provisions of Part XXI apply, with any modifications that the circumstances require, to the appeal.

Habeas corpus

573.2 (1) *Habeas corpus* proceedings may be brought before a judge of the Court of Appeal of Nunavut in respect of an order made or warrant issued by a judge of the Nunavut Court of Justice, except where

- (a) the order or warrant is of a kind that could only be made or issued in a province or a territory other than Nunavut by a superior court of criminal jurisdiction or a judge as defined in [section 552](#); or
- (b) another statutory right of review or appeal is available.

Exception

(2) Despite subsection (1), *habeas corpus* proceedings may be brought before a judge of the Court of Appeal of Nunavut with respect to an order or warrant of a judge of the Nunavut Court of Justice if the proceedings are brought to challenge the constitutionality of a person's detention or confinement.

Provisions apply

(3) [Subsections 784\(2\)](#) to [\(6\)](#) apply in respect of any proceedings brought under subsection (1) or (2).

1999, c. 3, s. 50.

PART XX

Procedure in Jury Trials and General Provisions

Preferring Indictment

Prosecutor may prefer indictment

574 (1) Subject to subsection (3), the prosecutor may, whether the charges were included in one information or not, prefer an indictment against any person who has been ordered to stand trial in respect of

- (a) any charge on which that person was ordered to stand trial; or
- (b) any charge founded on the facts disclosed by the evidence taken on the preliminary inquiry, in addition to or in substitution for any charge on which that person was ordered to stand trial.

Preferring indictment when no preliminary inquiry

(1.1) If a person has not requested a preliminary inquiry under [subsection 536\(4\)](#) or [536.1\(3\)](#) into the charge or was not entitled to make such a request, the prosecutor may, subject to subsection (3), prefer an indictment against a person in respect of a charge set

out in an information or informations, or any included charge, at any time after the person has made an election, re-election or deemed election on the information or informations.

Preferring single indictment

(1.2) If indictments may be preferred under both subsections (1) and (1.1), the prosecutor may prefer a single indictment in respect of one or more charges referred to in subsection (1) combined with one or more charges or included charges referred to in subsection (1.1).

Consent to inclusion of other charges

(2) An indictment preferred under any of subsections (1) to (1.2) may, if the accused consents, include a charge that is not referred to in those subsections, and the offence charged may be dealt with, tried and determined and punished in all respects as if it were an offence in respect of which the accused had been ordered to stand trial. However, if the offence was committed wholly in a province other than that in which the accused is before the court, [subsection 478\(3\)](#) applies.

Private prosecutor requires consent

(3) In a prosecution conducted by a prosecutor other than the Attorney General and in which the Attorney General does not intervene, an indictment may not be preferred under any of subsections (1) to (1.2) before a court without the written order of a judge of that court.

R.S., 1985, c. C-46, s. 574; R.S., 1985, c. 27 (1st Supp.), s. 113; [2002, c. 13, s. 45](#); [2019, c. 25, s. 263](#).

575 [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 113]

Indictment

576 (1) Except as provided in this Act, no indictment shall be preferred.

Criminal information and bill of indictment

(2) No criminal information shall be laid or granted and no bill of indictment shall be preferred before a grand jury.

Coroner's inquisition

(3) No person shall be tried on a coroner's inquisition.

R.S., 1985, c. C-46, s. 576; R.S., 1985, c. 27 (1st Supp.), s. 114.

Direct indictments

577 Despite [section 574](#), an indictment may be preferred even if the accused has not been given the opportunity to request a preliminary inquiry, a preliminary inquiry has been commenced but not concluded or a preliminary inquiry has been held and the accused has been discharged, if

(a) in the case of a prosecution conducted by the Attorney General or one in which the Attorney General intervenes, the personal consent in writing of the Attorney General or Deputy Attorney General is filed in court; or

(b) in any other case, a judge of the court so orders.

R.S., 1985, c. C-46, s. 577; R.S., 1985, c. 27 (1st Supp.), s. 115, c. 1 (4th Supp.), s. 18(F); [2002, c. 13, s. 46](#).

Summons or warrant

578 (1) Where notice of the recommencement of proceedings has been given pursuant to [subsection 579\(2\)](#) or an indictment has been filed with the court before which the proceedings are to commence or recommence, the court, if it considers it necessary, may issue

(a) a summons addressed to, or

(b) a warrant for the arrest of,

the accused or defendant, as the case may be, to compel him to attend before the court to answer the charge described in the indictment.

Part XVI to apply

(2) The provisions of Part XVI apply with such modifications as the circumstances require where a summons or warrant is issued under subsection (1).

R.S., 1985, c. C-46, s. 578; R.S., 1985, c. 27 (1st Supp.), s. 116.

Attorney General may direct stay

579 (1) The Attorney General or counsel instructed by the Attorney General for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by the Attorney General's or counsel's direction, as the case may be, and the entry shall then be made, at which time the proceedings shall be stayed accordingly and any undertaking or release order relating to the proceedings is vacated.

Recommencement of proceedings

(2) Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new information or preferring a new indictment, as the case may be, by the Attorney General or counsel instructed by him for that purpose giving notice of the recommencement to the clerk of the court in which the stay of the proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings, or before the expiration of the time within which the proceedings could have been commenced, whichever is the earlier, the proceedings shall be deemed never to have been commenced.

R.S., 1985, c. C-46, s. 579; R.S., 1985, c. 27 (1st Supp.), s. 117; [2019, c. 25, s. 264](#).

Instruction to stay

579.001 (1) The Attorney General or counsel instructed by him or her for that purpose shall, at any time after proceedings in relation to an act or omission of a *preclearance officer*, as defined in [section 5](#) of the *Preclearance Act, 2016*, are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by direction of the Attorney General if the Government of the United States has provided notice of the exercise of primary criminal jurisdiction under paragraph 14 of Article X of the Agreement.

Stay

(2) The clerk or other officer of the court shall make the entry immediately after being so directed, and on the entry being made the proceedings are stayed and any recognizance relating to the proceedings is vacated.

Recommencement

(3) The proceedings may be recommenced without laying a new information or preferring a new indictment, if the Attorney General or counsel instructed by him or her gives notice to the clerk or other officer of the court that

(a) the Government of the United States has provided notice of waiver under paragraph 15 of Article X of the Agreement; or

(b) the Government of the United States has declined, or is unable, to prosecute the accused and the accused has returned to Canada.

Proceedings deemed never commenced

(4) However, if the Attorney General or counsel does not give notice under subsection (3) on or before the first anniversary of the day on which the stay of proceedings was entered, the proceedings are deemed never to have been commenced.

Definition of Agreement

(5) In this section, **Agreement** means the Agreement on Land, Rail, Marine, and Air Transport Preclearance between the Government of Canada and the Government of the United States of America, done at Washington on March 16, 2015.

[2017, c. 27, s. 62.](#)

When Attorney General does not stay proceedings

579.01 If the Attorney General intervenes in proceedings and does not stay them under [section 579](#), he or she may, without conducting the proceedings, call witnesses, examine and cross-examine witnesses, present evidence and make submissions.

[2002, c. 13, s. 47.](#)

Intervention by Attorney General of Canada or Director of Public Prosecutions

579.1 (1) The Attorney General of Canada or the Director of Public Prosecutions appointed under [subsection 3\(1\)](#) of the *Director of Public Prosecutions Act*, or counsel instructed by him or her for that purpose, may intervene in proceedings in the following circumstances:

- (a) the proceedings are in respect of an offence for which he or she has the power to commence or to conduct a proceeding;
- (b) the proceedings have not been instituted by an Attorney General;
- (c) judgment has not been rendered; and
- (d) the Attorney General of the province in which the proceedings are taken has not intervened.

Sections 579 and 579.01 to apply

(2) [Sections 579](#) and [579.01](#) apply, with any modifications that the circumstances require, to proceedings in which the Attorney General of Canada or the Director of Public Prosecutions intervenes under this section.

1994, c. 44, s. 60; [2019, c. 25, s. 265](#).

Form of indictment

580 An indictment is sufficient if it is on paper and is in Form 4.

R.S., 1985, c. C-46, s. 580; R.S., 1985, c. 27 (1st Supp.), s. 117.

General Provisions respecting Counts

Substance of offence

581 (1) Each count in an indictment shall in general apply to a single transaction and shall contain in substance a statement that the accused or defendant committed an offence therein specified.

Form of statement

(2) The statement referred to in subsection (1) may be

- (a) in popular language without technical averments or allegations of matters that are not essential to be proved;
- (b) in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence; or
- (c) in words that are sufficient to give to the accused notice of the offence with which he is charged.

Details of circumstances

(3) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be

proved against him and to identify the transaction referred to, but otherwise the absence or insufficiency of details does not vitiate the count.

Indictment for treason

(4) If an accused is charged with an offence under [section 47](#) or [sections 50 to 53](#), every overt act that is to be relied on shall be stated in the indictment.

Reference to section

(5) A count may refer to any section, subsection, paragraph or subparagraph of the enactment that creates the offence charged, and for the purpose of determining whether a count is sufficient, consideration shall be given to any such reference.

General provisions not restricted

(6) Nothing in this Part relating to matters that do not render a count insufficient shall be deemed to restrict or limit the application of this section.

R.S., 1985, c. C-46, s. 581; R.S., 1985, c. 27 (1st Supp.), s. 118; [2018, c. 29, s. 63](#).

High treason and first degree murder

582 No person shall be convicted for the offence of high treason or first degree murder unless in the indictment charging the offence he is specifically charged with that offence.

R.S., c. C-34, s. 511; 1973-74, c. 38, s. 4; 1974-75-76, c. 105, s. 6.

Certain omissions not grounds for objection

583 No count in an indictment is insufficient by reason of the absence of details where, in the opinion of the court, the count otherwise fulfils the requirements of [section 581](#) and, without restricting the generality of the foregoing, no count in an indictment is insufficient by reason only that

- (a)** it does not name the person injured or intended or attempted to be injured;
- (b)** it does not name the person who owns or has a special property or interest in property mentioned in the count;
- (c)** it charges an intent to defraud without naming or describing the person whom it was intended to defraud;
- (d)** it does not set out any writing that is the subject of the charge;
- (e)** it does not set out the words used where words that are alleged to have been used are the subject of the charge;
- (f)** it does not specify the means by which the alleged offence was committed;
- (g)** it does not name or describe with precision any person, place or thing; or
- (h)** it does not, where the consent of a person, official or authority is required before proceedings may be instituted for an offence, state that the consent has been obtained.

Special Provisions respecting Counts

Sufficiency of count charging libel

584 (1) No count for publishing a seditious or defamatory libel, or for selling or exhibiting an obscene book, pamphlet, newspaper or other written matter, is insufficient by reason only that it does not set out the words that are alleged to be libellous or the writing that is alleged to be obscene.

Specifying sense

(2) A count for publishing a libel may charge that the published matter was written in a sense that by innuendo made the publication thereof criminal, and may specify that sense without any introductory assertion to show how the matter was written in that sense.

Proof

(3) It is sufficient, on the trial of a count for publishing a libel, to prove that the matter published was libellous, with or without innuendo.

R.S., 1985, c. C-46, s. 584; [2018, c. 29, s. 64](#).

Sufficiency of count charging perjury, etc.

585 No count that charges

- (a)** perjury,
- (b)** the making of a false oath or a false statement,
- (c)** fabricating evidence, or
- (d)** procuring the commission of an offence mentioned in paragraph (a), (b) or (c),

is insufficient by reason only that it does not state the nature of the authority of the tribunal before which the oath or statement was taken or made, or the subject of the inquiry, or the words used or the evidence fabricated, or that it does not expressly negative the truth of the words used.

R.S., 1985, c. C-46, s. 585; 1992, c. 1, s. 60(F).

Sufficiency of count relating to fraud

586 No count that alleges false pretences, fraud or any attempt or conspiracy by fraudulent means is insufficient by reason only that it does not set out in detail the nature of the false pretence, fraud or fraudulent means.

R.S., c. C-34, s. 515.

Particulars

What may be ordered

587 (1) A court may, where it is satisfied that it is necessary for a fair trial, order the prosecutor to furnish particulars and, without restricting the generality of the foregoing, may order the prosecutor to furnish particulars

- (a) of what is relied on in support of a charge of perjury, the making of a false oath or a false statement, fabricating evidence or counselling the commission of any of those offences;
- (b) of any false pretence or fraud that is alleged;
- (c) of any alleged attempt or conspiracy by fraudulent means;
- (d) setting out the passages in a book, pamphlet, newspaper or other printing or writing that are relied on in support of a charge of selling or exhibiting an obscene book, pamphlet, newspaper, printing or writing;
- (e) further describing any writing or words that are the subject of a charge;
- (f) further describing the means by which an offence is alleged to have been committed; or
- (g) further describing a person, place or thing referred to in an indictment.

Regard to evidence

(2) For the purpose of determining whether or not a particular is required, the court may give consideration to any evidence that has been taken.

Particular

- (3)** Where a particular is delivered pursuant to this section,
- (a) a copy shall be given without charge to the accused or his counsel;
 - (b) the particular shall be entered in the record; and
 - (c) the trial shall proceed in all respects as if the indictment had been amended to conform with the particular.

R.S., 1985, c. C-46, s. 587; R.S., 1985, c. 27 (1st Supp.), s. 7.

Ownership of Property

Ownership

588 The real and personal property of which a person has, by law, the management, control or custody shall, for the purposes of an indictment or proceeding against any other person for an offence committed on or in respect of the property, be deemed to be the property of the person who has the management, control or custody of it.

R.S., c. C-34, s. 517.

Joinder or Severance of Counts

Count for murder

589 No count that charges an indictable offence other than murder shall be joined in an indictment to a count that charges murder unless

(a) the count that charges the offence other than murder arises out of the same transaction as a count that charges murder; or

(b) the accused signifies consent to the joinder of the counts.

R.S., 1985, c. C-46, s. 589; 1991, c. 4, s. 2.

Offences may be charged in the alternative

590 (1) A count is not objectionable by reason only that

(a) it charges in the alternative several different matters, acts or omissions that are stated in the alternative in an enactment that describes as an indictable offence the matters, acts or omissions charged in the count; or

(b) it is double or multifarious.

Application to amend or divide counts

(2) An accused may at any stage of his trial apply to the court to amend or to divide a count that

(a) charges in the alternative different matters, acts or omissions that are stated in the alternative in the enactment that describes the offence or declares that the matters, acts or omissions charged are an indictable offence, or

(b) is double or multifarious,

on the ground that, as framed, it embarrasses him in his defence.

Order

(3) The court may, where it is satisfied that the ends of justice require it, order that a count be amended or divided into two or more counts, and thereupon a formal commencement may be inserted before each of the counts into which it is divided.

R.S., c. C-34, s. 519.

Joinder of counts

591 (1) Subject to [section 589](#), any number of counts for any number of offences may be joined in the same indictment, but the counts shall be distinguished in the manner shown in Form 4.

Each count separate

(2) Where there is more than one count in an indictment, each count may be treated as a separate indictment.

Severance of accused and counts

- (3)** The court may, where it is satisfied that the interests of justice so require, order
- (a)** that the accused or defendant be tried separately on one or more of the counts; and
 - (b)** where there is more than one accused or defendant, that one or more of them be tried separately on one or more of the counts.

Order for severance

(4) An order under subsection (3) may be made before or during the trial but, if the order is made during the trial, the jury shall be discharged from giving a verdict on the counts

- (a)** on which the trial does not proceed; or
- (b)** in respect of the accused or defendant who has been granted a separate trial.

Delayed enforcement

(4.1) The court may make an order under subsection (3) that takes effect either at a specified later date or on the occurrence of a specified event if, taking into account, among other considerations, the need to ensure consistent decisions, it is satisfied that it is in the interests of justice to do so.

Decisions binding on parties

(4.2) Unless the court is satisfied that it would not be in the interests of justice, the decisions relating to the disclosure or admissibility of evidence or the *Canadian Charter of Rights and Freedoms* that are made before any order issued under subsection (3) takes effect continue to bind the parties if the decisions are made — or could have been made — before the stage at which the evidence on the merits is presented.

Subsequent procedure

(5) The counts in respect of which a jury is discharged pursuant to paragraph (4)(a) may subsequently be proceeded on in all respects as if they were contained in a separate indictment.

Idem

(6) Where an order is made in respect of an accused or defendant under paragraph (3) (b), the accused or defendant may be tried separately on the counts in relation to which the order was made as if they were contained in a separate indictment.

R.S., 1985, c. C-46, s. 591; R.S., 1985, c. 27 (1st Supp.), s. 119; [2011, c. 16, s. 5](#).

Joinder of Accused in Certain Cases

Accessories after the fact

592 Any one who is charged with being an accessory after the fact to any offence may be indicted, whether or not the principal or any other party to the offence has been

indicted or convicted or is or is not amenable to justice.

R.S., c. C-34, s. 521.

Trial of persons jointly

593 (1) Any number of persons may be charged in the same indictment with an offence under [section 354](#) or [355.4](#) or [paragraph 356\(1\)\(b\)](#), even though

(a) the property was had in possession at different times; or

(b) the person by whom the property was obtained

(i) is not indicted with them, or

(ii) is not in custody or is not amenable to justice.

Conviction of one or more

(2) Where, pursuant to subsection (1), two or more persons are charged in the same indictment with an offence referred to in that subsection, any one or more of those persons who separately committed the offence in respect of the property or any part of it may be convicted.

R.S., 1985, c. C-46, s. 593; [2010, c. 14, s. 11](#).

594 to 596 [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 120]

Proceedings when Person Indicted is at Large

Bench warrant

597 (1) Where an indictment has been preferred against a person who is at large, and that person does not appear or remain in attendance for his trial, the court before which the accused should have appeared or remained in attendance may issue a warrant in Form 7 for his arrest.

Execution

(2) A warrant issued under subsection (1) may be executed anywhere in Canada.

Interim release

(3) If an accused is arrested under a warrant issued under subsection (1), a judge of the court that issued the warrant may make a release order referred to in [section 515](#).

Discretion to postpone execution

(4) A judge who issues a warrant may specify in the warrant the period before which the warrant shall not be executed, to allow the accused to appear voluntarily before a judge having jurisdiction in the territorial division in which the warrant was issued.

Deemed execution of warrant

(5) Where the accused appears voluntarily for the offence in respect of which the accused is charged, the warrant is deemed to be executed.

R.S., 1985, c. C-46, s. 597; R.S., 1985, c. 27 (1st Supp.), s. 121; 1997, c. 18, s. 68; [2019, c. 25, s. 266](#).

Election deemed to be waived

598 (1) Notwithstanding anything in this Act, where a person to whom [subsection 597\(1\)](#) applies has elected or is deemed to have elected to be tried by a court composed of a judge and jury and, at the time he failed to appear or to remain in attendance for his trial, he had not re-elected to be tried by a court composed of a judge without a jury or a provincial court judge without a jury, he shall not be tried by a court composed of a judge and jury unless

(a) he establishes to the satisfaction of a judge of the court in which he is indicted that there was a legitimate excuse for his failure to appear or remain in attendance for his trial; or

(b) the Attorney General requires pursuant to [section 568](#) or [569](#) that the accused be tried by a court composed of a judge and jury.

Election deemed to be waived

(2) An accused who, under subsection (1), may not be tried by a court composed of a judge and jury is deemed to have elected under [section 536](#) or [536.1](#) to be tried without a jury by a judge of the court where the accused was indicted and [section 561](#) or [561.1](#), as the case may be, does not apply in respect of the accused.

R.S., 1985, c. C-46, s. 598; R.S., 1985, c. 27 (1st Supp.), ss. 122, 185(F), 203(E); 1999, c. 3, s. 51; [2002, c. 13, s. 48\(E\)](#).

Change of Venue

Reasons for change of venue

599 (1) A court before which an accused is or may be indicted, at any term or sittings thereof, or a judge who may hold or sit in that court, may at any time before or after an indictment is found, on the application of the prosecutor or the accused, order the trial to be held in a territorial division in the same province other than that in which the offence would otherwise be tried if

(a) it appears expedient to the ends of justice, including

(i) to promote a fair and efficient trial, and

(ii) to ensure the safety and security of a victim or witness or to protect their interests and those of society; or

(b) a competent authority has directed that a jury is not to be summoned at the time appointed in a territorial division where the trial would otherwise by law be held.

(2) [\[Repealed, R.S., 1985, c. 1 \(4th Supp.\), s. 16\]](#)

Conditions respecting expense

(3) The court or judge may, in an order made on an application by the prosecutor under subsection (1), prescribe conditions that he thinks proper with respect to the payment of additional expenses caused to the accused as a result of the change of venue.

Transmission of record

(4) Where an order is made under subsection (1), the officer who has custody of the indictment, if any, and the writings and exhibits relating to the prosecution, shall transmit them forthwith to the clerk of the court before which the trial is ordered to be held, and all proceedings in the case shall be held or, if previously commenced, shall be continued in that court.

Idem

(5) Where the writings and exhibits referred to in subsection (4) have not been returned to the court in which the trial was to be held at the time an order is made to change the place of trial, the person who obtains the order shall serve a true copy thereof on the person in whose custody they are and that person shall thereupon transmit them to the clerk of the court before which the trial is to be held.

R.S., 1985, c. C-46, s. 599; R.S., 1985, c. 1 (4th Supp.), s. 16; [2019, c. 25, s. 267](#).

Order is authority to remove prisoner

600 An order that is made under [section 599](#) is sufficient warrant, justification and authority to all sheriffs, keepers of prisons and peace officers for the removal, disposal and reception of an accused in accordance with the terms of the order, and the sheriff may appoint and authorize any peace officer to convey the accused to a prison in the territorial division in which the trial is ordered to be held.

R.S., c. C-34, s. 528.

Amendment

Amending defective indictment or count

601 (1) An objection to an indictment preferred under this Part or to a count in an indictment, for a defect apparent on its face, shall be taken by motion to quash the indictment or count before the accused enters a plea, and, after the accused has entered a plea, only by leave of the court before which the proceedings take place. The court before which an objection is taken under this section may, if it considers it necessary, order the indictment or count to be amended to cure the defect.

Amendment where variance

(2) Subject to this section, a court may, on the trial of an indictment, amend the indictment or a count therein or a particular that is furnished under [section 587](#), to make the indictment, count or particular conform to the evidence, where there is a variance between the evidence and

- (a) a count in the indictment as preferred; or
- (b) a count in the indictment
 - (i) as amended, or
 - (ii) as it would have been if it had been amended in conformity with any particular that has been furnished pursuant to [section 587](#).

Amending indictment

(3) Subject to this section, a court shall, at any stage of the proceedings, amend the indictment or a count therein as may be necessary where it appears

- (a) that the indictment has been preferred under a particular Act of Parliament instead of another Act of Parliament;
- (b) that the indictment or a count thereof
 - (i) fails to state or states defectively anything that is requisite to constitute the offence,
 - (ii) does not negative an exception that should be negated,
 - (iii) is in any way defective in substance,

and the matters to be alleged in the proposed amendment are disclosed by the evidence taken on the preliminary inquiry or on the trial; or

- (c) that the indictment or a count thereof is in any way defective in form.

Matters to be considered by the court

(4) The court shall, in considering whether or not an amendment should be made to the indictment or a count in it, consider

- (a) the matters disclosed by the evidence taken on the preliminary inquiry;
- (b) the evidence taken on the trial, if any;
- (c) the circumstances of the case;
- (d) whether the accused has been misled or prejudiced in his defence by any variance, error or omission mentioned in subsection (2) or (3); and
- (e) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

Variance not material

(4.1) A variance between the indictment or a count therein and the evidence taken is not material with respect to

- (a) the time when the offence is alleged to have been committed, if it is proved that the indictment was preferred within the prescribed period of limitation, if any; or

(b) the place where the subject-matter of the proceedings is alleged to have arisen, if it is proved that it arose within the territorial jurisdiction of the court.

Adjournment if accused prejudiced

(5) Where, in the opinion of the court, the accused has been misled or prejudiced in his defence by a variance, error or omission in an indictment or a count therein, the court may, if it is of the opinion that the misleading or prejudice may be removed by an adjournment, adjourn the proceedings to a specified day or sittings of the court and may make such an order with respect to the payment of costs resulting from the necessity for amendment as it considers desirable.

Question of law

(6) The question whether an order to amend an indictment or a count thereof should be granted or refused is a question of law.

Endorsing indictment

(7) An order to amend an indictment or a count therein shall be endorsed on the indictment as part of the record and the proceedings shall continue as if the indictment or count had been originally preferred as amended.

Mistakes not material

(8) A mistake in the heading of an indictment shall be corrected as soon as it is discovered but, whether corrected or not, is not material.

Limitation

(9) The authority of a court to amend indictments does not authorize the court to add to the overt acts stated in an indictment for high treason or treason or for an offence against any provision in [sections 50, 51 and 53](#).

Definition of court

(10) In this section, **court** means a court, judge, justice or provincial court judge acting in summary conviction proceedings or in proceedings on indictment.

Application

(11) This section applies to all proceedings, including preliminary inquiries, with such modifications as the circumstances require.

R.S., 1985, c. C-46, s. 601; R.S., 1985, c. 27 (1st Supp.), s. 123; 1999, c. 5, s. 23(E); [2011, c. 16, s. 6](#); [2018, c. 29, s. 65](#).

602 [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 124]

Inspection and Copies of Documents

Right of accused

603 An accused is entitled, after he has been ordered to stand trial or at his trial,

(a) to inspect without charge the indictment, his own statement, the evidence and the exhibits, if any; and

(b) to receive, on payment of a reasonable fee determined in accordance with a tariff of fees fixed or approved by the Attorney General of the province, a copy

(i) of the evidence,

(ii) of his own statement, if any, and

(iii) of the indictment;

but the trial shall not be postponed to enable the accused to secure copies unless the court is satisfied that the failure of the accused to secure them before the trial is not attributable to lack of diligence on the part of the accused.

R.S., 1985, c. C-46, s. 603; R.S., 1985, c. 27 (1st Supp.), s. 101(E).

604 [Repealed, 1997, c. 18, s. 69]

Release of exhibits for testing

605 (1) A judge of a superior court of criminal jurisdiction or a court of criminal jurisdiction may, on summary application on behalf of the accused or the prosecutor, after three days notice to the accused or prosecutor, as the case may be, order the release of any exhibit for the purpose of a scientific or other test or examination, subject to such terms as appear to be necessary or desirable to ensure the safeguarding of the exhibit and its preservation for use at the trial.

Disobeying orders

(2) Every one who fails to comply with the terms of an order made under subsection (1) is guilty of contempt of court and may be dealt with summarily by the judge or provincial court judge who made the order or before whom the trial of the accused takes place.

R.S., 1985, c. C-46, s. 605; R.S., 1985, c. 27 (1st Supp.), s. 203.

Pleas

Pleas permitted

606 (1) An accused who is called on to plead may plead guilty or not guilty, or the special pleas authorized by this Part and no others.

Conditions for accepting guilty plea

(1.1) A court may accept a plea of guilty only if it is satisfied that

(a) the accused is making the plea voluntarily;

(b) the accused understands

(i) that the plea is an admission of the essential elements of the offence,

- (ii) the nature and consequences of the plea, and
- (iii) that the court is not bound by any agreement made between the accused and the prosecutor; and
- (c) the facts support the charge.

Validity of plea

(1.2) The failure of the court to fully inquire whether the conditions set out in subsection (1.1) are met does not affect the validity of the plea.

Refusal to plead

(2) Where an accused refuses to plead or does not answer directly, the court shall order the clerk of the court to enter a plea of not guilty.

Allowing time

(3) An accused is not entitled as of right to have his trial postponed but the court may, if it considers that the accused should be allowed further time to plead, move to quash or prepare for his defence or for any other reason, adjourn the trial to a later time in the session or sittings of the court, or to the next of any subsequent session or sittings of the court, on such terms as the court considers proper.

Included or other offence

(4) Notwithstanding any other provision of this Act, where an accused or defendant pleads not guilty of the offence charged but guilty of any other offence arising out of the same transaction, whether or not it is an included offence, the court may, with the consent of the prosecutor, accept that plea of guilty and, if the plea is accepted, the court shall find the accused or defendant not guilty of the offence charged and find him guilty of the offence in respect of which the plea of guilty was accepted and enter those findings in the record of the court.

Inquiry of court — murder and serious personal injury offences

(4.1) If the accused is charged with a serious personal injury offence, as that expression is defined in [section 752](#), or with the offence of murder, and the accused and the prosecutor have entered into an agreement under which the accused will enter a plea of guilty of the offence charged — or a plea of not guilty of the offence charged but guilty of any other offence arising out of the same transaction, whether or not it is an included offence — the court shall, after accepting the plea of guilty, inquire of the prosecutor if reasonable steps were taken to inform the victims of the agreement.

Inquiry of court — certain indictable offences

(4.2) If the accused is charged with an offence, as defined in [section 2](#) of the *Canadian Victims Bill of Rights*, that is an indictable offence for which the maximum punishment is imprisonment for five years or more, and that is not an offence referred to in subsection (4.1), and the accused and the prosecutor have entered into an agreement referred to in

subsection (4.1), the court shall, after accepting the plea of guilty, inquire of the prosecutor whether any of the victims had advised the prosecutor of their desire to be informed if such an agreement were entered into, and, if so, whether reasonable steps were taken to inform that victim of the agreement.

Duty to inform

(4.3) If subsection (4.1) or (4.2) applies, and any victim was not informed of the agreement before the plea of guilty was accepted, the prosecutor shall, as soon as feasible, take reasonable steps to inform the victim of the agreement and the acceptance of the plea.

Validity of plea

(4.4) Neither the failure of the court to inquire of the prosecutor, nor the failure of the prosecutor to take reasonable steps to inform the victims of the agreement, affects the validity of the plea.

(5) [Repealed, 2022, c. 17, s. 37]

R.S., 1985, c. C-46, s. 606; R.S., 1985, c. 27 (1st Supp.), s. 125; 2002, c. 13, s. 49; 2015, c. 13, s. 21; 2019, c. 25, s. 268; 2022, c. 17, s. 37.

Special pleas

607 (1) An accused may plead the special pleas of

- (a) *autrefois acquit*;
- (b) *autrefois convict*;
- (c) pardon; and
- (d) an expungement order under the *Expungement of Historically Unjust Convictions Act*.

In case of libel

(2) An accused who is charged with defamatory libel may plead in accordance with sections 611 and 612.

Disposal

(3) The pleas of *autrefois acquit*, *autrefois convict*, pardon and an expungement order under the *Expungement of Historically Unjust Convictions Act* shall be disposed of by the judge without a jury before the accused is called on to plead further.

Pleading over

(4) When the pleas referred to in subsection (3) are disposed of against the accused, he may plead guilty or not guilty.

Statement sufficient

- (5)** Where an accused pleads *autrefois acquit* or *autrefois convict*, it is sufficient if he
- (a)** states that he has been lawfully acquitted, convicted or discharged under [subsection 730\(1\)](#), as the case may be, of the offence charged in the count to which the plea relates; and
 - (b)** indicates the time and place of the acquittal, conviction or discharge under [subsection 730\(1\)](#).

Exception — foreign trials *in absentia*

(6) A person who is alleged to have committed an act or omission outside Canada that is an offence in Canada by virtue of any of [subsections 7\(2\) to \(3.1\)](#) or [\(3.7\)](#), or an offence under the [Crimes Against Humanity and War Crimes Act](#), and in respect of which the person has been tried and convicted outside Canada, may not plead *autrefois convict* with respect to a count that charges that offence if

- (a)** at the trial outside Canada the person was not present and was not represented by counsel acting under the person's instructions, and
- (b)** the person was not punished in accordance with the sentence imposed on conviction in respect of the act or omission,

notwithstanding that the person is deemed by virtue of [subsection 7\(6\)](#), or [subsection 12\(1\)](#) of the [Crimes Against Humanity and War Crimes Act](#), as the case may be, to have been tried and convicted in Canada in respect of the act or omission.

R.S., 1985, c. C-46, s. 607; R.S., 1985, c. 27 (1st Supp.), s. 126, c. 30 (3rd Supp.), s. 2, c. 1 (4th Supp.), s. 18(F); 1992, c. 1, s. 60(F); 1995, c. 22, s. 10; 2000, c. 24, s. 45; [2013, c. 13, s. 9](#); [2018, c. 11, s. 29](#).

Evidence of identity of charges

608 Where an issue on a plea of *autrefois acquit* or *autrefois convict* is tried, the evidence and adjudication and the notes of the judge and official stenographer on the former trial and the record transmitted to the court pursuant to [section 551](#) on the charge that is pending before that court are admissible in evidence to prove or to disprove the identity of the charges.

R.S., c. C-34, s. 536.

What determines identity

609 (1) Where an issue on a plea of *autrefois acquit* or *autrefois convict* to a count is tried and it appears

- (a)** that the matter on which the accused was given in charge on the former trial is the same in whole or in part as that on which it is proposed to give him in charge, and
- (b)** that on the former trial, if all proper amendments had been made that might then have been made, he might have been convicted of all the offences of which he may be convicted on the count to which the plea of *autrefois acquit* or *autrefois convict* is pleaded,

the judge shall give judgment discharging the accused in respect of that count.

Allowance of special plea in part

(2) The following provisions apply where an issue on a plea of *autrefois acquit* or *autrefois convict* is tried:

(a) where it appears that the accused might on the former trial have been convicted of an offence of which he may be convicted on the count in issue, the judge shall direct that the accused shall not be found guilty of any offence of which he might have been convicted on the former trial; and

(b) where it appears that the accused may be convicted on the count in issue of an offence of which he could not have been convicted on the former trial, the accused shall plead guilty or not guilty with respect to that offence.

R.S., c. C-34, s. 537.

Circumstances of aggravation

610 (1) Where an indictment charges substantially the same offence as that charged in an indictment on which an accused was previously convicted or acquitted, but adds a statement of intention or circumstances of aggravation tending, if proved, to increase the punishment, the previous conviction or acquittal bars the subsequent indictment.

Effect of previous charge of murder or manslaughter

(2) A conviction or an acquittal on an indictment for murder bars a subsequent indictment for the same homicide charging it as manslaughter or infanticide, and a conviction or acquittal on an indictment for manslaughter or infanticide bars a subsequent indictment for the same homicide charging it as murder.

Previous charges of first degree murder

(3) A conviction or an acquittal on an indictment for first degree murder bars a subsequent indictment for the same homicide charging it as second degree murder, and a conviction or acquittal on an indictment for second degree murder bars a subsequent indictment for the same homicide charging it as first degree murder.

Effect of previous charge of infanticide or manslaughter

(4) A conviction or an acquittal on an indictment for infanticide bars a subsequent indictment for the same homicide charging it as manslaughter, and a conviction or acquittal on an indictment for manslaughter bars a subsequent indictment for the same homicide charging it as infanticide.

R.S., c. C-34, s. 538; 1973-74, c. 38, s. 5; 1974-75-76, c. 105, s. 9.

Libel, plea of justification

611 (1) An accused who is charged with publishing a defamatory libel may plead that the defamatory matter published by him was true, and that it was for the public benefit that the matter should have been published in the manner in which and at the time when it was published.

Where more than one sense alleged

(2) A plea that is made under subsection (1) may justify the defamatory matter in any sense in which it is specified in the count, or in the sense that the defamatory matter bears without being specified, or separate pleas justifying the defamatory matter in each sense may be pleaded separately to each count as if two libels had been charged in separate counts.

Plea in writing

(3) A plea that is made under subsection (1) shall be in writing and shall set out the particular facts by reason of which it is alleged to have been for the public good that the matter should have been published.

Reply

(4) The prosecutor may in his reply deny generally the truth of a plea that is made under this section.

R.S., c. C-34, s. 539.

Plea of justification necessary

612 (1) The truth of the matters charged in an alleged libel shall not be inquired into in the absence of a plea of justification under [section 611](#) unless the accused is charged with publishing the libel knowing it to be false, in which case evidence of the truth may be given to negative the allegation that the accused knew that the libel was false.

Not guilty, in addition

(2) The accused may, in addition to a plea that is made under [section 611](#), plead not guilty and the pleas shall be inquired into together.

Effect of plea on punishment

(3) Where a plea of justification is pleaded and the accused is convicted, the court may, in pronouncing sentence, consider whether the guilt of the accused is aggravated or mitigated by the plea.

R.S., c. C-34, s. 540.

Plea of not guilty

613 Any ground of defence for which a special plea is not provided by this Act may be relied on under the plea of not guilty.

R.S., c. C-34, s. 541.

614 to 619 [Repealed, 1991, c. 43, s. 3]

Organizations

Appearance by attorney

620 Every organization against which an indictment is filed shall appear and plead by counsel or agent.

R.S., 1985, c. C-46, s. 620; 1997, c. 18, s. 70; [2003, c. 21, s. 11](#).

Notice to organization

621 (1) The clerk of the court or the prosecutor may, where an indictment is filed against an organization, cause a notice of the indictment to be served on the organization.

Contents of notice

(2) A notice of an indictment referred to in subsection (1) shall set out the nature and purport of the indictment and advise that, unless the organization appears on the date set out in the notice or the date fixed under [subsection 548\(2.1\)](#), and enters a plea, a plea of not guilty will be entered for the accused by the court, and that the trial of the indictment will be proceeded with as though the organization had appeared and pleaded.

R.S., 1985, c. C-46, s. 621; 1997, c. 18, s. 71; [2003, c. 21, s. 11](#).

Procedure on default of appearance

622 Where an organization does not appear in accordance with the notice referred to in [section 621](#), the presiding judge may, on proof of service of the notice, order the clerk of the court to enter a plea of not guilty on behalf of the organization, and the plea has the same force and effect as if the organization had appeared by its counsel or agent and pleaded that plea.

R.S., 1985, c. C-46, s. 622; 1997, c. 18, s. 72; [2003, c. 21, s. 11](#).

Trial of organization

623 Where an organization appears and pleads to an indictment or a plea of not guilty is entered by order of the court under [section 622](#), the court shall proceed with the trial of the indictment and, where the organization is convicted, [section 735](#) applies.

R.S., 1985, c. C-46, s. 623; 1995, c. 22, s. 10; [2003, c. 21, s. 11](#).

Record of Proceedings

How recorded

624 (1) It is sufficient, in making up the record of a conviction or acquittal on an indictment, to copy the indictment and the plea that was pleaded, without a formal caption or heading.

Record of proceedings

(2) The court shall keep a record of every arraignment and of proceedings subsequent to arraignment.

R.S., c. C-34, s. 552.

Form of record in case of amendment

625 Where it is necessary to draw up a formal record in proceedings in which the indictment has been amended, the record shall be drawn up in the form in which the indictment remained after the amendment, without reference to the fact that the indictment was amended.

R.S., c. C-34, s. 553.

Pre-hearing Conference

Pre-hearing conference

625.1 (1) Subject to subsection (2), on application by the prosecutor or the accused or on its own motion, the court, or a judge of the court, before which, or the judge, provincial court judge or justice before whom, any proceedings are to be held may order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by the court, judge, provincial court judge or justice, be held prior to the proceedings to consider the matters that, to promote a fair and expeditious hearing, would be better decided before the start of the proceedings, and other similar matters, and to make arrangements for decisions on those matters.

Mandatory pre-trial hearing for jury trials

(2) In any case to be tried with a jury, a judge of the court before which the accused is to be tried shall, before the trial, order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by a judge of that court, be held in accordance with the rules of court made under [sections 482](#) and [482.1](#) to consider any matters that would promote a fair and expeditious trial.

R.S., 1985, c. 27 (1st Supp.), s. 127, c. 1 (4th Supp.), s. 45(F); 1997, c. 18, s. 73; [2002, c. 13, s. 50](#).

Juries

Qualification of jurors

626 (1) A person who is qualified as a juror according to, and summoned as a juror in accordance with, the laws of a province is qualified to serve as a juror in criminal proceedings in that province.

No disqualification based on sex

(2) Notwithstanding any law of a province referred to in subsection (1), no person may be disqualified, exempted or excused from serving as a juror in criminal proceedings on the grounds of his or her sex.

R.S., 1985, c. C-46, s. 626; R.S., 1985, c. 27 (1st Supp.), s. 128.

Presiding judge

626.1 The judge before whom an accused is tried may be either the judge who presided over matters pertaining to the selection of a jury before the commencement of a trial or

another judge of the same court.

2002, c. 13, s. 51.

Support for juror with physical disability

627 The judge may permit a juror with a physical disability who is otherwise qualified to serve as a juror to have technical, personal, interpretative or other support services.

R.S., 1985, c. C-46, s. 627; R.S., 1985, c. 2 (1st Supp.), s. 1; 1998, c. 9, s. 4.

Challenging the Array

628 [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 129]

Challenging the jury panel

629 (1) The accused or the prosecutor may challenge the jury panel only on the ground of partiality, fraud or wilful misconduct on the part of the sheriff or other officer by whom the panel was returned.

In writing

(2) A challenge under subsection (1) shall be in writing and shall state that the person who returned the panel was partial or fraudulent or that he wilfully misconducted himself, as the case may be.

Form

(3) A challenge under this section may be in Form 40.

R.S., 1985, c. C-46, s. 629; R.S., 1985, c. 27 (1st Supp.), s. 130.

Trying ground of challenge

630 Where a challenge is made under [section 629](#), the judge shall determine whether the alleged ground of challenge is true or not, and where he is satisfied that the alleged ground of challenge is true, he shall direct a new panel to be returned.

R.S., c. C-34, s. 559.

Empanelling Jury

Names of jurors on cards

631 (1) The name of each juror on a panel of jurors that has been returned, his number on the panel and his address shall be written on a separate card, and all the cards shall, as far as possible, be of equal size.

To be placed in box

(2) The sheriff or other officer who returns the panel shall deliver the cards referred to in subsection (1) to the clerk of the court who shall cause them to be placed together in a box to be provided for the purpose and to be thoroughly shaken together.

Alternate jurors

(2.1) If the judge considers it advisable in the interests of justice to have one or two alternate jurors, the judge shall so order before the clerk of the court draws out the cards under subsection (3) or (3.1).

Additional jurors

(2.2) If the judge considers it advisable in the interests of justice, he or she may order that 13 or 14 jurors, instead of 12, be sworn in accordance with this Part before the clerk of the court draws out the cards under subsection (3) or (3.1).

Cards to be drawn by clerk of court

(3) If the array of jurors is not challenged or the array of jurors is challenged but the judge does not direct a new panel to be returned, the clerk of the court shall, in open court, draw out one after another the cards referred to in subsection (1), call out the number on each card as it is drawn and confirm with the person who responds that he or she is the person whose name appears on the card drawn, until the number of persons who have answered is, in the opinion of the judge, sufficient to provide a full jury and any alternate jurors ordered by the judge after allowing for orders to excuse, challenges and directions to stand by.

Exception

(3.1) The court, or a judge of the court, before which the jury trial is to be held may, if the court or judge is satisfied that it is necessary for the proper administration of justice, order the clerk of the court to call out the name and the number on each card.

Juror and other persons to be sworn

(4) The clerk of the court shall swear each member of the jury, and any alternate jurors, in the order in which his or her card was drawn and shall swear any other person providing technical, personal, interpretative or other support services to a juror with a physical disability.

Drawing additional cards if necessary

(5) If the number of persons who answer under subsection (3) or (3.1) is not sufficient to provide a full jury and the number of alternate jurors ordered by the judge, the clerk of the court shall proceed in accordance with subsections (3), (3.1) and (4) until 12 jurors — or 13 or 14 jurors, as the case may be, if the judge makes an order under subsection (2.2) — and any alternate jurors are sworn.

Ban on publication, limitation to access or use of information

(6) On application by the prosecutor or on its own motion, the court or judge before which a jury trial is to be held may, if the court or judge is satisfied that such an order is necessary for the proper administration of justice, make an order

(a) directing that the identity of a juror or any information that could disclose their identity shall not be published in any document or broadcast or transmitted in any way; or

(b) limiting access to or the use of that information.

R.S., 1985, c. C-46, s. 631; R.S., 1985, c. 27 (1st Supp.), s. 131; 1992, c. 41, s. 1; 1998, c. 9, s. 5; 2001, c. 32, ss. 38, 82; 2002, c. 13, s. 52; 2005, c. 32, s. 20; 2011, c. 16, s. 7.

Electronic or automated means

631.1 Any electronic or other automated means may be used to select jurors so long as the jurors would be randomly selected as required by the jury selection process described in [subsections 631\(1\) to \(5\)](#).

2022, c. 17, s. 38.

Excusing jurors

632 The judge may, at any time before the commencement of a trial, order that any juror be excused from jury service, whether or not the juror has been called pursuant to [subsection 631\(3\)](#) or [\(3.1\)](#) or any challenge has been made in relation to the juror, for reasons of

(a) personal interest in the matter to be tried;

(b) relationship with the judge presiding over the jury selection process, the judge before whom the accused is to be tried, the prosecutor, the accused, the counsel for the accused or a prospective witness; or

(c) personal hardship or any other reasonable cause that, in the opinion of the judge, warrants that the juror be excused.

R.S., 1985, c. C-46, s. 632; 1992, c. 41, s. 2; 2001, c. 32, s. 39; 2002, c. 13, s. 53.

Stand by

633 The judge may direct a juror who has been called under [subsection 631\(3\)](#) or [\(3.1\)](#) to stand by for reasons of personal hardship, maintaining public confidence in the administration of justice or any other reasonable cause.

R.S., 1985, c. C-46, s. 633; R.S., 1985, c. 27 (1st Supp.), s. 185(F); 1992, c. 41, s. 2; 2001, c. 32, s. 40; 2019, c. 25, s. 269.

634 [Repealed, 2019, c. 25, s. 269]

Order of challenges

635 (1) The accused shall be called on before the prosecutor is called on to declare whether the accused challenges the first juror for cause, and after that the prosecutor and the accused shall be called on alternately, in respect of each of the remaining jurors, to first make such a declaration.

Where there are joint trials

(2) Subsection (1) applies where two or more accused are to be tried together, but all of the accused shall exercise the challenges of the defence in turn, in the order in which their names appear in the indictment or in any other order agreed on by them,

(a) in respect of the first juror, before the prosecutor; and

(b) in respect of each of the remaining jurors, either before or after the prosecutor, in accordance with subsection (1).

R.S., 1985, c. C-46, s. 635; R.S., 1985, c. 2 (1st Supp.), s. 2; 1992, c. 41, s. 2; [2019, c. 25, s. 270](#).

636 and 637 [Repealed, 1992, c. 41, s. 2]

Challenge for cause

638 (1) A prosecutor or an accused is entitled to any number of challenges on the ground that

(a) the name of a juror does not appear on the panel, but no misnomer or misdescription is a ground of challenge where it appears to the court that the description given on the panel sufficiently designates the person referred to;

(b) a juror is not impartial;

(c) a juror has been convicted of an offence for which they were sentenced to a term of imprisonment of two years or more and for which no pardon or record suspension is in effect;

(d) a juror is not a Canadian citizen;

(e) a juror, even with the aid of technical, personal, interpretative or other support services provided to the juror under [section 627](#), is physically unable to perform properly the duties of a juror; or

(f) a juror does not speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or both official languages of Canada, where the accused is required by reason of an order under [section 530](#) to be tried before a judge and jury who speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or who speak both official languages of Canada, as the case may be.

No other ground

(2) No challenge for cause shall be allowed on a ground not mentioned in subsection (1).

(3) and (4) [Repealed, 1997, c. 18, s. 74]

(5) [Repealed, R.S., 1985, c. 31 (4th Supp.), s. 96]

R.S., 1985, c. C-46, s. 638; R.S., 1985, c. 27 (1st Supp.), s. 132, c. 31 (4th Supp.), s. 96; 1997, c. 18, s. 74; 1998, c. 9, s. 6; [2019, c. 25, s. 271](#).

Challenge in writing

639 (1) Where a challenge is made on a ground mentioned in [section 638](#), the court may, in its discretion, require the party that challenges to put the challenge in writing.

Form

(2) A challenge may be in Form 41.

Denial

(3) A challenge may be denied by the other party to the proceedings on the ground that it is not true.

R.S., c. C-34, s. 568.

Determination of challenge for cause

640 (1) If a challenge is made on a ground mentioned in [section 638](#), the judge shall determine whether the alleged ground is true or not and, if the judge is satisfied that it is true, the juror shall not be sworn.

Exclusion order

(2) On the application of the accused or prosecutor or on the judge's own motion, the judge may order the exclusion of all jurors, sworn and unsworn, from the court room until it is determined whether the ground of challenge is true if the judge is of the opinion that the order is necessary to preserve the impartiality of the jurors.

R.S., 1985, c. C-46, s. 640; [2008, c. 18, s. 26](#); [2011, c. 16, s. 9](#); [2019, c. 25, s. 272](#).

Calling persons who have stood by

641 (1) If a full jury and any alternate jurors have not been sworn and no cards remain to be drawn, the persons who have been directed to stand by shall be called again in the order in which their cards were drawn and shall be sworn, unless excused by the judge or challenged by the accused or the prosecutor.

Other persons becoming available

(2) If, before a person is sworn as a juror under subsection (1), other persons in the panel become available, the prosecutor may require the cards of those persons to be put into and drawn from the box in accordance with [section 631](#), and those persons shall be challenged, directed to stand by, excused or sworn, as the case may be, before the persons who were originally directed to stand by are called again.

R.S., 1985, c. C-46, s. 641; 1992, c. 41, s. 3; [2001, c. 32, s. 41](#); [2002, c. 13, s. 55](#); [2011, c. 16, s. 10](#).

Summoning other jurors when panel exhausted

642 (1) If a full jury and any alternate jurors considered advisable cannot be provided notwithstanding that the relevant provisions of this Part have been complied with, the court may, at the request of the prosecutor, order the sheriff or other proper officer to summon without delay as many persons, whether qualified jurors or not, as the court directs for the purpose of providing a full jury and alternate jurors.

Orally

(2) Jurors may be summoned under subsection (1) by word of mouth, if necessary.

Adding names to panel

(3) The names of the persons who are summoned under this section shall be added to the general panel for the purposes of the trial, and the same proceedings shall be taken with respect to calling and challenging those persons, excusing them and directing them to stand by as are provided in this Part with respect to the persons named in the original panel.

R.S., 1985, c. C-46, s. 642; 1992, c. 41, s. 4; [2002, c. 13, s. 56](#).

Substitution of alternate jurors

642.1 (1) Alternate jurors shall attend at the commencement of the presentation of the evidence on the merits and, if there is not a full jury present, shall replace any absent juror, in the order in which their cards were drawn under [subsection 631\(3\)](#).

Excusing of alternate jurors

(2) An alternate juror who is not required as a substitute shall be excused.

[2002, c. 13, s. 57](#); [2011, c. 16, s. 11](#).

Who shall be the jury

643 (1) The 12, 13 or 14 jurors who are sworn in accordance with this Part and present at the commencement of the presentation of the evidence on the merits shall be the jury to hear the evidence on the merits.

Names of jurors

(1.1) The name of each juror, including alternate jurors, who is sworn shall be kept apart until the juror is excused or the jury gives its verdict or is discharged, at which time the name shall be returned to the box as often as occasion arises, as long as an issue remains to be tried before a jury.

Same jury may try another issue by consent

(2) The court may try an issue with the same jury in whole or in part that previously tried or was drawn to try another issue, without the jurors being sworn again, but if the prosecutor or the accused objects to any of the jurors or the court excuses any of the jurors, the court shall order those persons to withdraw and shall direct that the required number of cards to make up a full jury be drawn and, subject to the provisions of this Part relating to challenges, orders to excuse and directions to stand by, the persons whose cards are drawn shall be sworn.

Sections directory

(3) Failure to comply with the directions of this section or [section 631](#), [635](#) or [641](#) does not affect the validity of a proceeding.

Discharge of juror

644 (1) Where in the course of a trial the judge is satisfied that a juror should not, by reason of illness or other reasonable cause, continue to act, the judge may discharge the juror.

Replacement of juror

(1.1) A judge may select another juror to take the place of a juror who by reason of illness or other reasonable cause cannot continue to act, if the jury has not yet begun to hear evidence, either by drawing a name from a panel of persons who were summoned to act as jurors and who are available at the court at the time of replacing the juror or by using the procedure referred to in [section 642](#).

Trial may continue

(2) Where in the course of a trial a member of the jury dies or is discharged pursuant to subsection (1), the jury shall, unless the judge otherwise directs and if the number of jurors is not reduced below ten, be deemed to remain properly constituted for all purposes of the trial and the trial shall proceed and a verdict may be given accordingly.

Trial may continue without jury

(3) If in the course of a trial the number of jurors is reduced below 10, the judge may, with the consent of the parties, discharge the jurors, continue the trial without a jury and render a verdict.

R.S., 1985, c. C-46, s. 644; 1992, c. 41, s. 6; 1997, c. 18, s. 75; [2019, c. 25, s. 273](#).

Trial

Trial continuous

645 (1) The trial of an accused shall proceed continuously subject to adjournment by the court.

Adjournment

(2) A judge may adjourn a trial from time to time in the same sittings.

Formal adjournment unnecessary

(3) For the purpose of subsection (2), no formal adjournment of trial or entry thereof is required.

Questions reserved for decision

(4) A judge, in any case tried without a jury, may reserve final decision on any question raised at the trial, or any matter raised further to a pre-hearing conference, and the decision, when given, shall be deemed to have been given at the trial.

Questions reserved for decision in a trial with a jury

(5) In any case to be tried with a jury, the judge before whom an accused is or is to be tried has jurisdiction, before any juror on a panel of jurors is called pursuant to [subsection 631\(3\)](#) or [\(3.1\)](#) and in the absence of any such juror, to deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn.

R.S., 1985, c. C-46, s. 645; R.S., 1985, c. 27 (1st Supp.), s. 133; 1997, c. 18, s. 76; [2001, c. 32, s. 43](#).

Taking evidence

646 On the trial of an accused for an indictable offence, the evidence of the witnesses for the prosecutor and the accused and the addresses of the prosecutor and the accused or counsel for the accused by way of summing up shall be taken in accordance with the provisions of Part XVIII, other than [subsections 540\(7\) to \(9\)](#), relating to the taking of evidence at preliminary inquiries.

R.S., 1985, c. C-46, s. 646; [2002, c. 13, s. 59](#).

Separation of jurors

647 (1) The judge may, at any time before the jury retires to consider its verdict, permit the members of the jury to separate.

Keeping in charge

(2) Where permission to separate under subsection (1) cannot be given or is not given, the jury shall be kept under the charge of an officer of the court as the judge directs, and that officer shall prevent the jurors from communicating with anyone other than himself or another member of the jury without leave of the judge.

Non-compliance with subsection (2)

(3) Failure to comply with subsection (2) does not affect the validity of the proceedings.

Empanelling new jury in certain cases

(4) Where the fact that there has been a failure to comply with this section or [section 648](#) is discovered before the verdict of the jury is returned, the judge may, if he considers that the failure to comply might lead to a miscarriage of justice, discharge the jury and

(a) direct that the accused be tried with a new jury during the same session or sittings of the court; or

(b) postpone the trial on such terms as justice may require.

Refreshment and accommodation

(5) The judge shall direct the sheriff to provide the jurors who are sworn with suitable and sufficient refreshment, food and lodging while they are together until they have given their verdict.

Restriction on publication

648 (1) After permission to separate is given to members of a jury under subsection 647(1), no information regarding any portion of the trial at which the jury is not present shall be published in any document or broadcast or transmitted in any way before the jury retires to consider its verdict.

Offence

(2) Every one who fails to comply with subsection (1) is guilty of an offence punishable on summary conviction.

(3) [Repealed, 2005, c. 32, s. 21]

R.S., 1985, c. C-46, s. 648; 2005, c. 32, s. 21.

Disclosure of jury proceedings

649 (1) Every member of a jury, and every person providing technical, personal, interpretative or other support services to a juror with a physical disability, who discloses any information relating to the proceedings of the jury when it was absent from the courtroom that was not subsequently disclosed in open court is guilty of an offence punishable on summary conviction.

Exceptions

(2) Subsection (1) does not apply in respect of the disclosure of information for the purposes of

(a) an investigation of an alleged offence under [subsection 139\(2\)](#) in relation to a juror;

(b) giving evidence in criminal proceedings in relation to such an offence; or

(c) any medical or psychiatric treatment or any therapy or counselling that a person referred to in subsection (1) receives from a health care professional after the completion of the trial in relation to health issues arising out of or related to the person's service at the trial as a juror or as a person who provided support services to a juror.

Health care professional

(3) For the purpose of paragraph (2)(c), the health care professional who provides any medical or psychiatric treatment or any therapy or counselling must be entitled to do so under the laws of a province.

R.S., 1985, c. C-46, s. 649; 1998, c. 9, s. 7; [2022, c. 12, s. 1](#).

Accused to be present

650 (1) Subject to subsections (1.1) and (2) and [section 650.01](#), an accused, other than an organization, shall be present in court during the whole of their trial, either in person

or, if authorized under any of [sections 715.231 to 715.241](#), by audioconference or videoconference.

Appearance by counsel

(1.1) The court may, with the consent of the prosecutor and the accused, allow the accused to appear by counsel for any part of the trial, other than a part in which the evidence of a witness is taken.

(1.2) [\[Repealed, 2022, c. 17, s. 39\]](#)

Exceptions

(2) The court may

- (a)** cause the accused to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible;
- (b)** permit the accused to be out of court during the whole or any part of his trial on such conditions as the court considers proper; or
- (c)** cause the accused to be removed and to be kept out of court during the trial of an issue as to whether the accused is unfit to stand trial, where it is satisfied that failure to do so might have an adverse effect on the mental condition of the accused.

To make defence

(3) An accused is entitled, after the close of the case for the prosecution, to make full answer and defence personally or by counsel.

R.S., 1985, c. C-46, s. 650; 1991, c. 43, s. 9; 1994, c. 44, s. 61; 1997, c. 18, s. 77; [2002, c. 13, s. 60](#); [2003, c. 21, s. 12](#); [2019, c. 25, s. 274](#); [2022, c. 17, s. 39](#).

Designation of counsel of record

650.01 (1) An accused may appoint counsel to represent the accused for any proceedings under this Act by filing a designation with the court.

Contents of designation

(2) The designation must contain the name and address of the counsel and be signed by the accused and the designated counsel.

Effect of designation

(3) If a designation is filed,

- (a)** the accused may appear by the designated counsel without being present for any part of the proceedings, other than
 - (i)** a part during which oral evidence of a witness is taken,
 - (ii)** a part during which jurors are being selected, and

(iii) an application for a writ of *habeas corpus*;

(b) an appearance by the designated counsel is equivalent to the accused's being present, unless the court orders otherwise; and

(c) a plea of guilty may be made, and a sentence may be pronounced, only if the accused is present, unless the court orders otherwise.

When court orders presence of accused

(4) If the court orders the accused to be present otherwise than by appearance by the designated counsel, the court may

(a) issue a summons to compel the presence of the accused and order that it be served by leaving a copy at the address contained in the designation; or

(b) issue a warrant to compel the presence of the accused.

[2002, c. 13, s. 61.](#)

Remote appearance

650.02 The prosecutor or the counsel designated under [section 650.01](#) may appear before the court by audioconference or videoconference, if the technological means is satisfactory to the court.

[2002, c. 13, s. 61](#); [2019, c. 25, s. 275](#).

Pre-charge conference

650.1 A judge in a jury trial may, before the charge to the jury, confer with the accused or counsel for the accused and the prosecutor with respect to the matters that should be explained to the jury and with respect to the choice of instructions to the jury.

[1997, c. 18, s. 78.](#)

Summing up by prosecutor

651 (1) Where an accused, or any one of several accused being tried together, is defended by counsel, the counsel shall, at the end of the case for the prosecution, declare whether or not he intends to adduce evidence on behalf of the accused for whom he appears and if he does not announce his intention to adduce evidence, the prosecutor may address the jury by way of summing up.

Summing up by accused

(2) Counsel for the accused or the accused, where he is not defended by counsel, is entitled, if he thinks fit, to open the case for the defence, and after the conclusion of that opening to examine such witnesses as he thinks fit, and when all the evidence is concluded to sum up the evidence.

Accused's right of reply

(3) Where no witnesses are examined for an accused, he or his counsel is entitled to address the jury last, but otherwise counsel for the prosecution is entitled to address the jury last.

Prosecutor's right of reply where more than one accused

(4) Where two or more accused are tried jointly and witnesses are examined for any of them, all the accused or their respective counsel are required to address the jury before it is addressed by the prosecutor.

R.S., c. C-34, s. 578.

View

652 (1) The judge may, where it appears to be in the interests of justice, at any time after the jury has been sworn and before it gives its verdict, direct the jury to have a view of any place, thing or person, and shall give directions respecting the manner in which, and the persons by whom, the place, thing or person shall be shown to the jury, and may for that purpose adjourn the trial.

Directions to prevent communication

(2) Where a view is ordered under subsection (1), the judge shall give any directions that he considers necessary for the purpose of preventing undue communication by any person with members of the jury, but failure to comply with any directions given under this subsection does not affect the validity of the proceedings.

Who shall attend

(3) Where a view is ordered under subsection (1), the accused and the judge shall attend.

R.S., c. C-34, s. 579.

Trying of issues of indictment by jury

652.1 (1) After the charge to the jury, the jury shall retire to try the issues of the indictment.

Reduction of number of jurors to 12

(2) However, if there are more than 12 jurors remaining, the judge shall identify the 12 jurors who are to retire to consider the verdict by having the number of each juror written on a card that is of equal size, by causing the cards to be placed together in a box that is to be thoroughly shaken together and by drawing one card if 13 jurors remain or two cards if 14 jurors remain. The judge shall then discharge any juror whose number is drawn.

[2011, c. 16, s. 13.](#)

Disagreement of jury

653 (1) Where the judge is satisfied that the jury is unable to agree on its verdict and that further detention of the jury would be useless, he may in his discretion discharge that jury and direct a new jury to be empanelled during the sittings of the court, or may adjourn the trial on such terms as justice may require.

Discretion not reviewable

(2) A discretion that is exercised under subsection (1) by a judge is not reviewable.

R.S., c. C-34, s. 580.

Mistrial — rulings binding at new trial

653.1 In the case of a mistrial, unless the court is satisfied that it would not be in the interests of justice, rulings relating to the disclosure or admissibility of evidence or the *Canadian Charter of Rights and Freedoms* that were made during the trial are binding on the parties in any new trial if the rulings are made — or could have been made — before the stage at which the evidence on the merits is presented.

2011, c. 16, s. 14.

Proceeding on Sunday, etc., not invalid

654 The taking of the verdict of a jury and any proceeding incidental thereto is not invalid by reason only that it is done on Sunday or on a holiday.

R.S., c. C-34, s. 581.

Evidence on Trial

Admissions at trial

655 Where an accused is on trial for an indictable offence, he or his counsel may admit any fact alleged against him for the purpose of dispensing with proof thereof.

R.S., c. C-34, s. 582.

Presumption — valuable minerals

656 In any proceeding in relation to theft or possession of a valuable mineral that is unrefined, partly refined, uncut or otherwise unprocessed by any person actively engaged in or on a mine, if it is established that the person possesses the valuable mineral, the person is presumed, in the absence of evidence raising a reasonable doubt to the contrary, to have stolen or unlawfully possessed the valuable mineral.

R.S., 1985, c. C-46, s. 656; 1999, c. 5, s. 24.

Use in evidence of statement by accused

657 A statement made by an accused under [subsection 541\(3\)](#) and purporting to be signed by the justice before whom it was made may be given in evidence against the accused at his or her trial without proof of the signature of the justice, unless it is proved that the justice by whom the statement purports to be signed did not sign it.

R.S., 1985, c. C-46, s. 657; 1994, c. 44, s. 62.

Proof of ownership and value of property

657.1 (1) In any proceedings, an affidavit or a solemn declaration of a person who claims to be the lawful owner of, or the person lawfully entitled to possession of, property that was the subject-matter of the offence, or any other person who has specialized knowledge of the property or of that type of property, containing the statements referred to in subsection (2), shall be admissible in evidence and, in the absence of evidence to the contrary, is evidence of the statements contained in the affidavit or solemn declaration without proof of the signature of the person appearing to have signed the affidavit or solemn declaration.

Statements to be made

(2) For the purposes of subsection (1), a person shall state in an affidavit or a solemn declaration

(a) that the person is the lawful owner of, or is lawfully entitled to possession of, the property, or otherwise has specialized knowledge of the property or of property of the same type as that property;

(b) the value of the property;

(c) in the case of a person who is the lawful owner of or is lawfully entitled to possession of the property, that the person has been deprived of the property by fraudulent means or otherwise without the lawful consent of the person;

(c.1) in the case of proceedings in respect of an offence under [section 342](#), that the credit card had been revoked or cancelled, is a false document within the meaning of [section 321](#) or that no credit card that meets the exact description of that credit card was ever issued; and

(d) any facts within the personal knowledge of the person relied on to justify the statements referred to in paragraphs (a) to (c.1).

Notice of intention to produce affidavit or solemn declaration

(3) Unless the court orders otherwise, no affidavit or solemn declaration shall be received in evidence pursuant to subsection (1) unless the prosecutor has, before the trial or other proceeding, given to the accused a copy of the affidavit or solemn declaration and reasonable notice of intention to produce it in evidence.

Attendance for examination

(4) Notwithstanding subsection (1), the court may require the person who appears to have signed an affidavit or solemn declaration referred to in that subsection to appear before it for examination or cross-examination in respect of the issue of proof of any of the statements contained in the affidavit or solemn declaration.

R.S., 1985, c. 23 (4th Supp.), s. 3; 1994, c. 44, s. 63; 1997, c. 18, s. 79.

Theft and possession

657.2 (1) Where an accused is charged with possession of any property obtained by the commission of an offence, evidence of the conviction or discharge of another person of theft of the property is admissible against the accused, and in the absence of evidence to the contrary is proof that the property was stolen.

Accessory after the fact

(2) Where an accused is charged with being an accessory after the fact to the commission of an offence, evidence of the conviction or discharge of another person of the offence is admissible against the accused, and in the absence of evidence to the contrary is proof that the offence was committed.

1997, c. 18, s. 80.

Expert testimony

657.3 (1) In any proceedings, the evidence of a person as an expert may be given by means of a report accompanied by the affidavit or solemn declaration of the person, setting out, in particular, the qualifications of the person as an expert if

- (a)** the court recognizes that person as an expert; and
- (b)** the party intending to produce the report in evidence has, before the proceeding, given to the other party a copy of the affidavit or solemn declaration and the report and reasonable notice of the intention to produce it in evidence.

Attendance for examination

(2) Notwithstanding subsection (1), the court may require the person who appears to have signed an affidavit or solemn declaration referred to in that subsection to appear before it for examination or cross-examination in respect of the issue of proof of any of the statements contained in the affidavit or solemn declaration or report.

Notice for expert testimony

(3) For the purpose of promoting the fair, orderly and efficient presentation of the testimony of witnesses,

- (a)** a party who intends to call a person as an expert witness shall, at least thirty days before the commencement of the trial or within any other period fixed by the justice or judge, give notice to the other party or parties of his or her intention to do so, accompanied by
 - (i)** the name of the proposed witness,
 - (ii)** a description of the area of expertise of the proposed witness that is sufficient to permit the other parties to inform themselves about that area of expertise, and
 - (iii)** a statement of the qualifications of the proposed witness as an expert;
- (b)** in addition to complying with paragraph (a), a prosecutor who intends to call a person as an expert witness shall, within a reasonable period before trial, provide to the other party or parties

- (i) a copy of the report, if any, prepared by the proposed witness for the case, and
- (ii) if no report is prepared, a summary of the opinion anticipated to be given by the proposed witness and the grounds on which it is based; and
- (c) in addition to complying with paragraph (a), an accused, or his or her counsel, who intends to call a person as an expert witness shall, not later than the close of the case for the prosecution, provide to the other party or parties the material referred to in paragraph (b).

If notices not given

- (4) If a party calls a person as an expert witness without complying with subsection (3), the court shall, at the request of any other party,
- (a) grant an adjournment of the proceedings to the party who requests it to allow him or her to prepare for cross-examination of the expert witness;
 - (b) order the party who called the expert witness to provide that other party and any other party with the material referred to in paragraph (3)(b); and
 - (c) order the calling or recalling of any witness for the purpose of giving testimony on matters related to those raised in the expert witness's testimony, unless the court considers it inappropriate to do so.

Additional court orders

- (5) If, in the opinion of the court, a party who has received the notice and material referred to in subsection (3) has not been able to prepare for the evidence of the proposed witness, the court may do one or more of the following:
- (a) adjourn the proceedings;
 - (b) order that further particulars be given of the evidence of the proposed witness; and
 - (c) order the calling or recalling of any witness for the purpose of giving testimony on matters related to those raised in the expert witness's testimony.

Use of material by prosecution

- (6) If the proposed witness does not testify, the prosecutor may not produce material provided to him or her under paragraph (3)(c) in evidence without the consent of the accused.

No further disclosure

- (7) Unless otherwise ordered by a court, information disclosed under this section in relation to a proceeding may only be used for the purpose of that proceeding.

1997, c. 18, s. 80; [2002, c. 13, s. 62](#).

Children and Young Persons

Testimony as to date of birth

658 (1) In any proceedings to which this Act applies, the testimony of a person as to the date of his or her birth is admissible as evidence of that date.

Testimony of a parent

(2) In any proceedings to which this Act applies, the testimony of a parent as to the age of a person of whom he or she is a parent is admissible as evidence of the age of that person.

Proof of age

(3) In any proceedings to which this Act applies,

(a) a birth or baptismal certificate or a copy of such a certificate purporting to be certified under the hand of the person in whose custody the certificate is held is evidence of the age of that person; and

(b) an entry or record of an incorporated society or its officers who have had the control or care of a child or young person at or about the time the child or young person was brought to Canada is evidence of the age of the child or young person if the entry or record was made before the time when the offence is alleged to have been committed.

Other evidence

(4) In the absence of any certificate, copy, entry or record mentioned in subsection (3), or in corroboration of any such certificate, copy, entry or record, a jury, judge, justice or provincial court judge, as the case may be, may receive and act on any other information relating to age that they consider reliable.

Inference from appearance

(5) In the absence of other evidence, or by way of corroboration of other evidence, a jury, judge, justice or provincial court judge, as the case may be, may infer the age of a child or young person from his or her appearance.

R.S., 1985, c. C-46, s. 658; 1994, c. 44, s. 64.

Corroboration

Children's evidence

659 Any requirement whereby it is mandatory for a court to give the jury a warning about convicting an accused on the evidence of a child is abrogated.

R.S., 1985, c. C-46, s. 659; R.S., 1985, c. 19 (3rd Supp.), s. 15; 1993, c. 45, s. 9.

Verdicts

Full offence charged, attempt proved

660 Where the complete commission of an offence charged is not proved but the evidence establishes an attempt to commit the offence, the accused may be convicted of the attempt.

R.S., c. C-34, s. 587.

Attempt charged, full offence proved

661 (1) Where an attempt to commit an offence is charged but the evidence establishes the commission of the complete offence, the accused is not entitled to be acquitted, but the jury may convict him of the attempt unless the judge presiding at the trial, in his discretion, discharges the jury from giving a verdict and directs that the accused be indicted for the complete offence.

Conviction a bar

(2) An accused who is convicted under this section is not liable to be tried again for the offence that he was charged with attempting to commit.

R.S., c. C-34, s. 588.

Offence charged, part only proved

662 (1) A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted

(a) of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved; or

(b) of an attempt to commit an offence so included.

First degree murder charged

(2) For greater certainty and without limiting the generality of subsection (1), where a count charges first degree murder and the evidence does not prove first degree murder but proves second degree murder or an attempt to commit second degree murder, the jury may find the accused not guilty of first degree murder but guilty of second degree murder or an attempt to commit second degree murder, as the case may be.

Conviction for infanticide or manslaughter on charge of murder

(3) Subject to subsection (4), where a count charges murder and the evidence proves manslaughter or infanticide but does not prove murder, the jury may find the accused not guilty of murder but guilty of manslaughter or infanticide, but shall not on that count find the accused guilty of any other offence.

Conviction for concealing body of child where murder or infanticide charged

(4) Where a count charges the murder of a child or infanticide and the evidence proves the commission of an offence under [section 243](#) but does not prove murder or infanticide,

the jury may find the accused not guilty of murder or infanticide, as the case may be, but guilty of an offence under section 243.

Conviction for dangerous operation when another offence charged

(5) For greater certainty, when a count charges an offence under [section 220](#), [221](#) or [236](#) arising out of the operation of a conveyance, and the evidence does not prove that offence but proves an offence under [section 320.13](#), the accused may be convicted of an offence under that section.

Conviction for break and enter with intent

(6) Where a count charges an offence under [paragraph 98\(1\)\(b\)](#) or [348\(1\)\(b\)](#) and the evidence does not prove that offence but does prove an offence under, respectively, [paragraph 98\(1\)\(a\)](#) or [348\(1\)\(a\)](#), the accused may be convicted of an offence under that latter paragraph.

R.S., 1985, c. C-46, s. 662; R.S., 1985, c. 27 (1st Supp.), s. 134; 2000, c. 2, s. 3; [2008, c. 6, s. 38](#); [2018, c. 21, s. 20](#).

No acquittal unless act or omission not wilful

663 Where a female person is charged with infanticide and the evidence establishes that she caused the death of her child but does not establish that, at the time of the act or omission by which she caused the death of the child,

(a) she was not fully recovered from the effects of giving birth to the child or from the effect of lactation consequent on the birth of the child, and

(b) the balance of her mind was, at that time, disturbed by reason of the effect of giving birth to the child or of the effect of lactation consequent on the birth of the child,

she may be convicted unless the evidence establishes that the act or omission was not wilful.

R.S., c. C-34, s. 590.

Previous Convictions

No reference to previous conviction

664 No indictment in respect of an offence for which, by reason of previous convictions, a greater punishment may be imposed shall contain any reference to previous convictions.

R.S., c. C-34, s. 591.

665 [Repealed, 1995, c. 22, s. 3]

Evidence of character

666 Where, at a trial, the accused adduces evidence of his good character, the prosecutor may, in answer thereto, before a verdict is returned, adduce evidence of the

previous conviction of the accused for any offences, including any previous conviction by reason of which a greater punishment may be imposed.

R.S., c. C-34, s. 593.

Proof of previous conviction

667 (1) In any proceedings,

(a) a certificate setting out with reasonable particularity the conviction or discharge under [section 730](#), the finding of guilt under the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, the finding of guilt under the *Youth Criminal Justice Act* or the conviction and sentence or finding of guilt and sentence in Canada of an offender is, on proof that the accused or defendant is the offender referred to in the certificate, evidence that the accused or defendant was so convicted, so discharged or so convicted and sentenced or found guilty and sentenced, without proof of the signature or the official character of the person appearing to have signed the certificate, if it is signed by

- (i)** the person who made the conviction, order for the discharge or finding of guilt,
- (ii)** the clerk of the court in which the conviction, order for the discharge or finding of guilt was made, or
- (iii)** a fingerprint examiner;

(b) evidence that the fingerprints of the accused or defendant are the same as the fingerprints of the offender whose fingerprints are reproduced in or attached to a certificate issued under subparagraph (a)(iii) is, in the absence of evidence to the contrary, proof that the accused or defendant is the offender referred to in that certificate;

(c) a certificate of a fingerprint examiner stating that he has compared the fingerprints reproduced in or attached to that certificate with the fingerprints reproduced in or attached to a certificate issued under subparagraph (a)(iii) and that they are those of the same person is evidence of the statements contained in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate; and

(d) a certificate under subparagraph (a)(iii) may be in Form 44, and a certificate under paragraph (c) may be in Form 45.

Idem

(2) In any proceedings, a copy of the summary conviction or discharge under [section 730](#) in Canada of an offender, signed by the person who made the conviction or order for the discharge or by the clerk of the court in which the conviction or order for the discharge was made, is, on proof that the accused or defendant is the offender referred to in the copy of the summary conviction, evidence of the conviction or discharge under section 730 of the accused or defendant, without proof of the signature or the official character of the person appearing to have signed it.

Proof of identity

(2.1) In any summary conviction proceedings, where the name of a defendant is similar to the name of an offender referred to in a certificate made under subparagraph (1)(a)(i) or (ii) in respect of a summary conviction or referred to in a copy of a summary conviction mentioned in subsection (2), that similarity of name is, in the absence of evidence to the contrary, evidence that the defendant is the offender referred to in the certificate or the copy of the summary conviction.

Attendance and right to cross-examine

(3) An accused against whom a certificate issued under subparagraph (1)(a)(iii) or paragraph (1)(c) is produced may, with leave of the court, require the attendance of the person who signed the certificate for the purposes of cross-examination.

Notice of intention to produce certificate

(4) No certificate issued under subparagraph (1)(a)(iii) or paragraph (1)(c) shall be received in evidence unless the party intending to produce it has given to the accused reasonable notice of his intention together with a copy of the certificate.

Definition of *fingerprint examiner*

(5) In this section, ***fingerprint examiner*** means a person designated as such for the purposes of this section by the Minister of Public Safety and Emergency Preparedness.

R.S., 1985, c. C-46, s. 667; R.S., 1985, c. 27 (1st Supp.), s. 136, c. 1 (4th Supp.), s. 18(F); 1995, c. 22, s. 10; 2002, c. 1, s. 181; 2005, c. 10, s. 34; 2008, c. 18, s. 27(F); 2012, c. 1, s. 200.

668 and 669 [Repealed, 1995, c. 22, s. 4]

Jurisdiction

Jurisdiction

669.1 (1) Where any judge, court or provincial court judge by whom or which the plea of the accused or defendant to an offence was taken has not commenced to hear evidence, any judge, court or provincial court judge having jurisdiction to try the accused or defendant has jurisdiction for the purpose of the hearing and adjudication.

Adjournment

(2) Any court, judge or provincial court judge having jurisdiction to try an accused or a defendant, or any clerk or other proper officer of the court, or in the case of an offence punishable on summary conviction, any justice, may, at any time before or after the plea of the accused or defendant is taken, adjourn the proceedings.

R.S., 1985, c. 27 (1st Supp.), s. 137.

Continuation of proceedings

669.2 (1) Subject to this section, where an accused or a defendant is being tried by

(a) a judge or provincial court judge,

(b) a justice or other person who is, or is a member of, a summary conviction court,
or

(c) a court composed of a judge and jury,

as the case may be, and the judge, provincial court judge, justice or other person dies or is for any reason unable to continue, the proceedings may be continued before another judge, provincial court judge, justice or other person, as the case may be, who has jurisdiction to try the accused or defendant.

Where adjudication is made

(2) Where a verdict was rendered by a jury or an adjudication was made by a judge, provincial court judge, justice or other person before whom the trial was commenced, the judge, provincial court judge, justice or other person before whom the proceedings are continued shall, without further election by an accused, impose the punishment or make the order that is authorized by law in the circumstances.

If no adjudication made

(3) Subject to subsections (4) and (5), if the trial was commenced but no adjudication was made or verdict rendered, the judge, provincial court judge, justice or other person before whom the proceedings are continued shall, without further election by an accused, commence the trial again as if no evidence on the merits had been taken.

If no adjudication made — jury trials

(4) If a trial that is before a court composed of a judge and a jury was commenced but no adjudication was made or verdict rendered, the judge before whom the proceedings are continued may, without further election by an accused, continue the trial or commence the trial again as if no evidence on the merits had been taken.

Where trial continued

(5) Where a trial is continued under subsection (4), any evidence that was adduced before a judge referred to in paragraph (1)(c) is deemed to have been adduced before the judge before whom the trial is continued but, if the prosecutor and the accused consent, any part of that evidence may be adduced again before the judge before whom the trial is continued.

R.S., 1985, c. 27 (1st Supp.), s. 137; 1994, c. 44, s. 65; [2011, c. 16, s. 15](#); [2022, c. 17, s. 40\(E\)](#).

Jurisdiction when appointment to another court

669.3 Where a court composed of a judge and a jury, a judge or a provincial court judge is conducting a trial and the judge or provincial court judge is appointed to another court, he or she continues to have jurisdiction in respect of the trial until its completion.

1994, c. 44, s. 66.

Formal Defects in Jury Process

Judgment not to be stayed on certain grounds

670 Judgment shall not be stayed or reversed after verdict on an indictment

- (a) by reason of any irregularity in the summoning or empanelling of the jury; or
- (b) for the reason that a person who served on the jury was not returned as a juror by a sheriff or other officer.

R.S., c. C-34, s. 598.

Directions respecting jury or jurors directory

671 No omission to observe the directions contained in any Act with respect to the qualification, selection, balloting or distribution of jurors, the preparation of the jurors' book, the selecting of jury lists or the drafting of panels from the jury lists is a ground for impeaching or quashing a verdict rendered in criminal proceedings.

R.S., c. C-34, s. 599.

Saving powers of court

672 Nothing in this Act alters, abridges or affects any power or authority that a court or judge had immediately before April 1, 1955, or any practice or form that existed immediately before April 1, 1955, with respect to trials by jury, jury process, juries or jurors, except where the power or authority, practice or form is expressly altered by or is inconsistent with this Act.

R.S., c. C-34, s. 600.

PART XX.1

Mental Disorder

Interpretation

Definitions

672.1 (1) In this Part,

accused includes a defendant in summary conviction proceedings and an accused in respect of whom a verdict of not criminally responsible on account of mental disorder has been rendered; (*accusé*)

assessment means an assessment by a medical practitioner or any other person who has been designated by the Attorney General as being qualified to conduct an assessment of the mental condition of the accused under an assessment order made under [section 672.11](#) or [672.121](#), and any incidental observation or examination of the accused; (*évaluation*)

chairperson includes any alternate that the chairperson of a Review Board may designate to act on the chairperson's behalf; (*président*)

court includes a summary conviction court as defined in [section 785](#), a judge, a justice and a judge of the court of appeal as defined in [section 673](#); (*tribunal*)

disposition means an order made by a court or Review Board under [section 672.54](#), an order made by a court under [section 672.58](#) or a finding made by a court under [subsection 672.64\(1\)](#); (*décision*)

dual status offender means an offender who is subject to a sentence of imprisonment in respect of one offence and a custodial disposition under [paragraph 672.54\(c\)](#) in respect of another offence; (*contrevenant à double statut*)

high-risk accused means an accused who is found to be a high-risk accused by a court under [subsection 672.64\(1\)](#); (*accusé à haut risque*)

hospital means a place in a province that is designated by the Minister of Health for the province for the custody, treatment or assessment of an accused in respect of whom an assessment order, a disposition or a placement decision is made; (*hôpital*)

medical practitioner means a person who is entitled to practise medicine by the laws of a province; (*médecin*)

party, in relation to proceedings of a court or Review Board to make or review a disposition, means

- (a) the accused,
- (b) the person in charge of the hospital where the accused is detained or is to attend pursuant to an assessment order or a disposition,
- (c) an Attorney General designated by the court or Review Board under [subsection 672.5\(3\)](#),
- (d) any interested person designated by the court or Review Board under [subsection 672.5\(4\)](#), or
- (e) where the disposition is to be made by a court, the prosecutor of the charge against the accused; (*parties*)

placement decision means a decision by a Review Board under [subsection 672.68\(2\)](#) as to the place of custody of a dual status offender; (*ordonnance de placement*)

prescribed means prescribed by regulations made by the Governor in Council under [section 672.95](#); (*Version anglaise seulement*)

Review Board means the Review Board established or designated for a province pursuant to [subsection 672.38\(1\)](#); (*commission d'examen*)

verdict of not criminally responsible on account of mental disorder means a verdict that the accused committed the act or made the omission that formed the basis of

the offence with which the accused is charged but is not criminally responsible on account of mental disorder. (*verdict de non-responsabilité criminelle pour cause de troubles mentaux*)

Reference

(2) For the purposes of [subsections 672.5\(3\)](#) and [\(5\)](#), [paragraph 672.86\(1\)\(b\)](#) and [subsections 672.86\(2\)](#) and [\(2.1\)](#), [672.88\(2\)](#) and [672.89\(2\)](#), in respect of a territory or proceedings commenced at the instance of the Government of Canada and conducted by or on behalf of that Government, a reference to the Attorney General of a province shall be read as a reference to the Attorney General of Canada.

1991, c. 43, s. 4; [2005, c. 22, s. 1](#); [2014, c. 6, s. 2](#).

Assessment Orders

Assessment order

672.11 A court having jurisdiction over an accused in respect of an offence may order an assessment of the mental condition of the accused, if it has reasonable grounds to believe that such evidence is necessary to determine

- (a)** whether the accused is unfit to stand trial;
- (b)** whether the accused was, at the time of the commission of the alleged offence, suffering from a mental disorder so as to be exempt from criminal responsibility by virtue of [subsection 16\(1\)](#);
- (c)** whether the balance of the mind of the accused was disturbed at the time of commission of the alleged offence, where the accused is a female person charged with an offence arising out of the death of her newly-born child;
- (d)** the appropriate disposition to be made, where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial has been rendered in respect of the accused;
- (d.1)** whether a finding that the accused is a high-risk accused should be revoked under [subsection 672.84\(3\)](#); or
- (e)** whether an order should be made under [section 672.851](#) for a stay of proceedings, where a verdict of unfit to stand trial has been rendered against the accused.

1991, c. 43, s. 4; 1995, c. 22, s. 10; [2005, c. 22, s. 2](#); [2014, c. 6, s. 3](#).

Where court may order assessment

672.12 (1) The court may make an assessment order at any stage of proceedings against the accused of its own motion, on application of the accused or, subject to subsections (2) and (3), on application of the prosecutor.

Limitation on prosecutor's application for assessment of fitness

(2) Where the prosecutor applies for an assessment in order to determine whether the accused is unfit to stand trial for an offence that is prosecuted by way of summary conviction, the court may only order the assessment if

- (a)** the accused raised the issue of fitness; or
- (b)** the prosecutor satisfies the court that there are reasonable grounds to doubt that the accused is fit to stand trial.

Limitation on prosecutor's application for assessment

(3) Where the prosecutor applies for an assessment in order to determine whether the accused was suffering from a mental disorder at the time of the offence so as to be exempt from criminal responsibility, the court may only order the assessment if

- (a)** the accused puts his or her mental capacity for criminal intent into issue; or
- (b)** the prosecutor satisfies the court that there are reasonable grounds to doubt that the accused is criminally responsible for the alleged offence, on account of mental disorder.

1991, c. 43, s. 4.

Review Board may order assessment

672.121 The Review Board that has jurisdiction over an accused found not criminally responsible on account of mental disorder or unfit to stand trial may order an assessment of the mental condition of the accused of its own motion or on application of the prosecutor or the accused, if it has reasonable grounds to believe that such evidence is necessary to

- (a)** make a recommendation to the court under [subsection 672.851\(1\)](#);
- (b)** make a disposition under [section 672.54](#) in one of the following circumstances:
 - (i)** no assessment report on the mental condition of the accused is available,
 - (ii)** no assessment of the mental condition of the accused has been conducted in the last twelve months, or
 - (iii)** the accused has been transferred from another province under [section 672.86](#);or
- (c)** determine whether to refer to the court for review under [subsection 672.84\(1\)](#) a finding that an accused is a high-risk accused.

[2005, c. 22, s. 3](#); [2014, c. 6, s. 4](#).

Contents of assessment order

672.13 (1) An assessment order must specify

- (a)** the service that or the person who is to make the assessment, or the hospital where it is to be made;
- (b)** whether the accused is to be detained in custody while the order is in force; and

(c) the period that the order is to be in force, including the time required for the assessment and for the accused to travel to and from the place where the assessment is to be made.

Form

(2) An assessment order may be in Form 48 or 48.1.

1991, c. 43, s. 4; [2005, c. 22, s. 4](#).

General rule for period

672.14 (1) An assessment order shall not be in force for more than thirty days.

Exception in fitness cases

(2) No assessment order to determine whether the accused is unfit to stand trial shall be in force for more than five days, excluding holidays and the time required for the accused to travel to and from the place where the assessment is to be made, unless the accused and the prosecutor agree to a longer period not exceeding thirty days.

Exception for compelling circumstances

(3) Despite subsections (1) and (2), a court or Review Board may make an assessment order that remains in force for sixty days if the court or Review Board is satisfied that compelling circumstances exist that warrant it.

1991, c. 43, s. 4; [2005, c. 22, s. 5](#).

Extension

672.15 (1) Subject to subsection (2), a court or Review Board may extend an assessment order, of its own motion or on the application of the accused or the prosecutor made during or at the end of the period during which the order is in force, for any further period that is required, in its opinion, to complete the assessment of the accused.

Maximum duration of extensions

(2) No extension of an assessment order shall exceed thirty days, and the period of the initial order together with all extensions shall not exceed sixty days.

1991, c. 43, s. 4; [2005, c. 22, s. 6](#).

Presumption against custody

672.16 (1) Subject to subsection (3), an accused shall not be detained in custody under an assessment order of a court unless

(a) the court is satisfied that on the evidence custody is necessary to assess the accused, or that on the evidence of a medical practitioner custody is desirable to assess the accused and the accused consents to custody;

(b) custody of the accused is required in respect of any other matter or by virtue of any other provision of this Act; or

(c) the prosecutor, having been given a reasonable opportunity to do so, shows that detention of the accused in custody is justified on either of the grounds set out in [subsection 515\(10\)](#).

Presumption against custody — Review Board

(1.1) If the Review Board makes an order for an assessment of an accused under [section 672.121](#), the accused shall not be detained in custody under the order unless

(a) the accused is currently subject to a disposition made under [paragraph 672.54\(c\)](#);

(b) the Review Board is satisfied on the evidence that custody is necessary to assess the accused, or that on the evidence of a medical practitioner custody is desirable to assess the accused and the accused consents to custody; or

(c) custody of the accused is required in respect of any other matter or by virtue of any other provision of this Act.

Residency as a condition of disposition

(1.2) Subject to paragraphs (1.1)(b) and (c), if the accused is subject to a disposition made under [paragraph 672.54\(b\)](#) that requires the accused to reside at a specified place, an assessment ordered under [section 672.121](#) shall require the accused to reside at the same place.

Report of medical practitioner

(2) For the purposes of paragraphs (1)(a) and (1.1)(b), if the prosecutor and the accused agree, the evidence of a medical practitioner may be received in the form of a report in writing.

Presumption of custody in certain circumstances

(3) An assessment order made in respect of an accused who is detained under [subsection 515\(6\)](#) or [522\(2\)](#) shall order that the accused be detained in custody under the same circumstances referred to in that subsection, unless the accused shows that custody is not justified under the terms of that subsection.

1991, c. 43, s. 4; [2005, c. 22, s. 7](#).

Assessment order takes precedence over bail hearing

672.17 During the period that an assessment order made by a court in respect of an accused charged with an offence is in force, no order for the interim release or detention of the accused may be made by virtue of Part XVI or [section 679](#) in respect of that offence or an included offence.

1991, c. 43, s. 4; [2005, c. 22, s. 8](#).

Application to vary assessment order

672.18 Where at any time while an assessment order made by a court is in force the prosecutor or an accused shows cause, the court may vary the terms of the order respecting the interim release or detention of the accused in such manner as it considers appropriate in the circumstances.

1991, c. 43, s. 4; [2005, c. 22, s. 9\(F\)](#).

No treatment order on assessment

672.19 No assessment order may direct that psychiatric or any other treatment of the accused be carried out, or direct the accused to submit to such treatment.

1991, c. 43, s. 4.

When assessment completed

672.191 An accused in respect of whom an assessment order is made shall appear before the court or Review Board that made the order as soon as practicable after the assessment is completed and not later than the last day of the period that the order is to be in force.

1997, c. 18, s. 81; [2005, c. 22, s. 10](#).

Assessment Reports

Assessment report

672.2 (1) An assessment order may require the person who makes the assessment to submit in writing an assessment report on the mental condition of the accused.

Assessment report to be filed

(2) An assessment report shall be filed with the court or Review Board that ordered it, within the period fixed by the court or Review Board, as the case may be.

Court to send assessment report to Review Board

(3) The court shall send to the Review Board without delay a copy of any report filed with it pursuant to subsection (2), to assist in determining the appropriate disposition to be made in respect of the accused.

Copies of reports to accused and prosecutor

(4) Subject to [subsection 672.51\(3\)](#), copies of any report filed with a court or Review Board under subsection (2) shall be provided without delay to the prosecutor, the accused and any counsel representing the accused.

1991, c. 43, s. 4; [2005, c. 22, s. 11](#).

Protected Statements

Definition of *protected statement*

672.21 (1) In this section, ***protected statement*** means a statement made by the accused during the course and for the purposes of an assessment or treatment directed by a disposition, to the person specified in the assessment order or the disposition, or to anyone acting under that person's direction.

Protected statements not admissible against accused

(2) No protected statement or reference to a protected statement made by an accused is admissible in evidence, without the consent of the accused, in any proceeding before a court, tribunal, body or person with jurisdiction to compel the production of evidence.

Exceptions

(3) Notwithstanding subsection (2), evidence of a protected statement is admissible for the purpose of

- (a)** determining whether the accused is unfit to stand trial;
- (b)** making a disposition or placement decision respecting the accused;
- (c)** determining, under [section 672.84](#), whether to refer to the court for review a finding that an accused is a high-risk accused or whether to revoke such a finding;
- (d)** determining whether the balance of the mind of the accused was disturbed at the time of commission of the alleged offence, where the accused is a female person charged with an offence arising out of the death of her newly-born child;
- (e)** determining whether the accused was, at the time of the commission of an alleged offence, suffering from automatism or a mental disorder so as to be exempt from criminal responsibility by virtue of [subsection 16\(1\)](#), if the accused puts his or her mental capacity for criminal intent into issue, or if the prosecutor raises the issue after verdict;
- (f)** challenging the credibility of an accused in any proceeding where the testimony of the accused is inconsistent in a material particular with a protected statement that the accused made previously; or
- (g)** establishing the perjury of an accused who is charged with perjury in respect of a statement made in any proceeding.

1991, c. 43, s. 4; [2005, c. 22, s. 12](#); [2014, c. 6, s. 5](#).

Fitness to Stand Trial

Presumption of fitness

672.22 An accused is presumed fit to stand trial unless the court is satisfied on the balance of probabilities that the accused is unfit to stand trial.

1991, c. 43, s. 4.

Court may direct issue to be tried

672.23 (1) Where the court has reasonable grounds, at any stage of the proceedings before a verdict is rendered, to believe that the accused is unfit to stand trial, the court may direct, of its own motion or on application of the accused or the prosecutor, that the issue of fitness of the accused be tried.

Burden of proof

(2) An accused or a prosecutor who makes an application under subsection (1) has the burden of proof that the accused is unfit to stand trial.

1991, c. 43, s. 4.

Counsel

672.24 (1) Where the court has reasonable grounds to believe that an accused is unfit to stand trial and the accused is not represented by counsel, the court shall order that the accused be represented by counsel.

Counsel fees and disbursements

(2) Where counsel is assigned pursuant to subsection (1) and legal aid is not granted to the accused pursuant to a provincial legal aid program, the fees and disbursements of counsel shall be paid by the Attorney General to the extent that the accused is unable to pay them.

Taxation of fees and disbursements

(3) Where counsel and the Attorney General cannot agree on the fees or disbursements of counsel, the Attorney General or the counsel may apply to the registrar of the court and the registrar may tax the disputed fees and disbursements.

1991, c. 43, s. 4; 1997, c. 18, s. 82.

Postponing trial of issue

672.25 (1) The court shall postpone directing the trial of the issue of fitness of an accused in proceedings for an offence for which the accused may be prosecuted by indictment or that is punishable on summary conviction, until the prosecutor has elected to proceed by way of indictment or summary conviction.

Idem

(2) The court may postpone directing the trial of the issue of fitness of an accused

(a) where the issue arises before the close of the case for the prosecution at a preliminary inquiry, until a time that is not later than the time the accused is called on to answer to the charge; or

(b) where the issue arises before the close of the case for the prosecution at trial, until a time not later than the opening of the case for the defence or, on motion of the accused, any later time that the court may direct.

1991, c. 43, s. 4.

Trial of issue by judge and jury

672.26 Where an accused is tried or is to be tried before a court composed of a judge and jury,

(a) if the judge directs that the issue of fitness of the accused be tried before the accused is given in charge to a jury for trial on the indictment, a jury composed of the number of jurors required in respect of the indictment in the province where the trial is to be held shall be sworn to try that issue and, with the consent of the accused, the issues to be tried on the indictment; and

(b) if the judge directs that the issue of fitness of the accused be tried after the accused has been given in charge to a jury for trial on the indictment, the jury shall be sworn to try that issue in addition to the issues in respect of which it is already sworn.

1991, c. 43, s. 4.

Trial of issue by court

672.27 The court shall try the issue of fitness of an accused and render a verdict where the issue arises

(a) in respect of an accused who is tried or is to be tried before a court other than a court composed of a judge and jury; or

(b) before a court at a preliminary inquiry or at any other stage of the proceedings.

1991, c. 43, s. 4.

Proceeding continues where accused is fit

672.28 Where the verdict on trial of the issue is that an accused is fit to stand trial, the arraignment, preliminary inquiry, trial or other stage of the proceeding shall continue as if the issue of fitness of the accused had never arisen.

1991, c. 43, s. 4.

Where continued detention in custody

672.29 Where an accused is detained in custody on delivery of a verdict that the accused is fit to stand trial, the court may order the accused to be detained in a hospital until the completion of the trial, if the court has reasonable grounds to believe that the accused would become unfit to stand trial if released.

1991, c. 43, s. 4.

Acquittal

672.3 Where the court has postponed directing the trial of the issue of fitness of an accused pursuant to [subsection 672.25\(2\)](#) and the accused is discharged or acquitted before the issue is tried, it shall not be tried.

1991, c. 43, s. 4.

Verdict of unfit to stand trial

672.31 Where the verdict on trial of the issue is that an accused is unfit to stand trial, any plea that has been made shall be set aside and any jury shall be discharged.

1991, c. 43, s. 4.

Subsequent proceedings

672.32 (1) A verdict of unfit to stand trial shall not prevent the accused from being tried subsequently where the accused becomes fit to stand trial.

Burden of proof

(2) The burden of proof that the accused has subsequently become fit to stand trial is on the party who asserts it, and is discharged by proof on the balance of probabilities.

1991, c. 43, s. 4.

***Prima facie* case to be made every two years**

672.33 (1) The court that has jurisdiction in respect of the offence charged against an accused who is found unfit to stand trial shall hold an inquiry, not later than two years after the verdict is rendered and every two years thereafter until the accused is acquitted pursuant to subsection (6) or tried, to decide whether sufficient evidence can be adduced at that time to put the accused on trial.

Extension of time for holding inquiry

(1.1) Despite subsection (1), the court may extend the period for holding an inquiry where it is satisfied on the basis of an application by the prosecutor or the accused that the extension is necessary for the proper administration of justice.

Court may order inquiry to be held

(2) On application of the accused, the court may order an inquiry under this section to be held at any time if it is satisfied, on the basis of the application and any written material submitted by the accused, that there is reason to doubt that there is a *prima facie* case against the accused.

Burden of proof

(3) At an inquiry under this section, the burden of proof that sufficient evidence can be adduced to put the accused on trial is on the prosecutor.

Admissible evidence at an inquiry

(4) In an inquiry under this section, the court shall admit as evidence

(a) any affidavit containing evidence that would be admissible if given by the person making the affidavit as a witness in court; or

(b) any certified copy of the oral testimony given at a previous inquiry or hearing held before a court in respect of the offence with which the accused is charged.

Conduct of inquiry

(5) The court may determine the manner in which an inquiry under this section is conducted and may follow the practices and procedures in respect of a preliminary inquiry under Part XVIII where it concludes that the interests of justice so require.

Where *prima facie* case not made

(6) Where, on the completion of an inquiry under this section, the court is satisfied that sufficient evidence cannot be adduced to put the accused on trial, the court shall acquit the accused.

1991, c. 43, s. 4; 2005, c. 22, ss. 13, 42(F).

Verdict of Not Criminally Responsible on Account of Mental Disorder

Verdict of not criminally responsible on account of mental disorder

672.34 Where the jury, or the judge or provincial court judge where there is no jury, finds that an accused committed the act or made the omission that formed the basis of the offence charged, but was at the time suffering from mental disorder so as to be exempt from criminal responsibility by virtue of [subsection 16\(1\)](#), the jury or the judge shall render a verdict that the accused committed the act or made the omission but is not criminally responsible on account of mental disorder.

1991, c. 43, s. 4.

Effect of verdict of not criminally responsible on account of mental disorder

672.35 Where a verdict of not criminally responsible on account of mental disorder is rendered, the accused shall not be found guilty or convicted of the offence, but

- (a)** the accused may plead *autrefois acquit* in respect of any subsequent charge relating to that offence;
- (b)** any court may take the verdict into account in considering an application for judicial interim release or in considering what dispositions to make or sentence to impose for any other offence; and
- (c)** the Parole Board of Canada or any provincial parole board may take the verdict into account in considering an application by the accused for parole or for a record suspension under the [Criminal Records Act](#) in respect of any other offence.

1991, c. 43, s. 4; 2012, c. 1, ss. 145, 160.

Verdict not a previous conviction

672.36 A verdict of not criminally responsible on account of mental disorder is not a previous conviction for the purposes of any offence under any Act of Parliament for which a greater punishment is provided by reason of previous convictions.

1991, c. 43, s. 4.

Definition of *application for federal employment*

672.37 (1) In this section, ***application for federal employment*** means an application form relating to

- (a) employment in any department, as defined in [section 2](#) of the *Financial Administration Act*;
- (b) employment by any Crown corporation as defined in [subsection 83\(1\)](#) of the *Financial Administration Act*;
- (c) enrolment in the Canadian Forces; or
- (d) employment in connection with the operation of any work, undertaking or business that is within the legislative authority of Parliament.

Application for federal employment

(2) No application for federal employment shall contain any question that requires the applicant to disclose any charge or finding that the applicant committed an offence that resulted in a finding or a verdict of not criminally responsible on account of mental disorder if the applicant was discharged absolutely or is no longer subject to any disposition in respect of that offence.

Punishment

(3) Any person who uses or authorizes the use of an application for federal employment that contravenes subsection (2) is guilty of an offence punishable on summary conviction.

1991, c. 43, s. 4.

Review Boards

Review Boards to be established

672.38 (1) A Review Board shall be established or designated for each province to make or review dispositions concerning any accused in respect of whom a verdict of not criminally responsible by reason of mental disorder or unfit to stand trial is rendered, and shall consist of not fewer than five members appointed by the lieutenant governor in council of the province.

Treated as provincial Board

(2) A Review Board shall be treated as having been established under the laws of the province.

Personal liability

(3) No member of a Review Board is personally liable for any act done in good faith in the exercise of the member's powers or the performance of the member's duties and functions or for any default or neglect in good faith in the exercise of those powers or the performance of those duties and functions.

Members of Review Board

672.39 A Review Board must have at least one member who is entitled under the laws of a province to practise psychiatry and, where only one member is so entitled, at least one other member must have training and experience in the field of mental health, and be entitled under the laws of a province to practise medicine or psychology.

1991, c. 43, s. 4.

Chairperson of a Review Board

672.4 (1) Subject to subsection (2), the chairperson of a Review Board shall be a judge of the Federal Court or of a superior, district or county court of a province, or a person who is qualified for appointment to, or has retired from, such a judicial office.

Transitional

(2) Where the chairperson of a Review Board that was established before the coming into force of subsection (1) is not a judge or other person referred to therein, the chairperson may continue to act until the expiration of his or her term of office if at least one other member of the Review Board is a judge or other person referred to in subsection (1) or is a member of the bar of the province.

1991, c. 43, s. 4.

Quorum of Review Board

672.41 (1) Subject to subsection (2), the quorum of a Review Board is constituted by the chairperson, a member who is entitled under the laws of a province to practise psychiatry, and any other member.

Transitional

(2) Where the chairperson of a Review Board that was established before the coming into force of this section is not a judge or other person referred to in [subsection 672.4\(1\)](#), the quorum of the Review Board is constituted by the chairperson, a member who is entitled under the laws of a province to practise psychiatry, and a member who is a person referred to in that subsection or a member of the bar of the province.

1991, c. 43, s. 4.

Majority vote

672.42 A decision of a majority of the members present and voting is the decision of a Review Board.

1991, c. 43, s. 4.

Powers of Review Boards

672.43 At a hearing held by a Review Board to make a disposition or review a disposition in respect of an accused, the chairperson has all the powers that are conferred by

sections 4 and 5 of the *Inquiries Act* on persons appointed as commissioners under Part I of that Act.

1991, c. 43, s. 4; 2005, c. 22, s. 42(F).

Rules of Review Board

672.44 (1) A Review Board may, subject to the approval of the lieutenant governor in council of the province, make rules providing for the practice and procedure before the Review Board.

Application and publication of rules

(2) The rules made by a Review Board under subsection (1) apply to any proceeding within its jurisdiction, and shall be published in the *Canada Gazette*.

Regulations

(3) Notwithstanding anything in this section, the Governor in Council may make regulations to provide for the practice and procedure before Review Boards, in particular to make the rules of Review Boards uniform, and all regulations made under this subsection prevail over any rules made under subsection (1).

1991, c. 43, s. 4.

Disposition Hearings

Hearing to be held by a court

672.45 (1) Where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered in respect of an accused, the court may of its own motion, and shall on application by the accused or the prosecutor, hold a disposition hearing.

Transmittal of transcript to Review Board

(1.1) If the court does not hold a hearing under subsection (1), it shall send without delay, following the verdict, in original or copied form, any transcript of the court proceedings in respect of the accused, any other document or information related to the proceedings, and all exhibits filed with it, to the Review Board that has jurisdiction in respect of the matter, if the transcript, document, information or exhibits are in its possession.

Disposition to be made

(2) At a disposition hearing, the court shall make a disposition in respect of the accused, if it is satisfied that it can readily do so and that a disposition should be made without delay.

1991, c. 43, s. 4; 2005, c. 22, ss. 14, 42(F).

Status quo pending Review Board hearing

672.46 (1) If the court does not make a disposition in respect of the accused at a disposition hearing, any order for the detention of the accused or any release order, appearance notice, summons or undertaking in respect of the accused that is in force at the time the verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered continues in force, subject to its terms, until the Review Board makes a disposition.

Variation

(2) Despite subsection (1), a court may, pending a disposition by the Review Board in respect of the accused, on cause being shown, vacate the detention order, release order, appearance notice, summons or undertaking referred to in that subsection, and make any other order for the detention of the accused or any other release order that the court considers to be appropriate in the circumstances, including an order directing that the accused be detained in custody in a hospital.

1991, c. 43, s. 4; [2005, c. 22, s. 42\(F\)](#); [2019, c. 25, s. 276](#).

Review Board to make disposition where court does not

672.47 (1) Where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered and the court makes no disposition in respect of an accused, the Review Board shall, as soon as is practicable but not later than forty-five days after the verdict was rendered, hold a hearing and make a disposition.

Extension of time for hearing

(2) Where the court is satisfied that there are exceptional circumstances that warrant it, the court may extend the time for holding a hearing under subsection (1) to a maximum of ninety days after the verdict was rendered.

Disposition made by court

(3) Where a court makes a disposition under [section 672.54](#) other than an absolute discharge in respect of an accused, the Review Board shall, not later than ninety days after the disposition was made, hold a hearing and make a disposition in respect of the accused.

Exception — high-risk accused

(4) Despite subsections (1) to (3), if the court makes a disposition under [subsection 672.64\(3\)](#), the Review Board shall, not later than 45 days after the day on which the disposition is made, hold a hearing and make a disposition under [paragraph 672.54\(c\)](#), subject to the restrictions set out in that subsection.

Extension of time for hearing

(5) If the court is satisfied that there are exceptional circumstances that warrant it, the court may extend the time for holding a hearing under subsection (4) to a maximum of 90 days after the day on which the disposition is made.

Review Board to determine fitness

672.48 (1) Where a Review Board holds a hearing to make or review a disposition in respect of an accused who has been found unfit to stand trial, it shall determine whether in its opinion the accused is fit to stand trial at the time of the hearing.

Review Board shall send accused to court

(2) If a Review Board determines that the accused is fit to stand trial, it shall order that the accused be sent back to court, and the court shall try the issue and render a verdict.

Chairperson may send accused to court

(3) The chairperson of a Review Board may, with the consent of the accused and the person in charge of the hospital where an accused is being detained, order that the accused be sent back to court for trial of the issue of whether the accused is unfit to stand trial, where the chairperson is of the opinion that

(a) the accused is fit to stand trial; and

(b) the Review Board will not hold a hearing to make or review a disposition in respect of the accused within a reasonable period.

1991, c. 43, s. 4; 2005, c. 22, s. 42(F).

Continued detention in hospital

672.49 (1) In a disposition made pursuant to [section 672.47](#) the Review Board or chairperson may require the accused to continue to be detained in a hospital until the court determines whether the accused is fit to stand trial, if the Review Board or chairperson has reasonable grounds to believe that the accused would become unfit to stand trial if released.

Copy of disposition to be sent to court

(2) The Review Board or chairperson shall send a copy of a disposition made pursuant to [section 672.47](#) without delay to the court having jurisdiction over the accused and to the Attorney General of the province where the accused is to be tried.

1991, c. 43, s. 4.

Procedure at disposition hearing

672.5 (1) A hearing held by a court or Review Board to make or review a disposition in respect of an accused, including a hearing referred to in [subsection 672.84\(1\)](#) or [\(3\)](#), shall be held in accordance with this section.

Hearing to be informal

(2) The hearing may be conducted in as informal a manner as is appropriate in the circumstances.

Attorneys General may be parties

(3) On application, the court or Review Board shall designate as a party the Attorney General of the province where the disposition is to be made and, where an accused is transferred from another province, the Attorney General of the province from which the accused is transferred.

Interested person may be a party

(4) The court or Review Board may designate as a party any person who has a substantial interest in protecting the interests of the accused, if the court or Review Board is of the opinion that it is just to do so.

Notice of hearing

(5) Notice of the hearing shall be given to the parties, the Attorney General of the province where the disposition is to be made and, where the accused is transferred to another province, the Attorney General of the province from which the accused is transferred, within the time and in the manner prescribed, or within the time and in the manner fixed by the rules of the court or Review Board.

Notice

(5.1) At the victim's request, notice of the hearing and of the relevant provisions of the Act shall be given to the victim within the time and in the manner fixed by the rules of the court or Review Board.

Notice of discharge and intended place of residence

(5.2) If the accused is discharged absolutely under [paragraph 672.54\(a\)](#) or conditionally under paragraph 672.54(b), a notice of the discharge and accused's intended place of residence shall, at the victim's request, be given to the victim within the time and in the manner fixed by the rules of the court or Review Board.

Order excluding the public

(6) Where the court or Review Board considers it to be in the best interests of the accused and not contrary to the public interest, the court or Review Board may order the public or any members of the public to be excluded from the hearing or any part of the hearing.

Right to counsel

(7) The accused or any other party has the right to be represented by counsel.

Assigning counsel

(8) If an accused is not represented by counsel, the court or Review Board shall, either before or at the time of the hearing, assign counsel to act for any accused

(a) who has been found unfit to stand trial; or

(b) wherever the interests of justice so require.

Counsel fees and disbursements

(8.1) Where counsel is assigned pursuant to subsection (8) and legal aid is not granted to the accused pursuant to a provincial legal aid program, the fees and disbursements of counsel shall be paid by the Attorney General to the extent that the accused is unable to pay them.

Taxation of fees and disbursements

(8.2) Where counsel and the Attorney General cannot agree on the fees or disbursements of counsel, the Attorney General or the counsel may apply to the registrar of the court and the registrar may tax the disputed fees and disbursements.

Right of accused to be present

(9) Subject to subsection (10), the accused has the right to be present during the whole of the hearing.

Removal or absence of accused

(10) The court or the chairperson of the Review Board may

(a) permit the accused to be absent during the whole or any part of the hearing on such conditions as the court or chairperson considers proper; or

(b) cause the accused to be removed and barred from re-entry for the whole or any part of the hearing

(i) where the accused interrupts the hearing so that to continue in the presence of the accused would not be feasible,

(ii) on being satisfied that failure to do so would likely endanger the life or safety of another person or would seriously impair the treatment or recovery of the accused, or

(iii) in order to hear, in the absence of the accused, evidence, oral or written submissions, or the cross-examination of any witness concerning whether grounds exist for removing the accused pursuant to subparagraph (ii).

Rights of parties at hearing

(11) Any party may adduce evidence, make oral or written submissions, call witnesses and cross-examine any witness called by any other party and, on application, cross-examine any person who made an assessment report that was submitted to the court or Review Board in writing.

Request to compel attendance of witnesses

(12) A party may not compel the attendance of witnesses, but may request the court or the chairperson of the Review Board to do so.

Video links

(13) If the accused so agrees, the court or the chairperson of the Review Board may permit the accused to appear by closed-circuit television or videoconference for any part of the hearing.

Adjournment

(13.1) The Review Board may adjourn the hearing for a period not exceeding thirty days if necessary for the purpose of ensuring that relevant information is available to permit it to make or review a disposition or for any other sufficient reason.

Determination of mental condition of the accused

(13.2) On receiving an assessment report, the court or Review Board shall determine whether, since the last time the disposition in respect of the accused was made or reviewed there has been any change in the mental condition of the accused that may provide grounds for the discharge of the accused under [paragraph 672.54\(a\)](#) or (b) and, if there has been such a change, the court or Review Board shall notify every victim of the offence that they are entitled to file a statement in accordance with subsection (14).

Notice to victims — referral of finding to court

(13.3) If the Review Board refers to the court for review under [subsection 672.84\(1\)](#) a finding that an accused is a high-risk accused, it shall notify every victim of the offence that they are entitled to file a statement with the court in accordance with subsection (14).

Victim impact statement

(14) A victim of the offence may prepare and file with the court or Review Board a written statement describing the physical or emotional harm, property damage or economic loss suffered by the victim as the result of the commission of the offence and the impact of the offence on the victim. Form 48.2 in Part XXVIII, or a form approved by the lieutenant governor in council of the province in which the court or Review Board is exercising its jurisdiction, must be used for this purpose.

Copy of statement

(15) The court or Review Board shall ensure that a copy of any statement filed in accordance with subsection (14) is provided to the accused or counsel for the accused, and the prosecutor, as soon as practicable after a verdict of not criminally responsible on account of mental disorder is rendered in respect of the offence.

Presentation of victim statement

(15.1) The court or Review Board shall, at the request of a victim, permit the victim to read a statement prepared and filed in accordance with subsection (14), or to present the statement in any other manner that the court or Review Board considers appropriate,

unless the court or Review Board is of the opinion that the reading or presentation of the statement would interfere with the proper administration of justice.

Inquiry by court or Review Board

(15.2) The court or Review Board shall, as soon as practicable after a verdict of not criminally responsible on account of mental disorder is rendered in respect of an offence and before making a disposition under [section 672.45](#), [672.47](#) or [672.64](#), inquire of the prosecutor or a victim of the offence, or any person representing a victim of the offence, whether the victim has been advised of the opportunity to prepare a statement referred to in subsection (14).

Adjournment

(15.3) On application of the prosecutor or a victim or of its own motion, the court or Review Board may adjourn the hearing held under [section 672.45](#), [672.47](#) or [672.64](#) to permit the victim to prepare a statement referred to in subsection (14) if the court or Review Board is satisfied that the adjournment would not interfere with the proper administration of justice.

(16) [Repealed, [2015, c. 13, s. 22](#)]

1991, c. 43, s. 4; 1997, c. 18, s. 84; 1999, c. 25, s. 11(Preamble); [2005, c. 22, ss. 16, 42\(F\)](#); [2014, c. 6, s. 7](#); [2015, c. 13, s. 22](#); [2019, c. 25, s. 277](#).

Order restricting publication — sexual offences

672.501 (1) Where a Review Board holds a hearing referred to in [section 672.5](#) in respect of an accused who has been declared not criminally responsible on account of mental disorder or unfit to stand trial for an offence referred to in [subsection 486.4\(1\)](#), the Review Board shall make an order directing that any information that could identify a victim, or a witness who is under the age of eighteen years, shall not be published in any document or broadcast or transmitted in any way.

Order restricting publication — child sexual abuse and exploitation material

(2) Where a Review Board holds a hearing referred to in [section 672.5](#) in respect of an accused who has been declared not criminally responsible on account of mental disorder or unfit to stand trial for an offence referred to in [section 163.1](#), a Review Board shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes *child sexual abuse and exploitation material* within the meaning of section 163.1, shall not be published in any document or broadcast or transmitted in any way.

Order restricting publication — other offences

(3) Where a Review Board holds a hearing referred to in [section 672.5](#) in respect of an accused who has been declared not criminally responsible on account of mental disorder or unfit to stand trial for an offence other than the offences referred to in subsection (1) or (2), on application of the prosecutor, a victim or a witness, the Review Board may

make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the Review Board is satisfied that the order is necessary for the proper administration of justice.

Order restricting publication

(4) An order made under any of subsections (1) to (3) does not apply in respect of the disclosure of information in the course of the administration of justice if it is not the purpose of the disclosure to make the information known in the community.

Application and notice

(5) An applicant for an order under subsection (3) shall

- (a)** apply in writing to the Review Board; and
- (b)** provide notice of the application to the prosecutor, the accused and any other person affected by the order that the Review Board specifies.

Grounds

(6) An applicant for an order under subsection (3) shall set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of justice.

Hearing may be held

(7) The Review Board may hold a hearing to determine whether an order under subsection (3) should be made, and the hearing may be in private.

Factors to be considered

(8) In determining whether to make an order under subsection (3), the Review Board shall consider

- (a)** the right to a fair and public hearing;
- (b)** whether there is a real and substantial risk that the victim or witness would suffer significant harm if their identity were disclosed;
- (c)** whether the victim or witness needs the order for their security or to protect them from intimidation or retaliation;
- (d)** society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process;
- (e)** whether effective alternatives are available to protect the identity of the victim or witness;
- (f)** the salutary and deleterious effects of the proposed order;
- (g)** the impact of the proposed order on the freedom of expression of those affected by it; and

(h) any other factor that the Review Board considers relevant.

Conditions

(9) An order made under subsection (3) may be subject to any conditions that the Review Board thinks fit.

Publication of application prohibited

(10) Unless the Review Board refuses to make an order under subsection (3), no person shall publish in any document or broadcast or transmit in any way

(a) the contents of an application;

(b) any evidence taken, information given or submissions made at a hearing under subsection (7); or

(c) any other information that could identify the person to whom the application relates as a victim or witness in the proceedings.

Offence

(11) Every person who fails to comply with an order made under any of subsections (1) to (3) is guilty of an offence punishable on summary conviction.

Application of order

(12) For greater certainty, an order referred to in subsection (11) also prohibits, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim or witness whose identity is protected by the order.

[2005, c. 22, ss. 17, 64; 2024, c. 23, s. 9.](#)

Definition of *disposition information*

672.51 (1) In this section, ***disposition information*** means all or part of an assessment report submitted to the court or Review Board and any other written information before the court or Review Board about the accused that is relevant to making or reviewing a disposition.

Disposition information to be made available to parties

(2) Subject to this section, all disposition information shall be made available for inspection by, and the court or Review Board shall provide a copy of it to, each party and any counsel representing the accused.

Exception where disclosure dangerous to any person

(3) The court or Review Board shall withhold some or all of the disposition information from an accused where it is satisfied, on the basis of that information and the evidence or report of the medical practitioner responsible for the assessment or treatment of the

accused, that disclosure of the information would be likely to endanger the life or safety of another person or would seriously impair the treatment or recovery of the accused.

Idem

(4) Notwithstanding subsection (3), the court or Review Board may release some or all of the disposition information to an accused where the interests of justice make disclosure essential in its opinion.

Exception where disclosure unnecessary or prejudicial

(5) The court or Review Board shall withhold disposition information from a party other than the accused or an Attorney General, where disclosure to that party, in the opinion of the court or Review Board, is not necessary to the proceeding and may be prejudicial to the accused.

Exclusion of certain persons from hearing

(6) A court or Review Board that withholds disposition information from the accused or any other party pursuant to subsection (3) or (5) shall exclude the accused or the other party, as the case may be, from the hearing during

(a) the oral presentation of that disposition information; or

(b) the questioning by the court or Review Board or the cross-examination of any person concerning that disposition information.

Prohibition of disclosure in certain cases

(7) No disposition information shall be made available for inspection or disclosed to any person who is not a party to the proceedings

(a) where the disposition information has been withheld from the accused or any other party pursuant to subsection (3) or (5); or

(b) where the court or Review Board is of the opinion that disclosure of the disposition information would be seriously prejudicial to the accused and that, in the circumstances, protection of the accused takes precedence over the public interest in disclosure.

Idem

(8) No part of the record of the proceedings in respect of which the accused was excluded pursuant to [subparagraph 672.5\(10\)\(b\)\(ii\)](#) or (iii) shall be made available for inspection to the accused or to any person who is not a party to the proceedings.

Information to be made available to specified persons

(9) Notwithstanding subsections (7) and (8), the court or Review Board may make any disposition information, or a copy of it, available on request to any person or member of a class of persons

(a) that has a valid interest in the information for research or statistical purposes, where the court or Review Board is satisfied that disclosure is in the public interest;

(b) that has a valid interest in the information for the purposes of the proper administration of justice; or

(c) that the accused requests or authorizes in writing to inspect it, where the court or Review Board is satisfied that the person will not disclose or give to the accused a copy of any disposition information withheld from the accused pursuant to subsection (3), or of any part of the record of proceedings referred to in subsection (8), or that the reasons for withholding that information from the accused no longer exist.

Disclosure for research or statistical purposes

(10) A person to whom the court or Review Board makes disposition information available under paragraph (9)(a) may disclose it for research or statistical purposes, but not in any form or manner that could reasonably be expected to identify any person to whom it relates.

Prohibition on publication

(11) No person shall publish in any document or broadcast or transmit in any way

(a) any disposition information that is prohibited from being disclosed pursuant to subsection (7); or

(b) any part of the record of the proceedings in respect of which the accused was excluded pursuant to [subparagraph 672.5\(10\)\(b\)\(ii\)](#) or (iii).

Powers of courts not limited

(12) Except as otherwise provided in this section, nothing in this section limits the powers that a court may exercise apart from this section.

1991, c. 43, s. 4; 1997, c. 18, s. 85; [2005, c. 22, ss. 18, 42\(F\)](#), c. 32, s. 22; [2014, c. 6, s. 8](#).

Record of proceedings

672.52 (1) The court or Review Board shall cause a record of the proceedings of its disposition hearings to be kept, and include in the record any assessment report submitted.

Transmittal of transcript to Review Board

(2) If a court holds a disposition hearing under [subsection 672.45\(1\)](#), whether or not it makes a disposition, it shall send without delay to the Review Board that has jurisdiction in respect of the matter, in original or copied form, a transcript of the hearing, any other document or information related to the hearing, and all exhibits filed with it, if the transcript, document, information or exhibits are in its possession.

Reasons for disposition and copies to be provided

(3) The court or Review Board shall state its reasons for making a disposition in the record of the proceedings, and shall provide every party with a copy of the disposition and those reasons.

1991, c. 43, s. 4; [2005, c. 22, ss. 19, 42\(F\)](#).

Proceedings not invalid

672.53 Any procedural irregularity in relation to a disposition hearing does not affect the validity of the hearing unless it causes the accused substantial prejudice.

1991, c. 43, s. 4.

Dispositions by a Court or Review Board

Terms of Dispositions

Dispositions that may be made

672.54 When a court or Review Board makes a disposition under [subsection 672.45\(2\)](#), [section 672.47](#), [subsection 672.64\(3\)](#) or [section 672.83](#) or [672.84](#), it shall, taking into account the safety of the public, which is the paramount consideration, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is necessary and appropriate in the circumstances:

(a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;

(b) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or

(c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

1991, c. 43, s. 4; [2005, c. 22, s. 20](#); [2014, c. 6, s. 9](#).

Significant threat to safety of public

672.5401 For the purposes of [section 672.54](#), a significant threat to the safety of the public means a risk of serious physical or psychological harm to members of the public — including any victim of or witness to the offence, or any person under the age of 18 years — resulting from conduct that is criminal in nature but not necessarily violent.

[2014, c. 6, s. 10](#).

Victim impact statement

672.541 If a verdict of not criminally responsible on account of mental disorder has been rendered in respect of an accused, the court or Review Board shall

(a) at a hearing held under [section 672.45](#), [672.47](#), [672.64](#), [672.81](#) or [672.82](#) or [subsection 672.84\(5\)](#), take into consideration any statement filed by a victim in accordance with [subsection 672.5\(14\)](#) in determining the appropriate disposition or conditions under [section 672.54](#), to the extent that the statement is relevant to its consideration of the criteria set out in [section 672.54](#);

(b) at a hearing held under [section 672.64](#) or [subsection 672.84\(3\)](#), take into consideration any statement filed by a victim in accordance with [subsection 672.5\(14\)](#), to the extent that the statement is relevant to its consideration of the criteria set out in [subsection 672.64\(1\)](#) or [672.84\(3\)](#), as the case may be, in deciding whether to find that the accused is a high-risk accused, or to revoke such a finding; and

(c) at a hearing held under [section 672.81](#) or [672.82](#) in respect of a high-risk accused, take into consideration any statement filed by a victim in accordance with [subsection 672.5\(14\)](#) in determining whether to refer to the court for review the finding that the accused is a high-risk accused, to the extent that the statement is relevant to its consideration of the criteria set out in [subsection 672.84\(1\)](#).

1999, c. 25, s. 12(Preamble); [2005, c. 22, s. 21](#); [2014, c. 6, s. 10](#).

Additional conditions — safety and security

672.542 When a court or Review Board holds a hearing referred to in [section 672.5](#), the court or Review Board shall consider whether it is desirable, in the interests of the safety and security of any person, particularly a victim of or witness to the offence or a justice system participant, to include as a condition of the disposition that the accused

(a) abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the disposition, or refrain from going to any place specified in the disposition; or

(b) comply with any other condition specified in the disposition that the court or Review Board considers necessary to ensure the safety and security of those persons.

[2014, c. 6, s. 10](#).

Treatment not a condition

672.55 (1) No disposition made under [section 672.54](#) shall direct that any psychiatric or other treatment of the accused be carried out or that the accused submit to such treatment except that the disposition may include a condition regarding psychiatric or other treatment where the accused has consented to the condition and the court or Review Board considers the condition to be reasonable and necessary in the interests of the accused.

(2) [\[Repealed, 2005, c. 22, s. 22\]](#)

1991, c. 43, s. 4; 1997, c. 18, s. 86; [2005, c. 22, s. 22](#).

Delegated authority to vary restrictions on liberty of accused

672.56 (1) A Review Board that makes a disposition in respect of an accused under [paragraph 672.54\(b\)](#) or (c) may delegate to the person in charge of the hospital

authority to direct that the restrictions on the liberty of the accused be increased or decreased within any limits and subject to any conditions set out in that disposition, and any direction so made is deemed for the purposes of this Act to be a disposition made by the Review Board.

Exception — high-risk accused

(1.1) If the accused is a high-risk accused, any direction is subject to the restrictions set out in [subsection 672.64\(3\)](#).

Notice to accused and Review Board of increase in restrictions

(2) A person who increases the restrictions on the liberty of the accused significantly pursuant to authority delegated to the person by a Review Board shall

- (a)** make a record of the increased restrictions on the file of the accused; and
- (b)** give notice of the increase as soon as is practicable to the accused and, if the increased restrictions remain in force for a period exceeding seven days, to the Review Board.

1991, c. 43, s. 4; [2014, c. 6, s. 11](#).

Warrant of committal

672.57 Where the court or Review Board makes a disposition under [paragraph 672.54\(c\)](#), it shall issue a warrant of committal of the accused, which may be in Form 49.

1991, c. 43, s. 4.

Treatment disposition

672.58 Where a verdict of unfit to stand trial is rendered and the court has not made a disposition under [section 672.54](#) in respect of an accused, the court may, on application by the prosecutor, by order, direct that treatment of the accused be carried out for a specified period not exceeding sixty days, subject to such conditions as the court considers appropriate and, where the accused is not detained in custody, direct that the accused submit to that treatment by the person or at the hospital specified.

1991, c. 43, s. 4.

Criteria for disposition

672.59 (1) No disposition may be made under [section 672.58](#) unless the court is satisfied, on the basis of the testimony of a medical practitioner, that a specific treatment should be administered to the accused for the purpose of making the accused fit to stand trial.

Evidence required

(2) The testimony required by the court for the purposes of subsection (1) shall include a statement that the medical practitioner has made an assessment of the accused and is of the opinion, based on the grounds specified, that

- (a) the accused, at the time of the assessment, was unfit to stand trial;
- (b) the psychiatric treatment and any other related medical treatment specified by the medical practitioner will likely make the accused fit to stand trial within a period not exceeding sixty days and that without that treatment the accused is likely to remain unfit to stand trial;
- (c) the risk of harm to the accused from the psychiatric and other related medical treatment specified is not disproportionate to the benefit anticipated to be derived from it; and
- (d) the psychiatric and other related medical treatment specified is the least restrictive and least intrusive treatment that could, in the circumstances, be specified for the purpose referred to in subsection (1), considering the opinions referred to in paragraphs (b) and (c).

1991, c. 43, s. 4.

Notice required

672.6 (1) The court shall not make a disposition under [section 672.58](#) unless the prosecutor notifies the accused, in writing and as soon as practicable, of the application.

Challenge by accused

(2) On receiving the notice referred to in subsection (1), the accused may challenge the application and adduce evidence for that purpose.

1991, c. 43, s. 4; 1997, c. 18, s. 87.

Exception

672.61 (1) The court shall not direct, and no disposition made under [section 672.58](#) shall include, the performance of psychosurgery or electro-convulsive therapy or any other prohibited treatment that is prescribed.

Definitions

(2) In this section,

electro-convulsive therapy means a procedure for the treatment of certain mental disorders that induces, by electrical stimulation of the brain, a series of generalized convulsions; (*sismothérapie*)

psychosurgery means any procedure that by direct or indirect access to the brain removes, destroys or interrupts the continuity of histologically normal brain tissue, or inserts indwelling electrodes for pulsed electrical stimulation for the purpose of altering behaviour or treating psychiatric illness, but does not include neurological procedures used to diagnose or treat intractable physical pain, organic brain conditions, or epilepsy, where any of those conditions is clearly demonstrable. (*psychochirurgie*)

1991, c. 43, s. 4.

Consent of hospital required for treatment

672.62 (1) No court shall make a disposition under [section 672.58](#) without the consent of

- (a) the person in charge of the hospital where the accused is to be treated; or
- (b) the person to whom responsibility for the treatment of the accused is assigned by the court.

Consent of accused not required for treatment

(2) The court may direct that treatment of an accused be carried out pursuant to a disposition made under [section 672.58](#) without the consent of the accused or a person who, according to the laws of the province where the disposition is made, is authorized to consent for the accused.

1991, c. 43, s. 4.

Effective date of disposition

672.63 A disposition shall come into force on the day on which it is made or on any later day that the court or Review Board specifies in it, and shall remain in force until the Review Board holds a hearing to review the disposition and makes another disposition.

1991, c. 43, s. 4; [2005, c. 22, s. 23](#).

High-Risk Accused

Finding

672.64 (1) On application made by the prosecutor before any disposition to discharge an accused absolutely, the court may, at the conclusion of a hearing, find the accused to be a high-risk accused if the accused has been found not criminally responsible on account of mental disorder for a serious personal injury offence, as defined in [subsection 672.81\(1.3\)](#), the accused was 18 years of age or more at the time of the commission of the offence and

- (a) the court is satisfied that there is a substantial likelihood that the accused will use violence that could endanger the life or safety of another person; or
- (b) the court is of the opinion that the acts that constitute the offence were of such a brutal nature as to indicate a risk of grave physical or psychological harm to another person.

Factors to consider

(2) In deciding whether to find that the accused is a high-risk accused, the court shall consider all relevant evidence, including

- (a) the nature and circumstances of the offence;
- (b) any pattern of repetitive behaviour of which the offence forms a part;
- (c) the accused's current mental condition;

(d) the past and expected course of the accused's treatment, including the accused's willingness to follow treatment; and

(e) the opinions of experts who have examined the accused.

Detention of high-risk accused

(3) If the court finds the accused to be a high-risk accused, the court shall make a disposition under [paragraph 672.54\(c\)](#), but the accused's detention must not be subject to any condition that would permit the accused to be absent from the hospital unless

(a) it is appropriate, in the opinion of the person in charge of the hospital, for the accused to be absent from the hospital for medical reasons or for any purpose that is necessary for the accused's treatment, if the accused is escorted by a person who is authorized by the person in charge of the hospital; and

(b) a structured plan has been prepared to address any risk related to the accused's absence and, as a result, that absence will not present an undue risk to the public.

Appeal

(4) A decision not to find an accused to be a high-risk accused is deemed to be a disposition for the purpose of [sections 672.72 to 672.78](#).

For greater certainty

(5) For greater certainty, a finding that an accused is a high-risk accused is a disposition and [sections 672.72 to 672.78](#) apply to it.

1991, c. 43, s. 4; [2005, c. 22, s. 24](#); [2014, c. 6, s. 12](#).

672.65 and 672.66 [No sections 672.65 and 672.66]

Dual Status Offenders

Where court imposes a sentence

672.67 (1) Where a court imposes a sentence of imprisonment on an offender who is, or thereby becomes, a dual status offender, that sentence takes precedence over any prior custodial disposition, pending any placement decision by the Review Board.

Custodial disposition by court

(2) Where a court imposes a custodial disposition on an accused who is, or thereby becomes, a dual status offender, the disposition takes precedence over any prior sentence of imprisonment pending any placement decision by the Review Board.

1991, c. 43, s. 4; 1995, c. 22, s. 10; [2005, c. 22, s. 25](#).

Definition of *Minister*

672.68 (1) In this section and in [sections 672.69 and 672.7](#), **Minister** means the Minister of Public Safety and Emergency Preparedness or the Minister responsible for correctional services of the province to which a dual status offender may be sent pursuant to a sentence of imprisonment.

Placement decision by Review Board

(2) On application by the Minister or of its own motion, where the Review Board is of the opinion that the place of custody of a dual status offender pursuant to a sentence or custodial disposition made by the court is inappropriate to meet the mental health needs of the offender or to safeguard the well-being of other persons, the Review Board shall, after giving the offender and the Minister reasonable notice, decide whether to place the offender in custody in a hospital or in a prison.

Idem

(3) In making a placement decision, the Review Board shall take into consideration

- (a)** the need to protect the public from dangerous persons;
- (b)** the treatment needs of the offender and the availability of suitable treatment resources to address those needs;
- (c)** whether the offender would consent to or is a suitable candidate for treatment;
- (d)** any submissions made to the Review Board by the offender or any other party to the proceedings and any assessment report submitted in writing to the Review Board; and
- (e)** any other factors that the Review Board considers relevant.

Time for making placement decision

(4) The Review Board shall make its placement decision as soon as practicable but not later than thirty days after receiving an application from, or giving notice to, the Minister under subsection (2), unless the Review Board and the Minister agree to a longer period not exceeding sixty days.

Effects of placement decision

(5) Where the offender is detained in a prison pursuant to the placement decision of the Review Board, the Minister is responsible for the supervision and control of the offender.

1991, c. 43, s. 4; [2005, c. 10, s. 34](#).

Minister and Review Board entitled to access

672.69 (1) The Minister and the Review Board are entitled to have access to any dual status offender in respect of whom a placement decision has been made, for the purpose of conducting a review of the sentence or disposition imposed.

Review of placement decisions

(2) The Review Board shall hold a hearing as soon as is practicable to review a placement decision, on application by the Minister or the dual status offender who is the subject of the decision, where the Review Board is satisfied that a significant change in circumstances requires it.

Idem

(3) The Review Board may of its own motion hold a hearing to review a placement decision after giving the Minister and the dual status offender who is subject to it reasonable notice.

Minister shall be a party

(4) The Minister shall be a party in any proceedings relating to the placement of a dual status offender.

1991, c. 43, s. 4; [2005, c. 22, s. 42\(F\)](#).

Notice of discharge

672.7 (1) Where the Minister or the Review Board intends to discharge a dual status offender from custody, each shall give written notice to the other indicating the time, place and conditions of the discharge.

Warrant of committal

(2) A Review Board that makes a placement decision shall issue a warrant of committal of the accused, which may be in Form 50.

1991, c. 43, s. 4.

Detention to count as service of term

672.71 (1) Each day of detention of a dual status offender pursuant to a placement decision or a custodial disposition shall be treated as a day of service of the term of imprisonment, and the accused shall be deemed, for all purposes, to be lawfully confined in a prison.

Disposition takes precedence over probation orders

(2) When a dual status offender is convicted or discharged on the conditions set out in a probation order made under [section 730](#) in respect of an offence but is not sentenced to a term of imprisonment, the custodial disposition in respect of the accused comes into force and, notwithstanding [subsection 732.2\(1\)](#), takes precedence over any probation order made in respect of the offence.

1991, c. 43, s. 4; 1995, c. 22, s. 10.

Appeals

Grounds for appeal

672.72 (1) Any party may appeal against a disposition made by a court or a Review Board, or a placement decision made by a Review Board, to the court of appeal of the province where the disposition or placement decision was made on any ground of appeal that raises a question of law or fact alone or of mixed law and fact.

Limitation period for appeal

(2) An appellant shall give notice of an appeal against a disposition or placement decision in the manner directed by the applicable rules of court within fifteen days after the day on which the appellant receives a copy of the placement decision or disposition and the reasons for it or within any further time that the court of appeal, or a judge of that court, may direct.

Appeal to be heard expeditiously

(3) The court of appeal shall hear an appeal against a disposition or placement decision in or out of the regular sessions of the court, as soon as practicable after the day on which the notice of appeal is given, within any period that may be fixed by the court of appeal, a judge of the court of appeal, or the rules of that court.

1991, c. 43, s. 4; 1997, c. 18, s. 88.

Appeal on the transcript

672.73 (1) An appeal against a disposition by a court or Review Board or placement decision by a Review Board shall be based on a transcript of the proceedings and any other evidence that the court of appeal finds necessary to admit in the interests of justice.

Additional evidence

(2) For the purpose of admitting additional evidence under this section, [subsections 683\(1\)](#) and [\(2\)](#) apply, with such modifications as the circumstances require.

1991, c. 43, s. 4.

Notice of appeal to be given to court or Review Board

672.74 (1) The clerk of the court of appeal, on receiving notice of an appeal against a disposition or placement decision, shall notify the court or Review Board that made the disposition.

Transmission of records to court of appeal

(2) On receipt of notification under subsection (1), the court or Review Board shall transmit to the court of appeal, before the time that the appeal is to be heard or within any time that the court of appeal or a judge of that court may direct,

- (a)** a copy of the disposition or placement decision;
- (b)** all exhibits filed with the court or Review Board or a copy of them; and
- (c)** all other material in its possession respecting the hearing.

Record to be kept by court of appeal

(3) The clerk of the court of appeal shall keep the material referred to in subsection (2) with the records of the court of appeal.

Appellant to provide transcript of evidence

(4) Unless it is contrary to an order of the court of appeal or any applicable rules of court, the appellant shall provide the court of appeal and the respondent with a transcript of any evidence taken before a court or Review Board by a stenographer or a sound recording apparatus, certified by the stenographer or in accordance with [subsection 540\(6\)](#), as the case may be.

Saving

(5) An appeal shall not be dismissed by the court of appeal by reason only that a person other than the appellant failed to comply with this section.

1991, c. 43, s. 4; [2005, c. 22, s. 42\(F\)](#).

Automatic suspension of certain dispositions

672.75 The filing of a notice of appeal against a disposition made under [section 672.58](#) suspends the application of the disposition pending the determination of the appeal.

1991, c. 43, s. 4; [2014, c. 6, s. 13](#).

Application respecting dispositions under appeal

672.76 (1) Any party who gives notice to each of the other parties, within the time and in the manner prescribed, may apply to a judge of the court of appeal for an order under this section respecting a disposition or placement decision that is under appeal.

Discretionary powers respecting suspension of dispositions

(2) On receipt of an application made pursuant to subsection (1) a judge of the court of appeal may, if satisfied that the mental condition of the accused justifies it,

(a) by order, direct that a disposition made under [section 672.58](#) be carried out pending the determination of the appeal, despite [section 672.75](#);

(a.1) by order, direct that a disposition made under [paragraph 672.54\(a\)](#) be suspended pending the determination of the appeal;

(b) by order, direct that the application of a placement decision or a disposition made under [paragraph 672.54\(b\)](#) or (c) be suspended pending the determination of the appeal;

(c) where the application of a disposition is suspended pursuant to [section 672.75](#) or paragraph (b), make any other disposition in respect of the accused that is appropriate in the circumstances, other than a disposition under [paragraph 672.54\(a\)](#) or [section 672.58](#), pending the determination of the appeal;

(d) where the application of a placement decision is suspended pursuant to an order made under paragraph (b), make any other placement decision that is appropriate in the circumstances, pending the determination of the appeal; and

(e) give any directions that the judge considers necessary for expediting the appeal.

Copy of order to parties

(3) A judge of the court of appeal who makes an order under this section shall send a copy of the order to each of the parties without delay.

1991, c. 43, s. 4; 2014, c. 6, s. 14.

Effect of suspension of disposition

672.77 Where the application of a disposition or placement decision appealed from is suspended, a disposition, or in the absence of a disposition any order for the interim release or detention of the accused, that was in effect immediately before the disposition or placement decision appealed from took effect, shall be in force pending the determination of the appeal, subject to any disposition made under [paragraph 672.76\(2\)](#) (c).

1991, c. 43, s. 4.

Powers of court of appeal

672.78 (1) The court of appeal may allow an appeal against a disposition or placement decision and set aside an order made by the court or Review Board, where the court of appeal is of the opinion that

- (a)** it is unreasonable or cannot be supported by the evidence;
- (b)** it is based on a wrong decision on a question of law; or
- (c)** there was a miscarriage of justice.

Idem

(2) The court of appeal may dismiss an appeal against a disposition or placement decision where the court is of the opinion

- (a)** that paragraphs (1)(a), (b) and (c) do not apply; or
- (b)** that paragraph (1)(b) may apply, but the court finds that no substantial wrong or miscarriage of justice has occurred.

Orders that the court may make

(3) Where the court of appeal allows an appeal against a disposition or placement decision, it may

- (a)** make any disposition under [section 672.54](#) or any placement decision that the Review Board could have made;
- (b)** refer the matter back to the court or Review Board for re-hearing, in whole or in part, in accordance with any directions that the court of appeal considers appropriate; or
- (c)** make any other order that justice requires.

1991, c. 43, s. 4; 1997, c. 18, s. 89.

672.79 [Repealed, 2005, c. 22, s. 26]

Review of Dispositions

Mandatory review of dispositions

672.81 (1) A Review Board shall hold a hearing not later than twelve months after making a disposition and every twelve months thereafter for as long as the disposition remains in force, to review any disposition that it has made in respect of an accused, other than an absolute discharge under [paragraph 672.54\(a\)](#).

Extension on consent

(1.1) Despite subsection (1), the Review Board may extend the time for holding a hearing to a maximum of twenty-four months after the making or reviewing of a disposition if the accused is represented by counsel and the accused and the Attorney General consent to the extension.

Extension for serious personal violence offence

(1.2) Despite subsection (1), at the conclusion of a hearing under this section the Review Board may, after making a disposition, extend the time for holding a subsequent hearing under this section to a maximum of twenty-four months if

- (a)** the accused has been found not criminally responsible for a serious personal injury offence;
- (b)** the accused is subject to a disposition made under [paragraph 672.54\(c\)](#); and
- (c)** the Review Board is satisfied on the basis of any relevant information, including disposition information within the meaning of subsection 672.51(1) and an assessment report made under an assessment ordered under [paragraph 672.121\(a\)](#), that the condition of the accused is not likely to improve and that detention remains necessary for the period of the extension.

Definition of *serious personal injury offence*

(1.3) For the purposes of subsection (1.2), *serious personal injury offence* means

- (a)** an indictable offence involving
 - (i)** the use or attempted use of violence against another person, or
 - (ii)** conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person; or
- (b)** an indictable offence referred to in [section 151](#), [152](#), [153](#), [153.1](#), [155](#), [160](#), [170](#), [171](#), [172](#), [271](#), [272](#) or [273](#) or an attempt to commit such an offence.

Extension on consent — high-risk accused

(1.31) Despite subsections (1) to (1.2), the Review Board may extend the time for holding a hearing in respect of a high-risk accused to a maximum of 36 months after

making or reviewing a disposition if the accused is represented by counsel and the accused and the Attorney General consent to the extension.

Extension — no likely improvement

(1.32) Despite subsections (1) to (1.2), at the conclusion of a hearing under [subsection 672.47\(4\)](#) or this section in respect of a high-risk accused, the Review Board may, after making a disposition, extend the time for holding a subsequent hearing under this section to a maximum of 36 months if the Review Board is satisfied on the basis of any relevant information, including disposition information as defined in subsection 672.51(1) and an assessment report made under an assessment ordered under [paragraph 672.121\(c\)](#), that the accused's condition is not likely to improve and that detention remains necessary for the period of the extension.

Notice

(1.4) If the Review Board extends the time for holding a hearing under subsection (1.2) or (1.32), it shall provide notice of the extension to the accused, the prosecutor and the person in charge of the hospital where the accused is detained.

Appeal

(1.5) A decision by the Review Board to extend the time for holding a hearing under subsection (1.2) or (1.32) is deemed to be a disposition for the purpose of [sections 672.72 to 672.78](#).

Additional mandatory reviews in custody cases

(2) The Review Board shall hold a hearing to review any disposition made under [paragraph 672.54\(b\)](#) or (c) as soon as practicable after receiving notice that the person in charge of the place where the accused is detained or directed to attend requests the review.

Review in case of increase on restrictions on liberty

(2.1) The Review Board shall hold a hearing to review a decision to significantly increase the restrictions on the liberty of the accused, as soon as practicable after receiving the notice referred to in [subsection 672.56\(2\)](#).

Idem

(3) Where an accused is detained in custody pursuant to a disposition made under [paragraph 672.54\(c\)](#) and a sentence of imprisonment is subsequently imposed on the accused in respect of another offence, the Review Board shall hold a hearing to review the disposition as soon as is practicable after receiving notice of that sentence.

1991, c. 43, s. 4; 2005, c. 22, ss. 27, 42(F); 2014, c. 6, s. 15.

Discretionary review

672.82 (1) A Review Board may hold a hearing to review any of its dispositions at any time, of its own motion or at the request of the accused or any other party.

Review Board to provide notice

(1.1) Where a Review Board holds a hearing under subsection (1) of its own motion, it shall provide notice to the prosecutor, the accused and any other party.

Review cancels appeal

(2) Where a party requests a review of a disposition under this section, the party is deemed to abandon any appeal against the disposition taken under [section 672.72](#).

1991, c. 43, s. 4; [2005, c. 22, s. 28](#).

Disposition by Review Board

672.83 (1) At a hearing held pursuant to [section 672.81](#) or [672.82](#), the Review Board shall, except where a determination is made under [subsection 672.48\(1\)](#) that the accused is fit to stand trial, review the disposition made in respect of the accused and make any other disposition that the Review Board considers to be appropriate in the circumstances.

(2) [\[Repealed, 2005, c. 22, s. 29\]](#)

1991, c. 43, s. 4; 1997, c. 18, s. 90; [2005, c. 22, ss. 29, 42\(F\)](#).

Review of finding — high-risk accused

672.84 (1) If a Review Board holds a hearing under [section 672.81](#) or [672.82](#) in respect of a high-risk accused, it shall, on the basis of any relevant information, including disposition information as defined in subsection 672.51(1) and an assessment report made under an assessment ordered under [paragraph 672.121\(c\)](#), if it is satisfied that there is not a substantial likelihood that the accused — whether found to be a high-risk accused under [paragraph 672.64\(1\)\(a\)](#) or (b) — will use violence that could endanger the life or safety of another person, refer the finding for review to the superior court of criminal jurisdiction.

Review of conditions

(2) If the Review Board is not so satisfied, it shall review the conditions of detention imposed under [paragraph 672.54\(c\)](#), subject to the restrictions set out in [subsection 672.64\(3\)](#).

Review of finding by court

(3) If the Review Board refers the finding to the superior court of criminal jurisdiction for review, the court shall, at the conclusion of a hearing, revoke the finding if the court is satisfied that there is not a substantial likelihood that the accused will use violence that could endanger the life or safety of another person, in which case the court or the Review Board shall make a disposition under any of [paragraphs 672.54\(a\) to \(c\)](#).

Hearing and disposition

(4) Any disposition referred to in subsection (3) is subject to [sections 672.45 to 672.47](#) as if the revocation is a verdict.

Review of conditions

(5) If the court does not revoke the finding, it shall immediately send to the Review Board, in original or copied form, a transcript of the hearing, any other document or information related to the hearing, and all exhibits filed with it, if the transcript, document, information or exhibits are in its possession. The Review Board shall, as soon as practicable but not later than 45 days after the day on which the court decides not to revoke the finding, hold a hearing and review the conditions of detention imposed under [paragraph 672.54\(c\)](#), subject to the restrictions set out in [subsection 672.64\(3\)](#).

Appeal

(6) A decision under subsection (1) about referring the finding to the court for review and a decision under subsection (3) about revoking the finding are deemed to be dispositions for the purpose of [sections 672.72 to 672.78](#).

1991, c. 43, s. 4; [2005, c. 22, s. 30](#); [2014, c. 6, s. 16](#).

Power to Compel Appearance

Bringing accused before Review Board

672.85 For the purpose of bringing the accused in respect of whom a hearing is to be held before the Review Board, including in circumstances in which the accused did not attend a previous hearing in contravention of a summons or warrant, the chairperson

(a) shall order the person having custody of the accused to bring the accused to the hearing at the time and place fixed for it; or

(b) may, if the accused is not in custody, issue a summons or warrant to compel the accused to appear at the hearing at the time and place fixed for it.

1991, c. 43, s. 4; [2005, c. 22, ss. 32, 42\(F\)](#).

Stay of Proceedings

Recommendation by Review Board

672.851 (1) The Review Board may, of its own motion, make a recommendation to the court that has jurisdiction in respect of the offence charged against an accused found unfit to stand trial to hold an inquiry to determine whether a stay of proceedings should be ordered if

(a) the Review Board has held a hearing under [section 672.81](#) or [672.82](#) in respect of the accused; and

(b) on the basis of any relevant information, including disposition information within the meaning of subsection 672.51(1) and an assessment report made under an assessment ordered under [paragraph 672.121\(a\)](#), the Review Board is of the opinion that

(i) the accused remains unfit to stand trial and is not likely to ever become fit to stand trial, and

(ii) the accused does not pose a significant threat to the safety of the public.

Notice

(2) If the Review Board makes a recommendation to the court to hold an inquiry, the Review Board shall provide notice to the accused, the prosecutor and any party who, in the opinion of the Review Board, has a substantial interest in protecting the interests of the accused.

Inquiry

(3) As soon as practicable after receiving the recommendation referred to in subsection (1), the court may hold an inquiry to determine whether a stay of proceedings should be ordered.

Court may act on own motion

(4) A court may, of its own motion, conduct an inquiry to determine whether a stay of proceedings should be ordered if the court is of the opinion, on the basis of any relevant information, that

(a) the accused remains unfit to stand trial and is not likely to ever become fit to stand trial; and

(b) the accused does not pose a significant threat to the safety of the public.

Assessment order

(5) If the court holds an inquiry under subsection (3) or (4), it shall order an assessment of the accused.

Application

(6) [Section 672.51](#) applies to an inquiry of the court under this section.

Stay

(7) The court may, on completion of an inquiry under this section, order a stay of proceedings if it is satisfied

(a) on the basis of clear information, that the accused remains unfit to stand trial and is not likely to ever become fit to stand trial;

(b) that the accused does not pose a significant threat to the safety of the public; and

(c) that a stay is in the interests of the proper administration of justice.

Proper administration of justice

(8) In order to determine whether a stay of proceedings is in the interests of the proper administration of justice, the court shall consider any submissions of the prosecutor, the accused and all other parties and the following factors:

- (a) the nature and seriousness of the alleged offence;
- (b) the salutary and deleterious effects of the order for a stay of proceedings, including any effect on public confidence in the administration of justice;
- (c) the time that has elapsed since the commission of the alleged offence and whether an inquiry has been held under [section 672.33](#) to decide whether sufficient evidence can be adduced to put the accused on trial; and
- (d) any other factor that the court considers relevant.

Effect of stay

(9) If a stay of proceedings is ordered by the court, any disposition made in respect of the accused ceases to have effect. If a stay of proceedings is not ordered, the finding of unfit to stand trial and any disposition made in respect of the accused remain in force, until the Review Board holds a disposition hearing and makes a disposition in respect of the accused under [section 672.83](#).

[2005, c. 22, s. 33](#).

Appeal

672.852 (1) The Court of Appeal may allow an appeal against an order made under [subsection 672.851\(7\)](#) for a stay of proceedings, if the Court of Appeal is of the opinion that the order is unreasonable or cannot be supported by the evidence.

Effect

(2) If the Court of Appeal allows the appeal, it may set aside the order for a stay of proceedings and restore the finding that the accused is unfit to stand trial and the disposition made in respect of the accused.

[2005, c. 22, s. 33](#).

Interprovincial Transfers

Interprovincial transfers

672.86 (1) An accused who is detained in custody or directed to attend at a hospital pursuant to a disposition made by a court or Review Board under [paragraph 672.54\(c\)](#) or a court under [section 672.58](#) may be transferred to any other place in Canada where

- (a) the Review Board of the province where the accused is detained or directed to attend recommends a transfer for the purpose of the reintegration of the accused into

society or the recovery, treatment or custody of the accused; and

(b) the Attorney General of the province to which the accused is being transferred, or an officer authorized by that Attorney General, and the Attorney General of the province from which the accused is being transferred, or an officer authorized by that Attorney General, give their consent.

Transfer where accused in custody

(2) Where an accused who is detained in custody is to be transferred, an officer authorized by the Attorney General of the province where the accused is being detained shall sign a warrant specifying the place in Canada to which the accused is to be transferred.

Transfer if accused not in custody

(2.1) An accused who is not detained in custody may be transferred to any other place in Canada where

(a) the Review Board of the province from which the accused is being transferred recommends a transfer for the purpose of the reintegration of the accused into society or the recovery or treatment of the accused; and

(b) the Attorney General of the province to which the accused is being transferred, or an officer authorized by that Attorney General, and the Attorney General of the province from which the accused is being transferred, or an officer authorized by that Attorney General, give their consent.

Order

(3) Where an accused is being transferred in accordance with subsection (2.1), the Review Board of the province from which the accused is being transferred shall, by order,

(a) direct that the accused be taken into custody and transferred pursuant to a warrant under subsection (2); or

(b) direct that the accused attend at a specified place in Canada, subject to any conditions that the Review Board of the province to or from which the accused is being transferred considers appropriate.

1991, c. 43, s. 4; [2005, c. 22, s. 34](#).

Delivery and detention of accused

672.87 A warrant described in [subsection 672.86\(2\)](#) is sufficient authority

(a) for any person who is responsible for the custody of an accused to have the accused taken into custody and conveyed to the person in charge of the place specified in the warrant; and

(b) for the person specified in the warrant to detain the accused in accordance with any disposition made in respect of the accused under [paragraph 672.54\(c\)](#).

1991, c. 43, s. 4.

Review Board of receiving province

672.88 (1) The Review Board of the province to which an accused is transferred under [section 672.86](#) has exclusive jurisdiction over the accused, and may exercise the powers and shall perform the duties mentioned in [sections 672.5](#) and [672.81](#) to [672.84](#) as if that Review Board had made the disposition in respect of the accused.

Agreement

(2) Notwithstanding subsection (1), the Attorney General of the province to which an accused is transferred may enter into an agreement subject to this Act with the Attorney General of the province from which the accused is transferred, enabling the Review Board of that province to exercise the powers and perform the duties referred to in subsection (1) in respect of the accused, in the circumstances and subject to the terms and conditions set out in the agreement.

1991, c. 43, s. 4; [2014, c. 6, s. 17](#).

Other interprovincial transfers

672.89 (1) If an accused who is detained in custody under a disposition made by a Review Board is transferred to another province otherwise than under [section 672.86](#), the Review Board of the province from which the accused is transferred has exclusive jurisdiction over the accused and may continue to exercise the powers and shall continue to perform the duties mentioned in [sections 672.5](#) and [672.81](#) to [672.84](#).

Agreement

(2) Notwithstanding subsection (1), the Attorneys General of the provinces to and from which the accused is to be transferred as described in that subsection may, after the transfer is made, enter into an agreement subject to this Act, enabling the Review Board of the province to which an accused is transferred to exercise the powers and perform the duties referred to in subsection (1) in respect of the accused, subject to the terms and conditions and in the circumstances set out in the agreement.

1991, c. 43, s. 4; [2014, c. 6, s. 18](#).

Enforcement of Orders and Regulations

Execution of warrant anywhere in Canada

672.9 Any warrant or process issued in relation to an assessment order or disposition made in respect of an accused may be executed or served in any place in Canada outside the province where the order or disposition was made as if it had been issued in that province.

1991, c. 43, s. 4; 1997, c. 18, s. 91; [2005, c. 22, s. 35\(F\)](#).

Arrest without warrant for contravention of disposition

672.91 A peace officer may arrest an accused without a warrant at any place in Canada if the peace officer has reasonable grounds to believe that the accused has contravened

or wilfully failed to comply with the assessment order or disposition or any condition of it, or is about to do so.

1991, c. 43, s. 4; 2005, c. 22, s. 36.

Release or delivery of accused subject to [paragraph 672.54\(b\)](#) disposition order

672.92 (1) If a peace officer arrests an accused under [section 672.91](#) who is subject to a disposition made under paragraph 672.54(b) or an assessment order, the peace officer, as soon as practicable, may release the accused from custody and

- (a) issue a summons or appearance notice compelling the accused's appearance before a justice; and
- (b) deliver the accused to the place specified in the disposition or assessment order.

No release

(2) A peace officer shall not release an accused under subsection (1) if the peace officer believes, on reasonable grounds,

- (a) that it is necessary in the public interest that the accused be detained in custody having regard to all the circumstances, including the need to
 - (i) establish the identity of the accused,
 - (ii) establish the terms and conditions of a disposition made under section 672.54 or of an assessment order,
 - (iii) prevent the commission of an offence, or
 - (iv) prevent the accused from contravening or failing to comply with the disposition or assessment order;
- (b) that the accused is subject to a disposition or an assessment order of a court, or Review Board, of another province; or
- (c) that, if the accused is released from custody, the accused will fail to attend, as required, before a justice.

Accused to be brought before justice

(3) If a peace officer does not release the accused, the accused shall be taken before a justice having jurisdiction in the territorial division in which the accused is arrested, without unreasonable delay and in any event within twenty-four hours after the arrest.

Accused subject to [paragraph 672.54\(c\)](#) disposition order

(4) If a peace officer arrests an accused under [section 672.91](#) who is subject to a disposition under [paragraph 672.54\(c\)](#), the accused shall be taken before a justice having jurisdiction in the territorial division in which the accused is arrested without unreasonable delay and, in any event, within twenty-four hours.

Justice not available

(5) If a justice described in subsection (3) or (4) is not available within twenty-four hours after the arrest, the accused shall be taken before a justice as soon as practicable.

1991, c. 43, s. 4; 2005, c. 22, s. 36.

Where justice to release accused

672.93 (1) A justice shall release an accused who is brought before the justice under [section 672.92](#) unless the justice is satisfied that there are reasonable grounds to believe that the accused has contravened or failed to comply with a disposition or an assessment order.

Notice

(1.1) If the justice releases the accused, notice shall be given to the court or Review Board, as the case may be, that made the disposition or assessment order.

Order of justice pending decision of Review Board

(2) If the justice is satisfied that there are reasonable grounds to believe that the accused has contravened or failed to comply with a disposition or an assessment order, the justice, pending a hearing of a Review Board with respect to the disposition or a hearing of a court or Review Board with respect to the assessment order, may make an order that is appropriate in the circumstances in relation to the accused, including an order that the accused be returned to a place that is specified in the disposition or assessment order. If the justice makes an order under this subsection, notice shall be given to the court or Review Board, as the case may be, that made the disposition or assessment order.

1991, c. 43, s. 4; 2005, c. 22, s. 36.

Powers of Review Board

672.94 Where a Review Board receives a notice given under [subsection 672.93\(1.1\)](#) or [\(2\)](#), it may exercise the powers and shall perform the duties mentioned in [sections 672.5](#) and [672.81](#) to [672.83](#) as if the Review Board were reviewing a disposition.

1991, c. 43, s. 4; 2005, c. 22, s. 36.

Regulations

672.95 The Governor in Council may make regulations

- (a)** prescribing anything that may be prescribed under this Part; and
- (b)** generally to carry out the purposes and provisions of this Part.

1991, c. 43, s. 4.

PART XXI

Appeals — Indictable Offences

Interpretation

Definitions

673 In this Part,

court of appeal means the court of appeal, as defined by the definition *court of appeal* in [section 2](#), for the province or territory in which the trial of a person by indictment is held; (*cour d'appel*)

indictment includes an information or charge in respect of which a person has been tried for an indictable offence under Part XIX; (*acte d'accusation*)

registrar means the registrar or clerk of the court of appeal; (*registraire*)

sentence includes

- (a) a declaration made under [subsection 199\(3\)](#),
- (b) an order made under [subsection 109\(1\)](#) or [110\(1\)](#), [section 161](#), [subsection 164.2\(1\)](#) or [194\(1\)](#), [section 320.24](#) or [462.37](#), [subsection 491.1\(2\)](#), [730\(1\)](#) or [737\(2.1\)](#) or (3) or [section 738](#), [739](#), [742.1](#), [742.3](#), [743.6](#), [745.4](#) or [745.5](#),
- (c) a disposition made under [section 731](#) or [732](#) or [subsection 732.2\(3\)](#) or (5), [742.4\(3\)](#) or [742.6\(9\)](#),
- (d) an order made under [subsection 16\(1\)](#) of the *Controlled Drugs and Substances Act*, and
- (e) an order made under [subsection 94\(1\)](#) of the *Cannabis Act*; (*sentence, peine ou condamnation*)

trial court means the court by which an accused was tried and includes a judge or a provincial court judge acting under Part XIX. (*tribunal de première instance*)

R.S., 1985, c. C-46, s. 673; R.S., 1985, c. 27 (1st Supp.), ss. 138, 203, c. 23 (4th Supp.), s. 4, c. 42 (4th Supp.), s. 4; 1992, c. 1, s. 58; 1993, c. 45, s. 10; 1995, c. 22, s. 5, c. 39, ss. 155, 190; 1996, c. 19, s. 74; 1999, c. 5, ss. 25, 51, c. 25, ss. 13, 31(Preamble); [2002, c. 13, s. 63](#); [2005, c. 22, ss. 38, 45](#); [2006, c. 14, s. 6](#); [2013, c. 11, s. 2](#); [2018, c. 16, s. 220](#), c. 21, s. 21; [2019, c. 25, s. 278](#); [2022, c. 17, s. 41](#).

Right of Appeal

Procedure abolished

674 No proceedings other than those authorized by this Part and Part XXVI shall be taken by way of appeal in proceedings in respect of indictable offences.

R.S., c. C-34, s. 602.

Right of appeal of person convicted

675 (1) A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal

(a) against his conviction

(i) on any ground of appeal that involves a question of law alone,

(ii) on any ground of appeal that involves a question of fact or a question of mixed law and fact, with leave of the court of appeal or a judge thereof or on the certificate of the trial judge that the case is a proper case for appeal, or

(iii) on any ground of appeal not mentioned in subparagraph (i) or (ii) that appears to the court of appeal to be a sufficient ground of appeal, with leave of the court of appeal; or

(b) against the sentence passed by the trial court, with leave of the court of appeal or a judge thereof unless that sentence is one fixed by law.

Summary conviction appeals

(1.1) A person may appeal, pursuant to subsection (1), with leave of the court of appeal or a judge of that court, to that court in respect of a summary conviction or a sentence passed with respect to a summary conviction as if the summary conviction had been a conviction in proceedings by indictment if

(a) there has not been an appeal with respect to the summary conviction;

(b) the summary conviction offence was tried with an indictable offence; and

(c) there is an appeal in respect of the indictable offence.

Appeal against absolute term in excess of 10 years

(2) A person who has been convicted of second degree murder and sentenced to imprisonment for life without eligibility for parole for a specified number of years in excess of ten may appeal to the court of appeal against the number of years in excess of ten of his imprisonment without eligibility for parole.

Appeal against [section 743.6](#) order

(2.1) A person against whom an order under [section 743.6](#) has been made may appeal to the court of appeal against the order.

Persons under eighteen

(2.2) A person who was under the age of eighteen at the time of the commission of the offence for which the person was convicted of first degree murder or second degree murder and sentenced to imprisonment for life without eligibility for parole until the person has served the period specified by the judge presiding at the trial may appeal to the court of appeal against the number of years in excess of the minimum number of years of imprisonment without eligibility for parole that are required to be served in respect of that person's case.

Appeal against s. 745.51(1) order

(2.3) A person against whom an order under [subsection 745.51\(1\)](#) has been made may appeal to the court of appeal against the order.

Appeals against verdicts based on mental disorder

(3) Where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered in respect of a person, that person may appeal to the court of appeal against that verdict on any ground of appeal mentioned in subparagraph (1)(a)(i), (ii) or (iii) and subject to the conditions described therein.

Where application for leave to appeal refused by judge

(4) Where a judge of the court of appeal refuses leave to appeal under this section otherwise than under paragraph (1)(b), the appellant may, by filing notice in writing with the court of appeal within seven days after the refusal, have the application for leave to appeal determined by the court of appeal.

R.S., 1985, c. C-46, s. 675; 1991, c. 43, s. 9; 1995, c. 42, s. 73; 1997, c. 18, s. 92; 1999, c. 31, s. 68; [2002, c. 13, s. 64](#); [2011, c. 5, s. 2](#).

Right of Attorney General to appeal

676 (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal

(a) against a judgment or verdict of acquittal or a verdict of not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;

(b) against an order of a superior court of criminal jurisdiction that quashes an indictment or in any manner refuses or fails to exercise jurisdiction on an indictment;

(c) against an order of a trial court that stays proceedings on an indictment or quashes an indictment; or

(d) with leave of the court of appeal or a judge thereof, against the sentence passed by a trial court in proceedings by indictment, unless that sentence is one fixed by law.

Summary conviction appeals

(1.1) The Attorney General or counsel instructed by the Attorney General may appeal, pursuant to subsection (1), with leave of the court of appeal or a judge of that court, to that court in respect of a verdict of acquittal in a summary offence proceeding or a sentence passed with respect to a summary conviction as if the summary offence proceeding was a proceeding by indictment if

(a) there has not been an appeal with respect to the summary conviction;

(b) the summary conviction offence was tried with an indictable offence; and

(c) there is an appeal in respect of the indictable offence.

Acquittal

(2) For the purposes of this section, a judgment or verdict of acquittal includes an acquittal in respect of an offence specifically charged where the accused has, on the trial thereof, been convicted or discharged under [section 730](#) of any other offence.

Appeal against verdict of unfit to stand trial

(3) The Attorney General or counsel instructed by the Attorney General for the purpose may appeal to the court of appeal against a verdict that an accused is unfit to stand trial, on any ground of appeal that involves a question of law alone.

Appeal against ineligible parole period

(4) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal in respect of a conviction for second degree murder, against the number of years of imprisonment without eligibility for parole, being less than twenty-five, that has been imposed as a result of that conviction.

Appeal against decision not to make [section 743.6](#) order

(5) The Attorney General or counsel instructed by the Attorney General for the purpose may appeal to the court of appeal against the decision of the court not to make an order under [section 743.6](#).

Appeal against decision not to make [s. 745.51\(1\)](#) order

(6) The Attorney General or counsel instructed by the Attorney General for the purpose may appeal to the court of appeal against the decision of the court not to make an order under [subsection 745.51\(1\)](#).

R.S., 1985, c. C-46, s. 676; R.S., 1985, c. 27 (1st Supp.), s. 139, c. 1 (4th Supp.), s. 18(F); 1991, c. 43, s. 9; 1995, c. 22, s. 10, c. 42, s. 74; 1997, c. 18, s. 93; [2002, c. 13, s. 65](#); [2008, c. 18, s. 28](#); [2011, c. 5, s. 3](#).

Appeal re costs

676.1 A party who is ordered to pay costs may, with leave of the court of appeal or a judge of a court of appeal, appeal the order or the amount of costs ordered.

1997, c. 18, s. 94.

Specifying grounds of dissent

677 Where a judge of the court of appeal expresses an opinion dissenting from the judgment of the court, the judgment of the court shall specify any grounds in law on which the dissent, in whole or in part, is based.

R.S., 1985, c. C-46, s. 677; 1994, c. 44, s. 67.

Procedure on Appeals

Notice of appeal

678 (1) An appellant who proposes to appeal to the court of appeal or to obtain the leave of that court to appeal shall give notice of appeal or notice of his application for leave to appeal in such manner and within such period as may be directed by rules of court.

Extension of time

(2) The court of appeal or a judge thereof may at any time extend the time within which notice of appeal or notice of an application for leave to appeal may be given.

R.S., c. C-34, s. 607; 1972, c. 13, s. 53; 1974-75-76, c. 105, s. 16.

Service where respondent cannot be found

678.1 Where a respondent cannot be found after reasonable efforts have been made to serve the respondent with a notice of appeal or notice of an application for leave to appeal, service of the notice of appeal or the notice of the application for leave to appeal may be effected substitutionally in the manner and within the period directed by a judge of the court of appeal.

R.S., 1985, c. 27 (1st Supp.), s. 140; 1992, c. 1, s. 60(F).

Release pending determination of appeal

679 (1) A judge of the court of appeal may, in accordance with this section, release an appellant from custody pending the determination of his appeal if,

- (a)** in the case of an appeal to the court of appeal against conviction, the appellant has given notice of appeal or, where leave is required, notice of his application for leave to appeal pursuant to [section 678](#);
- (b)** in the case of an appeal to the court of appeal against sentence only, the appellant has been granted leave to appeal; or
- (c)** in the case of an appeal or an application for leave to appeal to the Supreme Court of Canada, the appellant has filed and served his notice of appeal or, where leave is required, his application for leave to appeal.

Notice of application for release

(2) Where an appellant applies to a judge of the court of appeal to be released pending the determination of his appeal, he shall give written notice of the application to the prosecutor or to such other person as a judge of the court of appeal directs.

Circumstances in which appellant may be released

(3) In the case of an appeal referred to in paragraph (1)(a) or (c), the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that

- (a)** the appeal or application for leave to appeal is not frivolous;
 - (b)** he will surrender himself into custody in accordance with the terms of the order;
- and

(c) his detention is not necessary in the public interest.

Idem

(4) In the case of an appeal referred to in paragraph (1)(b), the judge of the court of appeal may order that the appellant be released pending the determination of his appeal or until otherwise ordered by a judge of the court of appeal if the appellant establishes that

(a) the appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if he were detained in custody;

(b) he will surrender himself into custody in accordance with the terms of the order; and

(c) his detention is not necessary in the public interest.

Conditions of release order

(5) If the judge of the court of appeal does not refuse the appellant's application, the judge shall make a release order referred to in section 515, the form of which may be adapted to suit the circumstances, which must include a condition that the accused surrender themselves into custody in accordance with the order.

Immediate release of appellant

(5.1) The person having the custody of the appellant shall, if the appellant complies with the release order, immediately release the appellant.

Applicable provisions

(6) Sections 495.1, 512.3 and 524 apply, with any modifications that the circumstances require, in respect of any proceedings under this section.

Release or detention pending hearing of reference

(7) If, with respect to any person, the Minister of Justice gives a direction or makes a reference under section 696.3, this section applies to the release or detention of that person pending the hearing and determination of the reference as though that person were an appellant in an appeal described in paragraph (1)(a).

Release or detention pending new trial or new hearing

(7.1) Where, with respect to any person, the court of appeal or the Supreme Court of Canada orders a new trial, section 515 or 522, as the case may be, applies to the release or detention of that person pending the new trial or new hearing as though that person were charged with the offence for the first time, except that the powers of a justice under section 515 or of a judge under section 522 are exercised by a judge of the court of appeal.

Application to appeals on summary conviction proceedings

(8) This section applies to applications for leave to appeal and appeals to the Supreme Court of Canada in summary conviction proceedings.

(9) [Repealed, 2019, c. 25, s. 279]

Directions for expediting appeal, new trial, etc.

(10) A judge of the court of appeal, where on the application of an appellant he does not make an order under subsection (5) or where he cancels an order previously made under this section, or a judge of the Supreme Court of Canada on application by an appellant in the case of an appeal to that Court, may give such directions as he thinks necessary for expediting the hearing of the appellant's appeal or for expediting the new trial or new hearing or the hearing of the reference, as the case may be.

R.S., 1985, c. C-46, s. 679; R.S., 1985, c. 27 (1st Supp.), s. 141; 1997, c. 18, s. 95; 1999, c. 25, s. 14(Preamble); 2002, c. 13, s. 66; 2019, c. 25, s. 279.

Review by court of appeal

680 (1) A decision made by a judge under [section 522](#), a decision made under [subsections 524\(3\) to \(5\)](#) with respect to an accused referred to in [paragraph 524\(1\)\(a\)](#) or a decision made by a judge of the court of appeal under [section 320.25](#) or [679](#) may, on the direction of the chief justice or acting chief justice of the court of appeal, be reviewed by that court and that court may, if it does not confirm the decision,

(a) vary the decision; or

(b) substitute another decision that, in its opinion, should have been made.

Single judge acting

(2) On consent of the parties, the powers of the court of appeal under subsection (1) may be exercised by a judge of that court.

Enforcement of decision

(3) A decision as varied or substituted under this section shall have effect and may be enforced in all respects as though it were the decision originally made.

R.S., 1985, c. C-46, s. 680; R.S., 1985, c. 27 (1st Supp.), s. 142; 1994, c. 44, s. 68; 2018, c. 21, s. 22; 2019, c. 25, s. 280; 2019, c. 25, s. 402; 2022, c. 17, s. 42.

681 [Repealed, 1991, c. 43, s. 9]

Report by judge

682 (1) Where, under this Part, an appeal is taken or an application for leave to appeal is made, the judge or provincial court judge who presided at the trial shall, at the request of the court of appeal or a judge thereof, in accordance with rules of court, furnish it or him with a report on the case or on any matter relating to the case that is specified in the request.

Transcript of evidence

(2) A copy or transcript of

- (a)** the evidence taken at the trial,
- (b)** any charge to the jury and any objections that were made to a charge to the jury,
- (c)** the reasons for judgment, if any, and
- (d)** the addresses of the prosecutor and the accused, if a ground for the appeal is based on either of the addresses,

shall be furnished to the court of appeal, except in so far as it is dispensed with by order of a judge of that court.

(3) [Repealed, 1997, c. 18, s. 96]

Copies to interested parties

(4) A party to an appeal is entitled to receive, on payment of any charges that are fixed by rules of court, a copy or transcript of any material that is prepared under subsections (1) and (2).

Copy for Minister of Justice

(5) The Minister of Justice is entitled, on request, to receive a copy or transcript of any material that is prepared under subsections (1) and (2).

R.S., 1985, c. C-46, s. 682; R.S., 1985, c. 27 (1st Supp.), ss. 143, 203; 1997, c. 18, s. 96.

Powers of court of appeal

683 (1) For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice,

- (a)** order the production of any writing, exhibit or other thing connected with the proceedings;
- (b)** order any witness who would have been a compellable witness at the trial, whether or not he was called at the trial,
 - (i)** to attend and be examined before the court of appeal, or
 - (ii)** to be examined in the manner provided by rules of court before a judge of the court of appeal, or before any officer of the court of appeal or justice of the peace or other person appointed by the court of appeal for the purpose;
- (c)** admit, as evidence, an examination that is taken under subparagraph (b)(ii);
- (d)** receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness;
- (e)** order that any question arising on the appeal that
 - (i)** involves prolonged examination of writings or accounts, or scientific or local investigation, and

(ii) cannot in the opinion of the court of appeal conveniently be inquired into before the court of appeal,

be referred for inquiry and report, in the manner provided by rules of court, to a special commissioner appointed by the court of appeal;

(f) act on the report of a commissioner who is appointed under paragraph (e) in so far as the court of appeal thinks fit to do so; and

(g) amend the indictment, unless it is of the opinion that the accused has been misled or prejudiced in his defence or appeal.

Parties entitled to adduce evidence and be heard

(2) In proceedings under this section, the parties or their counsel are entitled to examine or cross-examine witnesses and, in an inquiry under paragraph (1)(e), are entitled to be present during the inquiry, to adduce evidence and to be heard.

Remote appearance

(2.1) In proceedings under this section, the court of appeal may order that a party appear by audioconference or videoconference, if the technological means is satisfactory to the court.

Virtual presence of witnesses

(2.2) Sections 714.1 to 714.8 apply, with any modifications that the circumstances require, to examinations and cross-examinations of witnesses under this section.

Application of sections 715.25 and 715.26

(2.3) Sections 715.25 and 715.26 apply, with any modifications that the circumstances require, to proceedings under this section.

Other powers

(3) A court of appeal may exercise, in relation to proceedings in the court, any powers not mentioned in subsection (1) that may be exercised by the court on appeals in civil matters, and may issue any process that is necessary to enforce the orders or sentences of the court, but no costs shall be allowed to the appellant or respondent on the hearing and determination of an appeal or on any proceedings preliminary or incidental thereto.

Execution of process

(4) Any process that is issued by the court of appeal under this section may be executed anywhere in Canada.

Power to order suspension

(5) If an appeal or an application for leave to appeal has been filed in the court of appeal, that court, or a judge of that court, may, when the court, or the judge, considers

it to be in the interests of justice, order that any of the following be suspended until the appeal has been determined:

- (a) an obligation to pay a fine;
- (b) an order of forfeiture or disposition of forfeited property;
- (c) an order to make restitution under [section 738](#) or [739](#);
- (d) an obligation to pay a victim surcharge under [section 737](#);
- (e) a probation order under [section 731](#); and
- (f) a conditional sentence order under [section 742.1](#).

Release order or recognizance

(5.1) Before making an order under paragraph (5)(e) or (f), the court of appeal, or a judge of that court, may make a release order or order the offender to enter into a recognizance.

Revocation of suspension order

(6) The court of appeal may revoke any order it makes under subsection (5) where it considers the revocation to be in the interests of justice.

Release order to be taken into account

(7) If the offender is subject to a release order under subsection (5.1), the court of appeal shall, in determining whether to vary the sentence of the offender, take into account the conditions of that order and the period for which they were imposed on the offender.

R.S., 1985, c. C-46, s. 683; R.S., 1985, c. 27 (1st Supp.), s. 144, c. 23 (4th Supp.), s. 5; 1995, c. 22, s. 10; 1997, c. 18, ss. 97, 141; 1999, c. 25, s. 15(Preamble); [2002, c. 13, s. 67](#); [2008, c. 18, s. 29](#); [2019, c. 25, s. 281](#).

Legal assistance for appellant

684 (1) A court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.

Counsel fees and disbursements

(2) Where counsel is assigned pursuant to subsection (1) and legal aid is not granted to the accused pursuant to a provincial legal aid program, the fees and disbursements of counsel shall be paid by the Attorney General who is the appellant or respondent, as the case may be, in the appeal.

Taxation of fees and disbursements

(3) Where subsection (2) applies and counsel and the Attorney General cannot agree on fees or disbursements of counsel, the Attorney General or the counsel may apply to the registrar of the court of appeal and the registrar may tax the disputed fees and disbursements.

R.S., 1985, c. C-46, s. 684; R.S., 1985, c. 34 (3rd Supp.), s. 9.

Summary determination of frivolous appeals

685 (1) Where it appears to the registrar that a notice of appeal, which purports to be on a ground of appeal that involves a question of law alone, does not show a substantial ground of appeal, the registrar may refer the appeal to the court of appeal for summary determination, and, where an appeal is referred under this section, the court of appeal may, if it considers that the appeal is frivolous or vexatious and can be determined without being adjourned for a full hearing, dismiss the appeal summarily, without calling on any person to attend the hearing or to appear for the respondent on the hearing.

Summary determination of appeals filed in error

(2) If it appears to the registrar that a notice of appeal should have been filed with another court, the registrar may refer the appeal to a judge of the court of appeal for summary determination, and the judge may dismiss the appeal summarily without calling on any person to attend the hearing or to appear for the respondent on the hearing.

R.S., 1985, c. C-46, s. 685; [2008, c. 18, s. 30](#).

Powers of the Court of Appeal

Powers

686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

(a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

(b) may dismiss the appeal where

(i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,

(ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a),

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or

(iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

(c) may refuse to allow the appeal where it is of the opinion that the trial court arrived at a wrong conclusion respecting the effect of a special verdict, may order the conclusion to be recorded that appears to the court to be required by the verdict and may pass a sentence that is warranted in law in substitution for the sentence passed by the trial court; or

(d) may set aside a conviction and find the appellant unfit to stand trial or not criminally responsible on account of mental disorder and may exercise any of the powers of the trial court conferred by or referred to in [section 672.45](#) in any manner deemed appropriate to the court of appeal in the circumstances.

(e) [Repealed, 1991, c. 43, s. 9]

Order to be made

(2) Where a court of appeal allows an appeal under paragraph (1)(a), it shall quash the conviction and

(a) direct a judgment or verdict of acquittal to be entered; or

(b) order a new trial.

Substituting verdict

(3) Where a court of appeal dismisses an appeal under subparagraph (1)(b)(i), it may substitute the verdict that in its opinion should have been found and

(a) affirm the sentence passed by the trial court; or

(b) impose a sentence that is warranted in law or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.

Appeal from acquittal

(4) If an appeal is from an acquittal or verdict that the appellant or respondent was unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal may

(a) dismiss the appeal; or

(b) allow the appeal, set aside the verdict and

(i) order a new trial, or

(ii) except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused

should have been found guilty but for the error in law, and pass a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.

New trial under Part XIX

(5) Subject to subsection (5.01), if an appeal is taken in respect of proceedings under Part XIX and the court of appeal orders a new trial under this Part, the following provisions apply:

- (a)** if the accused, in his notice of appeal or notice of application for leave to appeal, requested that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall be held accordingly;
- (b)** if the accused, in his notice of appeal or notice of application for leave to appeal, did not request that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall, without further election by the accused, be held before a judge or provincial court judge, as the case may be, acting under Part XIX, other than a judge or provincial court judge who tried the accused in the first instance, unless the court of appeal directs that the new trial be held before the judge or provincial court judge who tried the accused in the first instance;
- (c)** if the court of appeal orders that the new trial shall be held before a court composed of a judge and jury, the new trial shall be commenced by an indictment in writing setting forth the offence in respect of which the new trial was ordered; and
- (d)** notwithstanding paragraph (a), if the conviction against which the accused appealed was for an offence mentioned in [section 553](#) and was made by a provincial court judge, the new trial shall be held before a provincial court judge acting under Part XIX, other than the provincial court judge who tried the accused in the first instance, unless the court of appeal directs that the new trial be held before the provincial court judge who tried the accused in the first instance.

New trial under Part XIX — Nunavut

(5.01) If an appeal is taken in respect of proceedings under Part XIX and the Court of Appeal of Nunavut orders a new trial under Part XXI, the following provisions apply:

- (a)** if the accused, in the notice of appeal or notice of application for leave to appeal, requested that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall be held accordingly;
- (b)** if the accused, in the notice of appeal or notice of application for leave to appeal, did not request that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall, without further election by the accused, and without a preliminary inquiry, be held before a judge, acting under Part XIX, other than a judge who tried the accused in the first instance, unless the Court of Appeal of Nunavut directs that the new trial be held before the judge who tried the accused in the first instance;

(c) if the Court of Appeal of Nunavut orders that the new trial shall be held before a court composed of a judge and jury, the new trial shall be commenced by an indictment in writing setting forth the offence in respect of which the new trial was ordered; and

(d) despite paragraph (a), if the conviction against which the accused appealed was for an indictable offence mentioned in [section 553](#), the new trial shall be held before a judge acting under Part XIX, other than the judge who tried the accused in the first instance, unless the Court of Appeal of Nunavut directs that the new trial be held before the judge who tried the accused in the first instance.

Election if new trial a jury trial

(5.1) Subject to subsection (5.2), if a new trial ordered by the court of appeal is to be held before a court composed of a judge and jury,

(a) the accused may, with the consent of the prosecutor, elect to have the trial heard before a judge without a jury or a provincial court judge;

(b) the election shall be deemed to be a re-election within the meaning of [subsection 561\(5\)](#); and

(c) [subsection 561\(5\)](#) applies, with such modifications as the circumstances require, to the election.

Election if new trial a jury trial — Nunavut

(5.2) If a new trial ordered by the Court of Appeal of Nunavut is to be held before a court composed of a judge and jury, the accused may, with the consent of the prosecutor, elect to have the trial heard before a judge without a jury. The election shall be deemed to be a re-election within the meaning of [subsection 561.1\(1\)](#), and [subsection 561.1\(6\)](#) applies, with any modifications that the circumstances require, to the election.

Where appeal allowed against verdict of unfit to stand trial

(6) Where a court of appeal allows an appeal against a verdict that the accused is unfit to stand trial, it shall, subject to subsection (7), order a new trial.

Appeal court may set aside verdict of unfit to stand trial

(7) Where the verdict that the accused is unfit to stand trial was returned after the close of the case for the prosecution, the court of appeal may, notwithstanding that the verdict is proper, if it is of the opinion that the accused should have been acquitted at the close of the case for the prosecution, allow the appeal, set aside the verdict and direct a judgment or verdict of acquittal to be entered.

Additional powers

(8) Where a court of appeal exercises any of the powers conferred by subsection (2), (4), (6) or (7), it may make any order, in addition, that justice requires.

R.S., 1985, c. C-46, s. 686; R.S., 1985, c. 27 (1st Supp.), ss. 145, 203; 1991, c. 43, s. 9; 1997, c. 18, s. 98; 1999, c. 3, s. 52, c. 5, s. 26; [2015, c. 3, s. 54\(F\)](#); [2019, c. 25, s. 282\(E\)](#).

Powers of court on appeal against sentence

687 (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,

- (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
- (b) dismiss the appeal.

Effect of judgment

(2) A judgment of a court of appeal that varies the sentence of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court.

R.S., c. C-34, s. 614.

Right of appellant to attend

688 (1) Subject to subsection (2), an appellant who is in custody is entitled, if he desires, to be present at the hearing of the appeal.

Appellant represented by counsel

(2) An appellant who is in custody and who is represented by counsel is not entitled to be present

- (a) at the hearing of the appeal, where the appeal is on a ground involving a question of law alone,
- (b) on an application for leave to appeal, or
- (c) on any proceedings that are preliminary or incidental to an appeal,

unless rules of court provide that he is entitled to be present or the court of appeal or a judge thereof gives him leave to be present.

Manner of appearance

(2.1) In the case of an appellant who is in custody and who is entitled to be present at any proceedings on an appeal, the court may order that, instead of the appellant appearing in person,

- (a) at an application for leave to appeal or at any proceedings that are preliminary or incidental to an appeal, the appellant appear by audioconference or videoconference, if the technological means is satisfactory to the court; and
- (b) at the hearing of the appeal, if the appellant has access to legal advice, they appear by closed-circuit television or videoconference.

Argument may be oral or in writing

(3) An appellant may present his case on appeal and his argument in writing instead of orally, and the court of appeal shall consider any case of argument so presented.

Sentence in absence of appellant

(4) A court of appeal may exercise its power to impose sentence notwithstanding that the appellant is not present.

R.S., 1985, c. C-46, s. 688; 2002, c. 13, s. 68; 2019, c. 25, s. 283; 2022, c. 17, s. 43(E).

Restitution or forfeiture of property

689 (1) If the trial court makes an order for compensation or for the restitution of property under [section 738](#) or [739](#) or an order of forfeiture of property under [subsection 164.2\(1\)](#) or [462.37\(1\)](#) or [\(2.01\)](#), the operation of the order is suspended

(a) until the expiration of the period prescribed by rules of court for the giving of notice of appeal or of notice of application for leave to appeal, unless the accused waives an appeal; and

(b) until the appeal or application for leave to appeal has been determined, where an appeal is taken or application for leave to appeal is made.

Annulling or varying order

(2) The court of appeal may by order annul or vary an order made by the trial court with respect to compensation or the restitution of property within the limits prescribed by the provision under which the order was made by the trial court, whether or not the conviction is quashed.

R.S., 1985, c. C-46, s. 689; R.S., 1985, c. 42 (4th Supp.), s. 5; 1995, c. 22, s. 10; 2002, c. 13, s. 69; 2005, c. 44, s. 12.

690 [Repealed, 2002, c. 13, s. 70]

Appeals to the Supreme Court of Canada

Appeal from conviction

691 (1) A person who is convicted of an indictable offence and whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada

(a) on any question of law on which a judge of the court of appeal dissents; or

(b) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

Appeal where acquittal set aside

(2) A person who is acquitted of an indictable offence other than by reason of a verdict of not criminally responsible on account of mental disorder and whose acquittal is set aside by the court of appeal may appeal to the Supreme Court of Canada

(a) on any question of law on which a judge of the court of appeal dissents;

(b) on any question of law, if the Court of Appeal enters a verdict of guilty against the person; or

(c) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

R.S., 1985, c. C-46, s. 691; R.S., 1985, c. 34 (3rd Supp.), s. 10; 1991, c. 43, s. 9; 1997, c. 18, s. 99.

Appeal against affirmation of verdict of not criminally responsible on account of mental disorder

692 (1) A person who has been found not criminally responsible on account of mental disorder and

(a) whose verdict is affirmed on that ground by the court of appeal, or

(b) against whom a verdict of guilty is entered by the court of appeal under [subparagraph 686\(4\)\(b\)\(ii\)](#),

may appeal to the Supreme Court of Canada.

Appeal against affirmation of verdict of unfit to stand trial

(2) A person who is found unfit to stand trial and against whom that verdict is affirmed by the court of appeal may appeal to the Supreme Court of Canada.

Grounds of appeal

(3) An appeal under subsection (1) or (2) may be

(a) on any question of law on which a judge of the court of appeal dissents; or

(b) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

R.S., 1985, c. C-46, s. 692; R.S., 1985, c. 34 (3rd Supp.), s. 11; 1991, c. 43, s. 9.

Appeal by Attorney General

693 (1) Where a judgment of a court of appeal sets aside a conviction pursuant to an appeal taken under [section 675](#) or dismisses an appeal taken pursuant to [paragraph 676\(1\)\(a\)](#), (b) or (c) or [subsection 676\(3\)](#), the Attorney General may appeal to the Supreme Court of Canada

(a) on any question of law on which a judge of the court of appeal dissents; or

(b) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

Terms

(2) Where leave to appeal is granted under paragraph (1)(b), the Supreme Court of Canada may impose such terms as it sees fit.

R.S., 1985, c. C-46, s. 693; R.S., 1985, c. 27 (1st Supp.), s. 146, c. 34 (3rd Supp.), s. 12.

Notice of appeal

694 No appeal lies to the Supreme Court of Canada unless notice of appeal in writing is served by the appellant on the respondent in accordance with the [Supreme Court Act](#).

R.S., 1985, c. C-46, s. 694; R.S., 1985, c. 34 (3rd Supp.), s. 13.

Legal assistance for accused

694.1 (1) The Supreme Court of Canada or a judge thereof may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal to the Court or to proceedings preliminary or incidental to an appeal to the Court where, in the opinion of the Court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.

Counsel fees and disbursements

(2) Where counsel is assigned pursuant to subsection (1) and legal aid is not granted to the accused pursuant to a provincial legal aid program, the fees and disbursements of counsel shall be paid by the Attorney General who is the appellant or respondent, as the case may be, in the appeal.

Taxation of fees and disbursements

(3) Where subsection (2) applies and counsel and the Attorney General cannot agree on fees or disbursements of counsel, the Attorney General or the counsel may apply to the Registrar of the Supreme Court of Canada, and the Registrar may tax the disputed fees and disbursements.

R.S., 1985, c. 34 (3rd Supp.), s. 13; 1992, c. 1, s. 60(F).

Right of appellant to attend

694.2 (1) Subject to subsection (2), an appellant who is in custody and who desires to be present at the hearing of the appeal before the Supreme Court of Canada is entitled to be present at it.

Appellant represented by counsel

(2) An appellant who is in custody and who is represented by counsel is not entitled to be present before the Supreme Court of Canada

- (a)** on an application for leave to appeal,
- (b)** on any proceedings that are preliminary or incidental to an appeal, or
- (c)** at the hearing of the appeal,

unless rules of court provide that entitlement or the Supreme Court of Canada or a judge thereof gives the appellant leave to be present.

R.S., 1985, c. 34 (3rd Supp.), s. 13.

Order of Supreme Court of Canada

695 (1) The Supreme Court of Canada may, on an appeal under this Part, make any order that the court of appeal might have made and may make any rule or order that is necessary to give effect to its judgment.

Election if new trial

(2) Subject to subsection (3), if a new trial ordered by the Supreme Court of Canada is to be held before a court composed of a judge and jury, the accused may, with the consent of the prosecutor, elect to have the trial heard before a judge without a jury or a provincial court judge. The election is deemed to be a re-election within the meaning of [subsection 561\(5\)](#) and subsections 561(5) to [\(7\)](#) apply to it with any modifications that the circumstances require.

Nunavut

(3) If a new trial ordered by the Supreme Court of Canada is to be held before a court composed of a judge and jury in Nunavut, the accused may, with the consent of the prosecutor, elect to have the trial heard before a judge without a jury. The election is deemed to be a re-election within the meaning of [subsection 561.1\(6\)](#) and subsections 561.1(6) to [\(9\)](#) apply to it with any modifications that the circumstances require.

R.S., 1985, c. C-46, s. 695; 1999, c. 5, s. 27; [2008, c. 18, s. 31](#).

Appeals by Attorney General of Canada

Right of Attorney General of Canada to appeal

696 The Attorney General of Canada has the same rights of appeal in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government as the Attorney General of a province has under this Part.

R.S., c. C-34, s. 624.

PART XXI.1

Applications for Ministerial Review — Miscarriages of Justice

Application

696.1 (1) An application for ministerial review on the grounds of miscarriage of justice may be made to the Minister of Justice by or on behalf of a person who has been convicted of an offence under an Act of Parliament or a regulation made under an Act of Parliament or has been found to be a dangerous offender or a long-term offender under Part XXIV and whose rights of judicial review or appeal with respect to the conviction or finding have been exhausted.

Form of application

(2) The application must be in the form, contain the information and be accompanied by any documents prescribed by the regulations.

2002, c. 13, s. 71.

Review of applications

696.2 (1) On receipt of an application under this Part, the Minister of Justice shall review it in accordance with the regulations.

Powers of investigation

(2) For the purpose of any investigation in relation to an application under this Part, the Minister of Justice has and may exercise the powers of a commissioner under Part I of the *Inquiries Act* and the powers that may be conferred on a commissioner under [section 11](#) of that Act.

Delegation

(3) Despite subsection 11(3) of the *Inquiries Act*, the Minister of Justice may delegate in writing to any member in good standing of the bar of a province, retired judge or any other individual who, in the opinion of the Minister, has similar background or experience the powers of the Minister to take evidence, issue subpoenas, enforce the attendance of witnesses, compel them to give evidence and otherwise conduct an investigation under subsection (2).

2002, c. 13, s. 71.

Definition of *court of appeal*

696.3 (1) In this section, *the court of appeal* means the court of appeal, as defined by the definition *court of appeal* in [section 2](#), for the province in which the person to whom an application under this Part relates was tried.

Power to refer

(2) The Minister of Justice may, at any time, refer to the court of appeal, for its opinion, any question in relation to an application under this Part on which the Minister desires the assistance of that court, and the court shall furnish its opinion accordingly.

Powers of Minister of Justice

(3) On an application under this Part, the Minister of Justice may

(a) if the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred,

(i) direct, by order in writing, a new trial before any court that the Minister thinks proper or, in the case of a person found to be a dangerous offender or a long-term offender under Part XXIV, a new hearing under that Part, or

(ii) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person found to be a dangerous offender or a long-term offender under Part XXIV, as the case may be; or

(b) dismiss the application.

No appeal

(4) A decision of the Minister of Justice made under subsection (3) is final and is not subject to appeal.

[2002, c. 13, s. 71.](#)

Considerations

696.4 In making a decision under [subsection 696.3\(3\)](#), the Minister of Justice shall take into account all matters that the Minister considers relevant, including

(a) whether the application is supported by new matters of significance that were not considered by the courts or previously considered by the Minister in an application in relation to the same conviction or finding under Part XXIV;

(b) the relevance and reliability of information that is presented in connection with the application; and

(c) the fact that an application under this Part is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy.

[2002, c. 13, s. 71.](#)

Annual report

696.5 The Minister of Justice shall within six months after the end of each financial year submit an annual report to Parliament in relation to applications under this Part.

[2002, c. 13, s. 71.](#)

Regulations

696.6 The Governor in Council may make regulations

(a) prescribing the form of, the information required to be contained in and any documents that must accompany an application under this Part;

(b) prescribing the process of review in relation to applications under this Part, which may include the following stages, namely, preliminary assessment, investigation, reporting on investigation and decision; and

(c) respecting the form and content of the annual report under [section 696.5](#).

[2002, c. 13, s. 71.](#)

PART XXI.2

Miscarriage of Justice Review Commission

Definitions

Definitions

696.7 The following definitions apply in this Part.

applicant in relation to a miscarriage of justice review application made to the Commission, means the person who is the subject of the finding or verdict in question. (*demandeur*)

Commission means the Miscarriage of Justice Review Commission established under [subsection 696.71\(1\)](#). (*Commission*)

Minister means the Minister of Justice. (*ministre*)

[2024, c. 33, s. 4.](#)

Establishment and Mandate

Commission established

696.71 (1) The Miscarriage of Justice Review Commission is established.

Composition

(2) The Commission consists of a Chief Commissioner and four to eight other commissioners, all of whom are appointed to hold office during good behaviour by the Governor in Council on the recommendation of the Minister.

Head office

(3) The head office of the Commission must be in a place in Canada that is designated by the Governor in Council.

[2024, c. 33, s. 4.](#)

Mandate

696.72 The Commission's mandate is to

(a) review applications made under Part XXI.1 on the grounds of miscarriage of justice after [section 3](#) of the *Miscarriage of Justice Review Commission Act (David and Joyce Milgaard's Law)* comes into force;

(b) make recommendations to address systemic issues that may lead to miscarriages of justice to relevant public authorities and bodies, including the Law Commission of Canada, federal-provincial-territorial committees and working groups, federal departments and agencies and parliamentary committees.

[2024, c. 33, s. 4.](#)

Commissioners

Diversity

696.73 In making recommendations for commissioner appointments, the Minister must seek to reflect the diversity of Canadian society and must take into account considerations such as gender equality and the overrepresentation of certain groups in the criminal justice system, including Indigenous peoples and Black persons.

[2024, c. 33, s. 4.](#)

Full- or part-time commissioners

696.74 The Chief Commissioner is a full-time commissioner. The other commissioners may be appointed as full-time or part-time commissioners.

[2024, c. 33, s. 4.](#)

Knowledge and experience

696.75 (1) The commissioners must have, in the opinion of the Governor in Council, knowledge and experience that is related to the Commission's mandate.

Legal qualifications

(2) At least one third of the commissioners, including the Chief Commissioner, must be members in good standing of the bar of a province and have at least ten years' experience in the practice of criminal law at the time of their appointment.

Diversity of qualifications

(3) At least one half of the commissioners must not, if possible, be persons described in subsection (2).

[2024, c. 33, s. 4.](#)

Role of Chief Commissioner

696.76 (1) The Chief Commissioner is the chief executive officer of the Commission and has supervision over and direction of the work and employees of the Commission.

Absence, incapacity or vacancy

(2) If the Chief Commissioner is absent or incapacitated or if their office is vacant, the Commission may authorize another commissioner who is a person described in [subsection 696.75\(2\)](#) to act as Chief Commissioner. The authorized commissioner is not, however, authorized to act as Chief Commissioner for more than 90 days without the Governor in Council's approval.

[2024, c. 33, s. 4.](#)

Term of office

696.77 (1) A commissioner is to be appointed to hold office for a term not exceeding seven years such that, to the extent possible, the terms of office of more than one half of the commissioners do not end in any one calendar year.

Reappointment

(2) A commissioner may be reappointed.

Removal

(3) A commissioner may be removed for cause by the Governor in Council.

[2024, c. 33, s. 4.](#)

Remuneration

696.78 (1) A commissioner is to receive the remuneration that is fixed by the Governor in Council.

Expenses

(2) A commissioner is entitled to be paid, in accordance with Treasury Board directives, reasonable travel and living expenses incurred while absent in the course of their duties and functions from, in the case of a full-time commissioner, their ordinary place of work and, in the case of a part-time commissioner, their ordinary place of residence.

Compensation

(3) A commissioner is deemed to be an employee for the purposes of the [Government Employees Compensation Act](#) and to be employed in the federal public administration for the purposes of any regulations made under [section 9](#) of the [Aeronautics Act](#).

[2024, c. 33, s. 4.](#)

Meetings

696.79 (1) The Chief Commissioner convenes and presides at meetings of the Commission.

Quorum

(2) One half of the commissioners holding office constitutes a quorum.

Decisions

(3) A decision of a majority of the commissioners at a meeting is a decision of the Commission.

[2024, c. 33, s. 4.](#)

Powers, Duties and Functions

Accessibility

696.8 The Commission must ensure that applicants and potential applicants are able to communicate readily with the Commission from any place in Canada.

[2024, c. 33, s. 4.](#)

Outreach

696.81 The Commission must publish information about its mandate on its website and must provide the public, including potential applicants, with information about its mandate and about miscarriages of justice.

[2024, c. 33, s. 4.](#)

Transparency

696.82 (1) The Commission must carry out its mandate in a transparent manner.

Publication of decisions

(2) The Commission must publish its decisions on its website in a manner that

- (a)** protects confidential information; and
- (b)** is not likely to interfere with the proper administration of justice in relation to a matter that the Commission directs to a court for a new trial or hearing or a matter that the Commission refers to a court of appeal for a hearing and determination.

[2024, c. 33, s. 4.](#)

Policies

696.83 (1) The Commission may adopt policies generally for the carrying out of its work and the management of its affairs, including policies respecting its procedures and practices.

Duty to adopt certain policies

(2) The Commission must adopt policies respecting

- (a)** the making of applications;
- (b)** each stage of the review process;
- (c)** applications that are made on behalf of persons;
- (d)** the provision of notices and other information to applicants, to their representatives, to attorneys general and to other interested persons, including victims; and
- (e)** meetings of the Commission.

Publication

(3) The Commission must publish its policies on its website.

Statutory Instruments Act

(4) The *Statutory Instruments Act* does not apply to policies adopted by the Commission.
2024, c. 33, s. 4.

Powers

696.84 (1) The Commission may, in carrying out its mandate,

- (a)** direct employees to provide applicants and potential applicants with general information and guidance on applications and each stage of the review process;
- (a.1)** direct employees to notify the Correctional Service of Canada and the Parole Board of Canada of the importance of ensuring that applicants and potential applicants do not experience barriers to or exclusion from programs, services or conditional release processes as a result of making an application for a review on the grounds of a miscarriage of justice;
- (b)** enter into contracts in its own name;
- (c)** provide supports to applicants in need, including by entering into contracts with service providers for the provision of those supports; and
- (d)** enter into contracts with persons who have technical or specialized knowledge to assist in the Commission's work.

Supports to applicants in need

(2) For the purposes of paragraph (1)(c), supports to applicants in need include

- (a)** directing them to services in their communities for persons in need or helping them access those services;
- (b)** providing them with translation and interpretation services;
- (c)** assisting them, if they are without means, in relation to necessities such as food and housing; and
- (d)** assisting them, if they are without means, in obtaining legal assistance in relation to making an application or providing a written response to an investigation report prepared by the Commission.

2024, c. 33, s. 4.

Security requirements

696.85 The Commission and its employees must follow established procedures and practices, including any requirement found in a Treasury Board policy or directive, for the secure handling, storage, transportation and transmission of information or documents.

2024, c. 33, s. 4.

Staff

Public Service Employment Act

696.86 The employees necessary for the proper conduct of the work of the Commission are to be appointed in accordance with the *Public Service Employment Act*.

2024, c. 33, s. 4.

Annual Report

Annual report

696.87 (1) The Chief Commissioner must, within five months after the end of each fiscal year, submit to the Minister a report that contains the following information for that fiscal year:

- (a) the number of applications received;
- (b) statistics on applicants that, to the extent possible, are disaggregated by gender identity, age, race, ethnic origin, language, disability, income and any other identity factor that is considered in the course of a gender-based analysis;
- (c) the number of investigations started and the number of investigations completed;
- (d) the number of matters that the Commission directed to courts for new trials or hearings;
- (e) the number of matters that the Commission referred to courts of appeal for hearings and determinations;
- (f) the number of applications dismissed;
- (g) the outcomes of matters that the Commission directed to courts for new trials or hearings;
- (h) the outcomes of matters that the Commission referred to courts of appeal for hearings and determinations;
- (i) the average length of time between the receipt of an application and the Commission's final decision;
- (j) the number of applicants in need who received supports;
- (k) the amounts paid to service providers under [paragraph 696.84\(1\)\(c\)](#), disaggregated, to the extent possible, by the nature of the supports provided by the service providers; and
- (l) any other information on the Commission's activities that the Chief Commissioner considers relevant.

Tabling

(2) The Minister must cause the report to be laid before each House of Parliament on any of the first 30 days on which that House is sitting after the day on which the report is received.

Publication

(3) The Commission must publish the annual report on its website after it has been tabled.

2024, c. 33, s. 4.

PART XXII

Procuring Attendance

Application

Application

697 Except where [section 527](#) applies, this Part applies where a person is required to attend to give evidence in a proceeding to which this Act applies.

R.S., c. C-34, s. 625.

Process

Subpoena

698 (1) Where a person is likely to give material evidence in a proceeding to which this Act applies, a subpoena may be issued in accordance with this Part requiring that person to attend to give evidence.

Warrant in Form 17

(2) Where it is made to appear that a person who is likely to give material evidence

(a) will not attend in response to a subpoena if a subpoena is issued, or

(b) is evading service of a subpoena,

a court, justice or provincial court judge having power to issue a subpoena to require the attendance of that person to give evidence may issue a warrant in Form 17 to cause that person to be arrested and to be brought to give evidence.

Subpoena issued first

(3) Except where paragraph (2)(a) applies, a warrant in Form 17 shall not be issued unless a subpoena has first been issued.

R.S., 1985, c. C-46, s. 698; R.S., 1985, c. 27 (1st Supp.), s. 203.

Who may issue

699 (1) If a person is required to attend to give evidence before a superior court of criminal jurisdiction, a court of appeal, an appeal court or a court of criminal jurisdiction other than a provincial court judge acting under Part XIX, a subpoena directed to that person shall be issued out of the court before which the attendance of that person is required.

Order of judge

(2) If a person is required to attend to give evidence before a provincial court judge acting under Part XIX or a summary conviction court under Part XXVII or in proceedings over which a justice has jurisdiction, a subpoena directed to the person shall be issued

(a) by a provincial court judge or a justice, where the person whose attendance is required is within the province in which the proceedings were instituted; or

(b) by a provincial court judge or out of a superior court of criminal jurisdiction of the province in which the proceedings were instituted, where the person whose attendance is required is not within the province.

Order of judge

(3) A subpoena shall not be issued out of a superior court of criminal jurisdiction pursuant to paragraph (2)(b), except pursuant to an order of a judge of the court made on application by a party to the proceedings.

Seal

(4) A subpoena or warrant that is issued by a court under this Part shall be under the seal of the court and shall be signed by a judge of the court or by the clerk of the court.

Signature

(5) A subpoena or warrant that is issued by a justice or provincial court judge under this Part must be signed by the justice, provincial court judge or the clerk of the court.

Sexual offences

(5.1) Despite anything in subsections (1) to (5), in the case of an offence referred to in [subsection 278.2\(1\)](#), a subpoena requiring a witness to bring to the court a record, the production of which is governed by [sections 278.1](#) to [278.91](#), must be issued by a judge and signed by the judge or the clerk of the court.

Form of subpoena

(6) Subject to subsection (7), a subpoena issued under this Part may be in Form 16.

Form of subpoena in sexual offences

(7) In the case of an offence referred to in [subsection 278.2\(1\)](#), a subpoena requiring a witness to bring anything to the court shall be in Form 16.1.

R.S., 1985, c. C-46, s. 699; R.S., 1985, c. 27 (1st Supp.), s. 203; 1994, c. 44, s. 69; 1997, c. 30, s. 2; 1999, c. 5, s. 28; [2019, c. 25, s. 284](#).

Contents of subpoena

700 (1) A subpoena shall require the person to whom it is directed to attend, at a time and place to be stated in the subpoena, to give evidence and, if required, to bring with

him anything that he has in his possession or under his control relating to the subject-matter of the proceedings.

Witness to appear and remain

(2) A person who is served with a subpoena issued under this Part shall attend and shall remain in attendance throughout the proceedings unless he is excused by the presiding judge, justice or provincial court judge.

R.S., 1985, c. C-46, s. 700; R.S., 1985, c. 27 (1st Supp.), ss. 148, 203.

Video links

700.1 (1) If a person is to give evidence under [section 714.1](#) or under [subsection 46\(2\)](#) of the *Canada Evidence Act* — or is to give evidence or a statement under an order made under [section 22.2](#) of the *Mutual Legal Assistance in Criminal Matters Act* — at a place within the jurisdiction of a court referred to in [subsection 699\(1\)](#) or [\(2\)](#) where the technology is available, a subpoena shall be issued out of the court to order the person to give that evidence at that place.

Sections of *Criminal Code*

(2) [Sections 699, 700 and 701](#) to [703.2](#) apply, with any modifications that the circumstances require, to a subpoena issued under this section.

1999, c. 18, s. 94; [2019, c. 25, s. 285](#).

Execution or Service of Process

Service

701 (1) Subject to subsection (2), a subpoena shall be served in a province by a peace officer or any other person who is qualified in that province to serve civil process, in accordance with [subsection 509\(2\)](#), with such modifications as the circumstances require.

Personal service

(2) A subpoena that is issued pursuant to [paragraph 699\(2\)\(b\)](#) shall be served personally on the person to whom it is directed.

(3) [\[Repealed, 2008, c. 18, s. 32\]](#)

R.S., 1985, c. C-46, s. 701; 1994, c. 44, s. 70; [2008, c. 18, s. 32](#).

Service in accordance with provincial laws

701.1 Despite [section 701](#), in any province, service of a document may be made in accordance with the laws of the province relating to offences created by the laws of that province.

1997, c. 18, s. 100; [2008, c. 18, s. 33](#).

Subpoena effective throughout Canada

702 (1) A subpoena that is issued by a provincial court judge or out of a superior court of criminal jurisdiction, a court of appeal, an appeal court or a court of criminal jurisdiction has effect anywhere in Canada according to its terms.

Subpoena effective throughout province

(2) A subpoena that is issued by a justice has effect anywhere in the province in which it is issued.

R.S., 1985, c. C-46, s. 702; 1994, c. 44, s. 71.

Warrant effective throughout Canada

703 (1) Notwithstanding any other provision of this Act, a warrant of arrest or committal that is issued out of a superior court of criminal jurisdiction, a court of appeal, an appeal court within the meaning of [section 812](#) or a court of criminal jurisdiction other than a provincial court judge acting under Part XIX may be executed anywhere in Canada.

Warrant effective in a province

(2) Despite any other provision of this Act but subject to subsections 487.0551(2), 490.03121(3) and 705(3), a warrant of arrest or committal that is issued by a justice or provincial court judge may be executed anywhere in the province in which it is issued.

R.S., 1985, c. C-46, s. 703; R.S., 1985, c. 27 (1st Supp.), s. 149; [2007, c. 22, s. 22](#); [2023, c. 28, s. 33](#).

Summons effective throughout Canada

703.1 A summons may be served anywhere in Canada and, if served, is effective notwithstanding the territorial jurisdiction of the authority that issued the summons.

R.S., 1985, c. 27 (1st Supp.), s. 149.

Service of process on an organization

703.2 Where any summons, notice or other process is required to be or may be served on an organization, and no other method of service is provided, service may be effected by delivery

(a) in the case of a municipality, to the mayor, warden, reeve or other chief officer of the municipality, or to the secretary, treasurer or clerk of the municipality; and

(b) in the case of any other organization, to the manager, secretary or other senior officer of the organization or one of its branches.

R.S., 1985, c. 27 (1st Supp.), s. 149; [2003, c. 21, s. 13](#).

Defaulting or Absconding Witness

Warrant for absconding witness

704 (1) Where a person is bound by recognizance to give evidence in any proceedings, a justice who is satisfied on information being made before him in writing and under oath that the person is about to abscond or has absconded may issue his warrant in Form 18

directing a peace officer to arrest that person and to bring him before the court, judge, justice or provincial court judge before whom he is bound to appear.

Endorsement of warrant

(2) [Section 528](#) applies, with such modifications as the circumstances require, to a warrant issued under this section.

Copy of information

(3) A person who is arrested under this section is entitled, on request, to receive a copy of the information on which the warrant for his arrest was issued.

R.S., 1985, c. C-46, s. 704; R.S., 1985, c. 27 (1st Supp.), s. 203.

Warrant if witness does not attend

705 (1) If a person who has been served with a subpoena to give evidence in a proceeding does not attend or remain in attendance, the court, judge, justice or provincial court judge before whom that person was required to attend may issue a warrant in Form 17 for the arrest of that person if it is established

(a) that the subpoena has been served in accordance with this Part, and

(b) that the person is likely to give material evidence.

Warrant if witness bound by recognizance

(2) If a person who has been bound by a recognizance to attend to give evidence in any proceeding does not attend or does not remain in attendance, the court, judge, justice or provincial court judge before whom that person was bound to attend may issue a warrant in Form 17 for the arrest of that person.

Warrant effective throughout Canada

(3) A warrant that is issued by a justice or provincial court judge pursuant to subsection (1) or (2) may be executed anywhere in Canada.

R.S., 1985, c. C-46, s. 705; R.S., 1985, c. 27 (1st Supp.), s. 203; [2019, c. 25, s. 286](#).

If witness arrested under warrant

706 If a person is brought before a court, judge, provincial court judge or justice under a warrant issued under [subsection 698\(2\)](#) or [section 704](#) or [705](#), the court, judge, provincial court judge or justice may, so that the person will appear and give evidence when required, order that the person be detained in custody or be released on recognizance, with or without sureties.

R.S., 1985, c. C-46, s. 706; R.S., 1985, c. 27 (1st Supp.), s. 203; [2019, c. 25, s. 287](#).

Maximum period for detention of witness

707 (1) No person shall be detained in custody under the authority of any provision of this Act, for the purpose only of appearing and giving evidence when required as a

witness, for any period exceeding thirty days unless prior to the expiration of those thirty days he has been brought before a judge of a superior court of criminal jurisdiction in the province in which he is being detained.

Application by witness to judge

(2) Where at any time prior to the expiration of the thirty days referred to in subsection (1), a witness being detained in custody as described in that subsection applies to be brought before a judge of a court described therein, the judge before whom the application is brought shall fix a time prior to the expiration of those thirty days for the hearing of the application and shall cause notice of the time so fixed to be given to the witness, the person having custody of the witness and such other persons as the judge may specify, and at the time so fixed for the hearing of the application the person having custody of the witness shall cause the witness to be brought before a judge of the court for that purpose.

Review of detention

(3) If the judge before whom a witness is brought under this section is not satisfied that the continued detention of the witness is justified, the judge shall order them to be discharged or to be released on recognizance, with or without sureties, so that the witness will appear and give evidence when required. However, if the judge is satisfied that the continued detention of the witness is justified, the judge may order their continued detention until they do what is required of them under [section 550](#) or the trial is concluded, or until they appear and give evidence when required, except that the total period of detention of the witness from the time they were first detained in custody shall not in any case exceed 90 days.

R.S., 1985, c. C-46, s. 707; [2019, c. 25, s. 288](#).

Contempt

708 (1) A person who, being required by law to attend or remain in attendance for the purpose of giving evidence, fails, without lawful excuse, to attend or remain in attendance accordingly is guilty of contempt of court.

Punishment

(2) A court, judge, justice or provincial court judge may deal summarily with a person who is guilty of contempt of court under this section and that person is liable to a fine not exceeding one hundred dollars or to imprisonment for a term not exceeding ninety days or to both, and may be ordered to pay the costs that are incident to the service of any process under this Part and to his detention, if any.

Form

(3) A conviction under this section may be in Form 38 and a warrant of committal in respect of a conviction under this section may be in Form 25.

R.S., 1985, c. C-46, s. 708; R.S., 1985, c. 27 (1st Supp.), s. 203; [2019, c. 25, s. 289\(F\)](#).

Electronically Transmitted Copies

Electronically transmitted copies

708.1 A copy of a summons, warrant or subpoena transmitted by a means of telecommunication that produces a writing has the same probative force as the original for the purposes of this Act.

1997, c. 18, s. 101.

Evidence on Commission

Order appointing commissioner

709 (1) A party to proceedings by way of indictment or summary conviction may apply for an order appointing a commissioner to take the evidence of a witness who

(a) is, by reason of

(i) physical disability arising out of illness, or

(ii) any other good and sufficient cause,

not likely to be able to attend at the time the trial is held; or

(b) is out of Canada.

Idem

(2) A decision under subsection (1) is deemed to have been made at the trial held in relation to the proceedings mentioned in that subsection.

R.S., 1985, c. C-46, s. 709; R.S., 1985, c. 27 (1st Supp.), s. 150; 1994, c. 44, s. 72.

Application where witness is ill

710 (1) An application under [paragraph 709\(1\)\(a\)](#) shall be made

(a) to a judge of a superior court of the province in which the proceedings are taken;

(b) to a judge of a county or district court in the territorial division in which the proceedings are taken; or

(c) to a provincial court judge, where

(i) at the time the application is made, the accused is before a provincial court judge presiding over a preliminary inquiry under Part XVIII, or

(ii) the accused or defendant is to be tried by a provincial court judge acting under Part XIX or XXVII.

Evidence of medical practitioner

(2) An application under [subparagraph 709\(1\)\(a\)\(i\)](#) may be granted on the evidence of a registered medical practitioner.

Admitting evidence of witness who is ill

711 Where the evidence of a witness mentioned in [paragraph 709\(1\)\(a\)](#) is taken by a commissioner appointed under [section 710](#), it may be admitted in evidence in the proceedings if

- (a)** it is proved by oral evidence or by affidavit that the witness is unable to attend by reason of death or physical disability arising out of illness or some other good and sufficient cause;
- (b)** the transcript of the evidence is signed by the commissioner by or before whom it purports to have been taken; and
- (c)** it is proved to the satisfaction of the court that reasonable notice of the time for taking the evidence was given to the other party, and that the accused or his counsel, or the prosecutor or his counsel, as the case may be, had or might have had full opportunity to cross-examine the witness.

R.S., 1985, c. C-46, s. 711; R.S., 1985, c. 27 (1st Supp.), s. 152; 1994, c. 44, s. 74; 1997, c. 18, s. 102.

Application for order when witness out of Canada

712 (1) An application that is made under [paragraph 709\(1\)\(b\)](#) shall be made

- (a)** to a judge of a superior court of criminal jurisdiction or of a court of criminal jurisdiction before which the accused is to be tried; or
- (b)** to a provincial court judge, where the accused or defendant is to be tried by a provincial court judge acting under Part XIX or XXVII.

Admitting evidence of witness out of Canada

(2) Where the evidence of a witness is taken by a commissioner appointed under this section, it may be admitted in evidence in the proceedings.

(3) *[Repealed, R.S., 1985, c. 27 (1st Supp.), s. 153]*

R.S., 1985, c. C-46, s. 712; R.S., 1985, c. 27 (1st Supp.), s. 153; 1994, c. 44, s. 75; 1997, c. 18, s. 103.

Providing for presence of accused counsel

713 (1) A judge or provincial court judge who appoints a commissioner may make provision in the order to enable an accused to be present or represented by counsel when the evidence is taken, but failure of the accused to be present or to be represented by counsel in accordance with the order does not prevent the admission of the evidence in the proceedings if the evidence has otherwise been taken in accordance with the order and with this Part.

Return of evidence

(2) An order for the taking of evidence by commission shall indicate the officer of the court to whom the evidence that is taken under the order shall be returned.

Evidence not excluded

713.1 Evidence taken by a commissioner appointed under [section 712](#) shall not be excluded by reason only that it would have been taken differently in Canada, provided that the process used to take the evidence is consistent with the law of the country where it was taken and that the process used to take the evidence was not contrary to the principles of fundamental justice.

1994, c. 44, s. 76.

Rules and practice same as in civil cases

714 Except where otherwise provided by this Part or by rules of court, the practice and procedure in connection with the appointment of commissioners under this Part, the taking of evidence by commissioners, the certifying and return thereof and the use of the evidence in the proceedings shall, as far as possible, be the same as those that govern like matters in civil proceedings in the superior court of the province in which the proceedings are taken.

R.S., c. C-34, s. 642.

Video and Audio Evidence

Audioconference and videoconference — witness in Canada

714.1 A court may order that a witness in Canada give evidence by audioconference or videoconference, if the court is of the opinion that it would be appropriate having regard to all the circumstances, including

- (a) the location and personal circumstances of the witness;
- (b) the costs that would be incurred if the witness were to appear in person;
- (c) the nature of the witness' anticipated evidence;
- (d) the suitability of the location from where the witness will give evidence;
- (e) the accused's right to a fair and public hearing;
- (f) the nature and seriousness of the offence; and
- (g) any potential prejudice to the parties caused by the fact that the witness would not be seen by them, if the court were to order the evidence to be given by audioconference.

1999, c. 18, s. 95; [2019, c. 25, s. 290](#); [2022, c. 17, s. 44\(E\)](#).

Videoconference — witness outside Canada

714.2 (1) A court shall receive evidence given by a witness outside Canada by videoconference, unless one of the parties satisfies the court that the reception of such testimony would be contrary to the principles of fundamental justice.

Notice

(2) A party who wishes to call a witness to give evidence under subsection (1) shall give notice to the court before which the evidence is to be given and the other parties of their intention to do so not less than 10 days before the witness is scheduled to testify.

1999, c. 18, s. 95; [2019, c. 25, s. 290](#).

Audioconference — witness outside Canada

714.3 The court may receive evidence given by a witness outside Canada by audioconference, if the court is of the opinion that it would be appropriate having regard to all the circumstances, including those set out in [paragraphs 714.1\(a\) to \(g\)](#).

1999, c. 18, s. 95; [2019, c. 25, s. 290](#).

Reasons

714.4 If the court does not make an order under [section 714.1](#) or does not receive evidence under [section 714.2](#) or [714.3](#), it shall include in the record a statement of the reasons for not doing so.

1999, c. 18, s. 95; [2019, c. 25, s. 290](#).

Cessation

714.41 The court may, at any time, cease the use of the technological means referred to in [section 714.1](#), [714.2](#) or [714.3](#) and take any measure that the court considers appropriate in the circumstances to have the witness give evidence.

[2019, c. 25, s. 290](#).

Oath or affirmation

714.5 The evidence referred to in [section 714.2](#) or [714.3](#), that is given by a witness who is outside of Canada, shall be given

- (a)** under oath or affirmation in accordance with Canadian law;
- (b)** under oath or affirmation in accordance with the law in the place where the witness is physically present; or
- (c)** in any other manner that demonstrates that the witness understands that they must tell the truth.

1999, c. 18, s. 95; [2019, c. 25, s. 290](#).

Other laws about witnesses to apply

714.6 When a witness who is outside Canada gives evidence under [section 714.2](#) or [714.3](#), the evidence is deemed to be given in Canada, and given under oath or affirmation in accordance with Canadian law, for the purposes of the laws relating to evidence, procedure, perjury and contempt of court.

1999, c. 18, s. 95; [2019, c. 25, s. 290](#).

Costs of technology

714.7 Unless the court orders otherwise, a party who calls a witness to give evidence by means of the technology referred to in [section 714.1](#), [714.2](#) or [714.3](#) shall pay any costs associated with the use of the technology.

1999, c. 18, s. 95; [2019, c. 25, s. 290](#).

Consent

714.8 Nothing in [sections 714.1](#) to [714.7](#) is to be construed as preventing a court from receiving evidence by audioconference or videoconference, if the parties so consent.

1999, c. 18, s. 95; [2019, c. 25, s. 290](#).

Evidence Previously Taken

Evidence at preliminary inquiry may be read at trial in certain cases

715 (1) Where, at the trial of an accused, a person whose evidence was given at a previous trial on the same charge, or whose evidence was taken in the investigation of the charge against the accused or on the preliminary inquiry into the charge, refuses to be sworn or to give evidence, or if facts are proved on oath from which it can be inferred reasonably that the person

- (a) is dead,
- (b) has since become and is insane,
- (c) is so ill that he is unable to travel or testify, or
- (d) is absent from Canada,

and where it is proved that the evidence was taken in the presence of the accused, it may be admitted as evidence in the proceedings without further proof, unless the accused proves that the accused did not have full opportunity to cross-examine the witness.

Admission of evidence

(2) Evidence that has been taken on the preliminary inquiry or other investigation of a charge against an accused may be admitted as evidence in the prosecution of the accused for any other offence on the same proof and in the same manner in all respects, as it might, according to law, be admitted as evidence in the prosecution of the offence with which the accused was charged when the evidence was taken.

Admission of evidence

(2.1) Despite subsections (1) and (2), evidence that has been taken at a preliminary inquiry in the absence of the accused may be admitted as evidence for the purposes referred to in those subsections if the accused was absent further to the permission of a justice granted under [paragraph 537\(1\)\(j.1\)](#).

Absconding accused deemed present

(3) For the purposes of this section, where evidence was taken at a previous trial or preliminary hearing or other proceeding in respect of an accused in the absence of the accused, who was absent by reason of having absconded, the accused is deemed to have been present during the taking of the evidence and to have had full opportunity to cross-examine the witness.

Exception

(4) Subsections (1) to (3) do not apply in respect of evidence received under [subsection 540\(7\)](#).

R.S., 1985, c. C-46, s. 715; 1994, c. 44, s. 77; 1997, c. 18, s. 105; [2002, c. 13, s. 72](#); [2008, c. 18, s. 34](#).

Transcript of evidence

715.01 (1) Despite [section 715](#), the transcript of testimony given by a *police officer*, as defined in [section 183](#), in the presence of an accused during a *voir dire* or preliminary inquiry held in relation to the accused's trial may be received in evidence at that trial.

Notice of intention to produce evidence

(2) No transcript is to be received in evidence unless the party intending to produce it has given to the party against whom it is intended to be produced reasonable notice of that intention together with a copy of the transcript.

Attendance of police officer

(3) The court may require the attendance of the police officer for the purposes of examination or cross-examination, as the case may be.

Admission of evidence

(4) Despite subsection (1), evidence that has been taken at a preliminary inquiry in the absence of an accused may be received in evidence for the purposes referred to in that subsection if the accused's absence was authorized by a justice under [paragraph 537\(1\)\(j.1\)](#).

Absconding accused deemed present

(5) For the purposes of this section, if evidence was taken during a *voir dire* or preliminary inquiry in the absence of an accused, who was absent by reason of having absconded, the accused is deemed to have been present during the taking of the evidence and to have had full opportunity to cross-examine the witness.

Exception

(6) This section does not apply to any evidence received under [subsection 540\(7\)](#).
[2019, c. 25, s. 291](#).

Video-recorded Evidence

Evidence of victim or witness under 18

715.1 (1) In any proceeding against an accused in which a victim or other witness was under the age of eighteen years at the time the offence is alleged to have been committed, a video recording made within a reasonable time after the alleged offence, in which the victim or witness describes the acts complained of, is admissible in evidence if the victim or witness, while testifying, adopts the contents of the video recording, unless the presiding judge or justice is of the opinion that admission of the video recording in evidence would interfere with the proper administration of justice.

Order prohibiting use

(2) The presiding judge or justice may prohibit any other use of a video recording referred to in subsection (1).

R.S., 1985, c. 19 (3rd Supp.), s. 16; 1997, c. 16, s. 7; [2005, c. 32, s. 23](#).

Evidence of victim or witness who has a disability

715.2 (1) In any proceeding against an accused in which a victim or other witness is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, a video recording made within a reasonable time after the alleged offence, in which the victim or witness describes the acts complained of, is admissible in evidence if the victim or witness, while testifying, adopts the contents of the video recording, unless the presiding judge or justice is of the opinion that admission of the video recording in evidence would interfere with the proper administration of justice.

Order prohibiting use

(2) The presiding judge or justice may prohibit any other use of a video recording referred to in subsection (1).

1998, c. 9, s. 8; [2005, c. 32, s. 23](#).

PART XXII.01

Remote Attendance by Certain Persons

Principles

Attendance

715.21 Except as otherwise provided in this Act, a person who appears at, participates in or presides at a proceeding shall do so in person.

[2019, c. 25, s. 292](#); [2022, c. 17, s. 45\(E\)](#).

Provisions providing for audioconference or videoconference

715.22 The purpose of the provisions of this Act that allow a person to appear at, participate in or preside at a proceeding by audioconference or videoconference, in accordance with the rules of court, is to serve the proper administration of justice, including by ensuring fair and efficient proceedings and enhancing access to justice.

[2019, c. 25, s. 292.](#)

General

Reasons

715.221 If the court denies a request respecting a person's appearance or participation by audioconference or videoconference under this Part, it shall include in the record a statement of the reasons for the denial.

[2022, c. 17, s. 46.](#)

Cessation

715.222 If the court allows or requires a person's appearance or participation by audioconference or videoconference under this Part, it may, at any time, cease the use of those technological means and take any measure that it considers appropriate in the circumstances to have the person appear at or participate in the proceedings.

[2022, c. 17, s. 46.](#)

Accused and Offenders

Considerations — appearance by audioconference or videoconference

715.23 Before making a determination to allow or require an accused or offender to appear by audioconference or videoconference under any of [sections 715.231 to 715.241](#), the court must be of the opinion that the appearance by those means would be appropriate having regard to all the circumstances, including

- (a) the location and personal circumstances of the accused or offender;
- (b) the costs that would be incurred if the accused or offender were to appear in person;
- (c) the suitability of the location from where the accused or offender will appear;
- (d) the accused's or offender's right to a fair and public hearing; and
- (e) the nature and seriousness of the offence.

[2019, c. 25, s. 292;](#) [2022, c. 17, s. 46.](#)

Preliminary inquiry

715.231 The court may, with the consent of the prosecutor and the accused, allow an accused to appear by videoconference at the preliminary inquiry.

[2022, c. 17, s. 46.](#)

Trial — summary conviction offence

715.232 The court may allow an accused to appear by videoconference at a trial for a summary conviction offence

(a) if the accused is not in custody, with the consent of the accused and the prosecutor; and

(b) if the accused is in custody, with the consent of the accused.

[2022, c. 17, s. 46.](#)

Trial — indictable offence

715.233 The court may, with the consent of the prosecutor and the accused, allow an accused to appear by videoconference at a trial for an indictable offence. However, an accused must not appear by videoconference during a jury trial when evidence is being presented to the jury.

[2022, c. 17, s. 46.](#)

Plea

715.234 (1) The court may, with the consent of the prosecutor and the accused, allow an accused to appear by audioconference or videoconference for the purpose of making a plea.

Limitation

(2) The court may allow the accused to appear by audioconference only if it is satisfied that

(a) videoconferencing is not readily available; and

(b) the appearance by audioconference would permit the court to inquire into the conditions for accepting a plea of guilty under [subsection 606\(1.1\)](#) despite the fact that the court would not be able to see the accused.

[2022, c. 17, s. 46.](#)

Sentencing

715.235 (1) The court may, with the consent of the prosecutor and the offender, allow an offender to appear by audioconference or videoconference for sentencing purposes.

Limitation

(2) The court may allow the offender to appear by audioconference only if videoconferencing is not readily available.

[2022, c. 17, s. 46.](#)

Proceedings not expressly provided for

715.24 In any proceedings in respect of which this Act does not expressly authorize the court to allow an accused or offender to appear by audioconference or videoconference or

limit or prohibit their appearance by those means, the court may allow the accused or offender to appear by either of those means.

[2019, c. 25, s. 292](#); [2022, c. 17, s. 46](#).

Accused in custody — no evidence taken

715.241 Despite [sections 715.231 to 715.233](#), the court may allow or require an accused who is in custody and who has access to legal advice to appear by videoconference in any proceeding referred to in those sections, other than a part in which the evidence of a witness is taken.

[2022, c. 17, s. 46](#).

Conditions — no access to legal advice

715.242 Despite anything in this Act, before allowing an accused or offender who does not have access to legal advice during the proceedings to appear by audioconference or videoconference, the court must be satisfied that they will be able to understand the proceedings and that any decisions made by them during the proceedings will be voluntary.

[2022, c. 17, s. 46](#).

Communication with counsel

715.243 An accused or offender who appears by audioconference or videoconference must be given the opportunity to communicate privately with counsel if they are represented by counsel.

[2022, c. 17, s. 46](#).

Participants

Definition of *participant*

715.25 (1) In this section, ***participant*** means any person, other than an accused, an offender, a witness, a juror, a judge or a justice, who may participate in a proceeding.

Participation by audioconference or videoconference

(2) Except as otherwise provided in this Act, the court may allow a participant to participate in a proceeding by audioconference or videoconference, if the court is of the opinion that it would be appropriate having regard to all the circumstances, including

- (a)** the location and personal circumstances of the participant;
- (b)** the costs that would be incurred if the participant were to participate in person;
- (c)** the nature of the participation;
- (d)** the suitability of the location from where the participant will participate;
- (e)** the accused's right to a fair and public hearing; and
- (f)** the nature and seriousness of the offence.

(3) [Repealed, 2022, c. 17, s. 47]

(4) [Repealed, 2022, c. 17, s. 47]

Costs

(5) Unless the court orders otherwise, a party who has a participant participate by audioconference or videoconference shall pay any costs associated with the use of that technology.

2019, c. 25, s. 292; 2022, c. 17, s. 47.

Judge or Justice

Presiding by audioconference or videoconference

715.26 (1) Except as otherwise provided in this Act, the judge or justice may preside at the proceeding by audioconference or videoconference, if the judge or justice considers it necessary having regard to all the circumstances, including

- (a) the accused's right to a fair and public hearing;
- (b) the nature of the witness' anticipated evidence;
- (c) the nature and seriousness of the offence; and
- (d) the suitability of the location from where the judge or justice will preside.

Reasons

(2) The judge or justice shall include in the record a statement of the judge or justice's reasons for the decision to preside at the proceeding by audioconference or videoconference.

Cessation

(3) The judge or justice may, at any time, cease the use of the technological means referred to in subsection (1) and take any measure that the judge or justice considers appropriate in the circumstances to preside at the proceeding.

2019, c. 25, s. 292.

Prospective Jurors

Definition of *prospective juror*

715.27 (1) In this section, *prospective juror* means a person who has been summoned as a juror and who has not yet been sworn in accordance with Part XX.

Participation by videoconference

(2) The court may, with the consent of the prosecutor and the accused, allow or require any or all prospective jurors to participate in the jury selection process by

videoconference if the court is of the opinion that it would be appropriate having regard to all the circumstances, including

- (a) the challenges related to the in-person participation of prospective jurors;
- (b) the nature of the participation;
- (c) the suitability of the location from where the prospective jurors will participate;
- (d) the privacy and security of the prospective jurors;
- (e) the accused's right to a fair and public hearing; and
- (f) the nature and seriousness of the offence.

Location provided

(3) The court may require prospective jurors to participate by videoconference only if the court has approved a location that will be provided for their participation where the technology for videoconferencing is available.

No location provided

(4) The court shall give prospective jurors the option to participate in person if it allows for their participation by videoconference but no location approved by the court is provided for their participation by those means.

[2022, c. 17, s. 48.](#)

PART XXII.1

Remediation Agreements

Definitions

715.3 (1) The following definitions apply in this Part.

court means a superior court of criminal jurisdiction but does not include a court of appeal. (*tribunal*)

offence means any offence listed in the schedule to this Part. (*infraction*)

organization has the same meaning as in [section 2](#) but does not include a public body, trade union or municipality. (*organisation*)

remediation agreement means an agreement, between an organization accused of having committed an offence and a prosecutor, to stay any proceedings related to that offence if the organization complies with the terms of the agreement. (*accord de réparation*)

victim has the same meaning as in [section 2](#) but, with respect to an offence under [section 3](#) or [4](#) of the [Corruption of Foreign Public Officials Act](#), it includes any person outside Canada. (*victime*)

Acting on victim's behalf

(2) For the purposes of this Part, a third party not referred to in [section 2.2](#) may also act on a victim's behalf when authorized to do so by the court, if the victim requests it or the prosecutor deems it appropriate.

[2018, c. 12, s. 404.](#)

Purpose

715.31 The purpose of this Part is to establish a remediation agreement regime that is applicable to organizations alleged to have committed an offence and that has the following objectives:

- (a)** to denounce an organization's wrongdoing and the harm that the wrongdoing has caused to victims or to the community;
- (b)** to hold the organization accountable for its wrongdoing through effective, proportionate and dissuasive penalties;
- (c)** to contribute to respect for the law by imposing an obligation on the organization to put in place corrective measures and promote a compliance culture;
- (d)** to encourage voluntary disclosure of the wrongdoing;
- (e)** to provide reparations for harm done to victims or to the community; and
- (f)** to reduce the negative consequences of the wrongdoing for persons — employees, customers, pensioners and others — who did not engage in the wrongdoing, while holding responsible those individuals who did engage in that wrongdoing.

[2018, c. 12, s. 404.](#)

Conditions for remediation agreement

715.32 (1) The prosecutor may enter into negotiations for a remediation agreement with an organization alleged to have committed an offence if the following conditions are met:

- (a)** the prosecutor is of the opinion that there is a reasonable prospect of conviction with respect to the offence;
- (b)** the prosecutor is of the opinion that the act or omission that forms the basis of the offence did not cause and was not likely to have caused serious bodily harm or death, or injury to national defence or national security, and was not committed for the benefit of, at the direction of, or in association with, a criminal organization or terrorist group;
- (c)** the prosecutor is of the opinion that negotiating the agreement is in the public interest and appropriate in the circumstances; and
- (d)** the Attorney General has consented to the negotiation of the agreement.

Factors to consider

(2) For the purposes of paragraph (1)(c), the prosecutor must consider the following factors:

- (a)** the circumstances in which the act or omission that forms the basis of the offence was brought to the attention of investigative authorities;
- (b)** the nature and gravity of the act or omission and its impact on any victim;
- (c)** the degree of involvement of senior officers of the organization in the act or omission;
- (d)** whether the organization has taken disciplinary action, including termination of employment, against any person who was involved in the act or omission;
- (e)** whether the organization has made reparations or taken other measures to remedy the harm caused by the act or omission and to prevent the commission of similar acts or omissions;
- (f)** whether the organization has identified or expressed a willingness to identify any person involved in wrongdoing related to the act or omission;
- (g)** whether the organization — or any of its representatives — was convicted of an offence or sanctioned by a regulatory body, or whether it entered into a previous remediation agreement or other settlement, in Canada or elsewhere, for similar acts or omissions;
- (h)** whether the organization — or any of its representatives — is alleged to have committed any other offences, including those not listed in the schedule to this Part; and
- (i)** any other factor that the prosecutor considers relevant.

Factors not to consider

(3) Despite paragraph (2)(i), if the organization is alleged to have committed an offence under [section 3](#) or [4](#) of the *Corruption of Foreign Public Officials Act*, the prosecutor must not consider the national economic interest, the potential effect on relations with a state other than Canada or the identity of the organization or individual involved.

[2018, c. 12, s. 404.](#)

Notice to organization — invitation to negotiate

715.33 (1) If the prosecutor wishes to negotiate a remediation agreement, they must give the organization written notice of the offer to enter into negotiations and the notice must include

- (a)** a summary description of the offence to which the agreement would apply;
- (b)** an indication of the voluntary nature of the negotiation process;
- (c)** an indication of the legal effects of the agreement;
- (d)** an indication that, by agreeing to the terms of this notice, the organization explicitly waives the inclusion of the negotiation period and the period during which

the agreement is in force in any assessment of the reasonableness of the delay between the day on which the charge is laid and the end of trial;

(e) an indication that negotiations must be carried out in good faith and that the organization must provide all information requested by the prosecutor that the organization is aware of or can obtain through reasonable efforts, including information enabling the identification of any person involved in the act or omission that forms the basis of the offence or any wrongdoing related to that act or omission;

(f) an indication of how the information disclosed by the organization during the negotiations may be used, subject to subsection (2);

(g) a warning that knowingly making false or misleading statements or knowingly providing false or misleading information during the negotiations may lead to the recommencement of proceedings or prosecution for obstruction of justice;

(h) an indication that either party may withdraw from the negotiations by providing written notice to the other party;

(i) an indication that reasonable efforts must be made by both parties to identify any victim as soon as practicable; and

(j) a deadline to accept the offer to negotiate according to the terms of the notice.

Admissions not admissible in evidence

(2) No admission, confession or statement accepting responsibility for a given act or omission made by the organization during the negotiations is admissible in evidence against that organization in any civil or criminal proceedings related to that act or omission, except those contained in the statement of facts or admission of responsibility referred to in [paragraphs 715.34\(1\)\(a\) and \(b\)](#), if the parties reach an agreement and it is approved by the court.

[2018, c. 12, s. 404.](#)

Mandatory contents of agreement

715.34 (1) A remediation agreement must include

(a) a statement of facts related to the offence that the organization is alleged to have committed and an undertaking by the organization not to make or condone any public statement that contradicts those facts;

(b) the organization's admission of responsibility for the act or omission that forms the basis of the offence;

(c) an indication of the obligation for the organization to provide any other information that will assist in identifying any person involved in the act or omission, or any wrongdoing related to that act or omission, that the organization becomes aware of, or can obtain through reasonable efforts, after the agreement has been entered into;

(d) an indication of the obligation for the organization to cooperate in any investigation, prosecution or other proceeding in Canada — or elsewhere if the prosecutor considers it appropriate — resulting from the act or omission, including by providing information or testimony;

(e) with respect to any property, benefit or advantage identified in the agreement that was obtained or derived directly or indirectly from the act or omission, an obligation for the organization to

(i) forfeit it to Her Majesty in right of Canada, to be disposed of in accordance with [paragraph 4\(1\)\(b.2\)](#) of the *Seized Property Management Act*,

(ii) forfeit it to Her Majesty in right of a province, to be disposed of as the Attorney General directs, or

(iii) otherwise deal with it, as the prosecutor directs;

(f) an indication of the obligation for the organization to pay a penalty to the Receiver General or to the treasurer of a province, as the case may be, for each offence to which the agreement applies, the amount to be paid and any other terms respecting payment;

(g) an indication of any reparations, including restitution consistent with [paragraph 738\(1\)\(a\)](#) or [\(b\)](#), that the organization is required to make to a victim or a statement by the prosecutor of the reasons why reparations to a victim are not appropriate in the circumstances and an indication of any measure required in lieu of reparations to a victim;

(h) an indication of the obligation for the organization to pay a victim surcharge for each offence to which the agreement applies, other than an offence under [section 3](#) or [4](#) of the *Corruption of Foreign Public Officials Act*, the amount to be paid and any other terms respecting payment;

(i) an indication of the obligation for the organization to report to the prosecutor on the implementation of the agreement and an indication of the manner in which the report is to be made and any other terms respecting reporting;

(j) an indication of the legal effects of the agreement;

(k) an acknowledgement by the organization that the agreement has been made in good faith and that the information it has provided during the negotiation is accurate and complete and a commitment that it will continue to provide accurate and complete information while the agreement is in force;

(l) an indication of the use that can be made of information obtained as a result of the agreement, subject to subsection (2);

(m) a warning that the breach of any term of the agreement may lead to an application by the prosecutor for termination of the agreement and a recommencement of proceedings;

(n) an indication of the obligation for the organization not to deduct, for income tax purposes, the costs of any reparations or other measures referred to in paragraph (g)

or any other costs incurred to fulfil the terms of the agreement;

(o) a notice of the prosecutor's right to vary or terminate the agreement with the approval of the court; and

(p) an indication of the deadline by which the organization must meet the terms of the agreement.

Admissions not admissible in evidence

(2) No admission, confession or statement accepting responsibility for a given act or omission made by the organization as a result of the agreement is admissible in evidence against that organization in any civil or criminal proceedings related to that act or omission, except those contained in the statement of facts and admission of responsibility referred to in paragraphs (1)(a) and (b), if the agreement is approved by the court.

Optional content of agreement

(3) A remediation agreement may include, among other things,

(a) an indication of the obligation for the organization to establish, implement or enhance compliance measures to address any deficiencies in the organization's policies, standards or procedures — including those related to internal control procedures and employee training — that may have allowed the act or omission;

(b) an indication of the obligation for the organization to reimburse the prosecutor for any costs identified in the agreement that are related to its administration and that have or will be incurred by the prosecutor; and

(c) an indication of the fact that an independent monitor has been appointed, as selected with the prosecutor's approval, to verify and report to the prosecutor on the organization's compliance with the obligation referred to in paragraph (a), or any other obligation in the agreement identified by the prosecutor, as well as an indication of the organization's obligations with respect to that monitor, including the obligations to cooperate with the monitor and pay the monitor's costs.

[2018, c. 12, s. 404](#); [2019, c. 29, s. 121\(F\)](#).

Independent monitor — conflict of interest

715.35 A candidate for appointment as an independent monitor must notify the prosecutor in writing of any previous or ongoing relationship, in particular with the organization or any of its representatives, that may have a real or perceived impact on the candidate's ability to provide an independent verification.

[2018, c. 12, s. 404](#).

Duty to inform victims

715.36 (1) After an organization has accepted the offer to negotiate according to the terms of the notice referred to in [section 715.33](#), the prosecutor must take reasonable steps to inform any victim, or any third party that is acting on the victim's behalf, that a remediation agreement may be entered into.

Interpretation

(2) The duty to inform any victim is to be construed and applied in a manner that is reasonable in the circumstances and not likely to interfere with the proper administration of justice, including by causing interference with prosecutorial discretion or compromising, hindering or causing excessive delay to the negotiation of an agreement or its conclusion.

Reasons

(3) If the prosecutor elects not to inform a victim or third party under subsection (1), they must provide the court, when applying for approval of the agreement, with a statement of the reasons why it was not appropriate to do so in the circumstances.

[2018, c. 12, s. 404.](#)

Application for court approval

715.37 (1) When the prosecutor and the organization have agreed to the terms of a remediation agreement, the prosecutor must apply to the court in writing for an order approving the agreement.

Coming into force

(2) The coming into force of the agreement is subject to the approval of the court.

Consideration of victims

(3) To determine whether to approve the agreement, the court hearing an application must consider

- (a)** any reparations, statement and other measure referred to in [paragraph 715.34\(1\)\(g\)](#);
- (b)** any statement made by the prosecutor under [subsection 715.36\(3\)](#);
- (c)** any victim or community impact statement presented to the court; and
- (d)** any victim surcharge referred to in [paragraph 715.34\(1\)\(h\)](#).

Victim or community impact statement

(4) For the purpose of paragraph (3)(c), the rules provided for in [sections 722 to 722.2](#) apply, other than [subsection 722\(6\)](#), with any necessary modifications and, in particular,

- (a)** a victim or community impact statement, or any other evidence concerning any victim, must be considered when determining whether to approve the agreement under subsection (6);
- (b)** the inquiry referred to in [subsection 722\(2\)](#) must be made at the hearing of the application; and
- (c)** the duty of the clerk under [section 722.1](#) or [subsection 722.2\(5\)](#) is deemed to be the duty of the prosecutor to make reasonable efforts to provide a copy of the

statement to the organization or counsel for the organization as soon as feasible after the prosecutor obtains it.

Victim surcharge

(5) For the purpose of [paragraph 715.34\(1\)\(h\)](#), the amount of the victim surcharge is 30% of any penalty referred to in [paragraph 715.34\(1\)\(f\)](#), or any other percentage that the prosecutor deems appropriate in the circumstances, and is payable to the treasurer of the province in which the application for approval referred to in [section 715.37](#) is made.

Approval order

(6) The court must, by order, approve the agreement if it is satisfied that

- (a)** the organization is charged with an offence to which the agreement applies;
- (b)** the agreement is in the public interest; and
- (c)** the terms of the agreement are fair, reasonable and proportionate to the gravity of the offence.

Stay of proceedings

(7) As soon as practicable after the court approves the agreement, the prosecutor must direct the clerk or other proper officer of the court to make an entry on the record that the proceedings against the organization in respect of any offence to which the agreement applies are stayed by that direction and that entry must be made immediately, after which time the proceedings shall be stayed accordingly.

Other proceedings

(8) No other proceedings may be initiated against the organization for the same offence while the agreement is in force.

Limitation period

(9) The running of a limitation period in respect of any offence to which the agreement applies is suspended while the agreement is in force.

[2018, c. 12, s. 404.](#)

Variation order

715.38 On application by the prosecutor, the court must, by order, approve any modification to a remediation agreement if the court is satisfied that the agreement continues to meet the conditions set out in [subsection 715.37\(6\)](#). On approval, the modification is deemed to form part of the agreement.

[2018, c. 12, s. 404.](#)

Termination order

715.39 (1) On application by the prosecutor, the court must, by order, terminate the agreement if it is satisfied that the organization has breached a term of the agreement.

Recommendation of proceedings

(2) As soon as the order is made, proceedings stayed in accordance with [subsection 715.37\(7\)](#) may be recommenced, without a new information or a new indictment, as the case may be, by the prosecutor giving notice of the recommencement to the clerk of the court in which the stay of the proceedings was entered.

Stay of proceedings

(3) If no notice is given within one year after the order is made under subsection (1), or before the expiry of the time within which the proceedings could have been commenced, whichever is earlier, the proceedings are deemed never to have been commenced.

[2018, c. 12, s. 404.](#)

Order declaring successful completion

715.4 (1) On application by the prosecutor, the court must, by order, declare that the terms of the agreement were met if it is satisfied that the organization has complied with the agreement.

Stay of proceedings

(2) The order stays the proceedings against the organization for any offence to which the agreement applies, the proceedings are deemed never to have been commenced and no other proceedings may be initiated against the organization for the same offence.

[2018, c. 12, s. 404.](#)

Deadline

715.41 (1) The prosecutor must, as soon as practicable after the deadline referred to in [paragraph 715.34\(1\)\(p\)](#), apply to the court in writing for a variation order under [section 715.38](#), including to extend the deadline, an order terminating the agreement under [section 715.39](#) or an order under [section 715.4](#) declaring that its terms were met and the court may issue any of these orders as it deems appropriate.

Deeming

(2) The agreement is deemed to remain in force until a court issues an order terminating it or declaring that its terms were met.

[2018, c. 12, s. 404.](#)

Publication

715.42 (1) Subject to subsection (2), the following must be published by the court as soon as practicable:

- (a)** the remediation agreement approved by the court;
- (b)** an order made under any of [sections 715.37](#) to [715.41](#) and the reasons for that order or the reasons for the decision not to make that order; and

(c) a decision made under subsection (2) or (5) and the reasons for that decision.

Decision not to publish

(2) The court may decide not to publish the agreement or any order or reasons referred to in paragraph (1)(b), in whole or in part, if it is satisfied that the non-publication is necessary for the proper administration of justice.

Factors to be considered

(3) To decide whether the proper administration of justice requires making the decision referred to in subsection (2), the court must consider

(a) society's interest in encouraging the reporting of offences and the participation of victims in the criminal justice process;

(b) whether it is necessary to protect the identity of any victims, any person not engaged in the wrongdoing and any person who brought the wrongdoing to the attention of investigative authorities;

(c) the prevention of any adverse effect to any ongoing investigation or prosecution;

(d) whether effective alternatives to the decision referred to in subsection (2) are available in the circumstances;

(e) the salutary and deleterious effects of making the decision referred to in subsection (2); and

(f) any other factor that the court considers relevant.

Conditions

(4) The court may make its decision subject to any conditions that it considers appropriate, including a condition related to the duration of non-publication.

Review of decision

(5) On application by any person, the court must review the decision made under subsection (2) to determine whether the non-publication continues to be necessary for the proper administration of justice. If the court is satisfied that the non-publication is no longer necessary, it must publish the agreement, order or reasons, as the case may be, in whole or in part, as soon as practicable.

[2018, c. 12, s. 404](#), c. 27, s. 686.

Regulations

715.43 (1) On the recommendation of the Minister of Justice, the Governor in Council may make regulations generally for the purposes of carrying out this Part, including regulations respecting

(a) the form of the remediation agreement; and

(b) the verification of compliance by an independent monitor, including

- (i) the qualifications for monitors,
- (ii) the process to select a monitor,
- (iii) the form and content of a conflict of interest notification, and
- (iv) reporting requirements.

Amendment of schedule

(2) On the recommendation of the Minister of Justice, the Governor in Council may, by order, amend the schedule by adding or deleting any offence to which a remediation agreement may apply.

Deleting offence

(3) If the Governor in Council orders the deletion of an offence from the schedule to this Part, this Part continues to apply to an organization alleged to have committed that offence if a notice referred to in [section 715.33](#) respecting that offence was sent to the organization before the day on which the order comes into force.

[2018, c. 12, s. 404.](#)

PART XXIII

Sentencing

Interpretation

Definitions

716 In this Part,

accused includes a defendant; (*accusé*)

alternative measures means measures other than judicial proceedings under this Act used to deal with a person who is eighteen years of age or over and alleged to have committed an offence; (*mesures de rechange*)

court means

- (a) a superior court of criminal jurisdiction,
- (b) a court of criminal jurisdiction,
- (c) a justice or provincial court judge acting as a summary conviction court under Part XXVII, or
- (d) a court that hears an appeal; (*tribunal*)

fine includes a pecuniary penalty or other sum of money, but does not include restitution. (*amende*)

Alternative Measures

When alternative measures may be used

717 (1) Alternative measures may be used to deal with a person alleged to have committed an offence only if it is not inconsistent with the protection of society and the following conditions are met:

- (a) the measures are part of a program of alternative measures authorized by the Attorney General or the Attorney General's delegate or authorized by a person, or a person within a class of persons, designated by the lieutenant governor in council of a province;
- (b) the person who is considering whether to use the measures is satisfied that they would be appropriate, having regard to the needs of the person alleged to have committed the offence and the interests of society and of the victim;
- (c) the person, having been informed of the alternative measures, fully and freely consents to participate therein;
- (d) the person has, before consenting to participate in the alternative measures, been advised of the right to be represented by counsel;
- (e) the person accepts responsibility for the act or omission that forms the basis of the offence that the person is alleged to have committed;
- (f) there is, in the opinion of the Attorney General or the Attorney General's agent, sufficient evidence to proceed with the prosecution of the offence; and
- (g) the prosecution of the offence is not in any way barred at law.

Restriction on use

(2) Alternative measures shall not be used to deal with a person alleged to have committed an offence if the person

- (a) denies participation or involvement in the commission of the offence; or
- (b) expresses the wish to have any charge against the person dealt with by the court.

Admissions not admissible in evidence

(3) No admission, confession or statement accepting responsibility for a given act or omission made by a person alleged to have committed an offence as a condition of the person being dealt with by alternative measures is admissible in evidence against that person in any civil or criminal proceedings.

No bar to proceedings

(4) The use of alternative measures in respect of a person alleged to have committed an offence is not a bar to proceedings against the person under this Act, but, if a charge is

laid against that person in respect of that offence,

(a) where the court is satisfied on a balance of probabilities that the person has totally complied with the terms and conditions of the alternative measures, the court shall dismiss the charge; and

(b) where the court is satisfied on a balance of probabilities that the person has partially complied with the terms and conditions of the alternative measures, the court may dismiss the charge if, in the opinion of the court, the prosecution of the charge would be unfair, having regard to the circumstances and that person's performance with respect to the alternative measures.

Laying of information, etc.

(5) Subject to subsection (4), nothing in this section shall be construed as preventing any person from laying an information, obtaining the issue or confirmation of any process, or proceeding with the prosecution of any offence, in accordance with law.

R.S., 1985, c. C-46, s. 717; 1995, c. 22, s. 6.

Records of persons dealt with

717.1 Sections 717.2 to 717.4 apply only in respect of persons who have been dealt with by alternative measures, regardless of the degree of their compliance with the terms and conditions of the alternative measures.

1995, c. 22, s. 6.

Police records

717.2 (1) A record relating to any offence alleged to have been committed by a person, including the original or a copy of any fingerprints or photographs of the person, may be kept by any police force responsible for, or participating in, the investigation of the offence.

Disclosure by peace officer

(2) A peace officer may disclose to any person any information in a record kept pursuant to this section that it is necessary to disclose in the conduct of the investigation of an offence.

Idem

(3) A peace officer may disclose to an insurance company any information in a record kept pursuant to this section for the purpose of investigating any claim arising out of an offence committed or alleged to have been committed by the person to whom the record relates.

1995, c. 22, s. 6.

Government records

717.3 (1) A department or agency of any government in Canada may keep records containing information obtained by the department or agency

- (a) for the purposes of an investigation of an offence alleged to have been committed by a person;
- (b) for use in proceedings against a person under this Act; or
- (c) as a result of the use of alternative measures to deal with a person.

Private records

(2) Any person or organization may keep records containing information obtained by the person or organization as a result of the use of alternative measures to deal with a person alleged to have committed an offence.

1995, c. 22, s. 6.

Disclosure of records

717.4 (1) Any record that is kept pursuant to [section 717.2](#) or [717.3](#) may be made available to

- (a) any judge or court for any purpose relating to proceedings relating to offences committed or alleged to have been committed by the person to whom the record relates;
- (b) any peace officer
 - (i) for the purpose of investigating any offence that the person is suspected on reasonable grounds of having committed, or in respect of which the person has been arrested or charged, or
 - (ii) for any purpose related to the administration of the case to which the record relates;
- (c) any member of a department or agency of a government in Canada, or any agent thereof, that is
 - (i) engaged in the administration of alternative measures in respect of the person, or
 - (ii) preparing a report in respect of the person pursuant to this Act; or
- (d) any other person who is deemed, or any person within a class of persons that is deemed, by a judge of a court to have a valid interest in the record, to the extent directed by the judge, if the judge is satisfied that the disclosure is
 - (i) desirable in the public interest for research or statistical purposes, or
 - (ii) desirable in the interest of the proper administration of justice.

Subsequent disclosure

(2) Where a record is made available for inspection to any person under subparagraph (1)(d)(i), that person may subsequently disclose information contained in the record, but

may not disclose the information in any form that would reasonably be expected to identify the person to whom it relates.

Information, copies

(3) Any person to whom a record is authorized to be made available under this section may be given any information contained in the record and may be given a copy of any part of the record.

Evidence

(4) Nothing in this section authorizes the introduction into evidence of any part of a record that would not otherwise be admissible in evidence.

Idem

(5) A record kept pursuant to [section 717.2](#) or [717.3](#) may not be introduced into evidence, except for the purposes set out in [paragraph 721\(3\)\(c\)](#), more than two years after the end of the period for which the person agreed to participate in the alternative measures.

1995, c. 22, s. 6.

Purpose and Principles of Sentencing

Purpose

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a)** to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b)** to deter the offender and other persons from committing offences;
- (c)** to separate offenders from society, where necessary;
- (d)** to assist in rehabilitating offenders;
- (e)** to provide reparations for harm done to victims or to the community; and
- (f)** to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

R.S., 1985, c. C-46, s. 718; R.S., 1985, c. 27 (1st Supp.), s. 155; 1995, c. 22, s. 6; [2015, c. 13, s. 23](#).

Objectives — offences against children

718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

[2005, c. 32, s. 24](#).

Objectives — offence against peace officer or other justice system participant

718.02 When a court imposes a sentence for an offence under [subsection 270\(1\)](#), [section 270.01](#) or [270.02](#) or [paragraph 423.1\(1\)\(b\)](#), the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

[2009, c. 22, s. 18.](#)

Objectives — offence against certain animals

718.03 When a court imposes a sentence for an offence under [subsection 445.01\(1\)](#), the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

[2015, c. 34, s. 4.](#)

Objectives — offence against vulnerable person

718.04 When a court imposes a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances — including because the person is Aboriginal and female — the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

[2019, c. 25, s. 292.1.](#)

Fundamental principle

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

R.S., 1985, c. 27 (1st Supp.), s. 156; 1995, c. 22, s. 6.

Other sentencing principles

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

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's intimate partner or a member of the victim or the offender's family,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(ii.2) evidence that the offender involved a person under the age of 18 years in the commission of the offence,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,

(iii.2) evidence that the offence was committed against a person who, in the performance of their duties and functions, was providing health services, including personal care services,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization,

(v) evidence that the offence was a terrorism offence,

(vi) evidence that the offence was committed while the offender was subject to a conditional sentence order made under [section 742.1](#) or released on parole, statutory release or unescorted temporary absence under the [Corrections and Conditional Release Act](#), and

(vii) evidence that the commission of the offence had the effect of impeding another person from obtaining health services, including personal care services,

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

1995, c. 22, s. 6; 1997, c. 23, s. 17; 2000, c. 12, s. 95; [2001, c. 32, s. 44\(F\)](#), c. 41, s. 20; [2005, c. 32, s. 25](#); [2012, c. 29, s. 2](#); [2015, c. 13, s. 24](#), c. 23, s. 16; [2017, c. 13, s. 4](#); [2019, c. 25, s. 293](#); [2021, c. 27, s. 5](#); [2024, c. 17, s. 374](#).

Additional consideration — increased vulnerability

718.201 A court that imposes a sentence in respect of an offence that involved the abuse of an intimate partner shall consider the increased vulnerability of female persons who are victims, giving particular attention to the circumstances of Aboriginal female victims.

[2019, c. 25, s. 293.1](#).

Organizations

Additional factors

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

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

2003, c. 21, s. 14.

Punishment Generally

Degrees of punishment

718.3 (1) Where an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence.

Discretion respecting punishment

(2) Where an enactment prescribes a punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence, but no punishment is a minimum punishment unless it is declared to be a minimum punishment.

Imprisonment in default where term not specified

(3) Where an accused is convicted of an offence punishable with both fine and imprisonment and a term of imprisonment in default of payment of the fine is not specified in the enactment that prescribes the punishment to be imposed, the imprisonment that may be imposed in default of payment shall not exceed the term of imprisonment that is prescribed in respect of the offence.

Cumulative punishments

(4) The court that sentences an accused shall consider directing

- (a)** that the term of imprisonment that it imposes be served consecutively to a sentence of imprisonment to which the accused is subject at the time of sentencing; and
- (b)** that the terms of imprisonment that it imposes at the same time for more than one offence be served consecutively, including when
 - (i)** the offences do not arise out of the same event or series of events,
 - (ii)** one of the offences was committed while the accused was on judicial interim release, including pending the determination of an appeal, or
 - (iii)** one of the offences was committed while the accused was fleeing from a peace officer.

Cumulative punishments — fines

(5) For the purposes of subsection (4), a term of imprisonment includes imprisonment that results from the operation of [subsection 734\(4\)](#).

Cumulative punishments — youth

(6) For the purposes of subsection (4), a sentence of imprisonment includes

- (a)** a disposition made under paragraph 20(1)(k) or (k.1) of the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985;
- (b)** a youth sentence imposed under [paragraph 42\(2\)\(n\)](#), (o), (q) or (r) of the *Youth Criminal Justice Act*; and
- (c)** a sentence that results from the operation of subsection 743.5(1) or (2).

Cumulative punishments — sexual offences against children

(7) When a court sentences an accused at the same time for more than one sexual offence committed against a child, the court shall direct

- (a)** that a sentence of imprisonment it imposes for an offence under [section 163.1](#) be served consecutively to a sentence of imprisonment it imposes for a sexual offence under another section of this Act committed against a child; and

(b) that a sentence of imprisonment it imposes for a sexual offence committed against a child, other than an offence under [section 163.1](#), be served consecutively to a sentence of imprisonment it imposes for a sexual offence committed against another child other than an offence under section 163.1.

Maximum penalty — intimate partner

(8) If an accused is convicted of an indictable offence in the commission of which violence was used, threatened or attempted against an intimate partner and the accused has been previously convicted of an offence in the commission of which violence was used, threatened or attempted against an intimate partner, the court may impose a term of imprisonment that is more than the maximum term of imprisonment provided for that offence but not more than

(a) five years, if the maximum term of imprisonment for the offence is two years or more but less than five years;

(b) 10 years, if the maximum term of imprisonment for the offence is five years or more but less than 10 years;

(c) 14 years, if the maximum term of imprisonment for the offence is 10 years or more but less than 14 years; or

(d) life, if the maximum term of imprisonment for the offence is 14 years or more and up to imprisonment for life.

1995, c. 22, s. 6; 1997, c. 18, s. 141; [2002, c. 1, s. 182](#); [2015, c. 23, s. 17](#); [2019, c. 25, s. 294](#).

Commencement of sentence

719 (1) A sentence commences when it is imposed, except where a relevant enactment otherwise provides.

Time at large excluded from term of imprisonment

(2) Any time during which a convicted person is unlawfully at large or is lawfully at large on interim release granted pursuant to any provision of this Act does not count as part of any term of imprisonment imposed on the person.

Determination of sentence

(3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.

Exception

(3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody.

Reasons

(3.2) The court shall give reasons for any credit granted and shall cause those reasons to be stated in the record.

Record of proceedings

(3.3) The court shall cause to be stated in the record and on the warrant of committal the offence, the amount of time spent in custody, the term of imprisonment that would have been imposed before any credit was granted, the amount of time credited, if any, and the sentence imposed.

Validity not affected

(3.4) Failure to comply with subsection (3.2) or (3.3) does not affect the validity of the sentence imposed by the court.

When time begins to run

(4) Notwithstanding subsection (1), a term of imprisonment, whether imposed by a trial court or the court appealed to, commences or shall be deemed to be resumed, as the case may be, on the day on which the convicted person is arrested and taken into custody under the sentence.

When fine imposed

(5) Notwithstanding subsection (1), where the sentence that is imposed is a fine with a term of imprisonment in default of payment, no time prior to the day of execution of the warrant of committal counts as part of the term of imprisonment.

Application for leave to appeal

(6) An application for leave to appeal is an appeal for the purposes of this section.

R.S., 1985, c. C-46, s. 719; R.S., 1985, c. 27 (1st Supp.), s. 157; 1995, c. 22, s. 6; [2009, c. 29, s. 3](#); [2018, c. 29, s. 66](#).

Procedure and Evidence

Sentencing proceedings

720 (1) A court shall, as soon as practicable after an offender has been found guilty, conduct proceedings to determine the appropriate sentence to be imposed.

Court-supervised programs

(2) The court may, with the consent of the Attorney General and the offender and after considering the interests of justice and of any victim of the offence, delay sentencing to enable the offender to attend a treatment program approved by the province under the supervision of the court, such as an addiction treatment program or a domestic violence counselling program.

R.S., 1985, c. C-46, s. 720; 1995, c. 22, s. 6; [2008, c. 18, s. 35](#).

Report by probation officer

721 (1) Subject to regulations made under subsection (2), where an accused, other than an organization, pleads guilty to or is found guilty of an offence, a probation officer shall, if required to do so by a court, prepare and file with the court a report in writing relating to the accused for the purpose of assisting the court in imposing a sentence or in determining whether the accused should be discharged under [section 730](#).

Provincial regulations

(2) The lieutenant governor in council of a province may make regulations respecting the types of offences for which a court may require a report, and respecting the content and form of the report.

Content of report

(3) Unless otherwise specified by the court, the report must, wherever possible, contain information on the following matters:

- (a)** the offender's age, maturity, character, behaviour, attitude and willingness to make amends;
- (b)** subject to [subsection 119\(2\)](#) of the *Youth Criminal Justice Act*, the history of previous dispositions under the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, the history of previous sentences under the *Youth Criminal Justice Act*, and of previous findings of guilt under this Act and any other Act of Parliament;
- (c)** the history of any alternative measures used to deal with the offender, and the offender's response to those measures; and
- (d)** any matter required, by any regulation made under subsection (2), to be included in the report.

Idem

(4) The report must also contain information on any other matter required by the court, after hearing argument from the prosecutor and the offender, to be included in the report, subject to any contrary regulation made under subsection (2).

Copy of report

(5) The clerk of the court shall provide a copy of the report, as soon as practicable after filing, to the offender or counsel for the offender, as directed by the court, and to the prosecutor.

R.S., 1985, c. C-46, s. 721; R.S., 1985, c. 27 (1st Supp.), s. 203; 1995, c. 22, s. 6; 1999, c. 25, s. 16(Preamble); [2002, c. 1, s. 183](#); [2003, c. 21, s. 15](#).

Victim impact statement

722 (1) When determining the sentence to be imposed on an offender or determining whether the offender should be discharged under [section 730](#) in respect of any offence,

the court shall consider any statement of a victim prepared in accordance with this section and filed with the court describing the physical or emotional harm, property damage or economic loss suffered by the victim as the result of the commission of the offence and the impact of the offence on the victim.

Inquiry by court

(2) As soon as feasible after a finding of guilt and in any event before imposing sentence, the court shall inquire of the prosecutor if reasonable steps have been taken to provide the victim with an opportunity to prepare a statement referred to in subsection (1).

Adjournment

(3) On application of the prosecutor or a victim or on its own motion, the court may adjourn the proceedings to permit the victim to prepare a statement referred to in subsection (1) or to present evidence in accordance with subsection (9), if the court is satisfied that the adjournment would not interfere with the proper administration of justice.

Form

(4) The statement must be prepared in writing, using Form 34.2 in Part XXVIII, in accordance with the procedures established by a program designated for that purpose by the lieutenant governor in council of the province in which the court is exercising its jurisdiction.

Presentation of statement

(5) The court shall, on the request of a victim, permit the victim to present the statement by

- (a)** reading it;
- (b)** reading it in the presence and close proximity of any support person of the victim's choice;
- (c)** reading it outside the court room or behind a screen or other device that would allow the victim not to see the offender; or
- (d)** presenting it in any other manner that the court considers appropriate.

Photograph

(6) During the presentation

- (a)** the victim may have with them a photograph of themselves taken before the commission of the offence if it would not, in the opinion of the court, disrupt the proceedings; or
- (b)** if the statement is presented by someone acting on the victim's behalf, that individual may have with them a photograph of the victim taken before the

commission of the offence if it would not, in the opinion of the court, disrupt the proceedings.

Conditions of exclusion

(7) The victim shall not present the statement outside the court room unless arrangements are made for the offender and the judge or justice to watch the presentation by means of closed-circuit television or otherwise and the offender is permitted to communicate with counsel while watching the presentation.

Consideration of statement

(8) In considering the statement, the court shall take into account the portions of the statement that it considers relevant to the determination referred to in subsection (1) and disregard any other portion.

Evidence concerning victim admissible

(9) Whether or not a statement has been prepared and filed in accordance with this section, the court may consider any other evidence concerning any victim of the offence for the purpose of determining the sentence to be imposed on the offender or whether the offender should be discharged under [section 730](#).

R.S., 1985, c. C-46, s. 722; 1995, c. 22, s. 6; 1999, c. 25, s. 17(Preamble); 2000, c. 12, s. 95; [2015, c. 13, s. 25](#).

Copy of statement

722.1 The clerk of the court shall provide a copy of a statement referred to in [subsection 722\(1\)](#), as soon as practicable after a finding of guilt, to the offender or counsel for the offender, and to the prosecutor.

1995, c. 22, s. 6; 1999, c. 25, s. 18(Preamble).

Community impact statement

722.2 (1) When determining the sentence to be imposed on an offender or determining whether the offender should be discharged under [section 730](#) in respect of any offence, the court shall consider any statement made by an individual on a community's behalf that was prepared in accordance with this section and filed with the court describing the harm or loss suffered by the community as the result of the commission of the offence and the impact of the offence on the community.

Form

(2) The statement must be prepared in writing, using Form 34.3 in Part XXVIII, in accordance with the procedures established by a program designated for that purpose by the lieutenant governor in council of the province in which the court is exercising its jurisdiction.

Presentation of statement

(3) The court shall, on the request of the individual making the statement, permit the individual to present the statement by

(a) reading it;

(b) reading it in the presence and close proximity of any support person of the individual's choice;

(c) reading it outside the court room or behind a screen or other device that would allow the individual not to see the offender; or

(d) presenting it in any other manner that the court considers appropriate.

Conditions of exclusion

(4) The individual making the statement shall not present it outside the court room unless arrangements are made for the offender and the judge or justice to watch the presentation by means of closed-circuit television or otherwise and the offender is permitted to communicate with counsel while watching the presentation.

Copy of statement

(5) The clerk of the court shall, as soon as feasible after a finding of guilt, provide a copy of the statement to the offender or counsel for the offender, and to the prosecutor.

1999, c. 25, s. 18(Preamble); [2015, c. 13, s. 26](#).

Submissions on facts

723 (1) Before determining the sentence, a court shall give the prosecutor and the offender an opportunity to make submissions with respect to any facts relevant to the sentence to be imposed.

Submission of evidence

(2) The court shall hear any relevant evidence presented by the prosecutor or the offender.

Production of evidence

(3) The court may, on its own motion, after hearing argument from the prosecutor and the offender, require the production of evidence that would assist it in determining the appropriate sentence.

Compel appearance

(4) Where it is necessary in the interests of justice, the court may, after consulting the parties, compel the appearance of any person who is a compellable witness to assist the court in determining the appropriate sentence.

Hearsay evidence

(5) Hearsay evidence is admissible at sentencing proceedings, but the court may, if the court considers it to be in the interests of justice, compel a person to testify where the person

(a) has personal knowledge of the matter;

(b) is reasonably available; and

(c) is a compellable witness.

R.S., 1985, c. C-46, s. 723; 1995, c. 22, s. 6.

Information accepted

724 (1) In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentencing proceedings and any facts agreed on by the prosecutor and the offender.

Jury

(2) Where the court is composed of a judge and jury, the court

(a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and

(b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.

Disputed facts

(3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,

(a) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;

(b) the party wishing to rely on a relevant fact, including a fact contained in a presentence report, has the burden of proving it;

(c) either party may cross-examine any witness called by the other party;

(d) subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and

(e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.

R.S., 1985, c. C-46, s. 724; 1995, c. 22, s. 6.

Other offences

725 (1) In determining the sentence, a court

(a) shall consider, if it is possible and appropriate to do so, any other offences of which the offender was found guilty by the same court, and shall determine the

sentence to be imposed for each of those offences;

(b) shall consider, if the Attorney General and the offender consent, any outstanding charges against the offender to which the offender consents to plead guilty and pleads guilty, if the court has jurisdiction to try those charges, and shall determine the sentence to be imposed for each charge unless the court is of the opinion that a separate prosecution for the other offence is necessary in the public interest;

(b.1) shall consider any outstanding charges against the offender, unless the court is of the opinion that a separate prosecution for one or more of the other offences is necessary in the public interest, subject to the following conditions:

(i) the Attorney General and the offender consent,

(ii) the court has jurisdiction to try each charge,

(iii) each charge has been described in open court,

(iv) the offender has agreed with the facts asserted in the description of each charge, and

(v) the offender has acknowledged having committed the offence described in each charge; and

(c) may consider any facts forming part of the circumstances of the offence that could constitute the basis for a separate charge.

Attorney General's consent

(1.1) For the purpose of paragraphs (1)(b) and (b.1), the Attorney General shall take the public interest into account before consenting.

No further proceedings

(2) The court shall, on the information or indictment, note

(a) any outstanding charges considered in determining the sentence under paragraph (1)(b.1), and

(b) any facts considered in determining the sentence under paragraph (1)(c),

and no further proceedings may be taken with respect to any offence described in those charges or disclosed by those facts unless the conviction for the offence of which the offender has been found guilty is set aside or quashed on appeal.

R.S., 1985, c. C-46, s. 725; R.S., 1985, c. 27 (1st Supp.), s. 158, c. 1 (4th Supp.), s. 18(F); 1995, c. 22, s. 6; 1999, c. 5, s. 31.

Offender may speak to sentence

726 Before determining the sentence to be imposed, the court shall ask whether the offender, if present, has anything to say.

R.S., 1985, c. C-46, s. 726; R.S., 1985, c. 27 (1st Supp.), s. 159, c. 1 (4th Supp.), s. 18(F); 1995, c. 22, s. 6.

Relevant information

726.1 In determining the sentence, a court shall consider any relevant information placed before it, including any representations or submissions made by or on behalf of the prosecutor or the offender.

1995, c. 22, s. 6.

Reasons for sentence

726.2 When imposing a sentence, a court shall state the terms of the sentence imposed, and the reasons for it, and enter those terms and reasons into the record of the proceedings.

1995, c. 22, s. 6.

Inquiry by court

726.3 When imposing a sentence, a court must inquire of the prosecutor if reasonable steps were taken to determine whether the victim wishes to receive information regarding the sentence and its administration and must, if known, enter the victim's wishes into the record of the proceedings.

2023, c. 28, s. 34.

Previous conviction

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

Procedure

(2) Where an offender is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, the court shall, on application by the prosecutor and on being satisfied that the offender was notified in accordance with subsection (1), ask whether the offender was previously convicted and, if the offender does not admit to any previous convictions, evidence of previous convictions may be adduced.

Where hearing *ex parte*

(3) Where a summary conviction court holds a trial pursuant to [subsection 803\(2\)](#) and convicts the offender, the court may, whether or not the offender was notified that a greater punishment would be sought by reason of a previous conviction, make inquiries and hear evidence with respect to previous convictions of the offender and, if any such conviction is proved, may impose a greater punishment by reason thereof.

Organizations

(4) If, under [section 623](#), the court proceeds with the trial of an organization that has not appeared and pleaded and convicts the organization, the court may, whether or not the organization was notified that a greater punishment would be sought by reason of a previous conviction, make inquiries and hear evidence with respect to previous convictions of the organization and, if any such conviction is proved, may impose a greater punishment by reason of that conviction.

Section does not apply

(5) This section does not apply to a person referred to in [paragraph 745\(b\)](#).

R.S., 1985, c. C-46, s. 727; R.S., 1985, c. 27 (1st Supp.), s. 160; 1995, c. 22, s. 6; [2003, c. 21, s. 16](#).

Sentence justified by any count

728 Where one sentence is passed on a verdict of guilty on two or more counts of an indictment, the sentence is good if any of the counts would have justified the sentence.

R.S., 1985, c. C-46, s. 728; 1995, c. 22, s. 6.

Proof of certificate of analyst

729 (1) In

(a) a prosecution for failure to comply with a condition in a probation order that the accused not have in possession or use drugs, or

(b) a hearing to determine whether the offender breached a condition of a conditional sentence order that the offender not have in possession or use drugs,

a certificate purporting to be signed by an analyst stating that the analyst has analyzed or examined a substance and stating the result of the analysis or examination is admissible in evidence and, in the absence of evidence to the contrary, is proof of the statements contained in the certificate without proof of the signature or official character of the person appearing to have signed the certificate.

Definition of *analyst*

(2) In this section, ***analyst*** means a person designated as an analyst under the [Controlled Drugs and Substances Act](#) or the [Cannabis Act](#).

Notice of intention to produce certificate

(3) No certificate shall be admitted in evidence unless the party intending to produce it has, before the trial or hearing, as the case may be, given reasonable notice and a copy of the certificate to the party against whom it is to be produced.

(4) and (5) [\[Repealed, 2008, c. 18, s. 36\]](#)

Requiring attendance of analyst

(6) The party against whom a certificate of an analyst is produced may, with leave of the court, require the attendance of the analyst for cross-examination.

Proof of certificate of analyst — bodily substance

729.1 (1) In a prosecution for failure to comply with a condition in a probation order that the accused not consume drugs, alcohol or any other intoxicating substance, or in a hearing to determine whether the offender breached such a condition of a conditional sentence order, a certificate purporting to be signed by an analyst that states that the analyst has analyzed a sample of a bodily substance and that states the result of the analysis is admissible in evidence and, in the absence of evidence to the contrary, is proof of the statements contained in the certificate without proof of the signature or official character of the person who appears to have signed the certificate.

Definition of *analyst*

(2) In this section, *analyst* has the same meaning as in [section 320.11](#).

Notice of intention to produce certificate

(3) No certificate shall be admitted in evidence unless the party intending to produce it has, before the trial or hearing, as the case may be, given reasonable notice and a copy of the certificate to the party against whom it is to be produced.

Requiring attendance of analyst

(4) The party against whom a certificate of an analyst is produced may, with leave of the court, require the attendance of the analyst for cross-examination.

[2011, c. 7, s. 2](#); [2018, c. 21, s. 23](#).

Absolute and Conditional Discharges

Conditional and absolute discharge

730 (1) Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under [subsection 731\(2\)](#).

Period for which appearance notice, etc., continues in force

(2) Subject to Part XVI, if an accused who has not been taken into custody or who has been released from custody under any provision of that Part pleads guilty to or is found guilty of an offence but is not convicted, the appearance notice, summons, undertaking or release order issued to, given or entered into by the accused continues in force, subject to its terms, until a disposition in respect of the accused is made under

subsection (1) unless, at the time the accused pleads guilty or is found guilty, the court, judge or justice orders that the accused be taken into custody pending such a disposition.

Effect of discharge

(3) Where a court directs under subsection (1) that an offender be discharged of an offence, the offender shall be deemed not to have been convicted of the offence except that

- (a)** the offender may appeal from the determination of guilt as if it were a conviction in respect of the offence;
- (b)** the Attorney General and, in the case of summary conviction proceedings, the informant or the informant's agent may appeal from the decision of the court not to convict the offender of the offence as if that decision were a judgment or verdict of acquittal of the offence or a dismissal of the information against the offender; and
- (c)** the offender may plead *autrefois convict* in respect of any subsequent charge relating to the offence.

Where person bound by probation order convicted of offence

(4) Where an offender who is bound by the conditions of a probation order made at a time when the offender was directed to be discharged under this section is convicted of an offence, including an offence under [section 733.1](#), the court that made the probation order may, in addition to or in lieu of exercising its authority under [subsection 732.2\(5\)](#), at any time when it may take action under that subsection, revoke the discharge, convict the offender of the offence to which the discharge relates and impose any sentence that could have been imposed if the offender had been convicted at the time of discharge, and no appeal lies from a conviction under this subsection where an appeal was taken from the order directing that the offender be discharged.

R.S., 1985, c. C-46, s. 730; 1995, c. 22, s. 6; 1997, c. 18, s. 141; [2003, c. 21, s. 17](#); [2019, c. 25, s. 296](#).

Probation

Making of probation order

731 (1) Where a person is convicted of an offence, a court may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission,

- (a)** if no minimum punishment is prescribed by law, suspend the passing of sentence and direct that the offender be released on the conditions prescribed in a probation order; or
- (b)** in addition to fining or sentencing the offender to imprisonment for a term not exceeding two years, direct that the offender comply with the conditions prescribed in a probation order.

Idem

(2) A court may also make a probation order where it discharges an accused under [subsection 730\(1\)](#).

(3.1) [Repealed, 1997, c. 17, s. 1]

R.S., 1985, c. C-46, s. 731; 1992, c. 1, s. 58, c. 20, s. 200; 1995, c. 22, s. 6; 1997, c. 17, s. 1.

Firearm, etc., prohibitions

731.1 (1) Before making a probation order, the court shall consider whether [section 109](#) or [110](#) is applicable.

Application of [section 109](#) or [110](#)

(2) For greater certainty, a condition of a probation order referred to in [paragraph 732.1\(3\)\(d\)](#) does not affect the operation of [section 109](#) or [110](#).

1992, c. 20, s. 201; 1995, c. 22, s. 6; [2002, c. 13, s. 73](#).

Intermittent sentence

732 (1) Where the court imposes a sentence of imprisonment of ninety days or less on an offender convicted of an offence, whether in default of payment of a fine or otherwise, the court may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission, and the availability of appropriate accommodation to ensure compliance with the sentence, order

(a) that the sentence be served intermittently at such times as are specified in the order; and

(b) that the offender comply with the conditions prescribed in a probation order when not in confinement during the period that the sentence is being served and, if the court so orders, on release from prison after completing the intermittent sentence.

Application to vary intermittent sentence

(2) An offender who is ordered to serve a sentence of imprisonment intermittently may, on giving notice to the prosecutor, apply to the court that imposed the sentence to allow it to be served on consecutive days.

Court may vary intermittent sentence if subsequent offence

(3) Where a court imposes a sentence of imprisonment on a person who is subject to an intermittent sentence in respect of another offence, the unexpired portion of the intermittent sentence shall be served on consecutive days unless the court otherwise orders.

R.S., 1985, c. C-46, s. 732; 1995, c. 22, s. 6.

Definitions

732.1 (1) In this section and [section 732.2](#),

change, in relation to optional conditions, includes deletions and additions;
(*modification*)

optional conditions means the conditions referred to in subsection (3) or (3.1).
(*conditions facultatives*)

Compulsory conditions of probation order

(2) The court shall prescribe, as conditions of a probation order, that the offender do all of the following:

(a) keep the peace and be of good behaviour;

(a.1) [Repealed, 2019, c. 25, s. 297]

(b) appear before the court when required to do so by the court; and

(c) notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.

(2.1) [Repealed, 2019, c. 25, s. 297]

(2.2) [Repealed, 2019, c. 25, s. 297]

Optional conditions of probation order

(3) The court may prescribe, as additional conditions of a probation order, that the offender do one or more of the following:

(a) report to a probation officer

(i) within two working days, or such longer period as the court directs, after the making of the probation order, and

(ii) thereafter, when required by the probation officer and in the manner directed by the probation officer;

(a.1) abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order or from going to any place or geographic area specified in the order, except in accordance with any specified conditions that the court considers necessary;

(b) remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the probation officer;

(c) abstain from the consumption of drugs except in accordance with a medical prescription, of alcohol or of any other intoxicating substance;

(c.1) provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation on the demand of a peace officer, a probation officer or someone designated under subsection (9) to make a demand, at the place and time and on the day specified by the person making the demand, if that person has reasonable grounds to believe that the offender has breached a condition of the order that

requires them to abstain from the consumption of drugs, alcohol or any other intoxicating substance;

(c.2) provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation at regular intervals that are specified by a probation officer in a notice in Form 51 served on the offender, if a condition of the order requires the offender to abstain from the consumption of drugs, alcohol or any other intoxicating substance;

(d) abstain from owning, possessing or carrying a weapon;

(e) provide for the support or care of dependants;

(f) perform up to 240 hours of community service over a period not exceeding eighteen months;

(g) if the offender agrees, and subject to the program director's acceptance of the offender, participate actively in a treatment program approved by the province;

(g.1) where the lieutenant governor in council of the province in which the probation order is made has established a program for curative treatment in relation to the consumption of alcohol or drugs, attend at a treatment facility, designated by the lieutenant governor in council of the province, for assessment and curative treatment in relation to the consumption by the offender of alcohol or drugs that is recommended pursuant to the program;

(g.2) where the lieutenant governor in council of the province in which the probation order is made has established a program governing the use of an alcohol ignition interlock device by an offender and if the offender agrees to participate in the program, comply with the program; and

(h) comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under [subsection 738\(2\)](#), for protecting society and for facilitating the offender's successful reintegration into the community.

Optional conditions — organization

(3.1) The court may prescribe, as additional conditions of a probation order made in respect of an organization, that the offender do one or more of the following:

(a) make restitution to a person for any loss or damage that they suffered as a result of the offence;

(b) establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;

(c) communicate those policies, standards and procedures to its representatives;

(d) report to the court on the implementation of those policies, standards and procedures;

(e) identify the senior officer who is responsible for compliance with those policies, standards and procedures;

(f) provide, in the manner specified by the court, the following information to the public, namely,

(i) the offence of which the organization was convicted,

(ii) the sentence imposed by the court, and

(iii) any measures that the organization is taking — including any policies, standards and procedures established under paragraph (b) — to reduce the likelihood of it committing a subsequent offence; and

(g) comply with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence.

Consideration — organizations

(3.2) Before making an order under paragraph (3.1)(b), a court shall consider whether it would be more appropriate for another regulatory body to supervise the development or implementation of the policies, standards and procedures referred to in that paragraph.

Form and period of order

(4) A probation order may be in Form 46, and the court that makes the probation order shall specify therein the period for which it is to remain in force.

Obligations of court

(5) The court that makes a probation order shall

(a) cause a copy of the order to be given to the offender and, on request, to the victim;

(b) explain the conditions of the order set under subsections (2) to (3.1) and the substance of [section 733.1](#) to the offender;

(c) cause an explanation to be given to the offender of the procedure for applying under [subsection 732.2\(3\)](#) for a change to the optional conditions and of the substance of subsections 732.2(3) and [\(5\)](#); and

(d) take reasonable measures to ensure that the offender understands the order and the explanations.

For greater certainty

(6) For greater certainty, a failure to comply with subsection (5) does not affect the validity of the probation order.

Notice — samples at regular intervals

(7) The notice referred to in paragraph (3)(c.2) must specify the places and times at which and the days on which the offender must provide samples of a bodily substance under a condition described in that paragraph. The first sample may not be taken earlier

than 24 hours after the offender is served with the notice, and subsequent samples must be taken at regular intervals of at least seven days.

Designations and specifications

(8) For the purposes of paragraphs (3)(c.1) and (c.2) and subject to the regulations, the Attorney General of a province or the minister of justice of a territory shall, with respect to the province or territory,

- (a)** designate the persons or classes of persons that may take samples of bodily substances;
- (b)** designate the places or classes of places at which the samples are to be taken;
- (c)** specify the manner in which the samples are to be taken;
- (d)** specify the manner in which the samples are to be analyzed;
- (e)** specify the manner in which the samples are to be stored, handled and destroyed;
- (f)** specify the manner in which the records of the results of the analysis of the samples are to be protected and destroyed;
- (g)** designate the persons or classes of persons that may destroy the samples; and
- (h)** designate the persons or classes of persons that may destroy the records of the results of the analysis of the samples.

Further designations

(9) For the purpose of paragraph (3)(c.1) and subject to the regulations, the Attorney General of a province or the minister of justice of a territory may, with respect to the province or territory, designate persons or classes of persons to make a demand for a sample of a bodily substance.

Restriction

(10) Samples of bodily substances referred to in paragraphs (3)(c.1) and (c.2) may not be taken, analyzed, stored, handled or destroyed, and the records of the results of the analysis of the samples may not be protected or destroyed, except in accordance with the designations and specifications made under subsection (8).

Destruction of samples

(11) The Attorney General of a province or the minister of justice of a territory, or a person authorized by the Attorney General or minister, shall cause all samples of bodily substances provided under a probation order to be destroyed within the periods prescribed by regulation unless the samples are reasonably expected to be used as evidence in a proceeding for an offence under [section 733.1](#).

Regulations

(12) The Governor in Council may make regulations

- (a)** prescribing bodily substances for the purposes of paragraphs (3)(c.1) and (c.2);
- (b)** respecting the designations and specifications referred to in subsections (8) and (9);
- (c)** prescribing the periods within which samples of bodily substances are to be destroyed under subsection (11); and
- (d)** respecting any other matters relating to the samples of bodily substances.

1995, c. 22, s. 6; 1999, c. 32, s. 6(Preamble); [2003, c. 21, s. 18](#); [2008, c. 18, s. 37](#); [2011, c. 7, s. 3](#); [2014, c. 21, s. 2](#); [2015, c. 13, s. 27](#); [2018, c. 21, s. 24\(F\)](#); [2019, c. 25, s. 297](#).

Prohibition on use of bodily substance

732.11 (1) No person shall use a bodily substance provided under a probation order except for the purpose of determining whether an offender is complying with a condition of the order that they abstain from the consumption of drugs, alcohol or any other intoxicating substance.

Prohibition on use or disclosure of result

(2) Subject to subsection (3), no person shall use, disclose or allow the disclosure of the results of the analysis of a bodily substance provided under a probation order.

Exception

(3) The results of the analysis of a bodily substance provided under a probation order may be disclosed to the offender to whom they relate, and may also be used or disclosed in the course of an investigation of, or in a proceeding for, an offence under [section 733.1](#) or, if the results are made anonymous, for statistical or other research purposes.

Offence

(4) Every person who contravenes subsection (1) or (2) is guilty of an offence punishable on summary conviction.

[2011, c. 7, s. 4](#).

Coming into force of order

732.2 (1) A probation order comes into force

- (a)** on the date on which the order is made;
- (b)** where the offender is sentenced to imprisonment under [paragraph 731\(1\)\(b\)](#) or was previously sentenced to imprisonment for another offence, as soon as the offender is released from prison or, if released from prison on conditional release, at the expiration of the sentence of imprisonment; or
- (c)** where the offender is under a conditional sentence order, at the expiration of the conditional sentence order.

Duration of order and limit on term of order

(2) Subject to subsection (5),

(a) where an offender who is bound by a probation order is convicted of an offence, including an offence under [section 733.1](#), or is imprisoned under [paragraph 731\(1\)\(b\)](#) in default of payment of a fine, the order continues in force except in so far as the sentence renders it impossible for the offender for the time being to comply with the order; and

(b) no probation order shall continue in force for more than three years after the date on which the order came into force.

Changes to probation order

(3) A court that makes a probation order may at any time, on application by the offender, the probation officer or the prosecutor, require the offender to appear before it and, after hearing the offender and one or both of the probation officer and the prosecutor,

(a) make any changes to the optional conditions that in the opinion of the court are rendered desirable by a change in the circumstances since those conditions were prescribed,

(b) relieve the offender, either absolutely or on such terms or for such period as the court deems desirable, of compliance with any optional condition, or

(c) decrease the period for which the probation order is to remain in force,

and the court shall thereupon endorse the probation order accordingly and, if it changes the optional conditions, inform the offender of its action and give the offender a copy of the order so endorsed.

Judge may act in chambers

(4) All the functions of the court under subsection (3) may be exercised in chambers.

Where person convicted of offence

(5) Where an offender who is bound by a probation order is convicted of an offence, including an offence under [section 733.1](#), and

(a) the time within which an appeal may be taken against that conviction has expired and the offender has not taken an appeal,

(b) the offender has taken an appeal against that conviction and the appeal has been dismissed, or

(c) the offender has given written notice to the court that convicted the offender that the offender elects not to appeal the conviction or has abandoned the appeal, as the case may be,

in addition to any punishment that may be imposed for that offence, the court that made the probation order may, on application by the prosecutor, require the offender to appear before it and, after hearing the prosecutor and the offender,

(d) where the probation order was made under [paragraph 731\(1\)\(a\)](#), revoke the order and impose any sentence that could have been imposed if the passing of sentence had not been suspended, or

(e) make such changes to the optional conditions as the court deems desirable, or extend the period for which the order is to remain in force for such period, not exceeding one year, as the court deems desirable,

and the court shall thereupon endorse the probation order accordingly and, if it changes the optional conditions or extends the period for which the order is to remain in force, inform the offender of its action and give the offender a copy of the order so endorsed.

Compelling appearance of person bound

(6) The provisions of Parts XVI and XVIII with respect to compelling the appearance of an accused before a justice apply, with such modifications as the circumstances require, to proceedings under subsections (3) and (5).

1995, c. 22, s. 6; [2004, c. 12, s. 12\(E\)](#).

Transfer of order

733 (1) Where an offender who is bound by a probation order becomes a resident of, or is convicted or discharged under [section 730](#) of an offence including an offence under [section 733.1](#) in, a territorial division other than the territorial division where the order was made, on the application of a probation officer, the court that made the order may, subject to subsection (1.1), transfer the order to a court in that other territorial division that would, having regard to the mode of trial of the offender, have had jurisdiction to make the order in that other territorial division if the offender had been tried and convicted there of the offence in respect of which the order was made, and the order may thereafter be dealt with and enforced by the court to which it is so transferred in all respects as if that court had made the order.

Attorney General's consent

(1.1) The transfer may be granted only with

(a) the consent of the Attorney General of the province in which the probation order was made, if the two territorial divisions are not in the same province; or

(b) the consent of the Attorney General of Canada, if the proceedings that led to the issuance of the probation order were instituted by or on behalf of the Attorney General of Canada.

Where court unable to act

(2) Where a court that has made a probation order or to which a probation order has been transferred pursuant to subsection (1) is for any reason unable to act, the powers of that court in relation to the probation order may be exercised by any other court that has equivalent jurisdiction in the same province.

R.S., 1985, c. C-46, s. 733; R.S., 1985, c. 24 (2nd Supp.), s. 46; 1995, c. 22, s. 6; 1999, c. 5, s. 32.

Failure to comply with probation order

733.1 (1) An offender who is bound by a probation order and who, without reasonable excuse, fails or refuses to comply with that order is guilty of

- (a) an indictable offence and is liable to imprisonment for a term of not more than four years; or
- (b) an offence punishable on summary conviction.

Where accused may be tried and punished

(2) An accused who is charged with an offence under subsection (1) may be tried and punished by any court having jurisdiction to try that offence in the place where the offence is alleged to have been committed or in the place where the accused is found, is arrested or is in custody, but where the place where the accused is found, is arrested or is in custody is outside the province in which the offence is alleged to have been committed, no proceedings in respect of that offence shall be instituted in that place without the consent of the Attorney General of that province.

1995, c. 22, s. 6; 2015, c. 23, s. 18; 2019, c. 25, s. 298.

Fines and Forfeiture

Power of court to impose fine

734 (1) Subject to subsection (2), a court that convicts a person, other than an organization, of an offence may fine the offender by making an order under [section 734.1](#)

- (a) if the punishment for the offence does not include a minimum term of imprisonment, in addition to or in lieu of any other sanction that the court is authorized to impose; or
- (b) if the punishment for the offence includes a minimum term of imprisonment, in addition to any other sanction that the court is required or authorized to impose.

Offender's ability to pay

(2) Except when the punishment for an offence includes a minimum fine or a fine is imposed in lieu of a forfeiture order, a court may fine an offender under this section only if the court is satisfied that the offender is able to pay the fine or discharge it under [section 736](#).

Meaning of default of payment

(3) For the purposes of this section and [sections 734.1](#) to [737](#), a person is in default of payment of a fine if the fine has not been paid in full by the time set out in the order made under section 734.1.

Imprisonment in default of payment

(4) Where an offender is fined under this section, a term of imprisonment, determined in accordance with subsection (5), shall be deemed to be imposed in default of payment of the fine.

Determination of term

(5) The term of imprisonment referred to in subsection (4) is the lesser of

(a) the number of days that corresponds to a fraction, rounded down to the nearest whole number, of which

(i) the numerator is the unpaid amount of the fine plus the costs and charges of committing and conveying the defaulter to prison, calculated in accordance with regulations made under subsection (7), and

(ii) the denominator is equal to eight times the provincial minimum hourly wage, at the time of default, in the province in which the fine was imposed, and

(b) the maximum term of imprisonment that the court could itself impose on conviction or, if the punishment for the offence does not include a term of imprisonment, five years in the case of an indictable offence or two years less a day in the case of a summary conviction offence.

Moneys found on offender

(6) All or any part of a fine imposed under this section may be taken out of moneys found in the possession of the offender at the time of the arrest of the offender if the court making the order, on being satisfied that ownership of or right to possession of those moneys is not disputed by claimants other than the offender, so directs.

Provincial regulations

(7) The lieutenant governor in council of a province may make regulations respecting the calculation of the costs and charges referred to in subparagraph (5)(a)(i) and in paragraph 734.8(1)(b).

Application to other law

(8) This section and [sections 734.1 to 734.8](#) and [736](#) apply to a fine imposed under any Act of Parliament, except that subsections (4) and (5) do not apply if the term of imprisonment in default of payment of the fine provided for in that Act or regulation is

(a) calculated by a different method; or

(b) specified, either as a minimum or a maximum.

R.S., 1985, c. C-46, s. 734; R.S., 1985, c. 27 (1st Supp.), s. 161; 1995, c. 22, s. 6; 1999, c. 5, s. 33; [2003, c. 21, s. 19](#); [2008, c. 18, s. 38](#); [2019, c. 25, s. 299](#).

Terms of order imposing fine

734.1 A court that fines an offender under [section 734](#) shall do so by making an order that clearly sets out

- (a) the amount of the fine;
- (b) the manner in which the fine is to be paid;
- (c) the time or times by which the fine, or any portion thereof, must be paid; and
- (d) such other terms respecting the payment of the fine as the court deems appropriate.

1995, c. 22, s. 6.

Obligations of court

734.2 (1) A court that makes an order under [section 734.1](#) shall

- (a) cause a copy of the order to be given to the offender;
- (b) explain the substance of [sections 734](#) to [734.8](#) and [736](#) to the offender;
- (c) cause an explanation to be given to the offender of the procedure for applying under [section 734.3](#) for a change to the optional conditions and of any available fine option programs referred to in [section 736](#) as well as the procedure to apply for admission to them; and
- (d) take reasonable measures to ensure that the offender understands the order and the explanations.

For greater certainty

(2) For greater certainty, a failure to comply with subsection (1) does not affect the validity of the order.

1995, c. 22, s. 6; [2008, c. 18, s. 39](#).

Change in terms of order

734.3 A court that makes an order under [section 734.1](#), or a person designated either by name or by title of office by that court, may, on application by or on behalf of the offender, subject to any rules made by the court under [section 482](#) or [482.1](#), change any term of the order except the amount of the fine, and any reference in this section and [sections 734](#), [734.1](#), [734.2](#) and [734.6](#) to an order shall be read as including a reference to the order as changed under this section.

1995, c. 22, s. 6; [2002, c. 13, s. 74](#).

Proceeds to go to provincial treasurer

734.4 (1) If a fine or forfeiture is imposed or an amount set out in an undertaking, release order or recognizance is forfeited and no provision, other than this section, is made by law for the application of the proceeds, the proceeds belong to Her Majesty in right of the province in which the fine or forfeiture was imposed or the amount was forfeited, and shall be paid by the person who receives them to the treasurer of that province.

Proceeds to go to Receiver General for Canada

(2) The proceeds described in subsection (1) belong to Her Majesty in right of Canada and must be paid by the person who receives them to the Receiver General if, as the case may be,

(a) the fine or forfeiture is imposed

(i) in respect of a contravention of a revenue law of Canada,

(ii) in respect of a breach of duty or malfeasance in office by an officer or employee of the Government of Canada, or

(iii) in respect of any proceedings instituted at the instance of the Government of Canada in which that government bears the costs of prosecution; or

(b) an amount set out in an undertaking, release order or recognizance is forfeited in connection with proceedings mentioned in paragraph (a).

Direction for payment to municipality

(3) If a provincial, municipal or local authority bears, in whole or in part, the expense of administering the law under which a fine or forfeiture is imposed or under which proceedings are taken in which an amount set out in an undertaking, release order or recognizance is forfeited,

(a) the lieutenant governor in council of a province may direct that the proceeds that belong to Her Majesty in right of the province shall be paid to that authority; and

(b) the Governor in Council may direct that the proceeds that belong to Her Majesty in right of Canada shall be paid to that authority.

1995, c. 22, s. 6; 2019, c. 25, s. 300.

Licences, permits, etc.

734.5 If an offender is in default of payment of a fine,

(a) where the proceeds of the fine belong to Her Majesty in right of a province by virtue of [subsection 734.4\(1\)](#), the person responsible, by or under an Act of the legislature of the province, for issuing, renewing or suspending a licence, permit or other similar instrument in relation to the offender may refuse to issue or renew or may suspend the licence, permit or other instrument until the fine is paid in full, proof of which lies on the offender; or

(b) where the proceeds of the fine belong to Her Majesty in right of Canada by virtue of [subsection 734.4\(2\)](#), the person responsible, by or under an Act of Parliament, for issuing or renewing a licence, permit or other similar instrument in relation to the offender may refuse to issue or renew or may suspend the licence, permit or other instrument until the fine is paid in full, proof of which lies on the offender.

1995, c. 22, s. 6; 1999, c. 5, s. 34.

Civil enforcement of fines, forfeiture

734.6 (1) Where

(a) an offender is in default of payment of a fine, or

(b) a forfeiture imposed by law is not paid as required by the order imposing it,

then, in addition to any other method provided by law for recovering the fine or forfeiture,

(c) the Attorney General of the province to whom the proceeds of the fine or forfeiture belong, or

(d) the Attorney General of Canada, where the proceeds of the fine or forfeiture belong to Her Majesty in right of Canada,

may, by filing the order, enter as a judgment the amount of the fine or forfeiture, and costs, if any, in any civil court in Canada that has jurisdiction to enter a judgment for that amount.

Effect of filing order

(2) An order that is entered as a judgment under this section is enforceable in the same manner as if it were a judgment obtained by the Attorney General of the province or the Attorney General of Canada, as the case may be, in civil proceedings.

1995, c. 22, s. 6.

Warrant of committal

734.7 (1) Where time has been allowed for payment of a fine, the court shall not issue a warrant of committal in default of payment of the fine

(a) until the expiration of the time allowed for payment of the fine in full; and

(b) unless the court is satisfied

(i) that the mechanisms provided by [sections 734.5](#) and [734.6](#) are not appropriate in the circumstances, or

(ii) that the offender has, without reasonable excuse, refused to pay the fine or discharge it under [section 736](#).

Reasons for committal

(2) Where no time has been allowed for payment of a fine and a warrant committing the offender to prison for default of payment of the fine is issued, the court shall state in the warrant the reason for immediate committal.

Period of imprisonment

(2.1) The period of imprisonment in default of payment of the fine shall be specified in a warrant of committal referred to in subsection (1) or (2).

Compelling appearance of person bound

(3) The provisions of Parts XVI and XVIII with respect to compelling the appearance of an accused before a justice apply, with such modifications as the circumstances require,

to proceedings under paragraph (1)(b).

Effect of imprisonment

(4) The imprisonment of an offender for default of payment of a fine terminates the operation of [sections 734.5](#) and [734.6](#) in relation to that fine.

1995, c. 22, s. 6; 1999, c. 5, s. 35.

Definition of *penalty*

734.8 (1) In this section, ***penalty*** means the aggregate of

(a) the fine, and

(b) the costs and charges of committing and conveying the defaulter to prison, calculated in accordance with regulations made under [subsection 734\(7\)](#).

Reduction of imprisonment on part payment

(2) The term of imprisonment in default of payment of a fine shall, on payment of a part of the penalty, whether the payment was made before or after the execution of a warrant of committal, be reduced by the number of days that bears the same proportion to the number of days in the term as the part paid bears to the total penalty.

Minimum that can be accepted

(3) No amount offered in part payment of a penalty shall be accepted after the execution of a warrant of committal unless it is sufficient to secure a reduction of sentence of one day, or a whole number multiple of one day, and no part payment shall be accepted until any fee that is payable in respect of the warrant or its execution has been paid.

To whom payment made

(4) Payment may be made under this section to the person that the Attorney General directs or, if the offender is imprisoned, to the person who has lawful custody of the prisoner or to any other person that the Attorney General directs.

Application of money paid

(5) A payment under this section shall be applied firstly to the payment in full of costs and charges, secondly to the payment in full of any victim surcharge imposed under [section 737](#), and then to payment of any part of the fine that remains unpaid.

1995, c. 22, s. 6; 1999, c. 5, s. 36, c. 25, s. 19(Preamble).

Fines on organizations

735 (1) An organization that is convicted of an offence is liable, in lieu of any imprisonment that is prescribed as punishment for that offence, to be fined in an amount, except where otherwise provided by law,

(a) that is in the discretion of the court, where the offence is an indictable offence; or

(b) not exceeding one hundred thousand dollars, where the offence is a summary conviction offence.

Application of certain provisions — fines

(1.1) A court that imposes a fine under subsection (1) or under any other Act of Parliament shall make an order that clearly sets out

- (a) the amount of the fine;
- (b) the manner in which the fine is to be paid;
- (c) the time or times by which the fine, or any portion of it, must be paid; and
- (d) any other terms respecting the payment of the fine that the court deems appropriate.

Effect of filing order

(2) [Section 734.6](#) applies, with any modifications that are required, when an organization fails to pay the fine in accordance with the terms of the order.

R.S., 1985, c. C-46, s. 735; R.S., 1985, c. 1 (4th Supp.), s. 18(F), c. 23 (4th Supp.), s. 7; 1995, c. 22, s. 6; 1999, c. 5, s. 37; [2003, c. 21, s. 20](#).

Fine option program

736 (1) An offender who is fined under [section 734](#) may, whether or not the offender is serving a term of imprisonment imposed in default of payment of the fine, discharge the fine in whole or in part by earning credits for work performed during a period not greater than two years in a program established for that purpose by the lieutenant governor in council

- (a) of the province in which the fine was imposed, or
- (b) of the province in which the offender resides, where an appropriate agreement is in effect between the government of that province and the government of the province in which the fine was imposed,

if the offender is admissible to such a program.

Credits and other matters

(2) A program referred to in subsection (1) shall determine the rate at which credits are earned and may provide for the manner of crediting any amounts earned against the fine and any other matters necessary for or incidental to carrying out the program.

Deemed payment

(3) Credits earned for work performed as provided by subsection (1) shall, for the purposes of this Act, be deemed to be payment in respect of a fine.

Federal-provincial agreement

(4) Where, by virtue of [subsection 734.4\(2\)](#), the proceeds of a fine belong to Her Majesty in right of Canada, an offender may discharge the fine in whole or in part in a fine option program of a province pursuant to subsection (1), where an appropriate agreement is in effect between the government of the province and the Government of Canada.

R.S., 1985, c. C-46, s. 736; R.S., 1985, c. 27 (1st Supp.), s. 162, c. 1 (4th Supp.), s. 18(F); 1992, c. 1, s. 60(F); 1995, c. 22, s. 6.

Victim surcharge

737 (1) An offender who is convicted, or discharged under [section 730](#), of an offence under this Act, the [Controlled Drugs and Substances Act](#) or the [Cannabis Act](#) shall pay a victim surcharge for each offence, in addition to any other punishment imposed on the offender.

Amount of surcharge

(2) Subject to subsections (2.1) and (3), the amount of the victim surcharge in respect of an offence is

- (a)** 30% of any fine that is imposed on the offender for the offence; or
- (b)** if no fine is imposed on the offender for the offence,
 - (i)** \$100 in the case of an offence punishable by summary conviction, and
 - (ii)** \$200 in the case of an offence punishable by indictment.

Exception

(2.1) Despite subsection (1), the court may, on application of the offender or on its own motion, order an offender to pay no victim surcharge, or to pay a reduced amount, if it is satisfied that the victim surcharge

- (a)** would cause undue hardship to the offender; or
- (b)** would not cause undue hardship to the offender but would be disproportionate to the gravity of the offence or the degree of responsibility of the offender.

Definition of *undue hardship*

(2.2) For the purposes of subsection (2.1), ***undue hardship*** means the offender is unable to pay a victim surcharge on account of the offender's precarious financial circumstances, including because of their unemployment, homelessness, lack of assets or significant financial obligations towards their dependants.

For greater certainty

(2.3) For greater certainty, for the purposes of subsection (2.2), the imprisonment of the offender alone does not constitute undue hardship.

Reasons

(2.4) When the court makes an order under subsection (2.1), the court shall state its reasons in the record of the proceedings.

Increase in surcharge

(3) The court may order an offender to pay a victim surcharge in an amount exceeding that set out in subsection (2) if the court considers it appropriate in the circumstances and is satisfied that the offender is able to pay the higher amount.

Time for payment

(4) The victim surcharge imposed in respect of an offence is payable within the time established by the lieutenant governor in council of the province in which the surcharge is imposed. If no time has been so established, the surcharge is payable within a reasonable time after its imposition.

Amounts applied to aid victims

(5) A victim surcharge shall be applied for the purposes of providing such assistance to victims of offences as the lieutenant governor in council of the province in which the surcharge is imposed may direct from time to time.

Notice

(6) The court shall cause to be given to the offender a written notice setting out

- (a)** the amount of the victim surcharge;
- (b)** the manner in which the victim surcharge is to be paid;
- (c)** the time by which the victim surcharge must be paid; and
- (d)** the procedure for applying for a change in any terms referred to in paragraphs (b) and (c) in accordance with [section 734.3](#).

Enforcement

(7) [Subsections 734\(3\) to \(7\)](#) and [sections 734.3, 734.5, 734.7, 734.8](#) and [736](#) apply, with any modifications that the circumstances require, in respect of a victim surcharge imposed under this section and, in particular,

- (a)** a reference in any of those provisions to “fine”, other than in [subsection 734.8\(5\)](#), must be read as if it were a reference to “victim surcharge”; and
- (b)** the notice provided under subsection (6) is deemed to be an order made under [section 734.1](#).

Application — subsections (2.1) to (2.4)

(8) Subsections (2.1) to (2.4) apply to any offender who is sentenced for an offence under this Act, the [Controlled Drugs and Substances Act](#) or the [Cannabis Act](#) that was committed after the day on which those subsections come into force.

Restitution

Court to consider restitution order

737.1 (1) If an offender is convicted or is discharged under [section 730](#) of an offence, the court that sentences or discharges the offender, in addition to any other measure imposed on the offender, shall consider making a restitution order under [section 738](#) or [739](#).

Inquiry by court

(2) As soon as feasible after a finding of guilt and in any event before imposing the sentence, the court shall inquire of the prosecutor if reasonable steps have been taken to provide the victims with an opportunity to indicate whether they are seeking restitution for their losses and damages, the amount of which must be readily ascertainable.

Adjournment

(3) On application of the prosecutor or on its own motion, the court may adjourn the proceedings to permit the victims to indicate whether they are seeking restitution or to establish their losses and damages, if the court is satisfied that the adjournment would not interfere with the proper administration of justice.

Form

(4) Victims and other persons may indicate whether they are seeking restitution by completing Form 34.1 in Part XXVIII or a form approved for that purpose by the lieutenant governor in council of the province in which the court is exercising its jurisdiction or by using any other method approved by the court, and, if they are seeking restitution, shall establish their losses and damages, the amount of which must be readily ascertainable, in the same manner.

Reasons

(5) If a victim seeks restitution and the court does not make a restitution order, it shall include in the record a statement of the court's reasons for not doing so.

[2015, c. 13, s. 29.](#)

Restitution to victims of offences

738 (1) Where an offender is convicted or discharged under [section 730](#) of an offence, the court imposing sentence on or discharging the offender may, on application of the Attorney General or on its own motion, in addition to any other measure imposed on the offender, order that the offender make restitution to another person as follows:

- (a)** in the case of damage to, or the loss or destruction of, the property of any person as a result of the commission of the offence or the arrest or attempted arrest of the

offender, by paying to the person an amount not exceeding the replacement value of the property as of the date the order is imposed, less the value of any part of the property that is returned to that person as of the date it is returned, where the amount is readily ascertainable;

(b) in the case of bodily or psychological harm to any person as a result of the commission of the offence or the arrest or attempted arrest of the offender, by paying to the person an amount not exceeding all pecuniary damages incurred as a result of the harm, including loss of income or support, if the amount is readily ascertainable;

(c) in the case of bodily harm or threat of bodily harm to the offender's intimate partner or child, or any other person, as a result of the commission of the offence or the arrest or attempted arrest of the offender, where the intimate partner, child or other person was a member of the offender's household at the relevant time, by paying to the person in question, independently of any amount ordered to be paid under paragraphs (a) and (b), an amount not exceeding actual and reasonable expenses incurred by that person, as a result of moving out of the offender's household, for temporary housing, food, child care and transportation, where the amount is readily ascertainable;

(d) in the case of an offence under [section 402.2](#) or [403](#), by paying to a person who, as a result of the offence, incurs expenses to re-establish their identity, including expenses to replace their identity documents and to correct their credit history and credit rating, an amount that is not more than the amount of those expenses, to the extent that they are reasonable, if the amount is readily ascertainable; and

(e) in the case of an offence under [subsection 162.1\(1\)](#), by paying to a person who, as a result of the offence, incurs expenses to remove the intimate image from the Internet or other digital network, an amount that is not more than the amount of those expenses, to the extent that they are reasonable, if the amount is readily ascertainable.

Regulations

(2) The lieutenant governor in council of a province may make regulations precluding the inclusion of provisions on enforcement of restitution orders as an optional condition of a probation order or of a conditional sentence order.

R.S., 1985, c. C-46, s. 738; 1995, c. 22, s. 6; 2000, c. 12, s. 95; [2005, c. 43, s. 7](#); [2009, c. 28, s. 11](#); [2014, c. 31, s. 24](#); [2019, c. 25, s. 302](#).

Restitution to persons acting in good faith

739 Where an offender is convicted or discharged under [section 730](#) of an offence and

(a) any property obtained as a result of the commission of the offence has been conveyed or transferred for valuable consideration to a person acting in good faith and without notice, or

(b) the offender has borrowed money on the security of that property from a person acting in good faith and without notice,

the court may, where that property has been returned to the lawful owner or the person who had lawful possession of that property at the time the offence was committed, order the offender to pay as restitution to the person referred to in paragraph (a) or (b) an amount not exceeding the amount of consideration for that property or the total amount outstanding in respect of the loan, as the case may be.

R.S., 1985, c. C-46, s. 739; R.S., 1985, c. 27 (1st Supp.), s. 163, c. 1 (4th Supp.), s. 18(F); 1995, c. 22, s. 6.

Ability to pay

739.1 The offender's financial means or ability to pay does not prevent the court from making an order under [section 738](#) or [739](#).

[2015, c. 13, s. 30.](#)

Payment under order

739.2 In making an order under [section 738](#) or [739](#), the court shall require the offender to pay the full amount specified in the order by the day specified in the order, unless the court is of the opinion that the amount should be paid in instalments, in which case the court shall set out a periodic payment scheme in the order.

[2015, c. 13, s. 30.](#)

More than one person

739.3 An order under [section 738](#) or [739](#) may be made in respect of more than one person, in which case the order must specify the amount that is payable to each person. The order may also specify the order of priority in which those persons are to be paid.

[2015, c. 13, s. 30.](#)

Public authority

739.4 (1) On the request of a person in whose favour an order under [section 738](#) or [739](#) would be made, the court may make the order in favour of a public authority, designated by the regulations, who is to be responsible for enforcing the order and remitting to the person making the request all amounts received under it.

Orders

(2) The lieutenant governor in council of a province may, by order, designate any person or body as a public authority for the purpose of subsection (1).

[2015, c. 13, s. 30.](#)

Priority to restitution

740 Where the court finds it applicable and appropriate in the circumstances of a case to make, in relation to an offender, an order of restitution under [section 738](#) or [739](#), and

(a) an order of forfeiture under this or any other Act of Parliament may be made in respect of property that is the same as property in respect of which the order of restitution may be made, or

(b) the court is considering ordering the offender to pay a fine and it appears to the court that the offender would not have the means or ability to comply with both the order of restitution and the order to pay the fine,

the court shall first make the order of restitution and shall then consider whether and to what extent an order of forfeiture or an order to pay a fine is appropriate in the circumstances.

R.S., 1985, c. C-46, s. 740; 1995, c. 22, s. 6.

Enforcing restitution order

741 (1) An offender who fails to pay all of the amount that is ordered to be paid under [section 732.1](#), [738](#), [739](#) or [742.3](#) by the day specified in the order or who fails to make a periodic payment required under the order is in default of the order and the person to whom the amount, or the periodic payment, as the case may be, was to be made may, by filing the order, enter as a judgment any amount ordered to be paid that remains unpaid under the order in any civil court in Canada that has jurisdiction to enter a judgment for that amount, and that judgment is enforceable against the offender in the same manner as if it were a judgment rendered against the offender in that court in civil proceedings.

Moneys found on offender

(2) All or any part of an amount that is ordered to be paid under [section 738](#) or [739](#) may be taken out of moneys found in the possession of the offender at the time of the arrest of the offender if the court making the order, on being satisfied that ownership of or right to possession of those moneys is not disputed by claimants other than the offender, so directs.

R.S., 1985, c. C-46, s. 741; R.S., 1985, c. 27 (1st Supp.), s. 164; 1995, c. 22, s. 6; [2004, c. 12, s. 13](#); [2015, c. 13, s. 31](#).

Notice of orders of restitution

741.1 If a court makes an order of restitution under [section 738](#) or [739](#), it shall cause notice of the content of the order, or a copy of the order, to be given to the person to whom the restitution is ordered to be paid, and if it is to be paid to a public authority designated by regulations made under [subsection 739.4\(2\)](#), to the public authority and the person to whom the public authority is to remit amounts received under the order.

R.S., 1985, c. 24 (2nd Supp.), s. 47; 1992, c. 11, s. 14, c. 20, s. 202; 1995, c. 19, s. 37, c. 22, s. 6; [2015, c. 13, s. 32](#).

Civil remedy not affected

741.2 A civil remedy for an act or omission is not affected by reason only that an order for restitution under [section 738](#) or [739](#) has been made in respect of that act or omission.

1992, c. 20, s. 203; 1995, c. 22, s. 6, c. 42, s. 75.

Conditional Sentence of Imprisonment

Definitions

742 In [sections 742.1 to 742.7](#),

change, in relation to optional conditions, includes deletions and additions;
(*modification*)

optional conditions means the conditions referred to in [subsection 742.3\(2\)](#);
(*conditions facultatives*)

supervisor means a person designated by the Attorney General, either by name or by title of office, as a supervisor for the purposes of [sections 742.1 to 742.7](#). (*agent de surveillance*)

R.S., 1985, c. C-46, s. 742; R.S., 1985, c. 27 (1st Supp.), s. 165; 1992, c. 11, s. 15; 1995, c. 22, s. 6.

Imposing of conditional sentence

742.1 If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under [section 742.3](#), if

(a) the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in [sections 718 to 718.2](#);

(b) the offence is not an offence punishable by a minimum term of imprisonment;

(c) the offence is not an offence under any of the following provisions:

(i) [section 239](#), for which a sentence is imposed under [paragraph 239\(1\)\(b\)](#) (attempt to commit murder),

(ii) [section 269.1](#) (torture), or

(iii) [section 318](#) (advocating genocide); and

(d) the offence is not a terrorism offence, or a criminal organization offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years or more.

(e) [Repealed, 2022, c. 15, s. 14]

(f) [Repealed, 2022, c. 15, s. 14]

1992, c. 11, s. 16; 1995, c. 19, s. 38, c. 22, s. 6; 1997, c. 18, s. 107.1; 2007, c. 12, s. 1; 2012, c. 1, s. 34; 2022, c. 15, s. 14.

Firearm, etc., prohibitions

742.2 (1) Before imposing a conditional sentence under [section 742.1](#), the court shall consider whether [section 109](#) or [110](#) is applicable.

Application of [section 109](#) or [110](#)

(2) For greater certainty, a condition of a conditional sentence order referred to in [paragraph 742.3\(2\)\(b\)](#) does not affect the operation of [section 109](#) or [110](#).

1995, c. 22, s. 6; [2002, c. 13, s. 75](#); [2004, c. 12, s. 14\(E\)](#).

Compulsory conditions of conditional sentence order

742.3 (1) The court shall prescribe, as conditions of a conditional sentence order, that the offender do all of the following:

- (a)** keep the peace and be of good behaviour;
- (b)** appear before the court when required to do so by the court;
- (c)** report to a supervisor
 - (i)** within two working days, or such longer period as the court directs, after the making of the conditional sentence order, and
 - (ii)** thereafter, when required by the supervisor and in the manner directed by the supervisor;
- (d)** remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the supervisor; and
- (e)** notify the court or the supervisor in advance of any change of name or address, and promptly notify the court or the supervisor of any change of employment or occupation.

(1.1) [\[Repealed, 2019, c. 25, s. 303\]](#)

(1.2) [\[Repealed, 2019, c. 25, s. 303\]](#)

(1.3) [\[Repealed, 2019, c. 25, s. 303\]](#)

Optional conditions of conditional sentence order

(2) The court may prescribe, as additional conditions of a conditional sentence order, that the offender do one or more of the following:

- (a)** abstain from the consumption of drugs except in accordance with a medical prescription, of alcohol or of any other intoxicating substance;
 - (a.1)** provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation on the demand of a peace officer, the supervisor or someone designated under subsection (7) to make a demand, at the place and time and on the day specified by the person making the demand, if that person has reasonable grounds to suspect that the offender has breached a condition of the order that requires them to abstain from the consumption of drugs, alcohol or any other intoxicating substance;
 - (a.2)** provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation at regular intervals that are specified by the supervisor in a notice in Form 51 served on the offender, if a condition of the order requires the offender to abstain from the consumption of drugs, alcohol or any other intoxicating substance;

(a.3) abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order or from going to any place or geographic area specified in the order, except in accordance with any specified conditions that the justice considers necessary;

(b) abstain from owning, possessing or carrying a weapon;

(c) provide for the support or care of dependants;

(d) perform up to 240 hours of community service over a period not exceeding eighteen months;

(e) attend a treatment program approved by the province; and

(f) comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under [subsection 738\(2\)](#), for securing the good conduct of the offender and for preventing a repetition by the offender of the same offence or the commission of other offences.

Obligations of court

(3) A court that makes an order under this section shall

(a) cause a copy of the order to be given to the offender and, on request, to the victim;

(b) explain the substance of subsection (1) and [sections 742.4](#) and [742.6](#) to the offender;

(c) cause an explanation to be given to the offender of the procedure for applying under [section 742.4](#) for a change to the optional conditions; and

(d) take reasonable measures to ensure that the offender understands the order and the explanations.

For greater certainty

(4) For greater certainty, a failure to comply with subsection (3) does not affect the validity of the order.

Notice — samples at regular intervals

(5) The notice referred to in paragraph (2)([a.2](#)) must specify the places and times at which and the days on which the offender must provide samples of a bodily substance under a condition described in that paragraph. The first sample may not be taken earlier than 24 hours after the offender is served with the notice, and subsequent samples must be taken at regular intervals of at least seven days.

Designations and specifications

(6) For the purposes of paragraphs (2)([a.1](#)) and ([a.2](#)) and subject to the regulations, the Attorney General of a province or the minister of justice of a territory shall, with respect to the province or territory,

- (a)** designate the persons or classes of persons that may take samples of bodily substances;
- (b)** designate the places or classes of places at which the samples are to be taken;
- (c)** specify the manner in which the samples are to be taken;
- (d)** specify the manner in which the samples are to be analyzed;
- (e)** specify the manner in which the samples are to be stored, handled and destroyed;
- (f)** specify the manner in which the records of the results of the analysis of the samples are to be protected and destroyed;
- (g)** designate the persons or classes of persons that may destroy the samples; and
- (h)** designate the persons or classes of persons that may destroy the records of the results of the analysis of the samples.

Further designations

(7) For the purpose of paragraph (2)([a.1](#)) and subject to the regulations, the Attorney General of a province or the minister of justice of a territory may, with respect to the province or territory, designate persons or classes of persons to make a demand for a sample of a bodily substance.

Restriction

(8) Samples of bodily substances referred to in paragraphs (2)([a.1](#)) and ([a.2](#)) may not be taken, analyzed, stored, handled or destroyed, and the records of the results of the analysis of the samples may not be protected or destroyed, except in accordance with the designations and specifications made under subsection (6).

Destruction of samples

(9) The Attorney General of a province or the minister of justice of a territory, or a person authorized by the Attorney General or minister, shall cause all samples of bodily substances provided under a conditional sentence order to be destroyed within the periods prescribed by regulation, unless the samples are reasonably expected to be used as evidence in proceedings under [section 742.6](#).

Regulations

(10) The Governor in Council may make regulations

- (a)** prescribing bodily substances for the purposes of paragraphs (2)([a.1](#)) and ([a.2](#));
- (b)** respecting the designations and specifications referred to in subsections (6) and (7);
- (c)** prescribing the periods within which samples of bodily substances are to be destroyed under subsection (9); and
- (d)** respecting any other matters relating to the samples of bodily substances.

Prohibition on use of bodily substance

742.31 (1) No person shall use a bodily substance provided under a conditional sentence order except for the purpose of determining whether an offender is complying with a condition of the order that they abstain from the consumption of drugs, alcohol or any other intoxicating substance.

Prohibition on use or disclosure of result

(2) Subject to subsection (3), no person shall use, disclose or allow the disclosure of the results of the analysis of a bodily substance provided under a conditional sentence order.

Exception

(3) The results of the analysis of a bodily substance provided under a conditional sentence order may be disclosed to the offender to whom they relate, and may also be used or disclosed in the course of proceedings under [section 742.6](#) or, if the results are made anonymous, for statistical or other research purposes.

Offence

(4) Every person who contravenes subsection (1) or (2) is guilty of an offence punishable on summary conviction.

[2011, c. 7, s. 6.](#)

Supervisor may propose changes to optional conditions

742.4 (1) Where an offender's supervisor is of the opinion that a change in circumstances makes a change to the optional conditions desirable, the supervisor shall give written notification of the proposed change, and the reasons for it, to the offender, to the prosecutor and to the court.

Hearing

(2) Within seven days after receiving a notification referred to in subsection (1),

(a) the offender or the prosecutor may request the court to hold a hearing to consider the proposed change, or

(b) the court may, of its own initiative, order that a hearing be held to consider the proposed change,

and a hearing so requested or ordered shall be held within thirty days after the receipt by the court of the notification referred to in subsection (1).

Decision at hearing

(3) At a hearing held pursuant to subsection (2), the court

(a) shall approve or refuse to approve the proposed change; and

(b) may make any other change to the optional conditions that the court deems appropriate.

Where no hearing requested or ordered

(4) Where no request or order for a hearing is made within the time period stipulated in subsection (2), the proposed change takes effect fourteen days after the receipt by the court of the notification referred to in subsection (1), and the supervisor shall so notify the offender and file proof of that notification with the court.

Changes proposed by offender or prosecutor

(5) Subsections (1) and (3) apply, with such modifications as the circumstances require, in respect of a change proposed by the offender or the prosecutor to the optional conditions, and in all such cases a hearing must be held, and must be held within thirty days after the receipt by the court of the notification referred to in subsection (1).

Judge may act in chambers

(6) All the functions of the court under this section may be exercised in chambers.

1995, c. 22, s. 6; 1999, c. 5, s. 39.

Transfer of order

742.5 (1) Where an offender who is bound by a conditional sentence order becomes a resident of a territorial division, other than the territorial division where the order was made, on the application of a supervisor, the court that made the order may, subject to subsection (1.1), transfer the order to a court in that other territorial division that would, having regard to the mode of trial of the offender, have had jurisdiction to make the order in that other territorial division if the offender had been tried and convicted there of the offence in respect of which the order was made, and the order may thereafter be dealt with and enforced by the court to which it is so transferred in all respects as if that court had made the order.

Attorney General's consent

(1.1) The transfer may be granted only with

(a) the consent of the Attorney General of the province in which the conditional sentence order was made, if the two territorial divisions are not in the same province; or

(b) the consent of the Attorney General of Canada, if the proceedings that led to the issuance of the conditional sentence order were instituted by or on behalf of the Attorney General of Canada.

Where court unable to act

(2) Where a court that has made a conditional sentence order or to which a conditional sentence order has been transferred pursuant to subsection (1) is for any reason unable

to act, the powers of that court in relation to the conditional sentence order may be exercised by any other court that has equivalent jurisdiction in the same province.

1995, c. 22, s. 6; 1999, c. 5, s. 40.

Procedure on breach of condition

742.6 (1) For the purpose of proceedings under this section,

(a) the provisions of Parts XVI and XVIII with respect to compelling the appearance of an accused before a justice apply, with any modifications that the circumstances require, and any reference in those Parts to committing an offence shall be read as a reference to breaching a condition of a conditional sentence order;

(b) the powers of arrest for breach of a condition are those that apply to an indictable offence, with any modifications that the circumstances require, and [subsection 495\(2\)](#) does not apply;

(c) despite paragraph (a), if an allegation of breach of condition is made, the proceeding is commenced by

(i) the issuance of a warrant for the arrest of the offender for the alleged breach,

(ii) the arrest without warrant of the offender for the alleged breach, or

(iii) the compelling of the offender's appearance in accordance with paragraph (d);

(d) if the offender is already detained or before a court, the offender's appearance may be compelled under the provisions referred to in paragraph (a);

(e) if an offender is arrested for the alleged breach, the peace officer who makes the arrest or a judge or justice may release the offender and the offender's appearance may be compelled under the provisions referred to in paragraph (a); and

(f) any judge of a superior court of criminal jurisdiction or of a court of criminal jurisdiction or any justice of the peace may issue a warrant to arrest no matter which court, judge or justice sentenced the offender.

Warrant — means of telecommunication

(1.1) A warrant may be issued under paragraph (1)(f) by a means of telecommunication, and the provisions in [section 487.1](#) on the issuance of a warrant apply for those purposes, with any necessary modifications.

Interim release

(2) For the purpose of the application of [section 515](#), the release from custody of an offender who is detained on the basis of an alleged breach of a condition of a conditional sentence order shall be governed by [subsection 515\(6\)](#).

Hearing

(3) The hearing of an allegation of a breach of condition shall be commenced within thirty days, or as soon thereafter as is practicable, after

(a) the offender's arrest; or

(b) the compelling of the offender's appearance in accordance with paragraph (1)(d).

Place

(3.1) The allegation may be heard by any court having jurisdiction to hear that allegation in the place where the breach is alleged to have been committed or the offender is found, arrested or in custody.

Attorney General's consent

(3.2) If the place where the offender is found, arrested or in custody is outside the province in which the breach is alleged to have been committed, no proceedings in respect of that breach shall be instituted in that place without

(a) the consent of the Attorney General of the province in which the breach is alleged to have been committed; or

(b) the consent of the Attorney General of Canada, if the proceedings that led to the issuance of the conditional sentence order were instituted by or on behalf of the Attorney General of Canada.

Adjournment

(3.3) A judge may, at any time during a hearing of an allegation of breach of condition, adjourn the hearing for a reasonable period.

Report of supervisor

(4) An allegation of a breach of condition must be supported by a written report of the supervisor, which report must include, where appropriate, signed statements of witnesses.

Admission of report on notice of intent

(5) The report is admissible in evidence if the party intending to produce it has, before the hearing, given the offender reasonable notice and a copy of the report.

(6) and (7) [Repealed, 2008, c. 18, s. 41]

Requiring attendance of supervisor or witness

(8) The offender may, with leave of the court, require the attendance, for cross-examination, of the supervisor or of any witness whose signed statement is included in the report.

Powers of court

(9) Where the court is satisfied, on a balance of probabilities, that the offender has without reasonable excuse, the proof of which lies on the offender, breached a condition of the conditional sentence order, the court may

- (a) take no action;
- (b) change the optional conditions;
- (c) suspend the conditional sentence order and direct
 - (i) that the offender serve in custody a portion of the unexpired sentence, and
 - (ii) that the conditional sentence order resume on the offender's release from custody, either with or without changes to the optional conditions; or
- (d) terminate the conditional sentence order and direct that the offender be committed to custody until the expiration of the sentence.

Warrant or arrest — suspension of running of conditional sentence order

(10) The running of a conditional sentence order imposed on an offender is suspended during the period that ends with the determination of whether a breach of condition had occurred and begins with the earliest of

- (a) the issuance of a warrant for the arrest of the offender for the alleged breach,
- (b) the arrest without warrant of the offender for the alleged breach, and
- (c) the compelling of the offender's appearance in accordance with paragraph (1)(d).

Conditions continue

(11) If the offender is not detained in custody during any period referred to in subsection (10), the conditions of the order continue to apply, with any changes made to them under [section 742.4](#), and any subsequent breach of those conditions may be dealt with in accordance with this section.

Detention under [s. 515\(6\)](#)

(12) A conditional sentence order referred to in subsection (10) starts running again on the making of an order to detain the offender in custody under [subsection 515\(6\)](#) and, unless [section 742.7](#) applies, continues running while the offender is detained under the order.

Earned remission does not apply

(13) [Section 6](#) of the *Prisons and Reformatories Act* does not apply to the period of detention in custody under [subsection 515\(6\)](#).

Unreasonable delay in execution

(14) Despite subsection (10), if there was unreasonable delay in the execution of a warrant, the court may, at any time, order that any period between the issuance and execution of the warrant that it considers appropriate in the interests of justice is deemed to be time served under the conditional sentence order unless the period has been so deemed under subsection (15).

Allegation dismissed or reasonable excuse

(15) If the allegation is withdrawn or dismissed or the offender is found to have had a reasonable excuse for the breach, the sum of the following periods is deemed to be time served under the conditional sentence order:

- (a)** any period for which the running of the conditional sentence order was suspended; and
- (b)** if subsection (12) applies, a period equal to one half of the period that the conditional sentence order runs while the offender is detained under an order referred to in that subsection.

Powers of court

(16) If a court is satisfied, on a balance of probabilities, that the offender has without reasonable excuse, the proof of which lies on the offender, breached a condition of the conditional sentence order, the court may, in exceptional cases and in the interests of justice, order that some or all of the period of suspension referred to in subsection (10) is deemed to be time served under the conditional sentence order.

Considerations

(17) In exercising its discretion under subsection (16), a court shall consider

- (a)** the circumstances and seriousness of the breach;
- (b)** whether not making the order would cause the offender undue hardship based on the offender's individual circumstances; and
- (c)** the period for which the offender was subject to conditions while the running of the conditional sentence order was suspended and whether the offender complied with those conditions during that period.

1995, c. 22, s. 6; 1999, c. 5, s. 41; [2004, c. 12, s. 15\(E\)](#); [2008, c. 18, s. 41](#); [2019, c. 25, s. 304](#); [2022, c. 17, s. 49](#).

If person imprisoned for new offence

742.7 (1) If an offender who is subject to a conditional sentence order is imprisoned as a result of a sentence imposed for another offence, whenever committed, the running of the conditional sentence order is suspended during the period of imprisonment for that other offence.

Breach of condition

(2) If an order is made under [paragraph 742.6\(9\)\(c\)](#) or (d) to commit an offender to custody, the custodial period ordered shall, unless the court considers that it would not be in the interests of justice, be served consecutively to any other period of imprisonment that the offender is serving when that order is made.

Multiple sentences

(3) If an offender is serving both a custodial period referred to in subsection (2) and any other period of imprisonment, the periods shall, for the purpose of section 743.1 and [section 139](#) of the *Corrections and Conditional Release Act*, be deemed to constitute one sentence of imprisonment.

Conditional sentence order resumes

(4) The running of any period of the conditional sentence order that is to be served in the community resumes upon the release of the offender from prison on parole, on statutory release, on earned remission, or at the expiration of the sentence.

1995, c. 22, s. 6; 1999, c. 5, s. 42; [2004, c. 12, s. 16\(E\)](#).

Imprisonment

Imprisonment when no other provision

743 Every one who is convicted of an indictable offence for which no punishment is specially provided is liable to imprisonment for a term not exceeding five years.

R.S., 1985, c. C-46, s. 743; 1992, c. 11, s. 16; 1995, c. 22, s. 6.

Imprisonment for life or more than two years

743.1 (1) Except where otherwise provided, a person who is sentenced to imprisonment for

- (a)** life,
- (b)** a term of two years or more, or
- (c)** two or more terms of less than two years each that are to be served one after the other and that, in the aggregate, amount to two years or more,

shall be sentenced to imprisonment in a penitentiary.

Subsequent term less than two years

(2) Where a person who is sentenced to imprisonment in a penitentiary is, before the expiration of that sentence, sentenced to imprisonment for a term of less than two years, the person shall serve that term in a penitentiary, but if the previous sentence of imprisonment in a penitentiary is set aside, that person shall serve that term in accordance with subsection (3).

Imprisonment for term less than two years

(3) A person who is sentenced to imprisonment and who is not required to be sentenced as provided in subsection (1) or (2) shall, unless a special prison is prescribed by law, be sentenced to imprisonment in a prison or other place of confinement, other than a penitentiary, within the province in which the person is convicted, in which the sentence of imprisonment may be lawfully executed.

Long-term supervision

(3.1) Despite subsection (3), an offender who is subject to long-term supervision under Part XXIV and is sentenced for another offence during the period of the supervision shall be sentenced to imprisonment in a penitentiary.

Sentence to penitentiary of person serving sentence elsewhere

(4) Where a person is sentenced to imprisonment in a penitentiary while the person is lawfully imprisoned in a place other than a penitentiary, that person shall, except where otherwise provided, be sent immediately to the penitentiary, and shall serve in the penitentiary the unexpired portion of the term of imprisonment that that person was serving when sentenced to the penitentiary as well as the term of imprisonment for which that person was sentenced to the penitentiary.

Transfer to penitentiary

(5) Where, at any time, a person who is imprisoned in a prison or place of confinement other than a penitentiary is subject to two or more terms of imprisonment, each of which is for less than two years, that are to be served one after the other, and the aggregate of the unexpired portions of those terms at that time amounts to two years or more, the person shall be transferred to a penitentiary to serve those terms, but if any one or more of such terms is set aside or reduced and the unexpired portions of the remaining term or terms on the day on which that person was transferred under this section amounted to less than two years, that person shall serve that term or terms in accordance with subsection (3).

Newfoundland

(6) For the purposes of subsection (3), “penitentiary” does not, until a day to be fixed by order of the Governor in Council, include the facility mentioned in [subsection 15\(2\)](#) of the *Corrections and Conditional Release Act*.

1992, c. 11, s. 16; 1995, c. 19, s. 39, c. 22, s. 6; 1997, c. 17, s. 1; [2008, c. 6, s. 39](#).

Report by court to Correctional Service

743.2 A court that sentences or commits a person to penitentiary shall forward to the Correctional Service of Canada its reasons and recommendation relating to the sentence or committal, any relevant reports that were submitted to the court, and any other information relevant to administering the sentence or committal.

1995, c. 22, s. 6.

Non-communication order

743.21 (1) The sentencing judge may issue an order prohibiting the offender from communicating, directly or indirectly, with any victim, witness or other person identified in the order during the custodial period of the sentence, except in accordance with any conditions specified in the order that the sentencing judge considers necessary.

Failure to comply with order

(2) Every person who fails, without lawful excuse, to comply with the order

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

2008, c. 18, s. 42; 2018, c. 29, s. 67; 2019, c. 25, s. 305.

Sentence served according to regulations

743.3 A sentence of imprisonment shall be served in accordance with the enactments and rules that govern the institution to which the prisoner is sentenced.

1995, c. 22, s. 6.

743.4 [Repealed, 2002, c. 1, s. 184]

Transfer of jurisdiction when person already sentenced under *Youth Criminal Justice Act*

743.5 (1) If a young person or an adult is or has been sentenced to a term of imprisonment for an offence while subject to a disposition made under paragraph 20(1)(k) or (k.1) of the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, or a youth sentence imposed under paragraph 42(2)(n), (o), (q) or (r) of the *Youth Criminal Justice Act*, the remaining portion of the disposition or youth sentence shall be dealt with, for all purposes under this Act or any other Act of Parliament, as if it had been a sentence imposed under this Act.

Transfer of jurisdiction when youth sentence imposed under *Youth Criminal Justice Act*

(2) If a disposition is made under paragraph 20(1)(k) or (k.1) of the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, with respect to a person or a youth sentence is imposed on a person under paragraph 42(2)(n), (o), (q) or (r) of the *Youth Criminal Justice Act* while the young person or adult is under sentence of imprisonment imposed under an Act of Parliament other than the *Youth Criminal Justice Act*, the disposition or youth sentence shall be dealt with, for all purposes under this Act or any other Act of Parliament, as if it had been a sentence imposed under this Act.

Sentences deemed to constitute one sentence — section 743.1

(3) For greater certainty, the following are deemed to constitute one sentence of imprisonment for the purposes of section 139 of the *Corrections and Conditional Release Act*:

(a) for the purposes of subsection (1), the remainder of the youth sentence or disposition and the subsequent term of imprisonment; and

(b) for the purposes of subsection (2), the term of imprisonment and the subsequent youth sentence or disposition.

1995, c. 22, ss. 6, 19, 20; 2002, c. 1, s. 184; 2008, c. 18, s. 43.

Eligibility for Parole

Power of court to delay parole

743.6 (1) Notwithstanding subsection 120(1) of the *Corrections and Conditional Release Act*, where an offender receives, on or after November 1, 1992, a sentence of imprisonment of two years or more, including a sentence of imprisonment for life imposed otherwise than as a minimum punishment, on conviction for an offence set out in Schedule I or II to that Act that was prosecuted by way of indictment, the court may, if satisfied, having regard to the circumstances of the commission of the offence and the character and circumstances of the offender, that the expression of society's denunciation of the offence or the objective of specific or general deterrence so requires, order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less.

Power of court to delay parole

(1.1) Notwithstanding [section 120](#) of the *Corrections and Conditional Release Act*, where an offender receives a sentence of imprisonment of two years or more, including a sentence of imprisonment for life imposed otherwise than as a minimum punishment, on conviction for a criminal organization offence other than an offence under [section 467.11](#), [467.111](#), [467.12](#) or [467.13](#), the court may order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less.

Power of court to delay parole

(1.2) Notwithstanding [section 120](#) of the *Corrections and Conditional Release Act*, where an offender receives a sentence of imprisonment of two years or more, including a sentence of imprisonment for life, on conviction for a terrorism offence or an offence under [section 467.11](#), [467.111](#), [467.12](#) or [467.13](#), the court shall order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less, unless the court is satisfied, having regard to the circumstances of the commission of the offence and the character and circumstances of the offender, that the expression of society's denunciation of the offence and the objectives of specific and general deterrence would be adequately served by a period of parole ineligibility determined in accordance with the *Corrections and Conditional Release Act*.

Principles that are to guide the court

(2) For greater certainty, the paramount principles which are to guide the court under this section are denunciation and specific or general deterrence, with rehabilitation of the offender, in all cases, being subordinate to these paramount principles.

1995, c. 22, s. 6, c. 42, s. 86; 1997, c. 23, s. 18; [2001, c. 32, s. 45](#), c. 41, ss. 21, 133; [2014, c. 17, ss. 15, 16](#).

Delivery of Offender to Keeper of Prison

Execution of warrant of committal

744 A peace officer or other person to whom a warrant of committal authorized by this or any other Act of Parliament is directed shall arrest the person named or described therein, if it is necessary to do so in order to take that person into custody, convey that person to the prison mentioned in the warrant and deliver that person, together with the warrant, to the keeper of the prison who shall thereupon give to the peace officer or other person who delivers the prisoner a receipt in Form 43 setting out the state and condition of the prisoner when delivered into custody.

R.S., 1985, c. C-46, s. 744; R.S., 1985, c. 27 (1st Supp.), s. 166, c. 1 (4th Supp.), s. 18(F); 1992, c. 11, s. 16; 1995, c. 22, s. 6.

Imprisonment for Life

Sentence of life imprisonment

745 Subject to [section 745.1](#), the sentence to be pronounced against a person who is to be sentenced to imprisonment for life shall be

(a) in respect of a person who has been convicted of high treason or first degree murder, that the person be sentenced to imprisonment for life without eligibility for parole until the person has served twenty-five years of the sentence;

(b) in respect of a person who has been convicted of second degree murder where that person has previously been convicted of culpable homicide that is murder, however described in this Act, that that person be sentenced to imprisonment for life without eligibility for parole until the person has served twenty-five years of the sentence;

(b.1) in respect of a person who has been convicted of second degree murder where that person has previously been convicted of an offence under [section 4](#) or [6](#) of the *Crimes Against Humanity and War Crimes Act* that had as its basis an intentional killing, whether or not it was planned and deliberate, that that person be sentenced to imprisonment for life without eligibility for parole until the person has served twenty-five years of the sentence;

(c) in respect of a person who has been convicted of second degree murder, that the person be sentenced to imprisonment for life without eligibility for parole until the person has served at least ten years of the sentence or such greater number of years, not being more than twenty-five years, as has been substituted therefor pursuant to [section 745.4](#); and

(d) in respect of a person who has been convicted of any other offence, that the person be sentenced to imprisonment for life with normal eligibility for parole.

R.S., 1985, c. C-46, s. 745; R.S., 1985, c. 27 (2nd Supp.), s. 10; 1990, c. 17, s. 14; 1992, c. 51, s. 39; 1995, c. 22, s. 6; 2000, c. 24, s. 46.

Information in respect of parole

745.01 (1) Except where [subsection 745.6\(2\)](#) applies, at the time of sentencing under [paragraph 745\(a\)](#), (b) or (c), the judge who presided at the trial of the offender shall state the following, for the record:

The offender has been found guilty of (*state offence*) and sentenced to imprisonment for life. The offender is not eligible for parole until (*state date*). However, after serving at least 15 years of the sentence, the offender may apply under [section 745.6](#) of the *Criminal Code* for a reduction in the number of years of imprisonment without eligibility for parole. If the jury hearing the application reduces the period of parole ineligibility, the offender may then make an application for parole under the [Corrections and Conditional Release Act](#) at the end of that reduced period.

Exception

(2) Subsection (1) does not apply if the offender is convicted of an offence committed on or after the day on which this subsection comes into force.

1999, c. 25, s. 21(Preamble); [2011, c. 2, s. 2](#).

Persons under eighteen

745.1 The sentence to be pronounced against a person who was under the age of eighteen at the time of the commission of the offence for which the person was convicted of first degree murder or second degree murder and who is to be sentenced to imprisonment for life shall be that the person be sentenced to imprisonment for life without eligibility for parole until the person has served

(a) such period between five and seven years of the sentence as is specified by the judge presiding at the trial, or if no period is specified by the judge presiding at the trial, five years, in the case of a person who was under the age of sixteen at the time of the commission of the offence;

(b) ten years, in the case of a person convicted of first degree murder who was sixteen or seventeen years of age at the time of the commission of the offence; and

(c) seven years, in the case of a person convicted of second degree murder who was sixteen or seventeen years of age at the time of the commission of the offence.

1995, c. 22, ss. 6, 21.

Recommendation by jury

745.2 Subject to [section 745.3](#), where a jury finds an accused guilty of second degree murder, the judge presiding at the trial shall, before discharging the jury, put to them the following question:

You have found the accused guilty of second degree murder and the law requires that I now pronounce a sentence of imprisonment for life against the accused. Do you wish to make any recommendation with respect to the number of years that the accused must serve before the accused is eligible for release on parole? You are not required to make any recommendation but if you do, your recommendation will be considered by me when I am determining whether I should substitute for the ten year period, which the law would otherwise require the accused to serve before the accused is eligible to

be considered for release on parole, a number of years that is more than ten but not more than twenty-five.

1995, c. 22, s. 6.

Recommendation by jury — multiple murders

745.21 (1) Where a jury finds an accused guilty of murder and that accused has previously been convicted of murder, the judge presiding at the trial shall, before discharging the jury, put to them the following question:

You have found the accused guilty of murder. The law requires that I now pronounce a sentence of imprisonment for life against the accused. Do you wish to make any recommendation with respect to the period without eligibility for parole to be served for this murder consecutively to the period without eligibility for parole imposed for the previous murder? You are not required to make any recommendation, but if you do, your recommendation will be considered by me when I make my determination.

Application

(2) Subsection (1) applies to an offender who is convicted of murders committed on a day after the day on which this section comes into force and for which the offender is sentenced under this Act, the *National Defence Act* or the *Crimes Against Humanity and War Crimes Act*.

2011, c. 5, s. 4.

Persons under sixteen

745.3 Where a jury finds an accused guilty of first degree murder or second degree murder and the accused was under the age of sixteen at the time of the commission of the offence, the judge presiding at the trial shall, before discharging the jury, put to them the following question:

You have found the accused guilty of first degree murder (or second degree murder) and the law requires that I now pronounce a sentence of imprisonment for life against the accused. Do you wish to make any recommendation with respect to the period of imprisonment that the accused must serve before the accused is eligible for release on parole? You are not required to make any recommendation but if you do, your recommendation will be considered by me when I am determining the period of imprisonment that is between five years and seven years that the law would require the accused to serve before the accused is eligible to be considered for release on parole.

1995, c. 22, ss. 6, 22.

Ineligibility for parole

745.4 Subject to [section 745.5](#), at the time of the sentencing under [section 745](#) of an offender who is convicted of second degree murder, the judge who presided at the trial of the offender or, if that judge is unable to do so, any judge of the same court may, having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission, and to the recommendation, if any, made pursuant to [section 745.2](#), by order, substitute for ten years a number of years of imprisonment (being more than ten but not more than twenty-five) without eligibility for parole, as the judge deems fit in the circumstances.

Idem

745.5 At the time of the sentencing under [section 745.1](#) of an offender who is convicted of first degree murder or second degree murder and who was under the age of sixteen at the time of the commission of the offence, the judge who presided at the trial of the offender or, if that judge is unable to do so, any judge of the same court, may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission, and to the recommendation, if any, made pursuant to [section 745.3](#), by order, decide the period of imprisonment the offender is to serve that is between five years and seven years without eligibility for parole, as the judge deems fit in the circumstances.

1995, c. 22, ss. 6, 23.

Ineligibility for parole — multiple murders

745.51 (1) At the time of the sentencing under [section 745](#) of an offender who is convicted of murder and who has already been convicted of one or more other murders, the judge who presided at the trial of the offender or, if that judge is unable to do so, any judge of the same court may, having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission, and the recommendation, if any, made pursuant to [section 745.21](#), by order, decide that the periods without eligibility for parole for each murder conviction are to be served consecutively.

Reasons

(2) The judge shall give, either orally or in writing, reasons for the decision to make or not to make an order under subsection (1).

Application

(3) Subsections (1) and (2) apply to an offender who is convicted of murders committed on a day after the day on which this section comes into force and for which the offender is sentenced under this Act, the [National Defence Act](#) or the [Crimes Against Humanity and War Crimes Act](#).

[2011, c. 5, s. 5.](#)

Application for judicial review

745.6 (1) Subject to subsections (2) to (2.6), a person may apply, in writing, to the appropriate Chief Justice in the province in which their conviction took place for a reduction in the number of years of imprisonment without eligibility for parole if the person

(a) has been convicted of murder or high treason;

(a.1) committed the murder or high treason before the day on which this paragraph comes into force;

(b) has been sentenced to imprisonment for life without eligibility for parole until more than fifteen years of their sentence has been served; and

(c) has served at least fifteen years of their sentence.

Exception — multiple murderers

(2) A person who has been convicted of more than one murder may not make an application under subsection (1), whether or not proceedings were commenced in respect of any of the murders before another murder was committed.

Less than 15 years of sentence served

(2.1) A person who is convicted of murder or high treason and who has served less than 15 years of their sentence on the day on which this subsection comes into force may, within 90 days after the day on which they have served 15 years of their sentence, make an application under subsection (1).

At least 15 years of sentence served

(2.2) A person who is convicted of murder or high treason and who has served at least 15 years of their sentence on the day on which this subsection comes into force may make an application under subsection (1) within 90 days after

(a) the end of five years after the day on which the person was the subject of a determination made under [subsection 745.61\(4\)](#) or a determination or conclusion to which [subsection 745.63\(8\)](#) applies; or

(b) the day on which this subsection comes into force, if the person has not made an application under subsection (1).

Non-application of subsection (2.2)

(2.3) Subsection (2.2) has no effect on a determination or decision made under [subsection 745.61\(3\)](#) or [\(5\)](#) or [745.63\(3\)](#), [\(5\)](#) or [\(6\)](#) as it read immediately before the day on which this subsection comes into force. A person in respect of whom a time is set under paragraph 745.61(3)(a) or 745.63(6)(a) as it read immediately before that day may make an application under subsection (1) within 90 days after the end of that time.

Further five-year period if no application made

(2.4) If the person does not make an application in accordance with subsection (2.1), (2.2) or (2.3), as the case may be, they may make an application within 90 days after the day on which they have served a further five years of their sentence following the 90-day period referred to in that subsection, as the case may be.

Subsequent applications

(2.5) A person who makes an application in accordance with subsection (2.1), (2.2) or (2.3), as the case may be, may make another application under subsection (1) within 90 days after

- (a) the end of the time set under [paragraph 745.61\(3\)\(a\)](#) or [745.63\(6\)\(a\)](#), if a time is set under that paragraph; or
- (b) the end of five years after the day on which the person is the subject of a determination made under [subsection 745.61\(4\)](#) or a determination or conclusion to which [subsection 745.63\(8\)](#) applies, if the person is the subject of such a determination or conclusion.

Subsequent applications

(2.6) A person who had made an application under subsection (1) as it read immediately before the day on which this subsection comes into force, whose application was finally disposed of on or after that day and who has then made a subsequent application may make a further application in accordance with subsection (2.5), if either paragraph (2.5) (a) or (b) is applicable.

(2.7) The 90-day time limits for the making of any application referred to in subsections (2.1) to (2.5) may be extended by the appropriate Chief Justice, or his or her designate, to a maximum of 180 days if the person, due to circumstances beyond their control, is unable to make an application within the 90-day time limit.

(2.8) If a person convicted of murder does not make an application under subsection (1) within the maximum time period allowed by this section, the Commissioner of Correctional Service Canada, or his or her designate, shall immediately notify in writing a parent, child, spouse or common-law partner of the victim that the convicted person did not make an application. If it is not possible to notify one of the aforementioned relatives, then the notification shall be given to another relative of the victim. The notification shall specify the next date on which the convicted person will be eligible to make an application under subsection (1).

Definition of *appropriate Chief Justice*

(3) For the purposes of this section and [sections 745.61 to 745.64](#), the ***appropriate Chief Justice*** is

- (a) in relation to the Province of Ontario, the Chief Justice of the Ontario Court;
- (b) in relation to the Province of Quebec, the Chief Justice of the Superior Court;
- (c) in relation to the Province of Newfoundland and Labrador, the Chief Justice of the Supreme Court, Trial Division;
- (d) in relation to the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Chief Justice of the Court of Queen's Bench;
- (e) in relation to the Provinces of Nova Scotia, British Columbia and Prince Edward Island, the Chief Justice of the Supreme Court; and
- (f) in relation to Yukon, the Northwest Territories and Nunavut, the Chief Justice of the Court of Appeal.

Judicial screening

745.61 (1) On receipt of an application under [subsection 745.6\(1\)](#), the appropriate Chief Justice shall determine, or shall designate a judge of the superior court of criminal jurisdiction to determine, on the basis of the following written material, whether the applicant has shown, on a balance of probabilities, that there is a substantial likelihood that the application will succeed:

- (a)** the application;
- (b)** any report provided by the Correctional Service of Canada or other correctional authorities; and
- (c)** any other written evidence presented to the Chief Justice or judge by the applicant or the Attorney General.

Criteria

(2) In determining whether the applicant has shown that there is a substantial likelihood that the application will succeed, the Chief Justice or judge shall consider the criteria set out in [paragraphs 745.63\(1\)\(a\) to \(e\)](#), with any modifications that the circumstances require.

Decision re new application

(3) If the Chief Justice or judge determines that the applicant has not shown that there is a substantial likelihood that the application will succeed, the Chief Justice or judge may

- (a)** set a time, no earlier than five years after the date of the determination, at or after which the applicant may make another application under [subsection 745.6\(1\)](#); or
- (b)** decide that the applicant may not make another application under that subsection.

If no decision re new application

(4) If the Chief Justice or judge determines that the applicant has not shown that there is a substantial likelihood that the application will succeed but does not set a time for another application or decide that such an application may not be made, the applicant may make another application no earlier than five years after the date of the determination.

Designation of judge to empanel jury

(5) If the Chief Justice or judge determines that the applicant has shown that there is a substantial likelihood that the application will succeed, the Chief Justice shall designate a judge of the superior court of criminal jurisdiction to empanel a jury to hear the application.

1996, c. 34, s. 2; [2011, c. 2, s. 4](#).

Appeal

745.62 (1) The applicant or the Attorney General may appeal to the Court of Appeal from a determination or a decision made under [section 745.61](#) on any question of law or fact or mixed law and fact.

Documents to be considered

(2) The appeal shall be determined on the basis of the documents presented to the Chief Justice or judge who made the determination or decision, any reasons for the determination or decision and any other documents that the Court of Appeal requires.

Sections to apply

(3) [Sections 673](#) to [696](#) apply, with such modifications as the circumstances require.

1996, c. 34, s. 2.

Hearing of application

745.63 (1) The jury empanelled under [subsection 745.61\(5\)](#) to hear the application shall consider the following criteria and determine whether the applicant's number of years of imprisonment without eligibility for parole ought to be reduced:

- (a)** the character of the applicant;
- (b)** the applicant's conduct while serving the sentence;
- (c)** the nature of the offence for which the applicant was convicted;
- (d)** any information provided by a victim at the time of the imposition of the sentence or at the time of the hearing under this section; and
- (e)** any other matters that the judge considers relevant in the circumstances.

Information provided by victim

(1.1) Information provided by a victim referred to in paragraph (1)(d) may be provided either orally or in writing, at the discretion of the victim, or in any other manner that the judge considers appropriate.

(2) [\[Repealed, 2015, c. 13, s. 34\]](#)

Reduction

(3) The jury hearing an application under subsection (1) may determine that the applicant's number of years of imprisonment without eligibility for parole ought to be reduced. The determination to reduce the number of years must be by unanimous vote.

No reduction

(4) The applicant's number of years of imprisonment without eligibility for parole is not reduced if

- (a)** the jury hearing an application under subsection (1) determines that the number of years ought not to be reduced;

- (b) the jury hearing an application under subsection (1) concludes that it cannot unanimously determine that the number of years ought to be reduced; or
- (c) the presiding judge, after the jury has deliberated for a reasonable period, concludes that the jury is unable to unanimously determine that the number of years ought to be reduced.

Where determination to reduce number of years

(5) If the jury determines that the number of years of imprisonment without eligibility for parole ought to be reduced, the jury may, by a vote of not less than two thirds of the members of the jury,

- (a) substitute a lesser number of years of imprisonment without eligibility for parole than that then applicable; or
- (b) terminate the ineligibility for parole.

Decision re new application

(6) If the applicant's number of years of imprisonment without eligibility for parole is not reduced, the jury may

- (a) set a time, no earlier than five years after the date of the determination or conclusion under subsection (4), at or after which the applicant may make another application under [subsection 745.6\(1\)](#); or
- (b) decide that the applicant may not make another application under that subsection.

Two-thirds decision

(7) The decision of the jury under paragraph (6)(a) or (b) must be made by not less than two thirds of its members.

If no decision re new application

(8) If the jury does not set a date on or after which another application may be made or decide that such an application may not be made, the applicant may make another application no earlier than five years after the date of the determination or conclusion under subsection (4).

1996, c. 34, s. 2; 1999, c. 25, s. 22(Preamble); [2011, c. 2, s. 5](#); [2015, c. 13, s. 34](#).

Rules

745.64 (1) The appropriate Chief Justice in each province or territory may make such rules as are required for the purposes of [sections 745.6 to 745.63](#).

Statutory Instruments Act

(1.1) The [Statutory Instruments Act](#) does not apply to those rules.

Territories

(2) When the appropriate Chief Justice is designating a judge of the superior court of criminal jurisdiction, for the purpose of a judicial screening under [subsection 745.61\(1\)](#) or to empanel a jury to hear an application under [subsection 745.61\(5\)](#), in respect of a conviction that took place in Yukon, the Northwest Territories or Nunavut, the appropriate Chief Justice may designate the judge from the Court of Appeal of Yukon, the Northwest Territories or Nunavut, or the Supreme Court of Yukon or the Northwest Territories or the Nunavut Court of Justice, as the case may be.

1996, c. 34, s. 2; 1999, c. 3, s. 53; [2002, c. 7, s. 147\(E\)](#); [2019, c. 25, s. 306](#).

Time spent in custody

746 In calculating the period of imprisonment served for the purposes of [section 745](#), [745.1](#), [745.4](#), [745.5](#) or [745.6](#), there shall be included any time spent in custody between

(a) in the case of a sentence of imprisonment for life after July 25, 1976, the day on which the person was arrested and taken into custody in respect of the offence for which that person was sentenced to imprisonment for life and the day the sentence was imposed; or

(b) in the case of a sentence of death that has been or is deemed to have been commuted to a sentence of imprisonment for life, the day on which the person was arrested and taken into custody in respect of the offence for which that person was sentenced to death and the day the sentence was commuted or deemed to have been commuted to a sentence of imprisonment for life.

R.S., 1985, c. C-46, s. 746; 1995, c. 19, s. 41, c. 22, ss. 6, 24.

Parole prohibited

746.1 (1) Unless Parliament otherwise provides by an enactment making express reference to this section, a person who has been sentenced to imprisonment for life without eligibility for parole for a specified number of years pursuant to this Act shall not be considered for parole or released pursuant to a grant of parole under the [Corrections and Conditional Release Act](#) or any other Act of Parliament until the expiration or termination of the specified number of years of imprisonment.

Absence with or without escort and day parole

(2) Subject to subsection (3), in respect of a person sentenced to imprisonment for life without eligibility for parole for a specified number of years pursuant to this Act, until the expiration of all but three years of the specified number of years of imprisonment,

(a) no day parole may be granted under the [Corrections and Conditional Release Act](#);

(b) no absence without escort may be authorized under that Act or the [Prisons and Reformatories Act](#); and

(c) except with the approval of the Parole Board of Canada, no absence with escort otherwise than for medical reasons or in order to attend judicial proceedings or a coroner's inquest may be authorized under either of those Acts.

Young offenders

(3) In the case of any person convicted of first degree murder or second degree murder who was under the age of eighteen at the time of the commission of the offence and who is sentenced to imprisonment for life without eligibility for parole for a specified number of years pursuant to this Act, until the expiration of all but one fifth of the period of imprisonment the person is to serve without eligibility for parole,

(a) no day parole may be granted under the *Corrections and Conditional Release Act*;

(b) no absence without escort may be authorized under that Act or the *Prisons and Reformatories Act*; and

(c) except with the approval of the Parole Board of Canada, no absence with escort otherwise than for medical reasons or in order to attend judicial proceedings or a coroner's inquest may be authorized under either of those Acts.

1995, c. 22, s. 6, c. 42, s. 87; 1997, c. 17, s. 2; 2012, c. 1, ss. 160, 201.

747 [Repealed, 1995, c. 22, s. 6]

Pardons and Remissions

To whom pardon may be granted

748 (1) Her Majesty may extend the royal mercy to a person who is sentenced to imprisonment under the authority of an Act of Parliament, even if the person is imprisoned for failure to pay money to another person.

Free or conditional pardon

(2) The Governor in Council may grant a free pardon or a conditional pardon to any person who has been convicted of an offence.

Effect of free pardon

(3) Where the Governor in Council grants a free pardon to a person, that person shall be deemed thereafter never to have committed the offence in respect of which the pardon is granted.

Punishment for subsequent offence not affected

(4) No free pardon or conditional pardon prevents or mitigates the punishment to which the person might otherwise be lawfully sentenced on a subsequent conviction for an offence other than that for which the pardon was granted.

R.S., 1985, c. C-46, s. 748; 1992, c. 22, s. 12; 1995, c. 22, s. 6.

Remission by Governor in Council

748.1 (1) The Governor in Council may order the remission, in whole or in part, of a fine or forfeiture imposed under an Act of Parliament, whoever the person may be to whom it is payable or however it may be recoverable.

Terms of remission

(2) An order for remission under subsection (1) may include the remission of costs incurred in the proceedings, but no costs to which a private prosecutor is entitled shall be remitted.

1995, c. 22, s. 6.

Royal prerogative

749 Nothing in this Act in any manner limits or affects Her Majesty's royal prerogative of mercy.

R.S., 1985, c. C-46, s. 749; 1995, c. 22, s. 6.

Disabilities

Public office vacated for conviction

750 (1) Where a person is convicted of an indictable offence for which the person is sentenced to imprisonment for two years or more and holds, at the time that person is convicted, an office under the Crown or other public employment, the office or employment forthwith becomes vacant.

When disability ceases

(2) A person to whom subsection (1) applies is, until undergoing the punishment imposed on the person or the punishment substituted therefor by competent authority or receives a free pardon from Her Majesty, incapable of holding any office under the Crown or other public employment, or of being elected or sitting or voting as a member of Parliament or of a legislature or of exercising any right of suffrage.

Disability to contract

(3) No person who is convicted of

- (a)** an offence under [section 121](#), [124](#) or [418](#),
- (b)** an offence under [section 380](#) committed against Her Majesty, or
- (c)** an offence under [paragraph 80\(1\)\(d\)](#), [subsection 80\(2\)](#) or [section 154.01](#) of the *Financial Administration Act*,

has, after that conviction, capacity to contract with Her Majesty or to receive any benefit under a contract between Her Majesty and any other person or to hold office under Her Majesty.

Application for restoration of privileges

(4) A person to whom subsection (3) applies may, at any time before a record suspension for which he or she has applied is ordered under the [Criminal Records Act](#), apply to the Governor in Council for the restoration of one or more of the capacities lost by the person by virtue of that subsection.

Order of restoration

(5) Where an application is made under subsection (4), the Governor in Council may order that the capacities lost by the applicant by virtue of subsection (3) be restored to that applicant in whole or in part and subject to such conditions as the Governor in Council considers desirable in the public interest.

Removal of disability

(6) Where a conviction is set aside by competent authority, any disability imposed by this section is removed.

R.S., 1985, c. C-46, s. 750; 1995, c. 22, s. 6; 2000, c. 1, s. 9; [2006, c. 9, s. 246](#); [2012, c. 1, s. 146](#).

Miscellaneous Provisions

Costs to successful party in case of libel

751 The person in whose favour judgment is given in proceedings by indictment for defamatory libel is entitled to recover from the opposite party costs in a reasonable amount to be fixed by order of the court.

R.S., 1985, c. C-46, s. 751; 1995, c. 22, s. 6.

How recovered

751.1 Where costs that are fixed under [section 751](#) are not paid forthwith, the party in whose favour judgment is given may enter judgment for the amount of the costs by filing the order in any civil court of the province in which the trial was held that has jurisdiction to enter a judgment for that amount, and that judgment is enforceable against the opposite party in the same manner as if it were a judgment rendered against that opposite party in that court in civil proceedings.

1995, c. 22, s. 6.

PART XXIV

Dangerous Offenders and Long-term Offenders

Interpretation

Definitions

752 In this Part,

court means the court by which an offender in relation to whom an application under this Part is made was convicted, or a superior court of criminal jurisdiction; (*tribunal*)

designated offence means

- (a)** a primary designated offence,
- (b)** an offence under any of the following provisions:
 - (i)** [paragraph 81\(1\)\(a\)](#) (using explosives),
 - (ii)** [paragraph 81\(1\)\(b\)](#) (using explosives),
 - (iii)** [section 85](#) (using firearm or imitation firearm in commission of offence),
 - (iv)** [section 87](#) (pointing firearm),
 - (iv.1)** [section 98](#) (breaking and entering to steal firearm),
 - (iv.2)** [section 98.1](#) (robbery to steal firearm),
 - (v)** [section 153.1](#) (sexual exploitation of person with disability),
 - (vi)** [section 163.1](#) (child sexual abuse and exploitation material),
 - (vii)** [section 170](#) (parent or guardian procuring sexual activity),
 - (viii)** [section 171](#) (householder permitting sexual activity by or in presence of child),
 - (ix)** [section 172.1](#) (luring child),
 - (ix.1)** [section 172.2](#) (agreement or arrangement — sexual offence against child),
 - (x) to (xii)** [\[Repealed, 2014, c. 25, s. 29\]](#)
 - (xiii)** [section 245](#) (administering noxious thing),
 - (xiv)** [section 266](#) (assault),
 - (xv)** [section 269](#) (unlawfully causing bodily harm),
 - (xvi)** [section 269.1](#) (torture),
 - (xvii)** [paragraph 270\(1\)\(a\)](#) (assaulting peace officer),
 - (xviii)** [section 273.3](#) (removal of child from Canada),
 - (xix)** [subsection 279\(2\)](#) (forcible confinement),
 - (xx)** [section 279.01](#) (trafficking in persons),
 - (xx.1)** [section 279.011](#) (trafficking of a person under the age of eighteen years),
 - (xx.2)** [section 279.02](#) (material benefit — trafficking),
 - (xx.3)** [section 279.03](#) (withholding or destroying documents — trafficking),
 - (xxi)** [section 279.1](#) (hostage taking),
 - (xxii)** [section 280](#) (abduction of person under age of 16),
 - (xxiii)** [section 281](#) (abduction of person under age of 14),
 - (xxiii.1)** [subsection 286.1\(2\)](#) (obtaining sexual services for consideration from person under 18 years),

- (xxiii.2) [section 286.2](#) (material benefit from sexual services),
- (xxiii.3) [section 286.3](#) (procuring),
- (xxiii.4) [section 320.13](#) (dangerous operation),
- (xxiii.5) [subsections 320.14\(1\), \(2\) and \(3\)](#) (operation while impaired),
- (xxiii.6) [section 320.15](#) (failure or refusal to comply with demand),
- (xxiii.7) [section 320.16](#) (failure to stop after accident),
- (xxiii.8) [section 320.17](#) (flight from peace officer),
- (xxiv) [section 344](#) (robbery), and
- (xxv) [section 348](#) (breaking and entering with intent, committing offence or breaking out),

(c) an offence under any of the following provisions of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as they read from time to time before January 1, 1988:

- (i) subsection 146(2) (sexual intercourse with female between ages of 14 and 16),
- (ii) [section 148](#) (sexual intercourse with feeble-minded),
- (iii) [section 166](#) (parent or guardian procuring defilement), and
- (iv) [section 167](#) (householder permitting defilement),

(c.1) an offence under any of the following provisions of this Act, as they read from time to time before the day on which this paragraph comes into force:

- (i) subsection 212(1) (procuring),
- (ii) subsection 212(2) (living on the avails of prostitution of person under 18 years),
- (iii) subsection 212(2.1) (aggravated offence in relation to living on the avails of prostitution of person under 18 years), and
- (iv) subsection 212(4) (prostitution of person under 18 years); or

(d) an attempt or conspiracy to commit an offence referred to in paragraph (b), (c) or (c.1); (*infraction désignée*)

long-term supervision means long-term supervision ordered under [subsection 753\(4\)](#), [753.01\(5\)](#) or [\(6\)](#) or [753.1\(3\)](#) or [subparagraph 759\(3\)\(a\)\(i\)](#); (*surveillance de longue durée*)

primary designated offence means

(a) an offence under any of the following provisions:

- (i) [section 151](#) (sexual interference),
- (ii) [section 152](#) (invitation to sexual touching),

- (iii) [section 153](#) (sexual exploitation),
- (iv) [section 155](#) (incest),
- (v) [section 239](#) (attempt to commit murder),
- (vi) [section 244](#) (discharging firearm with intent),
- (vii) [section 267](#) (assault with weapon or causing bodily harm),
- (viii) [section 268](#) (aggravated assault),
- (ix) [section 271](#) (sexual assault),
- (x) [section 272](#) (sexual assault with weapon, threats to third party or causing bodily harm),
- (xi) [section 273](#) (aggravated sexual assault), and
- (xii) [subsection 279\(1\)](#) (kidnapping),

(b) an offence under any of the following provisions of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as they read from time to time before January 4, 1983:

- (i) [section 144](#) (rape),
- (ii) [section 145](#) (attempt to commit rape),
- (iii) [section 149](#) (indecent assault on female),
- (iv) [section 156](#) (indecent assault on male),
- (v) [subsection 245\(2\)](#) (assault causing bodily harm), and
- (vi) [subsection 246\(1\)](#) (assault with intent) if the intent is to commit an offence referred to in any of subparagraphs (i) to (v) of this paragraph,

(c) an offence under any of the following provisions of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as enacted by [section 19](#) of *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, chapter 125 of the Statutes of Canada, 1980-81-82-83:

- (i) [section 246.1](#) (sexual assault),
- (ii) [section 246.2](#) (sexual assault with weapon, threats to third party or causing bodily harm), and
- (iii) [section 246.3](#) (aggravated sexual assault),

(d) an offence under any of the following provisions of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as they read from time to time before January 1, 1988:

- (i) [subsection 146\(1\)](#) (sexual intercourse with female under age of 14), and
- (ii) [paragraph 153\(1\)\(a\)](#) (sexual intercourse with step-daughter), or

(e) an attempt or conspiracy to commit an offence referred to in any of paragraphs (a) to (d); (*infraction primaire*)

serious personal injury offence means

(a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving

(i) the use or attempted use of violence against another person, or

(ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person,

and for which the offender may be sentenced to imprisonment for ten years or more, or

(b) an offence or attempt to commit an offence mentioned in [section 271](#) (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault). (*sérvices graves à la personne*)

R.S., 1985, c. C-46, s. 752; [2008, c. 6, ss. 40, 61](#); [2010, c. 3, s. 8](#); [2012, c. 1, s. 35](#); [2014, c. 25, s. 29](#); [2018, c. 21, s. 25](#); [2024, c. 23, s. 10](#).

Dangerous Offenders and Long-Term Offenders

Prosecutor's duty to advise court

752.01 If the prosecutor is of the opinion that an offence for which an offender is convicted is a serious personal injury offence that is a designated offence and that the offender was convicted previously at least twice of a designated offence and was sentenced to at least two years of imprisonment for each of those convictions, the prosecutor shall advise the court, as soon as feasible after the finding of guilt and in any event before sentence is imposed, whether the prosecutor intends to make an application under [subsection 752.1\(1\)](#).

[2008, c. 6, s. 41](#).

Application for remand for assessment

752.1 (1) On application by the prosecutor, if the court is of the opinion that there are reasonable grounds to believe that an offender who is convicted of a serious personal injury offence or an offence referred to in [paragraph 753.1\(2\)\(a\)](#) might be found to be a dangerous offender under [section 753](#) or a long-term offender under [section 753.1](#), the court shall, by order in writing, before sentence is imposed, remand the offender, for a period not exceeding 60 days, to the custody of a person designated by the court who can perform an assessment or have an assessment performed by experts for use as evidence in an application under section 753 or 753.1.

Report

(2) The person to whom the offender is remanded shall file a report of the assessment with the court not later than 30 days after the end of the assessment period and make

copies of it available to the prosecutor and counsel for the offender.

Extension of time

(3) On application by the prosecutor, the court may extend the period within which the report must be filed by a maximum of 30 days if the court is satisfied that there are reasonable grounds to do so.

1997, c. 17, s. 4; 2008, c. 6, s. 41.

Application for finding that an offender is a dangerous offender

753 (1) On application made under this Part after an assessment report is filed under [subsection 752.1\(2\)](#), the court shall find the offender to be a dangerous offender if it is satisfied

(a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in [section 752](#) and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing

(i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,

(ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or

(iii) any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint; or

(b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in [section 752](#) and the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses.

Presumption

(1.1) If the court is satisfied that the offence for which the offender is convicted is a primary designated offence for which it would be appropriate to impose a sentence of imprisonment of two years or more and that the offender was convicted previously at least twice of a primary designated offence and was sentenced to at least two years of

imprisonment for each of those convictions, the conditions in paragraph (1)(a) or (b), as the case may be, are presumed to have been met unless the contrary is proved on a balance of probabilities.

Time for making application

(2) An application under subsection (1) must be made before sentence is imposed on the offender unless

(a) before the imposition of sentence, the prosecutor gives notice to the offender of a possible intention to make an application under [section 752.1](#) and an application under subsection (1) not later than six months after that imposition; and

(b) at the time of the application under subsection (1) that is not later than six months after the imposition of sentence, it is shown that relevant evidence that was not reasonably available to the prosecutor at the time of the imposition of sentence became available in the interim.

Application for remand for assessment after imposition of sentence

(3) Notwithstanding [subsection 752.1\(1\)](#), an application under that subsection may be made after the imposition of sentence or after an offender begins to serve the sentence in a case to which paragraphs (2)(a) and (b) apply.

Sentence for dangerous offender

(4) If the court finds an offender to be a dangerous offender, it shall

(a) impose a sentence of detention in a penitentiary for an indeterminate period;

(b) impose a sentence for the offence for which the offender has been convicted — which must be a minimum punishment of imprisonment for a term of two years — and order that the offender be subject to long-term supervision for a period that does not exceed 10 years; or

(c) impose a sentence for the offence for which the offender has been convicted.

Sentence of indeterminate detention

(4.1) The court shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

If application made after sentencing

(4.2) If the application is made after the offender begins to serve the sentence in a case to which paragraphs (2)(a) and (b) apply, a sentence imposed under paragraph (4)(a), or a sentence imposed and an order made under [paragraph 4\(b\)](#), replaces the sentence that was imposed for the offence for which the offender was convicted.

If offender not found to be dangerous offender

(5) If the court does not find an offender to be a dangerous offender,

(a) the court may treat the application as an application to find the offender to be a long-term offender, [section 753.1](#) applies to the application and the court may either find that the offender is a long-term offender or hold another hearing for that purpose; or

(b) the court may impose sentence for the offence for which the offender has been convicted.

(6) [Repealed, 2008, c. 6, s. 42]

R.S., 1985, c. C-46, s. 753; 1997, c. 17, s. 4; [2008, c. 6, s. 42](#).

Application for remand for assessment — later conviction

753.01 (1) If an offender who is found to be a dangerous offender is later convicted of a serious personal injury offence or an offence under [subsection 753.3\(1\)](#), on application by the prosecutor, the court shall, by order in writing, before sentence is imposed, remand the offender, for a period not exceeding 60 days, to the custody of a person designated by the court who can perform an assessment or have an assessment performed by experts for use as evidence in an application under subsection (4).

Report

(2) The person to whom the offender is remanded shall file a report of the assessment with the court not later than 30 days after the end of the assessment period and make copies of it available to the prosecutor and counsel for the offender.

Extension of time

(3) On application by the prosecutor, the court may extend the period within which the report must be filed by a maximum of 30 days if the court is satisfied that there are reasonable grounds to do so.

Application for new sentence or order

(4) After the report is filed, the prosecutor may apply for a sentence of detention in a penitentiary for an indeterminate period, or for an order that the offender be subject to a new period of long-term supervision in addition to any other sentence that may be imposed for the offence.

Sentence of indeterminate detention

(5) If the application is for a sentence of detention in a penitentiary for an indeterminate period, the court shall impose that sentence unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a sentence for the offence for which the offender has been convicted — with or without a new period of long-term supervision — will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

New long-term supervision

(6) If the application is for a new period of long-term supervision, the court shall order that the offender be subject to a new period of long-term supervision in addition to a sentence for the offence for which they have been convicted unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that the sentence alone will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

2008, c. 6, s. 43.

Victim evidence

753.02 Any evidence given during the hearing of an application made under [subsection 753\(1\)](#) by a victim of an offence for which the offender was convicted is deemed also to have been given during any hearing held with respect to the offender under [paragraph 753\(5\)\(a\)](#) or [subsection 753.01\(5\)](#) or [\(6\)](#).

2008, c. 6, s. 43.

Application for finding that an offender is a long-term offender

753.1 (1) The court may, on application made under this Part following the filing of an assessment report under [subsection 752.1\(2\)](#), find an offender to be a long-term offender if it is satisfied that

- (a)** it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
- (b)** there is a substantial risk that the offender will reoffend; and
- (c)** there is a reasonable possibility of eventual control of the risk in the community.

Substantial risk

(2) The court shall be satisfied that there is a substantial risk that the offender will reoffend if

- (a)** the offender has been convicted of an offence under [section 151](#) (sexual interference), [152](#) (invitation to sexual touching) or [153](#) (sexual exploitation), [subsection 163.1\(2\)](#) (making child sexual abuse and exploitation material), [163.1\(3\)](#) (distribution, etc., of child sexual abuse and exploitation material), [163.1\(4\)](#) (possession of child sexual abuse and exploitation material) or [163.1\(4.1\)](#) (accessing child sexual abuse and exploitation material), [section 170](#) (parent or guardian procuring sexual activity), [171](#) (householder permitting sexual activity), [171.1](#) (making sexually explicit material available to child), [172.1](#) (luring a child) or [172.2](#) (agreement or arrangement — sexual offence against child), [subsection 173\(2\)](#) (exposure) or [section 271](#) (sexual assault), [272](#) (sexual assault with a weapon), [273](#) (aggravated sexual assault) or [279.011](#) (trafficking — person under 18 years) or [subsection 279.02\(2\)](#) (material benefit — trafficking of person under 18 years), [279.03\(2\)](#) (withholding or destroying documents — trafficking of person under 18 years), [286.1\(2\)](#) (obtaining sexual services for consideration from person under 18

years), 286.2(2) (material benefit from sexual services provided by person under 18 years) or 286.3(2) (procuring — person under 18 years), or has engaged in serious conduct of a sexual nature in the commission of another offence of which the offender has been convicted; and

(b) the offender

(i) has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part, that shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological damage on other persons, or

(ii) by conduct in any sexual matter including that involved in the commission of the offence for which the offender has been convicted, has shown a likelihood of causing injury, pain or other evil to other persons in the future through similar offences.

Sentence for long-term offender

(3) If the court finds an offender to be a long-term offender, it shall

(a) impose a sentence for the offence for which the offender has been convicted, which must be a minimum punishment of imprisonment for a term of two years; and

(b) order that the offender be subject to long-term supervision for a period that does not exceed 10 years.

Exception — if application made after sentencing

(3.1) The court may not impose a sentence under paragraph (3)(a) and the sentence that was imposed for the offence for which the offender was convicted stands despite the offender's being found to be a long-term offender, if the application was one that

(a) was made after the offender begins to serve the sentence in a case to which [paragraphs 753\(2\)\(a\) and \(b\)](#) apply; and

(b) was treated as an application under this section further to the court deciding to do so under [paragraph 753\(5\)\(a\)](#).

(4) and (5) [\[Repealed, 2008, c. 6, s. 44\]](#)

If offender not found to be long-term offender

(6) If the court does not find an offender to be a long-term offender, the court shall impose sentence for the offence for which the offender has been convicted.

1997, c. 17, s. 4; [2002, c. 13, s. 76](#); [2008, c. 6, s. 44](#); [2012, c. 1, s. 36](#); [2014, c. 25, s. 30](#); [2024, c. 23, s. 11](#).

Long-term supervision

753.2 (1) Subject to subsection (2), an offender who is subject to long-term supervision shall be supervised in the community in accordance with the [Corrections and Conditional Release Act](#) when the offender has finished serving

- (a) the sentence for the offence for which the offender has been convicted; and
- (b) all other sentences for offences for which the offender is convicted and for which sentence of a term of imprisonment is imposed on the offender, either before or after the conviction for the offence referred to in paragraph (a).

Sentence served concurrently with supervision

(2) A sentence imposed on an offender referred to in subsection (1), other than a sentence that requires imprisonment, is to be served concurrently with the long-term supervision.

Application for reduction in period of long-term supervision

(3) An offender who is required to be supervised, a member of the Parole Board of Canada or, on approval of that Board, the offender's parole supervisor, as defined in [subsection 99\(1\)](#) of the [Corrections and Conditional Release Act](#), may apply to a superior court of criminal jurisdiction for an order reducing the period of long-term supervision or terminating it on the ground that the offender no longer presents a substantial risk of reoffending and thereby being a danger to the community. The onus of proving that ground is on the applicant.

Notice to Attorney General

(4) The applicant must give notice of an application under subsection (3) to the Attorney General at the time the application is made.

1997, c. 17, s. 4; [2008, c. 6, s. 45](#); [2012, c. 1, ss. 147, 160](#).

Breach of long-term supervision

753.3 (1) An offender who, without reasonable excuse, fails or refuses to comply with long-term supervision is guilty of

- (a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or
- (b) an offence punishable on summary conviction.

Where accused may be tried and punished

(2) An accused who is charged with an offence under subsection (1) may be tried and punished by any court having jurisdiction to try that offence in the place where the offence is alleged to have been committed or in the place where the accused is found, is arrested or is in custody, but if the place where the accused is found, is arrested or is in custody is outside the province in which the offence is alleged to have been committed, no proceedings in respect of that offence shall be instituted in that place without the consent of the Attorney General of that province.

1997, c. 17, s. 4; [2008, c. 6, s. 46](#); [2019, c. 25, s. 307](#).

New offence

753.4 (1) If an offender who is subject to long-term supervision commits one or more offences under this or any other Act and a court imposes a sentence of imprisonment for the offence or offences, the long-term supervision is interrupted until the offender has finished serving all the sentences, unless the court orders its termination.

Reduction in term of long-term supervision

(2) A court that imposes a sentence of imprisonment under subsection (1) may order a reduction in the length of the period of the offender's long-term supervision.

1997, c. 17, s. 4; 2008, c. 6, s. 47.

Hearing of application

754 (1) With the exception of an application for remand for assessment, the court may not hear an application made under this Part unless

(a) the Attorney General of the province in which the offender was tried has, either before or after the making of the application, consented to the application;

(b) at least seven days notice has been given to the offender by the prosecutor, following the making of the application, outlining the basis on which it is intended to found the application; and

(c) a copy of the notice has been filed with the clerk of the court or the provincial court judge, as the case may be.

By court alone

(2) An application under this Part shall be heard and determined by the court without a jury.

When proof unnecessary

(3) For the purposes of an application under this Part, where an offender admits any allegations contained in the notice referred to in paragraph (1)(b), no proof of those allegations is required.

Proof of consent

(4) The production of a document purporting to contain any nomination or consent that may be made or given by the Attorney General under this Part and purporting to be signed by the Attorney General is, in the absence of any evidence to the contrary, proof of that nomination or consent without proof of the signature or the official character of the person appearing to have signed the document.

R.S., 1985, c. C-46, s. 754; R.S., 1985, c. 27 (1st Supp.), s. 203; 2008, c. 6, s. 48.

Exception to long-term supervision — life sentence

755 (1) The court shall not order that an offender be subject to long-term supervision if they have been sentenced to life imprisonment.

Maximum length of long-term supervision

(2) The periods of long-term supervision to which an offender is subject at any particular time must not total more than 10 years.

R.S., 1985, c. C-46, s. 755; 1997, c. 17, s. 5; [2008, c. 6, s. 49](#).

756 [Repealed, 1997, c. 17, s. 5]

Evidence of character

757 Without prejudice to the right of the offender to tender evidence as to their character and repute, if the court thinks fit, evidence of character and repute may be admitted

(a) on the question of whether the offender is or is not a dangerous offender or a long-term offender; and

(b) in connection with a sentence to be imposed or an order to be made under this Part.

R.S., 1985, c. C-46, s. 757; 1997, c. 17, s. 5; [2008, c. 6, s. 50](#).

Presence of accused at hearing of application

758 (1) The offender shall be present at the hearing of the application under this Part and if at the time the application is to be heard

(a) he is confined in a prison, the court may order, in writing, the person having the custody of the accused to bring him before the court; or

(b) he is not confined in a prison, the court shall issue a summons or a warrant to compel the accused to attend before the court and the provisions of Part XVI relating to summons and warrant are applicable with such modifications as the circumstances require.

Exception

(2) Notwithstanding subsection (1), the court may

(a) cause the offender to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible; or

(b) permit the offender to be out of court during the whole or any part of the hearing on such conditions as the court considers proper.

R.S., c. C-34, s. 693; 1976-77, c. 53, s. 14.

Appeal — offender

759 (1) An offender who is found to be a dangerous offender or a long-term offender may appeal to the court of appeal from a decision made under this Part on any ground of law or fact or mixed law and fact.

(1.1) [Repealed, [2008, c. 6, s. 51](#)]

Appeal — Attorney General

(2) The Attorney General may appeal to the court of appeal from a decision made under this Part on any ground of law.

Disposition of appeal

(3) The court of appeal may

(a) allow the appeal and

(i) find that an offender is or is not a dangerous offender or a long-term offender or impose a sentence that may be imposed or an order that may be made by the trial court under this Part, or

(ii) order a new hearing, with any directions that the court considers appropriate; or

(b) dismiss the appeal.

(3.1) and (3.2) [Repealed, 2008, c. 6, s. 51]

Effect of decision

(4) A decision of the court of appeal has the same force and effect as if it were a decision of the trial court.

(4.1) to (5) [Repealed, 2008, c. 6, s. 51]

Commencement of sentence

(6) Notwithstanding [subsection 719\(1\)](#), a sentence imposed on an offender by the court of appeal pursuant to this section shall be deemed to have commenced when the offender was sentenced by the court by which he was convicted.

Part XXI applies re appeals

(7) The provisions of Part XXI with respect to procedure on appeals apply, with such modifications as the circumstances require, to appeals under this section.

R.S., 1985, c. C-46, s. 759; 1995, c. 22, s. 10; 1997, c. 17, s. 6; [2008, c. 6, s. 51](#).

Disclosure to Correctional Service of Canada

760 Where a court finds an offender to be a dangerous offender or a long-term offender, the court shall order that a copy of all reports and testimony given by psychiatrists, psychologists, criminologists and other experts and any observations of the court with respect to the reasons for the finding, together with a transcript of the trial of the offender, be forwarded to the Correctional Service of Canada for information.

R.S., 1985, c. C-46, s. 760; 1997, c. 17, s. 7.

Review for parole

761 (1) Subject to subsection (2), where a person is in custody under a sentence of detention in a penitentiary for an indeterminate period, the Parole Board of Canada shall, as soon as possible after the expiration of seven years from the day on which that person was taken into custody and not later than every two years after the previous review, review the condition, history and circumstances of that person for the purpose of determining whether he or she should be granted parole under Part II of the [Corrections and Conditional Release Act](#) and, if so, on what conditions.

Idem

(2) Where a person is in custody under a sentence of detention in a penitentiary for an indeterminate period that was imposed before October 15, 1977, the Parole Board of Canada shall, at least once in every year, review the condition, history and circumstances of that person for the purpose of determining whether he should be granted parole under Part II of the [Corrections and Conditional Release Act](#) and, if so, on what conditions.

R.S., 1985, c. C-46, s. 761; 1992, c. 20, s. 215; 1997, c. 17, s. 8; [2012, c. 1, s. 160](#).

PART XXV

Effect and Enforcement of Undertakings, Release Orders and Recognizances

Applications for forfeiture

762 (1) Applications for the forfeiture of an amount set out in an undertaking, release order or recognizance must be made to the courts designated in column II of the schedule of the respective provinces designated in column I of the schedule.

Definitions

(2) In this Part,

clerk of the court means the officer designated in column III of the schedule in respect of the court designated in column II of the schedule; (*greffier du tribunal*)

schedule means the schedule to this Part. (*annexe*)

R.S., 1985, c. C-46, s. 762; [2019, c. 25, s. 309](#).

Undertaking or release order binding on person

763 (1) If a person is bound by an undertaking, release order or recognizance to appear before a court, provincial court judge or justice for any purpose and the session or sittings of that court or the proceedings are adjourned or an order is made changing the place of trial, that person and their sureties continue to be bound by the undertaking, release order or recognizance as if it had been entered into or issued with respect to the resumed proceedings or the trial at the time and place at which the proceedings are ordered to be resumed or the trial is ordered to be held.

Summary of certain provisions

(2) A summary of [section 763](#) must be set out in any undertaking, release order or recognizance.

R.S., 1985, c. C-46, s. 763; R.S., 1985, c. 27 (1st Supp.), s. 203; [2019, c. 25, s. 310](#).

Undertaking or release order binding on accused

764 (1) If an accused is bound by an undertaking or release order to appear for trial, their arraignment or conviction does not cancel the undertaking or release order, and it continues to bind them and their sureties for their appearance until the accused is discharged or sentenced, as the case may be.

Committal or new sureties

(2) Despite subsection (1), the court, provincial court judge or justice may commit an accused to prison or may require them to furnish new or additional sureties for their appearance until the accused is discharged or sentenced, as the case may be.

Effect of committal

(3) The sureties of an accused who is bound by a release order to appear for trial are discharged if the accused is committed to prison under subsection (2).

Summary of certain provisions

(4) A summary of subsections (1) to (3) must be set out in any undertaking or release order.

R.S., 1985, c. C-46, s. 764; R.S., 1985, c. 27 (1st Supp.), s. 203; [2019, c. 25, s. 310](#).

Effect of subsequent arrest

765 If an accused is bound by an undertaking or a release order to appear for trial, their arrest on another charge does not cancel the undertaking or release order, and it continues to bind them and their sureties for their appearance until the accused is discharged or sentenced, as the case may be, in respect of the offence to which the undertaking or release order relates.

R.S., 1985, c. C-46, s. 765; [2019, c. 25, s. 310](#).

Render of accused by sureties

766 (1) A surety for a person who is subject to a release order or recognizance may, by an application in writing to a court, provincial court judge or justice, apply to be relieved of their obligation under the release order or recognizance, and the court, provincial court judge or justice shall then make an order in writing for committal of that person to the prison named in that order.

Arrest

(2) An order issued by a court, provincial court judge or justice under subsection (1) must be given to the surety and, on receipt of it, the surety or any peace officer may arrest the person named in the order and deliver that person with the order to the keeper of the prison named in the order, and the keeper shall receive and imprison that person until the person is discharged according to law.

Certificate and entry of render

(3) If a court, provincial court judge or justice issues an order under subsection (1) and receives from the sheriff a certificate that the person named in the order has been committed to prison under subsection (2), the court, provincial court judge or justice shall order an entry of the committal to be endorsed on the release order or recognizance, as the case may be.

Discharge of sureties

(4) An endorsement under subsection (3) cancels the release order or recognizance, as the case may be, and discharges the sureties.

R.S., 1985, c. C-46, s. 766; R.S., 1985, c. 27 (1st Supp.), s. 203; [2019, c. 25, s. 310](#).

Render of accused in court by sureties

767 A surety for a person who is subject to a release order or recognizance may bring that person before the court where the person is required to appear or where the person entered into the recognizance at any time during the sittings of that court and before the person's trial, and the surety may discharge their obligation under the release order or recognizance by giving that person into the custody of the court. The court shall then commit that person to prison until the person is discharged according to law.

R.S., 1985, c. C-46, s. 767; [2019, c. 25, s. 310](#).

Substitution of surety

767.1 (1) If a surety for a person who is subject to a release order or recognizance has given the person into the custody of a court under [section 767](#), or a surety applies to be relieved of their obligation under the release order or recognizance under [subsection 766\(1\)](#), the court, justice or provincial court judge, as the case may be, may, instead of committing or issuing an order for the committal of the person to prison, substitute any other suitable person for the surety under the release order or recognizance.

Signing of release order or recognizance by new sureties

(2) If a person substituted for a surety under a release order or recognizance under subsection (1) signs the release order or recognizance, the original surety is discharged, but the release order or recognizance is not otherwise affected.

R.S., 1985, c. 27 (1st Supp.), s. 167; [2019, c. 25, s. 310](#).

Rights of surety preserved

768 Nothing in this Part limits any right that a surety has of taking and giving into custody any person for whom they are a surety under a release order or recognizance.

R.S., 1985, c. C-46, s. 768; [2019, c. 25, s. 310](#).

Application of judicial interim release provisions

769 Where a surety for a person has rendered him into custody and that person has been committed to prison, the provisions of Parts XVI, XXI and XXVII relating to judicial interim release apply, with such modifications as the circumstances require, in respect of him and he shall forthwith be taken before a justice or judge as an accused charged with an offence or as an appellant, as the case may be, for the purposes of those provisions.

R.S., c. C-34, s. 703; R.S., c. 2(2nd Supp.), s. 14.

Default to be endorsed

770 (1) If, in proceedings to which this Act applies, a person who is subject to an undertaking, release order or recognizance does not comply with any of its conditions, a court, provincial court judge or justice having knowledge of the facts shall endorse or cause to be endorsed on the undertaking, release order or recognizance a certificate in Form 33 setting out

- (a) the nature of the default;
- (b) the reason for the default, if it is known;
- (c) whether the ends of justice have been defeated or delayed by reason of the default; and
- (d) the names and addresses of the principal and sureties.

Transmission to clerk of court

(2) Once endorsed, the undertaking, release order or recognizance must be sent to the clerk of the court and shall be kept by them with the records of the court.

Certificate is evidence

(3) A certificate that has been endorsed on the undertaking, release order or recognizance is evidence of the default to which it relates.

Transmission of deposit

(4) If, in proceedings to which this section applies, the principal or surety has deposited money as security for the performance of a condition of an undertaking, release order or recognizance, that money must be sent to the clerk of the court with the defaulted undertaking, release order or recognizance, to be dealt with in accordance with this Part.

R.S., 1985, c. C-46, s. 770; R.S., 1985, c. 27 (1st Supp.), s. 203; 1997, c. 18, s. 108; [2019, c. 25, s. 311](#).

Proceedings in case of default

771 (1) If an undertaking, release order or recognizance has been endorsed with a certificate and has been received by the clerk of the court,

(a) a judge of the court shall, on the request of the clerk of the court or the Attorney General or counsel acting on the Attorney General's or counsel's behalf, as the case may be, fix a time and place for the hearing of an application for the forfeiture of the amount set out in the undertaking, release order or recognizance; and

(b) the clerk of the court shall, not less than 10 days before the time fixed under paragraph (a) for the hearing, send by registered mail, or have served in the manner directed by the court or prescribed by the rules of court, to each principal and surety, at the address set out in the certificate, a notice requiring the person to appear at the time and place fixed by the judge to show cause why the amount set out in the undertaking, release order or recognizance should not be forfeited.

Order of judge

(2) If subsection (1) has been complied with, the judge may, after giving the parties an opportunity to be heard, in the judge's discretion grant or refuse the application and make any order with respect to the forfeiture of the amount that the judge considers proper.

Judgment debtors of the Crown

(3) If a judge orders forfeiture of the amount set out in the undertaking, release order or recognizance, the principal and their sureties become judgment debtors of the Crown, each in the amount that the judge orders them to pay.

Order may be filed

(3.1) An order made under subsection (2) may be filed with the clerk of the superior court and if one is filed, the clerk shall issue a writ of *fiери facias* in Form 34 and deliver it to the sheriff of each of the territorial divisions in which the principal or any surety resides, carries on business or has property.

Transfer of deposit

(4) If a deposit has been made by a person against whom an order for forfeiture has been made, no writ of *fiери facias* may be issued, but the amount of the deposit must be transferred by the person who has custody of it to the person who is entitled by law to receive it.

R.S., 1985, c. C-46, s. 771; R.S., 1985, c. 27 (1st Supp.), s. 168; 1994, c. 44, s. 78; 1999, c. 5, s. 43; 2019, c. 25, s. 311.

Levy under writ

772 (1) Where a writ of *fiери facias* is issued pursuant to [section 771](#), the sheriff to whom it is delivered shall execute the writ and deal with the proceeds thereof in the same manner in which he is authorized to execute and deal with the proceeds of writs of *fiери facias* issued out of superior courts in the province in civil proceedings.

Costs

(2) Where this section applies, the Crown is entitled to the costs of execution and of proceedings incidental thereto that are fixed, in the Province of Quebec, by any tariff applicable in the Superior Court in civil proceedings, and in any other province, by any tariff applicable in the superior court of the province in civil proceedings, as the judge may direct.

R.S., c. C-34, s. 706.

Committal when writ not satisfied

773 (1) Where a writ of *fiери facias* has been issued under this Part and it appears from a certificate in a return made by the sheriff that sufficient goods and chattels, lands and tenements cannot be found to satisfy the writ, or that the proceeds of the execution of the writ are not sufficient to satisfy it, a judge of the court may, upon the application of the Attorney General or counsel acting on his behalf, fix a time and place for the sureties to show cause why a warrant of committal should not be issued in respect of them.

Notice

(2) Seven clear days notice of the time and place fixed for the hearing pursuant to subsection (1) shall be given to the sureties.

Hearing

(3) The judge shall, at the hearing held pursuant to subsection (1), inquire into the circumstances of the case and may in his discretion

- (a)** order the discharge of the amount for which the surety is liable; or
- (b)** make any order with respect to the surety and to his imprisonment that he considers proper in the circumstances and issue a warrant of committal in Form 27.

Warrant to committal

(4) A warrant of committal issued pursuant to this section authorizes the sheriff to take into custody the person in respect of whom the warrant was issued and to confine him in a prison in the territorial division in which the writ was issued or in the prison nearest to the court, until satisfaction is made or until the period of imprisonment fixed by the judge has expired.

Definition of *Attorney General*

(5) In this section and in [section 771](#), ***Attorney General*** means, where [subsection 734.4\(2\)](#) applies, the Attorney General of Canada.

R.S., 1985, c. C-46, s. 773; 1995, c. 22, s. 10.

PART XXVI

Extraordinary Remedies

Application of Part

774 This Part applies to proceedings in criminal matters by way of *certiorari*, *habeas corpus*, *mandamus*, *procedendo* and prohibition.

R.S., 1985, c. C-46, s. 774; R.S., 1985, c. 27 (1st Supp.), s. 169.

Appearance in person — *habeas corpus*

774.1 Despite any other provision of this Act, the person who is the subject of a writ of *habeas corpus* must appear in court in person.

[2002, c. 13, s. 77](#); [2022, c. 17, s. 50\(E\)](#).

Detention on inquiry to determine legality of imprisonment

775 Where proceedings to which this Part applies have been instituted before a judge or court having jurisdiction, by or in respect of a person who is in custody by reason that he is charged with or has been convicted of an offence, to have the legality of his imprisonment determined, the judge or court may, without determining the question, make an order for the further detention of that person and direct the judge, justice or provincial court judge under whose warrant he is in custody, or any other judge, justice or provincial court judge, to take any proceedings, hear such evidence or do any other thing that, in the opinion of the judge or court, will best further the ends of justice.

R.S., 1985, c. C-46, s. 775; R.S., 1985, c. 27 (1st Supp.), s. 203.

Where conviction or order not reviewable

776 No conviction or order shall be removed by *certiorari*

- (a) where an appeal was taken, whether or not the appeal has been carried to a conclusion; or
- (b) where the defendant appeared and pleaded and the merits were tried, and an appeal might have been taken, but the defendant did not appeal.

R.S., c. C-34, s. 710.

Conviction or order remediable, when

777 (1) No conviction, order or warrant for enforcing a conviction or order shall, on being removed by *certiorari*, be held to be invalid by reason of any irregularity, informality or insufficiency therein, where the court before which or the judge before whom the question is raised, on perusal of the evidence, is satisfied

- (a) that an offence of the nature described in the conviction, order or warrant, as the case may be, was committed,
- (b) that there was jurisdiction to make the conviction or order or issue the warrant, as the case may be, and
- (c) that the punishment imposed, if any, was not in excess of the punishment that might lawfully have been imposed,

but the court or judge has the same powers to deal with the proceedings in the manner that the court or judge considers proper that are conferred on a court to which an appeal might have been taken.

Correcting punishment

(2) Where, in proceedings to which subsection (1) applies, the court or judge is satisfied that a person was properly convicted of an offence but the punishment that was imposed is greater than the punishment that might lawfully have been imposed, the court or judge

(a) shall correct the sentence,

(i) where the punishment is a fine, by imposing a fine that does not exceed the maximum fine that might lawfully have been imposed,

(ii) where the punishment is imprisonment, and the person has not served a term of imprisonment under the sentence that is equal to or greater than the term of imprisonment that might lawfully have been imposed, by imposing a term of imprisonment that does not exceed the maximum term of imprisonment that might lawfully have been imposed, or

(iii) where the punishment is a fine and imprisonment, by imposing a punishment in accordance with subparagraph (i) or (ii), as the case requires; or

(b) shall remit the matter to the convicting judge, justice or provincial court judge and direct him to impose a punishment that is not greater than the punishment that may be lawfully imposed.

Amendment

(3) Where an adjudication is varied pursuant to subsection (1) or (2), the conviction and warrant of committal, if any, shall be amended to conform to the adjudication as varied.

Sufficiency of statement

(4) Any statement that appears in a conviction and is sufficient for the purpose of the conviction is sufficient for the purposes of an information, summons, order or warrant in which it appears in the proceedings.

R.S., 1985, c. C-46, s. 777; R.S., 1985, c. 27 (1st Supp.), s. 203.

Irregularities within [section 777](#)

778 Without restricting the generality of [section 777](#), that section shall be deemed to apply where

(a) the statement of the adjudication or of any other matter or thing is in the past tense instead of in the present tense;

(b) the punishment imposed is less than the punishment that might by law have been imposed for the offence that appears by the evidence to have been committed; or

(c) there has been an omission to negative circumstances, the existence of which would make the act complained of lawful, whether those circumstances are stated by

way of exception or otherwise in the provision under which the offence is charged or are stated in another provision.

R.S., c. C-34, s. 712.

General order for security by recognizance

779 (1) A court that has authority to quash a conviction, order or other proceeding on *certiorari* may prescribe by general order that no motion to quash any such conviction, order or other proceeding removed to the court by *certiorari* shall be heard unless the defendant has entered into a recognizance with one or more sufficient sureties, before one or more justices of the territorial division in which the conviction or order was made or before a judge or other officer, or has made a deposit to be prescribed with a condition that the defendant will prosecute the writ of *certiorari* at his own expense, without wilful delay, and, if ordered, will pay to the person in whose favour the conviction, order or other proceeding is affirmed his full costs and charges to be taxed according to the practice of the court where the conviction, order or proceeding is affirmed.

Provisions of Part XXV

(2) The provisions of Part XXV relating to forfeiture of an amount set out in a recognizance apply to a recognizance entered into under this section.

R.S., 1985, c. C-46, s. 779; [2019, c. 25, s. 313](#).

Effect of order dismissing application to quash

780 Where a motion to quash a conviction, order or other proceeding is refused, the order of the court refusing the application is sufficient authority for the clerk of the court forthwith to return the conviction, order or proceeding to the court from which or the person from whom it was removed, and for proceedings to be taken with respect thereto for the enforcement thereof.

R.S., c. C-34, s. 714.

Want of proof of order in council

781 (1) No order, conviction or other proceeding shall be quashed or set aside, and no defendant shall be discharged, by reason only that evidence has not been given

(a) of a proclamation or order of the Governor in Council or the lieutenant governor in council;

(b) of rules, regulations or by-laws made by the Governor in Council under an Act of Parliament or by the lieutenant governor in council under an Act of the legislature of the province; or

(c) of the publication of a proclamation, order, rule, regulation or by-law in the [Canada Gazette](#) or in the official gazette for the province.

Judicial notice

(2) Proclamations, orders, rules, regulations and by-laws mentioned in subsection (1) and the publication thereof shall be judicially noticed.

R.S., c. C-34, s. 715.

Defect in form

782 No warrant of committal shall, on *certiorari* or *habeas corpus*, be held to be void by reason only of any defect therein, where

(a) it is alleged in the warrant that the defendant was convicted; and

(b) there is a valid conviction to sustain the warrant.

R.S., c. C-34, s. 716.

No action against official when conviction, etc., quashed

783 Where an application is made to quash a conviction, order or other proceeding made or held by a provincial court judge acting under Part XIX or a justice on the ground that he exceeded his jurisdiction, the court to which or the judge to whom the application is made may, in quashing the conviction, order or other proceeding, order that no civil proceedings shall be taken against the justice or provincial court judge or against any officer who acted under the conviction, order or other proceeding or under any warrant issued to enforce it.

R.S., 1985, c. C-46, s. 783; R.S., 1985, c. 27 (1st Supp.), s. 203.

Appeal in *mandamus*, etc.

784 (1) An appeal lies to the court of appeal from a decision granting or refusing the relief sought in proceedings by way of *mandamus*, *certiorari* or prohibition.

Application of Part XXI

(2) Except as provided in this section, Part XXI applies, with such modifications as the circumstances require, to appeals under this section.

Refusal of application, and appeal

(3) Where an application for a writ of *habeas corpus ad subjiciendum* is refused by a judge of a court having jurisdiction therein, no application may again be made on the same grounds, whether to the same or to another court or judge, unless fresh evidence is adduced, but an appeal from that refusal shall lie to the court of appeal, and where on the appeal the application is refused a further appeal shall lie to the Supreme Court of Canada, with leave of that Court.

Where writ granted

(4) Where a writ of *habeas corpus ad subjiciendum* is granted by any judge, no appeal therefrom shall lie at the instance of any party including the Attorney General of the province concerned or the Attorney General of Canada.

Appeal from judgment on return of writ

(5) Where a judgment is issued on the return of a writ of *habeas corpus ad subjiciendum*, an appeal therefrom lies to the court of appeal, and from a judgment of the court of appeal to the Supreme Court of Canada, with the leave of that Court, at the instance of the applicant or the Attorney General of the province concerned or the Attorney General of Canada, but not at the instance of any other party.

Hearing of appeal

(6) An appeal in *habeas corpus* matters shall be heard by the court to which the appeal is directed at an early date, whether in or out of the prescribed sessions of the court.

R.S., 1985, c. C-46, s. 784; 1997, c. 18, s. 109.

PART XXVII

Summary Convictions

Interpretation

Definitions

785 In this Part,

clerk of the appeal court includes a local clerk of the appeal court; (*greffier de la cour d'appel*)

informant means a person who lays an information; (*dénonciateur*)

information includes

(a) a count in an information, and

(b) a complaint in respect of which a justice is authorized by an Act of Parliament or an enactment made thereunder to make an order; (*dénonciation*)

order means any order, including an order for the payment of money; (*ordonnance*)

proceedings means

(a) proceedings in respect of offences that are declared by an Act of Parliament or an enactment made thereunder to be punishable on summary conviction, and

(b) proceedings where a justice is authorized by an Act of Parliament or an enactment made thereunder to make an order; (*procédures*)

prosecutor means the Attorney General or, where the Attorney General does not intervene, the informant, and includes counsel or an agent acting on behalf of either of them; (*poursuivant*)

sentence includes

- (a) a declaration made under [subsection 199\(3\)](#),
- (b) an order made under [subsection 109\(1\)](#) or [110\(1\)](#), [section 320.24](#), [subsection 730\(1\)](#) or [737\(2.1\)](#) or (3) or [section 738](#), [739](#), [742.1](#) or [742.3](#),
- (c) a disposition made under [section 731](#) or [732](#) or [subsection 732.2\(3\)](#) or (5), [742.4\(3\)](#) or [742.6\(9\)](#),
- (d) an order made under [subsection 16\(1\)](#) of the *Controlled Drugs and Substances Act*, and
- (e) an order made under [subsection 94\(1\)](#) of the *Cannabis Act*; (*sentence, peine ou condamnation*)

summary conviction court means a person who has jurisdiction in the territorial division where the subject-matter of the proceedings is alleged to have arisen and who

- (a) is given jurisdiction over the proceedings by the enactment under which the proceedings are taken,
- (b) is a justice or provincial court judge, where the enactment under which the proceedings are taken does not expressly give jurisdiction to any person or class of persons, or
- (c) is a provincial court judge, where the enactment under which the proceedings are taken gives jurisdiction in respect thereof to two or more justices; (*cour des poursuites sommaires*)

trial includes the hearing of a complaint. (*procès ou instruction*)

R.S., 1985, c. C-46, s. 785; R.S., 1985, c. 27 (1st Supp.), ss. 170, 203; 1992, c. 1, s. 58; 1995, c. 22, s. 7, c. 39, s. 156; 1996, c. 19, s. 76; 1999, c. 25, s. 23(Preamble); [2002, c. 13, s. 78](#); [2006, c. 14, s. 7](#); [2013, c. 11, s. 4](#); [2018, c. 16, s. 223](#), c. 21, s. 26; [2019, c. 25, s. 314](#); [2022, c. 17, s. 51](#).

Application of Part

786 (1) Except where otherwise provided by law, this Part applies to proceedings as defined in this Part.

Limitation

(2) No proceedings shall be instituted more than 12 months after the time when the subject matter of the proceedings arose, unless the prosecutor and the defendant so agree.

R.S., 1985, c. C-46, s. 786; 1997, c. 18, s. 110; [2019, c. 25, s. 315](#).

Punishment

General penalty

787 (1) Unless otherwise provided by law, every person who is convicted of an offence punishable on summary conviction is liable to a fine of not more than \$5,000 or to a term of imprisonment of not more than two years less a day, or to both.

Imprisonment in default if not otherwise specified

(2) If the imposition of a fine or the making of an order for the payment of money is authorized by law, but the law does not provide that imprisonment may be imposed in default of payment of the fine or compliance with the order, the court may order that in default of payment of the fine or compliance with the order, as the case may be, the defendant shall be imprisoned for a term of not more than two years less a day.

R.S., 1985, c. C-46, s. 787; R.S., 1985, c. 27 (1st Supp.), s. 171; [2008, c. 18, s. 44](#); [2019, c. 25, s. 316](#).

Information

Commencement of proceedings

788 (1) Proceedings under this Part shall be commenced by laying an information in Form 2.

One justice may act before the trial

(2) Notwithstanding any other law that requires an information to be laid before or to be tried by two or more justices, one justice may

- (a)** receive the information;
- (b)** issue a summons or warrant with respect to the information; and
- (c)** do all other things preliminary to the trial.

R.S., c. C-34, s. 723.

Formalities of information

789 (1) In proceedings to which this Part applies, an information

- (a)** shall be in writing and under oath; and
- (b)** may charge more than one offence or relate to more than one matter of complaint, but where more than one offence is charged or the information relates to more than one matter of complaint, each offence or matter of complaint, as the case may be, shall be set out in a separate count.

No reference to previous convictions

(2) No information in respect of an offence for which, by reason of previous convictions, a greater punishment may be imposed shall contain any reference to previous convictions.

R.S., c. C-34, s. 724.

Any justice may act before and after trial

790 (1) Nothing in this Act or any other law shall be deemed to require a justice before whom proceedings are commenced or who issues process before or after the trial to be the justice or one of the justices before whom the trial is held.

Two or more justices

(2) Where two or more justices have jurisdiction with respect to proceedings, they shall be present and act together at the trial, but one justice may thereafter do anything that is required or is authorized to be done in connection with the proceedings.

(3) and (4) [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 172]

R.S., 1985, c. C-46, s. 790; R.S., 1985, c. 27 (1st Supp.), s. 172.

791 [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 173]

792 [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 174]

Defects and Objections

793 [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 175]

No need to negative exception, etc.

794 (1) No exception, exemption, proviso, excuse or qualification prescribed by law is required to be set out or negated, as the case may be, in an information.

(2) [Repealed, 2018, c. 29, s. 68]

R.S., 1985, c. C-46, s. 794; 2018, c. 29, s. 68.

Application

Application of Parts XVI, XVIII, XVIII.1, XX, XX.1 and XXII.01

795 The provisions of Parts XVI and XVIII with respect to compelling the appearance of an accused before a justice, the provisions of Parts XVIII.1, XX and XX.1, insofar as they are not inconsistent with this Part, and the provisions of Part XXII.01, apply, with any necessary modifications, to proceedings under this Part.

R.S., 1985, c. C-46, s. 795; R.S., 1985, c. 27 (1st Supp.), s. 176; 1991, c. 43, s. 7; 2011, c. 16, s. 16; 2022, c. 17, s. 52.

796 and 797 [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 176]

Trial

Jurisdiction

798 Every summary conviction court has jurisdiction to try, determine and adjudge proceedings to which this Part applies in the territorial division over which the person who constitutes that court has jurisdiction.

R.S., c. C-34, s. 733.

Non-appearance of prosecutor

799 Where, in proceedings to which this Part applies, the defendant appears for the trial and the prosecutor, having had due notice, does not appear, the summary conviction

court may dismiss the information or may adjourn the trial to some other time on such terms as it considers proper.

R.S., c. C-34, s. 734.

When both parties appear

800 (1) Where the prosecutor and defendant appear for the trial, the summary conviction court shall proceed to hold the trial.

Counsel or agent

(2) A defendant may appear personally or by counsel or agent, but the summary conviction court may require the defendant to appear personally and may, if it thinks fit, issue a warrant in Form 7 for the arrest of the defendant and adjourn the trial to await his appearance pursuant thereto.

(2.1) [Repealed, 2022, c. 17, s. 53]

Appearance by organization

(3) Where the defendant is an organization, it shall appear by counsel or agent and, if it does not appear, the summary conviction court may, on proof of service of the summons, proceed *ex parte* to hold the trial.

R.S., 1985, c. C-46, s. 800; 1997, c. 18, s. 111; 2003, c. 21, s. 21; 2019, c. 25, s. 317; 2022, c. 17, s. 53.

Arraignment

801 (1) Where the defendant appears for the trial, the substance of the information laid against him shall be stated to him, and he shall be asked,

(a) whether he pleads guilty or not guilty to the information, where the proceedings are in respect of an offence that is punishable on summary conviction; or

(b) whether he has cause to show why an order should not be made against him, in proceedings where a justice is authorized by law to make an order.

Finding of guilt, conviction or order if charge admitted

(2) Where the defendant pleads guilty or does not show sufficient cause why an order should not be made against him, as the case may be, the summary conviction court shall convict the defendant, discharge the defendant under [section 730](#) or make an order against the defendant accordingly.

Procedure if charge not admitted

(3) Where the defendant pleads not guilty or states that he has cause to show why an order should not be made against him, as the case may be, the summary conviction court shall proceed with the trial, and shall take the evidence of witnesses for the prosecutor and the defendant in accordance with the provisions of Part XVIII relating to preliminary inquiries.

(4) and (5) [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 177]

R.S., 1985, c. C-46, s. 801; R.S., 1985, c. 27 (1st Supp.), s. 177, c. 1 (4th Supp.), s. 18(F); 1995, c. 22, s. 10.

Right to make full answer and defence

802 (1) The prosecutor is entitled personally to conduct his case and the defendant is entitled to make his full answer and defence.

Examination of witnesses

(2) The prosecutor or defendant, as the case may be, may examine and cross-examine witnesses personally or by counsel or agent.

On oath

(3) Every witness at a trial in proceedings to which this Part applies shall be examined under oath.

R.S., c. C-34, s. 737.

Limitation on the use of agents

802.1 Despite [subsections 800\(2\)](#) and [802\(2\)](#), a defendant may not appear or examine or cross-examine witnesses by agent if he or she is liable, on summary conviction, to imprisonment for a term of more than six months, unless

- (a)** the defendant is an organization;
- (b)** the defendant is appearing to request an adjournment of the proceedings; or
- (c)** the agent is authorized to do so under a program approved — or criteria established — by the lieutenant governor in council of the province.

[2002, c. 13, s. 79](#); [2019, c. 25, s. 317.1](#).

Adjournment

803 (1) The summary conviction court may, in its discretion, before or during the trial, adjourn the trial to a time and place to be appointed and stated in the presence of the parties or their counsel or agents.

Non-appearance of defendant

(2) If a defendant who is tried alone or together with others does not appear at the time and place appointed for the trial after having been notified of that time and place, or does not appear for the resumption of a trial that has been adjourned in accordance with subsection (1), the summary conviction court

- (a)** may proceed *ex parte* to hear and determine the proceedings in the absence of that defendant as if they had appeared; or
- (b)** may, if it thinks fit, issue a warrant in Form 7 for the arrest of that defendant and adjourn the trial to await their appearance under the warrant.

Consent of Attorney General required

(3) If the summary conviction court proceeds in the manner described in paragraph (2) (a), no proceedings under [section 145](#) arising out of the defendant's failure to appear at the time and place appointed for the trial or for the resumption of the trial shall, without the consent of the Attorney General, be instituted or be proceeded with.

Non-appearance of prosecutor

(4) Where the prosecutor does not appear at the time and place appointed for the resumption of an adjourned trial, the summary conviction court may dismiss the information with or without costs.

(5) to (8) [Repealed, 1991, c. 43, s. 9]

R.S., 1985, c. C-46, s. 803; 1991, c. 43, s. 9; 1994, c. 44, s. 79; 1997, c. 18, s. 112; [2008, c. 18, s. 45](#).

Adjudication

Finding of guilt, conviction, order or dismissal

804 When the summary conviction court has heard the prosecutor, defendant and witnesses, it shall, after considering the matter, convict the defendant, discharge the defendant under [section 730](#), make an order against the defendant or dismiss the information, as the case may be.

R.S., 1985, c. C-46, s. 804; R.S., 1985, c. 27 (1st Supp.), s. 178, c. 1 (4th Supp.), s. 18(F); 1995, c. 22, s. 10.

805 [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 179]

Memo of conviction or order

806 (1) If a defendant is convicted or an order is made in relation to the defendant, a minute or memorandum of the conviction or order must be made by the summary conviction court indicating that the matter was dealt with under this Part and, on request by the defendant, the prosecutor or any other person, a conviction or order in Form 35 or 36, as the case may be, and a certified copy of the conviction or order must be drawn up and the certified copy must be delivered to the person making the request.

Warrant of committal

(2) Where a defendant is convicted or an order is made against him, the summary conviction court shall issue a warrant of committal in Form 21 or 22, and [section 528](#) applies in respect of a warrant of committal issued under this subsection.

Admissibility of certified copy

(3) If a warrant of committal in Form 21 is signed by a clerk of a court, a copy of the warrant of committal, certified by the clerk, is admissible in evidence in any proceeding.

R.S., 1985, c. C-46, s. 806; R.S., 1985, c. 27 (1st Supp.), s. 185(F); 1994, c. 44, s. 80; [2019, c. 25, s. 318](#).

Disposal of penalties when joint offenders

807 Where several persons join in committing the same offence and on conviction each is adjudged to pay an amount to a person aggrieved, no more shall be paid to that person than an amount equal to the value of the property destroyed or injured or the amount of the injury done, together with costs, if any, and the residue of the amount adjudged to be paid shall be applied in the manner in which other penalties imposed by law are directed to be applied.

R.S., c. C-34, s. 742.

Order of dismissal

808 (1) Where the summary conviction court dismisses an information, it may, if requested by the defendant, draw up an order of dismissal and shall give to the defendant a certified copy of the order of dismissal.

Effect of certificate

(2) A copy of an order of dismissal, certified in accordance with subsection (1) is, without further proof, a bar to any subsequent proceedings against the defendant in respect of the same cause.

R.S., c. C-34, s. 743.

Costs

809 (1) The summary conviction court may in its discretion award and order such costs as it considers reasonable and not inconsistent with such of the fees established by [section 840](#) as may be taken or allowed in proceedings before that summary conviction court, to be paid

(a) to the informant by the defendant, where the summary conviction court convicts or makes an order against the defendant; or

(b) to the defendant by the informant, where the summary conviction court dismisses an information.

Order set out

(2) An order under subsection (1) shall be set out in the conviction, order or order of dismissal, as the case may be.

Costs are part of fine

(3) Where a fine or sum of money or both are adjudged to be paid by a defendant and a term of imprisonment in default of payment is imposed, the defendant is, in default of payment, liable to serve the term of imprisonment imposed, and for the purposes of this subsection, any costs that are awarded against the defendant shall be deemed to be part of the fine or sum of money adjudged to be paid.

Where no fine imposed

(4) Where no fine or sum of money is adjudged to be paid by a defendant, but costs are awarded against the defendant or informant, the person who is liable to pay them is, in default of payment, liable to imprisonment for one month.

Definition of costs

(5) In this section, **costs** includes the costs and charges, after they have been ascertained, of committing and conveying to prison the person against whom costs have been awarded.

R.S., c. C-34, s. 744.

Sureties to Keep the Peace

If injury or damage feared

810 (1) An information may be laid before a justice by or on behalf of any person who fears on reasonable grounds that another person

(a) will cause personal injury to them or to their intimate partner or child or will damage their property; or

(b) will commit an offence under [section 162.1](#).

Duty of justice

(2) A justice who receives an information under subsection (1) shall cause the parties to appear before him or before a summary conviction court having jurisdiction in the same territorial division.

Adjudication

(3) If the justice or summary conviction court before which the parties appear is satisfied by the evidence adduced that the person on whose behalf the information was laid has reasonable grounds for the fear, the justice or court may order that the defendant enter into a recognizance, with or without sureties, to keep the peace and be of good behaviour for a period of not more than 12 months.

Refusal to enter into recognizance

(3.01) The justice or summary conviction court may commit the defendant to prison for a term of not more than 12 months if the defendant fails or refuses to enter into the recognizance.

Conditions in recognizance

(3.02) The justice or summary conviction court may add any reasonable conditions to the recognizance that the justice or court considers desirable to secure the good conduct of the defendant, including conditions that require the defendant

(a) to abstain from the consumption of drugs except in accordance with a medical prescription, of alcohol or of any other intoxicating substance;

(b) to provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation on the demand of a peace officer, a probation officer or someone designated under [paragraph 810.3\(2\)\(a\)](#) to make a demand, at the place and time and on the day specified by the person making the demand, if that person has reasonable grounds to believe that the defendant has breached a condition of the recognizance that requires them to abstain from the consumption of drugs, alcohol or any other intoxicating substance; or

(c) to provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation at regular intervals that are specified, in a notice in Form 51 served on the defendant, by a probation officer or a person designated under [paragraph 810.3\(2\)\(b\)](#) to specify them, if a condition of the recognizance requires the defendant to abstain from the consumption of drugs, alcohol or any other intoxicating substance.

Conditions

(3.1) Before making an order under subsection (3), the justice or the summary conviction court shall consider whether it is desirable, in the interests of the safety of the defendant or of any other person, to include as a condition of the recognizance that the defendant be prohibited from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, firearm part, ammunition, prohibited ammunition or explosive substance, or all such things, for any period specified in the recognizance and, if the justice or summary conviction court decides that it is so desirable, the justice or summary conviction court shall add such a condition to the recognizance.

Surrender, etc.

(3.11) Where the justice or summary conviction court adds a condition described in subsection (3.1) to a recognizance order, the justice or summary conviction court shall specify in the order the manner and method by which

(a) the things referred to in that subsection that are in the possession of the accused shall be surrendered, disposed of, detained, stored or dealt with; and

(b) the authorizations, licences and registration certificates held by the person shall be surrendered.

Reasons

(3.12) Where the justice or summary conviction court does not add a condition described in subsection (3.1) to a recognizance order, the justice or summary conviction court shall include in the record a statement of the reasons for not adding the condition.

Supplementary conditions

(3.2) Before making an order under subsection (3), the justice or the summary conviction court shall consider whether it is desirable, in the interests of the safety of the informant, of the person on whose behalf the information was laid or of that person's intimate partner or child, as the case may be, to add either or both of the following conditions to the recognizance,

(a) a condition prohibiting the defendant from being at, or within a distance specified in the recognizance from, a place specified in the recognizance where the person on whose behalf the information was laid or that person's intimate partner or child, as the case may be, is regularly found; or

(b) a condition prohibiting the defendant from communicating, in whole or in part, directly or indirectly, with the person on whose behalf the information was laid or that person's intimate partner or child, as the case may be.

Form — warrant of committal

(4) A warrant of committal to prison for failure or refusal to enter into the recognizance under subsection (3) may be in Form 23.

Modification of recognizance

(4.1) The justice or the summary conviction court may, on application of the informant or the defendant, vary the conditions fixed in the recognizance.

Procedure

(5) The provisions of this Part apply, with such modifications as the circumstances require, to proceedings under this section.

R.S., 1985, c. C-46, s. 810; 1991, c. 40, s. 33; 1994, c. 44, s. 81; 1995, c. 22, s. 8, c. 39, s. 157; 2000, c. 12, s. 95; [2011, c. 7, s. 7](#); [2014, c. 31, s. 25](#); [2019, c. 25, s. 319](#); [2023, c. 32, s. 13.4](#).

Fear of certain offences

810.01 (1) A person who fears on reasonable grounds that another person will commit an offence under [section 423.1](#) or a criminal organization offence may, with the Attorney General's consent, lay an information before a provincial court judge.

Appearances

(2) A provincial court judge who receives an information under subsection (1) may cause the parties to appear before a provincial court judge.

Adjudication

(3) If the provincial court judge before whom the parties appear is satisfied by the evidence adduced that the informant has reasonable grounds for the fear, the judge may order that the defendant enter into a recognizance to keep the peace and be of good behaviour for a period of not more than 12 months.

Duration extended

(3.1) However, if the provincial court judge is also satisfied that the defendant was convicted previously of an offence referred to in subsection (1), the judge may order that the defendant enter into the recognizance for a period of not more than two years.

Refusal to enter into recognizance

(4) The provincial court judge may commit the defendant to prison for a term not exceeding twelve months if the defendant fails or refuses to enter into the recognizance.

Conditions in recognizance

(4.1) The provincial court judge may add any reasonable conditions to the recognizance that the judge considers desirable for preventing the commission of an offence referred to in subsection (1), including conditions that require the defendant

(a) to participate in a treatment program;

(b) to wear an electronic monitoring device, if the Attorney General makes the request;

(c) to remain within a specified geographic area unless written permission to leave that area is obtained from the judge;

(d) to return to and remain at their place of residence at specified times;

(e) to abstain from the consumption of drugs, except in accordance with a medical prescription, of alcohol or of any other intoxicating substance;

(f) to provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation on the demand of a peace officer, a probation officer or someone designated under [paragraph 810.3\(2\)\(a\)](#) to make a demand, at the place and time and on the day specified by the person making the demand, if that person has reasonable grounds to believe that the defendant has breached a condition of the recognizance that requires them to abstain from the consumption of drugs, alcohol or any other intoxicating substance; or

(g) to provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation at regular intervals that are specified, in a notice in Form 51 served on the defendant, by a probation officer or a person designated under [paragraph 810.3\(2\)\(b\)](#) to specify them, if a condition of the recognizance requires the defendant to abstain from the consumption of drugs, alcohol or any other intoxicating substance.

Conditions — firearms

(5) The provincial court judge shall consider whether it is desirable, in the interests of the defendant's safety or that of any other person, to prohibit the defendant from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, firearm part, ammunition, prohibited ammunition or explosive substance, or all of those things. If the judge decides that it is desirable to do so, the judge shall add that condition to the recognizance and specify the period during which the condition applies.

Surrender, etc.

(5.1) If the provincial court judge adds a condition described in subsection (5) to a recognizance, the judge shall specify in the recognizance how the things referred to in that subsection that are in the defendant's possession shall be surrendered, disposed of, detained, stored or dealt with and how the authorizations, licences and registration certificates that are held by the defendant shall be surrendered.

Reasons

(5.2) If the provincial court judge does not add a condition described in subsection (5) to a recognizance, the judge shall include in the record a statement of the reasons for not adding the condition.

Variance of conditions

(6) A provincial court judge may, on application of the informant, the Attorney General or the defendant, vary the conditions fixed in the recognizance.

Other provisions to apply

(7) [Subsections 810\(4\)](#) and [\(5\)](#) apply, with any modifications that the circumstances require, to recognizances made under this section.

Definition of *Attorney General*

(8) With respect to proceedings under this section, ***Attorney General*** means either the Attorney General of Canada or the Attorney General of the province in which those proceedings are taken and includes the lawful deputy of any of them.

1997, c. 23, ss. 19, 26; [2001, c. 32, s. 46](#), c. 41, ss. 22, 133; [2002, c. 13, s. 80](#); [2009, c. 22, s. 19](#); [2011, c. 7, s. 8](#); [2015, c. 20, s. 24](#); [2023, c. 32, s. 13.5](#).

Fear of terrorism offence

810.011 (1) A person who fears on reasonable grounds that another person may commit a terrorism offence may, with the Attorney General's consent, lay an information before a provincial court judge.

Appearances

(2) The provincial court judge who receives an information under subsection (1) may cause the parties to appear before a provincial court judge.

Adjudication

(3) If the provincial court judge before whom the parties appear is satisfied by the evidence adduced that the informant has reasonable grounds for the fear, the judge may order that the defendant enter into a recognizance, with or without sureties, to keep the peace and be of good behaviour for a period of not more than 12 months.

Duration extended

(4) However, if the provincial court judge is also satisfied that the defendant was convicted previously of a terrorism offence, the judge may order that the defendant enter into the recognizance for a period of not more than five years.

Refusal to enter into recognizance

(5) The provincial court judge may commit the defendant to prison for a term of not more than 12 months if the defendant fails or refuses to enter into the recognizance.

Conditions in recognizance

(6) The provincial court judge may add any reasonable conditions to the recognizance that the judge considers desirable to secure the good conduct of the defendant, including conditions that require the defendant

- (a)** to participate in a treatment program;
- (b)** to wear an electronic monitoring device, if the Attorney General makes that request;
- (c)** to return to and remain at their place of residence at specified times;
- (d)** to abstain from the consumption of drugs, except in accordance with a medical prescription, of alcohol or of any other intoxicating substance;
- (e)** to provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation on the demand of a peace officer, a probation officer or someone designated under [paragraph 810.3\(2\)\(a\)](#) to make a demand, at the place and time and on the day specified by the person making the demand, if that person has reasonable grounds to believe that the defendant has breached a condition of the recognizance that requires them to abstain from the consumption of drugs, alcohol or any other intoxicating substance; or
- (f)** to provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation at regular intervals that are specified, in a notice in Form 51 served on the defendant, by a probation officer or a person designated under [paragraph 810.3\(2\)\(b\)](#) to specify them, if a condition of the recognizance requires the defendant to abstain from the consumption of drugs, alcohol or any other intoxicating substance.

Conditions — firearms

(7) The provincial court judge shall consider whether it is desirable, in the interests of the defendant's safety or that of any other person, to prohibit the defendant from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, firearm part, ammunition, prohibited ammunition or explosive substance, or all of those things. If the judge decides that it is desirable to do so, the judge shall add that condition to the recognizance and specify the period during which it applies.

Surrender, etc.

(8) If the provincial court judge adds a condition described in subsection (7) to a recognizance, the judge shall specify in the recognizance how the things referred to in that subsection that are in the defendant's possession shall be surrendered, disposed of, detained, stored or dealt with and how the authorizations, licences and registration certificates that are held by the defendant shall be surrendered.

Condition — passport

(9) The provincial court judge shall consider whether it is desirable, to secure the good conduct of the defendant, to include in the recognizance a condition that the defendant deposit, in the specified manner, any passport or other travel document issued in their

name that is in their possession or control. If the judge decides that it is desirable, the judge shall add the condition to the recognizance and specify the period during which it applies.

Condition — specified geographic area

(10) The provincial court judge shall consider whether it is desirable, to secure the good conduct of the defendant, to include in the recognizance a condition that the defendant remain within a specified geographic area unless written permission to leave that area is obtained from the judge or any individual designated by the judge. If the judge decides that it is desirable, the judge shall add the condition to the recognizance and specify the period during which it applies.

Reasons

(11) If the provincial court judge does not add a condition described in subsection (7), (9) or (10) to a recognizance, the judge shall include in the record a statement of the reasons for not adding it.

Variance of conditions

(12) A provincial court judge may, on application of the informant, the Attorney General or the defendant, vary the conditions fixed in the recognizance.

Other provisions to apply

(13) [Subsections 810\(4\)](#) and [\(5\)](#) apply, with any modifications that the circumstances require, to recognizances made under this section.

Definition of *Attorney General*

(14) With respect to proceedings under this section, ***Attorney General*** means either the Attorney General of Canada or the Attorney General of the province in which those proceedings are taken and includes the lawful deputy of any of them.

Annual report

(15) Each year, the Attorney General of Canada shall prepare and cause to be laid before each House of Parliament a report setting out the number of recognizances entered into under this section in the previous year.

[2015, c. 20, s. 25](#); [2019, c. 13, s. 153](#); [2023, c. 32, s. 13.6](#).

Fear of forced marriage or marriage under age of 16 years

810.02 (1) A person who fears on reasonable grounds that another person will commit an offence under [paragraph 273.3\(1\)\(d\)](#) or [section 293.1](#) or [293.2](#) may lay an information before a provincial court judge.

Appearances

(2) The judge who receives the information may cause the parties to appear before a provincial court judge.

Adjudication

(3) If the provincial court judge before whom the parties appear is satisfied by the evidence adduced that the informant has reasonable grounds for the fear, the judge may order that the defendant enter into a recognizance to keep the peace and be of good behaviour for a period of not more than 12 months.

Duration extended

(4) However, if the provincial court judge is also satisfied that the defendant was convicted previously of an offence referred to in subsection (1), the judge may order that the defendant enter into the recognizance for a period of not more than two years.

Refusal to enter into recognizance

(5) The provincial court judge may commit the defendant to prison for a term not exceeding 12 months if the defendant fails or refuses to enter into the recognizance.

Conditions in recognizance

(6) The provincial court judge may add any reasonable conditions to the recognizance that the judge considers desirable to secure the good conduct of the defendant, including conditions that

- (a)** prohibit the defendant from making agreements or arrangements for the marriage, whether in or outside Canada, of the person in respect of whom it is feared that the offence will be committed;
- (b)** prohibit the defendant from taking steps to cause the person in respect of whom it is feared that the offence will be committed to leave the jurisdiction of the court;
- (c)** require the defendant to deposit, in the specified manner, any passport or any other travel document that is in their possession or control, whether or not such passport or document is in their name or in the name of any other specified person;
- (d)** prohibit the defendant from communicating, directly or indirectly, with any specified person, or refrain from going to any specified place, except in accordance with any specified conditions that the judge considers necessary;
- (e)** require the defendant to participate in a treatment program, including a family violence counselling program;
- (f)** require the defendant to remain within a specified geographic area unless written permission to leave that area is obtained from the provincial court judge; and
- (g)** require the defendant to return to and remain at their place of residence at specified times.

Conditions — firearms

(7) The provincial court judge shall consider whether it is desirable, in the interests of the defendant's safety or that of any other person, to prohibit the defendant from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, firearm part, ammunition, prohibited ammunition or explosive substance, or all of those things. If the judge decides that it is desirable to do so, the judge shall add that condition to the recognizance and specify the period during which the condition applies.

Surrender, etc.

(8) If the provincial court judge adds a condition described in subsection (7) to a recognizance, the judge shall specify in the recognizance how the things referred to in that subsection that are in the defendant's possession are to be surrendered, disposed of, detained, stored or dealt with and how the authorizations, licences and registration certificates that are held by the defendant are to be surrendered.

Variance of conditions

(9) A provincial court judge may, on application of the informant or the defendant, vary the conditions fixed in the recognizance.

[2015, c. 29, s. 11](#); [2023, c. 32, s. 13.7](#).

Fear of domestic violence

810.03 (1) Any person who fears on reasonable grounds that another person will commit an offence that will cause personal injury to the intimate partner or a child of the other person, or to a child of the other person's intimate partner, may lay an information before a provincial court judge.

Appearances

(2) The provincial judge who receives an information under subsection (1) may cause the parties to appear before a provincial court judge.

Recognizance order

(3) If the provincial court judge before whom the parties appear is satisfied by the evidence adduced that the informant has reasonable grounds for the fear, the judge may order the defendant to enter into a recognizance to keep the peace and be of good behaviour for a period of not more than 12 months.

Duration extended

(4) If the provincial court judge is satisfied that the defendant was previously convicted of an offence in the commission of which violence was used against any former or current intimate partner of the defendant or any child of any former or current intimate partner or of the defendant, the judge may order the defendant to enter into the recognizance for a period of not more than two years.

Indigenous informant or defendant

(4.1) If the informant or the defendant is Indigenous, the provincial court judge shall consider whether, instead of making an order under subsection (3) or (4), it would be more appropriate to recommend that Indigenous support services, if any are available, be provided.

Refusal to enter into recognizance

(5) The provincial court judge may commit the defendant to prison for a term not exceeding 12 months if the defendant fails or refuses to enter into the recognizance.

Conditions in recognizance

(6) The provincial court judge may add any reasonable conditions to the recognizance that the judge considers desirable to ensure the good conduct of the defendant or to secure the safety and security of the intimate partner or a child of the defendant, or a child of the defendant's intimate partner, including conditions requiring the defendant

(a) to attend, under the supervision of the court, a treatment program approved by the province where the accused resides, such as an addiction treatment program or a domestic violence counselling program;

(b) to remain within a specified geographic area unless written permission to leave that area is obtained from the judge;

(c) to refrain from going to any specified place or being within a specified distance of any specified place, except in accordance with any specified conditions that the judge considers necessary;

(d) to wear an electronic monitoring device, with the consent of the Attorney General;

(e) to abstain from communicating, directly or indirectly, with the intimate partner, a child of the intimate partner or of the defendant or any relative or close friend of the intimate partner, except in accordance with any specified conditions that the judge considers necessary;

(f) to abstain from the consumption of drugs — except in accordance with a medical prescription — of alcohol or of any other intoxicating substance;

(g) to provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation on the demand of a peace officer, a probation officer or someone designated under [paragraph 810.3\(2\)\(a\)](#) to make a demand, at the place and time and on the day specified by the person making the demand, if that person has reasonable grounds to believe that the defendant has breached a condition of the recognizance requiring them to abstain from the consumption of drugs, alcohol or any other intoxicating substance; or

(h) to provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation at regular intervals that are specified, in a notice in Form 51 served on the defendant, by a probation officer or a person designated under [paragraph 810.3\(2\)\(b\)](#) to specify them, if a condition of the recognizance requires the defendant to abstain from the consumption of drugs, alcohol or any other intoxicating substance.

Conditions — firearms

(7) The provincial court judge shall consider whether it is desirable, in the interests of the intimate partner's safety or that of any other person, to prohibit the defendant from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, firearm part, ammunition, prohibited ammunition or explosive substance, or all of those things. If the judge decides that it is desirable to do so, the judge shall add that condition to the recognizance and specify the period during which the condition applies.

Surrender, etc.

(8) If the provincial court judge adds a condition described in subsection (7) to a recognizance, the judge shall specify in the recognizance how the things referred to in that subsection that are in the defendant's possession shall be surrendered, disposed of, detained, stored or dealt with and how the authorizations, licences and registration certificates held by the defendant shall be surrendered.

Reasons

(9) If the provincial court judge does not add a condition described in subsection (7) to a recognizance, the judge shall include in the record a statement of the reasons for not adding the condition.

Variance of conditions

(10) A provincial court judge may, on application of the Attorney General, the informant, the person on whose behalf the information is laid or the defendant, vary the conditions fixed in the recognizance.

Safety and security of informant

(11) When the defendant makes an application under subsection (10), the provincial court judge must, before varying any conditions, consult the informant and the person on whose behalf the information is laid about their safety and security needs.

Form — warrant of committal

(12) A warrant of committal to prison for failure or refusal to enter into the recognizance under subsection (3) may be in Form 23.

[2024, c. 22, s. 2](#); [2024, c. 22, s. 11](#).

Where fear of sexual offence

810.1 (1) Any person who fears on reasonable grounds that another person will commit an offence under [section 151](#) or [152](#), [subsection 153\(1\)](#), [section 155](#), [subsection 160\(2\)](#) or [\(3\)](#), [section 163.1](#), [170](#), [171](#), [171.1](#), [172.1](#) or [172.2](#), [subsection 173\(2\)](#), [section 271](#), [272](#), [273](#) or [279.011](#), [subsection 279.02\(2\)](#) or [279.03\(2\)](#), [section 280](#) or [281](#) or [subsection 286.1\(2\)](#), [286.2\(2\)](#) or [286.3\(2\)](#), in respect of one or more persons who are under the age of 16 years, may lay an information before a provincial court judge,

whether or not the person or persons in respect of whom it is feared that the offence will be committed are named.

Appearances

(2) A provincial court judge who receives an information under subsection (1) may cause the parties to appear before a provincial court judge.

Adjudication

(3) If the provincial court judge before whom the parties appear is satisfied by the evidence adduced that the informant has reasonable grounds for the fear, the judge may order that the defendant enter into a recognizance to keep the peace and be of good behaviour for a period that does not exceed 12 months.

Duration extended

(3.01) However, if the provincial court judge is also satisfied that the defendant was convicted previously of a sexual offence in respect of a person who is under the age of 16 years, the judge may order that the defendant enter into the recognizance for a period that does not exceed two years.

Conditions in recognizance

(3.02) The provincial court judge may add any reasonable conditions to the recognizance that the judge considers desirable to secure the good conduct of the defendant, including conditions that

(a) prohibit the defendant from having any contact — including communicating by any means — with a person under the age of 16 years, unless the defendant does so under the supervision of a person whom the judge considers appropriate;

(a.1) prohibit the defendant from using the Internet or other digital network, unless the defendant does so in accordance with conditions set by the judge;

(b) prohibit the defendant from attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, schoolground or playground;

(b.1) prohibit the defendant from communicating, directly or indirectly, with any person identified in the recognizance, or refrain from going to any place specified in the recognizance, except in accordance with the conditions specified in the recognizance that the judge considers necessary;

(c) require the defendant to participate in a treatment program;

(d) require the defendant to wear an electronic monitoring device, if the Attorney General makes the request;

(e) require the defendant to remain within a specified geographic area unless written permission to leave that area is obtained from the provincial court judge;

(f) require the defendant to return to and remain at his or her place of residence at specified times;

(g) require the defendant to abstain from the consumption of drugs except in accordance with a medical prescription, of alcohol or of any other intoxicating substance;

(h) require the defendant to provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation on the demand of a peace officer, a probation officer or someone designated under [paragraph 810.3\(2\)\(a\)](#) to make a demand, at the place and time and on the day specified by the person making the demand, if that person has reasonable grounds to believe that the defendant has breached a condition of the recognizance that requires them to abstain from the consumption of drugs, alcohol or any other intoxicating substance; or

(i) require the defendant to provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation at regular intervals that are specified, in a notice in Form 51 served on the defendant, by a probation officer or a person designated under [paragraph 810.3\(2\)\(b\)](#) to specify them, if a condition of the recognizance requires the defendant to abstain from the consumption of drugs, alcohol or any other intoxicating substance.

Conditions — firearms

(3.03) The provincial court judge shall consider whether it is desirable, in the interests of the defendant's safety or that of any other person, to prohibit the defendant from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, firearm part, ammunition, prohibited ammunition or explosive substance, or all of those things. If the judge decides that it is desirable to do so, the judge shall add that condition to the recognizance and specify the period during which the condition applies.

Surrender, etc.

(3.04) If the provincial court judge adds a condition described in subsection (3.03) to a recognizance, the judge shall specify in the recognizance how the things referred to in that subsection that are in the defendant's possession should be surrendered, disposed of, detained, stored or dealt with and how the authorizations, licences and registration certificates that are held by the defendant should be surrendered.

Condition — reporting

(3.05) The provincial court judge shall consider whether it is desirable to require the defendant to report to the correctional authority of a province or to an appropriate police authority. If the judge decides that it is desirable to do so, the judge shall add that condition to the recognizance.

Refusal to enter into recognizance

(3.1) The provincial court judge may commit the defendant to prison for a term not exceeding twelve months if the defendant fails or refuses to enter into the recognizance.

Judge may vary recognizance

(4) A provincial court judge may, on application of the informant or the defendant, vary the conditions fixed in the recognizance.

Other provisions to apply

(5) [Subsections 810\(4\)](#) and [\(5\)](#) apply, with such modifications as the circumstances require, to recognizances made under this section.

1993, c. 45, s. 11; 1997, c. 18, s. 113; [2002, c. 13, s. 81](#); [2008, c. 6, ss. 52, 54, 62](#); [2011, c. 7, s. 9](#); [2012, c. 1, s. 37](#); [2014, c. 21, s. 4](#), c. 25, s. 31; [2019, c. 25, s. 320](#); [2023, c. 32, s. 13.8](#).

Where fear of serious personal injury offence

810.2 (1) Any person who fears on reasonable grounds that another person will commit a serious personal injury offence, as that expression is defined in [section 752](#), may, with the consent of the Attorney General, lay an information before a provincial court judge, whether or not the person or persons in respect of whom it is feared that the offence will be committed are named.

Appearances

(2) A provincial court judge who receives an information under subsection (1) may cause the parties to appear before a provincial court judge.

Adjudication

(3) If the provincial court judge before whom the parties appear is satisfied by the evidence adduced that the informant has reasonable grounds for the fear, the judge may order that the defendant enter into a recognizance to keep the peace and be of good behaviour for a period that does not exceed 12 months.

Duration extended

(3.1) However, if the provincial court judge is also satisfied that the defendant was convicted previously of an offence referred to in subsection (1), the judge may order that the defendant enter into the recognizance for a period that does not exceed two years.

Refusal to enter into recognizance

(4) The provincial court judge may commit the defendant to prison for a term not exceeding twelve months if the defendant fails or refuses to enter into the recognizance.

Conditions in recognizance

(4.1) The provincial court judge may add any reasonable conditions to the recognizance that the judge considers desirable to secure the good conduct of the defendant, including conditions that require the defendant

(a) to participate in a treatment program;

- (b) to wear an electronic monitoring device, if the Attorney General makes the request;
- (c) to remain within a specified geographic area unless written permission to leave that area is obtained from the provincial court judge;
- (d) to return to and remain at his or her place of residence at specified times;
- (e) to abstain from the consumption of drugs except in accordance with a medical prescription, of alcohol or of any other intoxicating substance;
- (f) to provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation on the demand of a peace officer, a probation officer or someone designated under [paragraph 810.3\(2\)\(a\)](#) to make a demand, at the place and time and on the day specified by the person making the demand, if that person has reasonable grounds to believe that the defendant has breached a condition of the recognizance that requires them to abstain from the consumption of drugs, alcohol or any other intoxicating substance; or
- (g) to provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation at regular intervals that are specified, in a notice in Form 51 served on the defendant, by a probation officer or a person designated under [paragraph 810.3\(2\)\(b\)](#) to specify them, if a condition of the recognizance requires the defendant to abstain from the consumption of drugs, alcohol or any other intoxicating substance.

Conditions — firearms

(5) The provincial court judge shall consider whether it is desirable, in the interests of the defendant's safety or that of any other person, to prohibit the defendant from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, firearm part, ammunition, prohibited ammunition or explosive substance, or all of those things. If the judge decides that it is desirable to do so, the judge shall add that condition to the recognizance and specify the period during which the condition applies.

Surrender, etc.

(5.1) If the provincial court judge adds a condition described in subsection (5) to a recognizance, the judge shall specify in the recognizance how the things referred to in that subsection that are in the defendant's possession should be surrendered, disposed of, detained, stored or dealt with and how the authorizations, licences and registration certificates that are held by the defendant should be surrendered.

Reasons

(5.2) If the provincial court judge does not add a condition described in subsection (5) to a recognizance, the judge shall include in the record a statement of the reasons for not adding the condition.

Condition — reporting

(6) The provincial court judge shall consider whether it is desirable to require the defendant to report to the correctional authority of a province or to an appropriate police authority. If the judge decides that it is desirable to do so, the judge shall add that condition to the recognizance.

Variance of conditions

(7) A provincial court judge may, on application of the informant, of the Attorney General or of the defendant, vary the conditions fixed in the recognizance.

Other provisions to apply

(8) [Subsections 810\(4\)](#) and [\(5\)](#) apply, with such modifications as the circumstances require, to recognizances made under this section.

1997, c. 17, s. 9; [2002, c. 13, s. 82](#); [2008, c. 6, s. 53](#); [2011, c. 7, s. 10](#); [2023, c. 32, s. 13.9](#).

Audioconference or videoconference

810.21 (1) If a defendant is required to appear under any of [sections 83.3](#) and [810 to 810.2](#), a provincial court judge may, on application of the prosecutor, order that the defendant appear by audioconference or videoconference.

Application

(2) Despite [section 769](#), [sections 714.1 to 714.8](#) and Part XXII.01 apply, with any necessary modifications, to proceedings under this section.

[2015, c. 20, s. 26](#); [2019, c. 25, s. 321](#).

Transfer of order

810.22 (1) If a person who is bound by an order under any of [sections 83.3](#) and [810 to 810.2](#) becomes a resident of — or is charged with, convicted of or discharged under [section 730](#) of an offence, including an offence under [section 811](#), in — a territorial division other than the territorial division in which the order was made, on application of a peace officer or the Attorney General, a provincial court judge may, subject to subsection (2), transfer the order to a provincial court judge in that other territorial division and the order may then be dealt with and enforced by the provincial court judge to whom it is transferred in all respects as if that provincial court judge had made the order.

Attorney General's consent

(2) The transfer may be granted only with

(a) the consent of the Attorney General of the province in which the order was made, if the two territorial divisions are not in the same province; or

(b) the consent of the Attorney General of Canada, if the information that led to the issuance of the order was laid with the consent of the Attorney General of Canada.

If judge unable to act

(3) If the judge who made the order or a judge to whom an order has been transferred is for any reason unable to act, the powers of that judge in relation to the order may be exercised by any other judge of the same court.

2015, c. 20, s. 26.

Samples — designations and specifications

810.3 (1) For the purposes of [sections 810, 810.01, 810.03, 810.011, 810.1](#) and [810.2](#) and subject to the regulations, the Attorney General of a province or the minister of justice of a territory shall, with respect to the province or territory,

- (a)** designate the persons or classes of persons that may take samples of bodily substances;
- (b)** designate the places or classes of places at which the samples are to be taken;
- (c)** specify the manner in which the samples are to be taken;
- (d)** specify the manner in which the samples are to be analyzed;
- (e)** specify the manner in which the samples are to be stored, handled and destroyed;
- (f)** specify the manner in which the records of the results of the analysis of the samples are to be protected and destroyed;
- (g)** designate the persons or classes of persons that may destroy the samples; and
- (h)** designate the persons or classes of persons that may destroy the records of the results of the analysis of the samples.

Further designations

(2) Subject to the regulations, the Attorney General of a province or the minister of justice of a territory may, with respect to the province or territory, designate the persons or classes of persons

- (a)** to make a demand for a sample of a bodily substance for the purposes of [paragraphs 810\(3.02\)\(b\), 810.01\(4.1\)\(f\), 810.011\(6\)\(e\), 810.03\(7\)\(g\), 810.1\(3.02\)\(h\)](#) and [810.2\(4.1\)\(f\)](#); and
- (b)** to specify the regular intervals at which a defendant must provide a sample of a bodily substance for the purposes of [paragraphs 810\(3.02\)\(c\), 810.01\(4.1\)\(g\), 810.011\(6\)\(f\), 810.03\(7\)\(h\), 810.1\(3.02\)\(i\)](#) and [810.2\(4.1\)\(g\)](#).

Restriction

(3) Samples of bodily substances referred to in [sections 810, 810.01, 810.011, 810.03, 810.1](#) and [810.2](#) may not be taken, analyzed, stored, handled or destroyed, and the records of the results of the analysis of the samples may not be protected or destroyed, except in accordance with the designations and specifications made under subsection (1).

Destruction of samples

(4) The Attorney General of a province or the minister of justice of a territory, or a person authorized by the Attorney General or minister, shall cause all samples of bodily substances provided under a recognizance under [section 810](#), [810.01](#), [810.011](#), [810.03](#), [810.1](#) or [810.2](#) to be destroyed within the period prescribed by regulation unless the samples are reasonably expected to be used as evidence in a proceeding for an offence under [section 811](#).

Regulations

(5) The Governor in Council may make regulations

(a) prescribing bodily substances for the purposes of [sections 810](#), [810.01](#), [810.011](#), [810.03](#), [810.1](#) and [810.2](#);

(b) respecting the designations and specifications referred to in subsections (1) and (2);

(c) prescribing the periods within which samples of bodily substances are to be destroyed under subsection (4); and

(d) respecting any other matters relating to the samples of bodily substances.

Notice — samples at regular intervals

(6) The notice referred to in [paragraph 810\(3.02\)\(c\)](#), [810.01\(4.1\)\(g\)](#), [810.011\(6\)\(f\)](#), [810.03\(7\)\(h\)](#), [810.1\(3.02\)\(i\)](#) or [810.2\(4.1\)\(g\)](#) must specify the places and times at which and the days on which the defendant must provide samples of a bodily substance under a condition described in that paragraph. The first sample may not be taken earlier than 24 hours after the defendant is served with the notice, and subsequent samples must be taken at regular intervals of at least seven days.

[2011, c. 7, s. 11](#); [2015, c. 20, s. 34](#); [2024, c. 22, s. 3](#).

Prohibition on use of bodily substance

810.4 (1) No person shall use a bodily substance provided under a recognizance under [section 810](#), [810.01](#), [810.011](#), [810.03](#), [810.1](#) or [810.2](#) except for the purpose of determining whether a defendant is complying with a condition in the recognizance that they abstain from the consumption of drugs, alcohol or any other intoxicating substance.

Prohibition on use or disclosure of result

(2) Subject to subsection (3), no person shall use, disclose or allow the disclosure of the results of the analysis of a bodily substance provided under a recognizance under [section 810](#), [810.01](#), [810.011](#), [810.03](#), [810.1](#) or [810.2](#).

Exception

(3) The results of the analysis of a bodily substance provided under a recognizance under [section 810](#), [810.01](#), [810.011](#), [810.03](#), [810.1](#) or [810.2](#) may be disclosed to the defendant to whom they relate, and may also be used or disclosed in the course of an

investigation of, or in a proceeding for, an offence under [section 811](#) or, if the results are made anonymous, for statistical or other research purposes.

Offence

(4) Every person who contravenes subsection (1) or (2) is guilty of an offence punishable on summary conviction.

[2011, c. 7, s. 11](#); [2015, c. 20, s. 34](#); [2024, c. 22, s. 4](#).

Orders under [sections 486 to 486.5 and 486.7](#)

810.5 (1) [Sections 486 to 486.5 and 486.7](#) apply, with any necessary modifications, to proceedings under any of [sections 83.3 and 810 to 810.2](#).

Offence — order restricting publication

(2) Every person who fails to comply with an order made under any of [subsections 486.4\(1\) to \(3\) or subsection 486.5\(1\) or \(2\)](#) in proceedings referred to in subsection (1) is guilty of an offence under [section 486.6](#).

[2019, c. 13, s. 154](#).

Breach of recognizance

811 A person bound by a recognizance under any of [sections 83.3 and 810 to 810.2](#) who commits a breach of the recognizance is guilty of

(a) an indictable offence and is liable to imprisonment for a term of not more than four years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 811; 1993, c. 45, s. 11; 1994, c. 44, s. 82; 1997, c. 17, s. 10, c. 23, ss. 20, 27; [2001, c. 41, s. 23](#); [2015, c. 20, s. 27](#), c. 23, s. 19, c. 29, s. 12; [2019, c. 25, s. 322](#).

Proof of certificate of analyst — bodily substance

811.1 (1) In a prosecution for breach of a condition in a recognizance under [section 810, 810.01, 810.011, 810.03, 810.1 or 810.2](#) that a defendant not consume drugs, alcohol or any other intoxicating substance, a certificate purporting to be signed by an analyst that states that the analyst has analyzed a sample of a bodily substance and that states the result of the analysis is admissible in evidence and, in the absence of evidence to the contrary, is proof of the statements contained in the certificate without proof of the signature or official character of the person who appears to have signed the certificate.

Definition of *analyst*

(2) In this section, *analyst* has the same meaning as in [section 320.11](#).

Notice of intention to produce certificate

(3) No certificate shall be admitted in evidence unless the party intending to produce it has, before the trial, given reasonable notice and a copy of the certificate to the party

against whom it is to be produced.

Requiring attendance of analyst

(4) The party against whom a certificate of an analyst is produced may, with leave of the court, require the attendance of the analyst for cross-examination.

[2011, c. 7, s. 12](#); [2015, c. 20, s. 34](#); [2018, c. 21, s. 27](#); [2024, c. 22, s. 5](#).

Appeal

Definition of *appeal court*

812 (1) For the purposes of [sections 813 to 828](#), ***appeal court*** means

- (a)** in the Province of Ontario, the Superior Court of Justice sitting in the region, district or county or group of counties where the adjudication was made;
- (b)** in the Province of Quebec, the Superior Court;
- (c)** in the Provinces of Nova Scotia, British Columbia and Prince Edward Island, the Supreme Court;
- (d)** in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench;
- (e)** [\[Repealed, 1992, c. 51, s. 43\]](#)
- (f)** [\[Repealed, 2015, c. 3, s. 56\]](#)
- (g)** in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court;
- (h)** in Yukon and the Northwest Territories, a judge of the Supreme Court; and
- (i)** in Nunavut, a judge of the Nunavut Court of Justice.

When appeal court is Court of Appeal of Nunavut

(2) A judge of the Court of Appeal of Nunavut is the appeal court for the purposes of [sections 813 to 828](#) if the appeal is from a conviction, order, sentence or verdict of a summary conviction court consisting of a judge of the Nunavut Court of Justice.

R.S., 1985, c. C-46, s. 812; R.S., 1985, c. 11 (1st Supp.), s. 2, c. 27 (2nd Supp.), s. 10; 1990, c. 16, s. 7, c. 17, s. 15; 1992, c. 51, s. 43; 1998, c. 30, s. 14; 1999, c. 3, s. 55; [2002, c. 7, s. 149](#); [2015, c. 3, s. 56](#).

Appeal by defendant, informant or Attorney General

813 Except where otherwise provided by law,

- (a)** the defendant in proceedings under this Part may appeal to the appeal court
 - (i)** from a conviction or order made against him,
 - (ii)** against a sentence passed on him, or
 - (iii)** against a verdict of unfit to stand trial or not criminally responsible on account of mental disorder; and

(b) the informant, the Attorney General or his agent in proceedings under this Part may appeal to the appeal court

(i) from an order that stays proceedings on an information or dismisses an information,

(ii) against a sentence passed on a defendant, or

(iii) against a verdict of not criminally responsible on account of mental disorder or unfit to stand trial,

and the Attorney General of Canada or his agent has the same rights of appeal in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government as the Attorney General of a province or his agent has under this paragraph.

R.S., 1985, c. C-46, s. 813; R.S., 1985, c. 27 (1st Supp.), s. 180; 1991, c. 43, s. 9.

Manitoba and Alberta

814 (1) In the Provinces of Manitoba and Alberta, an appeal under [section 813](#) shall be heard at the sittings of the appeal court that is held nearest to the place where the cause of the proceedings arose, but the judge of the appeal court may, on the application of one of the parties, appoint another place for the hearing of the appeal.

Saskatchewan

(2) In the Province of Saskatchewan, an appeal under [section 813](#) shall be heard at the sittings of the appeal court at the judicial centre nearest to the place where the adjudication was made, but the judge of the appeal court may, on the application of one of the parties, appoint another place for the hearing of the appeal.

British Columbia

(3) In the Province of British Columbia, an appeal under [section 813](#) shall be heard at the sittings of the appeal court that is held nearest to the place where the adjudication was made, but the judge of the appeal court may, on the application of one of the parties, appoint another place for the hearing of the appeal.

Territories

(4) In Yukon, the Northwest Territories and Nunavut, an appeal under [section 813](#) shall be heard at the place where the cause of the proceedings arose or at the place nearest to it where a court is appointed to be held.

R.S., 1985, c. C-46, s. 814; 1993, c. 28, s. 78; [2002, c. 7, s. 150](#).

Notice of appeal

815 (1) An appellant who proposes to appeal to the appeal court shall give notice of appeal in such manner and within such period as may be directed by rules of court.

Extension of time

(2) The appeal court or a judge thereof may extend the time within which notice of appeal may be given.

R.S., c. C-34, s. 750; 1972, c. 13, s. 66; 1974-75-76, c. 93, s. 89.

Interim Release of Appellant

Release order — appellant

816 (1) A person who was the defendant in proceedings before a summary conviction court and who is an appellant under [section 813](#) shall, if they are in custody, remain in custody unless the appeal court at which the appeal is to be heard makes a release order referred to in section 515, the form of which may be adapted to suit the circumstances, which must include the condition that the person surrender themselves into custody in accordance with the order.

Release of appellant

(1.1) The person having the custody of the appellant shall, if the appellant complies with the order, immediately release the appellant.

Applicable provisions

(2) [Sections 495.1](#), [512.3](#) and [524](#) apply, with any modifications that the circumstances require, in respect of any proceedings under this section.

R.S., 1985, c. C-46, s. 816; R.S., 1985, c. 27 (1st Supp.), s. 181(E); [2019, c. 25, s. 323](#).

Recognizance of prosecutor

817 (1) The prosecutor in proceedings before a summary conviction court by whom an appeal is taken under [section 813](#) shall, immediately after filing the notice of appeal and proof of service of the notice in accordance with [section 815](#), appear before a justice, and the justice shall, after giving the prosecutor and the respondent a reasonable opportunity to be heard, order that the prosecutor enter into a recognizance, with or without sureties, in the amount that the justice directs and with or without the deposit of money or other valuable security that the justice directs.

Condition

(2) The condition of a recognizance entered into under this section is that the prosecutor will appear personally or by counsel at the sittings of the appeal court at which the appeal is to be heard.

Appeals by Attorney General

(3) This section does not apply in respect of an appeal taken by the Attorney General or by counsel acting on behalf of the Attorney General.

(4) [\[Repealed, 2019, c. 25, s. 324\]](#)

R.S., 1985, c. C-46, s. 817; [2019, c. 25, s. 324](#); [2022, c. 17, s. 54\(F\)](#).

Application to appeal court for review

818 (1) Where a justice makes an order under [section 817](#), either the appellant or the respondent may, before or at any time during the hearing of the appeal, apply to the appeal court for a review of the order made by the justice.

Disposition of application by appeal court

(2) On the hearing of an application under this section, the appeal court, after giving the appellant and the respondent a reasonable opportunity to be heard, shall

(a) dismiss the application; or

(b) if the person applying for the review shows cause, allow the application, vacate the order made by the justice and make the order that in the opinion of the appeal court should have been made.

Effect of order

(3) An order made under this section shall have the same force and effect as if it had been made by the justice.

R.S., c. 2(2nd Supp.), s. 16; 1974-75-76, c. 93, s. 91.1.

Application to fix date for hearing of appeal

819 (1) Where, in the case of an appellant who has been convicted by a summary conviction court and who is in custody pending the hearing of his appeal, the hearing of his appeal has not commenced within thirty days from the day on which notice of his appeal was given in accordance with the rules referred to in [section 815](#), the person having the custody of the appellant shall, forthwith on the expiration of those thirty days, apply to the appeal court to fix a date for the hearing of the appeal.

Order fixing date

(2) On receiving an application under subsection (1), the appeal court shall, after giving the prosecutor a reasonable opportunity to be heard, fix a date for the hearing of the appeal and give such directions as it thinks necessary for expediting the hearing of the appeal.

R.S., c. 2(2nd Supp.), s. 16; 1974-75-76, c. 93, s. 92.

Payment of fine not a waiver of appeal

820 (1) A person does not waive his right of appeal under [section 813](#) by reason only that he pays the fine imposed on conviction, without in any way indicating an intention to appeal or reserving the right to appeal.

Presumption

(2) A conviction, order or sentence shall be deemed not to have been appealed against until the contrary is shown.

R.S., c. C-34, s. 753.

Procedure on Appeal

Notification and transmission of conviction, etc.

821 (1) Where a notice of appeal has been given in accordance with the rules referred to in [section 815](#), the clerk of the appeal court shall notify the summary conviction court that made the conviction or order appealed from or imposed the sentence appealed against of the appeal and on receipt of the notification that summary conviction court shall transmit the conviction, order or order of dismissal and all other material in its possession in connection with the proceedings to the appeal court before the time when the appeal is to be heard, or within such further time as the appeal court may direct, and the material shall be kept by the clerk of the appeal court with the records of the appeal court.

Saving

(2) An appeal shall not be dismissed by the appeal court by reason only that a person other than the appellant failed to comply with the provisions of this Part relating to appeals.

Appellant to furnish transcript of evidence

(3) Where the evidence on a trial before a summary conviction court has been taken by a stenographer duly sworn or by a sound recording apparatus, the appellant shall, unless the appeal court otherwise orders or the rules referred to in [section 815](#) otherwise provide, cause a transcript thereof, certified by the stenographer or in accordance with [subsection 540\(6\)](#), as the case may be, to be furnished to the appeal court and the respondent for use on the appeal.

R.S., c. C-34, s. 754; 1972, c. 13, s. 67; 1974-75-76, c. 93, s. 93.

Certain sections applicable to appeals

822 (1) Where an appeal is taken under [section 813](#) in respect of any conviction, acquittal, sentence, verdict or order, [sections 683](#) to [689](#), with the exception of [subsections 683\(3\)](#) and [686\(5\)](#), apply, with such modifications as the circumstances require.

New trial

(2) Where an appeal court orders a new trial, it shall be held before a summary conviction court other than the court that tried the defendant in the first instance, unless the appeal court directs that the new trial be held before the summary conviction court that tried the accused in the first instance.

Order of detention or release

(3) Where an appeal court orders a new trial, it may make such order for the release or detention of the appellant pending the trial as may be made by a justice pursuant to [section 515](#) and the order may be enforced in the same manner as if it had been made

by a justice under that section, and the provisions of Part XVI apply with such modifications as the circumstances require to the order.

Trial *de novo*

(4) Despite subsections (1) to (3), if an appeal is taken under [section 813](#) and because of the condition of the record of the trial in the summary conviction court or for any other reason, the appeal court, on application of the defendant, the informant, the Attorney General or the Attorney General's agent, is of the opinion that the interests of justice would be better served by hearing and determining the appeal by holding a trial *de novo*, the appeal court may order that the appeal shall be heard by way of trial *de novo* in accordance with any rules that may be made under [section 482](#) or [482.1](#), and for that purpose the provisions of [sections 793 to 809](#) apply, with any modifications that the circumstances require.

Former evidence

(5) The appeal court may, for the purpose of hearing and determining an appeal under subsection (4), permit the evidence of any witness taken before the summary conviction court to be read if that evidence has been authenticated in accordance with [section 540](#) and if

- (a)** the appellant and respondent consent,
- (b)** the appeal court is satisfied that the attendance of the witness cannot reasonably be obtained, or
- (c)** by reason of the formal nature of the evidence or otherwise the court is satisfied that the opposite party will not be prejudiced,

and any evidence that is read under the authority of this subsection has the same force and effect as if the witness had given the evidence before the appeal court.

Appeal against sentence

(6) Where an appeal is taken under subsection (4) against sentence, the appeal court shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against and may, on such evidence, if any, as it thinks fit to require or receive, by order,

- (a)** dismiss the appeal, or
- (b)** vary the sentence within the limits prescribed by law for the offence of which the defendant was convicted,

and in making any order under paragraph (b), the appeal court may take into account any time spent in custody by the defendant as a result of the offence.

General provisions re appeals

(7) The following provisions apply in respect of appeals under subsection (4):

(a) where an appeal is based on an objection to an information or any process, judgment shall not be given in favour of the appellant

(i) for any alleged defect therein in substance or in form, or

(ii) for any variance between the information or process and the evidence adduced at the trial,

unless it is shown

(iii) that the objection was taken at the trial, and

(iv) that an adjournment of the trial was refused notwithstanding that the variance referred to in subparagraph (ii) had deceived or misled the appellant; and

(b) where an appeal is based on a defect in a conviction or an order, judgment shall not be given in favour of the appellant, but the court shall make an order curing the defect.

R.S., 1985, c. C-46, s. 822; 1991, c. 43, s. 9; [2002, c. 13, s. 83](#).

823 [Repealed, 1991, c. 43, s. 9]

Adjournment

824 The appeal court may adjourn the hearing of an appeal from time to time as may be necessary.

R.S., c. C-34, s. 756.

Dismissal for failure to appear or want of prosecution

825 The appeal court may, on proof that notice of an appeal has been given and that

(a) the appellant has failed to comply with the conditions of a release order made under [section 816](#) or of a recognizance entered into under [section 817](#); or

(b) the appeal has not been proceeded with or has been abandoned,

order that the appeal be dismissed.

R.S., 1985, c. C-46, s. 825; [2019, c. 25, s. 325](#).

Costs

826 Where an appeal is heard and determined or is abandoned or is dismissed for want of prosecution, the appeal court may make any order with respect to costs that it considers just and reasonable.

R.S., c. C-34, s. 758.

To whom costs payable, and when

827 (1) Where the appeal court orders the appellant or respondent to pay costs, the order shall direct that the costs be paid to the clerk of the court, to be paid by him to the person entitled to them, and shall fix the period within which the costs shall be paid.

Certificate of non-payment of costs

(2) Where costs are not paid in full within the period fixed for payment and the person who has been ordered to pay them has not been bound by a recognizance to pay them, the clerk of the court shall, on application by the person entitled to the costs, or by any person on his behalf, and on payment of any fee to which the clerk of the court is entitled, issue a certificate in Form 42 certifying that the costs or a part thereof, as the case may be, have not been paid.

Committal

(3) A justice having jurisdiction in the territorial division in which a certificate has been issued under subsection (2) may, on production of the certificate, by warrant in Form 26, commit the defaulter to imprisonment for a term not exceeding one month, unless the amount of the costs and, where the justice thinks fit so to order, the costs of the committal and of conveying the defaulter to prison are sooner paid.

R.S., c. C-34, s. 759.

Enforcement of conviction or order by court of appeal

828 (1) A conviction or order made by the appeal court may be enforced

- (a)** in the same manner as if it had been made by the summary conviction court; or
- (b)** by process of the appeal court.

Enforcement by justice

(2) Where an appeal taken against a conviction or order adjudging payment of a sum of money is dismissed, the summary conviction court that made the conviction or order or a justice for the same territorial division may issue a warrant of committal as if no appeal had been taken.

Duty of clerk of court

(3) When a conviction or order that has been made by an appeal court is to be enforced by a justice, the clerk of the appeal court shall send to the justice the conviction or order and all writings relating to that conviction or order, except the notice of intention to appeal and any undertaking, release order or recognizance.

R.S., 1985, c. C-46, s. 828; [2019, c. 25, s. 326](#).

Summary Appeal on Transcript or Agreed Statement of Facts

Definition of *appeal court*

829 (1) Subject to subsection (2), for the purposes of [sections 830 to 838](#), ***appeal court*** means, in any province, the superior court of criminal jurisdiction for the province.

Nunavut

(2) If the appeal is from a conviction, judgment, verdict or other final order or determination of a summary conviction court consisting of a judge of the Nunavut Court of Justice, ***appeal court*** means a judge of the Court of Appeal of Nunavut.

R.S., 1985, c. C-46, s. 829; R.S., 1985, c. 27 (1st Supp.), s. 182; 1999, c. 3, s. 56.

Appeals

830 (1) A party to proceedings to which this Part applies or the Attorney General may appeal against a conviction, judgment, verdict of acquittal or verdict of not criminally responsible on account of mental disorder or of unfit to stand trial or other final order or determination of a summary conviction court on the ground that

- (a)** it is erroneous in point of law;
- (b)** it is in excess of jurisdiction; or
- (c)** it constitutes a refusal or failure to exercise jurisdiction.

Form of appeal

(2) An appeal under this section shall be based on a transcript of the proceedings appealed from unless the appellant files with the appeal court, within fifteen days of the filing of the notice of appeal, a statement of facts agreed to in writing by the respondent.

Rules for appeals

(3) An appeal under this section shall be made within the period and in the manner directed by any applicable rules of court and where there are no such rules otherwise providing, a notice of appeal in writing shall be served on the respondent and a copy thereof, together with proof of service, shall be filed with the appeal court within thirty days after the date of the conviction, judgment or verdict of acquittal or other final order or determination that is the subject of the appeal.

Rights of Attorney General of Canada

(4) The Attorney General of Canada has the same rights of appeal in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government as the Attorney General of a province has under this section.

R.S., 1985, c. C-46, s. 830; R.S., 1985, c. 27 (1st Supp.), s. 182; 1991, c. 43, s. 9.

Application

831 The provisions of [sections 816, 817, 819 and 825](#) apply, with such modifications as the circumstances require, in respect of an appeal under [section 830](#), except that on receiving an application by the person having the custody of an appellant described in [section 819](#) to appoint a date for the hearing of the appeal, the appeal court shall, after giving the prosecutor a reasonable opportunity to be heard, give such directions as it thinks necessary for expediting the hearing of the appeal.

R.S., 1985, c. C-46, s. 831; R.S., 1985, c. 27 (1st Supp.), s. 182.

Release order or recognizance

832 (1) If a notice of appeal is filed under [section 830](#), the appeal court may, if the defendant is the appellant, make a release order as provided in [section 816](#) or, in any other case, order that the appellant appear before a justice and enter into a recognizance as provided in [section 817](#).

Attorney General

(2) Subsection (1) does not apply where the appellant is the Attorney General or counsel acting on behalf of the Attorney General.

R.S., 1985, c. C-46, s. 832; R.S., 1985, c. 27 (1st Supp.), s. 182; [2019, c. 25, s. 327](#).

No writ required

833 No writ of *certiorari* or other writ is required to remove any conviction, judgment, verdict or other final order or determination of a summary conviction court for the purpose of obtaining the judgment, determination or opinion of the appeal court.

R.S., 1985, c. C-46, s. 833; R.S., 1985, c. 27 (1st Supp.), s. 182; 1991, c. 43, s. 9.

Powers of appeal court

834 (1) When a notice of appeal is filed pursuant to [section 830](#), the appeal court shall hear and determine the grounds of appeal and may

(a) affirm, reverse or modify the conviction, judgment, verdict or other final order or determination, or

(b) remit the matter to the summary conviction court with the opinion of the appeal court,

and may make any other order in relation to the matter or with respect to costs that it considers proper.

Authority of judge

(2) Where the authority and jurisdiction of the appeal court may be exercised by a judge of that court, the authority and jurisdiction may, subject to any applicable rules of court, be exercised by a judge of the court sitting in chambers as well in vacation as in term time.

R.S., 1985, c. C-46, s. 834; R.S., 1985, c. 27 (1st Supp.), s. 182; 1991, c. 43, s. 9.

Enforcement

835 (1) Where the appeal court renders its decision on an appeal, the summary conviction court from which the appeal was taken or a justice exercising the same jurisdiction has the same authority to enforce a conviction, order or determination that has been affirmed, modified or made by the appeal court as the summary conviction court would have had if no appeal had been taken.

Idem

(2) An order of the appeal court may be enforced by its own process.

R.S., 1985, c. C-46, s. 835; R.S., 1985, c. 27 (1st Supp.), s. 182.

Appeal under [section 830](#)

836 Every person who appeals under [section 830](#) from any conviction, judgment, verdict or other final order or determination in respect of which that person is entitled to an appeal under [section 813](#) shall be taken to have abandoned all the person's rights of appeal under section 813.

R.S., 1985, c. C-46, s. 836; R.S., 1985, c. 27 (1st Supp.), s. 182; 1991, c. 43, s. 9.

Appeal barred

837 Where it is provided by law that no appeal lies from a conviction or order, no appeal under [section 830](#) lies from such a conviction or order.

R.S., 1985, c. C-46, s. 837; R.S., 1985, c. 27 (1st Supp.), s. 182.

Extension of time

838 The appeal court or a judge thereof may at any time extend any time period referred to in [section 830](#), [831](#) or [832](#).

R.S., 1985, c. C-46, s. 838; R.S., 1985, c. 27 (1st Supp.), s. 182.

Appeals to Court of Appeal

Appeal on question of law

839 (1) Subject to subsection (1.1), an appeal to the court of appeal as defined in [section 673](#) may, with leave of that court or a judge thereof, be taken on any ground that involves a question of law alone, against

(a) a decision of a court in respect of an appeal under [section 822](#); or

(b) a decision of an appeal court under [section 834](#), except where that court is the court of appeal.

Nunavut

(1.1) An appeal to the Court of Appeal of Nunavut may, with leave of that court or a judge of that court, be taken on any ground that involves a question of law alone, against a decision of a judge of the Court of Appeal of Nunavut acting as an appeal court under [subsection 812\(2\)](#) or [829\(2\)](#).

Sections applicable

(2) [Sections 673](#) to [689](#) apply with such modifications as the circumstances require to an appeal under this section.

Costs

(3) Notwithstanding subsection (2), the court of appeal may make any order with respect to costs that it considers proper in relation to an appeal under this section.

Enforcement of decision

(4) The decision of the court of appeal may be enforced in the same manner as if it had been made by the summary conviction court before which the proceedings were originally heard and determined.

Right of Attorney General of Canada to appeal

(5) The Attorney General of Canada has the same rights of appeal in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government as the Attorney General of a province has under this Part.

R.S., 1985, c. C-46, s. 839; R.S., 1985, c. 27 (1st Supp.), s. 183; 1999, c. 3, s. 57.

Fees and Allowances

Fees and allowances

840 (1) Subject to subsection (2), the fees and allowances mentioned in the schedule to this Part are the fees and allowances that may be taken or allowed in proceedings before summary conviction courts and justices under this Part.

Order of lieutenant governor in council

(2) The lieutenant governor in council of a province may order that all or any of the fees and allowances mentioned in the schedule to this Part shall not be taken or allowed in proceedings before summary conviction courts and justices under this Part in that province and, when the lieutenant governor in council so orders, he or she may fix any other fees and allowances for any items similar to those mentioned in the schedule, or any other items, to be taken or allowed instead.

R.S., 1985, c. C-46, s. 840; 1994, c. 44, s. 83; 1997, c. 18, s. 114.

PART XXVIII

Miscellaneous

Electronic Documents

Definitions

841 The definitions in this section apply in this section and in [sections 842 to 847](#).

data means representations of information or concepts, in any form. (*données*)

electronic document means data that is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by a person

or a computer system or other similar device. It includes a display, print-out or other output of the data and any document, record, order, exhibit, notice or form that contains the data. (*document électronique*)

R.S., 1985, c. C-46, s. 841; [R.S., 1985, c. 31 \(4th Supp.\), s. 97](#); [2002, c. 13, s. 84](#).

Dealing with data in court

842 Despite anything in this Act, a court may create, collect, receive, store, transfer, distribute, publish or otherwise deal with electronic documents if it does so in accordance with an Act or with the rules of court.

[2002, c. 13, s. 84](#).

Transfer of data

843 (1) Despite anything in this Act, a court may accept the transfer of data by electronic means if the transfer is made in accordance with the laws of the place where the transfer originates or the laws of the place where the data is received.

Time of filing

(2) If a document is required to be filed in a court and the filing is done by transfer of data by electronic means, the filing is complete when the transfer is accepted by the court.

[2002, c. 13, s. 84](#).

Documents in writing

844 A requirement under this Act that a document be made in writing is satisfied by the making of the document in electronic form in accordance with an Act or the rules of court.

[2002, c. 13, s. 84](#).

Signatures

845 If this Act requires a document to be signed, the court may accept a signature in an electronic document if the signature is made in accordance with an Act or the rules of court.

[2002, c. 13, s. 84](#).

Oaths

846 If under this Act an information, an affidavit or a solemn declaration or a statement under oath or solemn affirmation is to be made by a person, the court may accept it in the form of an electronic document if

- (a)** the person states in the electronic document that all matters contained in the information, affidavit, solemn declaration or statement are true to his or her knowledge and belief;

(b) the person before whom it is made or sworn is authorized to take or receive informations, affidavits, solemn declarations or statements and he or she states in the electronic document that the information, affidavit, solemn declaration or statement was made under oath, solemn declaration or solemn affirmation, as the case may be; and

(c) the electronic document was made in accordance with the laws of the place where it was made.

2002, c. 13, s. 84.

Copies

847 Any person who is entitled to obtain a copy of a document from a court is entitled, in the case of a document in electronic form, to obtain a printed copy of the electronic document from the court on payment of a reasonable fee determined in accordance with a tariff of fees fixed or approved by the Attorney General of the relevant province.

2002, c. 13, s. 84.

848 [Repealed, 2019, c. 25, s. 329]

Forms

Forms

849 (1) The forms set out in this Part, varied to suit the case, or forms to the like effect are deemed to be good, valid and sufficient in the circumstances for which they are provided.

Seal not required

(2) No justice is required to attach or affix a seal to any writing or process that he or she is authorized to issue and in respect of which a form is provided by this Part.

Official languages

(3) Any pre-printed portions of a form set out in this Part, varied to suit the case, or of a form to the like effect shall be printed in both official languages.

[Editorial note: In this consolidation, the forms referred to in this section can be found at the end of the Act.]

2002, c. 13, s. 84.

SCHEDULE TO PART XX.1

[Repealed, 2005, c. 22, s. 37]

SCHEDULE TO PART XXII.1

(Section 715.3 and subsections 715.32(2) and 715.43(2) and (3))

Offences in respect of which a remediation agreement may be entered into

1 An offence under any of the following provisions of this Act:

- (a)** [section 119](#) or [120](#) (bribery of officers);
- (b)** [section 121](#) (frauds on the government);
- (c)** [section 123](#) (municipal corruption);
- (d)** [section 124](#) (selling or purchasing office);
- (e)** [section 125](#) (influencing or negotiating appointments or dealing in offices);
- (f)** [subsection 139\(3\)](#) (obstructing justice);
- (g)** [section 322](#) (theft);
- (h)** [section 330](#) (theft by person required to account);
- (i)** [section 332](#) (misappropriation of money held under direction);
- (j)** [section 340](#) (destroying documents of title);
- (k)** [section 341](#) (fraudulent concealment);
- (l)** [section 354](#) (property obtained by crime);
- (m)** [section 362](#) (false pretence or false statement);
- (n)** [section 363](#) (obtaining execution of valuable security by fraud);
- (o)** [section 366](#) (forgery);
- (p)** [section 368](#) (use, trafficking or possession of forged document);
- (q)** [section 375](#) (obtaining by instrument based on forged document);
- (r)** [section 378](#) (offences in relation to registers);
- (s)** [section 380](#) (fraud);
- (t)** [section 382](#) (fraudulent manipulation of stock exchange transactions);
- (u)** [section 382.1](#) (prohibited insider trading);
- (v)** [section 383](#) (gaming in stocks or merchandise);
- (w)** [section 389](#) (fraudulent disposal of goods on which money advanced);
- (x)** [section 390](#) (fraudulent receipts under [Bank Act](#));
- (x.1)** [section 391](#) (trade secret);
- (y)** [section 392](#) (disposal of property to defraud creditors);
- (z)** [section 397](#) (books and documents);

- (z.1) [section 400](#) (false prospectus);
- (z.2) [section 418](#) (selling defective stores to Her Majesty); and
- (z.3) [section 426](#) (secret commissions).
- (z.4) [section 462.31](#) (laundering proceeds of crime).

2 An offence under any of the following provisions of the *Corruption of Foreign Public Officials Act*:

- a) [section 3](#) (bribing a foreign public official); and
- b) [section 4](#) (maintenance or destruction of books and records to facilitate or hide the bribing of a foreign public official).

3 A conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in [section 1](#) or [2](#).

[2018, c. 12, s. 405](#); [2020, c. 1, s. 38](#).

SCHEDULE [to Part XXV]

(Section 762)

Column I	Column II	Column III
Ontario	A judge of the Court of Appeal in respect of a release order or recognizance for the appearance of a person before the Court	The Registrar of the Court of Appeal
	The Superior Court of Justice in respect of undertakings or all other release orders or recognizances	A Registrar of the Superior Court of Justice
Quebec	The Court of Quebec, Criminal and Penal Division	The Clerk of the Court
Nova Scotia	The Supreme Court	A Prothonotary of the Supreme Court
New Brunswick	The Court of Queen's Bench	The Registrar of the Court of Queen's Bench
British Columbia	The Supreme Court in respect of an undertaking, release order or recognizance for the appearance of a person before that Court or the Court of Appeal	The District Registrar of the Supreme Court

Column I	Column II	Column III
	A Provincial Court in respect of an undertaking, release order or recognizance for the appearance of a person before a judge of that Court or a justice	The Clerk of the Provincial Court
Prince Edward Island	The Supreme Court	The Prothonotary
Manitoba	The Court of Queen's Bench	The registrar or a deputy registrar of the Court of Queen's Bench
Saskatchewan	The Court of Queen's Bench	The Local Registrar of the Court of Queen's Bench
Alberta	The Court of Queen's Bench	The Clerk of the Court of Queen's Bench
Newfoundland and Labrador	The Trial Division of the Supreme Court	The Registrar of the Supreme Court
Yukon	The Supreme Court	The Clerk of the Supreme Court
Northwest Territories	The Supreme Court	The Clerk of the Supreme Court
Nunavut	The Nunavut Court of Justice	The Clerk of the Nunavut Court of Justice

R.S., 1985, c. C-46, Sch. to Part XXV; R.S., 1985, c. 11 (1st Supp.), s. 2, c. 27 (2nd Supp.), s. 10; 1992, c. 1, s. 58, c. 51, ss. 40 to 42; 1998, c. 30, s. 14; 1999, c. 3, s. 54, c. 5, s. 44; [2002, c. 7, s. 148](#); [2015, c. 3, ss. 57 to 59](#); [2019, c. 25, s. 312](#).

SCHEDULE [to Part XXVII]

(Section 840)

Fees and Allowances That May Be Charged by Summary Conviction Courts and Justices

1	Information	\$ 1.00
2	Summons or warrant	\$ 0.50
3	Warrant where summons issued in first instance	\$ 0.30

4	Warrant where summons issued in first instance	\$ 0.30
5	Each subpoena or warrant to or for witnesses	\$ 0.30
	(A subpoena may contain any number of names. Only one subpoena may be issued on behalf of a party in any proceeding, unless the summary conviction court or the justice considers it necessary or desirable that more than one subpoena be issued.)	
6	Information for warrant for witness and warrant for witness	\$ 1.00
7	Each necessary copy of subpoena to or warrant for witness	\$ 0.20
8	Each release order or recognizance	\$ 1.00
9	Hearing and determining proceeding	\$ 1.00
10	Where hearing lasts more than two hours	\$ 2.00
11	Where two or more justices hear and determine a proceeding, each is entitled to the fee authorized by item 9.	
12	Each warrant of committal	\$ 0.50
13	Making up record of conviction or order on request of a party to the proceedings	\$ 1.00
14	Copy of a writing other than a conviction or order, on request of a party to the proceedings; for each folio of one hundred words	\$ 0.10
15	Bill of costs, when made out in detail on request of a party to the proceedings	\$ 0.20
	(Items 14 and 15 may be charged only where there has been an adjudication.)	
16	Attending to remand prisoner	\$ 1.00
17	Attending to make a release order or take a recognizance	\$ 1.00

Fees and Allowances That May Be Allowed to Peace Officers

- 18** Arresting a person on a warrant or without a warrant
.....\$ 1.50
- 19** Serving summons or subpoena
.....\$ 0.50
- 20** Mileage to serve summons or subpoena or to make an arrest, both ways, for each mile
\$ 0.10
- (Where a public conveyance is not used, reasonable costs of transportation may be allowed.)
- 21** Mileage where service cannot be effected, on proof of a diligent attempt to effect service, each way, for each mile
.....\$ 0.10
- 22** Returning with prisoner after arrest to take him before a summary conviction court or justice at a place different from the place where the peace officer received the warrant to arrest, if the journey is of necessity over a route different from that taken by the peace officer to make the arrest, each way, for each mile
.....\$ 0.10
- 23** Taking a prisoner to prison on remand or committal, each way, for each mile
.....\$ 0.10
- (Where a public conveyance is not used, reasonable costs of transportation may be allowed. No charge may be made under this item in respect of a service for which a charge is made under item 22.)
- 24** Attending summary conviction court or justice on summary conviction proceedings, for each day necessarily employed
.....\$ 2.00
- (Not more than \$2.00 may be charged under this item in respect of any day notwithstanding the number of proceedings that the peace officer attended on that day before that summary conviction court or justice.)

Fees and Allowances That May Be Allowed to Witnesses

- 25** Each day attending trial
.....\$ 4.00
- 26** Mileage travelled to attend trial, each way, for each mile
.....\$ 0.10

Fees and Allowances That May Be Allowed to Interpreters

- 27** Each half day attending trial \$ 2.50
- 28** Actual living expenses when away from ordinary place of residence, not to exceed per day
\$ 10.00
- 29** Mileage travelled to attend trial, each way, for each mile \$ 0.10

R.S., 1985, c. C-46, Sch. to Part XXVII; [2019, c. 25, s. 328](#).

FORM 1

(Sections 320.29, 462.32, 462.321 and 487)

Information To Obtain a Search Warrant

Canada,

Province of,

(*territorial division*).

This is the information of A.B., of in the said (*territorial division*), (*occupation*), hereinafter called the informant, taken before me.

The informant says that (*describe things to be searched for and offence in respect of which search is to be made*), and that he believes on reasonable grounds that the said things, or some part of them, are in the (*dwelling-house, etc.*) of C.D., of, in the said (*territorial division*). (*Here add the grounds of belief, whatever they may be.*)

Wherefore the informant prays that a search warrant may be granted to search the said (*dwelling-house, etc.*) for the said things.

Sworn before me this day of
....., A.D., at

(*Signature of Informant*)

A Justice of the Peace in and for

R.S., 1985, c. C-46, Form 1; [2018, c. 21, s. 28](#); [2024, c. 15, s. 313](#).

FORM 2

(Sections 506 and 788)

Information

Canada,

Province of,

(territorial division).

This is the information of C.D., of _____, (occupation), hereinafter called the informant.

The informant says that (if the informant has no personal knowledge state that he believes on reasonable grounds and state the offence).

Sworn before me this _____ day of _____, A.D. _____, at _____ .
(Signature of Informant)

A Justice of the Peace in and for _____

Note: The date of birth of the accused may be mentioned on the information or indictment.

R.S., 1985, c. C-46, Form 2; R.S., 1985, c. 27 (1st Supp.), s. 184.

FORM 3

[Repealed, R.S., 1985, c. 27 (1st Supp.), s. 184]

FORM 4

(Sections 566, 566.1, 580 and 591)

Heading of Indictment

Canada,

Province of _____,

(territorial division).

In the (set out name of the court)

Her Majesty the Queen

against

(name of accused)

(Name of accused) stands charged

1 That he (state offence).

2 That he (state offence).

Dated this _____ day of _____ A.D. _____, at _____ .

(Signature of signing officer Agent of Attorney General etc as the case may be)

Note: The date of birth of the accused may be mentioned on the information or indictment.

R.S., 1985, c. C-46, Form 4; R.S., 1985, c. 27 (1st Supp.), s. 184; 1999, c. 3, s. 58.

FORM 5

(Sections 320.29 and 487)

Warrant To Search

Canada,

Province of,

(*territorial division*).

To the peace officers in the said (*territorial division*) or to the (*named public officers*):

Whereas it appears on the oath of A.B., of that there are reasonable grounds for believing that (*describe things to be searched for and offence in respect of which search is to be made*) are in at, hereinafter called the premises;

This is, therefore, to authorize and require you between the hours of (*as the justice may direct*) to enter into the said premises and to search for the said things and to bring them before me or some other justice.

Dated this day of A.D., at

A Justice of the Peace in and for

R.S., 1985, c. C-46, Form 5; 1999, c. 5, s. 45; [2018, c. 21, s. 28](#).

FORM 5.001

(Subsection 487.012(1))

Preservation Demand

Canada,

Province of

(*territorial division*)

To (*name of person*), of

Because I have reasonable grounds to suspect that the computer data specified below is in your possession or control and that that computer data

will assist in the investigation of an offence that has been or will be committed under (specify the provision of the *Criminal Code* or other Act of Parliament),

(or)

will assist in the investigation of an offence that has been committed under (specify the provision of the law of the foreign state) that is being conducted by a person or authority, (name of person or authority), with responsibility in (specify the name of the foreign state) for the investigation of such offences,

you are required to preserve (specify the computer data) that is in your possession or control when you receive this demand until (insert date) unless, before that date, this demand is revoked or a document that contains that data is obtained under a warrant or an order.

This demand is subject to the following conditions:

If you contravene this demand without lawful excuse, you may be subject to a fine.

You are required to destroy the computer data that would not be retained in the ordinary course of business, and any document that is prepared for the purpose of preserving the computer data, in accordance with [section 487.0194](#) of the *Criminal Code*. If you contravene that provision without lawful excuse, you may be subject to a fine, to imprisonment or to both.

(Signature of peace officer or public officer)

[2014, c. 31, s. 26.](#)

FORM 5.002

(Subsection 487.013(2))

Information To Obtain a Preservation Order

Canada,

Province of

(territorial division)

This is the information of (name of peace officer or public officer), of ("the informant").

The informant says that they have reasonable grounds to suspect that an offence has been or will be committed under (specify the provision of the *Criminal Code* or other Act of Parliament) (or has been committed under (specify the provision of the law of the foreign state)) and that (specify the computer data) is in the possession or control of (name of the person) and will assist in the investigation of the offence.

The informant also says that a peace officer or public officer intends to apply or has applied for a warrant or order in connection with the investigation to obtain a document that contains the computer data (*and, if applicable, and that (name of person or authority) is conducting the investigation and has responsibility for the investigation of such offences in (insert the name of the foreign state))*).

The reasonable grounds are: (*including, if applicable, whether a preservation demand was made under [section 487.012](#) of the [Criminal Code](#)*)

The informant therefore requests that (*name of the person*) be ordered to preserve (*specify the computer data*) that is in their possession or control when they receive the order for 90 days after the day on which the order is made.

Sworn before me on (*date*), at (*place*).

(*Signature of informant*)

(*Signature of justice or judge*)

[2014, c. 31, s. 26.](#)

FORM 5.003

(Subsection 487.013(4))

Preservation Order

Canada,

Province of

(*territorial division*)

To (*name of person*), of

Whereas I am satisfied by information on oath of (*name of peace officer or public officer*), of,

(a) that there are reasonable grounds to suspect that an offence has been or will be committed under (*specify the provision of the [Criminal Code](#) or other Act of Parliament*) (or has been committed under (*specify the provision of the law of the foreign state*)) and that (*specify the computer data*) is in your possession or control and will assist in the investigation of the offence; and

(b) that a peace officer or public officer intends to apply or has applied for a warrant or order to obtain a document that contains the computer data (*and, if applicable, and that (name of person or authority) is conducting the investigation and has responsibility for the investigation of such offences in (insert the name of the foreign state)*);

Therefore, you are required to preserve the specified computer data that is in your possession or control when you receive this order until (*insert date*) unless, before that date, this order is revoked or a document that contains that data is obtained under a warrant or an order.

This order is subject to the following conditions:

If you contravene this order without lawful excuse, you may be subject to a fine, to imprisonment or to both.

You are required to destroy the computer data that would not be retained in the ordinary course of business, and any document that is prepared for the purpose of preserving the computer data, in accordance with [section 487.0194](#) of the *Criminal Code*. If you contravene that provision without lawful excuse, you may be subject to a fine, to imprisonment or to both.

Dated (*date*), at (*place*).

(*Signature of justice or judge*)

[2014, c. 31, s. 26.](#)

FORM 5.0031

(Subsections 487.0131(2) and (8))

Information To Obtain a Keep Account Open or Active Order

Canada,

Province of

(*territorial division*)

This is the information of (*name of peace officer or public officer*), of("the informant").

The informant says that they have reasonable grounds to suspect that an offence has been or will be committed under (*specify the provision of the *Criminal Code* or other Act of Parliament*) and that keeping (*specify the account*) open or active will assist in the investigation of the offence.

The reasonable grounds are:

The informant therefore requests that (*name of the person*) be ordered to keep (*specify the account*) open or active for 60 days after the day on which the order is made.

Sworn before me on (*date*), at (*place*).

(Signature of informant)

(Signature of justice or judge)

2024, c. 17, s. 363.

FORM 5.0032

(Subsection 487.0131(3))

Keep Account Open or Active Order

Canada,

Province of

(territorial division)

To (name of person), of

Whereas I am satisfied by information on oath of (name of peace officer or public officer), of, that there are reasonable grounds to suspect that an offence has been or will be committed under (specify the provision of the **Criminal Code** or other Act of Parliament) and that keeping (specify the account) open or active will assist in the investigation of the offence;

Therefore, you are required to

(a) keep the specified account open or active until (insert date) unless the holder of the account requests that you close or deactivate it or this order is revoked or varied; and

(b) notify (name of peace officer or public officer) as soon as practicable after the account is closed or deactivated at the request of the holder of the account.

This order is subject to the following conditions:

You have the right to apply to revoke or vary this order.

If you contravene this order without lawful excuse, you may be subject to a fine, to imprisonment or to both.

Dated (date), at (place).

(Signature of justice or judge)

2024, c. 17, s. 363.

FORM 5.004

(Subsections 487.014(2), 487.0141(2), (5) and (10), 487.015(2), 487.016(2), 487.017(2) and 487.018(3))

Information To Obtain a Production Order

Canada,

Province of

(territorial division)

This is the information of (*name of peace officer or public officer*), of (“the informant”).

The informant says that they have reasonable grounds to suspect (*or, if the application is for an order under [section 487.014](#) or [487.0141](#) of the [Criminal Code](#)*, reasonable grounds to believe)

(a) that an offence has been or will be committed under (*specify the provision of the [Criminal Code](#) or other Act of Parliament*); and

(b) (*if the application is for an order under [section 487.014](#) of the [Criminal Code](#)*) that (*specify the document or data*) is in the possession or control of (*name of the person*) and will afford evidence respecting the commission of the offence.

(or)

(b) (*if the application is for an order under [section 487.0141](#) of the [Criminal Code](#)*) that (*specify the document or data*), if it is in the possession or control of (*name of the person*) on (*specify the dates to be specified in the order*), will afford evidence respecting the commission of the offence (*and if applicable*, and that the information contained in all reports made under any of [sections 7, 7.1 and 9](#) of the [Proceeds of Crime \(Money Laundering\) and Terrorist Financing Act](#) during the period the order is to be in effect will afford evidence respecting the commission of the offence).

(or)

(b) (*if the application is for an order under [section 487.015](#) of the [Criminal Code](#)*) that the identification of a device or person involved in the transmission of (*specify the communication*) will assist in the investigation of the offence and that (*specify the transmission data*) that is in the possession or control of one or more persons whose identity is unknown will enable that identification.

(or)

(b) (*if the application is for an order under [section 487.016](#) of the [Criminal Code](#)*) that (*specify the transmission data*) is in the possession or control of (*name of the person*) and will assist in the investigation of the offence.

(or)

(b) (if the application is for an order under [section 487.017](#) of the *Criminal Code*) that (specify the tracking data) is in the possession or control of (name of the person) and will assist in the investigation of the offence.

(or)

(b) (if the application is for an order under [section 487.018](#) of the *Criminal Code*) that (specify the data) is in the possession or control of (name of the financial institution, person or entity) and will assist in the investigation of the offence.

The reasonable grounds are:

The informant therefore requests

(if the application is for an order under [section 487.014](#) of the *Criminal Code*) that (name of the person) be ordered to produce a document that is a copy of (specify the document) that is in their possession or control when they receive the order (and/or to prepare and produce a document containing (specify the data) that is in their possession or control when they receive the order).

(or)

(if the application is for an order under [section 487.0141](#) of the *Criminal Code*) that (name of the person) be ordered to produce a document that is a copy of (specify the document) that is in their possession or control on (specify the dates to be specified in the order) (and/or to prepare and produce a document containing (specify the data) that is in their possession or control on (specify the dates to be specified in the order)) (and if applicable, and that the person be ordered to produce a copy of all reports made under any of [sections 7, 7.1](#) and [9](#) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* during the period the order is to be in effect).

(or)

(if the application is for an order under [section 487.015](#) of the *Criminal Code*) that a person who is served with the order in accordance with [subsection 487.015\(4\)](#) of the *Criminal Code* be ordered to prepare and produce a document containing (specify the transmission data) that is in their possession or control when they are served with the order.

(or)

(if the application is for an order under [section 487.016](#) of the *Criminal Code*) that (name of the person) be ordered to prepare and produce a document containing (specify the transmission data) that is in their possession or control when they receive the order.

(or)

(if the application is for an order under [section 487.017](#) of the *Criminal Code*) that (name of the person) be ordered to prepare and produce a document containing (specify the tracking data) that is in their possession or control when they receive the order.

(or)

(if the application is for an order under [section 487.018](#) of the [Criminal Code](#)) that (name of the financial institution, person or entity) be ordered to prepare and produce a document setting out (specify the data) that is in their possession or control when they receive the order.

Sworn before me on (date), at (place).

(Signature of informant)

(Signature of justice or judge)

[2014, c. 31, s. 26](#); [2024, c. 17, s. 364](#).

FORM 5.005

(Subsection 487.014(3))

Production Order for Documents

Canada,

Province of

(territorial division)

To (name of person), of

Whereas I am satisfied by information on oath of (name of peace officer or public officer), of, that there are reasonable grounds to believe that an offence has been or will be committed under (specify the provision of the [Criminal Code](#) or other Act of Parliament) and that (specify the document or data) is in your possession or control and will afford evidence respecting the commission of the offence;

Therefore, you are ordered to

produce a document that is a copy of (specify the document) that is in your possession or control when you receive this order

(and/or)

prepare and produce a document containing (specify the data) that is in your possession or control when you receive this order.

The document must be produced to (name of peace officer or public officer) within (time) at (place) in (form).

This order is subject to the following conditions:

You have the right to apply to revoke or vary this order.

If you contravene this order without lawful excuse, you may be subject to a fine, to imprisonment or to both.

Dated *(date)*, at *(place)*.

(Signature of justice or judge)

2014, c. 31, s. 26.

FORM 5.0051

(Subsection 487.0141(3))

Production Order — Specified Dates

Canada,

Province of

(territorial division)

To *(name of person)*, of

Whereas I am satisfied by information on oath of *(name of peace officer or public officer)*, ..., that there are reasonable grounds to believe that an offence has been or will be committed under *(specify the provision of the Criminal Code or other Act of Parliament)* and that *(specify the document or data)*, if it is in your possession or control on any of the dates specified in this order, will afford evidence respecting the commission of the offence *(and if applicable, and that the information contained in all reports you make under any of sections 7, 7.1 and 9 of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act during the period this order is in effect will afford evidence respecting the commission of the offence)*;

Therefore, you are ordered to

produce a document that is a copy of *(specify the document)* that is in your possession or control on *(specify up to six dates)*

(and/or)

prepare and produce a document containing *(specify the data)* that is in your possession or control on *(specify up to six dates)*

(and if applicable)

produce a copy of all reports you make under any of sections 7, 7.1 and 9 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.

The document *(and if applicable and the copy of the report)* must be produced to *(name of peace officer or public officer)* within *(time)* of each of the dates specified in this order at *(place)* in *(form)*.

This order is subject to the following conditions:

You have the right to apply to revoke or vary this order.

If you contravene this order without lawful excuse, you may be subject to a fine, to imprisonment or to both.

Dated (*date*), at (*place*).

(*Signature of justice or judge*)

2024, c. 17, s. 365.

FORM 5.006

(Subsection 487.015(3))

Production Order To Trace a Communication

Canada,

Province of

(*territorial division*)

Whereas I am satisfied by information on oath of (*name of peace officer or public officer*), of, that there are reasonable grounds to suspect that an offence has been or will be committed under (*specify the provision of the **Criminal Code** or other Act of Parliament*), that the identification of a device or person involved in the transmission of (*specify the communication*) will assist in the investigation of the offence and that one or more persons whose identity was unknown when the application was made have possession or control of (*specify the transmission data*) that will enable that identification;

Therefore, on being served with this order in accordance with [subsection 487.015\(4\)](#) of the **Criminal Code**, you are ordered to prepare and produce a document containing (*specify the transmission data*) that is in your possession or control when you are served with this order.

The document must be produced to (*name of peace officer or public officer*) as soon as feasible at (*place*) in (*form*).

This order is subject to the following conditions:

You have the right to apply to revoke or vary this order.

If you contravene this order without lawful excuse, you may be subject to a fine, to imprisonment or to both.

Dated (*date*), at (*place*).

(Signature of justice or judge)

Served on (name of person) on (date), at (place).

(Signature of peace officer or public officer)

(Signature of person served)

2014, c. 31, s. 26.

FORM 5.007

(Subsections 487.016(3) and 487.017(3))

Production Order for Transmission Data or Tracking Data

Canada,

Province of

(territorial division)

To (name of person), of

Whereas I am satisfied by information on oath of (name of peace officer or public officer), of, that there are reasonable grounds to suspect that an offence has been or will be committed under (specify the provision of the *Criminal Code* or other Act of Parliament) and that (if the order is made under *section 487.016* of the *Criminal Code*, specify the transmission data) (or, if the order is made under *section 487.017* of the *Criminal Code*, specify the tracking data) is in your possession or control and will assist in the investigation of the offence;

Therefore, you are ordered to prepare and produce a document containing the data specified that is in your possession or control when you receive this order.

The document must be produced to (name of peace officer or public officer) within (time) at (place) in (form).

This order is subject to the following conditions:

You have the right to apply to revoke or vary this order.

If you contravene this order without lawful excuse, you may be subject to a fine, to imprisonment or to both.

Dated (date), at (place).

(Signature of justice or judge)

2014, c. 31, s. 26.

FORM 5.008

(Subsection 487.018(4))

Production Order for Financial Data

Canada,

Province of

(territorial division)

To *(name of financial institution, person or entity)*, of

Whereas I am satisfied by information on oath of *(name of peace officer or public officer)*, of, that there are reasonable grounds to suspect that an offence has been or will be committed under *(specify the provision of the Criminal Code or other Act of Parliament)* and that *(specify the data)* is in your possession or control and will assist in the investigation of the offence;

Therefore, you are ordered to prepare and produce a document setting out *(specify the data)* that is in your possession or control when you receive this order.

The document must be produced to *(name of the peace officer or public officer)* within *(time)* at *(place)* in *(form)*.

This order is subject to the following conditions:

You have the right to apply to revoke or vary this order.

If you contravene this order without lawful excuse, you may be subject to a fine, to imprisonment or to both.

Dated *(date)*, at *(place)*.

(Signature of justice or judge)

2014, c. 31, s. 26.

FORM 5.0081

(Subsection 487.019(3))

Information To Revoke or Vary an Order Made Under Any of Sections 487.013 to 487.018 of the Criminal Code

Canada,

Province of

(*territorial division*)

This is the information of (*name of peace officer or public officer*), of ("the informant").

The informant says that on or after (*insert date*) the informant became aware of the following facts that justify the revocation (or variation) of an order made on (*insert date*) under (*specify the provision of the **Criminal Code***):

.....

The informant therefore requests that the order be revoked (or be varied as follows:).

Sworn before me on (*date*), at (*place*).

(*Signature of informant*)

(*Signature of justice or judge*)

2014, c. 31, s. 26.

FORM 5.009

(Subsection 487.0191(2))

Information To Obtain a Non-Disclosure Order

Canada,

Province of

(*territorial division*)

This is the information of (*name of peace officer or public officer*), of ("the informant").

The informant says that they have reasonable grounds to believe that the disclosure of the existence (or any of the contents or any of the following portion or portions) of (*identify the preservation demand made under [section 487.012](#) of the **Criminal Code** or the order made under any of [sections 487.013](#) to [487.018](#) of that Act, as the case may be*) during (*identify the period*) would jeopardize the conduct of the investigation of the offence to which it relates:

(*specify portion or portions*)

The reasonable grounds are:

The informant therefore requests an order prohibiting (*name of the person, financial institution or entity*) from disclosing the existence (or any of the contents or any of the specified portion or portions) of the demand (or the order) during a period of (*identify the period*) after the day on which the order is made.

Sworn before me on (*date*), at (*place*).

(*Signature of informant*)

(*Signature of justice or judge*)

2014, c. 31, s. 26; 2024, c. 17, s. 366.

FORM 5.0091

(Subsection 487.0191(3))

Non-Disclosure Order

Canada,

Province of

(*territorial division*)

To (*name of person, financial institution or entity*), of:

Whereas I am satisfied by information on oath of (*name of peace officer or public officer*), of, that there are reasonable grounds to believe that the disclosure of the existence (or any of the contents or any of the portion or portions, specified in the information,) of (*identify the preservation demand made under [section 487.012](#) of the *Criminal Code* or the order made under any of [sections 487.013](#) to [487.018](#) of that Act, as the case may be*) during (*identify the period*) would jeopardize the conduct of the investigation of the offence to which it relates;

Therefore, you are prohibited from disclosing the existence (or any of the contents or any of the following portion or portions) of the demand (or the order) during a period of (*identify the period*) after the day on which this order is made.

(*specify portion or portions*)

You have the right to apply to revoke or vary this order.

If you contravene this order without lawful excuse, you may be subject to a fine, to imprisonment or to both.

Dated (*date*), at (*place*).

(*Signature of justice or judge*)

2014, c. 31, s. 26; 2024, c. 17, s. 366.

FORM 5.01

(Subsection 487.05(1))

**Information To Obtain a Warrant To Take
Bodily Substances for Forensic DNA Analysis**

Canada,

Province of

(territorial division)

This is the information of *(name of peace officer)*, *(occupation)*, of in the said *(territorial division)*, hereinafter called the informant, taken before me.

The informant says that he or she has reasonable grounds to believe

(a) that *(offence)*, a designated offence within the meaning of [section 487.04](#) of the *Criminal Code*, has been committed;

(b) that a bodily substance has been found

(i) at the place where the offence was committed,

(ii) on or within the body of the victim of the offence,

(iii) on anything worn or carried by the victim at the time when the offence was committed, or

(iv) on or within the body of any person or thing or at any place associated with the commission of the offence;

(c) that *(name of person)* was a party to the offence; and

(d) that forensic DNA analysis of a bodily substance from *(name of person)* will provide evidence about whether the bodily substance referred to in paragraph (b) was from that person.

The reasonable grounds are:

The informant therefore requests that a warrant be issued authorizing the taking from *(name of person)* of the number of samples of bodily substances that are reasonably required for forensic DNA analysis, provided that the person taking the samples is able by virtue of training or experience to take them by means of the investigative procedures described in [subsection 487.06\(1\)](#) of the *Criminal Code* and provided that, if the person taking the samples is not a peace officer, he or she take the samples under the direction of a peace officer.

Sworn to before me this day of, A.D., at

(Signature of informant)

(Signature of provincial court judge)

1998, c. 37, s. 24.

FORM 5.02

(Subsection 487.05(1))

Warrant Authorizing the Taking of Bodily Substances for Forensic DNA Analysis

Canada,

Province of

(territorial division)

To the peace officers in (territorial division):

Whereas it appears on the oath of (name of peace officer) of in the said (territorial division), that there are reasonable grounds to believe

(a) that (offence), a designated offence within the meaning of [section 487.04](#) of the *Criminal Code*, has been committed,

(b) that a bodily substance has been found

(i) at the place where the offence was committed,

(ii) on or within the body of the victim of the offence,

(iii) on anything worn or carried by the victim at the time when the offence was committed, or

(iv) on or within the body of any person or thing or at any place associated with the commission of the offence,

(c) that (name of person) was a party to the offence, and

(d) that forensic DNA analysis of a bodily substance from (name of person) will provide evidence about whether the bodily substance referred to in paragraph (b) was from that person;

And whereas I am satisfied that it is in the best interests of the administration of justice to issue this warrant;

This is therefore to authorize and require you to take from (name of person) or cause to be taken by a person acting under your direction, the number of samples of bodily substances that are reasonably required for forensic DNA analysis, provided that the

person taking the samples is able by virtue of training or experience to take them by means of the investigative procedures described in [subsection 487.06\(1\)](#) of the *Criminal Code* and provided that, if the person taking the samples is not a peace officer, he or she take the samples under the direction of a peace officer. This warrant is subject to the following terms and conditions that I consider advisable to ensure that the taking of the samples is reasonable in the circumstances:

Dated this day of A.D., at

(Signature of provincial court judge)

1998, c. 37, s. 24.

FORM 5.03

(Subsections 487.051(1) and (2))

Order Authorizing the Taking of Bodily Substances for Forensic DNA Analysis

Canada

Province of

(territorial division)

To the peace officers in (territorial division):

Whereas (*name of person*) has been convicted under the *Criminal Code*, discharged under [section 730](#) of that Act or, in the case of a young person, found guilty under the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, or the *Youth Criminal Justice Act* of (*offence*), which, on the day on which the person was sentenced or discharged, was a primary designated offence within the meaning of [section 487.04](#) of the *Criminal Code*;

Therefore, you are authorized to take or cause to be taken from (*name of person*) the number of samples of bodily substances that is reasonably required for forensic DNA analysis, provided that the person taking the samples is able, by virtue of training or experience, to take them by means of the investigative procedures described in [subsection 487.06\(1\)](#) of the *Criminal Code* and that, if the person taking the samples is not a peace officer, they take them under the direction of a peace officer.

This order is subject to the following terms and conditions that the court considers advisable to ensure that the taking of the samples is reasonable in the circumstances:

Dated (*date*)....., at(*place*).

(Signature of judge of the court or clerk of the court)

1998, c. 37, s. 24; [2002, c. 1, s. 185](#); [2005, c. 25, s. 12](#); [2007, c. 22, s. 23](#); [2019, c. 25, s. 330](#).

FORM 5.04

(Subsection 487.051(3))

Order Authorizing the Taking of Bodily Substances for Forensic DNA Analysis

Canada

Province of

(territorial division)

To the peace officers in *(territorial division)*:

Whereas *(name of person)*, in this order called the “person”,

(a) has been found not criminally responsible on account of mental disorder for *(offence)*, which, on the day on which the finding was made, was a primary designated offence within the meaning of [section 487.04](#) of the *Criminal Code*, or

(b) has been convicted under the *Criminal Code*, discharged under [section 730](#) of that Act or, in the case of a young person, found guilty under the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, or the *Youth Criminal Justice Act*, of, or has been found not criminally responsible on account of mental disorder for, *(offence)*, which, on the day on which the person was sentenced or discharged or the finding was made, was a secondary designated offence within the meaning of [section 487.04](#) of the *Criminal Code*;

Whereas the person’s criminal record, the nature of the offence, the circumstances surrounding its commission, whether the person was previously found not criminally responsible on account of mental disorder for a designated offence, and the impact that this order would have on the person’s privacy and security have been considered by the court;

And whereas the court is satisfied that it is in the best interests of the administration of justice to make this order;

Therefore, you are authorized to take or cause to be taken from *(name of person)* the number of samples of bodily substances that is reasonably required for forensic DNA analysis, provided that the person taking the samples is able, by virtue of training or experience, to take them by means of the investigative procedures described in [subsection 487.06\(1\)](#) of the *Criminal Code* and that, if the person taking the samples is not a peace officer, they take them under the direction of a peace officer.

This order is subject to the following terms and conditions that the court considers advisable to ensure that the taking of the samples is reasonable in the circumstances:

Dated *(date)*....., at*(place)*.

(Signature of judge of the court or clerk of the court)

1998, c. 37, s. 24; 2002, c. 1, s. 186; 2005, c. 25, s. 12; 2007, c. 22, s. 23; 2012, c. 1, s. 38; 2014, c. 25, s. 32; 2018, c. 16, s. 224, c. 21, s. 29; 2019, c. 25, s. 331; 2022, c. 17, s. 56.

FORM 5.041

(Subsections 487.051(4) and 487.055(3.11))

Order to a Person To Have Bodily Substances Taken for Forensic DNA Analysis

Canada

Province of

(territorial division)

To A.B., of ,

Whereas an order has been made under [section 487.051](#), or an authorization has been granted under [section 487.055](#), of the *Criminal Code*, to take from you the number of samples of bodily substances that is reasonably required for forensic DNA analysis;

This is therefore to order you, in Her Majesty's name, to appear on(date), at(hour), at (.....place), for the purpose of the taking of bodily substances by means of the investigative procedures set out in [subsection 487.06\(1\)](#) of the *Criminal Code*.

You are warned that failure to appear in accordance with this order may result in a warrant being issued for your arrest under [subsection 487.0551\(1\)](#) of the *Criminal Code*. You are also warned that failure to appear, without reasonable excuse, is an offence under [subsection 487.0552\(1\)](#) of that Act.

[Subsection 487.0551\(1\)](#) of the *Criminal Code* states as follows:

487.0551 (1) If a person fails to appear at the place, day and time set out in an order made under [subsection 487.051\(4\)](#) or [487.055\(3.11\)](#) or in a summons referred to in [subsection 487.055\(4\)](#) or [487.091\(3\)](#), a justice of the peace may issue a warrant for their arrest in Form 5.062 to allow samples of bodily substances to be taken.

[Subsection 487.0552\(1\)](#) of the *Criminal Code* states as follows:

487.0552 (1) Every person who, without reasonable excuse, fails to comply with an order made under [subsection 487.051\(4\)](#) or [487.055\(3.11\)](#) of this Act or under [subsection 196.14\(4\)](#) or [196.24\(4\)](#) of the *National Defence Act*, or with a summons referred to in [subsection 487.055\(4\)](#) or [487.091\(3\)](#) of this Act, is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than two years; or

(b) an offence punishable on summary conviction.

Dated (date)....., at(place).

(Signature of judge of the court or clerk of the court)

2007, c. 22, s. 23; 2019, c. 25, s. 332.

FORM 5.05

(Subsection 487.055(1))

Application for an Authorization To Take Bodily Substances for Forensic DNA Analysis

Canada

Province of

(territorial division)

I (name of peace officer), (occupation), of in (territorial division), apply for an authorization to take bodily substances for forensic DNA analysis. A certificate referred to in paragraph 667(1)(a) of the *Criminal Code* is filed with this application.

Whereas (name of offender), before June 30, 2000,

(a) had been declared a dangerous offender under Part XXIV of the *Criminal Code*,

(b) had been declared a dangerous offender or a dangerous sexual offender under Part XXI of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read from time to time before January 1, 1988,

(c) had been convicted of murder,

(c.1) had been convicted of attempted murder or conspiracy to commit murder or to cause another person to be murdered and is currently serving a sentence of imprisonment for that offence,

(d) had been convicted of a sexual offence within the meaning of subsection 487.055(3) of the *Criminal Code* and is currently serving a sentence of imprisonment for that offence, or

(e) had been convicted of manslaughter and is currently serving a sentence of imprisonment for that offence;

Therefore, I request that an authorization be granted under subsection 487.055(1) of the *Criminal Code* to take from (name of offender) the number of samples of bodily substances that is reasonably required for forensic DNA analysis, provided that the person taking the samples is able, by virtue of training or experience, to take them by

means of the investigative procedures described in [subsection 487.06\(1\)](#) of the *Criminal Code* and that, if the person taking the samples is not a peace officer, they take them under the direction of a peace officer.

Dated this day of, A.D., at

(Signature of applicant)

1998, c. 37, s. 24; [2005, c. 25, s. 12](#); [2007, c. 22, s. 23](#).

FORM 5.06

(Subsection 487.055(1))

Authorization To Take Bodily Substances for Forensic DNA Analysis

Canada

Province of

(territorial division)

To the peace officers in (territorial division):

Whereas (*name of peace officer*), a peace officer in (territorial division), has applied for an authorization to take the number of samples of bodily substances from (*name of offender*) that is reasonably required for forensic DNA analysis by means of the investigative procedures described in [subsection 487.06\(1\)](#) of the *Criminal Code*;

Whereas (*name of offender*), before June 30, 2000,

(a) had been declared a dangerous offender under Part XXIV of the *Criminal Code*,

(b) had been declared a dangerous offender or a dangerous sexual offender under Part XXI of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read from time to time before January 1, 1988,

(c) had been convicted of murder,

(c.1) had been convicted of attempted murder or conspiracy to commit murder or to cause another person to be murdered and, on the date of the application, was serving a sentence of imprisonment for that offence,

(d) had been convicted of a sexual offence within the meaning of [subsection 487.055\(3\)](#) of the *Criminal Code* and, on the date of the application, was serving a sentence of imprisonment for that offence, or

(e) had been convicted of manslaughter and, on the date of the application, was serving a sentence of imprisonment for that offence;

And whereas I have considered the offender's criminal record, the nature of the offence, the circumstances surrounding its commission and the impact that this authorization would have on the offender's privacy and security of the person;

Therefore, you are authorized to take those samples or cause them to be taken from (*name of offender*), provided that the person taking the samples is able, by virtue of training or experience, to take them by means of the investigative procedures described in [subsection 487.06\(1\)](#) of the *Criminal Code* and that, if the person taking the samples is not a peace officer, they take them under the direction of a peace officer.

This authorization is subject to the following terms and conditions that I consider advisable to ensure that the taking of the samples is reasonable in the circumstances:

Dated this day of , A.D., at

(Signature of provincial court judge)

1998, c. 37, s. 24; [2005, c. 25, s. 12](#); [2007, c. 22, s. 23](#).

FORM 5.061

(Subsections 487.055(4) and 487.091(3))

Summons to a Person To Have Bodily Substances Taken for Forensic DNA Analysis

Canada

Province of

(territorial division)

To A.B., of

Whereas an authorization has been granted under [section 487.055](#) or [487.091](#) of the *Criminal Code* to take from you the number of samples of bodily substances that is reasonably required for forensic DNA analysis;

This is therefore to command you, in Her Majesty's name, to appear on, the day of, A.D., at o'clock, at, for the purpose of the taking of bodily substances by means of the investigative procedures set out in [subsection 487.06\(1\)](#) of the *Criminal Code*. A peace officer, or a person who is acting under a peace officer's direction, who takes the samples of bodily substances may use as much force as necessary to do so.

You are warned that failure to appear in accordance with this summons may result in a warrant being issued for your arrest under [subsection 487.0551\(1\)](#) of the *Criminal Code*. You are also warned that failure to appear, without reasonable excuse, is an offence under [subsection 487.0552\(1\)](#) of that Act.

Subsection 487.0551(1) of the *Criminal Code* states as follows:

487.0551 (1) If a person fails to appear at the place, day and time set out in an order made under subsection 487.051(4) or 487.055(3.11) or in a summons referred to in subsection 487.055(4) or 487.091(3), a justice of the peace may issue a warrant for their arrest in Form 5.062 to allow samples of bodily substances to be taken.

Subsection 487.0552(1) of the *Criminal Code* states as follows:

487.0552 (1) Every person who, without reasonable excuse, fails to comply with an order made under subsection 487.051(4) or 487.055(3.11) of this Act or under subsection 196.14(4) or 196.24(4) of the *National Defence Act*, or with a summons referred to in subsection 487.055(4) or 487.091(3) of this Act, is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than two years; or

(b) an offence punishable on summary conviction.

Dated (date)....., at(place).

(Signature of judge of the court or clerk of the court)

2007, c. 22, s. 23; 2019, c. 25, s. 333.

FORM 5.062

(Subsection 487.0551(1))

Warrant for Arrest

Canada

Province of

(territorial division)

To the peace officers in (territorial division):

This warrant is issued for the arrest of A.B., of , (occupation), in this warrant called the "offender".

Whereas the offender failed to appear at the place, day and time set out in an order made under subsection 487.051(4) or 487.055(3.11), or in a summons referred to in subsection 487.055(4) or 487.091(3), of the *Criminal Code* to submit to the taking of samples of bodily substances;

This is, therefore, to command you, in Her Majesty's name, to arrest the offender without delay in order to allow the samples of bodily substances to be taken.

Dated this day of A.D. , at

2007, c. 22, s. 23.

FORM 5.07

(Subsection 487.057(1))

Report to a Provincial Court Judge or the Court

Canada

Province of

(territorial division)

☐ To (name of judge), a judge of the provincial court who issued a warrant under [section 487.05](#) or granted an authorization under [section 487.055](#) or [487.091](#) of the *Criminal Code* or to another judge of that court:

☐ To the court that made an order under [section 487.051](#) of the *Criminal Code*:

I (name of peace officer), declare that (state here whether the samples were taken under a warrant issued under [section 487.05](#), an order made under [section 487.051](#) or an authorization granted under [section 487.055](#) or [487.091](#) of the *Criminal Code*).

I have (state here whether you took the samples yourself or caused them to be taken under your direction) from (name of offender) the number of samples of bodily substances that I believe is reasonably required for forensic DNA analysis, in accordance with (state whether the samples were taken under a warrant issued or an authorization granted by the judge or another judge of the court or an order made by the court).

The samples were taken on the day of , A.D. , at o'clock.

I (or state the name of the person who took the samples) took the following samples from (name of offender) in accordance with [subsection 487.06\(1\)](#) of the *Criminal Code* and was able, by virtue of training or experience, to do so (check applicable box):

☐ individual hairs, including the root sheath

☐ epithelial cells taken by swabbing the lips, tongue or inside cheeks of the mouth

☐ blood taken by pricking the skin surface with a sterile lancet

Any terms or conditions in the (warrant, order or authorization) have been complied with.

Dated this day of A.D. , at

(Signature of peace officer)

FORM 5.08

(Subsection 487.091(1))

Application for an Authorization To Take Additional Samples of Bodily Substances for Forensic DNA Analysis

Canada

Province of

(territorial division)

I (*name of peace officer*), (*occupation*), of in (*territorial division*), apply for an authorization to take additional samples of bodily substances for forensic DNA analysis.

Whereas samples of bodily substances were taken from (*name of offender*) for the purpose of forensic DNA analysis under an order made under [section 487.051](#), or an authorization granted under [section 487.055](#), of the *Criminal Code* (*attach a copy of the order or authorization*);

And whereas on (*day/month/year*) it was determined that

(a) a DNA profile could not be derived from the samples for the following reasons:

(b) the information or bodily substances required by regulations made under the [DNA Identification Act](#) were not transmitted in accordance with the requirements of the regulations or were lost for the following reasons:

Therefore, I request that an authorization be granted under [subsection 487.091\(1\)](#) of the *Criminal Code* to take from (*name of offender*) the number of additional samples of bodily substances that is reasonably required for forensic DNA analysis, provided that the person taking the samples is able, by virtue of training or experience, to take them by means of the investigative procedures described in [subsection 487.06\(1\)](#) of the *Criminal Code* and that, if the person taking the samples is not a peace officer, they take them under the direction of a peace officer.

Dated this day of , A.D. , at

(Signature of applicant)

1998, c. 37, s. 24; [2005, c. 25, s. 13](#); [2007, c. 22, s. 25](#).

FORM 5.09

(Subsection 487.091(1))

Authorization To Take Additional Samples of Bodily Substances for Forensic DNA Analysis

Canada

Province of

(*territorial division*)

To the peace officers in (*territorial division*):

Whereas samples of bodily substances were taken from (*name of offender*) for the purpose of forensic DNA analysis under an order made under [section 487.051](#) or an authorization granted under [section 487.055](#), of the *Criminal Code*;

Whereas on (*day/month/year*) it was determined that

(a) a DNA profile could not be derived from the samples for the following reasons:

(b) the information or bodily substances required by regulations made under the [DNA Identification Act](#) were not transmitted in accordance with the requirements of the regulations or were lost for the following reasons:

And whereas (*name of peace officer*), a peace officer in (*territorial division*), has applied for an authorization to take the number of additional samples of bodily substances from (*name of offender*) that is reasonably required for forensic DNA analysis by means of the investigative procedures described in [subsection 487.06\(1\)](#) of the *Criminal Code*;

Therefore, you are authorized to take those additional samples, or cause them to be taken, from (*name of offender*), provided that the person taking the samples is able, by virtue of training or experience, to take them by means of the investigative procedures described in [subsection 487.06\(1\)](#) of the *Criminal Code* and that, if the person taking the samples is not a peace officer, they take them under the direction of a peace officer.

This authorization is subject to the following terms and conditions that I consider advisable to ensure that the taking of the samples is reasonable in the circumstances:

Dated this day of , A.D. , at

(Signature of provincial court judge)

1998, c. 37, s. 24; [2005, c. 25, s. 13](#); [2007, c. 22, s. 25](#).

FORM 5.1

(Subsection 320.29(5) and subparagraphs 462.32(4)(a)(ii) and 487.093(1)(a)(ii))

Notice — Execution of Search Warrant

A warrant under section (section of the *Criminal Code* under which the warrant is issued) has been executed (at *location* or on *name of person*) on (*date*).

If anything is seized during the execution of the warrant, the things that were seized may be brought before the court at (*address*). However, if the peace officer, public officer or other person who executed the warrant filed with that court a report on the things that were seized, you may obtain a copy of the report from the clerk of that court. The report will indicate the things that were seized and the location at which they are being held.

R.S., 1985, c. 27 (1st Supp.), s. 184, c. 1 (4th Supp.), s. 17; 2018, c. 21, s. 30; 2022, c. 17, s. 57.

FORM 5.2

(Subsection 489.1(3))

Report to a Justice

Canada,

Province of _____,

(*territorial division*).

To a justice having jurisdiction in respect of the matter and jurisdiction in the province in which the warrant referred to below was issued (*or, if no warrant was issued, a justice having jurisdiction in respect of the matter*).

I, (*name of the peace officer or other person*) have (*state here whether you have acted under a warrant issued under the *Criminal Code*, under section 487.11 or 489 of the *Criminal Code*, or otherwise in the execution of duties under the *Criminal Code* or other Act of Parliament to be specified*)

1 searched the premises situated at _____; and

2 seized the following things and dealt with them as follows:

Thing Seized	Disposition
(<i>describe each thing seized</i>)	(<i>state, in respect of each thing seized, whether</i> (a) <i>it was returned to the person lawfully entitled to its possession, in which case the receipt for it shall be attached to this report; or</i> (b) <i>it is being detained to be dealt with according to law, in which case indicate the location and manner in which or, if applicable, the person by whom it is being detained.</i>)
1. _____	_____
2. _____	_____
3. _____	_____

4.

Signed on (*date*), at (*place*).

(*Signature of peace officer or other person*)

R.S., 1985, c. 27 (1st Supp.), s. 184; 2018, c. 21, s. 31; 2022, c. 17, s. 57.

FORM 5.3

(Section 462.32)

Report to a Judge of Property Seized

Canada,

Province of,

(*territorial division*).

To a judge of the court from which the warrant was issued (*specify court*):

I, (*name of the peace officer or other person*) have acted under a warrant issued under [section 462.32](#) of the *Criminal Code* and have

1 searched the premises situated at; and

2 seized the following property:

Property Seized	Location
(<i>describe each item of property seized</i>)	(<i>state, in respect of each item of property seized, the location where it is being detained</i>).
1.	
2.	
3.	
4.	

Dated this day of A.D., at

Signature of peace officer or other person

R.S., 1985, c. 42 (4th Supp.), s. 6.

FORM 6

(Section 2)

Summons to a Person Charged with an Offence

Canada,

Province of

(*territorial division*).

To (*name of person*), of, born on (*date of birth*):

Because you have this day been charged with (*set out briefly the offence in respect of which the accused is charged*);

Therefore, you are ordered, in Her Majesty's name:

(a) to appear on (*date*) at (*hour*) at (*place*) for the purposes of the *Identification of Criminals Act* (*Ignore, if not filled in*); and

(b) to attend court on (*date*), at (*hour*), at (*place*), or before any justice for the (*territorial division*) who is there, and to attend court at any time after as required by the court, in order to be dealt with according to law.

You are warned that, unless you have a lawful excuse, it is an offence under subsection 145(3) of the *Criminal Code* to fail to appear for the purposes of the *Identification of Criminals Act* or to attend court, as required in this summons.

If you commit an offence under subsection 145(3) of the *Criminal Code*, a warrant for your arrest may be issued (Section 512 or 512.1 of the *Criminal Code*) and you may be liable to a fine or to imprisonment, or to both.

If you do not comply with this summons or are charged with committing an indictable offence after it has been issued to you, this summons may be cancelled and, as a result, you may be detained in custody (Subsection 524(4) of the *Criminal Code*).

Signed on (*date*), at (*place*).

.....

(*Signature of judge, justice, clerk of the court or chairperson of the Review Board*)

.....

(*Name of the judge, justice or chairperson*)

R.S., 1985, c. C-46, Form 6; R.S., 1985, c. 27 (1st Supp.), s.184; 2018, c. 29, s. 69; 2019, c. 25, s. 334.

FORM 6.1

(Subsection 485.2(1))

Application for a Summons under Section 485.2

Canada,

Province of

(territorial division)

I (name), (occupation), of in (territorial division), apply for the issuance of a summons under [section 485.2](#) of the *Criminal Code* requiring (name of accused or offender) to attend at a time and place stated in it for the purposes of the *Identification of Criminals Act*.

(Name of accused or offender) was previously required to appear on (date) at (hour) at (place) for the purposes of the *Identification of Criminals Act* under (a summons or an appearance notice or an undertaking or an order) issued on (date) in relation to (set out briefly the offence in respect of which the accused or offender was previously required to appear).

☐ (Check if applicable) The offence which is currently the subject of the proceedings, namely (set out briefly the offence for which the accused is currently charged or the offender has been determined to be guilty) is different from the offence listed above, but stems from the same matter for which the accused or offender was previously required to appear under that Act, and is an offence referred to in paragraph 2(1)(c) of that Act.

The measurements, processes and operations referred to in that Act were not completed for the following reason(s):

(set out reason(s))

Sworn before me on (date), at (place).

(Signature of applicant)

(Signature of judge, justice or clerk of the court)

[2022, c. 17, s. 58.](#)

FORM 6.2

(Subsection 485.2(1))

Summons to Appear for the Purposes of the *Identification of Criminals Act*

Canada,

Province of

(territorial division)

To (name of person), of, born on (date of birth):

Because you were previously required to appear on *(date)* at *(hour)* at *(place)* for the purposes of the *Identification of Criminals Act* under *(a summons or an appearance notice or an undertaking or an order)* issued on *(date)* and the measurements, processes and operations referred to in that Act were not completed for exceptional reasons;

You are ordered, in Her Majesty's name, to appear on *(date)* at *(hour)* at *(place)* for the purposes of the *Identification of Criminals Act* in relation to *(set out briefly the offence in respect of which the accused was charged or the offender has been determined to be guilty)*.

You are warned that, unless you have a lawful excuse, it is an offence under [subsection 145\(3\)](#) of the *Criminal Code* to fail to appear for the purposes of the *Identification of Criminals Act*, as required in this summons.

If you commit an offence under [subsection 145\(3\)](#) of the *Criminal Code*, a warrant for your arrest may be issued ([section 512](#) or [512.1](#) of the *Criminal Code*) and you may be liable to a fine or to imprisonment, or to both.

If you are on interim release and do not comply with this summons or are charged with committing an indictable offence after it has been issued to you, any summons, appearance notice, undertaking or release order to which you are subject may be cancelled and, as a result, you may be detained in custody ([section 524](#) of the *Criminal Code*).

Signed on *(date)*, at *(place)*.

(Signature of judge, justice or clerk of the court)

(Name of the judge or justice)

[2022, c. 17, s. 58.](#)

FORM 6.3

(Section 490.0132)

Summons to Appear for the Purposes of Section 490.0132

Canada,

Province of

(territorial division)

To *(name of person)*, of, born on *(date of birth)*:

Because on *(date)* at *(hour)* at *(place)* a sentence was imposed on you — or a verdict of not criminally responsible on account of mental disorder was rendered in respect of you

— for a primary offence and the court did not, at the time the sentence was imposed or the verdict was rendered, consider whether an order to comply with the *Sex Offender Information Registration Act* should be made under any of subsections 490.012(1) to (3) of the *Criminal Code*;

You are ordered, in His Majesty's name, to appear on *(date)* at *(hour)* at *(place)* for the purposes of considering whether an order should be made under any of subsections 490.012(1) to (3) of the *Criminal Code* in respect of the primary offence for which the sentence was imposed or the verdict of not criminally responsible on account of mental disorder was rendered.

You are warned that, unless you have a lawful excuse, it is an offence under subsection 145(3) of the *Criminal Code* to fail to appear as required in this summons.

If you commit an offence under subsection 145(3) of the *Criminal Code*, a warrant for your arrest may be issued (section 512 or 512.1 of the *Criminal Code*) and you may be liable to a fine or to imprisonment, or to both.

Signed on *(date)*, at *(place)*.

(Signature of judge, justice or clerk of the court)

(Name of the judge or justice)

2023, c. 28, s. 36.

FORM 6.4

(Section 490.03121)

Warrant for Arrest

Canada

Province of

(territorial division)

To the peace officers in *(territorial division)*:

This warrant is issued for the arrest of *(name of person)*, of, born on *(date of birth)*.

Whereas *(name of person)* contravened a requirement, under the *Criminal Code* or another Act of Parliament, to comply with sections 4 to 5.1 of the *Sex Offender Information Registration Act*;

This is, therefore, to command you, in His Majesty's name, to arrest *(name of person)* without delay in order to bring them to a *registration centre*, as defined in subsection

3(1) of the *Sex Offender Information Registration Act*, to remedy any contravention of any of sections 4 to 5.1 of that Act.

Signed on (date), at (place).

.....

(Signature of justice)

.....

(Name of the justice who has issued this warrant)

2023, c. 28, s. 36.

FORM 7

(Sections 475, 493, 597, 800 and 803)

Warrant for Arrest

Canada,

Province of,

(territorial division).

To the peace officers in the (territorial division):

This warrant is issued for the arrest of (name of person), of, born on (date of birth), referred to in this warrant as the accused.

Because the accused has been charged with (set out briefly the offence in respect of which the accused is charged);

And because (check those that are applicable):

- ☐ (a) there are reasonable grounds to believe that it is necessary in the public interest to issue this warrant for the arrest of the accused [507(4), 512(1)];
- ☐ (b) the accused failed to attend court in accordance with the summons served on the accused [512(2)];
- ☐ (c) (an appearance notice or undertaking) was confirmed and the accused failed to attend court in accordance with it [512(2)];
- ☐ (d) it appears that a summons cannot be served because the accused is evading service [512(2)];
- ☐ (e) the accused was ordered to be present at the hearing of an application for a review of an order made by a justice and did not attend the hearing [520(5), 521(5)];

- (f) there are reasonable grounds to believe that the accused has contravened or is about to contravene the (summons *or* appearance notice *or* undertaking *or* release order) on which the accused was released [512.3];
- (g) there are reasonable grounds to believe that the accused has committed an indictable offence since their release from custody on (summons *or* appearance notice *or* undertaking *or* release order) [512.3];
- (h) the accused was required by (appearance notice *or* undertaking *or* summons) to attend at a time and place stated in it for the purposes of the *Identification of Criminals Act* and did not appear at that time and place [512.1, 512.2];
- (i) an indictment has been found against the accused and the accused has not appeared or remained in attendance before the court for their trial [597];
- (j) *(if none of the above applies, reproduce the provisions of the statute that authorize this warrant)*.

Therefore, you are ordered, in Her Majesty's name, to immediately arrest the accused and to bring them before (*state court, judge or justice*), to be dealt with according to law.

□ (*Check if applicable*) Because there are reasonable grounds to believe that the accused is or will be present in (*specify dwelling-house*), this warrant is also issued to authorize you to enter the dwelling-house for the purpose of arresting the accused, subject to the condition that you may not enter the dwelling-house unless you have, immediately before entering the dwelling-house, reasonable grounds to believe that the person to be arrested is present in the dwelling-house.

Signed on (*date*), at (*place*).

.....

(*Signature of judge, provincial court judge, justice or clerk of the court*)

.....

(*Name of the judge, provincial court judge or justice who has issued this warrant*)

R.S., 1985, c. C-46, Form 7; R.S., 1985, c. 27 (1st Supp.), s.203; 1997, c. 39, s. 3; 1999, c. 5, s. 46; [2019, c. 25, s. 335](#).

FORM 7.1

(Section 529.1)

Warrant To Enter Dwelling-house

Canada,

Province of,

(*territorial division*).

To the peace officers in the said (*territorial division*):

This warrant is issued in respect of the arrest of A.B., or a person with the following description (), of _____, (*occupation*).

Whereas there are reasonable grounds to believe:*

(a) a warrant referred to in this or any other Act of Parliament to arrest or apprehend the person is in force anywhere in Canada;

(b) grounds exist to arrest the person without warrant under [paragraph 495\(1\)\(a\)](#) or (b) or [section 672.91](#) of the *Criminal Code*; or

(c) grounds exist to arrest or apprehend without warrant the person under an Act of Parliament, other than this Act;

And whereas there are reasonable grounds to believe that the person is or will be present in (*here describe dwelling-house*);

This warrant is issued to authorize you to enter the dwelling-house for the purpose of arresting or apprehending the person.

Dated this _____ day of _____ A.D. _____, at _____ .

Judge, Clerk of the Court, Provincial Court Judge or Justice

* *Initial applicable recital.*

1997, c. 39, s. 3; [2002, c. 13, s. 85](#).

FORM 8

(Sections 493 and 515)

Warrant for Committal

Canada,

Province of _____,

(*territorial division*).

To the peace officers in the (*territorial division*) and to the keeper of the (*prison*) at _____:

This warrant is issued for the committal of (*name of person*), of _____, born on (*date of birth*), referred to in this warrant as the accused.

Because the accused has been charged with (*set out briefly the offence in respect of which the accused is charged*);

And because (*check those that are applicable*):

- ☐ (a) the prosecutor has shown cause why the detention of the accused in custody is justified [515(5)];
- ☐ (b) a release order has been issued but the accused has not yet complied with the conditions of the order [519(1), 520(9), 521(10), 524(8), 525(6)];^{*}
- ☐ (c) the application by the prosecutor for a review of the release order has been allowed and that release order has been vacated, and the prosecutor has shown cause why the detention of the accused in custody is justified [521];
- ☐ (d) the accused has contravened or was about to contravene a (summons *or* appearance notice *or* undertaking *or* release order) and it was cancelled, and the detention of the accused in custody is justified [515(10), 523.1(3), 524(3) and (4)];
- ☐ (e) there are reasonable grounds to believe that the accused has committed an indictable offence after having become subject to the (summons *or* appearance notice *or* undertaking *or* release order) and the detention of the accused in custody is justified [515(10), 524(3) and (4)];
- ☐ (f) (*if none of the above applies, reproduce the provisions of the statute that authorize this warrant*).

Therefore, you are ordered, in Her Majesty's name, to arrest the accused and convey them safely to the (*prison*) at, and there deliver them to its keeper, with the following order:

You are ordered to receive the accused in your custody in this prison and keep them safely there until they are delivered by due course of law.

Signed on (*date*), at (*place*).

.....

(*Signature of judge, justice or clerk of the court*)

.....

(*Name of the judge or justice who has issued this warrant*)

^{*} If the person having custody of the accused is authorized under [paragraph 519\(1\)\(b\)](#) of the *Criminal Code* to release the accused if they comply with a release order, endorse the authorization on this warrant and attach a copy of the order.

R.S., 1985, c. C-46, Form 8; R.S., 1985, c. 27 (1st Supp.), ss. 184, 203; [2019, c. 25, s. 336](#).

FORM 9

(Section 2)

Appearance Notice

Canada,

Province of

(*territorial division*)

1 Identification

Surname: Given name(s):

Date of Birth:

2 Contact Information

.....

3 Alleged Offence

You are alleged to have committed (*set out briefly the substance of the offence, including any failure referred to in [section 496](#), that the accused is alleged to have committed*).

☐ (*Check if applicable*) No new charges are being laid against you at this time but you are required to appear at a judicial referral hearing under [section 523.1](#) for a failure under [section 496](#).

4 Conditions

You must attend court as indicated below, and afterwards as required by the court:

Date:

Time:

Court number:

Court address:

5 Appearance for the purposes of the *Identification of Criminals Act* (if applicable)

☐ You are required to appear on (*date*) at (*hour*) at (*place*) for the purposes of the *Identification of Criminals Act*.

6 Consequence for non-compliance

You are warned that,

(a) in the case where charges have been laid against you, unless you have a lawful excuse, you commit an offence under [subsection 145\(3\)](#) of the *Criminal Code* if you fail to appear for the purposes of the *Identification of Criminals Act* or to attend court, as required in this appearance notice;

(b) in the case where no charges have been laid against you and you fail to appear at a judicial referral hearing under [section 523.1](#), as required in this appearance notice, charges may be laid against you for the alleged offence described in item 3 of this notice.

If you commit an offence under [subsection 145\(3\)](#) of the *Criminal Code*, a warrant for your arrest may be issued ([section 512](#) or [512.2](#) of the *Criminal Code*) and you may be liable to a fine or to imprisonment, or to both.

It is not a lawful excuse to an offence under [subsection 145\(3\)](#) of the *Criminal Code* that this appearance notice does not accurately describe the offence that you are alleged to have committed ([subsection 145\(6\)](#) of the *Criminal Code*).

If you do not comply with this appearance notice or are charged with committing an indictable offence after you have been released, this appearance notice may be cancelled and, as a result, you may be detained in custody ([subsection 524\(4\)](#) of the *Criminal Code*).

7 Signatures

ACCUSED:

I understand the contents of this appearance notice and agree to comply with it.

Signed on *(date)*, at *(place)*.

.....

(Signature of accused)

PEACE OFFICER:

Signed on *(date)*, at *(place)*.

.....

(Signature of peace officer)

.....

(Name of the peace officer)

R.S., 1985, c. C-46, Form 9; R.S., 1985, c. 27 (1st Supp.), s. 184; 1994, c. 44, s. 84; 1997, c. 18, s. 115; [2018, c. 29, s. 70](#); [2019, c. 25, s. 337](#).

FORM 10

(Section 2)

Undertaking

Canada,

Province of

(*territorial division*).

1 Identification

Surname: Given name(s):

Date of Birth:

2 Contact Information

.....

3 Alleged offence(s)

(*set out briefly the offence(s) which the accused is alleged to have committed*)

4 Mandatory Condition

You must attend court as indicated below, and afterwards as required by the court:

Date:

Time:

Court number:

Court address:

5 Additional Conditions

You must also comply with any conditions that are indicated below by a check mark (*check only those that are reasonable in the circumstances of the offence and necessary, to ensure the accused's attendance in court or the safety and security of any victim of or witness to the offence, or to prevent the continuation or repetition of the offence or the commission of another offence*):

- ☐ (a) You must report to (*name or title*) at (*place*) on (*date or dates*).
- ☐ (b) You must remain within the following territorial jurisdiction:
- ☐ (c) You must notify (*name, title and phone number*) of any change of your (*address, employment or occupation*).
- ☐ (d) You must not communicate, directly or indirectly, with, except in accordance with the following conditions:
- ☐ (e) You must not go to (*places which are related to the person(s) mentioned in the condition set out in paragraph (d)*), except in accordance with the following conditions:

- ☐ (f) You must not enter the areas (*describe in detail the boundaries of the areas related to the person(s) mentioned in the condition set out in paragraph (d)*), except in accordance with the following conditions:
- ☐ (g) You must deposit all your passports with (*name or title*) at (*place*) before (*date*).
- ☐ (h) You must reside at (*place*), be at that residence between (*hour*) and (*hour*), and present yourself at the entrance of that residence when a peace officer or (*name and title of another person*) requests you to do so within those hours.
- ☐ (i) You must not possess a firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, firearm part, ammunition, prohibited ammunition or explosive substance and you must surrender those that are in your possession and also any authorization, licence or registration certificate or other document enabling you to acquire or possess them to (*name or title*) at (*place*).
- ☐ (j) You promise to pay the amount of (*not more than \$500*), if you fail to comply with a condition of this undertaking.
- ☐ (k) You must deposit money or other valuable security whose value is equal to the amount of (*not more than \$500*) with (*name or title*), because you are not ordinarily resident in the province or do not reside within 200 km of the place in which you are in custody.
- ☐ (l) You must comply with the following conditions (*conditions for ensuring the safety and security of any victim of or witness to the alleged offence*):

6 Appearance for the purposes of the *Identification of Criminals Act*

- ☐ You are required to appear on (*date*) at (*hour*) at (*place*) for the purposes of the *Identification of Criminals Act*.

7 Variation and Replacement

The conditions of this undertaking may be varied with the written consent of the prosecutor and yourself. In addition, you or the prosecutor may apply to a justice of the peace to replace this undertaking with a release order under [section 515](#) of the *Criminal Code*.

8 Conditions in effect

The mandatory condition and the conditions indicated by a check mark on this undertaking remain in effect until they are cancelled or changed or until you have been discharged, sentenced or otherwise detained by the court ([sections 763 and 764](#) of the *Criminal Code*).

9 Consequence for non-compliance

You are warned that, unless you have a lawful excuse, you commit an offence under [section 145](#) of the *Criminal Code* if you fail to follow any of the conditions set out in

this undertaking, including

- (a)** to fail to attend court as required;
- (b)** to fail to appear as required for the purposes of the *Identification of Criminals Act*;
- (c)** to fail to remain in the territorial jurisdiction specified in [section 5](#) of this undertaking (*if applicable*).

If you commit an offence under [section 145](#) of the *Criminal Code*, a warrant for your arrest may be issued ([section 512](#) or [512.2](#) of the *Criminal Code*) and you may be liable to a fine or to imprisonment, or to both.

It is not a lawful excuse to an offence under [subsection 145\(4\)](#) of the *Criminal Code* that this undertaking does not accurately describe the offence that you are alleged to have committed ([subsection 145\(6\)](#) of the *Criminal Code*).

If you do not comply with this undertaking or are charged with committing an indictable offence after you have been released, this undertaking may be cancelled and, as a result, you may be detained in custody ([subsection 524\(4\)](#) of the *Criminal Code*).

If you do not comply with this undertaking, the funds or valuable security promised or deposited by you or your surety could be forfeited ([subsection 771\(2\)](#) of the *Criminal Code*).

10 Signatures

ACCUSED:

I understand the contents of this undertaking and agree to comply with the mandatory condition and the conditions that are indicated by a check mark.

I understand that I do not have to accept the conditions and that, if I do not accept the conditions, I will be brought to a justice for a bail hearing.

Signed on (*date*), at (*place*).

.....

(*Signature of accused*)

PEACE OFFICER:

Signed on (*date*), at (*place*).

.....

(*Signature of peace officer*)

.....

(Name of the peace officer)

R.S., 1985, c. C-46, Form 10; 1994, c. 44, s. 84; 1997, c. 18, s. 115; 2018, c. 29, s. 70; 2019, c. 25, s. 337; 2022, c. 17, s. 59; 2023, c. 32, s. 13.10.

FORM 11

(Section 2)

Release Order

Canada,

Province of

(territorial division).

1 Identification

Surname: Given name(s):

Date of Birth:

2 Contact Information

.....

3 Charge(s)

(set out briefly the offence in respect of which the accused was charged)

4 Financial Obligations

☐ You do not have any financial obligations under this release order.

or

In order for you to be released, the obligations that are indicated below by a check mark must be complied with.

☐ You promise to pay the amount of if you fail to comply with a condition of this release order.

☐ You must deposit money in the amount of or other valuable security whose value does not exceed with the clerk of the court.

☐ The surety (name), born on (date of birth), (promises to pay or deposits) to the court the amount of

5 Conditions

You must comply with the conditions that are indicated below by a check mark.

- ☐ You must report to (*name or title*) at (*place*) on (*date or dates*).
- ☐ You must remain within the territorial jurisdiction of (*province or territory*).
- ☐ You must notify (*name, title and phone number*) of any change of your (*address, employment or occupation*).
- ☐ You must not communicate, directly or indirectly, with (*victims, witnesses or other persons*), except in accordance with the following conditions:
- ☐ You must not go to (*place*) or enter (*geographic area*), except in accordance with the following conditions:
- ☐ You must deposit all your passports with (*name or title*) at (*place*) before (*date*).
- ☐ You must not possess a firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, firearm part, ammunition, prohibited ammunition or explosive substance and you must surrender any of them in your possession and any authorization, licence or registration certificate or other document enabling the acquisition or possession of a firearm to (*name or title*) at (*place*).
- ☐ You must comply with the following conditions (*conditions for ensuring the safety and security of any victim of or witness to the alleged offence*):
- ☐ You must comply with the following conditions:

6 Variation

The conditions of this release order may be varied with the written consent of the prosecutor, yourself and your sureties, if any. In addition, you or the prosecutor may apply to a judge to have any condition in this release order cancelled or changed.

7 Conditions in effect

The conditions indicated by a check mark on this release order (including any obligations imposed on your sureties) remain in effect until they are cancelled or changed or until you have been discharged, sentenced or otherwise detained by the court ([sections 763 and 764](#) of the *Criminal Code*).

8 Consequence for non-compliance

You are warned that, unless you have a lawful excuse, you commit an offence under [section 145](#) of the *Criminal Code* if you fail to follow any of the conditions set out in this release order, including if you fail to attend court as required.

If you commit an offence under [section 145](#) of the *Criminal Code*, a warrant for your arrest may be issued ([sections 512 and 512.3](#) of the *Criminal Code*) and you may be liable to a fine or to imprisonment, or to both.

If you do not comply with this release order or are charged with committing an indictable offence after you have been released, this release order may be cancelled

and, as a result, you may be detained in custody ([subsection 524\(4\)](#) of the *Criminal Code*).

If you do not comply with this release order, the money or other valuable security promised or deposited by you or your surety could be forfeited ([subsection 771\(2\)](#) of the *Criminal Code*).

9 Signatures

SURETY: (*if applicable*)

I understand my role and my responsibilities under this release order and I agree to act as a surety.

I agree to (*promise or deposit*) to the court the amount of money described in [section 4](#) of this release order.

- ☐ Surety Declaration is attached ([section 515.1](#) of the *Criminal Code*).
- ☐ Surety is excepted from providing Surety Declaration ([subsection 515.1\(2\)](#) of the *Criminal Code*).

Signed on (*date*), at (*place*).

.....

(*Signature of the surety*)

ACCUSED:

I understand the contents of this form and agree to comply with the conditions that are indicated by a check mark.

I understand that I do not have to accept the conditions and that, if I do not accept the conditions, I will be detained.

Signed on (*date*), at (*place*).

.....

(*Signature of accused*)

JUDGE, JUSTICE OR CLERK OF THE COURT:

Signed on (*date*), at (*place*).

.....

(*Signature of judge, justice or clerk of the court*)

.....

(*Name of judge or justice who has issued this order*)

FORM 11.1

(Section 515.01)

Order to Appear for the Purposes of the *Identification of Criminals Act*

Canada,

Province of

(territorial division)

1 Identification

Surname: Given name(s):

Date of birth:

2 Contact Information

.....

3 Charge(s)

(set out briefly the offence in respect of which the accused was charged)

4 Appearance for the purposes of the *Identification of Criminals Act*

You are ordered, in Her Majesty's name, to appear on (date) at (hour) at (place) for the purposes of the *Identification of Criminals Act*.

5 Consequence for non-compliance

You are warned that, unless you have a lawful excuse, it is an offence under [subsection 145\(2\)](#) of the *Criminal Code* to fail to appear for the purposes of the *Identification of Criminals Act*, as required by this order.

If you commit an offence under [subsection 145\(2\)](#) of the *Criminal Code*, a warrant for your arrest may be issued ([section 512](#), [512.2](#) or [512.3](#) of the *Criminal Code*) and you may be liable to a fine or to imprisonment, or to both.

If you do not comply with this order you may be arrested and the release order to which you are subject may be cancelled and, as a result, you may be detained in custody ([section 524](#) of the *Criminal Code*).

6 Signatures

Signed on *(date)*, at *(place)*.

(Signature of judge, justice or clerk of the court)

(Name of the judge or justice)

1994, c. 44, s. 84; 1997, c. 18, s. 115; 1999, c. 25, s. 24; 2002, c. 13, s. 86(F); 2018, c. 29, s. 71; 2019, c. 25, s. 337; 2022, c. 17, s. 60.

FORM 12

(Section 515.1)

Surety Declaration

Canada,

Province of _____,

(territorial division).

1 Identification

Surname: _____ Given name(s): _____

Date of Birth: _____

Home address: _____

Phone number(s): _____ *(primary)* _____ *(other)*

Other contact information *(if any)*: _____

Employment or occupation *(if any)*: _____

Name and contact information for employer *(if any)*: _____

2 Information about the Accused

Surname: _____ Given name(s): _____

Date of Birth: _____

Court file number: _____

3 Other information required

Relationship to the accused: _____

I am acting as a surety in respect of another accused.

☐ Yes ☐ No

If yes, name and date of birth of any other accused: _____

I have a criminal record or there are outstanding criminal charges against me.

☐ Yes ☐ No

If yes, description of criminal record, if any, and all outstanding criminal charges, specifying offence and year of conviction:

4 Charges against the Accused

I understand that the accused has been charged with (*set out briefly the offence in respect of which the accused was charged*).

5 Other Outstanding Charges against the Accused

☐ I understand that the accused does not have any other outstanding criminal charges.

☐ I understand that the accused has also been charged with (*set out briefly the offence in respect of which the accused was charged*), but this declaration does not apply to those charges.

6 Criminal Record of the Accused

☐ I understand that the accused does not have a criminal record.

☐ I understand that the accused has a criminal record, which is described below or a copy of which I have attached and initialled.

.....

7 Financial Promise or Deposit

As a surety for the accused, I am willing to (*promise or deposit*) to the court the amount of

8 Acknowledgment

I understand that failure on the part of the accused to follow any of the conditions in their release order or recognizance could lead to the forfeiture of the amount of money that has been promised or deposited.

I understand that I may, at any time, ask to no longer be a surety by making an application, by bringing the accused to the court in order to be discharged from my obligation ([section 767](#) of the *Criminal Code*) or by taking and giving the accused into custody ([section 768](#) of the *Criminal Code*).

I voluntarily make this declaration and it is my free choice to take on the responsibilities of a surety.

9 Signature

Signed on (*date*), at (*place*).

.....
(Signature of the surety)

Sworn before me on (date), at (place).

.....
(Signature of the person who is authorized to take or receive statements made under oath, solemn declaration or solemn affirmation)

R.S., 1985, c. C-46, Form 12; R.S., 1985, c. 27 (1st Supp.), s. 184; 1994, c. 44, s. 84; 1999, c. 25, s. 25; 2008, c. 18, s. 45.1; 2018, c. 29, s. 72; 2019, c. 25, s. 337.

FORM 13

[Repealed, 2019, c. 25, s. 337]

FORM 14

[Repealed, 2019, c. 25, s. 337]

FORM 15

(Section 543)

Warrant To Convey Accused Before Justice of Another Territorial Division

Canada,

Province of,

(territorial division).

To the peace officers in the said (territorial division):

Whereas A.B., of hereinafter called the accused, has been charged that (state place of offence and charge);

And whereas the deposition of X.Y. in respect of the charge has been taken by me (or if the signatory is not the justice, the justice);

And Whereas the charge is for an offence committed in the (territorial division);

This is to command you, in Her Majesty's name, to convey the said A.B., before a justice of the (last mentioned territorial division).

Dated (date)....., at(place).

(Signature of justice or clerk of the court)

.....

R.S., 1985, c. C-46, Form 15; [2019, c. 25, s. 338](#).

FORM 16

(Section 699)

Subpoena to a Witness

Canada,

Province of,

(territorial division).

To E.F., of, (occupation);

Whereas A.B. has been charged that (*state offence as in the information*), and it has been made to appear that you are likely to give material evidence for (the prosecution or the defence);

This is therefore to command you to attend before (*set out court or justice*), on the day of A.D., at o'clock in the noon at to give evidence concerning the said charge.*

*Where a witness is required to produce anything, add the following:

and to bring with you anything in your possession or under your control that relates to the said charge, and more particularly the following: (*specify any documents, objects or other things required*).

Dated this day of A.D., at

A Judge, Justice or Clerk of the court

(Seal, if required)

R.S., 1985, c. C-46, Form 16; R.S., 1985, c. 27 (1st Supp.), s. 184; 1999, c. 5, s. 47.

FORM 16.1

(Subsections 278.3(5) and 699(7))

Subpoena to a Witness in the Case of Proceedings in Respect of an Offence Referred to in Subsection 278.2(1) of the Criminal Code

Canada,

Province of _____,

(*territorial division*).

To E.F., of _____, (*occupation*);

Whereas A.B. has been charged that (*state offence as in the information*), and it has been made to appear that you are likely to give material evidence for (the prosecution or the defence);

This is therefore to command you to attend before (*set out court or justice*), on _____ the _____ day of _____ A.D. _____, at _____ o'clock in the _____ noon at _____ to give evidence concerning the said charge, and to bring with you anything in your possession or under your control that relates to the said charge, and more particularly the following: (*specify any documents, objects or other things required*).

TAKE NOTE

You are only required to bring the things specified above to the court on the date and at the time indicated, and you are not required to provide the things specified to any person or to discuss their contents with any person unless and until ordered by the court to do so.

If anything specified above is a **record** as defined in [section 278.1](#) of the *Criminal Code*, it may be subject to a determination by the court in accordance with sections 278.1 to [278.91](#) of the *Criminal Code* as to whether and to what extent it should be produced.

If anything specified above is a **record** as defined in [section 278.1](#) of the *Criminal Code*, the production of which is governed by sections 278.1 to [278.91](#) of the *Criminal Code*, this subpoena must be accompanied by a copy of an application for the production of the record made pursuant to [section 278.3](#) of the *Criminal Code*, and you will have an opportunity to make submissions to the court concerning the production of the record.

If anything specified above is a **record** as defined in [section 278.1](#) of the *Criminal Code*, the production of which is governed by sections 278.1 to [278.91](#) of the *Criminal Code*, you are not required to bring it with you until a determination is made in accordance with those sections as to whether and to what extent it should be produced.

As defined in [section 278.1](#) of the *Criminal Code*, **record** means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes, without limiting the generality of the foregoing, medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other

Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.

Dated this day of A.D., at

Judge, Clerk of the Court, Provincial Court Judge or Justice

(Seal, if required)

1997, c. 30, s. 3.

FORM 17

(Sections 698 and 705)

Warrant for Witness

Canada,

Province of,

(territorial division).

To the peace officers in the (territorial division):

Whereas A.B. of, has been charged that (*state offence as in the information*);

And Whereas it has been made to appear that E.F. of, hereinafter called the witness, is likely to give material evidence for (the prosecution or the defence) and that*

*Insert whichever of the following is appropriate:

- (a) the said E.F. will not attend unless compelled to do so;
- (b) the said E.F. is evading service of a subpoena;
- (c) the said E.F. was duly served with a subpoena and has neglected (to attend at the time and place appointed therein or to remain in attendance);
- (d) the said E.F. was bound by a recognizance to attend and give evidence and has neglected (to attend or to remain in attendance).

This is therefore to command you, in Her Majesty's name, to arrest and bring the witness forthwith before (*set out court or justice*) to be dealt with in accordance with [section 706](#) of the *Criminal Code*.

Dated this day of A.D., at

A Justice or Clerk of the Court

(Seal, if required)

FORM 18

(Section 704)

Warrant To Arrest an Absconding Witness

Canada,

Province of,

(*territorial division*).

To the peace officers in the (*territorial division*):

Whereas A.B., of, has been charged that (*state offence as in the information*);

And whereas I am (*or if the signatory is not the justice, the justice is*) satisfied by information in writing and under oath that C.D., of, in this warrant called the witness, is bound by recognizance to give evidence on the trial of the accused on the charge, and that the witness (has absconded or is about to abscond);

This is therefore to command you, in Her Majesty's name, to arrest the witness and bring him forthwith before (*the court, judge, justice or provincial court judge before whom the witness is bound to appear*) to be dealt with in accordance with [section 706](#) of the *Criminal Code*.

Dated (*date*)....., at(*place*).

(*Signature of justice or clerk of the court*)

.....

R.S., 1985, c. C-46, Form 18; R.S., 1985, c. 27 (1st Supp.), s. 203; [2019, c. 25, s. 339](#).

FORM 19

(Sections 516 and 537)

Warrant Remanding a Prisoner

Canada,

Province of,

(*territorial division*).

To the peace officers in the (*territorial division*):

You are hereby commanded forthwith to arrest, if necessary, and convey to the (*prison*) at the persons named in the following schedule each of whom has been remanded to the time mentioned in the schedule:

Person charged Offence Remanded to

And you, the keeper of the prison, are directed to receive each of the persons into your custody in the prison and keep each person safely until the day when that person's remand expires and then to have that person before me or any other justice (*or if the signatory is not the justice*, before any justice) on(date),..... at(hour), at(place), there to answer to the charge and to be dealt with according to law, unless you are otherwise directed before that time.

Dated (date)....., at(place).

(Signature of justice or clerk of the court)

.....

R.S., 1985, c. C-46, Form 19; R.S., 1985, c. 27 (1st Supp.), s. 184; [2019, c. 25, s. 340](#).

FORM 20

(Section 545)

Warrant of Committal of Witness for Refusing to Be Sworn or to Give Evidence

Canada,

Province of,

(territorial division).

To the peace officers in the (territorial division):

Whereas A.B. of, in this warrant called the accused, has been charged that (*set out offence as in the information*);

And whereas E.F. of, in this warrant called the witness, attending before me (*or if the signatory is not the justice*, before the justice) to give evidence for (the prosecution or the defence) concerning the charge against the accused (refused to be sworn or being duly sworn as a witness refused to answer certain questions concerning the charge that were put to them or refused or failed to produce the following writings, namely or refused to sign their deposition) having been ordered to do so, without offering any just excuse for that refusal or failure;

This is therefore to direct you, in Her Majesty's name, to arrest, if necessary, and take the witness and convey them safely to the prison at, and there deliver them to the keeper of it, together with the following precept:

You, the keeper, are directed to receive the witness into your custody in the prison and safely keep them there for the term of days, unless they sooner consent to do

what was required of them, and for so doing this is a sufficient warrant.

Dated (date)....., at(place).

(Signature of justice or clerk of the court)

.....

R.S., 1985, c. C-46, Form 20; R.S., 1985, c. 27 (1st Supp.), s. 184; 2019, c. 25, s. 341.

FORM 21

(Sections 570 and 806)

Warrant of Committal on Conviction

Canada,

Province of,

(territorial division).

To the peace officers in (territorial division) and to the keeper of (prison) at :

Whereas (name), in this Form called the offender, was, on the day of
20....., convicted by (name of judge and court) of having committed the following
offence(s) and it was adjudged that the offender be sentenced as follows:

Offence (state offence of which offender was convicted)	Sentence (state term of imprisonment for the offence and, in case of imprisonment for default of payment of fine, so indicate together with the amount of it and applicable costs and whether payable immediately or within a time fixed)	Remarks (state the amount of time spent in custody before sentencing, the term of imprisonment that would have been imposed before any credit was granted under subsection 719(3) or (3.1), the amount of time credited, if any, and whether the sentence is consecutive or concurrent, and specify consecutive to or concurrent with what other sentence)
1.		
2.		
3.		
4.		

You are hereby commanded, in Her Majesty’s name, to arrest the offender if it is
necessary to do so in order to take the offender into custody, and to take and convey him
or her safely to (prison) at and deliver him or her to its keeper, who is hereby
commanded to receive the accused into custody and to imprison him or her there for the
term(s) of his or her imprisonment, unless, if a term of imprisonment was imposed only
in default of payment of a fine or costs, those amounts and the costs and charges of the

committal and of conveying the offender to that prison are paid sooner, and this is a sufficient warrant for so doing.

Dated this day of 20....., at

Clerk of the Court, Justice, Judge or Provincial Court Judge

R.S., 1985, c. C-46, Form 21; R.S., 1985, c. 27 (1st Supp.), s. 184; 1995, c. 22, s. 9; 2009, c. 29, s. 4.

FORM 22

(Section 806)

Warrant of Committal on an Order for the Payment of Money

Canada,

Province of,

(*territorial division*).

To the peace officers in the (*territorial division*) and to the keeper of the (*prison*) at

.....:

Whereas A.B., hereinafter called the defendant, was tried on an information alleging that (*set out matter of complaint*), and it was ordered that (*set out the order made*), and in default that the defendant be imprisoned in the (*prison*) at for a term of;

You are directed, in Her Majesty's name, to arrest, if necessary, and take the defendant and convey them safely to the (*prison*) at, and deliver them to the keeper of the prison, together with the following precept:

You, the keeper of the prison, are directed to receive the defendant into your custody in this prison and keep them safely there for the term of, unless the amounts and the costs and charges of the committal and of conveying the defendant to the prison are sooner paid, and for so doing this is a sufficient warrant.

Dated (*date*)....., at(*place*).

(*Signature of provincial court judge, justice or clerk of the court*)

.....

R.S., 1985, c. C-46, Form 22; R.S., 1985, c. 27 (1st Supp.), s. 184; 2019, c. 25, s. 342.

FORM 23

(Sections 810 and 810.1)

Warrant of Committal for Failure To Furnish Recognizance To Keep the Peace

Canada,

Province of _____,

(*territorial division*).

To the peace officers in the (*territorial division*) and to the keeper of the (*prison*) at _____:

Whereas A.B., hereinafter called the accused, has been ordered to enter into a recognizance to keep the peace and be of good behaviour, and has (refused or failed) to enter into a recognizance accordingly;

You are hereby commanded, in Her Majesty's name, to arrest, if necessary, and take the accused and convey him safely to the (*prison*) at _____ and deliver him to the keeper thereof, together with the following precept:

You, the said keeper, are hereby commanded to receive the accused into your custody in the said prison and imprison him there until he enters into a recognizance as aforesaid or until he is discharged in due course of law.

Dated this _____ day of _____ A.D. _____, at _____ .

Clerk of the Court, Justice or Provincial Court Judge

(*Seal, if required*)

R.S., 1985, c. C-46, Form 23; R.S., 1985, c. 27 (1st Supp.), ss. 184, 203; 1993, c. 45, s. 12.

FORM 24

(Section 550)

Warrant of Committal of Witness for Failure to Enter into Recognizance

Canada,

Province of _____,

(*territorial division*).

To the peace officers in the (*territorial division*) and to the keeper of the (*prison*) at _____:

Whereas A.B., in this warrant called the accused, was committed for trial on a charge that
(*state offence as in the information*);

And whereas E.F., in this warrant called the witness, having appeared as a witness on the preliminary inquiry into the charge, and being required to enter into a recognizance to appear as a witness on the trial of the accused on the charge, has (failed or refused) to do so;

This is therefore to direct you, in Her Majesty's name, to arrest, if necessary, and take and safely convey the witness to the (*prison*) at and there deliver them to the keeper of it, together with the following precept:

You, the keeper, are directed to receive the witness into your custody in the prison and keep them there safely until the trial of the accused on the charge, unless before that time the witness enters into the recognizance.

Dated (*date*)....., at(*place*).

(*Signature of justice or clerk of the court*)

.....

R.S., 1985, c. C-46, Form 24; R.S., 1985, c. 27 (1st Supp.), s. 184; [2019, c. 25, s. 343](#).

FORM 25

(Section 708)

Warrant of Committal for Contempt

Canada,

Province of,

(*territorial division*).

To the peace officers in the (*territorial division*) and to the keeper of the (*prison*) at (*place*).....:

Because E.F. of, in this warrant called the defaulter, was on (*date*), at (*place*), convicted before for contempt because the defaulter did not attend before to give evidence on the trial of a charge that (*state offence as in the information*) against A.B. of , although (duly subpoenaed or bound by recognizance to appear and give evidence in that regard, *as the case may be*) and did not show any sufficient excuse for the default;

And because, following the conviction it was ordered that the defaulter (*set out the punishment imposed*);

And because the defaulter has not paid the amounts ordered to be paid; (*delete if not applicable*)

Therefore, you are ordered, in Her Majesty's name, to arrest, if necessary, and take the defaulter and convey them safely to the prison at and there deliver them to its keeper, together with the following order:

You, the keeper, are ordered to receive the defaulter into your custody in this prison and keep them safely there * and for so doing this is a sufficient warrant.

*Insert whichever of the following is applicable:

(a) for the term of

(b) for the term of , unless the sums and the costs and charges of the committal and of conveying the defaulter to the prison are sooner paid;

(c) for the term of and for the term of (*if consecutive so state*) unless the sums and the costs and charges of the committal and of conveying the defaulter to the prison are sooner paid.

Dated (*date*)....., at(*place*).

(*Signature of judge, provincial court judge, justice or clerk of the court*)

(*Seal, if required*)

R.S., 1985, c. C-46, Form 25; R.S., 1985, c. 27 (1st Supp.), s. 184; 2019, c. 25, s. 344.

FORM 26

(Section 827)

Warrant of Committal in Default of Payment of Costs of an Appeal

Canada,

Province of,

(*territorial division*).

To the peace officers of (*territorial division*) and to the keeper of the (*prison*) at
:

Whereas it appears that on the hearing of an appeal before the (*set out court*) it was adjudged that A.B., of, hereinafter called the defaulter, should pay to the Clerk of the Court the sum of dollars in respect of costs;

And Whereas the Clerk of the Court has certified that the defaulter has not paid the sum within the time limited therefor;

I do hereby command you, the said peace officers, in Her Majesty's name, to take the defaulter and safely convey him to the (*prison*) at and deliver him to the keeper thereof, together with the following precept:

I do hereby command you, the said keeper, to receive the defaulter into your custody in the said prison and imprison him for the term of, unless the said sum and the costs and charges of the committal and of conveying the defaulter to the said prison are sooner paid, and for so doing this is a sufficient warrant.

Dated this day of A.D., at

A Justice of the Peace in and for

FORM 27

(Section 773)

Warrant of Committal on Forfeiture of Amounts

Canada,
Province of
(*territorial division*).

To the sheriff of (*territorial division*) and to the keeper of the (*prison*) at (*place*).

This warrant of committal is issued for the arrest of (*name of person or persons*), referred to in this warrant as the defaulter or defaulters, as the case may be.

You are ordered to arrest the defaulter or defaulters and convey them safely to the (*prison*) at, and deliver them to its keeper, with the following order:

You, the keeper, are ordered to receive the defaulter or defaulters into your custody in this prison and keep them safely there for a period of or until satisfaction is made of a judgment debt of, due to Her Majesty the Queen in respect of the forfeiture of an amount set out in (an undertaking entered into *or* a release order issued *or* a recognizance entered into) on (*date*).

Dated (*date*), at (*place*).

.....

(*Signature of judge of the court or clerk of the court*)

.....

(Name of judge who has issued this warrant of committal)

(Seal, if required)

R.S., 1985, c. C-46, Form 27; R.S., 1985, c. 27 (1st Supp.), s. 184; 2019, c. 25, s. 345.

FORM 28

(Section 528)

Endorsement of Warrant

Canada,

Province of _____,

(territorial division).

In accordance with the application this day made to me, I authorize the arrest of the accused (or defendant), within the (territorial division).

Dated (date)_____, at _____(place). _____

(Signature of justice) _____

R.S., 1985, c. C-46, Form 28; R.S., 1985, c. 27 (1st Supp.), s. 184; 2019, c. 25, s. 346.

FORM 28.1

[Repealed, 2007, c. 22, s. 26]

FORM 29

(Section 507)

Endorsement of Warrant

Canada,

Province of _____,

(territorial division).

Whereas this warrant is issued under section 507, 508 or 512 of the *Criminal Code* in respect of an offence other than an offence mentioned in section 522 of the *Criminal Code*, I hereby authorize the release of the accused pursuant to section 499 of that Act.

Dated this _____ day of _____ A.D. _____, at _____ .

A Justice of the Peace in and for _____

FORM 30

(Section 537)

Order for Accused to Be Brought Before Justice Prior to Expiration of Period of Remand

Canada,

Province of _____,

(*territorial division*).

To the keeper of the (*prison*) at _____:

Whereas by warrant dated (*date*), A.B., in this order called the accused, was committed to your custody and you were required to keep them safely until the (*date*) _____, and then to have them before me or any other justice (*or if the signatory is not the justice, any justice*) at (*place*) _____ at _____ (*hour*) to answer to the charge against the accused and to be dealt with according to law unless you should be ordered otherwise before that time;

Now, therefore, you are directed to have the accused before _____ at (*place*) _____ at _____ (*hour*) to answer to the charge against them and so they may be dealt with according to law.

Dated (*date*) _____, at _____ (*place*).

(*Signature of justice or clerk of the court*) _____

R.S., 1985, c. C-46, Form 30; [2019, c. 25, s. 347](#).

FORM 31

(Section 540)

Deposition of a Witness

Canada,

Province of _____,

(*territorial division*).

These are the depositions of X.Y., of _____, and M.N., of _____, taken before me, this _____ day of _____ A.D., _____ at _____, in the presence and hearing of

A.B., hereinafter called the accused, who stands charged (*state offence as in the information*).

X.Y., having been duly sworn, deposes as follows: (*insert deposition as nearly as possible in words of witness*).

M.N., having been duly sworn, deposes as follows:

I certify that the depositions of X.Y., and M.N., written on the several sheets of paper hereto annexed to which my signature is affixed, were taken in the presence and hearing of the accused (and signed by them respectively, in his presence *where they are required to be signed by witness*). In witness whereof I have hereto signed my name.

A Justice of the Peace in and for

FORM 32

(Sections 2, 462.34, 490.9, 550, 683, 706, 707, 779, 810, 810.01, 810.03, 810.1, 810.2, 817 and 832)

Recognizance

Canada,

Province of

(*territorial division*)

1 Identification

Surname: Given name(s):

Date of birth:

Home address:

Phone number(s): (*primary*) (*other*)

Other contact information (*if any*):

Employment or Occupation (*if any*):

Name and contact information of employer (*if any*):

2 Financial Promise or Deposit

Pursuant to (*provision*) of the *Criminal Code*, I agree to (*promise or deposit*) the amount of \$, or the other valuable security described here:

I understand that if I fail to comply with any of the conditions listed below, this amount or security may be forfeited.

3 Conditions

(List the conditions that have been ordered by the court and indicate the duration for which each condition remains in effect.)

.....

4 Variation

I understand that I may apply to a judge or a justice of the peace to have any condition in this form cancelled or varied.

5 Conditions in effect

I understand that the conditions in this recognizance remain in effect until they are cancelled or changed or until I have been discharged, sentenced or otherwise detained by the court ([sections 763](#) and [764](#) of the *Criminal Code*).

6 Signatures

PERSON WHO IS GIVING RECOGNIZANCE:

I understand the contents of this form and agree to comply with the conditions that are listed above.

Signed on (date), at (place).

.....

(Signature of the person)

.....

(Print name)

SURETY *(if applicable)*:

I understand my role and my responsibilities under this recognizance and I agree to act as a surety.

I agree to *(promise or deposit)* as security to the court the amount of \$

I understand that if the person who is giving this recognizance fails to comply with any of the conditions in this recognizance, the money that I have promised or deposited may be forfeited.

Surety Declaration *(if applicable)*

☐ Surety Declaration attached. ([Section 515.1](#) of the *Criminal Code*.)

☐ Surety excepted from providing Surety Declaration. ([Subsection 515.1\(2\)](#) of the *Criminal Code*.)

Signed on (date), at (place).

.....

(Signature of the Surety)

.....
(Print name)

JUDGE, PROVINCIAL COURT JUDGE, JUSTICE OR CLERK OF THE COURT:

Signed on (date), at (place).

.....
(Signature of the judge, provincial court judge, justice or clerk of the court)

.....
(Print name)

List of Conditions

(a) has a surety (sections 462.34, 490.9, 550, 779, 810, 817 and 832 of the *Criminal Code*);

(b) agrees to keep the peace and be of good behaviour (sections 83.3, 810, 810.01, 810.03, 810.1 and 810.2 of the *Criminal Code*);

(c) abstains from possessing a firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, firearm part, ammunition, prohibited ammunition or explosive substance and surrenders those in their possession and surrenders any authorization, licence or registration certificate or other document enabling the acquisition or possession of a firearm (sections 83.3, 810, 810.01, 810.03, 810.1 and 810.2 of the *Criminal Code*);

(d) participates in a treatment program (sections 810.01, 810.03, 810.1 and 810.2 of the *Criminal Code*);

(e) wears an electronic monitoring device (*if the Attorney General makes the request*) (sections 810.01, 810.1 and 810.2 of the *Criminal Code*);

(e.1) wears an electronic monitoring device (*if the Attorney General has consented to this condition*) (section 810.03 of the *Criminal Code*);

(e.2) abstains from communicating, directly or indirectly, with the intimate partner, a child of the intimate partner or of the defendant or any relative or close friend of the intimate partner, except in accordance with any specified conditions that the judge considers necessary (section 810.03 of the *Criminal Code*);

(f) remains within a specified geographic area unless written permission to leave that area is obtained from the judge (sections 810.01, 810.03 and 810.2 of the *Criminal Code*);

(f.1) refrain from going to any specified place or being within a specified distance of any specified place, except in accordance with any specified conditions that the judge considers necessary (section 810.03 of the *Criminal Code*);

(g) returns to and remains at their place of residence at specified times ([sections 810.01, 810.1 and 810.2](#) of the *Criminal Code*);

(h) abstains from the consumption of drugs, except in accordance with a medical prescription ([sections 810.01, 810.03, 810.1 and 810.2](#) of the *Criminal Code*);

(i) abstains from the consumption of alcohol or of any other intoxicating substance, except in accordance with a medical prescription ([sections 810.01, 810.03, 810.1 and 810.2](#) of the *Criminal Code*);

(j) abstains from any contact — including communicating by any means — with a person under the age of 16 years, unless doing so under the supervision of a person whom the judge considers appropriate ([section 810.1](#) of the *Criminal Code*);

(k) abstains from using the Internet or other digital network, unless doing so in accordance with conditions set by the judge ([section 810.1](#) of the *Criminal Code*);

(l) abstains from attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, schoolground or playground ([section 810.1](#) of the *Criminal Code*);

(m) appears personally or by counsel at the sittings of the appeal court at which the appeal is to be heard ([sections 817 and 832](#) of the *Criminal Code*);

(n) appears in court as required ([sections 550, 706 and 707](#) of the *Criminal Code*);

(o) in the case where a warrant was issued under [section 462.32](#) of the *Criminal Code* or a restraint order was made under [subsection 462.33\(3\)](#) of that Act in relation to any property (*set out a description of the property and its location*), refrains from doing or causing anything to be done that would result, directly or indirectly, in the disappearance, dissipation or reduction in value of the property or otherwise affect the property so that all or a part thereof could not be subject to an order of forfeiture under [section 462.37](#) or [462.38](#) of that Act or any other provision of that Act or any other Act of Parliament ([section 462.34](#) of the *Criminal Code*);

(p) agrees to prosecute the writ of *certiorari* at their own expense, without wilful delay, and, if ordered, to pay to the person in whose favour the conviction, order or other proceeding is affirmed their full costs and charges to be taxed according to the practice of the court where the conviction, order or proceeding is affirmed ([section 779](#) of the *Criminal Code*);

(q) any other reasonable conditions, including:

- reports at specified times to peace officer or other person designated;
- remains within designated territorial jurisdiction;
- notifies peace officer or other person designated of any change in their address, employment or occupation;

- abstains from communicating, directly or indirectly, with victim, witness or other specified person except in accordance with conditions specified by judge, provincial court judge or justice; and
- deposits all their passports as the judge, provincial court judge or justice directs.

R.S., 1985, c. C-46, Form 32; R.S., 1985, c. 27 (1st Supp.), ss. 101, 184, 203; c. 42 (4th Supp.), s. 7; 1993, c. 45, ss. 13, 14; 1999, c. 25, s. 27; [2019, c. 25, s. 348](#); [2022, c. 17, s. 61\(F\)](#); [2023, c. 32, s. 13.12](#); [2024, c. 22, s. 6](#); 2024, c. 22, s. 11.

FORM 33

(Section 770)

Certificate of Default to Be Endorsed

It is certified that A.B. (has not appeared as required by this undertaking, release order or recognizance *or* has not complied with a condition of this undertaking, release order or recognizance) and that for this reason the ends of justice have been (defeated *or* delayed, *as the case may be*).

The nature of the default is and the reason for the default is (*state reason if known*).

The names and addresses of the principal and sureties are as follows:

Dated (date)....., at(place).

.....

(*Signature of judge, provincial court judge, justice, clerk of the court, peace officer or other person*)

(*Seal, if required*)

R.S., 1985, c. C-46, Form 33; R.S., 1985, c. 27 (1st Supp.), s. 203; 1994, c. 44, s. 84; [2019, c. 25, s. 349](#).

FORM 34

(Section 771)

Writ of Fieri Facias

Elizabeth II by the Grace of God, etc.

To the sheriff of (*territorial division*), GREETING.

You are hereby commanded to levy of the goods and chattels, lands and tenements of each of the following persons the amount set opposite the name of each:

Name	Address	Occupation	Amount

And you are further commanded to make a return of what you have done in execution of this writ.

Dated this day of A.D., at

Clerk of the
(Seal)

FORM 34.1
(Subsection 737.1(4))
Statement on Restitution

Canada,

Province of,
(territorial division).

To the court that is sentencing (*name the offender*) who was convicted, or was discharged under [section 730](#) of the *Criminal Code*, of an offence under that Act.

I, (*name of declarant*), declare that (*check the appropriate box*):

- ☐ (i) I am not seeking restitution for the losses and damages I suffered as the result of the commission of the offence.
- ☐ (ii) I am seeking restitution in the amount of \$..... for the following losses and damages I suffered as the result of the commission of the offence.

I declare that I have suffered the following losses and damages as the result of the commission of the offence:

(Complete the following table if seeking restitution.)

Description	Amount of loss and damage
(describe each loss and damage)	(state the amount of each loss and damage)
1.	
2.	
3.	
4.	

I understand that the amount of my losses and damages must be readily ascertainable by the court. For that purpose, I am responsible for providing the court with all necessary documents, including bills, receipts and estimates, in support of my claim for restitution.

Dated this day of 20....., at

Signature of declarant

2011, c. 6, s. 5; 2015, c. 13, s. 35.

FORM 34.2
(Subsection 722(4))
Victim Impact Statement

This form may be used to provide a description of the physical or emotional harm, property damage or economic loss suffered by you as the result of the commission of an offence, as well as a description of the impact of the offence on you. You may attach additional pages if you need more space.

Your statement must not include

- any statement about the offence or the offender that is not relevant to the harm or loss you suffered;
- any unproven allegations;
- any comments about any offence for which the offender was not convicted;
- any complaint about any individual, other than the offender, who was involved in the investigation or prosecution of the offence; or
- except with the court’s approval, an opinion or recommendation about the sentence.

You may present a detailed account of the impact the offence has had on your life. The following sections are examples of information you may wish to include in your statement. You are not required to include all of this information.

Emotional impact

Describe how the offence has affected you emotionally. For example, think of

- your lifestyle and activities;
- your relationships with others such as your spouse, family and friends;
- your ability to work, attend school or study; and
- your feelings, emotions and reactions as they relate to the offence.

Physical impact

Describe how the offence has affected you physically. For example, think of

- ongoing physical pain, discomfort, illness, scarring, disfigurement or physical limitation;
 - hospitalization or surgery you have had because of the offence;
 - treatment, physiotherapy or medication you have been prescribed;
 - the need for any further treatment or the expectation that you will receive further treatment; and
 - any permanent or long-term disability.
-
-
-
-

Economic impact

Describe how the offence has affected you financially. For example, think of

- the value of any property that was lost or damaged and the cost of repairs or replacement;
- any financial loss due to missed time from work;
- the cost of any medical expenses, therapy or counselling;
- any costs or losses that are not covered by insurance.

Please note that this is not an application for compensation or restitution.

Fears for security

Describe any fears you have for your security or that of your family and friends. For example, think of

- concerns with respect to contact with the offender; and
- concerns with respect to contact between the offender and members of your family or close friends.

Drawing, poem or letter

You may use this space to draw a picture or write a poem or letter if it will help you express the impact that the offence has had on you.

- ☐ I would like to present my statement in court.
- ☐ I would like to receive information respecting the sentence imposed on the offender and its administration.

To the best of my knowledge, the information contained in this statement is true.

Dated this day of 20....., at

Signature of declarant

If you completed this statement on behalf of the victim, please indicate the reasons why you did so and the nature of your relationship with the victim.

Dated this day of 20....., at

Signature of declarant

2015, c. 13, s. 35; 2023, c. 28, s. 37.

FORM 34.3

(Subsection 722.2(2))

Community Impact Statement

This form may be used to provide a description of the harm or loss suffered by a community as the result of the commission of an offence, as well as a description of the impact of the offence on the community. You may attach additional pages if you need more space.

Your statement must not include

- any statement about the offence or the offender that is not relevant to the harm or loss suffered by the community;
- any unproven allegations;
- any comments about any offence for which the offender was not convicted;
- any complaint about any individual, other than the offender, who was involved in the investigation or prosecution of the offence; or
- except with the court’s approval, an opinion or recommendation about the sentence.

Name of community on whose behalf the statement is made:

Explain how the statement reflects this community’s views:

You may present a detailed account of the impact the offence has had on the community. The following sections are examples of information you may wish to include in your statement. You are not required to include all of this information.

Emotional impact

Describe how the offence has affected community members emotionally. For example, think of

- community members’ lifestyles and activities;
- community members’ relationships with others in the community and outside it;
- community members’ ability to work, attend school or study;
- community members’ feelings, emotions and reactions as they relate to the offence; and
- the community’s sense of belonging to the region.

Physical impact

Describe how the offence has affected community members physically. For example, think of

- the ability of community members to access services; and
- changes in transportation and routes taken to and from school, work, shopping, etc.

Economic impact

Describe how the offence has affected the community financially. For example, think of

- any reduction in the number of visitors or tourists to the region;
- the value of any property that was lost or damaged and the cost of repairs or replacement; and
- any costs or losses that are not covered by insurance.

Please note that this is not an application for compensation or restitution.

Fears for security

Describe any fears that community members have for their security or that of their family and friends. For example, think of concerns with respect to contact with the offender.

Drawing, poem or letter

You may use this space to draw a picture or write a poem or letter if it will help you express the impact that the offence has had on the community.

☐ I would like to present this statement in court.

To the best of my knowledge, the information contained in this statement is true.

Dated this day of 20....., at

Signature of declarant

2015, c. 13, s. 35.

FORM 35

(Sections 570 and 806)

Conviction

Canada,

Province of,

(territorial division).

Be it remembered that on the day of at, A.B., (date of birth) hereinafter called the accused, was tried under Part (XIX or XXVII) of the *Criminal Code* on the charge that (state fully the offence of which accused was convicted), was

convicted of the said offence and the following punishment was imposed on him, namely,

**Use whichever of the following forms of sentence is applicable:*

(a) that the said accused be imprisoned in the (prison) at for the term of;

(b) that the said accused forfeit and pay the sum of dollars to be applied according to law and also pay to the sum of dollars in respect of

costs and in default of payment of the said sums forthwith (*or within a time fixed, if any*), to be imprisoned in the (*prison*) at for the term of unless the said sums and the costs and charges of the committal and of conveying the accused to the said prison are sooner paid;

(c) that the said accused be imprisoned in the (*prison*) at for the term of and in addition forfeit and pay the sum of dollars to be applied according to law and also pay to the sum of dollars in respect of costs and in default of payment of the said sums forthwith (*or within a time fixed, if any*), to be imprisoned in the (*prison*) at for the term of (*if sentence to be consecutive, state accordingly*) unless the said sums and the costs and charges of the committal and of conveying the accused to the said prison are sooner paid.

Dated this day of A.D., at

Clerk of the Court, Justice or Provincial Court Judge

(*Seal, if required*)

R.S., 1985, c. C-46, Form 35; R.S., 1985, c. 27 (1st Supp.), ss. 184, 203.

FORM 36

(Sections 570 and 806)

Order Against an Offender

Canada,

Province of,

(*territorial division*).

Be it remembered that on the day of A.D., at, A.B., (*date of birth*) of, was tried on an information (*indictment*) alleging that (*set out matter of complaint or alleged offence*), and it was ordered and adjudged that (*set out the order made*).

Dated this day of A.D., at

Justice or Clerk of the Court

R.S., 1985, c. C-46, Form 36; R.S., 1985, c. 27 (1st Supp.), s. 184.

FORM 37

(Section 570)

Order Acquitting Accused

Canada,

Province of _____,

(*territorial division*).

Be it remembered that on the _____ day of _____ A.D. _____, at _____ A.B.,
of _____, (*occupation*), (*date of birth*) was tried on the charge that (*state fully the
offence of which accused was acquitted*) and was found not guilty of the said offence.

Dated this _____ day of _____ A.D. _____, at _____ .

Provincial Court Judge or Clerk of the Court

(*Seal, if required*)

R.S., 1985, c. C-46, Form 37; R.S., 1985, c. 27 (1st Supp.), ss. 184, 203.

FORM 38

(Section 708)

Conviction for Contempt

Canada,

Province of _____,

(*territorial division*).

Be it remembered that on (*date*)_____, at _____(*place*) in the (*territorial division*),
E.F. of _____, in this conviction called the defaulter, is convicted for contempt in that
they did not attend before (*set out court or justice*) to give evidence on the trial of a
charge that (*state fully offence with which accused was charged*), although (duly
subpoenaed or bound by recognizance to attend to give evidence, *as the case may be*)
and has not shown any sufficient excuse for their default;

The defaulter is therefore convicted for their default, (*set out punishment as authorized
and determined in accordance with [section 708](#) of the *Criminal Code**).

Dated (*date*)_____, at _____(*place*).

(*Signature of judge, provincial court judge, justice or clerk of the court*)

(*Seal, if required*)

R.S., 1985, c. C-46, Form 38; [2019, c. 25, s. 350](#).

FORM 39

(Sections 519 and 550)

Order for Discharge of a Person in Custody

Canada,

Province of _____,

(*territorial division*).

To the keeper of the (*prison*) at _____:

You are directed to release E.F., detained by you under a (warrant of committal or order) dated (*date*)_____, if E.F. is detained by you for no other cause.

(*Signature of judge, justice or clerk of the court*)

(*Seal, if required*)

R.S., 1985, c. C-46, Form 39; [2019, c. 25, s. 351](#).

FORM 40

(Section 629)

Challenge To Array

Canada,

Province of _____,

(*territorial division*).

The Queen

v.

C.D.

The (prosecutor or accused) challenges the array of the panel on the ground that X.Y., (sheriff or deputy sheriff), who returned the panel, was guilty of (partiality or fraud or wilful misconduct) on returning it.

Dated this _____ day of _____ A.D. _____, at _____ .

Counsel for (prosecutor or accused)

FORM 41

(Section 639)

Challenge for Cause

Canada,

Province of _____,

(territorial division).

The Queen

v.

C.D.

The (prosecutor or accused) challenges G.H. on the ground that (*set out ground of challenge in accordance with subsection 638(1) of the Criminal Code*).

Counsel for (prosecutor or accused)

FORM 42

(Section 827)

Certificate of Non-payment of Costs of Appeal

In the Court of _____

(Style of Cause)

I hereby certify that A.B. (the appellant or respondent, *as the case may be*) in this appeal, having been ordered to pay costs in the sum of _____ dollars, has failed to pay the said costs within the time limited for the payment thereof.

Dated this _____ day of _____ A.D. _____, at _____ .

Clerk of the Court of _____

(Seal)

FORM 43

(Section 744)

Jailer's Receipt to Peace Officer for Prisoner

I hereby certify that I have received from X.Y., a peace officer for (*territorial division*), one A.B., together with a (warrant or order) issued by (*set out court or justice, as the case may be*).*

*

Add a statement of the condition of the prisoner

Dated this _____ day of _____ A.D. _____, at _____ .

Keeper of (*prison*)

R.S., 1985, c. C-46, Form 43; 1995, c. 22, s. 18.

FORM 44

(Section 667)

I, (*name*), a fingerprint examiner designated as such for the purposes of [section 667](#) of the *Criminal Code* by the Minister of Public Safety and Emergency Preparedness, do hereby certify that (*name*) also known as (*aliases if any*), FPS Number _____, whose fingerprints are shown reproduced below (*reproduction of fingerprints*) or attached hereto, has been convicted, discharged under [section 730](#) of the *Criminal Code* or convicted and sentenced in Canada as follows:

(*record*)

Dated this _____ day of _____ A.D. _____, at _____

Fingerprint Examiner

R.S., 1985, c. C-46, Form 44; R.S., 1985, c. 27 (1st Supp.), s. 184, c. 1 (4th Supp.), s. 18; 1995, c. 22, s. 18; [2005, c. 10, s. 34](#).

FORM 45

(Section 667)

I, (*name*), a fingerprint examiner designated as such for the purposes of [section 667](#) of the *Criminal Code* by the Minister of Public Safety and Emergency Preparedness, do hereby certify that I have compared the fingerprints reproduced in or attached to exhibit A with the fingerprints reproduced in or attached to the certificate in Form 44 marked exhibit B and that they are those of the same person.

Dated this _____ day of _____ A.D. _____, at _____ .

Fingerprint Examiner

R.S., 1985, c. C-46, Form 45; R.S., 1985, c. 27 (1st Supp.), s. 184; [2005, c. 10, s. 34](#).

FORM 46

(Section 732.1)

Probation Order

Canada,

Province of _____,

(territorial division).

Whereas on the day of at, A.B., hereinafter called the offender, (pleaded guilty to or was tried under (*here insert Part XIX, XX or XXVII, as the case may be*) of the *Criminal Code* and was (*here insert convicted or found guilty, as the case may be*) on the charge that (*here state the offence to which the offender pleaded guilty or for which the offender was convicted or found guilty, as the case may be*);

And whereas on the day of the court adjudged*

*
Use whichever of the following forms of disposition is applicable:

(a) that the offender be discharged on the following conditions:

(b) that the passing of sentence on the offender be suspended and that the said offender be released on the following conditions:

(c) that the offender forfeit and pay the sum of dollars to be applied according to law and in default of payment of the said sum without delay (*or within a time fixed, if any*), be imprisoned in the (*prison*) at for the term of

unless the said sum and charges of the committal and of conveying the said offender to the said prison are sooner paid, and in addition thereto, that the said offender comply with the following conditions:

(d) that the offender be imprisoned in the (*prison*) at for the term of and, in addition thereto, that the said offender comply with the following conditions:

(e) that following the expiration of the offender's conditional sentence order related to this or another offence, that the said offender comply with the following conditions:

(f) that following the expiration of the offender's sentence of imprisonment related to another offence, that the said offender comply with the following conditions:

(g) when the offender is ordered to serve the sentence of imprisonment intermittently, that the said offender comply with the following conditions when not in confinement:

Now therefore the said offender shall, for the period of from the date of this order (*or, where paragraph (d), (e) or (f) is applicable, the date of expiration of the offender's sentence of imprisonment or conditional sentence order*) comply with the following conditions, namely, that the said offender shall keep the peace and be of good behaviour, appear before the court when required to do so by the court and notify the court or probation officer in advance of any change of name or address and promptly notify the court or probation officer of any change of employment or occupation, and, in addition,

(*here state any additional conditions prescribed pursuant to [subsection 732.1\(3\)](#) of the *Criminal Code**).

Dated this day of A.D., at

Clerk of the Court, Justice or Provincial Court Judge

R.S., 1985, c. C-46, Form 46; R.S., 1985, c. 27 (1st Supp.), s. 203; 1995, c. 22, s. 10; [2004, c. 12, s. 17](#).

FORM 47

(Section 462.48)

Order To Disclose Income Tax Information

Canada,

Province of,

(*territorial division*).

To A.B., of, (*office or occupation*):

Whereas, it appears on the oath of C.D., of, that there are reasonable grounds for believing that E.F., of, has committed or benefited from the commission of the offence of and that the information or documents (*describe information or documents*) are likely to be of substantial value to an investigation of that offence or a related matter; and

Whereas there are reasonable grounds for believing that it is in the public interest to allow access to the information or documents, having regard to the benefit likely to accrue to the investigation if the access is obtained;

This is, therefore, to authorize and require you between the hours of (*as the judge may direct*), during the period commencing on and ending on, to produce all the above-mentioned information and documents to one of the following police officers, namely, (*here name police officers*) and allow the police officer to remove the information or documents, or to allow the police officer access to the above-mentioned information and documents and to examine them, *as the judge directs*, subject to the following conditions (*state conditions*):

Dated this day of A.D., at

Signature of judge

R.S., 1985, c. 42 (4th Supp.), s. 8.

FORM 48

(Section 672.13)

Assessment Order of the Court

Canada,

Province of

(*territorial division*)

Whereas I have (*or if the signatory is the clerk of the court, the judge or justice has*) reasonable grounds to believe that evidence of the mental condition of (*name of accused*), who has been charged with, may be necessary to determine *

☐ whether the accused is unfit to stand trial

☐ whether the accused suffered from a mental disorder so as to exempt the accused from criminal responsibility by virtue of [subsection 16\(1\)](#) of the *Criminal Code* at the time of the act or omission charged against the accused

☐ whether the balance of the mind of the accused was disturbed at the time of commission of the alleged offence, if the accused is a female person charged with an offence arising out of the death of her newly-born child

☐ if a verdict of unfit to stand trial or a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused, the appropriate disposition to be made in respect of the accused under [section 672.54](#), [672.58](#) or [672.64](#) of the *Criminal Code* or whether the court should, under [subsection 672.84\(3\)](#) of that Act, revoke a finding that the accused is a high-risk accused

☐ if a verdict of unfit to stand trial has been rendered in respect of the accused, whether the court should order a stay of proceedings under [section 672.851](#) of the *Criminal Code*

An assessment of the mental condition of (*name of accused*) is ordered to be conducted by/at (*name of person or service by which or place where assessment is to be made*) for a period of days.

This order is to be in force for a total of days, including travelling time, during which time the accused is to remain *

☐ in custody at (*place where accused is to be detained*)

☐ out of custody, on the following conditions:

(*set out conditions, if applicable*)

*
Check applicable option.

Dated (*date*)....., at(*place*).

(*Signature of judge, provincial court judge, justice or clerk of the court*)

FORM 48.1

(Section 672.13)

Assessment Order of the Review Board

Canada,

Province of

(territorial division)

Whereas I have reasonable grounds to believe that evidence of the mental condition of *(name of accused)*, who has been charged with, may be necessary to *

☐ if a verdict of unfit to stand trial or a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused, make a disposition under [section 672.54](#) of the *Criminal Code* or determine whether the Review Board should, under [subsection 672.84\(1\)](#) of that Act, refer to the superior court of criminal jurisdiction for review a finding that the accused is a high-risk accused

☐ if a verdict of unfit to stand trial has been rendered in respect of the accused, determine whether the Review Board should make a recommendation to the court that has jurisdiction in respect of the offence charged against the accused to hold an inquiry to determine whether a stay of proceedings should be ordered in accordance with [section 672.851](#) of the *Criminal Code*

I hereby order an assessment of the mental condition of *(name of accused)* to be conducted by/at *(name of person or service by whom or place where assessment is to be made)* for a period of days.

This order is to be in force for a total of days, including travelling time, during which time the accused is to remain *

☐ in custody at *(place where accused is to be detained)*

☐ out of custody, on the following conditions:

(set out conditions, if applicable)

*Check applicable option.

Dated this day of A.D., at

(Signature of Chairperson of the Review Board)

[2005, c. 22, s. 40](#); [2014, c. 6, s. 20](#).

FORM 48.2

Victim Impact Statement — Not Criminally Responsible

This form may be used to provide a description of the physical or emotional harm, property damage or economic loss suffered by you arising from the conduct for which the accused person was found not criminally responsible on account of mental disorder, as well as a description of the impact that the conduct has had on you. You may attach additional pages if you need more space.

Your statement must not include

- any statement about the conduct of the accused that is not relevant to the harm or loss suffered by you;
- any unproven allegations;
- any comments about any conduct for which the accused was not found not criminally responsible;
- any complaint about any individual, other than the accused, who was involved in the investigation or prosecution of the offence; or
- except with the court's or Review Board's approval, an opinion or recommendation about the disposition.

The following sections are examples of information you may wish to include in your statement. You are not required to include all of this information.

Emotional impact

Describe how the accused's conduct has affected you emotionally. For example, think of

- your lifestyle and activities;
- your relationships with others such as your spouse, family and friends;
- your ability to work, attend school or study; and
- your feelings, emotions and reactions as these relate to the conduct.

Physical impact

Describe how the accused's conduct has affected you physically. For example, think of

- ongoing physical pain, discomfort, illness, scarring, disfigurement or physical limitation;
- hospitalization or surgery you have had because of the conduct of the accused;
- treatment, physiotherapy or medication you have been prescribed;
- the need for any further treatment or the expectation that you will receive further treatment; and
- any permanent or long-term disability.

Economic impact

Describe how the accused's conduct has affected you financially. For example, think of

- the value of any property that was lost or damaged and the cost of repairs or replacement;
- any financial loss due to missed time from work;
- the cost of any medical expenses, therapy or counselling; and
- any costs or losses that are not covered by insurance.

Please note that this is not an application for compensation or restitution.

Fears for security

Describe any fears you have for your security or that of your family and friends. For example, think of

- concerns with respect to contact with the accused; and
- concerns with respect to contact between the accused and members of your family or close friends.

Drawing, poem or letter

You may use this space to draw a picture or write a poem or letter if it will help you express the impact that the accused's conduct has had on you.

- ☐ I would like to read or present my statement (in court or before the Review Board).
- ☐ I would like to receive information respecting any hearings held to make or review a disposition in respect of the accused.
- ☐ I would like to receive information respecting any disposition made in respect of the accused.
- ☐ If the accused is discharged absolutely or conditionally, I would like to receive notice of that discharge and of the accused's intended place of residence.

To the best of my knowledge, the information contained in this statement is true.

Dated this day of 20....., at

Signature of declarant

[2015, c. 13, s. 36](#); [2023, c. 28, s. 38](#).

FORM 49

(Section 672.57)

Warrant of Committal

Disposition of Detention

Canada,

Province of

(*territorial division*)

To the peace officers in the said (*territorial division*) and to the keeper (*administrator, warden*) of the (*prison, hospital or other appropriate place where the accused is detained*).

This warrant is issued for the committal of A.B., of _____, (*occupation*), hereinafter called the accused.

Whereas the accused has been charged that (*set out briefly the offence in respect of which the accused was charged*);

And whereas the accused was found*

☐ unfit to stand trial

☐ not criminally responsible on account of mental disorder

This is, therefore, to command you, in Her Majesty's name, to take the accused in custody and convey the accused safely to the (*prison, hospital or other appropriate place*) at _____, and there deliver the accused to the keeper (*administrator, warden*) with the following precept:

You, the keeper (*administrator, warden*), are therefore directed to receive the accused in your custody in the (*prison, hospital or other appropriate place*) and to keep the accused safely there until the accused is delivered by due course of law.

The following are the conditions to which the accused shall be subject while in your (*prison, hospital or other appropriate place*):

The following are the powers regarding the restrictions (*and the limits and conditions on those restrictions*) on the liberty of the accused that are hereby delegated to you the said keeper (*administrator, warden*) of the said (*prison, hospital or other appropriate place*):

*
Check applicable option.

Dated (*date*)_____, at _____(*place*).

(*Signature of judge, provincial court judge, justice, clerk of the court or chairperson of the review board*)

1991, c. 43, s. 8; 2019, c. 25, s. 353.

FORM 50

(Subsection 672.7(2))

Warrant of Committal

Placement Decision

Canada,

Province of

(territorial division)

To the peace officers in the said *(territorial division)* and to the keeper *(administrator, warden)* of the *(prison, hospital or other appropriate place where the accused is detained)*.

This warrant is issued for the committal of A.B., of _____, *(occupation)*, hereinafter called the accused.

Whereas the accused has been charged that *(set out briefly the offence in respect of which the accused was charged)*;

And whereas the accused was found*

☐ unfit to stand trial

☐ not criminally responsible on account of mental disorder

And whereas the Review Board has held a hearing and decided that the accused shall be detained in custody;

And whereas the accused is required to be detained in custody pursuant to a warrant of committal issued by *(set out the name of the Judge, Clerk of the Court, Provincial Court Judge or Justice as well as the name of the court and territorial division)*, dated the _____ day of _____, in respect of the offence that *(set out briefly the offence in respect of which the accused was charged or convicted)*;

This is, therefore, to command you, in Her Majesty's name, to *

☐ execute the warrant of committal issued by the court, according to its terms

☐ execute the warrant of committal issued herewith by the Review Board

*Check applicable option.

Dated this _____ day of _____ A.D. _____, at _____.

(Signature of chairperson of the Review Board)

1991, c. 43, s. 8.

FORM 51

(Paragraphs 732.1(3)(c.2), 742.3(2)(a.2), 810(3.02)(c), 810.01(4.1)(g), 810.03(7)(h), 810.011(6)(f), 810.1(3.02)(i) and 810.2(4.1)(g))

Notice of Obligation To Provide Samples of Bodily Substance

To A.B., of _____, (occupation), (address in Canada), (date of birth), (gender):

Because, on (date), you were ordered, under (applicable provision) of the *Criminal Code*, to provide samples of a bodily substance prescribed by regulation at regular intervals for the purpose of analysis;

You are provided with this notice to inform you of your obligations with respect to providing samples.

1 On (specify a day not earlier than 24 hours after the day on which the notice is served), you must report, at any time from (time) to (time), at (address of place at which sample to be taken, as designated by the Attorney General of the province or Minister of Justice of the territory), to provide a sample of your (specify type of bodily substance prescribed by regulation).

2 Every (specify a number not less than seven) days after you first report to provide a sample, you must report, at any time from (time) to (time), at (address of place at which sample to be taken, as designated by the Attorney General of the province or Minister of Justice of the territory), to provide a sample of your (specify type of bodily substance prescribed by regulation).

3 You have the right to apply to a court to terminate the obligation to provide samples, and the right to appeal any decision of that court.

4 If you are found to have not complied with your obligation to provide samples as set out in this notice, you may be subject to a fine or imprisonment, or to both (or, in the case of a conditional sentence, you may be subject to proceedings under [section 742.6](#) of the *Criminal Code*, the consequences of which may include imprisonment).

5 The results of the analysis of the bodily substances may be used or disclosed in accordance with the *Criminal Code*, including in proceedings against you, the result of which may be that you are subject to a fine or imprisonment, or to both (or, in the case of a conditional sentence, including in proceedings under [section 742.6](#) of the *Criminal Code*, the consequences of which may include imprisonment).

Served on (date), at (place the notice is served).

(Signature of probation officer, supervisor or person designated by the Attorney General or Minister of Justice,

as the case may be)
1991, c. 43, s. 8; 1995, c. 22, s. 10 (Sch. I, item 37); [2005, c. 22, s. 41](#); [2011, c. 7, s. 13](#); [2015, c. 20, s. 34](#); [2024, c. 22, s. 7](#).

(Section 490.012)

Order To Comply with Sex Offender Information Registration Act

Canada,

Province of

(territorial division)

To A.B., of, *(occupation), (address or address of court if no fixed address), (date of birth), (gender):*

You have been convicted of or found not criminally responsible on account of mental disorder for *(description of offence(s))* under *(applicable designated offence provision(s) of the Criminal Code)*, a designated offence (or designated offences) within the meaning of [subsection 490.011\(1\)](#) of the *Criminal Code*.

1 You must report for the first time to the registration centre referred to in section 7.1 of the *Sex Offender Information Registration Act*, whenever required under [subsection 4\(1\)](#) of that Act.

2 You must subsequently report to the registration centre referred to in section 7.1 of the *Sex Offender Information Registration Act*, whenever required under section 4.1 or 4.3 of that Act, for a period of years after this order is made *(or if [paragraph 490.013\(2\)\(c\)](#) or any of [subsections 490.013\(3\), \(5\) or \(6\)](#) of the Criminal Code* applies, for life).

3 Information relating to you will be collected under sections 5 and 6 of the *Sex Offender Information Registration Act* by a person who collects information at the registration centre.

4 Information relating to you will be registered in a database, and may be consulted, disclosed and used in the circumstances set out in the *Sex Offender Information Registration Act*.

5 If you believe that the information registered in the database contains an error or omission, you may ask a person who collects information at the registration centre referred to in section 7.1 of the *Sex Offender Information Registration Act* or, if applicable, the Canadian Forces Provost Marshal, to correct the information.

6 You have the right to apply to a court to terminate this order, and the right to appeal the decision of that court.

7 If you are found to have contravened this order, you may be subject to a fine or imprisonment, or to both.

8 If you are found to have provided false or misleading information, you may be subject to a fine or imprisonment, or to both.

Dated this day of, at

(Signature of judge or clerk and name of court)

(Signature of person subject to order)

2004, c. 10, s. 21; 2007, c. 5, s. 30; 2010, c. 17, s. 26; 2013, c. 24, s. 117(F); 2023, c. 28, s. 39.

FORM 53

(Sections 490.019 and 490.032)

Notice of Obligation To Comply with Sex Offender Information Registration Act

Canada,

Province of,

(territorial division).

To A.B., of, (occupation), a person referred to in [subsection 490.02\(1\)](#) of the *Criminal Code*:

Because, on (insert date(s)), you were convicted of, or found not criminally responsible on account of mental disorder for, ... (insert description of offence(s)), one or more offences referred to in paragraph (a), (c), (c.1), (d), (d.1) or (e) of the definition **designated offence** in [subsection 490.011\(1\)](#) of the *Criminal Code* or in paragraph (a) or (c) of the definition **designated offence** in [section 227](#) of the *National Defence Act*, under (insert the applicable offence provision(s)), this is provided to give you notice that you are required to comply with the *Sex Offender Information Registration Act*.

1 You must report for the first time to the registration centre referred to in section 7.1 of the *Sex Offender Information Registration Act*, whenever required under [subsection 4\(2\)](#) of that Act.

2 You must subsequently report to the registration centre referred to in section 7.1 of the *Sex Offender Information Registration Act*, whenever required under section 4.1 or 4.3 of that Act, for a period of years after you were sentenced, or found not criminally responsible on account of mental disorder, for the offence (or if [paragraph 490.022\(3\)\(c\)](#) or (d) of the *Criminal Code* applies, for life) or for any shorter period set out in [subsection 490.022\(2\)](#) of the *Criminal Code*.

3 Information relating to you will be collected under sections 5 and 6 of the *Sex Offender Information Registration Act* by a person who collects information at the registration

centre.

4 Information relating to you will be registered in a database, and may be consulted, disclosed and used in the circumstances set out in the *Sex Offender Information Registration Act*.

5 If you believe that the information registered in the database contains an error or omission, you may ask a person who collects information at the registration centre referred to in section 7.1 of the *Sex Offender Information Registration Act* or, if applicable, the Canadian Forces Provost Marshal, to correct the information.

6 You have the right to apply to a court to exempt you from the obligation to comply with the *Sex Offender Information Registration Act*, and the right to appeal any decision of that court.

7 You have the right to apply to a court to terminate the obligation, and the right to appeal any decision of that court.

8 If you are found to have contravened the obligation, you may be subject to a fine or imprisonment, or to both.

9 If you are found to have provided false or misleading information, you may be subject to a fine or imprisonment, or to both.

Dated this day of, at

[2004, c. 10, s. 21](#); [2007, c. 5, s. 31](#); [2013, c. 24, s. 117\(F\)](#); [2014, c. 25, s. 33](#).

FORM 54

(Sections 490.02901 to 490.02903, 490.02905 and 490.032)

Obligation To Comply with Sex Offender Information Registration Act

To A.B., of, (occupation), (address in Canada), (date of birth), (gender):

Because, on (date), you were convicted of or found not criminally responsible on account of mental disorder for an offence (or offences) in (location of offence(s)) that the Attorney General of the province, or the minister of justice of the territory, has identified as being equivalent to (description of offence(s)) under (applicable provision(s) of the *Criminal Code*), an offence (or offences) referred to in paragraph (a) of the definition *primary offence* in [subsection 490.011\(1\)](#) of the *Criminal Code*;

You are provided with this to inform you that you are required to comply with the *Sex Offender Information Registration Act*.

1 You must report for the first time to the registration centre referred to in section 7.1 of the *Sex Offender Information Registration Act*, whenever required under [subsection 4\(2\)](#)

of that Act.

2 You must subsequently report to the registration centre referred to in section 7.1 of the *Sex Offender Information Registration Act*, whenever required under section 4.1 or 4.3 of that Act, for a period of years after the day on which you were sentenced or found not criminally responsible on account of mental disorder for the offence (or if [paragraph 490.02904\(3\)\(c\) or \(d\) of the Criminal Code](#) applies, for life because you were convicted of or found not criminally responsible on account of mental disorder for an offence (or offences) that the Attorney General of the province, or the minister of justice of the territory, has identified as equivalent to (*description of offence(s)*) under (*applicable offence provision(s) of the Criminal Code*), an offence (or offences) referred to in paragraph (a) of the definition *primary offence* in [subsection 490.011\(1\)](#) of the *Criminal Code*) or for any shorter period determined under [subsection 490.02904\(2\)](#) of the *Criminal Code*.

3 Information relating to you will be collected under sections 5 and 6 of the *Sex Offender Information Registration Act* by a person who collects information at the registration centre.

4 Information relating to you will be registered in a database, and may be consulted, disclosed and used in the circumstances set out in the *Sex Offender Information Registration Act*.

5 If you believe that the information registered in the database contains an error or omission, you may ask a person who collects information at the registration centre referred to in section 7.1 of the *Sex Offender Information Registration Act* to correct the information.

6 You have the right to apply to a court to exempt you from the obligation to comply with the *Sex Offender Information Registration Act*, and the right to appeal the decision of that court.

6.1 You have the right to apply to a court to vary the duration of the obligation to comply with the *Sex Offender Information Registration Act* if the obligation applies for life because you were convicted or found not criminally responsible on account of mental disorder for more than one offence, and you have the right to appeal the decision of that court.

7 You have the right to apply to a court to terminate the obligation to comply with the *Sex Offender Information Registration Act* and the right to appeal the decision of that court.

8 If you are found to have not complied with the *Sex Offender Information Registration Act*, you may be subject to a fine or imprisonment, or to both.

9 If you are found to have provided false or misleading information, you may be subject to a fine or imprisonment, or to both.

Served on (*date*).

For administrative use only:

Sentence imposed or verdict of not criminally responsible on account of mental disorder rendered on (*date*).

[2010, c. 17, s. 27](#); [2023, c. 28, s. 40](#).

Tab 66

Canada Evidence Act, RSC 1985, c C-5



Current version: in force since 2024-08-19

Link to this version: <https://canlii.ca/t/56cjm>

Citation to this version: Canada Evidence Act, RSC 1985, c C-5, <<https://canlii.ca/t/56cjm>> retrieved on 2026-03-23

Currency: This statute is current to 2026-03-02 according to the [Justice Laws Web Site](#)

Canada Evidence Act

R.S.C., 1985, c. C-5

An [Act respecting witnesses and evidence](#)

Short Title

Short title

1 This Act may be cited as the *Canada Evidence Act*.

R.S., c. E-10, s. 1.

Part I

Application

Application

2 This Part applies to all criminal proceedings and to all civil proceedings and other matters whatever respecting which Parliament has jurisdiction.

R.S., c. E-10, s. 2.

Witnesses

Interest or crime

3 A person is not incompetent to give evidence by reason of interest or crime.

R.S., c. E-10, s. 3.

Accused and spouse

4 (1) Every person charged with an offence, and, except as otherwise provided in this section, the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.

Spouse of accused

(2) No person is incompetent, or uncompellable, to testify for the prosecution by reason only that they are married to the accused.

Communications during marriage

(3) No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage.

(4) and (5) [Repealed, 2015, c. 13, s. 52]

Failure to testify

(6) The failure of the person charged, or of the wife or husband of that person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution.

R.S., 1985, c. C-5, s. 4; R.S., 1985, c. 19 (3rd Supp.), s. 17; 2002, c. 1, s. 166; 2014, c. 25, s. 34, c. 31, s. 27; 2015, c. 13, s. 52.

Incriminating questions

5 (1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

Answer not admissible against witness

(2) Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence.

R.S., 1985, c. C-5, s. 5; 1997, c. 18, s. 116.

Evidence of person with physical disability

6 (1) If a witness has difficulty communicating by reason of a physical disability, the court may order that the witness be permitted to give evidence by any means that enables the evidence to be intelligible.

Evidence of person with mental disability

(2) If a witness with a mental disability is determined under [section 16](#) to have the capacity to give evidence and has difficulty communicating by reason of a disability, the court may order that the witness be permitted to give evidence by any means that enables the evidence to be intelligible.

Inquiry

(3) The court may conduct an inquiry to determine if the means by which a witness may be permitted to give evidence under subsection (1) or (2) is necessary and reliable.

R.S., 1985, c. C-5, s. 6; 1998, c. 9, s. 1.

Identification of accused

6.1 For greater certainty, a witness may give evidence as to the identity of an accused whom the witness is able to identify visually or in any other sensory manner.

1998, c. 9, s. 1.

Expert witnesses

7 Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called on either side without the leave of the court or judge or person presiding.

R.S., c. E-10, s. 7.

Handwriting comparison

8 Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting those writings, may be submitted to the court and jury as proof of the genuineness or otherwise of the writing in dispute.

R.S., c. E-10, s. 8.

Adverse witnesses

9 (1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, the party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony, but before the last mentioned proof can be given the circumstances of the supposed

statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

Previous statements by witness not proved adverse

(2) Where the party producing a witness alleges that the witness made at other times a statement in writing, reduced to writing, or recorded on audio tape or video tape or otherwise, inconsistent with the witness' present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider the cross-examination in determining whether in the opinion of the court the witness is adverse.

R.S., 1985, c. C-5, s. 9; 1994, c. 44, s. 85.

Cross-examination as to previous statements

10 (1) On any trial a witness may be cross-examined as to previous statements that the witness made in writing, or that have been reduced to writing, or recorded on audio tape or video tape or otherwise, relative to the subject-matter of the case, without the writing being shown to the witness or the witness being given the opportunity to listen to the audio tape or view the video tape or otherwise take cognizance of the statements, but, if it is intended to contradict the witness, the witness' attention must, before the contradictory proof can be given, be called to those parts of the statement that are to be used for the purpose of so contradicting the witness, and the judge, at any time during the trial, may require the production of the writing or tape or other medium for inspection, and thereupon make such use of it for the purposes of the trial as the judge thinks fit.

Deposition of witness in criminal investigation

(2) A deposition of a witness, purporting to have been taken before a justice on the investigation of a criminal charge and to be signed by the witness and the justice, returned to and produced from the custody of the proper officer shall be presumed, in the absence of evidence to the contrary, to have been signed by the witness.

R.S., 1985, c. C-5, s. 10; 1994, c. 44, s. 86.

Cross-examination as to previous oral statements

11 Where a witness, on cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make the statement, proof may be given that he did in fact make it, but before that proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

R.S., c. E-10, s. 11.

Examination as to previous convictions

12 (1) A witness may be questioned as to whether the witness has been convicted of any offence, excluding any offence designated as a contravention under the

Contraventions Act, but including such an offence where the conviction was entered after a trial on an indictment.

Proof of previous convictions

(1.1) If the witness either denies the fact or refuses to answer, the opposite party may prove the conviction.

How conviction proved

(2) A conviction may be proved by producing

(a) a certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, if it is for an indictable offence, or a copy of the summary conviction, if it is for an offence punishable on summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court in which the conviction, if on indictment, was had, or to which the conviction, if summary, was returned; and

(b) proof of identity.

R.S., 1985, c. C-5, s. 12; 1992, c. 47, s. 66.

Oaths and Solemn Affirmations

Who may administer oaths

13 Every court and judge, and every person having, by law or consent of parties, authority to hear and receive evidence, has power to administer an oath to every witness who is legally called to give evidence before that court, judge or person.

R.S., c. E-10, s. 13.

Solemn affirmation by witness instead of oath

14 (1) A person may, instead of taking an oath, make the following solemn affirmation:

I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth.

Effect

(2) Where a person makes a solemn affirmation in accordance with subsection (1), his evidence shall be taken and have the same effect as if taken under oath.

R.S., 1985, c. C-5, s. 14; 1994, c. 44, s. 87.

Solemn affirmation by deponent

15 (1) Where a person who is required or who desires to make an affidavit or deposition in a proceeding or on an occasion on which or concerning a matter respecting which an oath is required or is lawful, whether on the taking of office or otherwise, does not wish to take an oath, the court or judge, or other officer or person qualified to take affidavits or depositions, shall permit the person to make a solemn affirmation in the words

following, namely, "I, ..., do solemnly affirm, etc.", and that solemn affirmation has the same force and effect as if that person had taken an oath.

Effect

(2) Any witness whose evidence is admitted or who makes a solemn affirmation under this section or [section 14](#) is liable to indictment and punishment for perjury in all respects as if he had been sworn.

R.S., 1985, c. C-5, s. 15; 1994, c. 44, s. 88.

Witness whose capacity is in question

16 (1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine

(a) whether the person understands the nature of an oath or a solemn affirmation;
and

(b) whether the person is able to communicate the evidence.

Testimony under oath or solemn affirmation

(2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.

Testimony on promise to tell truth

(3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.

No questions regarding understanding of promise

(3.1) A person referred to in subsection (3) shall not be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

Inability to testify

(4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.

Burden as to capacity of witness

(5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

Person under fourteen years of age

16.1 (1) A person under fourteen years of age is presumed to have the capacity to testify.

No oath or solemn affirmation

(2) A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.

Evidence shall be received

(3) The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.

Burden as to capacity of witness

(4) A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.

Court inquiry

(5) If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.

Promise to tell truth

(6) The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.

Understanding of promise

(7) No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

Effect

(8) For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

[2005, c. 32, s. 27](#).

Judicial Notice

Imperial Acts, etc.

17 Judicial notice shall be taken of all Acts of the Imperial Parliament, of all ordinances made by the Governor in Council, or the lieutenant governor in council of any province or colony that, or some portion of which, now forms or hereafter may form part of Canada, and of all the Acts of the legislature of any such province or colony, whether enacted before or after the passing of the [Constitution Act, 1867](#).

R.S., c. E-10, s. 17.

Acts of Canada

18 Judicial notice shall be taken of all Acts of Parliament, public or private, without being specially pleaded.

R.S., c. E-10, s. 18.

Documentary Evidence

Copies by Queen's Printer

19 Every copy of any Act of Parliament, public or private, published by the Queen's Printer, is evidence of that Act and of its contents, and every copy purporting to be published by the Queen's Printer shall be deemed to be so published, unless the contrary is shown.

R.S., 1985, c. C-5, s. 19; 2000, c. 5, s. 52.

Imperial proclamations, etc.

20 Imperial proclamations, orders in council, treaties, orders, warrants, licences, certificates, rules, regulations or other Imperial official records, Acts or documents may be proved

(a) in the same manner as they may from time to time be provable in any court in England;

(b) by the production of a copy of the [Canada Gazette](#), or a volume of the Acts of Parliament purporting to contain a copy of the same or a notice thereof; or

(c) by the production of a copy of them purporting to be published by the Queen's Printer.

R.S., 1985, c. C-5, s. 20; 2000, c. 5, s. 53.

Proclamations, etc., of Governor General

21 Evidence of any proclamation, order, regulation or appointment, made or issued by the Governor General or by the Governor in Council, or by or under the authority of any minister or head of any department of the Government of Canada and evidence of a treaty to which Canada is a party, may be given in all or any of the following ways:

(a) by the production of a copy of the [Canada Gazette](#), or a volume of the Acts of Parliament purporting to contain a copy of the treaty, proclamation, order, regulation

or appointment, or a notice thereof;

(b) by the production of a copy of the proclamation, order, regulation or appointment, purporting to be published by the Queen's Printer;

(c) by the production of a copy of the treaty purporting to be published by the Queen's Printer;

(d) by the production, in the case of any proclamation, order, regulation or appointment made or issued by the Governor General or by the Governor in Council, of a copy or extract purporting to be certified to be true by the clerk or assistant or acting clerk of the Queen's Privy Council for Canada; and

(e) by the production, in the case of any order, regulation or appointment made or issued by or under the authority of any minister or head of a department of the Government of Canada, of a copy or extract purporting to be certified to be true by the minister, by his deputy or acting deputy, or by the secretary or acting secretary of the department over which he presides.

R.S., 1985, c. C-5, s. 21; 2000, c. 5, s. 54.

Proclamations, etc., of lieutenant governor

22 (1) Evidence of any proclamation, order, regulation or appointment made or issued by a lieutenant governor or lieutenant governor in council of any province, or by or under the authority of any member of the executive council, being the head of any department of the government of the province, may be given in all or any of the following ways:

(a) by the production of a copy of the official gazette for the province purporting to contain a copy of the proclamation, order, regulation or appointment, or a notice thereof;

(b) by the production of a copy of the proclamation, order, regulation or appointment purporting to be published by the government or Queen's Printer for the province; and

(c) by the production of a copy or extract of the proclamation, order, regulation or appointment purporting to be certified to be true by the clerk or assistant or acting clerk of the executive council, by the head of any department of the government of a province, or by his deputy or acting deputy, as the case may be.

Territories

(2) Evidence of any proclamation, order, regulation or appointment made by the Lieutenant Governor or Lieutenant Governor in Council of the Northwest Territories, as constituted prior to September 1, 1905, or by the Legislature of Yukon, of the Northwest Territories or for Nunavut, may be given by the production of a copy of the [Canada Gazette](#) purporting to contain a copy of the proclamation, order, regulation or appointment, or a notice of it.

R.S., 1985, c. C-5, s. 22; 1993, c. 28, s. 78; 2000, c. 5, s. 55; [2002, c. 7, s. 96](#); [2014, c. 2, s. 5](#).

Evidence of judicial proceedings, etc.

23 (1) Evidence of any proceeding or record whatever of, in or before any court in Great Britain, the Supreme Court, the Federal Court of Appeal, the Federal Court or the Tax Court of Canada, any court in a province, any court in a British colony or possession or any court of record of the United States, of a state of the United States or of any other foreign country, or before any justice of the peace or coroner in a province, may be given in any action or proceeding by an exemplification or certified copy of the proceeding or record, purporting to be under the seal of the court or under the hand or seal of the justice, coroner or court stenographer, as the case may be, without any proof of the authenticity of the seal or of the signature of the justice, coroner or court stenographer or other proof whatever.

Certificate where court has no seal

(2) Where any court, justice or coroner or court stenographer referred to in subsection (1) has no seal, or so certifies, the evidence may be given by a copy purporting to be certified under the signature of a judge or presiding provincial court judge or of the justice or coroner or court stenographer, without any proof of the authenticity of the signature or other proof whatever.

R.S., 1985, c. C-5, s. 23; R.S., 1985, c. 27 (1st Supp.), s. 203; 1993, c. 34, s. 15; 1997, c. 18, s. 117; [2002, c. 8, s. 118](#).

Certified copies

24 In every case in which the original record could be admitted in evidence,

(a) a copy of any official or public document of Canada or of any province, purporting to be certified under the hand of the proper officer or person in whose custody the official or public document is placed, or

(b) a copy of a document, by-law, rule, regulation or proceeding, or a copy of any entry in any register or other book of any municipal or other corporation, created by charter or Act of Parliament or the legislature of any province, purporting to be certified under the seal of the corporation, and the hand of the presiding officer, clerk or secretary thereof,

is admissible in evidence without proof of the seal of the corporation, or of the signature or official character of the person or persons appearing to have signed it, and without further proof thereof.

R.S., c. E-10, s. 24.

Books and documents

25 Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, and no other Act exists that renders its contents provable by means of a copy, a copy thereof or extract therefrom is admissible in evidence in any court of justice or before a person having, by law or by consent of parties, authority to hear, receive and examine evidence, if it is proved that it is a copy or extract purporting to be certified to be true by the officer to whose custody the original has been entrusted.

Books kept in offices under Government of Canada

26 (1) A copy of any entry in any book kept in any office or department of the Government of Canada, or in any commission, board or other branch in the federal public administration, shall be admitted as evidence of that entry, and of the matters, transactions and accounts therein recorded, if it is proved by the oath or affidavit of an officer of the office or department, commission, board or other branch in the federal public administration that the book was, at the time of the making of the entry, one of the ordinary books kept in the office, department, commission, board or other branch in the federal public administration, that the entry was made in the usual and ordinary course of business of the office, department, commission, board or other branch in the federal public administration and that the copy is a true copy thereof.

Proof of non-issue of licence or document

(2) Where by any Act of Parliament or regulation made under an Act of Parliament provision is made for the issue by a department, commission, board or other branch in the federal public administration of a licence requisite to the doing or having of any act or thing or for the issue of any other document, an affidavit of an officer of the department, commission, board or other branch in the federal public administration, sworn before any commissioner or other person authorized to take affidavits, setting out that he or she has charge of the appropriate records and that after careful examination and search of those records he or she has been unable to find in any given case that any such licence or other document has been issued, shall be admitted in evidence as proof, in the absence of evidence to the contrary, that in that case no licence or other document has been issued.

Proof of mailing departmental matter

(3) Where by any Act of Parliament or regulation made under an Act of Parliament provision is made for sending by mail any request for information, notice or demand by a department or other branch in the federal public administration, an affidavit of an officer of the department or other branch in the federal public administration, sworn before any commissioner or other person authorized to take affidavits, setting out that he or she has charge of the appropriate records, that he or she has a knowledge of the facts in the particular case, that the request, notice or demand was sent by registered letter on a named date to the person or firm to whom it was addressed (indicating that address) and that he or she identifies as exhibits attached to the affidavit the post office certificate of registration of the letter and a true copy of the request, notice or demand, shall, on production and proof of the post office receipt for the delivery of the registered letter to the addressee, be admitted in evidence as proof, in the absence of evidence to the contrary, of the sending and of the request, notice or demand.

Proof of official character

(4) Where proof is offered by affidavit pursuant to this section, it is not necessary to prove the official character of the person making the affidavit if that information is set out in the body of the affidavit.

Notarial acts in Quebec

27 Any document purporting to be a copy of a notarial act or instrument made, filed or registered in the Province of Quebec, and to be certified by a notary or prothonotary to be a true copy of the original in his possession as such notary or prothonotary, shall be admitted in evidence in the place and stead of the original and has the same force and effect as the original would have if produced and proved, but it may be proved in rebuttal that there is no original, that the copy is not a true copy of the original in some material particular or that the original is not an instrument of such nature as may, by the law of the Province of Quebec, be taken before a notary or be filed, enrolled or registered by a notary in that Province.

R.S., c. E-10, s. 27.

Notice of production of book or document

28 (1) No copy of any book or other document shall be admitted in evidence, under the authority of [section 23](#), [24](#), [25](#), [26](#) or [27](#), on any trial, unless the party intending to produce the copy has before the trial given to the party against whom it is intended to be produced reasonable notice of that intention.

Not less than 7 days

(2) The reasonableness of the notice referred to in subsection (1) shall be determined by the court, judge or other person presiding, but the notice shall not in any case be less than seven days.

R.S., c. E-10, s. 28.

Copies of entries

29 (1) Subject to this section, a copy of any entry in any book or record kept in any financial institution shall in all legal proceedings be admitted in evidence as proof, in the absence of evidence to the contrary, of the entry and of the matters, transactions and accounts therein recorded.

Admission in evidence

(2) A copy of an entry in the book or record described in subsection (1) shall not be admitted in evidence under this section unless it is first proved that the book or record was, at the time of the making of the entry, one of the ordinary books or records of the financial institution, that the entry was made in the usual and ordinary course of business, that the book or record is in the custody or control of the financial institution and that the copy is a true copy of it, and such proof may be given by any person employed by the financial institution who has knowledge of the book or record or the manager or accountant of the financial institution, and may be given orally or by affidavit sworn before any commissioner or other person authorized to take affidavits.

Cheques, proof of “no account”

(3) Where a cheque has been drawn on any financial institution or branch thereof by any person, an affidavit of the manager or accountant of the financial institution or branch, sworn before any commissioner or other person authorized to take affidavits, setting out that he is the manager or accountant, that he has made a careful examination and search of the books and records for the purpose of ascertaining whether or not that person has an account with the financial institution or branch and that he has been unable to find such an account, shall be admitted in evidence as proof, in the absence of evidence to the contrary, that that person has no account in the financial institution or branch.

Proof of official character

(4) Where evidence is offered by affidavit pursuant to this section, it is not necessary to prove the signature or official character of the person making the affidavit if the official character of that person is set out in the body of the affidavit.

Compulsion of production or appearance

(5) A financial institution or officer of a financial institution is not in any legal proceedings to which the financial institution is not a party compellable to produce any book or record, the contents of which can be proved under this section, or to appear as a witness to prove the matters, transactions and accounts therein recorded unless by order of the court made for special cause.

Order to inspect and copy

(6) On the application of any party to a legal proceeding, the court may order that that party be at liberty to inspect and take copies of any entries in the books or records of a financial institution for the purposes of the legal proceeding, and the person whose account is to be inspected shall be notified of the application at least two clear days before the hearing thereof, and if it is shown to the satisfaction of the court that he cannot be notified personally, the notice may be given by addressing it to the financial institution.

Warrants to search

(7) Nothing in this section shall be construed as prohibiting any search of the premises of a financial institution under the authority of a warrant to search issued under any other Act of Parliament, but unless the warrant is expressly endorsed by the person under whose hand it is issued as not being limited by this section, the authority conferred by any such warrant to search the premises of a financial institution and to seize and take away anything in it shall, with respect to the books or records of the institution, be construed as limited to the searching of those premises for the purpose of inspecting and taking copies of entries in those books or records, and [section 490](#) of the *Criminal Code* does not apply in respect of the copies of those books or records obtained under a warrant referred to in this section.

Computation of time

(8) Holidays shall be excluded from the computation of time under this section.

Definitions

(9) In this section,

court means the court, judge, arbitrator or person before whom a legal proceeding is held or taken; (*tribunal*)

financial institution means the Bank of Canada, the Business Development Bank of Canada and any institution that accepts in Canada deposits of money from its members or the public, and includes a branch, agency or office of any of those Banks or institutions; (*institution financière*)

legal proceeding means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration. (*procédure judiciaire*)

R.S., 1985, c. C-5, s. 29; 1994, c. 44, s. 90; 1995, c. 28, s. 47; 1999, c. 28, s. 149.

Business records to be admitted in evidence

30 (1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding on production of the record.

Inference where information not in business record

(2) Where a record made in the usual and ordinary course of business does not contain information in respect of a matter the occurrence or existence of which might reasonably be expected to be recorded in that record, the court may on production of the record admit the record for the purpose of establishing that fact and may draw the inference that the matter did not occur or exist.

Copy of records

(3) Where it is not possible or reasonably practicable to produce any record described in subsection (1) or (2), a copy of the record accompanied by two documents, one that is made by a person who states why it is not possible or reasonably practicable to produce the record and one that sets out the source from which the copy was made, that attests to the copy's authenticity and that is made by the person who made the copy, is admissible in evidence under this section in the same manner as if it were the original of the record if each document is

(a) an affidavit of each of those persons sworn before a commissioner or other person authorized to take affidavits; or

(b) a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.

Where record kept in form requiring explanation

(4) Where production of any record or of a copy of any record described in subsection (1) or (2) would not convey to the court the information contained in the record by reason of its having been kept in a form that requires explanation, a transcript of the explanation of the record or copy prepared by a person qualified to make the explanation is admissible in evidence under this section in the same manner as if it were the original of the record if it is accompanied by a document that sets out the person's qualifications to make the explanation, attests to the accuracy of the explanation, and is

(a) an affidavit of that person sworn before a commissioner or other person authorized to take affidavits; or

(b) a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.

Court may order other part of record to be produced

(5) Where part only of a record is produced under this section by any party, the court may examine any other part of the record and direct that, together with the part of the record previously so produced, the whole or any part of the other part thereof be produced by that party as the record produced by him.

Court may examine record and hear evidence

(6) For the purpose of determining whether any provision of this section applies, or for the purpose of determining the probative value, if any, to be given to information contained in any record admitted in evidence under this section, the court may, on production of any record, examine the record, admit any evidence in respect thereof given orally or by affidavit including evidence as to the circumstances in which the information contained in the record was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record.

Notice of intention to produce record or affidavit

(7) Unless the court orders otherwise, no record or affidavit shall be admitted in evidence under this section unless the party producing the record or affidavit has, at least seven days before its production, given notice of his intention to produce it to each other party to the legal proceeding and has, within five days after receiving any notice in that behalf given by any such party, produced it for inspection by that party.

Not necessary to prove signature and official character

(8) Where evidence is offered by affidavit under this section, it is not necessary to prove the signature or official character of the person making the affidavit if the official character of that person is set out in the body of the affidavit.

Examination on record with leave of court

(9) Subject to [section 4](#), any person who has or may reasonably be expected to have knowledge of the making or contents of any record produced or received in evidence under this section may, with leave of the court, be examined or cross-examined thereon by any party to the legal proceeding.

Evidence inadmissible under this section

(10) Nothing in this section renders admissible in evidence in any legal proceeding

- (a)** such part of any record as is proved to be
 - (i)** a record made in the course of an investigation or inquiry,
 - (ii)** a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding,
 - (iii)** a record in respect of the production of which any privilege exists and is claimed, or
 - (iv)** a record of or alluding to a statement made by a person who is not, or if he were living and of sound mind would not be, competent and compellable to disclose in the legal proceeding a matter disclosed in the record;
- (b)** any record the production of which would be contrary to public policy; or
- (c)** any transcript or recording of evidence taken in the course of another legal proceeding.

Construction of this section

(11) The provisions of this section shall be deemed to be in addition to and not in derogation of

- (a)** any other provision of this or any other Act of Parliament respecting the admissibility in evidence of any record or the proof of any matter; or
- (b)** any existing rule of law under which any record is admissible in evidence or any matter may be proved.

Definitions

(12) In this section,

business means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or elsewhere by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government; (*affaires*)

copy and **photographic film**, in relation to any record, includes a print, whether enlarged or not, from a photographic film of the record, and **photographic film** includes

a photographic plate, microphotographic film or photostatic negative; (*copie et pellicule photographique*)

court means the court, judge, arbitrator or person before whom a legal proceeding is held or taken; (*tribunal*)

legal proceeding means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration; (*procédure judiciaire*)

record includes the whole or any part of any book, document, paper, card, tape or other thing on or in which information is written, recorded, stored or reproduced, and, except for the purposes of subsections (3) and (4), any copy or transcript admitted in evidence under this section pursuant to subsection (3) or (4). (*pièce*)

R.S., 1985, c. C-5, s. 30; 1994, c. 44, s. 91.

Definitions

31 (1) In this section,

corporation means any bank, including the Bank of Canada and the Business Development Bank of Canada, any authorized foreign bank within the meaning of [section 2](#) of the *Bank Act* and each of the following carrying on business in Canada, namely, every railway, express, telegraph and telephone company (except a street railway and tramway company), insurance company or society, trust company and loan company; (*personne morale*)

government means the government of Canada or of any province and includes any department, commission, board or branch of any such government; (*gouvernement*)

photographic film includes any photographic plate, microphotographic film and photostatic negative. (*pellicule photographique*)

When print admissible in evidence

(2) A print, whether enlarged or not, from any photographic film of

- (a)** an entry in any book or record kept by any government or corporation and destroyed, lost or delivered to a customer after the film was taken,
- (b)** any bill of exchange, promissory note, cheque, receipt, instrument or document held by any government or corporation and destroyed, lost or delivered to a customer after the film was taken, or
- (c)** any record, document, plan, book or paper belonging to or deposited with any government or corporation,

is admissible in evidence in all cases in which and for all purposes for which the object photographed would have been admitted on proof that

- (d)** while the book, record, bill of exchange, promissory note, cheque, receipt, instrument or document, plan, book or paper was in the custody or control of the

government or corporation, the photographic film was taken thereof in order to keep a permanent record thereof, and

(e) the object photographed was subsequently destroyed by or in the presence of one or more of the employees of the government or corporation, or was lost or was delivered to a customer.

Evidence of compliance with conditions

(3) Evidence of compliance with the conditions prescribed by this section may be given by any one or more of the employees of the government or corporation, having knowledge of the taking of the photographic film, of the destruction, loss or delivery to a customer, or of the making of the print, as the case may be, either orally or by affidavit sworn in any part of Canada before any notary public or commissioner for oaths.

Proof by notarial copy

(4) Unless the court otherwise orders, a notarial copy of an affidavit under subsection (3) is admissible in evidence in lieu of the original affidavit.

R.S., 1985, c. C-5, s. 31; 1992, c. 1, s. 142; 1995, c. 28, s. 47; 1999, c. 28, s. 150.

Authentication of electronic documents

31.1 Any person seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be.

2000, c. 5, s. 56.

Application of best evidence rule — electronic documents

31.2 (1) The best evidence rule in respect of an electronic document is satisfied

(a) on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored; or

(b) if an evidentiary presumption established under [section 31.4](#) applies.

Printouts

(2) Despite subsection (1), in the absence of evidence to the contrary, an electronic document in the form of a printout satisfies the best evidence rule if the printout has been manifestly or consistently acted on, relied on or used as a record of the information recorded or stored in the printout.

2000, c. 5, s. 56.

Presumption of integrity

31.3 For the purposes of subsection 31.2(1), in the absence of evidence to the contrary, the integrity of an electronic documents system by or in which an electronic document is recorded or stored is proven

(a) by evidence capable of supporting a finding that at all material times the computer system or other similar device used by the electronic documents system was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic document and there are no other reasonable grounds to doubt the integrity of the electronic documents system;

(b) if it is established that the electronic document was recorded or stored by a party who is adverse in interest to the party seeking to introduce it; or

(c) if it is established that the electronic document was recorded or stored in the usual and ordinary course of business by a person who is not a party and who did not record or store it under the control of the party seeking to introduce it.

2000, c. 5, s. 56.

Presumptions regarding secure electronic signatures

31.4 The Governor in Council may make regulations establishing evidentiary presumptions in relation to electronic documents signed with secure electronic signatures, including regulations respecting

(a) the association of secure electronic signatures with persons; and

(b) the integrity of information contained in electronic documents signed with secure electronic signatures.

2000, c. 5, s. 56.

Standards may be considered

31.5 For the purpose of determining under any rule of law whether an electronic document is admissible, evidence may be presented in respect of any standard, procedure, usage or practice concerning the manner in which electronic documents are to be recorded or stored, having regard to the type of business, enterprise or endeavour that used, recorded or stored the electronic document and the nature and purpose of the electronic document.

2000, c. 5, s. 56.

Proof by affidavit

31.6 (1) The matters referred to in [subsection 31.2\(2\)](#) and [sections 31.3](#) and [31.5](#) and in regulations made under [section 31.4](#) may be established by affidavit.

Cross-examination

(2) A party may cross-examine a deponent of an affidavit referred to in subsection (1) that has been introduced in evidence

(a) as of right, if the deponent is an adverse party or is under the control of an adverse party; and

(b) with leave of the court, in the case of any other deponent.

2000, c. 5, s. 56.

Application

31.7 Sections 31.1 to 31.4 do not affect any rule of law relating to the admissibility of evidence, except the rules relating to authentication and best evidence.

2000, c. 5, s. 56.

Definitions

31.8 The definitions in this section apply in [sections 31.1 to 31.6](#).

computer system means a device that, or a group of interconnected or related devices one or more of which,

(a) contains computer programs or other data; and

(b) pursuant to computer programs, performs logic and control, and may perform any other function. (*système informatique*)

data means representations of information or of concepts, in any form. (*données*)

electronic document means data that is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by a person or a computer system or other similar device. It includes a display, printout or other output of that data. (*document électronique*)

electronic documents system includes a computer system or other similar device by or in which data is recorded or stored and any procedures related to the recording or storage of electronic documents. (*système d'archivage électronique*)

secure electronic signature means a secure electronic signature as defined in [subsection 31\(1\)](#) of the [Personal Information Protection and Electronic Documents Act](#). (*signature électronique sécurisée*)

2000, c. 5, s. 56.

Order signed by Secretary of State

32 (1) An order signed by the Secretary of State of Canada and purporting to be written by command of the Governor General shall be admitted in evidence as the order of the Governor General.

Copies published in [Canada Gazette](#)

(2) All copies of official and other notices, advertisements and documents published in the [Canada Gazette](#) are admissible in evidence as proof, in the absence of evidence to the contrary, of the originals and of their contents.

R.S., 1985, c. C-5, s. 32; 2000, c. 5, s. 57.

Proof of handwriting of person certifying

33 (1) No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any

proclamation, order, regulation, appointment, book or other document.

Printed or written

(2) Any copy or extract referred to in subsection (1) may be in print or in writing, or partly in print and partly in writing.

R.S., c. E-10, s. 33.

Attesting witness

34 (1) It is not necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite.

Instrument, how proved

(2) Any instrument referred to in subsection (1) may be proved by admission or otherwise as if there had been no attesting witness thereto.

R.S., c. E-10, s. 34.

Impounding of forged instrument

35 Where any instrument that has been forged or fraudulently altered is admitted in evidence, the court or the judge or person who admits the instrument may, at the request of any person against whom it is admitted in evidence, direct that the instrument shall be impounded and be kept in the custody of an officer of the court or other proper person for such period and subject to such conditions as to the court, judge or person admitting the instrument seem meet.

R.S., c. E-10, s. 35.

Construction

36 This Part shall be deemed to be in addition to and not in derogation of any powers of proving documents given by any existing Act or existing at law.

R.S., c. E-10, s. 36.

Interpretation

Definition of *official*

36.1 In [sections 37](#) to [38.43](#), ***official*** has the same meaning as in [section 118](#) of the *Criminal Code*.

[2001, c. 41, s. 43](#); [2024, c. 16, s. 76](#).

Specified Public Interest

Objection to disclosure of information

37 (1) Subject to [sections 38](#) to [38.16](#), a Minister of the Crown in right of Canada or other official may object to the disclosure of information before a court, person or body

with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.

Obligation of court, person or body

(1.1) If an objection is made under subsection (1), the court, person or body shall ensure that the information is not disclosed other than in accordance with this Act.

Objection made to superior court

(2) If an objection to the disclosure of information is made before a superior court, that court may determine the objection.

Objection not made to superior court

(3) If an objection to the disclosure of information is made before a court, person or body other than a superior court, the objection may be determined, on application, by

(a) the Federal Court, in the case of a person or body vested with power to compel production by or under an Act of Parliament if the person or body is not a court established under a law of a province; or

(b) the trial division or trial court of the superior court of the province within which the court, person or body exercises its jurisdiction, in any other case.

Limitation period

(4) An application under subsection (3) shall be made within 10 days after the objection is made or within any further or lesser time that the court having jurisdiction to hear the application considers appropriate in the circumstances.

Disclosure order

(4.1) Unless the court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, the court may authorize by order the disclosure of the information.

Disclosure order

(5) If the court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, but that the public interest in disclosure outweighs in importance the specified public interest, the court may, by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any encroachment upon the specified public interest resulting from disclosure, authorize the disclosure, subject to any conditions that the court considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.

Prohibition order

(6) If the court does not authorize disclosure under subsection (4.1) or (5), the court shall, by order, prohibit disclosure of the information.

Evidence

(6.1) The court may receive into evidence anything that, in the opinion of the court, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base its decision on that evidence.

When determination takes effect

(7) An order of the court that authorizes disclosure does not take effect until the time provided or granted to appeal the order has expired or, if the order is appealed, the time provided or granted to appeal a judgment of an appeal court that confirms the order has expired and no further appeal from a judgment that confirms the order is available.

Introduction into evidence

(8) A person who wishes to introduce into evidence material the disclosure of which is authorized under subsection (5), but who may not be able to do so by reason of the rules of admissibility that apply before the court, person or body with jurisdiction to compel the production of information, may request from the court having jurisdiction under subsection (2) or (3) an order permitting the introduction into evidence of the material in a form or subject to any conditions fixed by that court, as long as that form and those conditions comply with the order made under subsection (5).

Relevant factors

(9) For the purpose of subsection (8), the court having jurisdiction under subsection (2) or (3) shall consider all the factors that would be relevant for a determination of admissibility before the court, person or body.

R.S., 1985, c. C-5, s. 37; [2001, c. 41, ss. 43, 140](#); [2002, c. 8, s. 183](#); [2013, c. 9, s. 17\(E\)](#).

Appeal to court of appeal

37.1 (1) Subject to subsection (1.1), an appeal lies from a determination under any of [subsections 37\(4.1\) to \(6\)](#)

- (a)** to the Federal Court of Appeal from a determination of the Federal Court; or
- (b)** to the court of appeal of a province from a determination of a trial division or trial court of a superior court of the province.

Limitation — person charged with offence

(1.1) A person who is charged with an offence may appeal a determination referred to in subsection (1) that is made in relation to a criminal trial or other criminal proceeding only if they are convicted of the offence.

Limitation period for appeal

(2) An appeal under this section shall be brought

(a) in the case of an appeal permitted under subsection (1.1), after conviction and within the same period in which the accused may appeal from their conviction or any further time that the court referred to in subsection (1) considers appropriate in the circumstances; or

(b) in any other case, within 15 days after the day on which the determination appealed from is made or any further time that the court referred to in subsection (1) considers appropriate in the circumstances.

Exceptional circumstances

(3) Despite subsection (1.1) and paragraph (2)(a), the court referred to in subsection (1) may, on application by the person charged with the offence, permit the appeal to be brought before conviction if the court is satisfied that there are exceptional circumstances that justify doing so.

2001, c. 41, ss. 43, 141; 2024, c. 16, s. 77.

Limitation periods for appeals to Supreme Court of Canada

37.2 Notwithstanding any other Act of Parliament,

(a) an application for leave to appeal to the Supreme Court of Canada from a judgment made under subsection 37.1(1) shall be made within 10 days after the date of the judgment appealed from or within any further time that the court having jurisdiction to grant leave to appeal considers appropriate in the circumstances; and

(b) if leave to appeal is granted, the appeal shall be brought in the manner set out in [subsection 60\(1\)](#) of the *Supreme Court Act* but within the time specified by the court that grants leave.

2001, c. 41, s. 43.

37.21 [Repealed, 2004, c. 12, s. 18]

Protection of right to a fair trial

37.3 (1) A judge presiding at a criminal trial or other criminal proceeding may make any order that he or she considers appropriate in the circumstances to protect the right of the accused to a fair trial, as long as that order complies with the terms of any order made under any of [subsections 37\(4.1\) to \(6\)](#) in relation to that trial or proceeding or any judgment made on appeal of an order made under any of those subsections.

Potential orders

(2) The orders that may be made under subsection (1) include, but are not limited to, the following orders:

(a) an order dismissing specified counts of the indictment or information, or permitting the indictment or information to proceed only in respect of a lesser or

included offence;

(b) an order effecting a stay of the proceedings; and

(c) an order finding against any party on any issue relating to information the disclosure of which is prohibited.

[2001, c. 41, s. 43](#); [2015, c. 3, s. 14\(F\)](#).

International Relations and National Defence and National Security

Provisions of General Application

Definitions

38 The following definitions apply in this section and in [sections 38.01 to 38.15](#).

judge means the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice to conduct hearings under [section 38.04](#). (*juge*)

participant means a person who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information. (*participant*)

potentially injurious information means information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security. (*renseignements potentiellement préjudiciables*)

proceeding means a proceeding before a court, person or body with jurisdiction to compel the production of information, but does not include a *federal proceeding*, as defined in [section 38.2](#). (*instance*)

prosecutor means an agent of the Attorney General of Canada or of the Attorney General of a province, the Director of Military Prosecutions under the [National Defence Act](#) or an individual who acts as a prosecutor in a proceeding. (*poursuivant*)

sensitive information means information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard. (*renseignements sensibles*)

R.S., 1985, c. C-5, s. 38; [2001, c. 41, ss. 43, 141](#); [2013, c. 9, s. 18\(F\)](#); [2024, c. 16, s. 79](#).

Notice to Attorney General of Canada

38.01 (1) Every participant who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information that the participant believes is sensitive information or potentially injurious information shall, as soon as possible, notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

During a proceeding

(2) Every participant who believes that sensitive information or potentially injurious information is about to be disclosed, whether by the participant or another person, in the course of a proceeding shall raise the matter with the person presiding at the proceeding and notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (1). In such circumstances, the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

Notice of disclosure from official

(3) An official, other than a participant, who believes that sensitive information or potentially injurious information may be disclosed in connection with a proceeding may notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

During a proceeding

(4) An official, other than a participant, who believes that sensitive information or potentially injurious information is about to be disclosed in the course of a proceeding may raise the matter with the person presiding at the proceeding. If the official raises the matter, he or she shall notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (3), and the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

Military proceedings

(5) In the case of a proceeding under Part III of the [National Defence Act](#), other than a *summary hearing* as defined in subsection 2(1) of that Act, notice under any of subsections (1) to (4) shall be given to both the Attorney General of Canada and the Minister of National Defence.

Exception

(6) This section does not apply when

- (a)** the information is disclosed by a person to their solicitor in connection with a proceeding, if the information is relevant to that proceeding;
- (b)** the information is disclosed to enable the Attorney General of Canada, the Minister of National Defence, a judge or a court hearing an appeal from, or a review of, an order of the judge to discharge their responsibilities under [section 38](#), this section and [sections 38.02 to 38.13](#), [38.15](#) and [38.16](#);
- (c)** disclosure of the information is authorized by the government institution in which or for which the information was produced or, if the information was not produced in or for a government institution, the government institution in which it was first received; or

(d) the information is disclosed to an entity and, where applicable, for a purpose listed in the schedule.

Exception

(7) Subsections (1) and (2) do not apply to a participant if a government institution referred to in paragraph (6)(c) advises the participant that it is not necessary, in order to prevent disclosure of the information referred to in that paragraph, to give notice to the Attorney General of Canada under subsection (1) or to raise the matter with the person presiding under subsection (2).

Schedule

(8) The Governor in Council may, by order, add to or delete from the schedule a reference to any entity or purpose, or amend such a reference.

[2001, c. 41, s. 43](#); [2019, c. 15, s. 48](#).

Disclosure prohibited

38.02 (1) Subject to [subsection 38.01\(6\)](#), no person shall disclose in connection with a proceeding

(a) information about which notice is given under any of subsections 38.01(1) to (4);

(b) the fact that notice is given to the Attorney General of Canada under any of subsections 38.01(1) to (4), or to the Attorney General of Canada and the Minister of National Defence under [subsection 38.01\(5\)](#);

(c) the fact that an application is made to the Federal Court under [section 38.04](#) or that an appeal or review of an order made under any of subsections 38.06(1) to (3) in connection with the application is instituted; or

(d) the fact that an agreement is entered into under [section 38.031](#) or [subsection 38.04\(6\)](#).

Entities

(1.1) When an entity listed in the schedule, for any purpose listed there in relation to that entity, makes a decision or order that would result in the disclosure of sensitive information or potentially injurious information, the entity shall not disclose the information or cause it to be disclosed until notice of intention to disclose the information has been given to the Attorney General of Canada and a period of 10 days has elapsed after notice was given.

Exceptions

(2) Disclosure of the information or the facts referred to in subsection (1) is not prohibited if

(a) the Attorney General of Canada authorizes the disclosure in writing under [section 38.03](#) or by agreement under [section 38.031](#) or [subsection 38.04\(6\)](#); or

(b) a judge authorizes the disclosure under subsection 38.06(1) or (2) or a court hearing an appeal from, or a review of, the order of the judge authorizes the disclosure, and either the time provided to appeal the order or judgment has expired or no further appeal is available.

2001, c. 41, ss. 43, 141.

Authorization by Attorney General of Canada

38.03 (1) The Attorney General of Canada may, at any time and subject to any conditions that he or she considers appropriate, authorize the disclosure of all or part of the information and facts the disclosure of which is prohibited under subsection 38.02(1).

Military proceedings

(2) In the case of a proceeding under Part III of the *National Defence Act*, other than a *summary hearing* as defined in subsection 2(1) of that Act, the Attorney General of Canada may authorize disclosure only with the agreement of the Minister of National Defence.

Notice

(3) The Attorney General of Canada shall, within 30 days after the day on which they first receive a notice about information under any of subsections 38.01(1) to (4), notify in writing every person who provided notice under [section 38.01](#) about that information of their decision with respect to disclosure of the information.

2001, c. 41, s. 43; 2019, c. 15, s. 49; 2024, c. 16, s. 80.

Disclosure agreement

38.031 (1) The Attorney General of Canada and a person who has given notice under subsection 38.01(1) or (2) and is not required to disclose information but wishes, in connection with a proceeding, to disclose any facts referred to in paragraphs 38.02(1)(b) to (d) or information about which he or she gave the notice, or to cause that disclosure, may, before the person applies to the Federal Court under [paragraph 38.04\(2\)\(c\)](#), enter into an agreement that permits the disclosure of part of the facts or information or disclosure of the facts or information subject to conditions.

No application to Federal Court

(2) If an agreement is entered into under subsection (1), the person may not apply to the Federal Court under [paragraph 38.04\(2\)\(c\)](#) with respect to the information about which he or she gave notice to the Attorney General of Canada under subsection 38.01(1) or (2).

2001, c. 41, ss. 43, 141.

Application to Federal Court — Attorney General of Canada

38.04 (1) The Attorney General of Canada may, at any time and in any circumstances, apply to the Federal Court for an order with respect to the disclosure of information about

which notice was given under any of subsections 38.01(1) to (4).

Application to Federal Court — general

(2) If, with respect to information about which notice was given under any of subsections 38.01(1) to (4), the Attorney General of Canada does not provide notice of a decision in accordance with [subsection 38.03\(3\)](#) or, other than by an agreement under [section 38.031](#), does not authorize the disclosure of the information or authorizes the disclosure of only part of the information or authorizes the disclosure subject to any conditions,

(a) the Attorney General of Canada shall apply to the Federal Court for an order with respect to disclosure of the information if a person who gave notice under subsection 38.01(1) or (2) is a witness;

(b) a person, other than a witness, who is required to disclose information in connection with a proceeding shall apply to the Federal Court for an order with respect to disclosure of the information; and

(c) a person who is not required to disclose information in connection with a proceeding but who wishes to disclose it or to cause its disclosure may apply to the Federal Court for an order with respect to disclosure of the information.

Notice to Attorney General of Canada

(3) A person who applies to the Federal Court under paragraph (2)(b) or (c) shall provide notice of the application to the Attorney General of Canada.

Court records

(4) Subject to paragraph (5)([a.1](#)), an application under this section is confidential. During the period when an application is confidential, the Chief Administrator of the Courts Administration Service may, subject to [section 38.12](#), take any measure that he or she considers appropriate to protect the confidentiality of the application and the information to which it relates.

Procedure

(5) As soon as the Federal Court is seized of an application under this section, the judge

(a) shall hear the representations of the Attorney General of Canada and, in the case of a proceeding under Part III of the [National Defence Act](#), other than a *summary hearing* as defined in subsection 2(1) of that Act, the Minister of National Defence, with respect to making the application public;

(a.1) shall, if he or she decides that the application should be made public, make an order to that effect;

(a.2) shall hear the representations of the Attorney General of Canada and, in the case of a proceeding under Part III of the [National Defence Act](#), other than a *summary hearing* as defined in subsection 2(1) of that Act, the Minister of National Defence, concerning the identity of all parties or witnesses whose interests may be affected by

either the prohibition of disclosure or the conditions to which disclosure is subject, and concerning the persons who should be given notice of any hearing of the matter;

(b) shall decide whether it is necessary to hold any hearing of the matter;

(c) if he or she decides that a hearing should be held, shall

(i) determine who should be given notice of the hearing,

(ii) order the Attorney General of Canada to notify those persons, and

(iii) determine the content and form of the notice; and

(d) if he or she considers it appropriate in the circumstances, may give any person the opportunity to make representations.

Disclosure agreement

(6) After the Federal Court is seized of an application made under paragraph (2)(c) or, in the case of an appeal from, or a review of, an order of the judge made under any of subsections 38.06(1) to (3) in connection with that application, before the appeal or review is disposed of,

(a) the Attorney General of Canada and the person who made the application may enter into an agreement that permits the disclosure of part of the facts referred to in paragraphs 38.02(1)(b) to (d) or part of the information or disclosure of the facts or information subject to conditions; and

(b) if an agreement is entered into, the Court's consideration of the application or any hearing, review or appeal shall be terminated.

Termination of Court consideration, hearing, review or appeal

(7) Subject to subsection (6), after the Federal Court is seized of an application made under this section or, in the case of an appeal from, or a review of, an order of the judge made under any of subsections 38.06(1) to (3), before the appeal or review is disposed of, if the Attorney General of Canada authorizes the disclosure of all or part of the information or withdraws conditions to which the disclosure is subject, the Court's consideration of the application or any hearing, appeal or review shall be terminated in relation to that information, to the extent of the authorization or the withdrawal.

[2001, c. 41, ss. 43, 141](#); [2013, c. 9, s. 19](#); [2019, c. 15, s. 50](#).

Report relating to proceedings

38.05 If he or she receives notice of a hearing under [paragraph 38.04\(5\)\(c\)](#), a person presiding or designated to preside at the proceeding to which the information relates or, if no person is designated, the person who has the authority to designate a person to preside may, within 10 days after the day on which he or she receives the notice, provide the judge with a report concerning any matter relating to the proceeding that the person considers may be of assistance to the judge.

[2001, c. 41, s. 43](#).

Disclosure order

38.06 (1) Unless the judge concludes that the disclosure of the information or facts referred to in subsection 38.02(1) would be injurious to international relations or national defence or national security, the judge may, by order, authorize the disclosure of the information or facts.

Disclosure — conditions

(2) If the judge concludes that the disclosure of the information or facts would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all or part of the information or facts, a summary of the information or a written admission of facts relating to the information.

Order confirming prohibition

(3) If the judge does not authorize disclosure under subsection (1) or (2), the judge shall, by order, confirm the prohibition of disclosure.

When determination takes effect

(3.01) An order of the judge that authorizes disclosure does not take effect until the time provided or granted to appeal the order has expired or, if the order is appealed, the time provided or granted to appeal a judgment of an appeal court that confirms the order has expired and no further appeal from a judgment that confirms the order is available.

Evidence

(3.1) The judge may receive into evidence anything that, in the opinion of the judge, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base his or her decision on that evidence.

Introduction into evidence

(4) A person who wishes to introduce into evidence material the disclosure of which is authorized under subsection (2) but who may not be able to do so in a proceeding by reason of the rules of admissibility that apply in the proceeding may request from a judge an order permitting the introduction into evidence of the material in a form or subject to any conditions fixed by that judge, as long as that form and those conditions comply with the order made under subsection (2).

Relevant factors

(5) For the purpose of subsection (4), the judge shall consider all the factors that would be relevant for a determination of admissibility in the proceeding.

Notice of order

38.07 The judge may order the Attorney General of Canada to give notice of an order made under any of subsections 38.06(1) to (3) to any person who, in the opinion of the judge, should be notified.

2001, c. 41, s. 43.

Automatic review

38.08 If the judge determines that a party to the proceeding whose interests are adversely affected by an order made under any of subsections 38.06(1) to (3) was not given the opportunity to make representations under [paragraph 38.04\(5\)\(d\)](#), the judge shall refer the order to the Federal Court of Appeal for review.

2001, c. 41, s. 43.

Appeal to Federal Court of Appeal

38.09 (1) Subject to subsection (1.1), an order made under any of subsections 38.06(1) to (3) may be appealed to the Federal Court of Appeal.

Limitation — person charged with offence

(1.1) A person who is charged with an offence may appeal an order referred to in subsection (1) that is made in relation to a criminal trial or other criminal proceeding only if they are convicted of the offence.

Limitation period for appeal

(2) An appeal under this section shall be brought

(a) in the case of an appeal permitted under subsection (1.1), after conviction and within the same period in which the accused may appeal from their conviction or any further time that the Court considers appropriate in the circumstances; or

(b) in any other case, within 15 days after the day on which the order is made or any further time that the Court considers appropriate in the circumstances.

Exceptional circumstances

(3) Despite subsection (1.1) and paragraph (2)(a), the Court may, on application by the person charged with the offence, permit the appeal to be brought before conviction if the Court is satisfied that there are exceptional circumstances that justify doing so.

2001, c. 41, s. 43; 2024, c. 16, s. 81.

Limitation periods for appeals to Supreme Court of Canada

38.1 Notwithstanding any other Act of Parliament,

(a) an application for leave to appeal to the Supreme Court of Canada from a judgment made on appeal shall be made within 15 days after the day on which the

judgment appealed from is made or within any further time that the Supreme Court of Canada considers appropriate in the circumstances; and

(b) if leave to appeal is granted, the appeal shall be brought in the manner set out in [subsection 60\(1\)](#) of the [Supreme Court Act](#) but within the time specified by the Supreme Court of Canada.

[2001, c. 41, s. 43](#); [2024, c. 16, s. 82](#).

Special rules — hearing in private

38.11 (1) The judge conducting a hearing under [subsection 38.04\(5\)](#) or the court hearing an appeal or review of an order made under any of subsections 38.06(1) to (3) may make an order that the hearing be held, or the appeal or review be heard, in private.

Special rules — hearing in National Capital Region

(1.1) A hearing under [subsection 38.04\(5\)](#) or an appeal or review of an order made under any of subsections 38.06(1) to (3) shall, at the request of either the Attorney General of Canada or, in the case of a proceeding under Part III of the [National Defence Act](#), other than a *summary hearing* as defined in subsection 2(1) of that Act, the Minister of National Defence, be held or heard, as the case may be, in the National Capital Region, as described in the schedule to the [National Capital Act](#).

Ex parte representations

(2) The judge conducting a hearing under [subsection 38.04\(5\)](#) or the court hearing an appeal or review of an order made under any of subsections 38.06(1) to (3) may give any person who makes representations under paragraph 38.04(5)(d), and shall give the Attorney General of Canada and, in the case of a proceeding under Part III of the [National Defence Act](#), other than a *summary hearing* as defined in subsection 2(1) of that Act, the Minister of National Defence, the opportunity to make representations *ex parte*.

Ex parte representations — public hearing

(3) If a hearing under [subsection 38.04\(5\)](#) is held, or an appeal or review of an order made under any of subsections 38.06(1) to (3) is heard, in public, any *ex parte* representations made in that hearing, appeal or review shall be made in private.

[2001, c. 41, s. 43](#); [2013, c. 9, s. 21](#); [2019, c. 15, s. 51](#).

Protective order

38.12 (1) The judge conducting a hearing under [subsection 38.04\(5\)](#) or the court hearing an appeal or review of an order made under any of subsections 38.06(1) to (3) may make any order that the judge or the court considers appropriate in the circumstances to protect the confidentiality of any information to which the hearing, appeal or review relates.

Court records

(2) The court records relating to a hearing that is held, or an appeal or review that is heard, in private or to any *ex parte* representations are confidential. The judge or the court may order that the court records, or any part of them, relating to a private or public hearing, appeal or review be sealed and kept in a location to which the public has no access.

2001, c. 41, s. 43; 2013, c. 9, s. 22.

Certificate of Attorney General of Canada

38.13 (1) The Attorney General of Canada may personally issue a certificate that prohibits the disclosure of information in connection with a proceeding for the purpose of protecting information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Foreign Interference and Security of Information Act* or for the purpose of protecting national defence or national security. The certificate may only be issued after an order or decision that would result in the disclosure of the information to be subject to the certificate has been made under this or any other Act of Parliament.

Military proceedings

(2) In the case of a proceeding under Part III of the *National Defence Act*, other than a *summary hearing* as defined in subsection 2(1) of that Act, the Attorney General of Canada may issue the certificate only with the agreement, given personally, of the Minister of National Defence.

Service of certificate

(3) The Attorney General of Canada shall cause a copy of the certificate to be served on

- (a)** the person presiding or designated to preside at the proceeding to which the information relates or, if no person is designated, the person who has the authority to designate a person to preside;
- (b)** every party to the proceeding;
- (c)** every person who gives notice under [section 38.01](#) in connection with the proceeding;
- (d)** every person who, in connection with the proceeding, may disclose, is required to disclose or may cause the disclosure of the information about which the Attorney General of Canada has received notice under [section 38.01](#);
- (e)** every party to a hearing under [subsection 38.04\(5\)](#) or to an appeal of an order made under any of subsections 38.06(1) to (3) in relation to the information;
- (f)** the judge who conducts a hearing under [subsection 38.04\(5\)](#) and any court that hears an appeal from, or review of, an order made under any of subsections 38.06(1) to (3) in relation to the information; and
- (g)** any other person who, in the opinion of the Attorney General of Canada, should be served.

Filing of certificate

- (4) The Attorney General of Canada shall cause a copy of the certificate to be filed
- (a) with the person responsible for the records of the proceeding to which the information relates; and
 - (b) in the Registry of the Federal Court and the registry of any court that hears an appeal from, or review of, an order made under any of subsections 38.06(1) to (3).

Effect of certificate

- (5) If the Attorney General of Canada issues a certificate, then, notwithstanding any other provision of this Act, disclosure of the information shall be prohibited in accordance with the terms of the certificate.

***Statutory Instruments Act* does not apply**

- (6) The *Statutory Instruments Act* does not apply to a certificate issued under subsection (1).

Publication

- (7) The Attorney General of Canada shall, without delay after a certificate is issued, cause the certificate to be published in the *Canada Gazette*.

Restriction

- (8) The certificate and any matters arising out of it are not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with [section 38.131](#).

Expiry

- (9) The certificate expires 10 years after the day on which it is issued and may be reissued.

[2001, c. 41, s. 43](#); [2013, c. 9, s. 23](#); [2019, c. 15, s. 52](#); [2024, c. 16, s. 57](#).

Application for review of certificate

38.131 (1) A party to the proceeding referred to in [section 38.13](#) may apply to the Federal Court of Appeal for an order varying or cancelling a certificate issued under that section on the grounds referred to in subsection (8) or (9), as the case may be.

Notice to Attorney General of Canada

- (2) The applicant shall give notice of the application to the Attorney General of Canada.

Military proceedings

- (3) In the case of proceedings under Part III of the *National Defence Act*, other than a *summary hearing* as defined in subsection 2(1) of that Act, notice under subsection (2)

shall be given to both the Attorney General of Canada and the Minister of National Defence.

Single judge

(4) Despite [section 16](#) of the *Federal Courts Act*, for the purposes of the application, the Federal Court of Appeal consists of a single judge of that Court.

Admissible information

(5) In considering the application, the judge may receive into evidence anything that, in the opinion of the judge, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base a determination made under any of subsections (8) to (10) on that evidence.

Special rules and protective order

(6) [Sections 38.11](#) and [38.12](#) apply, with any necessary modifications, to an application made under subsection (1).

Expedited consideration

(7) The judge shall consider the application as soon as reasonably possible, but not later than 10 days after the application is made under subsection (1).

Varying the certificate

(8) If the judge determines that some of the information subject to the certificate does not relate either to information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Foreign Interference and Security of Information Act*, or to national defence or national security, the judge shall make an order varying the certificate accordingly.

Cancelling the certificate

(9) If the judge determines that none of the information subject to the certificate relates to information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Foreign Interference and Security of Information Act*, or to national defence or national security, the judge shall make an order cancelling the certificate.

Confirming the certificate

(10) If the judge determines that all of the information subject to the certificate relates to information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Foreign Interference and Security of Information Act*, or to national defence or national security, the judge shall make an order confirming the certificate.

Determination is final

(11) Notwithstanding any other Act of Parliament, a determination of a judge under any of subsections (8) to (10) is final and is not subject to review or appeal by any court.

Publication

(12) If a certificate is varied or cancelled under this section, the Attorney General of Canada shall, as soon as possible after the decision of the judge and in a manner that mentions the original publication of the certificate, cause to be published in the *Canada Gazette*

(a) the certificate as varied under subsection (8); or

(b) a notice of the cancellation of the certificate under subsection (9).

2001, c. 41, s. 43; 2004, c. 12, s. 19(E); 2019, c. 15, s. 53; 2024, c. 16, s. 57; 2024, c. 16, s. 83.

Protection of right to a fair trial

38.14 (1) The person presiding at a criminal proceeding may make any order that he or she considers appropriate in the circumstances to protect the right of the accused to a fair trial, as long as that order complies with the terms of any order made under any of subsections 38.06(1) to (3) in relation to that proceeding, any judgment made on appeal from, or review of, the order, or any certificate issued under [section 38.13](#).

Potential orders

(2) The orders that may be made under subsection (1) include, but are not limited to, the following orders:

(a) an order dismissing specified counts of the indictment or information, or permitting the indictment or information to proceed only in respect of a lesser or included offence;

(b) an order effecting a stay of the proceedings; and

(c) an order finding against any party on any issue relating to information the disclosure of which is prohibited.

2001, c. 41, s. 43.

Fiat

38.15 (1) If sensitive information or potentially injurious information may be disclosed in connection with a prosecution that is not instituted by the Attorney General of Canada or on his or her behalf, the Attorney General of Canada may issue a fiat and serve the fiat on the prosecutor.

Effect of fiat

(2) When a fiat is served on a prosecutor, the fiat establishes the exclusive authority of the Attorney General of Canada with respect to the conduct of the prosecution described in the fiat or any related process.

Fiat filed in court

(3) If a prosecution described in the fiat or any related process is conducted by or on behalf of the Attorney General of Canada, the fiat or a copy of the fiat shall be filed with the court in which the prosecution or process is conducted.

Fiat constitutes conclusive proof

(4) The fiat or a copy of the fiat

(a) is conclusive proof that the prosecution described in the fiat or any related process may be conducted by or on behalf of the Attorney General of Canada; and

(b) is admissible in evidence without proof of the signature or official character of the Attorney General of Canada.

Military proceedings

(5) This section does not apply to a proceeding under Part III of the [National Defence Act](#).

[2001, c. 41, s. 43.](#)

Regulations

38.16 The Governor in Council may make any regulations that the Governor in Council considers necessary to carry into effect the purposes and provisions of [sections 38 to 38.15](#), including regulations respecting the notices, certificates and the fiat.

[2001, c. 41, s. 43.](#)

Annual report

38.17 Each year the Attorney General of Canada shall prepare and cause to be laid before each House of Parliament a report for the previous year on the operation of [sections 38.13](#) and [38.15](#) that includes the number of certificates and fiats issued under [sections 38.13](#) and [38.15](#), respectively.

[2013, c. 9, s. 24.](#)

Secure Administrative Review Proceedings

Definitions

38.2 The following definitions apply in this section and in [sections 38.21 to 38.45](#).

federal proceeding means

(a) an application for judicial review or an appeal in the Federal Court of a decision of a *federal board, commission or other tribunal*, as defined in [subsection 2\(1\)](#) of the [Federal Courts Act](#);

(b) an appeal in the Federal Court of Appeal from a decision of the Federal Court in a proceeding referred to in paragraph (a);

(c) an application for judicial review or an appeal in the Federal Court of Appeal of a decision of a federal board, commission or other tribunal referred to in paragraph (a);

or

(d) a proceeding referred to in [section 6](#) or [11](#) of the *Charities Registration (Security Information) Act*.

It does not include any proceeding in the Federal Court or the Federal Court of Appeal that is in respect of a matter under the *Immigration and Refugee Protection Act* and does not include a proceeding in which information may be disclosed to either of those courts for a purpose listed in the schedule. (*instance fédérale*)

judge means

(a) in relation to a federal proceeding in the Federal Court of Appeal, not fewer than three judges of that court, each of whom is either the Chief Justice or a judge designated by the Chief Justice to conduct hearings under [section 38.25](#), sitting together in an uneven number; and

(b) in relation to a federal proceeding in the Federal Court, the Chief Justice of that court or a judge designated by the Chief Justice to conduct hearings under [section 38.25](#). (*juge*)

non-governmental party means a party to a federal proceeding who is neither the Attorney General of Canada nor represented by the Attorney General of Canada. (*partie non gouvernementale*)

participant means a person who, in connection with a federal proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information. (*participant*)

potentially injurious information has the same meaning as in [section 38](#). (*renseignements potentiellement préjudiciables*)

sensitive information has the same meaning as in [section 38](#). (*renseignements sensibles*)

special counsel means a person appointed as a special counsel under [section 38.34](#). (*conseiller juridique spécial*)

[2024, c. 16, s. 84](#).

Notice to Attorney General of Canada

38.21 (1) Every participant who, in connection with a federal proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information that the participant believes is sensitive information or potentially injurious information must, as soon as possible, notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the federal proceeding.

During federal proceeding

(2) Every participant who believes that sensitive information or potentially injurious information is about to be disclosed, whether by the participant or another person, in the

course of a federal proceeding must raise the matter with the person presiding at the federal proceeding and notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (1). In such circumstances, the person presiding at the federal proceeding must ensure that the information is not disclosed other than in accordance with this Act.

Notice of disclosure from official

(3) An official, other than a participant, who believes that sensitive information or potentially injurious information may be disclosed in connection with a federal proceeding may notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the federal proceeding.

During federal proceeding

(4) An official, other than a participant, who believes that sensitive information or potentially injurious information is about to be disclosed in the course of a federal proceeding may raise the matter with the person presiding at the federal proceeding. If the official raises the matter, they must notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (3), and the person presiding at the federal proceeding must ensure that the information is not disclosed other than in accordance with this Act.

Exception

(5) This section does not apply when

- (a)** the information is disclosed by a person to their lawyer in connection with a federal proceeding, if the information is relevant to that proceeding;
- (b)** the information is disclosed to enable the Attorney General of Canada, special counsel, a judge, or a court hearing an appeal from an order of the judge, to exercise their powers and perform their duties and functions under this section and [sections 38.22 to 38.41 and 38.43](#); or
- (c)** disclosure of the information is authorized by the government institution in which or for which the information was produced or, if the information was not produced in or for a government institution, the government institution in which it was first received.

Exception

(6) Subsections (1) and (2) do not apply to a participant if a government institution referred to in paragraph (5)(c) advises the participant that it is not necessary, in order to prevent disclosure of the information referred to in that paragraph, to give notice to the Attorney General of Canada under subsection (1) or to raise the matter under subsection (2) with the person presiding at the federal proceeding.

[2024, c. 16, s. 84.](#)

Disclosure prohibited

38.22 (1) Subject to [subsection 38.21\(5\)](#), it is prohibited for a person to disclose in connection with a federal proceeding

- (a) information about which notice is given under any of subsections 38.21(1) to (4);
- (b) the fact that notice is given to the Attorney General of Canada under any of subsections 38.21(1) to (4);
- (c) the fact that a motion is made under [section 38.25](#) or that an appeal of an order made under any of subsections 38.26(1) to (3) in connection with the motion is instituted; or
- (d) the fact that an agreement is entered into under [section 38.24](#) or [subsection 38.25\(6\)](#).

Exceptions

(2) Disclosure of the information or the facts referred to in subsection (1) is not prohibited if

- (a) the Attorney General of Canada authorizes the disclosure in writing under [section 38.23](#) or by agreement under [section 38.24](#) or [subsection 38.25\(6\)](#); or
- (b) a judge authorizes the disclosure under subsection 38.26(1) or (2) or a court hearing an appeal from the order of the judge authorizes the disclosure, and either the time provided to appeal the order or the appeal court's judgment has expired or no further appeal is available.

[2024, c. 16, s. 84.](#)

Authorization by Attorney General of Canada

38.23 (1) The Attorney General of Canada may, at any time and subject to any conditions that they consider appropriate, authorize the disclosure of all or part of the information and facts the disclosure of which is prohibited under subsection 38.22(1).

Notice

(2) The Attorney General of Canada must, within 30 days after the day on which they first receive a notice about information under any of subsections 38.21(1) to (4), notify in writing every person who provided notice under those subsections about that information of their decision with respect to disclosure of the information.

[2024, c. 16, s. 84.](#)

Disclosure agreement

38.24 (1) The Attorney General of Canada and a person who has given notice under subsection 38.21(1) or (2) and is not required to disclose information but wishes, in connection with a federal proceeding, to disclose any facts referred to in paragraphs 38.22(1)(b) to (d) or information about which the person gave the notice, or to cause that disclosure, may, before the person brings a motion under [paragraph 38.25\(2\)\(c\)](#),

enter into an agreement that permits the disclosure of part of the facts or information or disclosure of the facts or information subject to conditions.

No motion

(2) If an agreement is entered into under subsection (1), the person may not bring a motion under [paragraph 38.25\(2\)\(c\)](#) with respect to the information about which they gave notice to the Attorney General of Canada under subsection 38.21(1) or (2).

[2024, c. 16, s. 84.](#)

Motion — Attorney General of Canada

38.25 (1) The Attorney General of Canada may, at any time and under any circumstances during a federal proceeding, bring a motion to a judge for an order with respect to the disclosure of information about which notice was given under any of subsections 38.21(1) to (4).

Motion — general

(2) If, with respect to information about which notice was given under any of subsections 38.21(1) to (4), the Attorney General of Canada does not provide notice of a decision in accordance with [subsection 38.23\(2\)](#) or, other than by an agreement under [section 38.24](#), does not authorize the disclosure of the information or authorizes the disclosure of only part of the information or authorizes the disclosure subject to any conditions,

(a) the Attorney General of Canada must bring a motion to a judge for an order with respect to disclosure of the information if a person who gave notice under subsection 38.21(1) or (2) is a witness;

(b) a person, other than a witness, who is required to disclose information in connection with a federal proceeding must bring a motion to a judge for an order with respect to disclosure of the information; and

(c) a person who is not required to disclose information in connection with a federal proceeding but who wishes to disclose it or to cause its disclosure may bring a motion to a judge for an order with respect to disclosure of the information.

Notice to Attorney General of Canada

(3) A person who makes a motion under paragraph (2)(b) or (c) must provide notice of the motion to the Attorney General of Canada.

Court records

(4) Subject to paragraph (5)(b), a motion under this section is confidential. During the period when a motion is confidential, the Chief Administrator of the Courts Administration Service may, subject to [section 38.31](#), take any measure that they consider appropriate to protect the confidentiality of the motion and the information to which it relates.

Procedure

- (5)** As soon as they are seized of a motion under this section, the judge
- (a)** must hear the representations of the Attorney General of Canada with respect to making the motion public;
 - (b)** must, if they decide that the motion should be made public, make an order to that effect;
 - (c)** must hear the representations of the Attorney General of Canada concerning the identity of all parties or witnesses whose interests may be affected by either the prohibition of disclosure or the conditions to which disclosure is subject and concerning the persons who should be given notice of any hearing of the matter;
 - (d)** must decide whether it is necessary to hold any hearing of the matter;
 - (e)** if they decide that a hearing should be held, must
 - (i)** determine who should be given notice of the hearing,
 - (ii)** order the Attorney General of Canada to notify those persons, and
 - (iii)** determine the content and form of the notice; and
 - (f)** may, if they consider it appropriate in the circumstances, give any person the opportunity to make representations.

Disclosure agreement

- (6)** After the judge is seized of a motion made under paragraph (2)(c) or, in the case of an appeal from an order of the judge made under any of subsections 38.26(1) to (3) in connection with that motion, before the appeal is disposed of,
- (a)** the Attorney General of Canada and the person who made the motion may enter into an agreement that permits the disclosure of part of the facts referred to in paragraphs 38.22(1)(b) to (d) or part of the information or disclosure of the facts or information subject to conditions; and
 - (b)** if an agreement is entered into, the judge's consideration of the motion or any hearing or appeal must be terminated.

Termination

- (7)** Subject to subsection (6), after the judge is seized of a motion made under this section — or, in the case of an appeal from an order of the judge made under any of subsections 38.26(1) to (3), before the appeal is disposed of — and if the Attorney General of Canada authorizes the disclosure of all or part of the information or withdraws conditions to which the disclosure is subject, the judge's consideration of the motion or any hearing or appeal must be terminated in relation to that information, to the extent of the authorization or the withdrawal.

[2024, c. 16, s. 84.](#)

Disclosure order

38.26 (1) Unless the judge concludes that the disclosure of the information or facts referred to in subsection 38.22(1) would be injurious to international relations or national defence or national security, the judge may, by order, authorize the disclosure of the information or facts.

Disclosure — conditions

(2) If the judge concludes that the disclosure of the information or facts would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all or part of the information or facts, a summary of the information or a written admission of facts relating to the information.

Order confirming prohibition

(3) If the judge does not authorize disclosure under subsection (1) or (2), the judge must, by order, confirm the prohibition of disclosure.

When determination takes effect

(4) An order of the judge that authorizes disclosure does not take effect until the time provided or granted to appeal the order has expired or, if the order is appealed, the time provided or granted to appeal a judgment of an appeal court that confirms the order has expired and no further appeal from a judgment that confirms the order is available.

Evidence

(5) The judge may receive into evidence anything that, in the opinion of the judge, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base their decision on that evidence.

[2024, c. 16, s. 84.](#)

Notice of order

38.27 The judge may order the Attorney General of Canada to give notice of an order made under any of subsections 38.26(1) to (3) to any person who, in the opinion of the judge, should be notified.

[2024, c. 16, s. 84.](#)

Appeal to Federal Court of Appeal

38.28 (1) An order made by a judge of the Federal Court under any of subsections 38.26(1) to (3) may be appealed to the Federal Court of Appeal.

Limitation period for appeal

(2) An appeal must be brought within 15 days after the day on which the order is made or within any further time that the Federal Court of Appeal considers appropriate in the circumstances.

2024, c. 16, s. 84.

Limitation periods for appeals to Supreme Court of Canada

38.29 Despite any other Act of Parliament,

(a) an application for leave to appeal to the Supreme Court of Canada from an order made under any of subsections 38.26(1) to (3) by the Federal Court of Appeal, or from a judgment of the Federal Court of Appeal in an appeal of such an order made by the Federal Court, must be made within 15 days after the day on which the order or judgment appealed from is made or within any further time that the Supreme Court of Canada considers appropriate in the circumstances; and

(b) if leave to appeal is granted, the appeal must be brought in the manner set out in [subsection 60\(1\)](#) of the [Supreme Court Act](#) but within the time specified by the Supreme Court of Canada.

2024, c. 16, s. 84.

Special rules — hearing in private

38.3 (1) The judge conducting a hearing under [subsection 38.25\(5\)](#) or the court hearing an appeal of an order made under any of subsections 38.26(1) to (3) may make an order that the hearing be held, or the appeal be heard, in private.

Special rules — hearing in National Capital Region

(2) A hearing under [subsection 38.25\(5\)](#) or an appeal of an order made under any of subsections 38.26(1) to (3) must, at the request of the Attorney General of Canada, be held or heard, as the case may be, in the National Capital Region, as described in the schedule to the [National Capital Act](#).

***Ex parte* representations**

(3) The judge conducting a hearing under [subsection 38.25\(5\)](#) or the court hearing an appeal of an order made under any of subsections 38.26(1) to (3) may give any person who makes representations under paragraph 38.25(5)(f), and must give the Attorney General of Canada, the opportunity to make representations *ex parte*.

***Ex parte* representations — public hearing**

(4) If a hearing under [subsection 38.25\(5\)](#) is held, or an appeal of an order made under any of subsections 38.26(1) to (3) is heard, in public, any *ex parte* representations made in that hearing or appeal must be made in private.

2024, c. 16, s. 84.

Protective order

38.31 (1) The judge conducting a hearing under [subsection 38.25\(5\)](#) or the court hearing an appeal of an order made under any of subsections 38.26(1) to (3) may make any order that the judge or the court considers appropriate in the circumstances to protect the confidentiality of any information to which the hearing or appeal relates.

Court records

(2) The court records relating to a hearing that is held, or an appeal that is heard, in private or to any *ex parte* representations are confidential. The judge or the court may order that the court records, or any part of them, relating to a private or public hearing or appeal be sealed and kept in a location to which the public has no access.

[2024, c. 16, s. 84.](#)

Judge seized

38.32 The judge who hears the motion brought under subsection 38.25(1) or (2) becomes seized of all matters in the federal proceeding.

[2024, c. 16, s. 84.](#)

Undisclosed information — federal proceeding

38.33 (1) In considering the merits of the federal proceeding, the judge may receive into evidence, and may base their decision on, any information the disclosure of which is prohibited as a result of the application of [sections 38.21](#) to [38.26](#).

Representations and private hearing

(2) For the purposes of subsection (1), the judge may — or, if the Attorney General of Canada so requests, the judge must —

- (a)** receive *ex parte* representations; and
- (b)** conduct a hearing in private and in the absence of the non-governmental party and their counsel.

Procedure

(3) In conducting a hearing under paragraph (2)(b), the judge must

- (a)** deal with all matters as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit;
- (b)** without disclosing the information referred to in subsection (1), ensure that the non-governmental party to the federal proceeding is provided with a summary of the information that enables that party to be reasonably informed of the case; and
- (c)** at the request of the Attorney General of Canada, hold the hearing in the National Capital Region, as described in the schedule to the [National Capital Act](#).

Decision

(4) The judge may base any decision on the information referred to in subsection (1) even if a summary of that information has not been provided to the non-governmental party.

2024, c. 16, s. 84.

Special counsel

38.34 (1) The judge, in consideration of the principles of fairness and natural justice, may appoint a special counsel for the purposes of

- (a)** a motion made under [section 38.25](#) and the federal proceeding as a whole; and
- (b)** any appeal of the motion or of the federal proceeding.

List

(2) The special counsel may be appointed from the list of persons referred to in [subsection 85\(1\)](#) of the *Immigration and Refugee Protection Act*.

2024, c. 16, s. 84.

Special counsel's role

38.35 (1) A special counsel's role is to protect the interests of the non-governmental party when information and other evidence is presented, or representations are made in private and in the absence of the non-governmental party and their counsel.

Responsibilities

(2) A special counsel may

- (a)** make oral and written representations with respect to the information or other evidence that has been filed with the court but has not been disclosed to the non-governmental party and their counsel;
- (b)** participate in, and cross-examine witnesses who testify during, any part of the proceeding that is held in private and in the absence of the non-governmental party and their counsel; and
- (c)** exercise, with the judge's authorization, any other powers that are necessary to protect the interests of the non-governmental party.

For greater certainty

(3) For greater certainty, the special counsel is not a party to the federal proceeding and the relationship between the special counsel and the non-governmental party is not that of lawyer and client.

Protection of communications with special counsel

(4) However, a communication between the non-governmental party or their counsel and the special counsel that, if the relationship were one of lawyer and client, would be subject to solicitor-client privilege or the professional secrecy of advocates is deemed to

be subject to that privilege or professional secrecy. For greater certainty, in respect of that communication, the special counsel is not a compellable witness in any proceeding.

[2024, c. 16, s. 84.](#)

Immunity

38.36 A special counsel is not personally liable for anything they do or omit to do in good faith under this Act.

[2024, c. 16, s. 84.](#)

Obligation to provide information

38.37 The Attorney General of Canada must, within a period set by the judge, provide the special counsel with a copy of the information or other evidence that has been filed with the court in relation to the federal proceeding, including any information or other evidence that is not disclosed to the non-governmental party and their counsel.

[2024, c. 16, s. 84.](#)

Restrictions on communications — special counsel

38.38 (1) After the information or other evidence is received by the special counsel, the special counsel may, during the remainder of the federal proceeding and any appeal in respect of it, communicate with another person about the federal proceeding or the appeal only with the judge's or appeal court's authorization and subject to any conditions that the judge or appeal court considers appropriate.

Restrictions on communications — other persons

(2) If the special counsel is authorized to communicate with a person, the judge or appeal court may prohibit that person from communicating with anyone else about the federal proceeding or appeal during its remainder or may impose conditions with respect to such a communication during that period.

[2024, c. 16, s. 84.](#)

Disclosure and communication prohibited

38.39 With the exception of communications authorized by a judge or disclosures permitted under [section 38.22](#), it is prohibited for a person to

(a) disclose information or other evidence that is disclosed to them under [section 38.37](#) or [38.38](#) and that is treated as confidential by the judge; or

(b) communicate with another person about the content of any part of a federal proceeding, or an appeal in respect of it, that is heard in private and in the absence of the non-governmental party and their counsel.

[2024, c. 16, s. 84.](#)

Fairness

38.4 (1) The judge may, if they are of the opinion that they are unable to conduct a fair hearing because the non-governmental party is not reasonably informed of the case, make an order granting an appropriate remedy to the non-governmental party.

Potential orders

(2) The orders that may be made under subsection (1) include, but are not limited to, the following:

- (a)** an order allowing or dismissing the federal proceeding; and
- (b)** an order finding against any party on any issue relating to information the disclosure of which is prohibited.

For greater certainty

(3) For greater certainty, a remedy referred to in subsection (1) must not include the disclosure of information ordered not to be disclosed under [subsection 38.26\(3\)](#) or [38.41\(4\)](#).

[2024, c. 16, s. 84.](#)

Certificate of Attorney General of Canada

38.41 (1) The Attorney General of Canada may personally issue a certificate that prohibits the disclosure of information in connection with a federal proceeding for the purpose of protecting information obtained in confidence from, or in relation to, a *foreign entity* as defined in subsection 2(1) of the *Foreign Interference and Security of Information Act* or for the purpose of protecting national defence or national security. The certificate may only be issued after an order or decision that would result in the disclosure of the information to be subject to the certificate has been made under this or any other Act of Parliament.

Service of certificate

(2) The Attorney General of Canada must cause a copy of the certificate to be served on

- (a)** the person presiding or designated to preside at the federal proceeding to which the information relates or, if no person is designated, the person who has the authority to designate a person to preside;
- (b)** every party to the federal proceeding;
- (c)** every person who gives notice under [section 38.21](#) in connection with the federal proceeding;
- (d)** every person who, in connection with the federal proceeding, may disclose, is required to disclose or may cause the disclosure of the information about which the Attorney General of Canada has received notice under [section 38.21](#);
- (e)** every party to a hearing under [subsection 38.25\(5\)](#) or to an appeal of an order made under any of subsections 38.26(1) to (3) in relation to the information;

- (f) any court that hears an appeal from an order made under any of subsections 38.26(1) to (3) in relation to the information; and
- (g) any other person who, in the opinion of the Attorney General of Canada, should be served.

Filing of certificate

(3) The Attorney General of Canada must cause a copy of the certificate to be filed in the registry of the Federal Court of Appeal or the Federal Court, as the case may be, and the registry of any court that hears an appeal from an order made under any of subsections 38.26(1) to (3).

Effect of certificate

(4) If the Attorney General of Canada issues a certificate, then, despite any other provision of this Act, disclosure of the information is prohibited in accordance with the terms of the certificate.

Statutory Instruments Act does not apply

(5) The *Statutory Instruments Act* does not apply to a certificate issued under subsection (1).

Publication

(6) The Attorney General of Canada must, without delay after a certificate is issued, cause the certificate to be published in the *Canada Gazette*.

Restriction

(7) The certificate and any matters arising out of it are not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with [section 38.42](#).

Expiry

(8) The certificate expires 10 years after the day on which it is issued and may be reissued.

[2024, c. 16, s. 84](#).

Application for review of certificate

38.42 (1) A party to the federal proceeding referred to in [section 38.41](#) may apply to the Federal Court of Appeal for an order varying or cancelling a certificate issued under that section on the grounds referred to in subsection (7) or (8), as the case may be.

Notice to Attorney General of Canada

(2) The applicant must give notice of the application to the Attorney General of Canada.

Single judge

(3) Despite paragraph (a) of the definition *judge* in [section 38.2](#) and [section 16](#) of the *Federal Courts Act*, for the purposes of the application, the Federal Court of Appeal consists of a single judge of that Court.

Admissible information

(4) In considering the application, the judge may receive into evidence anything that, in the opinion of the judge, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base a determination made under any of subsections (7) to (9) on that evidence.

Special rules and protective order

(5) [Sections 38.3](#) and [38.31](#) apply, with any necessary modifications, to an application made under subsection (1).

Expedited consideration

(6) The judge must consider the application as soon as reasonably possible, but not later than 10 days after the application is made under subsection (1).

Varying certificate

(7) If the judge determines that some of the information subject to the certificate does not relate either to information obtained in confidence from, or in relation to, a foreign entity, or to national defence or national security, the judge must make an order varying the certificate accordingly.

Cancelling certificate

(8) If the judge determines that none of the information subject to the certificate relates to information obtained in confidence from, or in relation to, a foreign entity, or to national defence or national security, the judge must make an order cancelling the certificate.

Confirming certificate

(9) If the judge determines that all of the information subject to the certificate relates to information obtained in confidence from, or in relation to, a foreign entity, or to national defence or national security, the judge must make an order confirming the certificate.

Determination is final

(10) Despite any other Act of Parliament, a determination of a judge under any of subsections (7) to (9) is final and is not subject to review or appeal by any court.

Publication

(11) If a certificate is varied or cancelled under this section, the Attorney General of Canada must, as soon as possible after the decision of the judge and in a manner that mentions the original publication of the certificate, cause to be published in the [Canada Gazette](#)

(a) the certificate as varied under subsection (7); or

(b) a notice of the cancellation of the certificate under subsection (8).

Definition of *foreign entity*

(12) In this section, ***foreign entity*** has the same meaning as in subsection 2(1) of the [Foreign Interference and Security of Information Act](#).

[2024, c. 16, s. 84.](#)

Regulations

38.43 The Governor in Council may make any regulations that the Governor in Council considers necessary for carrying out the purposes and provisions of [sections 38.2 to 38.42](#), including regulations respecting the notices and certificates.

[2024, c. 16, s. 84.](#)

Annual report

38.44 The report referred to in [section 38.17](#) must also set out the operation of [section 38.41](#) for the previous year and include the number of certificates issued under that section.

[2024, c. 16, s. 84.](#)

Rules

38.45 (1) The Chief Justice of the Federal Court of Appeal and the Chief Justice of the Federal Court may each establish a committee to make rules governing the practice and procedure in relation to the participation of special counsel in federal proceedings before the court over which they preside. The rules are binding despite any rule of practice that would otherwise apply.

Composition of committees

(2) Each committee established is to be composed of the appropriate Chief Justice, the Attorney General of Canada or one or more representatives of the Attorney General of Canada, and one or more members of the bar of any province who have experience in a field of law relevant to federal proceedings. Each Chief Justice may also designate additional members of their committee.

Chief Justice to preside

(3) Each Chief Justice, or a member designated by them, is to preside over their committee.

[2024, c. 16, s. 84.](#)

Confidences of the Queen's Privy Council for Canada

Objection relating to a confidence of the Queen's Privy Council

39 (1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.

Definition

(2) For the purpose of subsection (1), ***a confidence of the Queen's Privy Council for Canada*** includes, without restricting the generality thereof, information contained in

(a) a memorandum the purpose of which is to present proposals or recommendations to Council;

(b) a discussion paper the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;

(c) an agenda of Council or a record recording deliberations or decisions of Council;

(d) a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d); and

(f) draft legislation.

Definition of Council

(3) For the purposes of subsection (2), ***Council*** means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

Exception

(4) Subsection (1) does not apply in respect of

(a) a confidence of the Queen's Privy Council for Canada that has been in existence for more than twenty years; or

(b) a discussion paper described in paragraph (2)(b)

(i) if the decisions to which the discussion paper relates have been made public, or

(ii) where the decisions have not been made public, if four years have passed since the decisions were made.

Journalistic Sources

Definitions

39.1 (1) The following definitions apply in this section.

document has the same meaning as in [section 487.011](#) of the *Criminal Code*.
(*document*)

journalist means a person whose main occupation is to contribute directly, either regularly or occasionally, for consideration, to the collection, writing or production of information for dissemination by the media, or anyone who assists such a person.
(*journaliste*)

journalistic source means a source that confidentially transmits information to a journalist on the journalist's undertaking not to divulge the identity of the source, whose anonymity is essential to the relationship between the journalist and the source. (*source journalistique*)

Objection

(2) Subject to subsection (7), a journalist may object to the disclosure of information or a document before a court, person or body with the authority to compel the disclosure of information on the grounds that the information or document identifies or is likely to identify a journalistic source.

Former journalist

(3) For the purposes of subsections (2) and (7), **journalist** includes an individual who was a journalist when information that identifies or is likely to identify the journalistic source was transmitted to that individual.

Power of court, person or body

(4) The court, person or body may raise the application of subsection (2) on their own initiative.

Objection of court, person or body

(5) When an objection or the application of subsection (2) is raised, the court, person or body shall ensure that the information or document is not disclosed other than in accordance with this section.

Observations

(6) Before determining the question, the court, person or body must give the parties and interested persons a reasonable opportunity to present observations.

Authorization

(7) The court, person or body may authorize the disclosure of information or a document only if they consider that

(a) the information or document cannot be produced in evidence by any other reasonable means; and

(b) the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source, having regard to, among other things,

(i) the importance of the information or document to a central issue in the proceeding,

(ii) freedom of the press, and

(iii) the impact of disclosure on the journalistic source and the journalist.

Conditions

(8) An authorization under subsection (7) may contain any conditions that the court, person or body considers appropriate to protect the identity of the journalistic source.

Burden of proof

(9) A person who requests the disclosure has the burden of proving that the conditions set out in subsection (7) are fulfilled.

Appeal

(10) An appeal lies from a determination under subsection (7)

(a) to the Federal Court of Appeal from a determination of the Federal Court;

(b) to the court of appeal of a province from a determination of a superior court of the province;

(c) to the Federal Court from a determination of a court, person or body vested with power to compel production by or under an Act of Parliament if the court, person or body is not established under a law of a province; or

(d) to the trial division or trial court of the superior court of the province within which the court, person or body exercises its jurisdiction, in any other case.

Limitation period for appeal

(11) An appeal under subsection (10) shall be brought within 10 days after the date of the determination appealed from or within any further time that the court having jurisdiction to hear the appeal considers appropriate in the circumstances.

Hearing in summary way

(12) An appeal under subsection (10) shall be heard and determined without delay and in a summary way.

Provincial Laws of Evidence

How applicable

40 In all proceedings over which Parliament has legislative authority, the laws of evidence in force in the province in which those proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document, subject to this Act and other Acts of Parliament, apply to those proceedings.

R.S., c. E-10, s. 37.

Statutory Declarations

Solemn declaration

41 Any judge, notary public, justice of the peace, provincial court judge, recorder, mayor or commissioner authorized to take affidavits to be used either in the provincial or federal courts, or any other functionary authorized by law to administer an oath in any matter, may receive the solemn declaration of any person voluntarily making the declaration before him, in the following form, in attestation of the execution of any writing, deed or instrument, or of the truth of any fact, or of any account rendered in writing:

I, _____, solemnly declare that (*state the fact or facts declared to*), and I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath.

Declared before me _____ at _____ this _____ day of _____ 19_____

R.S., 1985, c. C-5, s. 41; R.S., 1985, c. 27 (1st Supp.), s. 203.

Insurance Proofs

Affidavits, etc.

42 Any affidavit, solemn affirmation or declaration required by any insurance company authorized by law to do business in Canada, in regard to any loss of or injury to person, property or life insured or assured therein, may be taken before any commissioner or other person authorized to take affidavits, before any justice of the peace or before any notary public for any province, and the commissioner, person, justice of the peace or notary public is required to take the affidavit, solemn affirmation or declaration.

R.S., c. E-10, s. 39.

Part II

Application

Foreign courts

43 This Part applies to the taking of evidence relating to proceedings in courts out of Canada.

R.S., c. E-10, s. 40.

Interpretation

Definitions

44 In this Part,

cause includes a proceeding against a criminal; (*cause*)

court means any superior court in any province; (*tribunal*)

judge means any judge of any superior court in any province; (*juge*)

oath includes a solemn affirmation in cases in which, by the law of Canada, or of a province, as the case may be, a solemn affirmation is allowed instead of an oath. (*serment*)

R.S., c. E-10, s. 41; 1984, c. 40, s. 27.

Construction

45 This Part shall not be so construed as to interfere with the right of legislation of the legislature of any province requisite or desirable for the carrying out of the objects hereof.

R.S., c. E-10, s. 42.

Procedure

Order for examination of witness in Canada

46 (1) If, on an application for that purpose, it is made to appear to any court or judge that any court or tribunal outside Canada, before which any civil, commercial or criminal matter is pending, is desirous of obtaining the testimony in relation to that matter of a party or witness within the jurisdiction of the first mentioned court, of the court to which the judge belongs or of the judge, the court or judge may, in its or their discretion, order the examination on oath on interrogatories, or otherwise, before any person or persons named in the order, of that party or witness accordingly, and by the same or any subsequent order may command the attendance of that party or witness for the purpose of being examined, and for the production of any writings or other documents mentioned in the order and of any other writings or documents relating to the matter in question that are in the possession or power of that party or witness.

Video links, etc.

(2) For greater certainty, testimony for the purposes of subsection (1) may be given by means of technology that permits the virtual presence of the party or witness before the

court or tribunal outside Canada or that permits that court or tribunal, and the parties, to hear and examine the party or witness.

R.S., 1985, c. C-5, s. 46; 1999, c. 18, s. 89.

Enforcement of the order

47 On the service on the party or witness of an order referred to in section 46, and of an appointment of a time and place for the examination of the party or witness signed by the person named in the order for taking the examination, or, if more than one person is named, by one of the persons named, and on payment or tender of the like conduct money as is properly payable on attendance at a trial, the order may be enforced in like manner as an order made by the court or judge in a cause pending in that court or before that judge.

R.S., c. E-10, s. 44.

Expenses and conduct money

48 Every person whose attendance is required in the manner described in [section 47](#) is entitled to the like conduct money and payment for expenses and loss of time as on attendance at a trial.

R.S., c. E-10, s. 45.

Administering oath

49 On any examination of parties or witnesses, under the authority of any order made in pursuance of this Part, the oath shall be administered by the person authorized to take the examination, or, if more than one person is authorized, by one of those persons.

R.S., c. E-10, s. 46.

Right of refusal to answer or produce document

50 (1) Any person examined under any order made under this Part has the like right to refuse to answer questions tending to criminate himself, or other questions, as a party or witness, as the case may be, would have in any cause pending in the court by which, or by a judge whereof, the order is made.

Laws about witnesses to apply — video links etc.

(1.1) Despite subsection (1), when a party or witness gives evidence under [subsection 46\(2\)](#), the evidence shall be given as though they were physically before the court or tribunal outside Canada, for the purposes of the laws relating to evidence and procedure but only to the extent that giving the evidence would not disclose information otherwise protected by the Canadian law of non-disclosure of information or privilege.

Contempt of court in Canada

(1.2) When a party or witness gives evidence under [subsection 46\(2\)](#), the Canadian law relating to contempt of court applies with respect to a refusal by the party or witness to

answer a question or to produce a writing or document referred to in subsection 46(1), as ordered under that subsection by the court or judge.

Nature of right

(2) No person shall be compelled to produce, under any order referred to in subsection (1), any writing or other document that he could not be compelled to produce at a trial of such a cause.

R.S., 1985, c. C-5, s. 50; 1999, c. 18, s. 90.

Rules of court

51 (1) The court may frame rules and orders in relation to procedure and to the evidence to be produced in support of the application for an order for examination of parties and witnesses under this Part, and generally for carrying this Part into effect.

Letters rogatory

(2) In the absence of any order in relation to the evidence to be produced in support of the application referred to in subsection (1), letters rogatory from a court or tribunal outside Canada in which the civil, commercial or criminal matter is pending, are deemed and taken to be sufficient evidence in support of the application.

R.S., 1985, c. C-5, s. 51; 1999, c. 18, s. 91.

Part III

Application

Application of this Part

52 This Part extends to the following classes of persons:

- (a)** officers of any of Her Majesty's diplomatic or consular services while performing their functions in any foreign country, including ambassadors, envoys, ministers, charges d'affaires, counsellors, secretaries, attaches, consuls general, consuls, vice-consuls, pro-consuls, consular agents, acting consuls general, acting consuls, acting vice-consuls and acting consular agents;
- (b)** officers of the Canadian diplomatic, consular and representative services while performing their functions in any foreign country or in any part of the Commonwealth and Dependent Territories other than Canada, including, in addition to the diplomatic and consular officers mentioned in paragraph (a), high commissioners, permanent delegates, acting high commissioners, acting permanent delegates, counsellors and secretaries;
- (c)** Canadian Government Trade Commissioners and Assistant Canadian Government Trade Commissioners while performing their functions in any foreign country or in any part of the Commonwealth and Dependent Territories other than Canada;

(d) honorary consular officers of Canada while performing their functions in any foreign country or in any part of the Commonwealth and Dependent Territories other than Canada;

(e) judicial officials in a foreign country in respect of oaths, affidavits, solemn affirmations, declarations or similar documents that the official is authorized to administer, take or receive; and

(f) persons locally engaged and designated by the Deputy Minister of Foreign Affairs or any other person authorized by that Deputy Minister while performing their functions in any foreign country or in any part of the Commonwealth and Dependent Territories other than Canada.

R.S., 1985, c. C-5, s. 52; 1994, c. 44, s. 92; 1997, c. 18, s. 118.

Oaths and Solemn Affirmations

Oaths taken abroad

53 Oaths, affidavits, solemn affirmations or declarations administered, taken or received outside Canada by any person mentioned in [section 52](#) are as valid and effectual and are of the like force and effect to all intents and purposes as if they had been administered, taken or received in Canada by a person authorized to administer, take or receive oaths, affidavits, solemn affirmations or declarations therein that are valid and effectual under this Act.

R.S., c. E-10, s. 50.

Documentary Evidence

Documents to be admitted in evidence

54 (1) Any document that purports to have affixed, impressed or subscribed on it or to it the signature of any person authorized by any of [paragraphs 52\(a\) to \(d\)](#) to administer, take or receive oaths, affidavits, solemn affirmations or declarations, together with their seal or with the seal or stamp of their office, or the office to which the person is attached, in testimony of any oath, affidavit, solemn affirmation or declaration being administered, taken or received by the person, shall be admitted in evidence, without proof of the seal or stamp or of the person's signature or official character.

Status of statements

(2) An affidavit, solemn affirmation, declaration or other similar statement taken or received in a foreign country by an official referred to in [paragraph 52\(e\)](#) shall be admitted in evidence without proof of the signature or official character of the official appearing to have signed the affidavit, solemn affirmation, declaration or other statement.

R.S., 1985, c. C-5, s. 54; 1994, c. 44, s. 93.

SCHEDULE

(Paragraph 38.01(6)(d), subsections 38.01(8) and 38.02(1.1) and section 38.2)

Designated Entities

- 1** A judge of the Federal Court, for the purposes of [section 21](#) of the *Canadian Security Intelligence Service Act*
- 2** [Repealed, 2024, c. 16, s. 86]
- 3** A judge of the Federal Court, the Federal Court of Appeal or the Immigration Division or Immigration Appeal Division of the Immigration and Refugee Board, for the purposes of [sections 77 to 87.1](#) of the *Immigration and Refugee Protection Act*
- 4** [Repealed, 2024, c. 16, s. 86]
- 5 to 8** [Repealed, 2001, c. 41, s. 124]
- 9** A board of inquiry convened under [section 45](#) of the *National Defence Act*
- 10** A court martial or a military judge for the purposes of Part III of the *National Defence Act*
- 11** The Federal Public Sector Labour Relations and Employment Board referred to in [subsection 4\(1\)](#) of the *Federal Public Sector Labour Relations and Employment Board Act*, for the purposes of a grievance process under the *Federal Public Sector Labour Relations Act* with respect to an employee of the Canadian Security Intelligence Service, with the exception of any information provided to the Board by the employee
- 12** The Information Commissioner, for the purposes of the *Access to Information Act*
- 13** The Privacy Commissioner, for the purposes of the *Privacy Act*
- 14** The Privacy Commissioner, for the purposes of the *Personal Information Protection and Electronic Documents Act*
- 15** A judge of the Federal Court, for the purposes of [section 41](#) of the *Access to Information Act*
- 16** A judge of the Federal Court, for the purpose of [sections 41 to 43](#) of the *Privacy Act*
- 17** A judge of the Federal Court, for the purpose of [sections 14 to 17](#) of the *Personal Information Protection and Electronic Documents Act*
- 18** The National Security and Intelligence Review Agency, for the purposes of [sections 16 to 19](#) of the *National Security and Intelligence Review Agency Act*, with the exception of any information provided to the Agency by the complainant or an individual who has been denied a security clearance

19 The Public Sector Integrity Commissioner, for the purposes of [sections 26 to 35](#) of the *Public Servants Disclosure Protection Act*

20 [Repealed, 2019, c. 13, s. 61]

21 [Repealed, 2024, c. 16, s. 86]

22 The Civilian Review and Complaints Commission for the Royal Canadian Mounted Police, for the purposes of the *Royal Canadian Mounted Police Act*, but only in relation to information that is under the control, or in the possession, of the Royal Canadian Mounted Police or the Central Authority, as the case may be.

23 The Public Inquiry into Foreign Interference in Federal Electoral Processes and Democratic Institutions, for the purposes of that inquiry, except if the hearing is open to the public

[2001, c. 41, ss. 44, 124](#); [2003, c. 22, s. 105](#); [SOR/2004-19](#); [2005, c. 46, s. 56](#); [2006, c. 9, s. 222](#); [SOR/2006-80, 335](#); [2008, c. 3, s. 11](#); [SOR/2012-220](#); [2013, c. 18, ss. 45, 85](#), c. 40, s. 448; [2015, c. 20, s. 13](#), c. 36, s. 43; [2017, c. 9, s. 41](#); [2019, c. 13, s. 20](#); [2019, c. 13, s. 61](#); [2019, c. 15, s. 54](#); [2019, c. 18, s. 60](#); [SOR/2023-205, s. 1](#); [2024, c. 16, s. 85](#); [2024, c. 16, s. 86](#).

Tab 67

Judges Act, RSC 1985, c J-1



Current version: in force since 2024-06-20

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Judges Act

R.S.C., 1985, c. J-1

An Act respecting judges of federal and provincial courts

Short Title

Short title

1 This Act may be cited as the *Judges Act*.

R.S., c. J-1, s. 1.

Interpretation

Definitions

2 In this Act,

age of retirement of a judge or of an associate judge means the age, fixed by law, at which the judge or associate judge ceases to hold office; (*mise à la retraite d'office*)

associate judge means an associate judge of the Federal Court or an associate judge of the Tax Court of Canada and includes a supernumerary associate judge; (*juge adjoint*)

attorney general of the province, except where otherwise defined, means the minister of the Crown of the province who is responsible for judicial affairs; (*procureur général de*

la province)

Commissioner means the Commissioner for Federal Judicial Affairs referred to in [section 73](#); (*commissaire*)

common-law partner, in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year; (*conjoint de fait*)

Council means the Canadian Judicial Council established by subsection 59(1); (*Conseil*)

county includes district; (*comté*)

judge includes a chief justice, senior associate chief justice, associate chief justice, supernumerary judge and regional senior judge; (*juge*)

Minister means the Minister of Justice of Canada; (*ministre*)

prothonotary [Repealed, 2022, c. 10, s. 333]

survivor, in relation to a judge or to an associate judge, means a person who was married to the judge or associate judge at the time of the judge's or associate judge's death or who establishes that he or she was cohabiting with the judge or associate judge in a conjugal relationship at the time of the judge's or associate judge's death and had so cohabited for a period of at least one year. (*survivant*)

R.S., 1985, c. J-1, s. 2; 1990, c. 17, s. 27; 1992, c. 51, s. 2; 2000, c. 12, s. 159; [2002, c. 8, s. 82\(E\)](#); [2014, c. 39, s. 316](#); [2017, c. 33, s. 230](#); [2022, c. 10, s. 333](#); [2022, c. 10, s. 371](#); [2023, c. 18, s. 1](#).

Application to associate judges

2.1 (1) Subject to subsection (2), [sections 26](#) to 26.3, 34 and 39, paragraphs 40(1)(a) and (b), [subsection 40\(2\)](#), [sections 41](#), 41.2 to 42, 43.1 to 56 and 57, paragraph 60(2)(b) and Part IV also apply to an associate judge.

Associate judge who made election

(2) [Sections 41.2](#), [41.3](#), [42](#) and [43.1](#) to [52.22](#) do not apply to an associate judge who made an election under the [Economic Action Plan 2014 Act, No. 2](#) to continue to be deemed to be employed in the public service for the purposes of the [Public Service Superannuation Act](#).

[2014, c. 39, s. 317](#); [2022, c. 10, s. 334](#); [2022, c. 10, s. 371](#); [2022, c. 10, s. 375](#); [2023, c. 18, s. 2](#).

PART I

Judges and Associate Judges

Eligibility

Eligibility for appointment

3 No person is eligible to be appointed a judge of a superior court in any province unless, in addition to any other requirements prescribed by law, that person

(a) is a barrister or advocate of at least 10 years' standing at the bar of any province or has, for an aggregate of at least 10 years,

(i) been a barrister or advocate at the bar of any province, and

(ii) after becoming a barrister or advocate at the bar of any province, exercised powers and performed duties and functions of a judicial nature on a full-time basis in respect of a position held under a law of Canada or a province; and

(b) undertakes to participate in continuing education on matters related to sexual assault law and social context, which includes systemic racism and systemic discrimination, including by attending seminars established under [paragraph 60\(2\)\(b\)](#).

R.S., 1985, c. J-1, s. 3; 1992, c. 51, s. 3; 1996, c. 22, s. 2; [2021, c. 8, s. 1](#).

4 to 6 [Repealed, 1990, c. 17, s. 28]

7 [Repealed, 1992, c. 51, s. 4]

Age of Retirement

Retirement age

8 (1) A judge of the Supreme Court of British Columbia who held the office of a judge of the County Courts of British Columbia on March 1, 1987 and on June 30, 1990 may retire at the age of seventy years.

Retirement age

(2) A judge of the Superior Court of Justice in and for the Province of Ontario who held the office of a judge of the District Court of Ontario on March 1, 1987 and on August 31, 1990 may retire at the age of seventy years.

Idem

(3) A judge of the Supreme Court of Nova Scotia who held the office of a judge of the County Court of Nova Scotia on March 1, 1987 and on the coming into force of this subsection may retire at the age of seventy years.

R.S., 1985, c. J-1, s. 8; R.S., 1985, c. 16 (3rd Supp.), s. 1; 1992, c. 51, s. 4; 1998, c. 30, s. 1.

Salaries

Supreme Court of Canada

9 The yearly salaries of the judges of the Supreme Court of Canada are as follows:

(a) the Chief Justice of Canada, \$435,600; and

(b) the eight puisne judges, \$403,300 each.

R.S., 1985, c. J-1, s. 9; R.S., 1985, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; [2001, c. 7, s. 1](#); [2006, c. 11, s. 1](#); [2012, c. 31, s. 210](#); [2017, c. 20, s. 196](#); [2022, c. 10, s. 336](#).

Federal Courts

10 The yearly salaries of the judges of the Federal Courts are as follows:

- (a)** the Chief Justice of the Federal Court of Appeal, \$371,400;
- (b)** the other judges of the Federal Court of Appeal, \$338,800 each;
- (c)** the Chief Justice and the Associate Chief Justice of the Federal Court, \$371,400 each; and
- (d)** the other judges of the Federal Court, \$338,800 each.

R.S., 1985, c. J-1, s. 10; R.S., 1985, c. 41 (1st Supp.), s. 1, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; [2001, c. 7, s. 2](#); [2002, c. 8, s. 83](#); [2006, c. 11, s. 1](#); [2012, c. 31, s. 210](#); [2017, c. 20, s. 197](#); [2018, c. 12, s. 297](#); [2022, c. 10, s. 337](#).

Federal Court associate judges

10.1 The yearly salaries of the associate judges of the Federal Court shall be 80% of the yearly salaries, calculated in accordance with [section 25](#), of the judges referred to in [paragraph 10\(d\)](#).

[2014, c. 39, s. 318](#); [2017, c. 20, s. 198](#); [2022, c. 10, s. 371](#).

Court Martial Appeal Court

10.2 The yearly salary of the Chief Justice of the Court Martial Appeal Court of Canada shall be \$371,400.

[2017, c. 20, s. 198](#); [2022, c. 10, s. 338](#).

Tax Court of Canada

11 The yearly salaries of the judges of the Tax Court of Canada are as follows:

- (a)** the Chief Justice, \$371,400;
- (b)** the Associate Chief Justice, \$371,400; and
- (c)** the other judges, \$338,800 each.

R.S., 1985, c. J-1, s. 11; R.S., 1985, c. 11 (1st Supp.), s. 2, c. 51 (4th Supp.), s. 13; [2001, c. 7, s. 3](#); [2002, c. 8, s. 84\(E\)](#); [2006, c. 11, s. 1](#); [2012, c. 31, s. 210](#); [2017, c. 20, s. 199](#); [2022, c. 10, s. 339](#).

Tax Court of Canada associate judges

11.1 The yearly salaries of the associate judges of the Tax Court of Canada shall be 80% of the yearly salaries, calculated in accordance with [section 25](#), of the judges referred to in [paragraph 11\(c\)](#).

[2022, c. 10, s. 340](#); [2022, c. 10, s. 371](#).

Court of Appeal for Ontario and Superior Court of Justice

12 The yearly salaries of the judges of the Court of Appeal for Ontario and of the Superior Court of Justice in and for the Province of Ontario are as follows:

- (a) the Chief Justice and the Associate Chief Justice of Ontario, \$371,400 each;
- (b) the 14 Justices of Appeal, \$338,800 each;
- (c) the Chief Justice and the Associate Chief Justice of the Superior Court of Justice, \$371,400 each; and
- (d) the 212 other judges of the Superior Court of Justice, \$338,800 each.

R.S., 1985, c. J-1, s. 12; R.S., 1985, c. 41 (1st Supp.), s. 2, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 1990, c. 17, s. 29; 1998, c. 30, s. 2; [2001, c. 7, s. 4](#); [2006, c. 11, s. 1](#); [2012, c. 31, s. 210](#); [2017, c. 20, s. 200](#); [2018, c. 12, s. 298](#); [2021, c. 23, s. 255](#); [2022, c. 10, s. 341](#).

Court of Appeal and Superior Court of Quebec

13 The yearly salaries of the judges of the Court of Appeal and of the Superior Court in and for the Province of Quebec are as follows:

- (a) the Chief Justice of Quebec, \$371,400;
- (b) the 19 puisne judges of the Court of Appeal, \$338,800 each;
- (c) the Chief Justice, the Senior Associate Chief Justice and the Associate Chief Justice of the Superior Court, \$371,400 each; and
- (d) the 144 puisne judges of the Superior Court, \$338,800 each.

R.S., 1985, c. J-1, s. 13; R.S., 1985, c. 41 (1st Supp.), s. 3, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 1989, c. 8, s. 1; [2001, c. 7, s. 5](#); [2006, c. 11, s. 1](#); [2012, c. 31, s. 210](#); [2014, c. 20, s. 164](#); [2017, c. 20, s. 201](#); [2022, c. 10, s. 342](#).

Court of Appeal and Supreme Court of Nova Scotia

14 The yearly salaries of the judges of the Nova Scotia Court of Appeal and the Supreme Court of Nova Scotia are as follows:

- (a) the Chief Justice of Nova Scotia, \$371,400;
- (b) the seven other judges of the Court of Appeal, \$338,800 each;
- (c) the Chief Justice and the Associate Chief Justice of the Supreme Court, \$371,400 each; and
- (d) the 23 other judges of the Supreme Court, \$338,800 each.

R.S., 1985, c. J-1, s. 14; R.S., 1985, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 1989, c. 8, s. 2; 1992, c. 51, s. 5; [2001, c. 7, s. 6](#); [2006, c. 11, s. 1](#); [2012, c. 31, s. 210](#); [2017, c. 20, s. 202](#); [2022, c. 10, s. 343](#).

Court of Appeal and Court of Queen's Bench of New Brunswick

15 The yearly salaries of the judges of the Court of Appeal of New Brunswick and of the Court of Queen's Bench of New Brunswick are as follows:

- (a) the Chief Justice of New Brunswick, \$371,400;

(b) the five other judges of the Court of Appeal, \$338,800 each;

(c) the Chief Justice and the Associate Chief Justice of the Court of Queen's Bench, \$371,400 each; and

(d) the 20 other judges of the Court of Queen's Bench, \$338,800 each.

R.S., 1985, c. J-1, s. 15; R.S., 1985, c. 41 (1st Supp.), s. 4, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 2001, c. 7, s. 7; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2017, c. 20, s. 203; 2022, c. 10, s. 344.

Court of Appeal and Court of Queen's Bench for Manitoba

16 The yearly salaries of the judges of the Court of Appeal for Manitoba and of Her Majesty's Court of Queen's Bench for Manitoba are as follows:

(a) the Chief Justice of Manitoba, \$371,400;

(b) the six Judges of Appeal, \$338,800 each;

(c) the Chief Justice, the Senior Associate Chief Justice and the Associate Chief Justice of the Court of Queen's Bench, \$371,400 each; and

(d) the 31 puisne judges of the Court of Queen's Bench, \$338,800 each.

R.S., 1985, c. J-1, s. 16; R.S., 1985, c. 41 (1st Supp.), s. 5, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 1989, c. 8, s. 3; 2001, c. 7, s. 8; 2006, c. 11, s. 1; 2009, c. 19, s. 1; 2012, c. 31, s. 210; 2017, c. 20, s. 204; 2022, c. 10, s. 345.

Court of Appeal and Supreme Court of British Columbia

17 The yearly salaries of the judges of the Court of Appeal for British Columbia and of the Supreme Court of British Columbia are as follows:

(a) the Chief Justice of British Columbia, \$371,400;

(b) the 12 Justices of Appeal, \$338,800 each;

(c) the Chief Justice and the Associate Chief Justice of the Supreme Court, \$371,400 each; and

(d) the 86 other judges of the Supreme Court, \$338,800 each.

R.S., 1985, c. J-1, s. 17; R.S., 1985, c. 41 (1st Supp.), s. 6, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 1989, c. 8, s. 4; 1990, c. 16, s. 15; 2001, c. 7, s. 9; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2017, c. 20, s. 205; 2021, c. 23, s. 256; 2022, c. 10, s. 346.

Court of Appeal and Supreme Court of Prince Edward Island

18 The yearly salaries of the judges of the Court of Appeal of Prince Edward Island and of the Supreme Court of Prince Edward Island are as follows:

(a) the Chief Justice of Prince Edward Island, \$371,400;

(b) the two other judges of the Court of Appeal, \$338,800 each;

(c) the Chief Justice of the Supreme Court, \$371,400; and

(d) the three other judges of the Supreme Court, \$338,800 each.

R.S., 1985, c. J-1, s. 18; R.S., 1985, c. 50 (1st Supp.), s. 4, c. 27 (2nd Supp.), s. 1, c. 39 (3rd Supp.), s. 1; 2001, c. 7, s. 10; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2015, c. 3, s. 125; 2017, c. 20, s. 206; 2022, c. 10, s. 347.

Court of Appeal and Court of Queen's Bench for Saskatchewan

19 The yearly salaries of the judges of the Court of Appeal for Saskatchewan and of Her Majesty's Court of Queen's Bench for Saskatchewan are as follows:

- (a) the Chief Justice of Saskatchewan, \$371,400;
- (b) the seven Judges of Appeal, \$338,800 each;
- (c) the Chief Justice and the Associate Chief Justice of the Court of Queen's Bench, \$371,400 each; and
- (d) the 33 other judges of the Court of Queen's Bench, \$338,800 each.

R.S., 1985, c. J-1, s. 19; R.S., 1985, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 2001, c. 7, s. 11; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2017, c. 20, s. 207; 2018, c. 12, s. 299; 2021, c. 23, s. 257; 2022, c. 10, s. 348.

Court of Appeal and Court of Queen's Bench of Alberta

20 The yearly salaries of the judges of the Court of Appeal of Alberta and of the Court of Queen's Bench of Alberta are as follows:

- (a) the Chief Justice of Alberta, \$371,400;
- (b) the 10 Justices of Appeal, \$338,800 each;
- (c) the Chief Justice and the two Associate Chief Justices of the Court of Queen's Bench, \$371,400 each; and
- (d) the 70 other Justices of the Court of Queen's Bench, \$338,800 each.

R.S., 1985, c. J-1, s. 20; R.S., 1985, c. 41 (1st Supp.), s. 7, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 1989, c. 8, s. 5; 2001, c. 7, s. 12; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2014, c. 20, s. 165; 2017, c. 20, s. 208, c. 33, s. 231; 2022, c. 10, s. 349.

Supreme Court of Newfoundland and Labrador

21 The yearly salaries of the judges of the Supreme Court of Newfoundland and Labrador are as follows:

- (a) the Chief Justice of Newfoundland and Labrador, \$371,400;
- (b) the five Judges of Appeal, \$338,800 each;
- (c) the Chief Justice and the Associate Chief Justice of the Trial Division, \$371,400 each; and
- (d) the 18 other judges of the Trial Division, \$338,800 each.

R.S., 1985, c. J-1, s. 21; R.S., 1985, c. 41 (1st Supp.), s. 8, c. 50 (1st Supp.), s. 4, c. 27 (2nd Supp.), s. 2, c. 39 (3rd Supp.), s. 1; 1989, c. 8, s. 6; 2001, c. 7, s. 13; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2017, c. 20, s. 209; 2021, c. 23, s. 258; 2022, c. 10, s. 350.

Supreme Court of Yukon

22 (1) The yearly salaries of the judges of the Supreme Court of Yukon are as follows:

- (a) the Chief Justice, \$371,400; and
- (b) the two other judges, \$338,800 each.

Supreme Court of the Northwest Territories

(2) The yearly salaries of the judges of the Supreme Court of the Northwest Territories are as follows:

- (a) the Chief Justice, \$371,400; and
- (b) the two other judges, \$338,800 each.

Nunavut Court of Justice

(2.1) The yearly salaries of the judges of the Nunavut Court of Justice are as follows:

- (a) the Chief Justice, \$371,400; and
- (b) the five other judges, \$338,800 each.

(3) [Repealed, 2017, c. 33, s. 232]

R.S., 1985, c. J-1, s. 22; R.S., 1985, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 1989, c. 8, s. 7; 1999, c. 3, s. 72; 2001, c. 7, s. 14; 2002, c. 7, s. 189; 2006, c. 11, s. 2; 2011, c. 24, s. 170; 2012, c. 31, s. 210; 2017, c. 20, s. 210, c. 33, s. 232; 2022, c. 10, s. 351.

Rounding of amounts

23 A salary referred to in any of [sections 9 to 22](#) that is not a multiple of one hundred dollars shall be rounded down to the next lowest multiple of one hundred dollars.

R.S., 1985, c. J-1, s. 23; R.S., 1985, c. 5 (1st Supp.), s. 2, c. 11 (1st Supp.), s. 2, c. 41 (1st Supp.), s. 9, c. 50 (1st Supp.), s. 4; 1989, c. 8, s. 8; 1990, c. 16, s. 16, c. 17, s. 30; 1992, c. 51, s. 6; 2001, c. 7, s. 15.

Additional judges

24 (1) Notwithstanding [sections 12 to 22](#) but subject to subsections (3) and (4), where the number of judges of a superior court in a province has been increased by or pursuant to an Act of the legislature of the province beyond the number of judges of that court whose salaries are provided for by sections 12 to 22, a salary is payable pursuant to this section to each additional judge, appointed to that court in accordance with that Act and in the manner provided by law, from the time that judge's appointment becomes effective and in the same manner and subject to the same terms and conditions as if the salary were payable under sections 12 to 22.

Salaries fixed

(2) The salary of a judge appointed in the circumstances described in subsection (1) is the salary annexed, pursuant to [sections 12 to 22](#), to the office of judge to which the appointment is made.

Limit

(3) Subject to subsection (4), the number of salaries that may be paid pursuant to this section at any one time shall not be greater than

- (a)** 16, in the case of judges appointed to appeal courts in the provinces; and
- (b)** 79, in the case of judges appointed to superior courts in the provinces other than appeal courts.
- (c)** [Repealed, 1992, c. 51, s. 7]

Unified family courts

(4) For the purposes of assisting the establishment of unified family courts in the provinces, a further number of salaries not greater than 58 at any one time may be paid in the case of judges appointed to courts described in paragraph (3)(b)

- (a)** where the court has the jurisdiction of a unified family court; or
- (b)** where a request has been made by a provincial attorney general for the appointment to the court of judges to exercise the jurisdiction of a unified family court.

Salary deemed payable under [sections 12 to 22](#)

(5) A salary payable to a judge under this section is deemed, for all purposes of the provisions of this Act, other than this section, and of any other Act of Parliament, to be a salary payable under [sections 12 to 22](#).

Definition of *appeal court*

(6) In this section, ***appeal court*** means, in relation to each of the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, Alberta and Newfoundland and Labrador, the Court of Appeal of the Province.

R.S., 1985, c. J-1, s. 24; R.S., 1985, c. 41 (1st Supp.), s. 10, c. 27 (2nd Supp.), s. 3; 1989, c. 8, s. 9; 1992, c. 51, s. 7; 1996, c. 30, s. 1; 1998, c. 30, s. 3; [2006, c. 11, s. 3](#); [2008, c. 26, s. 1](#); [2015, c. 3, s. 126](#); [2017, c. 20, s. 211](#); [2018, c. 12, s. 300](#); [2024, c. 17, s. 320](#).

Periodic Adjustment and Revision of Salaries

Annual adjustment of salary

25 (1) The yearly salaries referred to in [sections 9 to 22](#) apply in respect of the twelve-month period beginning on April 1, 2020.

Annual adjustment of salary

(2) The salary annexed to an office of judge referred to in [sections 9, 10, 10.2, 11 and 12 to 22](#) for the twelve-month period beginning on April 1, 2021, and for each subsequent twelve-month period, shall be the amount obtained by multiplying

(a) the salary annexed to that office for the twelve month period immediately preceding the twelve month period in respect of which the salary is to be determined

by

(b) the percentage that the Industrial Aggregate for the first adjustment year is of the Industrial Aggregate for the second adjustment year, or one hundred and seven per cent, whichever is less.

Meaning of certain expressions

(3) For the purposes of this section,

(a) in relation to any twelve month period in respect of which the salary is to be determined, the **first adjustment year** is the most recent twelve month period for which the Industrial Aggregate is available on the first day of the period in respect of which the salary is to be determined, and the **second adjustment year** is the twelve month period immediately preceding the first adjustment year; and

(b) the **Industrial Aggregate** for an adjustment year is the average weekly wages and salaries of the Industrial Aggregate in Canada for that year as published by Statistics Canada under the authority of the [Statistics Act](#).

R.S., 1985, c. J-1, s. 25; R.S., 1985, c. 16 (3rd Supp.), s. 2; 1993, c. 13, s. 10; 1994, c. 18, s. 9; 1998, c. 30, s. 4; [2001, c. 7, s. 16](#); [2006, c. 11, s. 4](#); [2012, c. 31, s. 211](#); [2014, c. 39, s. 319](#); [2017, c. 20, s. 212](#); [2022, c. 10, s. 352](#).

Commission

26 (1) The Judicial Compensation and Benefits Commission is hereby established to inquire into the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judges' benefits generally.

Factors to be considered

(1.1) In conducting its inquiry, the Commission shall consider

(a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;

(b) the role of financial security of the judiciary in ensuring judicial independence;

(c) the need to attract outstanding candidates to the judiciary; and

(d) any other objective criteria that the Commission considers relevant.

Quadrennial inquiry

(2) The Commission shall commence an inquiry on June 1, 2020, and on June 1 of every fourth year after 2020, and shall submit a report containing its recommendations to the Minister within nine months after the date of commencement.

Postponement

(3) The Commission may, with the consent of the Minister and the judiciary, postpone the date of commencement of a quadrennial inquiry.

Other reports

(4) In addition to its quadrennial inquiry, the Minister may at any time refer to the Commission for its inquiry a matter mentioned in subsection (1). The Commission shall submit to that Minister a report containing its recommendations within a period fixed by the Minister after consultation with the Commission.

Extension of time

(5) The Governor in Council may, on the request of the Commission, extend the time for submission of a report under subsection (2) or (4).

Report of Commission

(6) The Minister shall table a copy of the report in each House of Parliament on any of the first ten days on which that House is sitting after the Minister receives the report.

Referral to Committee

(6.1) A report that is tabled in each House of Parliament under subsection (6) shall, on the day it is tabled or, if the House is not sitting on that day, on the day that House next sits, be referred by that House to a committee of that House that is designated or established by that House for the purpose of considering matters relating to justice.

Report by Committee

(6.2) A committee referred to in subsection (6.1) may conduct inquiries or public hearings in respect of a report referred to it under that subsection, and if it does so, the committee shall, not later than ninety sitting days after the report is referred to it, report its findings to the House that designated or established the committee.

Definition of *sitting day*

(6.3) For the purpose of subsection (6.2), ***sitting day*** means a day on which the House of Commons or the Senate, as the case may be, sits.

Response to report

(7) The Minister shall respond to a report of the Commission within four months after receiving it. Following that response, if applicable, he or she shall, within a reasonable period, cause to be prepared and introduced a bill to implement the response.

R.S., 1985, c. J-1, s. 26; 1996, c. 2, s. 1; 1998, c. 30, s. 5; [2001, c. 7, s. 17\(F\)](#); [2012, c. 31, s. 212](#); [2017, c. 20, s. 213](#); [2023, c. 18, s. 13](#).

Nomination

26.1 (1) The Judicial Compensation and Benefits Commission consists of three members appointed by the Governor in Council as follows:

- (a) one person nominated by the judiciary;
- (b) one person nominated by the Minister; and
- (c) one person, who shall act as chairperson, nominated by the members who are nominated under paragraphs (a) and (b).

Tenure and removal

(2) Each member holds office during good behaviour, and may be removed for cause at any time by the Governor in Council.

Term of office

(3) The term of office for the initial members appointed to the Commission ends on August 31, 2003. The members subsequently appointed hold office for a term of four years.

Continuance of duties

(4) Where the term of a member ends, other than in the case of removal for cause, the member may carry out and complete any duties of the members in respect of a matter that was referred to the Commission under [subsection 26\(4\)](#) while he or she was a member.

Reappointment

(5) A member is eligible to be reappointed for one further term if re-nominated in accordance with subsection (1).

Absence or incapacity

(6) In the event of the absence or incapacity of a member, the Governor in Council may appoint as a substitute temporary member a person nominated in accordance with subsection (1) to hold office during the absence or incapacity.

Vacancy

(7) If the office of a member becomes vacant during the term of the member, the Governor in Council shall appoint a person nominated in accordance with subsection (1) to hold office as a member for the remainder of the term.

Quorum

(8) A quorum of the Commission consists of all three members.

Remuneration

(9) The members of the Commission and persons carrying out duties under subsection (4) shall be paid

- (a) the fees fixed by the Governor in Council; and

(b) such travel and living expenses incurred in the course of their duties while away from their ordinary place of residence as are fixed by the Governor in Council.

Compensation

(10) The members of the Commission and persons carrying out duties under subsection (4) are deemed to be employed in the federal public administration for the purposes of the *Government Employees Compensation Act* and any regulations made under [section 9](#) of the *Aeronautics Act*.

1998, c. 30, s. 5; [2003, c. 22, s. 224\(E\)](#); [2023, c. 18, s. 13](#).

Definition of *judiciary*

26.11 In [sections 26](#) and [26.1](#), ***judiciary*** includes associate judges.

[2017, c. 20, s. 214](#); [2022, c. 10, s. 353](#); [2022, c. 10, s. 371](#).

Personnel

26.2 (1) The Commission may engage the services of any persons necessary for the proper conduct of the Commission.

Presumption

(2) No person engaged under subsection (1) shall, as a result, be considered to be employed in the federal public administration.

1998, c. 30, s. 5; [2003, c. 22, s. 224\(E\)](#).

Costs payable

26.3 (1) The Commission may identify those representatives of the judiciary participating in an inquiry of the Commission to whom costs shall be paid in accordance with this section.

Entitlement to payment of costs

(2) A representative of the judiciary identified under subsection (1) who participates in an inquiry of the Commission is entitled to be paid, out of the Consolidated Revenue Fund, two thirds of the costs determined under subsection (3) in respect of his or her participation.

Determination of costs

(3) An assessment officer of the Federal Court, other than a judge or an associate judge, shall determine the amount of costs, on a solicitor-and-client basis, in accordance with the *Federal Courts Rules*.

Application

(4) This section applies to costs incurred in relation to participation in any inquiry of the Commission conducted after September 1, 1999.

Costs payable to representative of associate judges

26.4 (1) The Commission may identify one representative of the associate judges of the Federal Court and one representative of the associate judges of the Tax Court of Canada participating in an inquiry of the Commission to whom costs shall be paid in accordance with this section.

Entitlement to payment of costs

(2) The representatives identified under subsection (1) are entitled to be paid, out of the Consolidated Revenue Fund, 95% of the costs determined under subsection (3) in respect of their participation.

Determination of costs

(3) An assessment officer of the Federal Court, other than a judge or an associate judge, shall determine the amount of costs, on a solicitor-and-client basis, in accordance with the *Federal Courts Rules*.

Application

(4) This section applies to costs incurred as of April 1, 2015 in relation to participation in any inquiry of the Commission.

2014, c. 39, s. 321; 2017, c. 20, s. 215; 2022, c. 10, s. 354; 2022, c. 10, s. 371.

Special and Representational Allowances

Allowance for incidental expenditures actually incurred

27 (1) On and after April 1, 2020, every judge in receipt of a salary under this Act is entitled to be paid, up to a maximum of \$7,500 for each year, for reasonable incidental expenditures that the fit and proper execution of the office of judge may require, to the extent that the judge has actually incurred the expenditures and is not entitled to be reimbursed for them under any other provision of this Act.

Allowance for incidental expenditures by associate judges

(1.1) On and after April 1, 2020, every associate judge is entitled to be paid, up to a maximum of \$7,500 for each year, for reasonable incidental expenditures that the fit and proper execution of the office of associate judge may require, to the extent that the associate judge has actually incurred the expenditures and is not entitled to be reimbursed for them under any other provision of this Act.

Additional allowance for northern judges

(2) On and after April 1, 2004, there shall be paid to each judge of the Supreme Court of Newfoundland and Labrador resident in Labrador and each judge of the Supreme Court of Yukon, the Supreme Court of the Northwest Territories and the Nunavut Court of Justice

who is in receipt of a salary under this Act, in addition to the allowance provided by subsection (1), a non-accountable yearly allowance of \$12,000 as compensation for the higher cost of living in Labrador and in the territories.

Allowance — medical or dental treatment

(2.1) If a judge referred to in subsection (2) is required to travel for the purpose of receiving a non-elective medical or dental treatment that is required without delay and unavailable at or in the immediate vicinity of the place where the judge resides, the judge is entitled to be paid an allowance for reasonable expenses actually incurred while travelling for that purpose, to the extent that the judge may not be reimbursed for them under any other provision of this Act.

Additional allowance — Federal Courts and Tax Court of Canada

(3) There shall be paid to every judge of the Federal Court of Appeal, the Federal Court and the Tax Court of Canada who is in receipt of a salary under this Act, in addition to the allowance provided by subsection (1), a non-accountable yearly allowance of \$2,000 as compensation for special incidental expenditures inherent in the exercise of their office as judge.

(3.1) [Repealed, 2002, c. 8, s. 86]

Continuance in force of subsection (3)

(4) Subsection (3) shall continue in force for so long as [subsection 57\(2\)](#) continues in force in relation to judges of superior courts in the provinces.

Idem

(5) The additional allowances described in subsections (2) and (3) are deemed not to be travel or personal or living expense allowances expressly fixed by this Act.

Representational allowance

(6) On and after April 1, 2020, each of the following judges is entitled to be paid, as a representational allowance, reasonable travel and other expenses actually incurred by the judge or the spouse or common-law partner of the judge in discharging the special extra-judicial obligations and responsibilities that devolve on the judge, to the extent that those expenses may not be reimbursed under any other provision of this Act and their aggregate amount does not exceed in any year the maximum amount indicated below in respect of the judge:

- (a)** the Chief Justice of Canada, \$25,000;
- (b)** each puisne judge of the Supreme Court of Canada, \$15,000;
- (c)** the Chief Justice of the Federal Court of Appeal and each chief justice described in [sections 12 to 21](#) as the chief justice of a province, \$17,500;
- (d)** each other chief justice referred to in [sections 10 to 21](#), \$15,000;

(e) the Chief Justices of the Court of Appeal of Yukon, the Court of Appeal of the Northwest Territories, the Court of Appeal of Nunavut, the Supreme Court of Yukon, the Supreme Court of the Northwest Territories and the Nunavut Court of Justice, \$15,000 each;

(f) the Chief Justice of the Court Martial Appeal Court of Canada, \$15,000; and

(g) the Senior Judge of the Family Court, and each regional senior judge, of the Superior Court of Justice in and for the Province of Ontario, \$7,500.

(7) [Repealed, 2006, c. 11, s. 6]

Judge acting in place of recipient

(8) Where any justice or judge mentioned in subsection (6), other than a puisne judge of the Supreme Court of Canada, is unable to discharge the obligations and responsibilities referred to in that subsection or the office of that justice or judge is vacant, the judge who acts in the place of that justice or judge is entitled to be paid the representational allowance provided for that justice or judge.

Definition of *chief justice*

(9) In this section, except in paragraphs (6)(a) and (c), ***chief justice*** includes a senior associate chief justice and an associate chief justice.

R.S., 1985, c. J-1, s. 27; R.S., 1985, c. 50 (1st Supp.), s. 5, c. 27 (2nd Supp.), s. 4, c. 51 (4th Supp.), s. 14; 1989, c. 8, s. 10; 1990, c. 17, s. 31; 1992, c. 51, s. 8; 1993, c. 28, s. 78; 1996, c. 30, s. 2; 1998, c. 15, s. 29; 1999, c. 3, s. 73; 2000, c. 12, s. 168; 2001, c. 7, s. 19; 2002, c. 7, ss. 190, 277(E), c. 8, s. 86; 2006, c. 11, s. 6; 2012, c. 31, s. 213; 2017, c. 20, s. 216, c. 33, s. 233; 2022, c. 10, s. 356; 2022, c. 10, s. 371.

Supernumerary Judges and Associate Judges

Federal Courts and Tax Court

28 (1) If a judge of the Federal Court of Appeal, the Federal Court or the Tax Court of Canada notifies the Minister of his or her election to give up regular judicial duties and hold office only as a supernumerary judge, the judge shall hold the office of supernumerary judge of that Court from the time notice is given until he or she reaches the age of retirement, resigns or is removed from or otherwise ceases to hold office, or until the expiry of 10 years from the date of the election, whichever occurs earlier, and shall be paid the salary annexed to that office.

Restriction on election

(2) An election may be made under subsection (1) only by a judge

(a) who has continued in judicial office for at least 15 years and whose combined age and number of years in judicial office is not less than 80; or

(b) who has attained the age of 70 years and has continued in judicial office for at least 10 years.

Duties of judge

(3) A judge who has made the election referred to in subsection (1) shall hold himself or herself available to perform such special judicial duties as may be assigned to the judge

(a) by the Chief Justice of the Federal Court of Appeal, if the judge is a judge of that Court;

(b) by the Chief Justice or the Associate Chief Justice of the Federal Court, if the judge is a judge of that Court; or

(c) by the Chief Justice or the Associate Chief Justice of the Tax Court of Canada, if the judge is a judge of that Court.

Salary of supernumerary judge

(4) The salary of each supernumerary judge of the Federal Court of Appeal, the Federal Court or the Tax Court of Canada is the salary annexed to the office of a judge of that Court, other than the office of a Chief Justice or Associate Chief Justice.

R.S., 1985, c. J-1, s. 28; R.S., 1985, c. 16 (3rd Supp.), s. 3; [2002, c. 8, s. 87](#); [2006, c. 11, s. 7](#); [2018, c. 12, s. 301](#); [2023, c. 18, s. 13](#).

Provincial superior courts

29 (1) If the legislature of a province has enacted legislation establishing for each office of judge of a superior court of the province the additional office of supernumerary judge of the court, and a judge of that court notifies the Minister and the attorney general of the province of the judge's election to give up regular judicial duties and hold office only as a supernumerary judge, the judge shall hold the office of supernumerary judge from the time notice is given until he or she reaches the age of retirement, resigns or is removed from or otherwise ceases to hold office, or until the expiry of 10 years from the date of the election, whichever occurs earlier, and shall be paid the salary annexed to that office.

Conditions

(2) An election under subsection (1) may only be made by a judge

(a) who has continued in judicial office for at least 15 years and whose combined age and number of years in judicial office is not less than 80; or

(b) who has attained the age of 70 years and has continued in judicial office for at least 10 years.

Duties of judge

(3) A judge who has made the election referred to in subsection (1) shall hold himself or herself available to perform such special judicial duties as may be assigned to the judge

(a) by the chief justice, senior associate chief justice or associate chief justice, as the case may be, of the court of which the judge is a member or, where that court is constituted with divisions, of the division of which the judge is a member; or

(b) in the case of a supernumerary judge of the Supreme Court of Yukon, the Supreme Court of the Northwest Territories or the Nunavut Court of Justice, by the Chief Justice of that Court.

Salary of supernumerary judge

(4) The salary of each supernumerary judge of a superior court is the salary annexed to the office of a judge of that court other than a chief justice, senior associate chief justice or associate chief justice.

Reference to attorney general of a province

(5) In this section, a reference to the attorney general of a province shall be construed in relation to Yukon, the Northwest Territories and Nunavut as a reference to the Commissioner of that territory.

(6) [Repealed, 2017, c. 33, s. 234]

R.S., 1985, c. J-1, s. 29; 1993, c. 28, s. 78; 1999, c. 3, s. 74; 2002, c. 7, s. 191, c. 8, s. 88(E); 2006, c. 11, s. 8; 2012, c. 31, s. 214; 2017, c. 33, s. 234; 2023, c. 18, s. 13.

Supernumerary associate judges

30 (1) If an associate judge notifies the Minister of his or her election to give up regular judicial duties and hold office only as a supernumerary associate judge, the associate judge shall hold the office of supernumerary associate judge from the time notice is given until he or she reaches the age of retirement, resigns or is removed from or otherwise ceases to hold office, or until the end of five years from the date of the election, whichever occurs earlier, and shall be paid the salary annexed to that office.

Restriction on election

(2) An election may be made under subsection (1) only by an associate judge

(a) who has continued in judicial office for at least 15 years and whose combined age and number of years in judicial office is not less than 80; or

(b) who has attained the age of 70 years and has continued in judicial office for at least 10 years.

Duties of associate judge

(3) An associate judge who has made the election referred to in subsection (1) shall hold himself or herself available to perform such special judicial duties as may be assigned to the associate judge by the chief justice or the associate chief justice of the court to which he or she is appointed.

Salary of supernumerary associate judge

(4) The salary of each supernumerary associate judge is the salary annexed to the office of an associate judge.

Deemed election and notice

(5) For the purposes of subsection (1), if an associate judge gives notice to the Minister of the associate judge's election to be effective on a future day specified in the notice, being a day on which the associate judge will be eligible to make the election, the associate judge is, effective on that day, deemed to have elected and given notice of the election on that day.

R.S., 1985, c. J-1, s. 30; R.S., 1985, c. 16 (3rd Supp.), s. 4; 1990, c. 17, s. 32; 1992, c. 51, s. 9; [2022, c. 10, s. 358](#); [2022, c. 10, s. 371](#); [2022, c. 10, s. 375](#).

Chief Justice Continuing as Judge

Election of Chief or Associate Chief to change to duties of judge only

31 (1) If the Chief Justice of the Federal Court of Appeal or the Chief Justice or Associate Chief Justice of the Federal Court or the Tax Court of Canada has notified the Minister of his or her election to cease to perform the duties of that office and to perform only the duties of a judge, he or she shall then hold only the office of a judge of the Federal Court of Appeal, the Federal Court or the Tax Court of Canada, as the case may be, and shall be paid the salary annexed to the office of a judge of that Court, until he or she reaches the age of retirement, resigns or is removed from or otherwise ceases to hold office.

Restriction on election

(2) The Chief Justice of the Federal Court of Appeal or the Chief Justice or Associate Chief Justice of the Federal Court or the Tax Court of Canada may make the election referred to in subsection (1) only if he or she has continued in the office for at least five years or has continued in the office and another office referred to in this subsection for a total of at least five years.

Duties of judge

(3) The Chief Justice of the Federal Court of Appeal or the Chief Justice or Associate Chief Justice of the Federal Court or the Tax Court of Canada who has made the election referred to in subsection (1) shall perform all of the judicial duties normally performed by a judge of the Federal Court of Appeal, the Federal Court or the Tax Court of Canada, as the case may be.

Salary of judge

(4) The salary of the Chief Justice of the Federal Court of Appeal or the Chief Justice or Associate Chief Justice of the Federal Court or the Tax Court of Canada who has made the election referred to in subsection (1) is the salary annexed to the office of a judge (other than the Chief Justice) of the Federal Court of Appeal, a judge (other than the Chief Justice or the Associate Chief Justice) of the Federal Court or a judge (other than the Chief Justice or the Associate Chief Justice) of the Tax Court of Canada, as the case may be.

R.S., 1985, c. J-1, s. 31; [2002, c. 8, s. 90](#); [2017, c. 20, s. 217\(F\)](#); [2018, c. 12, s. 302](#); [2023, c. 18, s. 13](#).

Election of Chief Justice of the Court Martial Appeal Court of Canada

31.1 If the Chief Justice of the Court Martial Appeal Court of Canada notifies the Minister of their election to cease to perform the duties of that office and to perform only the duties of a judge of the court on which they serve, they shall, after giving that notice, hold only the office of a judge and shall be paid the salary annexed to the office of a judge, until they reach the age of retirement, resign or are removed from or otherwise cease to hold office.

[2017, c. 20, s. 218](#); [2023, c. 18, s. 13](#).

Election to cease to perform duties of chief justice of provincial superior court

32 (1) Where the legislature of a province has enacted legislation establishing for each office of chief justice of a superior court of the province such additional offices of judge of that court as are required for the purposes of this section, and a chief justice of that court has notified the Minister and the attorney general of the province of his or her election to cease to perform the duties of chief justice and to perform only the duties of a judge, the chief justice shall thereupon hold only the office of a judge, other than a chief justice, of that court and shall be paid the salary annexed to the office of a judge, other than a chief justice, of that court until he or she reaches the age of retirement, resigns or is removed from or otherwise ceases to hold office.

Restriction on election

(2) A chief justice of a superior court of a province may make the election referred to in subsection (1) only if the chief justice has continued in the office of chief justice, senior associate chief justice or associate chief justice of a superior court of the province or a division thereof, or in two or more such offices, for at least five years.

Duties of judge

(3) A chief justice of a superior court of a province who has made the election referred to in subsection (1) shall perform all of the judicial duties normally performed by a judge, other than the chief justice, of that court.

Salary of judge

(4) The salary of each chief justice of a superior court of a province who has made the election referred to in subsection (1) is the salary annexed to the office of a judge of that court, other than a chief justice.

Definition of *chief justice* and *chief justice of a superior court of a province*

(5) In this section, ***chief justice*** or ***chief justice of a superior court of a province*** means a chief justice, senior associate chief justice or associate chief justice of such a court or, where the court is constituted with divisions, of a division thereof.

(6) [\[Repealed, 1992, c. 51, s. 10\]](#)

R.S., 1985, c. J-1, s. 32; 1992, c. 51, s. 10; [2002, c. 8, s. 91\(E\)](#); [2023, c. 18, s. 13](#).

Chief Justice

32.1 (1) If the Chief Justice of the Supreme Court of Yukon, the Supreme Court of the Northwest Territories or the Nunavut Court of Justice has notified the Minister and the attorney general of the territory of his or her election to cease to perform the duties of chief justice and to perform only the duties of a judge, he or she shall then hold only the office of a judge, other than the chief justice, of that court and shall be paid the salary annexed to the office of a judge, other than the chief justice, of that court until he or she reaches the age of retirement, resigns or is removed from or otherwise ceases to hold office.

Restriction on election

(2) A chief justice may make the election referred to in subsection (1) only if he or she has continued in that office for at least five years.

Duties

(3) A chief justice who has made the election referred to in subsection (1) shall perform all of the judicial duties normally performed by a judge, other than the chief justice, of the applicable court.

Salary

(4) The salary of a chief justice who has made the election referred to in subsection (1) is the salary annexed to the office of a judge, other than the chief justice, of the applicable court.

[2012, c. 31, s. 216](#); [2017, c. 33, s. 236](#); [2023, c. 18, s. 13](#).

Early Notice

Deemed election and notice

33 (1) If a judge gives notice to the Minister and, if appropriate, to the attorney general of the province concerned of the judge's election as provided in [section 28, 29, 31, 31.1, 32](#) or [32.1](#) to be effective on a future day specified in the notice, being a day on which the judge will be eligible to so elect, the judge is, effective on that day, deemed to have elected and given notice of the election on that day under section 28, 29, 31, 31.1, 32 or 32.1, as the case may be.

Reference to attorney general of a province

(2) In this section, a reference to the attorney general of a province shall be construed in relation to Yukon, the Northwest Territories and Nunavut as a reference to the Commissioner of that territory.

[R.S., 1985, c. J-1, s. 33](#); [1992, c. 51, s. 11](#); [1993, c. 28, s. 78](#); [2002, c. 7, s. 192](#); [2017, c. 20, s. 219](#); [2023, c. 18, s. 13](#).

Travel and Other Allowances

Superior courts

34 (1) Subject to this section and [sections 36 to 39](#), a judge of a superior court who, for the purposes of performing any function or duty in that capacity, attends at any place other than that at which or in the immediate vicinity of which the judge is by law obliged to reside is entitled to be paid, as a travel allowance, moving or transportation expenses and the reasonable travel and other expenses incurred by the judge in so attending.

Where no allowance

(2) No judge is entitled to be paid a travel allowance for attending at or in the immediate vicinity of the place where the judge resides.

R.S., 1985, c. J-1, s. 34; 1992, c. 51, s. 12; [2002, c. 8, s. 92](#).

35 [\[Repealed, 1992, c. 51, s. 13\]](#)

Certain superior courts, where no allowance

36 (1) No travel allowance shall be paid

(a) to a judge of the Nova Scotia Court of Appeal or of the Supreme Court of Nova Scotia for attending at the judicial centre at which or in the immediate vicinity of which the judge maintains his or her principal office;

(b) to a judge of the Court of Appeal of Prince Edward Island or the Supreme Court of Prince Edward Island for attending at the city of Charlottetown; or

(c) to a judge of the Court of Appeal for British Columbia for attending at either of the cities of Victoria or Vancouver, unless the judge resides at the other of those cities or in the immediate vicinity thereof.

Where place of residence approved by order in council

(2) Nothing in subsection (1) affects the right of a judge to be paid a travel allowance under subsection 34(1) if the judge resides at a place approved by the Governor in Council.

R.S., 1985, c. J-1, s. 36; 1992, c. 51, s. 14; [2015, c. 3, s. 127](#).

Judges of Supreme Court of Nova Scotia

37 A judge of the Supreme Court of Nova Scotia who, for the purposes of performing any function or duty in that capacity, attends at any judicial centre within the judicial district for which the judge is designated as a resident judge, other than the judicial centre at which or in the immediate vicinity of which the judge resides or maintains his or her principal office, is entitled to be paid, as a travel allowance, moving or transportation expenses and the reasonable travel and other expenses incurred by the judge in so attending.

R.S., 1985, c. J-1, s. 37; 1992, c. 51, s. 15.

Judges of the Superior Court of Justice of Ontario

38 A judge of the Superior Court of Justice in and for the Province of Ontario who, for the purpose of performing any function or duty in that capacity, attends at any judicial centre

within the region for which the judge was appointed or assigned, other than the judicial centre at which or in the immediate vicinity of which the judge resides, is entitled to be paid, as a travel allowance, moving or transportation expenses and the reasonable travel and other expenses incurred by the judge in so attending.

R.S., 1985, c. J-1, s. 38; R.S., 1985, c. 11 (1st Supp.), s. 2; 1990, c. 17, s. 33; 1998, c. 30, s. 6.

Certificate of judge

39 Every application for payment of a travel allowance shall be accompanied by a certificate of the judge applying for it showing the number of days for which a travel allowance is claimed and the amount of the actual expenses incurred.

R.S., c. J-1, s. 21.

Removal allowance

40 (1) A removal allowance shall be paid to

(a) a person who is appointed a judge of a superior court and who, for the purposes of assuming the functions and duties of that office, is required to move from his or her place of residence to a place outside the immediate vicinity of the place where the person resided at the time of the appointment;

(b) a judge of a superior court who, during tenure and for the purposes of performing the functions and duties of that office, is required to change the place of residence of the judge to a place other than that at which or in the immediate vicinity of which the judge was required to reside immediately before being required to change the place of residence of that judge;

(c) a judge of the Supreme Court of Newfoundland and Labrador resident in Labrador, the Supreme Court of Yukon, the Supreme Court of the Northwest Territories or the Nunavut Court of Justice who moves to a place of residence in one of the 10 provinces or in another territory during the period of two years

(i) beginning two years before the judge's date of eligibility to retire, or

(ii) if no removal allowance is paid in respect of a move made during the period described in subparagraph (i), beginning on the judge's date of retirement or resignation from office;

(d) a survivor or *child*, as defined in subsection 47(1), of a judge of the Supreme Court of Newfoundland and Labrador resident in Labrador, the Supreme Court of Yukon, the Supreme Court of the Northwest Territories or the Nunavut Court of Justice who dies while holding office as such, if the survivor or child lives with the judge at the time of the judge's death and, within two years after the death, moves to a place of residence in one of the 10 provinces or in another territory;

(e) a judge of the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court or the Tax Court of Canada who moves to a place of residence in Canada outside the area within which the judge was required to reside by the Act establishing that Court, during the period of two years

(i) beginning two years before the judge's date of eligibility to retire, or

(ii) if no removal allowance is paid in respect of a move made during the period described in subparagraph (i), beginning on the judge's date of retirement or resignation from office; and

(f) a survivor or child, as defined in subsection 47(1), of a judge of the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court or the Tax Court of Canada who dies while holding office as such, if the survivor or child lives with the judge at the time of the judge's death and, within two years after the death, moves to a place of residence in Canada outside the area within which the judge was required to reside by the Act establishing that Court.

Limitation

(1.1) Paragraphs (1)(c) and (d) apply only in respect of

(a) a judge who resided in one of the 10 provinces or in another territory at the time of appointment to the Supreme Court of Yukon, the Supreme Court of the Northwest Territories or the Nunavut Court of Justice, as the case may be; or

(b) a judge of the Supreme Court of Newfoundland and Labrador resident in Labrador who at the time of appointment did not reside there.

Limitation

(1.2) Paragraphs (1)(e) and (f) apply only in respect of a judge who, at the time of appointment to the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court or the Tax Court of Canada, as the case may be, resided outside the area within which the judge was required to reside by the Act establishing that Court.

Idem

(2) A removal allowance referred to in subsection (1) shall be paid for moving and other expenses of such kinds as are prescribed by or under the authority of the Governor in Council and on such terms and conditions as are so prescribed.

Expenses of spouse or common-law partner

(2.1) Where a removal allowance is payable to a judge of the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court or the Tax Court of Canada under paragraph (1)(a), an employment assistance allowance shall be paid to the judge's spouse or common-law partner up to a maximum of \$5,000 for expenses actually incurred by the spouse or common-law partner in pursuing employment in the judge's new place of residence.

R.S., 1985, c. J-1, s. 40; R.S., 1985, c. 50 (1st Supp.), s. 6; 1989, c. 8, s. 11; 1992, c. 51, s. 16; 1999, c. 3, s. 75; 2000, c. 12, s. 160; [2002, c. 7, s. 193](#), c. 8, s. 93; [2006, c. 11, s. 9](#); [2017, c. 20, s. 220](#).

Meeting, conference and seminar expenses

41 (1) A judge of a superior court who attends a meeting, conference or seminar that is held for a purpose relating to the administration of justice and that the judge in the capacity of a judge is required by law to attend, or who, with the approval of the chief justice of that court, attends any such meeting, conference or seminar that the judge in that capacity is expressly authorized by law to attend, is entitled to be paid, as a conference allowance, reasonable travel and other expenses actually incurred by the judge in so attending.

Expenses for other meetings, conferences or seminars

(2) Subject to subsection (3), a judge of a superior court who, with the approval of the chief justice of that court,

(a) attends a meeting, conference or seminar that the judge in the capacity of a judge is not expressly authorized by law or is not required by law to attend but that is certified by the chief justice to be a meeting, conference or seminar having as its object or as one of its objects the promotion of efficiency or uniformity in the superior courts, or the improvement of the quality of judicial service in those courts, or

(b) in lieu of attending a meeting, conference or seminar referred to in paragraph (a) that is certified as provided in that paragraph, acquires written or recorded materials distributed for the purpose of, or written or recorded proceedings of, any such meeting, conference or seminar,

is entitled to be paid, as a conference allowance, reasonable travel and other expenses actually incurred by the judge in so attending or the cost of acquiring the materials or proceedings, as the case may be.

Limitation

(3) Where the aggregate amount of conference allowances that have been paid under subsection (2) in any year

(a) to the judges of the Supreme Court of Canada exceeds the product obtained by multiplying the number of judges of that Court by one thousand dollars, or

(b) to the judges of any other particular superior court exceeds the greater of \$5,000 and the product obtained by multiplying the number of judges of that court by \$500,

no additional amount may be paid under that subsection in that year as a conference allowance to any judge of that court except with the approval of the Minister.

Definitions

(4) For the purposes of this section,

chief justice of any court of which a particular judge is a member means the chief justice or other person recognized by law as having rank or status senior to all other members of, or having the supervision of, that court, but if that court is constituted with divisions, then it means the person having that rank or status in relation to all other members of the division of which the particular judge is a member; (*juge en chef*)

superior court, in the case of a superior court constituted with divisions, means a division thereof. (*juridiction supérieure*)

R.S., 1985, c. J-1, s. 41; R.S., 1985, c. 50 (1st Supp.), s. 7; 1992, c. 51, s. 17; [2002, c. 8, s. 94](#); [2023, c. 18, s. 13](#).

Special Retirement Provision — Supreme Court of Canada Judges

Retired judge may continue to hold office

41.1 (1) A judge of the Supreme Court of Canada who has retired may, with the approval of the Chief Justice of Canada, continue to participate in judgments in which he or she participated before retiring, for a period not greater than six months after the date of the retirement.

Salary, etc.

(2) A retired judge participating in judgments shall receive

- (a)** the salary annexed to the office during that period less any amount otherwise payable to him or her under this Act in respect of the period, other than those amounts described in paragraphs (b) and (c);
- (b)** an amount that bears the same ratio to the allowance for incidental expenditures actually incurred referred to in subsection 27(1) that the number of months in the period bears to twelve; and
- (c)** the representational allowance referred to in [subsection 27\(6\)](#) for the period, as though the appropriate maximum referred to in that subsection were an amount that bears the same ratio to that allowance that the number of months in the period bears to twelve.

No extra remuneration

(3) [Section 57](#) applies with respect to a judge to whom this section applies.

[2001, c. 7, s. 20](#); [2006, c. 11, s. 10](#).

Benefits

Life insurance

41.2 (1) The Treasury Board shall establish, or enter into a contract to acquire, an insurance program for judges covering the following, on terms and conditions similar to those contained in the Public Service Management Insurance Plan and the public service management insurance directives that apply to executives:

- (a)** basic life insurance;
- (b)** supplementary life insurance;

- (c) post-retirement life insurance;
- (d) dependants' insurance; and
- (e) accidental death and dismemberment insurance.

Administration

(2) The Treasury Board may

- (a) set terms and conditions in respect of the program, including those respecting premiums or contributions payable, benefits, and management and control of the program;
- (b) make contributions and pay premiums or benefits, as required, out of the Consolidated Revenue Fund; and
- (c) undertake and do all things it considers appropriate for the purpose of administering or supervising the program.

Non-application of certain regulations

(3) A contract entered into under this section is not subject to any regulation with respect to contracts made by the Treasury Board under the *Financial Administration Act*.

Compulsory participation

(4) Participation in basic life insurance under paragraph (1)(a) is compulsory for all judges.

Transitional

(5) A judge who holds office on the day on which this section comes into force may, despite subsection (4), elect, at any time within ninety days after that day,

- (a) to participate in basic life insurance under paragraph (1)(a) but have his or her coverage under it limited to 100 per cent of salary at the time of his or her death; or
- (b) not to participate in basic life insurance.

Transitional

(6) Subject to subsection (7), on the coming into force of this section, judges shall no longer be eligible for coverage under any other life insurance program established by the Treasury Board.

Supplementary life insurance

(7) Those judges covered by supplementary life insurance on the coming into force of this section may have their coverage continued under the insurance program for judges, unless they have made an election under paragraph (5)(b).

Health and dental care benefits

41.3 (1) Judges shall be eligible to participate in the Public Service Health Care Plan and the Public Service Dental Care Plan established by the Treasury Board, on the same terms and conditions as apply to employees in the executive group.

Health and dental care benefits for retired judges

(2) Judges who are in receipt of an annuity under this Act shall be eligible to participate in the Public Service Health Care Plan and the Pensioners' Dental Services Plan established by the Treasury Board, on the same terms and conditions as apply to pensioners.

Administration

(3) Subject to subsections (1) and (2), the Treasury Board may

- (a)** set any terms and conditions in respect of those plans, including those respecting premiums or contributions payable, benefits, and management and control of the plans;
- (b)** make contributions and pay premiums or benefits, as required, out of the Consolidated Revenue Fund; and
- (c)** undertake and do all things it considers appropriate for the purpose of administering or supervising the plans.

2001, c. 7, s. 20.

Accidental death in the exercise of duties

41.4 (1) Compensation, within the meaning of the [Government Employees Compensation Act](#), shall be paid to the dependants of a judge whose death results from an accident arising out of or in the performance of judicial duties, on the same basis as that paid to dependants eligible for compensation under that Act.

Flying accidents causing death

(2) Regulations made under [section 9](#) of the [Aeronautics Act](#) apply with respect to a judge whose death results from an accident arising out of or in the performance of judicial duties.

Death resulting from act of violence

(3) Compensation shall be paid to the survivors of a judge whose death results from an act of violence unlawfully committed by another person or persons that occurs while the judge is performing judicial duties, on the same basis as that paid to the survivors of employees slain on duty within the meaning of the Public Service Income Benefit Plan for Survivors of Employees Slain on Duty, with any modifications that the circumstances require.

Application

(4) Subsections (1) to (3) apply to deaths that occur on or after April 1, 2000.

2001, c. 7, s. 20.

Delegation

41.5 (1) The Treasury Board may authorize the President or Secretary of the Treasury Board to exercise and perform, in such manner and subject to such terms and conditions as the Treasury Board directs, any of the powers and functions of the Treasury Board under [sections 41.2](#) and [41.3](#) and may, from time to time as it sees fit, revise or rescind and reinstate the authority so granted.

Subdelegation

(2) The President or Secretary of the Treasury Board may, subject to and in accordance with the authorization, authorize one or more persons under his or her jurisdiction or any other person to exercise or perform any of those powers or functions.

2001, c. 7, s. 20.

Annuities for Judges

Payment of annuities

42 (1) A judge shall be paid an annuity equal to two thirds of the salary annexed to the office held by the judge at the time of his or her resignation, removal or attaining the age of retirement, as the case may be, if the judge

(a) has continued in judicial office for at least 15 years, has a combined age and number of years in judicial office that is not less than 80 and resigns from office;

(b) has attained the age of retirement and has held judicial office for at least 10 years; or

(c) has continued in judicial office on the Supreme Court of Canada for at least 10 years and resigns from office.

Grant of annuities

(1.1) The Governor in Council shall grant to a judge an annuity equal to two thirds of the salary annexed to the office held by the judge at the time of his or her resignation, removal or attaining the age of retirement, as the case may be, if the judge

(a) has continued in judicial office for at least 15 years and resigns his or her office, if in the opinion of the Governor in Council the resignation is conducive to the better administration of justice or is in the national interest; or

(b) has become afflicted with a permanent infirmity disabling him or her from the due execution of the office of judge and resigns his or her office or by reason of that infirmity is removed from office.

Prorated annuity

(2) If a judge who has attained the age of retirement has held judicial office for less than 10 years, an annuity shall be paid to that judge that bears the same ratio to the annuity described in subsection (1) as the number of years the judge has held judicial office, to the nearest one tenth of a year, bears to 10 years.

Duration of annuities

(3) An annuity granted or paid to a judge under this section shall commence on the day of his or her resignation, removal or attaining the age of retirement and shall continue during the life of the judge.

Definition of *judicial office*

(4) In this section, ***judicial office*** means the office of a judge of a superior or county court or the office of an associate judge.

R.S., 1985, c. J-1, s. 42; 1998, c. 30, s. 7; 2002, c. 8, ss. 95, 111(E); 2006, c. 11, s. 11; 2014, c. 39, s. 322; 2017, c. 33, s. 238; 2022, c. 10, s. 359; 2022, c. 10, s. 371.

Annuity payable to supernumerary judge

43 (1) If a supernumerary judge, before becoming one, held the office of chief justice, senior associate chief justice or associate chief justice, the annuity payable to the judge under [section 42](#) is an annuity equal to two thirds of the salary annexed, at the time of his or her resignation, removal or attaining the age of retirement, to the office of chief justice, senior associate chief justice or associate chief justice previously held by him or her.

Annuity for former supernumerary judge

(1.1) If a supernumerary judge to whom subsection (1) applies is appointed to a different court to perform only the duties of a judge, the annuity payable to the judge under [section 42](#) is an annuity equal to two thirds of the salary annexed, at the time of his or her resignation, removal or attaining the age of retirement, to the office of chief justice, senior associate chief justice or associate chief justice previously held by him or her.

Annuity — election under [section 31](#), [32](#) or [32.1](#)

(2) If the Chief Justice of the Federal Court of Appeal or the Chief Justice or Associate Chief Justice of the Federal Court or the Tax Court of Canada, in accordance with [section 31](#), or a chief justice of a superior court of a province, in accordance with [section 32](#), or the Chief Justice of the Supreme Court of Yukon, the Supreme Court of the Northwest Territories or the Nunavut Court of Justice, in accordance with [section 32.1](#), has elected to cease to perform his or her duties and to perform only the duties of a judge, the annuity payable to him or her under [section 42](#) is an annuity equal to two thirds of the salary annexed, at the time of his or her resignation, removal or attainment of the age of retirement, to the office held by him or her immediately before his or her election.

Annuity — election under [section 31.1](#)

(2.1) If the Chief Justice of the Court Martial Appeal Court of Canada, in accordance with [section 31.1](#), has elected to cease to perform his or her duties as such and to perform only the duties of a judge, the annuity payable to him or her under [section 42](#) is an annuity equal to two thirds of the salary annexed, at the time of his or her resignation, removal or attaining the age of retirement, to the office held by him or her immediately before his or her election, if he or she had continued in that office for at least five years or had continued in that office and any other office of chief justice for a total of at least five years.

Annuity payable to chief justice

(2.2) If a chief justice is appointed to a different court to perform only the duties of a judge, the annuity payable to him or her under [section 42](#) is an annuity equal to two thirds of the salary annexed, at the time of his or her resignation, removal or attaining the age of retirement, to the office of chief justice, if he or she had continued in that office for at least five years or had continued in that office and any other office of chief justice for at least five years.

Definition of *chief justice* and *chief justice of a superior court of a province*

(3) In subsections (2) to (2.2), ***chief justice*** or ***chief justice of a superior court of a province*** means a chief justice, senior associate chief justice or associate chief justice of that court, or, if that court is constituted with divisions, of a division of that court.

Application of subsections (1) and (2)

(4) Subsections (1) and (2) are deemed to have come into force on April 1, 2012.

R.S., 1985, c. J-1, s. 43; 1992, c. 51, s. 19; [2002, c. 8, s. 96](#); [2012, c. 31, s. 217](#); [2017, c. 20, s. 221](#), c. 33, s. 239; [2018, c. 12, ss. 303, 308](#).

Prorated Annuities — Early Retirement

55 years of age and 10 years in office

43.1 (1) A judge who has attained the age of 55 years, has continued in judicial office for at least 10 years and elects early retirement shall be paid an immediate annuity or a deferred annuity, at the option of the judge, calculated in accordance with this section.

Calculation of amount of deferred annuity

(2) The amount of the deferred annuity shall be two thirds of the amount of the salary annexed to the judge's office at the time of the election multiplied by a fraction of which

(a) the numerator is the number of years, to the nearest one tenth of a year, during which the judge has continued in judicial office, and

(b) the denominator is the number of years, to the nearest one tenth of a year, during which the judge would have been required to continue in judicial office in order to be eligible to be paid an annuity under paragraph 42(1)(a) or (b).

Immediate annuity

(3) If a judge exercises the option to receive an immediate annuity, the amount of that annuity is equal to the amount of the deferred annuity, reduced by the product obtained by multiplying

(a) five per cent of the amount of the deferred annuity

by

(b) the difference between sixty and his or her age in years, to the nearest one-tenth of a year, at the time he or she exercises the option.

Second exercise of option

(4) A judge whose option was to receive a deferred annuity may, between the date of that option and the date on which the deferred annuity would be payable, opt for an immediate annuity. An immediate annuity shall be paid to the judge from the date of the second option.

Survivor's annuity

(5) On the death of a judge who has been paid an immediate annuity or a deferred annuity under subsection (1) or (4), the annuity paid to a survivor under [subsection 44\(2\)](#) shall be determined as if the judge were in receipt of a deferred annuity.

Definitions

(6) The definitions in this subsection apply in this section.

deferred annuity means an annuity that becomes payable to a judge at the time that he or she reaches sixty years of age and that continues to be paid during the life of the judge. (*pension différée*)

immediate annuity means an annuity that becomes payable to a judge at the time that he or she exercises an option to receive the annuity and that continues to be paid during the life of the judge. (*pension immédiate*)

judicial office includes the office of an associate judge. (*magistrature*)

[2001, c. 7, s. 21](#); [2006, c. 11, s. 12](#); [2014, c. 39, s. 323](#); [2017, c. 33, s. 240](#); [2022, c. 10, s. 360](#); [2022, c. 10, s. 371](#).

Annuities for Survivors

Annuity for surviving spouse

44 (1) Subject to this section, if a judge of a superior court while holding office died or dies after July 10, 1955, the survivor of the judge shall be paid, commencing on July 18, 1983 or immediately after the death of the judge, whichever is later, and continuing during the life of the survivor, an annuity equal to one third of

(a) the salary of the judge at the date of the death of the judge, or

(b) the salary annexed, at the date of death, to the office previously held by the judge of chief justice, senior associate chief justice or associate chief justice, if one of subsections 43(1), (1.1), (2), (2.1) or (2.2) would have applied to the judge if he or she had resigned, been removed or attained the age of retirement, on the day of death.

Judge receiving annuity

(2) Subject to this section, if a judge who, before, on or after July 11, 1955, was granted or paid a pension or annuity under this Act or any other Act of Parliament providing for pensions or annuities to be granted or paid to judges, died or dies after July 10, 1955, the survivor of the judge shall be paid

(a) an annuity equal to one half of the pension or annuity granted or paid to the judge, commencing on July 18, 1983 or immediately after the death of the judge, whichever is later, and continuing during the life of the survivor; or

(b) if a division of the judge's annuity benefits has been made under [section 52.14](#), an annuity equal to one half of the annuity that would have been granted or paid to the judge had the annuity benefits not been divided, commencing immediately after the death of the judge and continuing during the life of the survivor.

Prothonotaries

(3) No annuity shall be paid under this section to the survivor of a prothonotary of the Federal Court if the prothonotary ceased to hold the office of prothonotary before the day on which this subsection comes into force.

Limitation on annuity for survivor

(4) No annuity shall be paid under this section to the survivor of a judge if the survivor became the spouse or began to cohabit with the judge in a conjugal relationship after the judge ceased to hold office.

(5) and (6) *[Repealed, R.S., 1985, c. 39 (3rd Supp.), s. 2]*

R.S., 1985, c. J-1, s. 44; R.S., 1985, c. 39 (3rd Supp.), s. 2; 1992, c. 51, s. 20; 1996, c. 30, s. 3; 2000, c. 12, ss. 162, 169; [2001, c. 7, s. 22](#); [2002, c. 8, s. 97](#); [2006, c. 11, s. 13](#); [2014, c. 39, s. 324](#); [2017, c. 20, s. 222](#); [2017, c. 33, s. 242](#).

Election for enhanced annuity for survivor

44.01 (1) Subject to the regulations, a judge may elect to have the annuity to be paid to his or her survivor increased so that it is calculated as if the reference to "one half" in [subsection 44\(2\)](#) were read as a reference to "60%" or "75%".

Reduction of annuity

(2) If a judge makes the election, the amount of the annuity granted or paid to the judge shall be reduced in accordance with the regulations as of the date the election takes effect, but the combined actuarial present value of the reduced annuity and the annuity

that would be paid to the survivor must not be less than the combined actuarial present value of the annuity granted or paid to the judge and the annuity that would be paid to the survivor, immediately before the reduction is made.

Election to take effect at time of retirement

(3) Subject to subsection (6), an election under this section takes effect on the date that the judge ceases to hold office.

Death within one year after election

(4) Despite anything in this section, when a judge dies within one year after the election takes effect, the annuity payable to the survivor remains that payable under [subsection 44\(2\)](#) and the amount representing the reduction that was made in the amount of the judge's annuity under subsection (2) shall be repaid to the judge's estate or succession, together with interest at the rate prescribed under the [Income Tax Act](#) for amounts payable by the Minister of National Revenue as refunds of overpayments of tax under that Act.

Regulations

(5) The Governor in Council may make regulations respecting

- (a)** the time, manner and circumstances in which an election is made, is deemed to have been made or is deemed not to have been made, is revoked or is deemed to have been revoked, or ceases to have effect, and the retroactive application of that making, revocation or cessation;
- (b)** the reduction to be made in the amount of a judge's annuity when the election is made;
- (c)** the calculation of the amount of the annuity to be paid to the judge and the survivor under subsection (2);
- (d)** the time, manner and circumstances in which a reduction of a judge's annuity may be returned and interest may be paid; and
- (e)** any other matter that the Governor in Council considers necessary for carrying out the purposes and provisions of this section.

Transitional

(6) A judge who is in receipt of an annuity on the day on which this section comes into force may make his or her election in accordance with the regulations, and the election takes effect on the day this section comes into force.

Limitation on annuity to survivor

(7) Despite anything in this section, no election may be made under this section for the benefit of a spouse or common-law partner of a judge unless that person was the spouse or common-law partner at the date the judge ceased to hold office.

Annuity to be prorated between the two survivors

44.1 (1) Notwithstanding [section 44](#), if there are two persons who are entitled to an annuity under that section, each survivor shall receive a share of the annuity prorated in accordance with subsection (2) for his or her life.

Determination of prorated share

(2) The prorated share of each survivor is equal to the product obtained by multiplying the annuity by a fraction of which the numerator is the number of years that the survivor cohabited with the judge, whether before or after his or her appointment as a judge, and the denominator is the total obtained by adding the number of years that each of the survivors so cohabited with the judge.

Years

(3) In determining a number of years for the purpose of subsection (2), a part of a year shall be counted as a full year if the part is six or more months and shall be ignored if it is less.

Waiver

(4) A survivor is not entitled to receive an annuity under [section 44](#) or this section if the survivor has waived his or her entitlement to the annuity under an agreement entered into in accordance with applicable provincial law.

2000, c. 12, s. 163.

Election for former judges

44.2 (1) Subject to the regulations, a judge to whom an annuity has been granted or paid may elect to reduce his or her annuity so that an annuity may be paid to a person who, at the time of the election, is the spouse or common-law partner of the judge but to whom an annuity under [section 44](#) must not be paid.

Reduction of annuity

(2) If a judge makes the election, the amount of the annuity granted or paid to the judge shall be reduced in accordance with the regulations, but the combined actuarial present value of the reduced annuity and the annuity that would be paid to the spouse or common-law partner under subsection (3) must not be less than the actuarial present value of the annuity granted or paid to the judge immediately before the reduction is made.

Payment to person in respect of whom election is made

(3) When the judge dies, the spouse or common-law partner in respect of whom an election was made shall be paid an annuity in an amount determined in accordance with the election, subsection (2) and the regulations.

Death within one year after election

(3.1) Despite anything in this section, when a judge dies within one year after making the election, the election is deemed not to have been made and the amount representing the reduction that was made in the amount of the judge's annuity under subsection (2) shall be repaid to the judge's estate or succession, together with interest at the rate prescribed under the [Income Tax Act](#) for amounts payable by the Minister of National Revenue as refunds of overpayments of tax under that Act.

Regulations

(4) The Governor in Council may make regulations respecting

- (a)** the time, manner and circumstances in which an election is made, is deemed to have been made or is deemed not to have been made, is revoked or is deemed to have been revoked, or ceases to have effect, and the retroactive application of that making, revocation or cessation;
- (b)** the reduction to be made in the amount of a judge's annuity when an election is made;
- (c)** the amount of the annuity to be paid under subsection (3);
- (d)** the time, manner and circumstances in which a reduction of a judge's annuity may be returned and interest may be paid; and
- (e)** any other matter that the Governor in Council considers necessary for carrying out the purposes and provisions of this section.

2000, c. 12, s. 163; [2001, c. 7, s. 24](#); [2017, c. 33, s. 244](#).

45 and 46 [Repealed, 1992, c. 51, s. 21]

Lump Sum Payment

Lump sum payment

46.1 Where a judge dies while holding office, a lump sum equal to one sixth of the yearly salary of the judge at the time of death shall be paid to the survivor of the judge or, if there are two survivors, to the survivor who was cohabiting with the judge at the time of death, and if there is no survivor, to the estate or succession of the judge.

1989, c. 8, s. 12; 2000, c. 12, s. 164.

Annuities for Surviving Children

Definition of *child*

47 (1) For the purposes of this section and [sections 48](#) and [49](#), **child** means a child of a judge, including a child adopted legally or in fact, who

- (a)** is less than eighteen years of age; or
- (b)** is eighteen or more years of age but less than twenty-five years of age and is in full-time attendance at a school or university, having been in such attendance

substantially without interruption since the child of the judge reached eighteen years of age or the judge died, whichever occurred later.

Regulations respecting school attendance

(2) The Governor in Council may make regulations

- (a)** defining, for the purposes of this Act, the expression “full-time attendance at a school or university” as applied to a child of a judge; and
- (b)** specifying, for the purposes of this Act, the circumstances under which attendance at a school or university shall be determined to be substantially without interruption.

Annuity for surviving children

(3) If a judge of a superior or county court dies while holding office, or a judge who was granted or paid an annuity after October 5, 1971 dies, an annuity shall be paid to each surviving child of that judge as provided in subsections (4) and (5).

Annuity for children if survivor

(4) Each child of a judge described in subsection (3) shall be paid

- (a)** if the judge leaves a survivor, an annuity equal to one-fifth of the annuity that is provided for a survivor under subsection 44(1) or (2); and
- (b)** if there is no survivor or the survivor dies, an annuity equal to two-fifths of the annuity that is provided for a survivor under subsection 44(1) or (2).

Maximum of annuities to children

(5) The total amount of the annuities paid under subsection (4) shall not exceed four-fifths, in the case described in paragraph (4)(a), and eight-fifths, in the case described in paragraph (4)(b), of the annuity that is provided for a survivor under subsection 44(1) or (2).

(6) [Repealed, 2000, c. 12, s. 165]

R.S., 1985, c. J-1, s. 47; R.S., 1985, c. 39 (3rd Supp.), s. 3; 1998, c. 30, s. 8(F); 2000, c. 12, s. 165; 2002, c. 8, s. 98; 2017, c. 33, s. 246.

Apportionment of annuities among surviving children

48 (1) If, in computing the annuities to be paid under [subsection 47\(3\)](#) to the children of a judge referred to in that subsection, it is determined that there are more than four children of the judge to whom an annuity shall be paid, the total amount of the annuities paid shall be apportioned among the children in the shares that the Minister considers just and proper under the circumstances.

Children’s annuities, to whom paid

(2) If an annuity under this Act is paid to a child of a judge, payment shall, if the child is less than 18 years of age, be made to the person having the custody and control of the

child or, if there is no person having the custody and control of the child, to any person that the Minister directs and, for the purposes of this subsection, the survivor of the judge, except if the child is living apart from the survivor, shall be presumed, in the absence of evidence to the contrary, to be the person having the custody and control of the child.

R.S., 1985, c. J-1, s. 48; 2000, c. 12, s. 166; [2017, c. 33, s. 247](#); [2023, c. 18, s. 13](#).

Regulations concerning Inheritance Taxes

Payment of certain taxes out of C.R.F.

49 The Governor in Council may make regulations providing for the payment out of the Consolidated Revenue Fund, on the payment of an annuity under this Act to the survivor or children of a judge or a retired judge, of the whole or any part of the portion of any estate, legacy, succession or inheritance duties or taxes that are payable by the survivor or children with respect to the annuity, as is determined in accordance with the regulations to be attributable to that annuity, and prescribing the amount by which and the manner in which the annuity in that case shall be reduced.

R.S., 1985, c. J-1, s. 49; 2000, c. 12, s. 169; [2017, c. 33, s. 248\(E\)](#).

Judges' Contributions toward Annuities

Judges appointed before February 17, 1975

50 (1) Every judge appointed before February 17, 1975 to hold office as a judge of a superior or county court shall, by reservation from the judge's salary under this Act, contribute to the Consolidated Revenue Fund one and one-half per cent of that salary.

Judges appointed after February 16, 1975

(2) Every judge appointed after February 16, 1975 to whom subsection (1) does not apply, shall, by reservation from the judge's salary under this Act, contribute

(a) to the Consolidated Revenue Fund an amount equal to six per cent of that salary; and

(b) to the Supplementary Retirement Benefits Account established in the accounts of Canada pursuant to the [Supplementary Retirement Benefits Act](#),

(i) prior to 1977, an amount equal to one-half of one per cent of that salary, and

(ii) commencing with the month of January 1977, an amount equal to one per cent of that salary.

Adjustment of contributions

(2.1) A supernumerary judge, a judge who continues in judicial office after having been in judicial office for at least 15 years and whose combined age and number of years in judicial office is not less than 80, a judge of the Supreme Court of Canada who has continued in judicial office on that Court for at least 10 years, or a judge referred to in

[section 41.1](#) is not required to contribute under subsections (1) and (2) but is required to contribute, by reservation from salary, to the Supplementary Retirement Benefits Account at a rate of one per cent of his or her salary.

Interest

(2.2) Interest is payable on all contributions refunded as a result of the application of subsection (2.1) at the rate prescribed under the [Income Tax Act](#) for amounts payable by the Minister of National Revenue as refunds of overpayments of tax under that Act.

Income Tax Act

(3) For the purposes of the [Income Tax Act](#), the amounts contributed by a judge pursuant to subsection (1), (2) or (2.1) are deemed to be contributed to or under a registered pension plan.

Amounts to be credited to S.R.B. Account

(4) Where any amount is paid into the Supplementary Retirement Benefits Account pursuant to paragraph (2)(b), an amount equal to the amount so paid shall be credited to that Account.

Definition of *judicial office*

(5) In this section, ***judicial office*** includes the office of an associate judge.

R.S., 1985, c. J-1, s. 50; 1992, c. 51, s. 23; 1999, c. 31, s. 240; [2001, c. 7, s. 25](#); [2002, c. 8, s. 99](#); [2006, c. 11, s. 14](#); [2014, c. 39, s. 325](#); [2022, c. 10, s. 361](#); [2022, c. 10, s. 371](#).

Return of contributions if no annuity

51 (1) If a judge has ceased to hold office otherwise than by reason of death and, at the time he or she ceased to hold office, no annuity under this Act was granted or could be paid to that judge, there shall be paid to the judge, in respect of his or her having ceased to hold that office, an amount equal to the total contributions made by him or her under subsection 50(1) or paragraph 50(2)(a), together with interest, if any, calculated in accordance with subsection (4).

Return of contributions if annuity

(2) If a judge to whom subsection 50(1) applies has ceased to hold office otherwise than by reason of death and that judge is granted or paid an annuity under this Act, there shall be paid to the judge in respect of his or her having ceased to hold that office an amount equal to the total contributions made by the judge under subsection 50(1), together with interest, if any, calculated in accordance with subsection (4), if,

(a) at the time the judge ceased to hold office, there is no person to whom an annuity under this Act could be paid in respect of the judge on his or her death; or

(b) at any time after the judge ceased to hold office but before his or her death, all persons to whom an annuity under this Act could be paid in respect of the judge on his or her death have died or ceased to be eligible to be paid an annuity.

Death benefit

(3) Where, on or at any time after the death of a judge who died while holding office, or the death of a judge who died after ceasing to hold office but to whom no amount has been paid under subsection (1) or (2), there is no person or there is no longer any person to whom an annuity under this Act may be paid in respect of the judge, any amount by which

(a) the total contributions made by the judge under subsection 50(1) or paragraph 50(2)(a), together with interest, if any, calculated pursuant to subsection (4),

exceeds

(b) the total amount, if any, paid to or in respect of the judge as annuity payments under this Act,

shall thereupon be paid as a death benefit to the estate of the judge or, if less than one thousand dollars, as the Minister may direct.

Interest on payments and amounts of contributions

(4) Where an amount becomes payable under subsection (1), (2) or (3) in respect of contributions made by a judge under subsection 50(1) or paragraph 50(2)(a), the Minister shall

(a) determine the total amount of contributions that have been made under that provision by the judge in respect of each year, in this subsection called a “contribution year”, in which contributions were made by the judge; and

(b) calculate interest on the amount determined under paragraph (a) in respect of each contribution year, compounded annually,

(i) in respect of each contribution year before 1997,

(A) at the rate of four per cent from December 31 of the contribution year to December 31, 1996, and

(B) at the rate prescribed under the [Income Tax Act](#) for amounts payable by the Minister of National Revenue as refunds of overpayments of tax under that Act in effect from time to time, from December 31, 1996 to December 31 of the year immediately before the year in which the amount in respect of contributions made by the judge becomes payable, and

(ii) in respect of the 1997 contribution year and each contribution year after 1997, at the rate mentioned in clause (i)(B) from December 31 of the contribution year to December 31 of the year immediately before the year in which the amount in respect of contributions made by the judge becomes payable.

R.S., 1985, c. J-1, s. 51; 1998, c. 30, s. 9; [2002, c. 8, ss. 100\(E\), 111\(E\)](#); [2017, c. 33, s. 249\(E\)](#); [2023, c. 18, s. 13](#).

Diversion Under Financial Support Order

Diversion of payments to satisfy financial support order

52 (1) If a court in Canada of competent jurisdiction has made an order requiring a recipient of an annuity or other amount payable under section 42, 43, 43.1, 44, 44.1 or 44.2 or subsection 51(1) to pay financial support, amounts so payable to the recipient are subject to being diverted to the person named in the order in accordance with Part II of the *Garnishment, Attachment and Pension Diversion Act*.

Payment deemed to be to former judge

(2) For the purposes of this Part, any payment made pursuant to subsection (1) shall be deemed to have been made to the former judge in respect of whom the payment was made.

R.S., 1985, c. J-1, s. 52; 2000, c. 12, s. 167; 2017, c. 20, s. 224.

Division of Judge's Annuity Benefits on Conjugal Breakdown

Definitions

52.1 The following definitions apply in this section and in [sections 52.11 to 52.22](#).

agreement means an agreement referred to in [subparagraph 52.11\(2\)\(b\)\(ii\)](#). (*accord*)

annuity means an annuity payable under [section 42, 43 or 43.1](#). (*pension*)

annuity benefit means an annuity or a return of contributions payable under [section 51](#), and includes amounts payable to a judge under the *Supplementary Retirement Benefits Act*. (*prestation de pension*)

application means an application made under subsection 52.11(1). (*demande*)

court order means an order referred to in [paragraph 52.11\(2\)\(a\)](#) or [subparagraph 52.11\(2\)\(b\)\(i\)](#). (*ordonnance*)

interested party, in relation to an application for division of a judge's annuity benefits, means the judge or the spouse, former spouse or former common-law partner with whom those benefits would be divided under the application. (*intéressé*)

judge includes a former judge who has been granted or paid an annuity. (*juge*)

Minister [Repealed, 2023, c. 18, s. 3]

prescribed means prescribed by regulation. (*Version anglaise seulement*)

spouse, in relation to a judge, includes a person who is a party to a void marriage with the judge. (*époux*)

2006, c. 11, s. 15; 2017, c. 33, s. 250(E); 2023, c. 18, s. 3.

Application for division

52.11 (1) A judge or a spouse, former spouse or former common-law partner of a judge may, in the circumstances described in subsection (2), apply in accordance with the regulations for the division of the judge's annuity benefits between the judge and the spouse, former spouse or former common-law partner.

When application may be made

(2) An application may be made under the following circumstances:

(a) where a court of competent jurisdiction in Canada, in proceedings in relation to divorce, annulment of marriage or separation, has made an order that provides for the annuity benefits to be divided between the interested parties; or

(b) where the interested parties have been living separate and apart for a period of one year or more and, either before or after they began to live separate and apart,

(i) a court of competent jurisdiction in Canada has made an order that provides for the annuity benefits to be divided between them, or

(ii) the interested parties have entered into a written agreement that provides for the annuity benefits to be divided between them.

Notice to interested parties

(3) The Minister shall send to each interested party in accordance with the regulations a notice of the receipt of an application.

[2006, c. 11, s. 15.](#)

Objections by interested parties

52.12 (1) An interested party who objects to the division of annuity benefits on any of the grounds described in subsection (2) may submit a notice of objection in writing in accordance with the regulations within 90 days after the day on which notice of the receipt of the application is sent to the interested party under [subsection 52.11\(3\)](#).

Grounds for objection

(2) The grounds for objection are as follows:

(a) the court order or agreement on which the application is based has been varied or is of no force or effect;

(b) the terms of the court order or agreement have been or are being satisfied by other means; or

(c) proceedings have been commenced in a court of competent jurisdiction in Canada to appeal or review the court order or challenge the terms of the agreement.

Documentary evidence

(3) An interested party who submits a notice of objection shall include with that notice documentary evidence to establish the grounds for objection.

[2006, c. 11, s. 15.](#)

Approval of division

52.13 (1) Subject to subsections (2) and (3), the Minister shall, as soon as is practicable after the Minister is satisfied that an application meets the requirements of this Act, approve the division of annuity benefits in respect of which the application is made.

When decision to be deferred

(2) When an interested party submits a notice of objection in accordance with [section 52.12](#), the Minister shall

- (a)** if the objection is made on the grounds referred to in [paragraph 52.12\(2\)\(a\)](#) or **(b)**, defer a decision on the application until the Minister is able to ascertain to his or her satisfaction whether those grounds have been established; and
- (b)** if the objection is made on the grounds referred to in [paragraph 52.12\(2\)\(c\)](#), defer a decision on the application until the final disposition of the proceedings on which those grounds are based.

Refusal of division

(3) The Minister shall refuse to approve the division of annuity benefits if

- (a)** the application is withdrawn in accordance with the regulations;
- (b)** a notice of objection has been submitted on grounds referred to in [paragraph 52.12\(2\)\(a\)](#) or **(b)** and the Minister is satisfied that those grounds have been established and constitute sufficient reason to refuse the division;
- (c)** a notice of objection has been submitted on grounds referred to in [paragraph 52.12\(2\)\(c\)](#) and the court order or agreement is of no force or effect as a result of the proceedings referred to in that paragraph;
- (d)** the period of cohabitation of the judge and the spouse, former spouse or former common-law partner cannot be determined under [subsection 52.14\(6\)](#); or
- (e)** the Minister is satisfied, based on evidence submitted by any person, that it would not be just to approve the division.

Exception

(4) Notwithstanding subsection (3), the Minister may approve the division of annuity benefits on the basis of an order of a court issued pursuant to any proceedings referred to in [paragraph 52.12\(2\)\(c\)](#).

Transitional

(5) The Minister may approve the division of the annuity benefits even though the court order or agreement on which the application is based was made or entered into before the day on which subsection 52.11(1) comes into force.

[2006, c. 11, s. 15.](#)

Division of annuity benefits

52.14 (1) Subject to subsections (3) and (3.1), where the Minister approves the division of the annuity benefits of a judge, the spouse, former spouse or former common-law partner shall be accorded a share of the annuity benefits consisting of

- (a)** an amount representing 50% of a proportion, determined in accordance with subsection (2), of the value of the annuity that is attributed, in accordance with the regulations, to the period subject to division; or
- (b)** if the terms of the court order or agreement on which the application for division is based provide for the payment to the spouse, former spouse or former common-law partner of a share of annuity benefits that is less than the amount determined under paragraph (a), that lesser share.

Proportion of annuity value

(2) The proportion of the value of an annuity referred to in paragraph (1)(a) is

- (a)** subject to paragraph (b), the period subject to division divided by the judge's number of years of service until the judge's actual date of retirement or, in the case of a judge who has not yet retired, until the judge's expected date of retirement determined in accordance with the regulations; or
 - (b)** in the case of a judge who had resigned or been removed from office by reason of an infirmity, the quotient obtained by dividing
 - (i)** the period, measured to the nearest one tenth of a year, from the beginning of the period subject to division to the earlier of the end of the period of cohabitation and the judge's expected date of retirement if the infirmity had not occurred, determined in accordance with the regulations,
- by
- (ii)** the judge's number of years of service up to the judge's expected date of retirement if the infirmity had not occurred, determined in accordance with the regulations.

Return of contributions

(3) Subject to subsections (3.1) and (4), if the Minister approves the division of the annuity benefits of a judge who was not eligible to be paid an annuity at the end of the period subject to division, the spouse, former spouse or former common-law partner shall be accorded a share of the annuity benefits consisting of

- (a)** an amount equal to 50% of the contributions made by the judge under [section 50](#) during the period subject to division plus 50% of any interest payable on those contributions; or
- (b)** if the terms of the court order or agreement on which the application for division is based provide for the payment to the spouse, former spouse or former common-law partner of a share of annuity benefits that is less than the amount determined under paragraph (a), that lesser share.

Return of contributions — infirm annuitant

(3.1) Subject to subsection (4), if the Minister approves the division of the annuity benefits of a judge who had been granted an annuity by reason of an infirmity but was not otherwise eligible to be paid an annuity at the end of the period subject to division, the spouse, former spouse or former common-law partner shall be accorded a share of the annuity benefits consisting of

- (a)** an amount equal to 50% of the contributions that would have been made during the period described in subparagraph (2)(b)(i) if the judge had continued in office, on the basis of the salary annexed to the office held by the judge at the time the judge ceased to hold office, plus 50% of any interest payable on those contributions; or
- (b)** if the terms of the court order or agreement on which the application for division is based provide for the payment to the spouse, former spouse or former common-law partner of a share of annuity benefits that is less than the amount determined under paragraph (a), that lesser share.

Election by spouse

(4) A judge's spouse, former spouse or former common-law partner who is entitled to be accorded a share of the judge's annuity benefits under subsection (3) or (3.1) may elect in the manner prescribed by the regulations, in lieu of receiving that share, to receive — at the time the judge becomes eligible to be granted or paid an annuity, or at the time the judge would have become eligible to be paid an annuity had the judge not resigned or been removed from office by reason of an infirmity — a share of the annuity benefits for which the judge is or would have been eligible, determined as provided in subsection (1).

Death or resignation of judge

(5) If an election has been made under subsection (4) and, before becoming eligible to be paid an annuity, the judge dies, resigns, is removed from office or otherwise ceases to hold office, the spouse, former spouse or former common-law partner shall instead be paid immediately the portion of the judge's contributions to which the spouse was otherwise entitled under subsection (3) or (3.1).

Determination of periods of division and cohabitation

(6) For the purposes of this section and [sections 52.15](#) and [52.16](#),

- (a)** a period subject to division is the portion of a period of cohabitation during which a judge held office under this Act, measured in years to the nearest one tenth of a year; and
- (b)** a period of cohabitation is the period during which interested parties cohabited, as specified by the court order or agreement on which an application for division is based or, if none is specified, as determined in accordance with the regulations on the basis of evidence submitted by either or both of the interested parties.

Death of spouse, former spouse or former common-law partner

(7) A share of annuity benefits that cannot be accorded under subsection (1) by reason only of the death of the spouse, former spouse or former common-law partner shall be paid to that person's estate or succession.

Adjustment of accrued benefits

(8) Where the Minister approves the division of a judge's annuity benefits, the annuity benefits payable to the judge under this Act shall be adjusted in accordance with the regulations.

Notice of division

(9) The Minister shall send a notice of the division of annuity benefits in the prescribed manner to each interested party.

2006, c. 11, s. 15; 2015, c. 3, s. 128(F); 2017, c. 20, s. 225; 2017, c. 33, s. 251(E).

Transfer and payment of share

52.15 (1) The spouse's, former spouse's or former common-law partner's share of a judge's annuity benefits shall be accorded by

(a) the transfer of the specified portion of that share to a retirement savings plan established for the spouse, former spouse or former common-law partner that is of the prescribed kind for the purposes of [section 26](#) of the *Pension Benefits Standards Act, 1985*; and

(b) the payment of the remainder of that share, if any, to the spouse, former spouse or former common-law partner.

Calculation of specified portion

(2) For the purpose of paragraph (1)(a), the specified portion of a spouse's, former spouse's or former common-law partner's share of a judge's annuity benefits is

(a) if that share consists of a portion of the judge's contributions, that portion; or

(b) in any other case, the amount determined by the formula

$$(A \times B \times C) / D$$

where

A is the share of the annuity benefits,

B is the period subject to division,

C is the defined benefit limit, within the meaning of regulations made under the *Income Tax Act*, for the calendar year in which the share is accorded, and

D is the portion of the annuity that is attributed, in accordance with the regulations, to the period subject to division.

Tax treatment

(3) For the purposes of the [Income Tax Act](#), an amount transferred to a retirement savings plan in accordance with paragraph (1)(a) is deemed to be an amount transferred from a registered pension plan in accordance with [subsection 147.3\(5\)](#) of that Act.

[2006, c. 11, s. 15.](#)

Further divisions precluded

52.16 Where a division of annuity benefits is made in respect of a period subject to division under [section 52.14](#), no further divisions may be made under that section in respect of that period.

[2006, c. 11, s. 15.](#)

Amounts transferred in error

52.17 Where the amount transferred or paid in respect of a spouse, former spouse or former common-law partner, or paid to the estate or succession of a deceased spouse, former spouse or former common-law partner, under [section 52.14](#) or [52.15](#) exceeds the amount that the spouse, former spouse or former common-law partner was entitled to have transferred or paid or the estate or succession was entitled to be paid, the amount in excess constitutes a debt due to Her Majesty in right of Canada by that spouse, former spouse or former common-law partner or that estate or succession.

[2006, c. 11, s. 15.](#)

Amounts paid before adjustment

52.18 Where an adjustment is made under [subsection 52.14\(8\)](#) and an amount is or has been paid to a judge that exceeds the amount to which the judge is or would have been entitled under this Act after the effective date of that adjustment, the amount in excess constitutes a debt due to Her Majesty in right of Canada by the judge and may be recovered at any time by set-off against any annuity benefit that is payable to the judge under this Act, without prejudice to any other recourse available to Her Majesty in right of Canada with respect to its recovery.

[2006, c. 11, s. 15.](#)

Void transactions

52.19 (1) Amounts that a spouse, former spouse or former common-law partner is or may become entitled to under [section 52.14](#) are not capable of being assigned, charged, anticipated or given as security, and any transaction that purports to assign, charge, anticipate or give as security any such amount is void.

Exemption from attachment, etc.

(2) Amounts that a spouse, former spouse or former common-law partner is or may become entitled to under [section 52.14](#) are exempt from attachment, seizure and execution, either at law or in equity.

[2006, c. 11, s. 15.](#)

Access of spouse, etc. to division of benefits

52.2 Notwithstanding any other provision of this Act, a court of competent jurisdiction may order, for any period that the court determines, that no action be taken by the Minister under this Act that may prejudice the ability of the spouse, common-law partner, former spouse or former common-law partner to make an application or obtain the division of the judge's annuity benefits under this Act.

2006, c. 11, s. 15.

Information for spouse, etc. re benefits

52.21 Subject to the regulations, the Minister shall, at the request of a spouse, common-law partner, former spouse or former common-law partner of a judge, provide that person with information prescribed by the regulations concerning the benefits that are or may become payable to or in respect of that judge under this Act.

2006, c. 11, s. 15.

Regulations

52.22 The Governor in Council may make regulations

- (a)** respecting the manner of making an application, the information that is to be provided in it and the documents that are to accompany it;
- (b)** prescribing the circumstances in which interested parties are deemed to have been living separate and apart for the purposes of [paragraph 52.11\(2\)\(b\)](#);
- (c)** prescribing circumstances in which a person may make an application or object to an application on behalf of another person, or may act on behalf of another person in proceeding with an application made by that other person;
- (d)** prescribing circumstances in which, the manner in which and the conditions under which the personal representative or the liquidator of the succession of a deceased judge or of a deceased spouse, former spouse or former common-law partner of a judge may make or object to an application or may proceed with an application that was made by or on behalf of the judge, spouse, former spouse or former common-law partner;
- (e)** when regulations are made under paragraph (c) or (d), respecting the manner in which and the extent to which any provision of this Act applies to a person referred to in that paragraph or in the circumstances prescribed by those regulations, and adapting any provision of this Act to those persons or circumstances;
- (f)** prescribing circumstances in which, the manner in which and the conditions under which a spouse, former spouse or former common-law partner of a judge may make an application after the death of the judge;
- (g)** respecting the notice of receipt of applications to be given to interested parties under [subsection 52.11\(3\)](#);
- (h)** respecting the withdrawal of applications;
- (i)** respecting the manner of submitting notices of objection under subsection 52.12(1);

- (j)** for determining the value of an annuity to be attributed to a period subject to division, for the purposes of subsection 52.14(1);
- (k)** for determining the expected date of retirement of a judge, for the purposes of subsections 52.14(2) and (3.1);
- (l)** respecting the actuarial assumptions on which the determinations made under paragraphs (j) and (k) are to be based;
- (m)** prescribing the manner in which a judge's spouse, former spouse or former common-law partner may make an election under subsection 52.14(4), and respecting the notification of a judge of such an election;
- (n)** prescribing, for the purposes of paragraph 52.14(6)(b), the manner of determining the period during which interested parties cohabited;
- (o)** respecting the adjustment of the annuity benefits payable to a judge under subsection 52.14(8), including the determination of the effective date of the adjustment;
- (p)** generally respecting the division of the annuity benefits of a judge who resigns or is removed from office by reason of an infirmity;
- (q)** respecting the manner in which and the extent to which any provision of this Act applies, notwithstanding the other provisions of this Act, to a judge, to a spouse, former spouse, common-law partner or former common-law partner of a judge or to any other person when annuity benefits are divided under section 52.14, and adapting any provision of this Act to those persons;
- (r)** for determining the portion of an annuity to be attributed to a period subject to division, for the purposes of subsection 52.15(2);
- (s)** for the purposes of section 52.21, respecting the manner in which a request for information is to be made by a spouse, former spouse, common-law partner or former common-law partner of a judge, prescribing the information that is to be provided to that person concerning the benefits that are or may become payable to or in respect of the judge and specifying circumstances in which a request may be refused;
- (t)** prescribing remedial action that may be taken in prescribed circumstances in response to administrative error or the provision of erroneous information;
- (u)** prescribing any matter or thing that may be prescribed under sections 52.1 to 52.21; and
- (v)** generally for carrying out the purposes and provisions of sections 52.1 to 52.21 and this section.

2006, c. 11, s. 15; 2017, c. 20, s. 226(F).

Payment of Salaries, Allowances, Annuities and Other Amounts

Amounts payable out of C.R.F.

53 (1) The salaries, allowances and annuities payable under Parts I to III and the amounts payable under [sections 46.1](#), [51](#) and [52.15](#) shall be paid out of the Consolidated Revenue Fund.

Prorating

(2) For any period less than a year, the salaries and annuities payable shall be paid pro rata.

Monthly instalments

(3) The salaries and annuities payable shall be paid by monthly instalments.

First payment

(4) The first payment of salary of any judge shall be made pro rata on the first day of the month that occurs next after the appointment of the judge.

Legal representatives

(5) If a judge resigns the office of judge or dies, the judge or his or her legal representatives are entitled to receive such proportionate part of the judge's salary as has accrued during the time that the judge executed the office since the last payment.

R.S., 1985, c. J-1, s. 53; 1989, c. 8, s. 13; [2002, c. 8, s. 111\(E\)](#); [2006, c. 11, s. 16](#); [2023, c. 18, s. 4](#).

Absence from Judicial Duties

Leave of absence

54 (1) No judge of a superior court shall be granted leave of absence from his or her judicial duties for a period

(a) of six months or less, except with the approval of the chief justice of the superior court; or

(b) of more than six months, except with the approval of the Governor in Council.

Notification of leave by chief justice

(1.1) Whenever a leave of absence is granted under paragraph (1)(a), the chief justice of the superior court shall, without delay, notify the Minister and, in the case of provincial or territorial courts, the minister of justice or the attorney general of the province or territory.

Notification of leave by Minister

(1.2) Whenever a leave of absence is granted under paragraph (1)(b), the Minister shall, without delay, notify the chief justice of the superior court and, in the case of provincial or territorial courts, the minister of justice or the attorney general of the province or territory.

Report by chief justice of absence

(2) If it appears to the chief justice of a superior court that a judge of the court is absent from the judge's judicial duties without the approval required by subsection (1), the chief justice shall report the absence to the Minister.

Absentee judge to report

(3) Whenever a judge of a superior court is absent from the judge's judicial duties for a period of more than 30 days, the judge shall report the absence and the reasons for it to the Minister.

(4) [Repealed, 2017, c. 33, s. 252]

R.S., 1985, c. J-1, s. 54; 1992, c. 51, s. 24; 1996, c. 30, s. 4; 1999, c. 3, s. 76; 2002, c. 7, s. 194, c. 8, s. 101; 2012, c. 31, s. 218; 2017, c. 33, s. 252; 2023, c. 18, s. 13.

Extra-judicial Employment

Judicial duties exclusively

55 No judge shall, either directly or indirectly, for himself or herself or others, engage in any occupation or business other than his or her judicial duties, but every judge shall devote himself or herself exclusively to those judicial duties.

R.S., 1985, c. J-1, s. 55; 2002, c. 8, s. 102(E).

Acting as commissioner, etc.

56 (1) No judge shall act as commissioner, arbitrator, adjudicator, referee, conciliator or mediator on any commission or on any inquiry or other proceeding unless

(a) in the case of any matter within the legislative authority of Parliament, the judge is by an Act of Parliament expressly authorized so to act or the judge is thereunto appointed or so authorized by the Governor in Council; or

(b) in the case of any matter within the legislative authority of the legislature of a province, the judge is by an Act of the legislature of the province expressly authorized so to act or the judge is thereunto appointed or so authorized by the lieutenant governor in council of the province.

Acting as statutory assessor or arbitrator

(2) Subsection (1) does not apply to judges acting as arbitrators or assessors of compensation or damages under any public Act, whether of general or local application, of Canada or of a province, whereby a judge is required or authorized without authority from the Governor in Council or lieutenant governor in council to assess or ascertain compensation or damages.

R.S., 1985, c. J-1, s. 56; 1996, c. 10, s. 233.

Authorization

56.1 (1) Notwithstanding [section 55](#), Madam Justice Louise Arbour of the Ontario Court of Appeal is authorized to take a leave from her judicial duties to serve as Prosecutor of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia and of the International Tribunal for Rwanda.

Expenses

(2) Madam Justice Louise Arbour may receive moving or transportation expenses and reasonable travel and other expenses, in connection with her service as Prosecutor, from the United Nations.

Leave without pay

(3) Madam Justice Louise Arbour may elect to take a leave of absence without pay for the purpose described in subsection (1), in which case she is not entitled to receive any salary or allowances under this Act for the duration of the leave, but may receive remuneration from the United Nations for her service as Prosecutor.

Ceasing contributions

(4) If Madam Justice Louise Arbour elects to take a leave of absence without pay under subsection (3), she shall not continue the contributions required by [section 50](#) for the duration of the leave and that section does not apply to her for the duration of the leave, which duration shall not be counted as time during which she held judicial office for the purposes of [sections 28, 29](#) and [42](#).

Deemed salary in event of death

(5) For the purposes of subsections 44(1) and (2), section 46.1 and subsection 47(3), if Madam Justice Louise Arbour dies while on a leave of absence without pay, she is deemed to be in receipt at the time of death of the salary that she would have been receiving if she had not been absent on leave without pay.

1996, c. 30, s. 5.

Extra Remuneration

No extra remuneration

57 (1) Except as provided in subsection (3), no judge shall accept any salary, fee, remuneration or other emolument or any expenses or allowances for acting in any capacity described in subsection 56(1) or as administrator or deputy of the Governor General or for performing any duty or service, whether judicial or executive, that the judge may be required to perform for or on behalf of the Government of Canada or the government of a province.

Exception

(2) The right of a judge to receive remuneration under any Act of the legislature of a province, other than for acting in any capacity described in subsection 56(1), is not affected by subsection (1), but no judge is entitled to receive remuneration under any such Act or Acts in an aggregate amount exceeding \$3,000 per annum.

Expenses excepted

(3) In the cases described in subsection (1), a judge may receive his or her moving or transportation expenses and the reasonable travel and other expenses incurred by him or her away from his or her ordinary place of residence while acting in any such capacity or in the performance of any such duty or service, in the same amount and under the same conditions as if the judge were performing a function or duty as such judge, if those expenses are paid in respect of any matter within the legislative authority of Parliament, by the Government of Canada, and in respect of any matter within the legislative authority of the legislature of a province, by the government of the province.

R.S., 1985, c. J-1, s. 57; [2002, c. 8, s. 103\(E\)](#).

PART II

Canadian Judicial Council

58 [\[Repealed, 2023, c. 18, s. 5\]](#)

Constitution of the Council

Council established

59 (1) There is hereby established a Council, to be known as the Canadian Judicial Council, consisting of

- (a)** the Chief Justice of Canada, who shall be the chairperson of the Council;
- (b)** the chief justice and any senior associate chief justice and associate chief justice of each superior court or branch or division thereof; and
- (c)** [\[Repealed, 2017, c. 33, s. 253\]](#)
- (d)** the Chief Justice of the Court Martial Appeal Court of Canada.
- (e)** [\[Repealed, 2002, c. 8, s. 104\]](#)

(2) and (3) [\[Repealed, 1999, c. 3, s. 77\]](#)

Substitute member

(4) Each member of the Council may appoint a judge of that member's court to be a substitute member of the Council and the substitute member shall act as a member of the Council during any period in which he or she is appointed to act, but the Chief Justice of Canada may, in lieu of appointing a member of the Supreme Court of Canada, appoint any former member of that Court to be a substitute member of the Council.

R.S., 1985, c. J-1, s. 59; 1992, c. 51, s. 25; 1996, c. 30, s. 6; 1999, c. 3, s. 77; 2002, c. 7, s. 195, c. 8, s. 104; 2017, c. 33, s. 253; 2023, c. 18, s. 6(E).

Objects of Council

60 (1) The objects of the Council are to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts.

Powers of Council

(2) In furtherance of its objects, the Council may

- (a)** establish conferences of chief justices and associate chief justices; and
- (b)** establish seminars for the continuing education of judges, including seminars on matters related to sexual assault law, intimate partner violence, coercive control in intimate partner and family relationships and social context, which includes systemic racism and systemic discrimination.
- (c)** [Repealed, 2023, c. 18, s. 7]
- (d)** [Repealed, 2023, c. 18, s. 7]

Seminars related to sexual assault law

(3) The Council should ensure that seminars on matters related to sexual assault law established under paragraph (2)(b)

- (a)** are developed after consultation with persons, groups or organizations the Council considers appropriate, such as sexual assault survivors and persons, groups and organizations that support them, including Indigenous leaders and representatives of Indigenous communities; and
- (b)** include, where the Council finds appropriate, instruction in evidentiary prohibitions, principles of consent and the conduct of sexual assault proceedings, as well as education regarding myths and stereotypes associated with sexual assault complainants.

R.S., 1985, c. J-1, s. 60; 1992, c. 51, s. 26; 2002, c. 8, s. 105; 2021, c. 8, s. 2; 2023, c. 7, s. 2; 2023, c. 18, s. 7.

Meetings of Council

61 (1) The Council shall meet at least once a year.

Work of Council

(2) Subject to this Act, the work of the Council shall be carried on in such manner as the Council may direct.

By-laws

(3) The Council may make by-laws

- (a)** respecting the calling of meetings of the Council;

(b) respecting the conduct of business at meetings of the Council, including the fixing of quorums for such meetings, the establishment of committees of the Council and the delegation of duties to any such committees; and

(c) respecting the processes and proceedings under Part IV.

R.S., 1985, c. J-1, s. 61; [2023, c. 18, s. 8](#).

Employment of counsel and assistants

62 The Council may engage the services of any persons that it considers necessary for carrying out its objects and duties, and also the services of counsel to assist the Council in the processes and proceedings under Part IV.

R.S., 1985, c. J-1, s. 62; [2023, c. 18, s. 9](#).

Report — seminars

62.1 (1) Within 60 days after the end of each calendar year, the Council should submit to the Minister a report on the seminars referred to in [paragraph 60\(2\)\(b\)](#) on matters related to sexual assault law, intimate partner violence, coercive control in intimate partner and family relationships and social context, which includes systemic racism and systemic discrimination, that were offered in the preceding calendar year. The report should include the following information:

(a) the title and a description of the content of each seminar, its duration and the dates on which it was offered; and

(b) the number of judges who attended each seminar.

Tabling of report

(2) The Minister shall cause a copy of any report received to be tabled in each House of Parliament on any of the first 10 days on which that House is sitting after the Minister receives the report.

[2021, c. 8, s. 3](#); [2023, c. 7, s. 3](#).

63 [Repealed, [2023, c. 18, s. 10](#)]

64 [Repealed, [2023, c. 18, s. 10](#)]

65 [Repealed, [2023, c. 18, s. 10](#)]

65.1 [Repealed, [2023, c. 18, s. 10](#)]

66 [Repealed, [2023, c. 18, s. 10](#)]

67 [Repealed, R.S., 1985, c. 16 (3rd Supp.), s. 5]

68 [Repealed, R.S., 1985, c. 16 (3rd Supp.), s. 6]

69 [Repealed, [2023, c. 18, s. 10](#)]

70 [Repealed, [2023, c. 18, s. 10](#)]

71 [Repealed, [2023, c. 18, s. 10](#)]

PART III

Administration of Federal Judicial Affairs

72 [Repealed, 2023, c. 18, s. 11]

Commissioner for Federal Judicial Affairs

Commissioner for Federal Judicial Affairs

73 There shall be an officer, called the Commissioner for Federal Judicial Affairs, who shall have the rank and status of a deputy head of a department and who shall be appointed by the Governor in Council after consultation by the Minister with the Council or such committee thereof as is named for the purpose by the Council.

1976-77, c. 25, s. 17.

Duties and functions of Commissioner

74 (1) It shall be the duty and function of the Commissioner, under the Minister, to

- (a) act as the deputy of the Minister in performing all such duties and functions in relation to the administration of Part I as fall, by law, within the responsibility of the Minister;
- (b) prepare budgetary submissions for the requirements of the Council;
- (c) be responsible for any other administrative arrangements that are necessary to ensure that all reasonable requirements, including those for premises, equipment and other supplies and services and for officers, clerks and employees of the Council for the carrying out of its operations, are provided for in accordance with law; and
- (d) do such other things as the Minister may require in connection with any matter or matters falling, by law, within the Minister's responsibilities for the proper functioning of the judicial system in Canada.

Interpretation of subsection (1)

(2) It is hereby declared for greater certainty that such of the duties and functions of the Minister as are, by paragraphs (1)(a) to (d), subject to be performed by the Commissioner do not form part of the duties and functions assigned to the Minister by the *Department of Justice Act*.

R.S., 1985, c. J-1, s. 74; 2002, c. 8, s. 108.

Registrar of the Supreme Court of Canada

Duties and functions

75 (1) The duties and functions described in paragraphs 74(1)(a) to (c) shall, in relation to the Supreme Court of Canada and the judges thereof, be carried out by the Registrar

of the Court, who may, for that purpose, utilize the services of other persons on the staff of the Court.

Registrar deemed deputy head

(2) The Registrar of the Supreme Court of Canada shall, for the purposes of the [Public Service Employment Act](#) and other Acts of Parliament and for purposes relating to the duties and functions of the Registrar under this section, be deemed to be the deputy head of the portion of the federal public administration appointed under [subsection 12\(2\)](#) of the [Supreme Court Act](#).

R.S., 1985, c. J-1, s. 75; [2003, c. 22, s. 224\(E\)](#).

76 [[Repealed, 2002, c. 8, s. 109](#)]

Commissioner's Staff

Appointment

77 The officers, clerks and employees who are required by the Commissioner to carry out the Commissioner's duties and functions under [section 74](#) shall be appointed under the [Public Service Employment Act](#).

R.S., 1985, c. J-1, s. 77; [2002, c. 8, s. 110](#).

Commissioner is deputy head

78 The Commissioner and the officers, clerks and employees appointed under [section 77](#) shall be a portion of the federal public administration that is separate from the Department of Justice and of which the Commissioner shall be the deputy head.

R.S., 1985, c. J-1, s. 78; [2002, c. 8, s. 110](#); [2003, c. 22, s. 224\(E\)](#).

PART IV

Conduct Review Process

DIVISION 1

Complaints Concerning Judges

Definition

Definition of *judicial office*

79 In this Division, ***judicial office*** includes the office of an associate judge.

[2023, c. 18, s. 12](#); [2022, c. 10, s. 375](#).

Removal from Office

Justification

80 For the purposes of this Division, the removal from office of a judge is justified only if, for any of the following reasons, the judge's continuation in office would undermine public confidence in the impartiality, integrity or independence of the judge or of their office to such an extent that it would render the judge incapable of executing the functions of judicial office:

- (a) infirmity;
- (b) misconduct;
- (c) failure in the due execution of judicial office;
- (d) the judge is in a position that a reasonable, fair-minded and informed observer would consider to be incompatible with the due execution of judicial office.

[2023, c. 18, s. 12.](#)

Rosters

Establishment of roster of judges

81 (1) The Council shall establish a roster of superior court judges who may be designated as members of a panel established under this Division. The judges on the roster must not be members of the Council.

Number

(2) The number of judges on the roster is set at the discretion of the Council.

Recommendation

(3) The naming of a judge to the roster must be made on the recommendation of the Canadian Superior Courts Judges Association.

Term

(4) A judge named to the roster remains on it for four years unless they cease to hold judicial office or request to be removed from the roster. When the four-year term ends, the judge may be renamed to the roster on the recommendation of the Canadian Superior Courts Judges Association.

[2023, c. 18, s. 12.](#)

Establishment of lay persons

82 (1) The Council shall establish a roster of lay persons who may be designated as members of a review panel or full hearing panel established under this Division.

Number

(2) The number of persons on the roster is set at the discretion of the Council.

Conditions

(3) To be named to the roster, a person must

- (a)** never have been admitted to the bar of any province or to the Chambre des notaires du Québec;
- (b)** never have worked as a paralegal in Canada; and
- (c)** meet the other selection criteria established by the Council.

Selection criteria made public

(4) The Council shall make public the selection criteria that it has established for the purpose of paragraph (3)(c).

Term

(5) A person named to the roster of lay persons remains on it for four years unless they request to be removed from the roster or, in the opinion of the Council, they cease to meet the conditions set out in subsection (3). When the four-year term ends, the person may be renamed to the roster.

[2023, c. 18, s. 12.](#)

Official languages

83 In naming persons to the roster of judges and to the roster of lay persons, the Council shall take into account the fact that the proceedings of panels established under this Division will be in either or both official languages.

[2023, c. 18, s. 12.](#)

Diversity

84 The Council shall name persons who reflect the diversity of the Canadian population to the roster of judges and to the roster of lay persons.

[2023, c. 18, s. 12.](#)

Rosters available to public

85 The Council shall make the roster of judges and the roster of lay persons available to the public.

[2023, c. 18, s. 12.](#)

Complaints

Complaints

86 (1) Complaints may be made to the Council, in the form specified by the Council, in respect of a judge of a superior court for any reason referred to in [paragraphs 80\(a\) to \(d\)](#).

Complaint by Council

(2) The Council may make a complaint only if two of its members have reasonable grounds to believe that the public's confidence in the impartiality, integrity or independence of the judge or of the judicial office of the judge could be undermined for any reason referred to in [paragraphs 80\(a\) to \(d\)](#).

Anonymous complaints

(3) A complaint may be made anonymously, but such a complaint may be dealt with only if two members of the Council have reasonable grounds to believe that the public's confidence in the impartiality, integrity or independence of the judge or of the judicial office of the judge could be undermined for any reason referred to in [paragraphs 80\(a\) to \(d\)](#).

[2023, c. 18, s. 12.](#)

Notice to complainant

87 The Council shall establish policies respecting the notifying of complainants of any decisions made under this Division.

[2023, c. 18, s. 12.](#)

Screening Officer

Designation

88 The Council may designate as a screening officer one or more persons, including a judge, who meets the criteria specified by the Council.

[2023, c. 18, s. 12.](#)

Referral to screening officer

89 The Council shall refer every complaint to a screening officer, other than a complaint made by the Council itself or an anonymous complaint.

[2023, c. 18, s. 12.](#)

Dismissal of complaint

90 (1) Subject to subsection (2), a screening officer may dismiss a complaint if they are of the opinion that it

- (a)** is frivolous, vexatious or made for an improper purpose or is an abuse of process;
- (b)** was not made for a reason referred to in [paragraphs 80\(a\) to \(d\)](#); or
- (c)** does not meet the other screening criteria specified by the Council.

Screening criteria to be made public

(2) The Council shall make public the screening criteria that it has established for the purpose of paragraph (1)(c).

Restriction

(3) A screening officer shall not dismiss a complaint that alleges sexual misconduct or sexual harassment or that alleges discrimination on a prohibited ground of discrimination within the meaning of the [Canadian Human Rights Act](#).

[2023, c. 18, s. 12.](#)

Referral to Council

91 If a screening officer does not dismiss a complaint, they shall refer it to the Council for the designation of a reviewing member.

[2023, c. 18, s. 12.](#)

Reviewing Member

Designation

92 In the case of a complaint made by the Council itself or an anonymous complaint, or on receipt of a complaint referred to it under [section 91](#), the Council shall designate one of its members to review the complaint.

[2023, c. 18, s. 12.](#)

Written submissions

93 The reviewing member shall give the judge who is the subject of the complaint an opportunity to make written submissions about the complaint within the time limit established by the Council for the purpose of this section.

[2023, c. 18, s. 12.](#)

Dismissal of complaint

94 (1) The reviewing member shall dismiss the complaint if they are of the opinion that it should be dismissed for any reason set out in paragraphs 90(1)(a) to (c) or that it is wholly without merit.

Communication of dismissal

(2) If the reviewing member dismisses the complaint, they shall inform the complainant in writing of their decision and the reasons for it.

Exclusion

(3) The reasons shall not include information that is confidential or personal, or that is not in the public interest to disclose.

[2023, c. 18, s. 12.](#)

Referral to Council

95 If the reviewing member does not dismiss the complaint, they shall refer it to the Council for the establishment of a review panel.

2023, c. 18, s. 12.

Notice of decision

96 The reviewing member shall give notice of their decision to the judge who is the subject of the complaint and to the chief justice of the court of which the judge is a member.

2023, c. 18, s. 12.

Provision of information

97 After the review panel is established, the reviewing member shall provide it with every document in their possession that relates to the complaint. The reviewing member may also provide the review panel with their observations about the complaint and their recommendations about how it should be resolved.

2023, c. 18, s. 12.

Review Panel

Establishment

98 (1) Subject to subsection (2), on receipt of a complaint referred to it under [section 95](#), the Council shall establish a review panel consisting of the following persons designated by the Council to review the complaint:

- (a) a member of the Council;
- (b) a judge named in the roster of judges; and
- (c) a person named in the roster of lay persons.

Direction to review new complaint

(2) If a complaint is referred to the Council under [section 95](#) and a review panel established to review a previous complaint involving the same judge has not yet made a decision in respect of that complaint, the Council may direct the review panel to also review the new complaint.

2023, c. 18, s. 12.

Written submissions

99 The review panel shall give the judge who is the subject of the complaint and chief justice of the court of which the judge is a member an opportunity to provide written submissions within the time limit established by the Council for the purpose of this section.

2023, c. 18, s. 12.

Basis of decisions

100 The review panel shall make its decision only on the basis of the substance of the complaint, any information provided under [section 97](#), any written submissions provided

under [section 99](#) and any other document that it considers relevant.

[2023, c. 18, s. 12.](#)

Referral to Council

101 The review panel shall refer the complaint to the Council for the establishment of a full hearing panel if it determines that the judge's removal from office could be justified.

[2023, c. 18, s. 12.](#)

Dismissal of complaint or action

102 If the review panel does not refer the complaint to the Council under [section 101](#), it may dismiss the complaint or take one or more of the following actions if it considers it appropriate to do so in the circumstances:

- (a) issue a private or public expression of concern;
- (b) issue a private or public warning;
- (c) issue a private or public reprimand;
- (d) order the judge to apologize, either privately or publicly, by whatever means the panel considers appropriate in the circumstances;
- (e) order the judge to take specific measures, including attending counselling or a continuing education course;
- (f) take any action that the panel considers to be equivalent to any of the actions referred to in paragraphs (a) to (e);
- (g) with the consent of the judge, take any other action that the panel considers appropriate in the circumstances.

[2023, c. 18, s. 12.](#)

Notice of decision and reasons

103 (1) The review panel shall give notice of its decision and the reasons for it to

- (a) the judge who is the subject of the complaint;
- (b) the chief justice of the court of which that judge is a member; and
- (c) the Council.

Communication of dismissal

(2) If the review panel dismisses the complaint, it shall inform the complainant in writing of its decision and the reasons for it.

Exclusion

(3) The reasons shall not include information that is confidential or personal, or that is not in the public interest to disclose.

[2023, c. 18, s. 12.](#)

Request to establish panel

104 If the review panel takes any action under [section 102](#), the judge who is the subject of the complaint may, within 30 days after the day on which the review panel sends the judge a notice informing the judge of its decision, request that the Council establish a reduced hearing panel to review the complaint.

[2023, c. 18, s. 12.](#)

Provision of information

105 If a reduced hearing panel or a full hearing panel is established in respect of a complaint that was before a review panel, the review panel shall provide to the presenting counsel in respect of the hearing panel all the information that was before it and the decision and reasons it provided under [section 103](#).

[2023, c. 18, s. 12.](#)

Hearing Panels

Presenting Counsel

Designation

106 (1) When it establishes a reduced hearing panel or a full hearing panel, the Council shall designate one of its members to designate a lawyer of at least 10 years' standing at the bar of any province to act as presenting counsel in respect of the hearing panel.

Restriction

(2) The member of the Council who designates the presenting counsel shall not be designated as any of the following:

- (a)** a member of the reduced hearing panel or the full hearing panel;
- (b)** a member of any appeal panel established in respect of any decision of the reduced hearing panel or the full hearing panel.

Replacement

(3) The presenting counsel may at any time be replaced by another presenting counsel designated in accordance with subsection (1).

[2023, c. 18, s. 12.](#)

Role

107 The role of the presenting counsel consists of preparing a statement of allegations against a judge who is the subject of a complaint before a reduced hearing panel or full hearing panel, as the case may be, and presenting evidence. The presenting counsel is also responsible for bringing an appeal and presenting arguments in an appeal.

[2023, c. 18, s. 12.](#)

Instructions

108 (1) The presenting council shall take instructions from the Council member who designated them.

Absence or incapacity

(2) In the event of the absence or incapacity of the Council member who designated the presenting counsel, the Council may designate another Council member to give instructions to the presenting counsel.

[2023, c. 18, s. 12.](#)

Standards of conduct

109 In fulfilling their responsibilities, the presenting counsel shall conduct themselves in accordance with the standards and principles that govern the conduct of Crown prosecutors, with any modifications that may be necessary.

[2023, c. 18, s. 12.](#)

Reduced Hearing Panel

Establishment

110 (1) Subject to subsection (2), on receipt of a request made under [section 104](#), the Council shall establish a reduced hearing panel consisting of the following persons designated by it to review the complaint to which the request relates:

- (a)** a member of the Council;
- (b)** a judge named in the roster of judges; and
- (c)** a lawyer of at least 10 years' standing at the bar of any province.

Direction to review new complaint

(2) If a request is made under [section 104](#) by a judge who has previously made a request under that section and the reduced hearing panel established in respect of the previous request has not yet made a decision in respect of the complaint to which the previous request relates, the Council may direct the reduced hearing panel to also review the new complaint.

[2023, c. 18, s. 12.](#)

Decision and reasons not considered

111 In considering the complaint, the reduced hearing panel shall not consider the decision of the review panel that caused the judge who is the subject of the complaint to make the request under [section 104](#) or the reasons for that decision.

[2023, c. 18, s. 12.](#)

Referral of complaint to Council

112 The reduced hearing panel shall refer the complaint to the Council for the establishment of a full hearing panel if it determines that the removal from office of the judge who is the subject of the complaint could be justified.

2023, c. 18, s. 12.

Dismissal or actions

113 If the reduced hearing panel does not refer the complaint to the Council under [section 112](#), it may dismiss the complaint or take one or more of the actions referred to in [paragraphs 102\(a\) to \(g\)](#) if it considers it appropriate to do so in the circumstances.

2023, c. 18, s. 12.

Notice of decision and reasons

114 The reduced hearing panel shall give notice of its decision and the reasons for it to

- (a) the judge who is the subject of the complaint;
- (b) the chief justice of the court of which that judge is a member;
- (c) the Council; and
- (d) the presenting counsel.

2023, c. 18, s. 12.

Decision and reasons made public

115 The Council shall make public the reduced hearing panel's decision and the reasons for it, as soon as feasible after receiving them, if the reduced hearing panel's hearings were public. If they were not public, the Council shall make public as much of the decision and reasons as possible having regard to the reasons for holding the hearings, or part of them, in private.

2023, c. 18, s. 12.

Right of appeal

116 The judge to whom the complaint relates and the presenting counsel may respectively, within 30 days after the day on which the reduced hearing panel sends them a notice of its decision, file with the Council a notice appealing the decision.

2023, c. 18, s. 12.

Full Hearing Panel

Establishment

117 (1) Subject to subsection (3), on receipt of a referral of a complaint made under [section 101](#) or [112](#), the Council shall establish a full hearing panel consisting of the following persons to review the complaint:

- (a) two members of the Council who are designated by it;
- (b) a judge named in the roster of judges who is designated by it;

- (c) a person named in the roster of lay persons who is designated by it; and
- (d) a lawyer who is a member of the bar of a province and who is designated in accordance with subsection (2).

Designation of lawyer

(2) The lawyer referred to in paragraph (1)(d) is to be designated by the Minister. However, if the full hearing panel is being established as the result of a request by the Minister under [section 148](#) or the Minister does not designate a lawyer within 30 days after the day on which the Minister receives written notice from the Council that a full hearing panel is to be established, the lawyer is to be designated by the Council.

Direction to review new complaint

(3) If a complaint is referred to the Council under [section 101](#) or [112](#), and a full hearing panel established to review a previous complaint or to consider a request made under [section 148](#) involving the same judge has not yet made a decision in respect of the previous complaint or the request, the Council may direct the full hearing panel to also review the new complaint.

[2023, c. 18, s. 12.](#)

Decision and reasons not considered

118 In considering the complaint, the full hearing panel shall not consider the decision of the review panel or reduced hearing panel, as the case may be, that led to the establishment of the full hearing panel, or the reasons for that decision.

[2023, c. 18, s. 12.](#)

Removal justified

119 If the full hearing panel determines, on a balance of probabilities, that the judge's removal from office is justified, it shall make a decision to that effect.

[2023, c. 18, s. 12.](#)

Dismissal or action

120 If the full hearing panel determines, on a balance of probabilities, that the judge's removal is not justified, it may dismiss the complaint or take one or more of the actions referred to in [paragraphs 102\(a\) to \(g\)](#) if the full hearing panel considers that it is appropriate to do so in the circumstances.

[2023, c. 18, s. 12.](#)

Notice of decision and reasons

121 The full hearing panel shall give notice of its decision and the reasons for it to

- (a) the judge who is the subject of the complaint;
- (b) the chief justice of the court of which that judge is a member;

(c) the Council; and

(d) the presenting counsel.

[2023, c. 18, s. 12.](#)

Decision and reasons made public

122 The Council shall make public the full hearing panel's decision and the reasons for it, as soon as feasible after receiving the decision, if the full hearing panel's hearings were public. If they were not public, the Council shall make public as much of the decision and reasons as possible having regard to the reasons for holding the hearings, or part of them, in private.

[2023, c. 18, s. 12.](#)

Right of appeal

123 The judge who is the subject of the complaint and the presenting counsel may respectively, within 30 days after the day on which the full hearing panel sends them a notice of its decision, file with the Council a notice appealing the decision.

[2023, c. 18, s. 12.](#)

Rights of Judge

Rights

124 The judge who is the subject of a complaint that is before a hearing panel has the right to be heard, to cross-examine witnesses and to adduce evidence, in person or by counsel.

[2023, c. 18, s. 12.](#)

Statement of allegation and notice

125 The judge who is the subject of a complaint that is before a hearing panel is to be provided with a copy of the statement of allegations prepared by the presenting counsel and given reasonable notice of the subject matter and the date, time and place of the hearings.

[2023, c. 18, s. 12.](#)

Salaries and Annuities

Time in judicial office and salary

126 (1) For the purposes of calculating an annuity under Part I, if a full hearing panel decides that the removal from office of a judge who is the subject of a complaint is justified, the day after the day on which the judge is given notice of the full hearing panel's decision is the day to be used to determine the number of years the judge has been in judicial office and the salary annexed to the office held by the judge at the time of his or her resignation, removal or attaining the age of retirement unless

- (a)** the decision is set aside by a decision of the Supreme Court of Canada, or by the decision of an appeal panel if the appeal panel's decision is final;
- (b)** the Minister's response under subsection 140(1) provides that no action is to be taken to remove the judge from office; or
- (c)** the matter of removal of the judge from office is put to one or both Houses of Parliament and is rejected by either of them.

Contributions toward annuities

(2) No reservations are to be made under [section 50](#) from the judge's salary in respect of the period that begins on the day after the day on which the judge is given notice of the full hearing panel's decision, unless one of paragraphs (1)(a) to (c) applies, in which case the judge shall contribute an amount equal to the amount that would have been reserved from the judge's salary had subsection (1) not applied.

Salary increases

(3) For greater certainty, nothing in subsection (1) is to be construed as removing from the judge any entitlement to a salary increase that takes effect on or after the day on which the judge is given notice of the full hearing panel's decision.

[2023, c. 18, s. 12.](#)

General

Powers

127 A hearing panel has all the powers vested in a superior court of the province in which the judge who is the subject of the complaint resides, including

- (a)** the power to summon before it any witness and require them to give evidence on oath, orally or in writing or on solemn affirmation if they are entitled to affirm in civil matters, and to produce any documents and evidence that it considers necessary; and
- (b)** the power to enforce the attendance of any witness and compel them to give evidence.

[2023, c. 18, s. 12.](#)

Rules of evidence

128 A hearing panel is not bound by any legal or technical rules of evidence and may receive and base a decision on evidence presented in its hearings that it considers credible or trustworthy in the circumstances of the case.

[2023, c. 18, s. 12.](#)

Hearings public

129 (1) A hearing panel's hearings are to be public, but it may hold all or any part of its hearings in private if it considers doing so to be in the public interest.

Prohibition of publication

(2) A hearing panel may prohibit the publication of any information or documents placed before it, if it is of the opinion that such a publication is not in the public interest.

[2023, c. 18, s. 12.](#)

Appeals

Appeal Panel

Establishment

130 On receipt of a notice of appeal filed under [section 116](#) or [123](#), the Council shall establish an appeal panel consisting of the following persons designated by it:

- (a)** three members of the Council; and
- (b)** two judges named in the roster of judges.

[2023, c. 18, s. 12.](#)

Power

131 The appeal panel has all the powers vested in the court of appeal of the province in which the judge who is the subject of the complaint resides. It may, among other things, reverse, vary or affirm any decision of the reduced hearing panel or full hearing panel, as the case may be, and make any decision the hearing panel could have made.

[2023, c. 18, s. 12.](#)

Hearings public

132 (1) The appeal panel's hearings are to be public, but it may conduct all or any part of its hearings in private if it considers doing so to be in the public interest.

Prohibition of publication

(2) The appeal panel may prohibit the publication of any information or documents placed before it if it is of the opinion that such a publication is not in the public interest.

[2023, c. 18, s. 12.](#)

Right to make submissions

133 The judge who is the subject of the appeal and the presenting counsel are each entitled to make oral and written submissions to the appeal panel.

[2023, c. 18, s. 12.](#)

Nature of appeal

134 The appeal is to be heard on the basis of the record of the hearing panel whose decision was appealed and on any submissions made by the judge who is the subject of the appeal and the presenting counsel. The appeal panel may, in exceptional

circumstances, admit additional evidence or testimony if, in its opinion, it is essential in the interests of justice to do so.

[2023, c. 18, s. 12.](#)

Notice of decision and reasons

135 The appeal panel shall give notice of its decision and the reasons for it to

- (a) the judge who is the subject of the appeal;
- (b) the chief justice of the court of which that judge is a member;
- (c) the Council; and
- (d) the presenting counsel.

[2023, c. 18, s. 12.](#)

Decision and reasons made public

136 The Council shall make public the appeal panel's decision and the reasons for it, as soon as feasible after receiving them, if the appeal panel's hearings were public. If they were not public, the Council shall make public as much of the decision and reasons as possible having regard to the reasons for holding the hearings, or part of them, in private.

[2023, c. 18, s. 12.](#)

Supreme Court of Canada

Notice of application for leave to appeal

137 The judge who is the subject of a decision of an appeal panel and the presenting counsel may respectively, within 30 days after the day on which the appeal panel sends them a notice of its decision, file a notice of application for leave to appeal to the Supreme Court of Canada.

[2023, c. 18, s. 12.](#)

Right of attorneys general

138 If leave to appeal is granted by the Supreme Court of Canada, the Attorney General of Canada and the attorney general of a province may intervene in the appeal.

[2023, c. 18, s. 12.](#)

Report to Minister

Report with recommendation

139 (1) If a full hearing panel is established in respect of a complaint, the full hearing panel shall, as soon as feasible after the earliest of the following, provide to the Minister a report setting out a recommendation, consistent with the final decision in respect of the complaint, as to whether or not the judge who is the subject of the complaint should be removed from office:

- (a) the judge and the presenting counsel have both waived their rights under [section 123](#) or [137](#),
- (b) the time limit for exercising those rights has expired, and
- (c) the Supreme Court of Canada has not granted leave to appeal or, if it has, it has made a decision in respect of the appeal panel's decision.

Decisions and reasons

(2) The report must also set out the full hearing panel's decision and any decision of the appeal panel and the Supreme Court of Canada, as well as the reasons, if any, for those decisions.

Copy of report

(3) The full hearing panel shall as soon as feasible give a copy of the report to the judge, the presenting counsel and the Council.

Report made public

(4) The Council shall make public as much of the report as it considers appropriate taking into account the extent to which the decisions and reasons set out in the report were made public.

Absence or incapacity

(5) In the event of the absence or incapacity of all three judges of the full hearing panel, the Council shall designate one of its members to assist the other members of the full hearing panel in preparing the report or, if the others are also absent or incapacitated, to provide the report.

[2023, c. 18, s. 12.](#)

Minister's response

140 (1) The Minister shall respond publicly to the report.

Information

(2) For the purpose of responding publicly, the Minister may seek information from the full hearing panel on any matter that the Minister considers necessary.

Obligation to provide information

(3) The full hearing panel shall provide the judge who is the subject of the report and the presenting counsel with any information that it provides to the Minister.

Absence or incapacity

(4) In the event of the absence or incapacity of all three judges of the full hearing panel, the Council shall designate one of its members to assist the other members of the full

hearing panel in providing the information to the Minister or, if the others are also absent or incapacitated, to provide the information.

[2023, c. 18, s. 12.](#)

General

Ineligibility

Ineligibility

141 (1) A member of the Council and a judge named in the roster of judges is not eligible to be designated

(a) as a reviewing member under [section 92](#), or as a member of any panel established under this Division, in respect of any complaint involving a judge of the court of which they are a member; or

(b) more than once under this Division in respect of the same complaint or the same judge.

Subsections 86(2) and (3)

(2) A member of the Council who is referred to in [subsection 86\(2\)](#) or [\(3\)](#) whose belief led to the Council making a complaint in respect of a judge or to an anonymous complaint being dealt with is not eligible to be designated, in their capacity as a member of the Council or in any other capacity, as a reviewing member under [section 92](#) or as a member of any panel established under this Division, in respect of the complaint.

[2023, c. 18, s. 12.](#)

Designation

Designation from roster of judges

142 The Council may designate a judge named in the roster of judges to be a member of a panel established under [section 98](#), [110](#), [117](#) or [130](#) instead of designating a member of the Council as the section in question requires.

[2023, c. 18, s. 12.](#)

Immunity

Immunity

143 A screening officer, a reviewing member or a member of a panel established under this Division shall have the same immunity as a judge of a superior court.

[2023, c. 18, s. 12.](#)

Financial Provisions

Regulations

144 The Governor in Council may make regulations respecting the fees, allowances and expenses to be paid or reimbursed under [section 146](#).

[2023, c. 18, s. 12.](#)

Guidelines

145 (1) Subject to the regulations, the Commissioner shall make guidelines respecting the fees, allowances and expenses to be paid or reimbursed under [section 146](#).

Incorporation by reference

(2) The guidelines may incorporate by reference any policy, guideline or directive of the Treasury Board or any federal department regarding fees, allowances or expenses, as it is amended from time to time.

Obligation to justify differences

(3) If an amount provided for in the guidelines made under subsection (1) differs from the amount provided for in Treasury Board directives regarding fees, allowances and expenses, the Commissioner shall make the reasons for the difference available to the public unless the difference is attributable solely to compliance with the regulations.

[2023, c. 18, s. 12.](#)

Amounts payable out of C.R.F.

146 (1) Subject to the regulations made under [section 144](#) and the guidelines made under subsection 145(1), there shall be paid out of the Consolidated Revenue Fund all amounts payable in respect of the following:

- (a)** the expenses incurred by members of the Council and judges named in the roster of judges in the course of carrying out their duties under this Division or Division 2;
- (b)** the expenses incurred by and the allowances payable to panel members, other than judges, in the course of carrying out their duties under this Division or Division 2;
- (c)** the fees of and the expenses incurred by presenting counsel in the course of carrying out their duties under this Division or Division 2;
- (d)** subject to subsection (2), the fees of and the expenses incurred by lawyers representing judges who are the subject of a complaint under this Division or Division 2;
- (e)** the fees and expenses of lawyers and experts engaged by panels established under this Division or Division 2; and
- (f)** the expenses incidental to the conduct of meetings and hearings under this Division or Division 2, including the renting of rooms, the recording and transcription of proceedings, translation services and security.

Restriction

(2) Fees and expenses of lawyers representing judges may be paid only in respect of proceedings under this Division or Division 2 or in respect of appeals to the Supreme Court of Canada relating to those proceedings. For greater certainty, no payments to lawyers representing judges are to be made in respect of any judicial review of any decision made under this Division or Division 2.

[2023, c. 18, s. 12.](#)

Independent review of financial provisions

147 (1) Within 18 months after the day on which the first report is submitted under [section 160](#) and on every fifth anniversary of that day, the Council shall cause an independent review of the application of [sections 144](#) to [146](#) to be conducted. The review is to be conducted by a person or body designated by the Commissioner in consultation with the Council.

Report

(2) The person or body conducting the review shall provide a report of their findings and recommendations to the Minister, the chairperson of the Council and the Commissioner. The report shall include a finding on whether [sections 144](#) to [146](#) have been applied in a manner consistent with best practices regarding financial controls.

Report to be made public

(3) The Council shall make the report public with any redactions that the Commissioner and chairperson of the Council jointly consider necessary to protect confidential or personal information.

[2023, c. 18, s. 12.](#)

DIVISION 2

Requests Concerning Judges

Request

148 The Minister or the attorney general of a province may request that the Council establish a full hearing panel to determine whether the removal from office of a judge of a superior court is justified.

[2023, c. 18, s. 12.](#)

Establishment

149 (1) Subject to subsection (2), on receipt of the request, the Council shall establish a full hearing panel in accordance with [section 117](#) to consider the request.

Direction to consider new request

(2) If a full hearing panel established to consider a previous request made under [section 148](#) or to review a complaint made under [section 101](#) or [112](#) involving the same judge

has not yet made a decision in respect of the previous request or the complaint, the Council may direct the full hearing panel to also consider the new request.

[2023, c. 18, s. 12.](#)

Application of [sections 119 to 143](#)

150 Sections 119 to 143 apply, with any necessary modifications, in respect of the request and all proceedings arising from it.

[2023, c. 18, s. 12.](#)

DIVISION 3

Requests Concerning Office Holders

Removal from office

151 For the purposes of this Division, the removal from office of a person appointed under an Act of Parliament to hold office during good behaviour, other than a judge, is justified only if, for any of the following reasons, the person's continuation in office would undermine public confidence in the integrity of the person or of their office to such an extent that it would render the person incapable of executing the functions of their office:

- (a)** infirmity;
- (b)** misconduct;
- (c)** failure in the due execution of their office;
- (d)** the person has been placed in a position that a reasonable, fair-minded and informed observer would consider to be incompatible with the due execution of their office.

[2023, c. 18, s. 12.](#)

Request

152 The Minister may request that the Council establish a full hearing panel to determine whether the removal from office of a person referred to in [section 151](#) is justified.

[2023, c. 18, s. 12.](#)

Establishment

153 On receipt of the request, the Council shall establish a full hearing panel in accordance with [section 117](#) to consider the request.

[2023, c. 18, s. 12.](#)

Application of [sections 119 to 125 and 127 to 143](#)

154 Sections 119 to 125 and 127 to 143 apply, with any necessary modifications, in respect of the request and all proceedings arising from it.

[2023, c. 18, s. 12.](#)

Removal from office

155 (1) On receipt of a report provided under subsection 139(1) containing a recommendation that a person be removed from office, the Governor in Council, may, on the recommendation of the Minister, by order, remove the person from office if the person is a person who may be removed from office by the Governor in Council other than on address of the Senate or House of Commons or joint address of the Senate and House of Commons.

Orders and reports laid before Parliament

(2) If an order is made under subsection (1), a copy of the order and a copy of the report relating to the order must be laid before each House of Parliament within 15 days after the day on which the order is made or, if either House is not then sitting, on any of the first 15 days on which that House is sitting.

[2023, c. 18, s. 12.](#)

Leave of absence with salary

156 The Governor in Council may, for any period that the Governor in Council considers appropriate, grant leave of absence to any person, other than a judge, whose removal from office is recommended because of infirmity in a report provided under subsection 139(1) and, if leave of absence is granted, the person's salary is to continue to be paid during the period of leave of absence.

[2023, c. 18, s. 12.](#)

DIVISION 4

General

Powers, rights and duties not affected

157 Nothing in, or done or omitted to be done under the authority of, this Part affects any power, right or duty of the Senate, the House of Commons or the Governor in Council in relation to the removal from office of a judge or any other person.

[2023, c. 18, s. 12.](#)

Decision final

158 A decision made by a member of the Council under any of Divisions 1 to 3 or by a member of a panel established under any of those Divisions is final and is not to be questioned or reviewed in any court other than provided for in this Part.

[2023, c. 18, s. 12.](#)

Remote appearance

159 For greater certainty, any proceedings or hearings under this Part may take place by remote appearance.

Annual report

160 (1) The Council shall, within three months after the end of each calendar year, submit a report to the Minister setting out, in respect of the year, the number of

- (a) complaints received;
- (b) complaints dismissed by a screening officer;
- (c) complaints dismissed by a reviewing member;
- (d) complaints reviewed by review panels, hearing panels and appeal panels; and
- (e) complaints in respect of which any of the actions referred to in [paragraphs 102\(a\) to \(g\)](#) were taken.

Report to be made public

(2) After the annual report is submitted to the Minister, the Council shall make it public.

Tab 68

Canadian Judicial Council Inquiries and Investigations By-laws, 2015, SOR/2015-203



This regulation replaces [SOR/2002-371](#).

Current version: in force since 2015-07-29

Link to this version: <https://canlii.ca/t/52hcf>

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Canadian Judicial Council Inquiries and Investigations By-laws, 2015

SOR/2015-203

[JUDGES ACT](#)

Registration 2015-07-29

Canadian Judicial Council Inquiries and Investigations By-laws, 2015

The Canadian Judicial Council, pursuant to [subsection 61\(3\)](#) of the *Judges Act*^a, makes the annexed *Canadian Judicial Council Inquiries and Investigations By-laws, 2015*.

^aR.S., c. J-1

Ottawa, July 28, 2015

BEVERLEY McLACHLIN
Chief Justice of Canada
Chairman
Canadian Judicial Council

Interpretation

Definitions

1 The following definitions apply in these By-laws.

Act means the *Judges Act*. (*Loi*)

senior member means, in relation to a complaint or allegation, the longest-serving eligible member of the Judicial Conduct Committee who has not previously considered the matter or, if no Judicial Conduct Committee member is available, the longest-serving member of the Council who has not previously considered the matter. (*doyen*)

Establishment and Powers of a Judicial Conduct Review Panel

Establishment of Judicial Conduct Review Panel

2 (1) The Chairperson or Vice-Chairperson of the Judicial Conduct Committee, established by the Council in order to consider complaints or allegations made in respect of a judge of a superior court may, if they determine that a complaint or allegation on its face might be serious enough to warrant the removal of the judge, establish a Judicial Conduct Review Panel to decide whether an Inquiry Committee should be constituted in accordance with [subsection 63\(3\)](#) of the *Act*.

Designation of members

(2) The senior member designates the members of the Judicial Conduct Review Panel.

Composition of Judicial Conduct Review Panel

(3) The Judicial Conduct Review Panel is to be composed of five persons of which three are members of the Council, one is a puisne judge and one is a person who is neither a judge nor a member of the bar of a province.

Serious matter

(4) The Judicial Conduct Review Panel may decide that an Inquiry Committee is to be constituted only if it determines that the matter might be serious enough to warrant the removal of the judge.

Matter sent back to Chairperson or Vice-Chairperson

(5) If the Judicial Conduct Review Panel decides that no Inquiry Committee is to be constituted, it must send the matter back to the Chairperson or Vice-Chairperson of the Judicial Conduct Committee for them to make a decision on the most appropriate way to resolve it.

Complainant informed

(6) If the Judicial Conduct Review Panel decides that an Inquiry Committee is to be constituted, the Council's Executive Director must inform the complainant, if any, by letter.

Decision, reasons and statement of issues

(7) The Judicial Conduct Review Panel must prepare written reasons and a statement of issues to be considered by the Inquiry Committee. The Council's Executive Director must send a copy of the Judicial Conduct Review Panel's decision, reasons and statement of issues to

- (a)** the judge and their Chief Justice;
- (b)** the Minister; and
- (c)** the Inquiry Committee, once it is constituted.

Notice inviting Minister to designate members

(8) The Council's Executive Director must also send a notice to the Minister inviting that Minister to designate members of the bar of a province to the Inquiry Committee in accordance with [subsection 63\(3\)](#) of the [Act](#).

Designating Members to Inquiry Committee

Designation of members

3 (1) An Inquiry Committee constituted in accordance with [subsection 63\(3\)](#) of the [Act](#) is composed of an uneven number of members designated by the senior member, the majority of whom are from the Council.

Additional members

(2) If the Minister does not designate any members within 60 days after the day on which the notice is received under [paragraph 2\(8\)](#), the senior member may designate additional Council members to the Inquiry Committee to complete its composition.

Senior member chooses chair

(3) The senior member also designates one of the members of the Inquiry Committee to chair the Committee.

Persons not eligible to be members

(4) The following persons are not eligible to be members of the Inquiry Committee:

- (a)** the Chairperson or Vice-Chairperson of the Judicial Conduct Committee who referred the matter to the Judicial Conduct Review Panel;

(b) a member of the same court as that of the judge who is the subject of the inquiry or investigation; and

(c) a member of the Judicial Conduct Review Panel who participated in the deliberations to decide whether an Inquiry Committee must be constituted.

Legal Counsel and Advisors

Persons to advise and assist

4 The Inquiry Committee may engage legal counsel and other persons to provide advice and to assist in the conduct of the inquiry.

Inquiry Committee Proceedings

Complaint or allegation

5 (1) The Inquiry Committee may consider any complaint or allegation pertaining to the judge that is brought to its attention. In so doing, it must take into account the Judicial Conduct Review Panel's written reasons and statement of issues.

Sufficient notice to respond

(2) The Inquiry Committee must inform the judge of all complaints or allegations pertaining to the judge and must give them sufficient time to respond fully to them.

Comments from judge

(3) The Inquiry Committee may set a time limit to receive comments from the judge that is reasonable in the circumstances, it must notify the judge of that time limit, and, if any comments are received within that time limit, it must consider them.

Public or private hearing

6 (1) Subject to [subsection 63\(6\)](#) of the [Act](#), hearings of the Inquiry Committee must be conducted in public unless, the Inquiry Committee determines that the public interest and the due administration of justice require that all or any part of a hearing be conducted in private.

Prohibition of publication if not in public interest

(2) The Inquiry Committee may prohibit the publication of any information or documents placed before it if it determines that publication is not in the public interest and may take any measures that it considers necessary to protect the identity of persons, including persons who have received assurances of confidentiality as part of the consideration of a complaint or allegation made in respect of the judge.

Principle of fairness

7 The Inquiry Committee must conduct its inquiry or investigation in accordance with the principle of fairness.

Inquiry Committee Report

Report of findings and conclusions

8 (1) The Inquiry Committee must submit a report to the Council setting out its findings and its conclusions about whether to recommend the removal of the judge from office.

Copy of report and notice to complainant

(2) After the report has been submitted to the Council, its Executive Director must provide a copy to the judge and to any other persons or bodies who had standing in the hearing. He or she must also notify the complainant, if any, when the Inquiry Committee has made the report.

Hearing conducted in public

(3) If the hearing was conducted in public, the report must be made available to the public and a copy provided to the complainant, if any.

Judge's Response to Inquiry Committee Report

Written submission by judge

9 (1) Within 30 days after the day on which the Inquiry Committee's report is received, the judge may make a written submission to the Council regarding the report.

Extension

(2) On the judge's request, the Council must grant an extension of time for making the submission if it considers that the extension is in the public interest.

Deliberations of Council Concerning Removal of Judges from office

Senior member chairs meetings

10 (1) The senior member who is available to participate in deliberations concerning the removal from office of a judge is to chair any meetings of Council related to those deliberations.

Quorum

(2) A quorum of 17 members of the Council is required when it meets to deliberate the removal from office of a judge.

Quorum — death, incapacity, resignation or retirement

(3) In the event of the death, incapacity, resignation or retirement of a member during the deliberations, the remaining members constitute a quorum.

Vote in event of tie

(4) During the deliberations of the Council concerning the removal from office of a judge, the member chairing the meeting may vote in respect of a report of the Council's conclusions on the matter only in the event of a tie.

Deliberations

(5) Deliberations of the Council concerning the removal from office of a judge may also be held by audio-conference or by video conference.

Consideration of Inquiry Committee Report by Council

Consideration of report and written submissions

11 (1) The Council must consider the Inquiry Committee's report and any written submission made by the judge.

Who must not participate

(2) Persons referred to in [subsection 3\(4\)](#) and members of the Inquiry Committee must not participate in the Council's consideration of the report or in any other deliberations of the Council related to the matter.

Clarification

12 If the Council is of the opinion that the Inquiry Committee's report requires a clarification or that a supplementary inquiry or investigation is necessary, it may refer all or part of the matter back to the Inquiry Committee with directions.

Council Report

Report of conclusions to Minister

13 The Council's Executive Director must provide the judge with a copy of the report of its conclusions that the Council presented to the Minister in accordance with [section 65](#) of the [Act](#).

Transitional Provision

14 Despite these By-laws, the *Canadian Judicial Council Inquiries and Investigations By-laws*, as they read immediately before the day on which these By-laws come into force, continue to apply in respect of any inquiries or investigations being conducted by a Review Panel or an Inquiry Committee or the Council acting under [section 11](#) or [12](#), that were commenced under those By-laws.

Repeal

15 [Repeal]

Coming into Force

16 These By-laws come into force on the day on which they are registered.

Tab 69

Public Service of Ontario Act, 2006, SO 2006, c 35, Sch A



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Public Service of Ontario Act, 2006

S.O. 2006, CHAPTER 35
SCHEDULE A

Consolidation Period: From April 1, 2024 to the [e-Laws currency date](#).

Last amendment: 2021, c. 4, Sched. 3, s. 27.

**PART I
GENERAL****PURPOSE, INTERPRETATION AND APPLICATION****Purposes of this Act**

1 The following are the purposes of this Act:

1. To ensure that the public service of Ontario is effective in serving the public, the government and the Legislature.
2. To ensure that the public service of Ontario is non-partisan, professional, ethical and competent.
3. To set out roles and responsibilities in the administration of the public service of Ontario.
4. To provide a framework in law for the leadership and management of the public service of Ontario.
5. To set out rights and duties of public servants concerning ethical conduct.
6. To set out rights and duties of public servants concerning political activity.
7. To establish procedures for the disclosure and investigation of wrongdoing in the public service of Ontario and to protect public servants who disclose wrongdoing from reprisals. 2006, c. 35, Sched. A, s. 1.

Interpretation

2 (1) In this Act,

“Commission public body” means a public body that is prescribed as a Commission public body under clause 8 (1.1) (b); (“organisme public rattaché à la Commission”)

“Conflict of Interest Commissioner” means the Conflict of Interest Commissioner described in section 14 as it read immediately before the day section 2 of Schedule 35 to the *Restoring Trust, Transparency and Accountability Act, 2018* comes into force; (“commissaire aux conflits d’intérêts”)

“government appointee” means a person who is a public servant by virtue of paragraph 5 of subsection (2); (“personne nommée par le gouvernement”)

“Integrity Commissioner” means the Integrity Commissioner appointed under the *Members’ Integrity Act, 1994*; (“commissaire à l’intégrité”)

“minister” means a member of the Executive Council; (“ministre”)

“minister’s office” includes the office of the parliamentary assistant, if any, assigned to the minister; (“cabinet d’un ministre”)

“prescribed” means prescribed by regulation; (“prescrit”)

“public body” means a body that is prescribed as a public body under clause 8 (1.1) (a); (“organisme public”)

“public service of Ontario” means,

- (a) ministries, including ministers’ offices, and
- (b) public bodies; (“fonction publique de l’Ontario”)

“regulation” means a regulation under this Act. (“règlement”) 2006, c. 35, Sched. A, s. 2 (1); 2009, c. 33, Sched. 17, s. 10 (1, 2); 2018, c. 17, Sched. 35, s. 1.

Public servant

(2) For the purposes of this Act, the following are public servants:

- 1. Every person employed under Part III.
- 2. The Secretary of the Cabinet.
- 3. Every deputy minister.
- 4. Every employee of a public body.
- 5. Every person appointed by the Lieutenant Governor in Council, the Lieutenant Governor or a minister to a public body. 2006, c. 35, Sched. A, s. 2 (2).

Certain appointees not public servants

(3) For the purposes of this Act, judges, justices of the peace, associate judges, deputy judges, the Small Claims Court Administrative Judge and officers of the Assembly are not public servants. 2006, c. 35, Sched. A, s. 2 (3); 2018, c. 17, Sched. 45, s. 14; 2021, c. 4, Sched. 3, s. 27.

Application of Act to former public servants

3 Except where otherwise provided, a reference in this Act to a former public servant is a reference to a person who ceased to be a public servant on or after the day on which this section comes into force. 2006, c. 35, Sched. A, s. 3.

Application of Act to Cabinet Office, etc.

4 For the purposes of this Act, the Cabinet Office is a ministry, the Premier is its minister and the Secretary of the Cabinet is its deputy minister. 2006, c. 35, Sched. A, s. 4.

OATHS AND AFFIRMATIONS

Oath or affirmation of allegiance

5 (1) Every public servant shall swear or affirm his or her allegiance to the Crown as prescribed under clause 8 (1) (c). 2006, c. 35, Sched. A, s. 5 (1).

Exception

(2) Subsection (1) does not apply to a public servant in the circumstances prescribed under clause 8 (1) (d). 2006, c. 35, Sched. A, s. 5 (2).

Oath or affirmation of office

6 Every public servant shall swear or affirm an oath of office as prescribed under clause 8 (1) (c). 2006, c. 35, Sched. A, s. 6.

Administering oath, affirmation

7 An oath or affirmation may only be administered under section 5 or 6 by a person prescribed under clause 8 (1) (e). 2006, c. 35, Sched. A, s. 7.

REGULATIONS**Regulations, Part I**

8 (1) The Lieutenant Governor in Council may make regulations,

- (a), (b) Repealed: 2009, c. 33, Sched. 17, s. 10 (3).
- (c) respecting the wording of oaths and affirmations required under sections 5 and 6 and the manner of making them;
- (d) prescribing the circumstances in which a public servant is exempt from the requirement to swear or affirm his or her allegiance to the Crown under subsection 5 (1);
- (e) prescribing persons who have the authority to administer an oath or affirmation for the purposes of sections 5 and 6. 2006, c. 35, Sched. A, s. 8 (1); 2009, c. 33, Sched. 17, s. 10 (3).

Same, Minister

(1.1) The minister responsible for the administration of this Act may make regulations,

- (a) prescribing the bodies that are public bodies for the purposes of the definition of “public body” in subsection 2 (1);
- (b) prescribing as Commission public bodies, for the purposes of the definition of “Commission public body” in subsection 2 (1), public bodies,
 - (i) for which the Public Service Commission may, under this or any other Act, appoint public servants under Part III, or
 - (ii) in respect of which there is no statutory authority to employ employees. 2009, c. 33, Sched. 17, s. 10 (4).

Scope of regulations

(2) Regulations made under this section may be general or particular in their application. 2006, c. 35, Sched. A, s. 8 (2).

PART II**ROLES AND RESPONSIBILITIES IN THE ADMINISTRATION OF THE PUBLIC SERVICE OF ONTARIO****PUBLIC SERVICE COMMISSION****Commission continued**

9 (1) The Civil Service Commission is continued under the name the Public Service Commission in English and Commission de la fonction publique in French. 2006, c. 35, Sched. A, s. 9 (1).

Composition

(2) The Public Service Commission shall be composed of a chair and at least two other members appointed by the Lieutenant Governor in Council. 2006, c. 35, Sched. A, s. 9 (2).

Remuneration, etc.

(3) The Lieutenant Governor in Council may fix the remuneration and allowance for expenses of members of the Public Service Commission. 2006, c. 35, Sched. A, s. 9 (3).

Powers, duties and functions

10 The Public Service Commission may exercise the powers and shall perform the duties and functions assigned to it under this or any other Act. 2006, c. 35, Sched. A, s. 10.

Employees

11 (1) Such employees as are considered necessary for the proper conduct of the business of the Public Service Commission may be appointed under Part III. 2006, c. 35, Sched. A, s. 11 (1).

Consultants

(2) The Public Service Commission may retain such technical and professional consultants as it considers necessary for the proper conduct of the Commission's business, at the remuneration and on the terms that the Commission approves. 2006, c. 35, Sched. A, s. 11 (2).

Annual report

12 (1) The Public Service Commission shall prepare an annual report, provide it to the minister responsible for the administration of this Act and make it available to the public. 2017, c. 34, Sched. 46, s. 49 (1).

Same

(2) The Public Service Commission shall comply with such directives as may be issued by the Management Board of Cabinet with respect to,

- (a) the form and content of the annual report;
- (b) when to provide it to the minister; and
- (c) when and how to make it available to the public. 2017, c. 34, Sched. 46, s. 49 (1).

Same

(3) The Public Service Commission shall include such additional content in the annual report as the minister may require. 2017, c. 34, Sched. 46, s. 49 (1).

Tabling of annual report

12.1 The minister responsible for the administration of this Act shall table the Public Service Commission's annual report in the Assembly and shall comply with such directives as may be issued by the Management Board of Cabinet with respect to when to table it. 2017, c. 34, Sched. 46, s. 49 (1).

No personal liability

13 (1) No action or other proceeding may be instituted against the Public Service Commission or a member of or an employee in the Commission for any act done or omitted in good faith in the exercise or intended exercise of the Commission's powers or in the execution or intended execution of the Commission's duties or functions. 2006, c. 35, Sched. A, s. 13 (1).

Crown liability

(2) Despite subsection 8 (3) of the *Crown Liability and Proceedings Act, 2019*, subsection (1) does not relieve the Crown of liability in respect of a tort committed by a person mentioned in subsection (1) to which the Crown would otherwise be subject. 2006, c. 35, Sched. A, s. 13 (2); 2019, c. 7, Sched. 17, s. 149 (1).

INTEGRITY COMMISSIONER

Integrity Commissioner

14 (1) The Integrity Commissioner may exercise the powers and shall perform the duties and functions assigned to him or her under this Act. 2018, c. 17, Sched. 35, s. 2.

Designate

(2) The Integrity Commissioner may designate in writing an employee of the office of the Commissioner to fulfil the duties of the Commissioner under this Act, subject to any conditions or restrictions set out in the designation. 2018, c. 17, Sched. 35, s. 2.

Employees

15 (1) The Integrity Commissioner may hire, pursuant to section 23.11 of the *Members' Integrity Act, 1994*, such employees as he or she considers necessary for the proper exercise of the powers and performance of the duties and functions of the Commissioner under this Act. 2018, c. 17, Sched. 35, s. 2.

Consultants

(2) The Integrity Commissioner may retain such technical and professional consultants as he or she considers necessary for the proper exercise of the powers and performance of the duties and functions of the Commissioner under this Act, at the remuneration and on the terms that the Commissioner approves. 2018, c. 17, Sched. 35, s. 2.

Employees continued

16 (1) The employees who work in the office of the Conflict of Interest Commissioner immediately before the day section 2 of Schedule 35 to the *Restoring Trust, Transparency and Accountability Act, 2018* comes into force become employees of the Office of the Assembly on that day. 2018, c. 17, Sched. 35, s. 2.

Same

(2) The employment of the employees described in subsection (1) is not terminated or severed, including for the purposes of the *Employment Standards Act, 2000*, and the employment of the employees immediately before and after the day section 2 of Schedule 35 to the *Restoring Trust, Transparency and Accountability Act, 2018* comes into force is continuous for the purposes of calculating an employee's length or period of employment. 2018, c. 17, Sched. 35, s. 2.

Transfers

17 (1) The Crown in right of Ontario may transfer to the Integrity Commissioner any of its rights, obligations, assets and liabilities relating to the office of the Conflict of Interest Commissioner or any interest in or entitlement to such a right, obligation, asset and liability, with or without consideration, on terms and conditions agreed upon between the Crown and the Integrity Commissioner. 2018, c. 17, Sched. 35, s. 2.

Agreement assignable

(2) Where an agreement is the subject of a transfer under subsection (1), it shall be deemed to be assignable by the minister responsible for the administration of this Act without the consent of any party to the agreement. 2018, c. 17, Sched. 35, s. 2.

Other agreements

(3) The Crown may enter into such other agreements, execute such documents and instruments, and do such other acts and things as the minister responsible for the administration of this Act considers necessary or advisable to effect a transfer authorized in subsection (1). 2018, c. 17, Sched. 35, s. 2.

Annual report

18 The Integrity Commissioner shall include in his or her annual report prepared under section 24 of the *Members' Integrity Act, 1994* a report on the exercise of the powers and performance of the duties and functions of the Commissioner under this Act, and may include such additional content as the Management Board of Cabinet or the minister responsible for the administration of this Act requests. 2018, c. 17, Sched. 35, s. 2.

Immunity

19 Sections 25 and 26 of the *Members' Integrity Act, 1994* apply to the Integrity Commissioner and the employees of the office of the Commissioner in respect of their duties under this Act. 2018, c. 17, Sched. 35, s. 2.

19.1 Repealed: 2018, c. 17, Sched. 35, s. 2.

Protection from liability

20 (1) No cause of action arises, no proceeding may be brought and no remedy is available or damages, costs or compensation payable in connection with any amendment made by Schedule 35 to the *Restoring Trust, Transparency and Accountability Act, 2018* to this Act or anything done or not done in accordance with those amendments. 2018, c. 17, Sched. 35, s. 2.

Same

(2) Subsection (1) applies whether the cause of action on which a proceeding is based arose before or after the day that subsection comes into force. 2018, c. 17, Sched. 35, s. 2.

Proceedings set aside

(3) Any proceeding referred to in subsection (1) commenced before the day that subsection comes into force is deemed to have been dismissed, without costs, on that day. 2018, c. 17, Sched. 35, s. 2.

20.1 Repealed: 2018, c. 17, Sched. 35, s. 3 (2).

PUBLIC SERVICE GRIEVANCE BOARD**Public Service Grievance Board continued**

21 (1) The board known as the Public Service Grievance Board in English and Commission des griefs de la fonction publique in French is continued. 2006, c. 35, Sched. A, s. 21 (1).

Composition

(2) The Public Service Grievance Board shall be composed of a chair and at least two other members appointed by the Lieutenant Governor in Council for a fixed term. 2006, c. 35, Sched. A, s. 21 (2).

Remuneration, etc.

(3) The Lieutenant Governor in Council may fix the remuneration and allowance for expenses of members of the Public Service Grievance Board. 2006, c. 35, Sched. A, s. 21 (3).

Powers, duties and functions

22 The Public Service Grievance Board may exercise the powers and shall perform the duties and functions assigned to it under this or any other Act. 2006, c. 35, Sched. A, s. 22.

Procedures

23 (1) Proceedings before the Public Service Grievance Board shall be governed in accordance with the following:

1. Subject to paragraph 2, the *Statutory Powers Procedure Act* and any rules made under that Act by the Board apply to proceedings before the Board.
2. On the coming into force of a regulation made under subsection (2) establishing procedural rules for proceedings before the Board, the *Statutory Powers Procedure Act* and any rules made under that Act cease to apply to proceedings before the Board to the extent that the *Statutory Powers Procedure Act* and any rules made under it conflict with the regulation. 2006, c. 35, Sched. A, s. 23 (1).

Same

(2) The Lieutenant Governor in Council may make regulations establishing procedural rules for proceedings before the Public Service Grievance Board. 2006, c. 35, Sched. A, s. 23 (2).

Same

(3) Without limiting the generality of subsection (2), a regulation made under that subsection may provide for transitional provisions respecting the application of procedural rules to proceedings before the Public Service Grievance Board. 2006, c. 35, Sched. A, s. 23 (3).

Same

(4) A regulation made under subsection (2) may be general or particular in its application. 2006, c. 35, Sched. A, s. 23 (4).

Restriction, decision on grievance

24 (1) In making a decision on a grievance, the Public Service Grievance Board shall not provide for the employment of a public servant in a position that involves direct responsibility for or provides an opportunity for contact with a vulnerable person specified in a regulation made under clause 31 (1) (a) if the Board has found that the public servant,

(a) has applied force to a vulnerable person, except the minimum force necessary for self-defence or the defence of another person or necessary to restrain the vulnerable person for his or her own protection; or

(b) has sexually molested a vulnerable person. 2006, c. 35, Sched. A, s. 24 (1).

Same

(2) Where subsection (1) applies, the Public Service Grievance Board may provide for the employment of the public servant in another, substantially equivalent, position. 2006, c. 35, Sched. A, s. 24 (2).

Criminal conviction or discharge

25 (1) If a public servant is convicted or discharged of an offence under the *Criminal Code* (Canada) in respect of an act or omission that results in discipline or dismissal and the discipline or dismissal becomes the subject matter of a grievance before the Public Service Grievance Board, proof of the conviction or discharge shall be taken as conclusive evidence that the public servant committed the act or omission after,

(a) the time for an appeal has expired; or

(b) if an appeal was taken, the appeal was dismissed and no further appeal is available. 2006, c. 35, Sched. A, s. 25 (1).

Adjournment pending appeal to be granted

(2) If an adjournment of a grievance is requested pending an appeal of a conviction or a discharge mentioned in subsection (1), the Public Service Grievance Board shall grant the adjournment. 2006, c. 35, Sched. A, s. 25 (2).

Decisions final

26 A decision of the Public Service Grievance Board is final. 2006, c. 35, Sched. A, s. 26.

No personal liability

27 (1) No action or other proceeding may be instituted against the Public Service Grievance Board or a member of or an employee in the Board for any act done or omitted in good faith in the exercise or intended exercise of the Board's powers or in the execution or intended execution of the Board's duties and functions. 2006, c. 35, Sched. A, s. 27 (1).

Crown liability

(2) Despite subsection 8 (3) of the *Crown Liability and Proceedings Act, 2019*, subsection (1) does not relieve the Crown of liability in respect of a tort committed by a person mentioned in subsection (1) to which the Crown would otherwise be subject. 2006, c. 35, Sched. A, s. 27 (2); 2019, c. 7, Sched. 17, s. 149 (2).

OTHER OFFICIALS**Secretary of the Cabinet**

28 The Secretary of the Cabinet is the clerk of the Executive Council and the head of the public service of Ontario. 2006, c. 35, Sched. A, s. 28.

Deputy ministers

29 (1) The deputy minister of a ministry, acting on behalf of the minister, is responsible for the operation of the ministry. 2006, c. 35, Sched. A, s. 29 (1).

Responsibility to inform minister

(2) The deputy minister shall give the minister such information as the minister may require to carry out his or her responsibilities as the minister of the ministry, a member of the Executive Council and a member of the Assembly. 2006, c. 35, Sched. A, s. 29 (2).

Responsibility re public servants

(3) Deputy ministers shall promote effective, non-partisan, professional, ethical and competent public service by public servants. 2006, c. 35, Sched. A, s. 29 (3).

Powers, duties and functions

(4) A deputy minister shall exercise such powers and perform such duties and functions as may be assigned to him or her under this or any other Act or by the Lieutenant Governor in Council or by the minister. 2006, c. 35, Sched. A, s. 29 (4).

Acting deputy ministers

30 (1) The Secretary of the Cabinet may designate in writing a public servant to exercise the powers and perform the duties and functions of the deputy minister in his or her absence. 2006, c. 35, Sched. A, s. 30 (1).

Same

(2) The Secretary of the Cabinet may delegate his or her power to designate under subsection (1) to a deputy minister with respect to his or her ministry. 2006, c. 35, Sched. A, s. 30 (2).

Same

(3) The Secretary of the Cabinet may impose conditions and restrictions that govern the exercise of the delegated power. 2006, c. 35, Sched. A, s. 30 (3).

REGULATIONS**Regulations, Part II**

31 (1) The Lieutenant Governor in Council may make regulations,

- (a) specifying who is a vulnerable person for the purposes of section 24;
- (b) prescribing powers, duties and functions of the Public Service Grievance Board, in addition to those provided under this Act;
- (c) prescribing circumstances in addition to those set out in this Act in which a public servant may file a grievance with the Public Service Grievance Board;
- (d) prescribing matters that cannot be the subject of a grievance before the Public Service Grievance Board;
- (e) prescribing classes of public servants who are not eligible to file a grievance with the Public Service Grievance Board;
- (f) prescribing remedy powers of the Public Service Grievance Board in respect of circumstances prescribed under clause (c);
- (g) prescribing powers, duties and functions of the Public Service Commission and the Integrity Commissioner under this Act, in addition to those already provided;
- (h) providing for the delegation and subdelegation of the powers, duties and functions prescribed under clause (g), in the manner and to the persons or bodies specified in the regulations, subject to such restrictions or conditions as may be prescribed. 2006, c. 35, Sched. A, s. 31 (1); 2018, c. 17, Sched. 35, s. 4.

Same

(2) Regulations made under this section may be general or particular in their application. 2006, c. 35, Sched. A, s. 31 (2).

PART III
EMPLOYMENT BY THE CROWN

APPOINTMENT BY THE PUBLIC SERVICE COMMISSION

Appointment by the Public Service Commission

Employment in a ministry

32 (1) The Public Service Commission may appoint persons to employment by the Crown to work in a ministry, other than in a minister's office. 2006, c. 35, Sched. A, s. 32 (1).

Employment in a Commission public body

(2) The Public Service Commission may appoint persons to employment by the Crown to work in a Commission public body. 2006, c. 35, Sched. A, s. 32 (2).

Fixed term or otherwise

(3) An appointment by the Public Service Commission may be for a fixed term or otherwise. 2006, c. 35, Sched. A, s. 32 (3).

Same

(4) A person appointed by the Public Service Commission for a fixed term may be reappointed for one or more further terms. 2006, c. 35, Sched. A, s. 32 (4).

Creation of positions

33 (1) The Management Board of Cabinet may, by directive, create classes of position for public servants appointed by the Public Service Commission and determine the duties of and qualifications for the positions. 2006, c. 35, Sched. A, s. 33 (1).

Salary or wage ranges

(2) The Management Board of Cabinet may, by directive, determine salary ranges or wage ranges for public servants appointed by the Public Service Commission. 2006, c. 35, Sched. A, s. 33 (2).

Other remuneration

(3) The Management Board of Cabinet may, by directive, determine other remuneration, including benefits, for public servants appointed by the Public Service Commission. 2006, c. 35, Sched. A, s. 33 (3).

Other terms, conditions of employment

(4) The Management Board of Cabinet may, by directive, establish other terms and conditions of employment for public servants appointed by the Public Service Commission and for deputy ministers. 2006, c. 35, Sched. A, s. 33 (4); 2009, c. 33, Sched. 17, s. 10 (5).

General or particular

(5) Directives issued under this section may be general or particular in their application. 2006, c. 35, Sched. A, s. 33 (5).

Non-application

(6) Part III (Regulations) of the *Legislation Act, 2006* does not apply to a directive issued under this section. 2006, c. 35, Sched. A, ss. 33 (6), 157.

Archive

(7) The Management Board of Cabinet shall maintain an archive of all directives issued by it under this section indicating the period during which each directive applies. 2006, c. 35, Sched. A, s. 33 (7).

Discipline and dismissal

34 The Public Service Commission may for cause,

- (a) impose disciplinary measures, including suspension, on a public servant appointed by it, as the Commission considers appropriate; and
- (b) dismiss from employment a public servant appointed by it, as the Commission considers appropriate. 2009, c. 33, Sched. 17, s. 10 (6).

Suspension, maximum period

35 A suspension under section 34 by the Public Service Commission may continue for a period not exceeding one month and, during the suspension, the public servant is not entitled to receive a salary, wages or any other remuneration, including benefits. 2006, c. 35, Sched. A, s. 35.

Commission may investigate

36 (1) The Public Service Commission may conduct an investigation in order to determine whether there is cause for the purposes of section 34. 2006, c. 35, Sched. A, s. 36 (1).

Suspension pending an investigation

(2) The Public Service Commission may, pending the conclusion of an investigation, suspend the public servant for a period not exceeding the period prescribed under clause 55 (1) (a). 2006, c. 35, Sched. A, s. 36 (2).

Same

(3) The Public Service Commission may withhold the public servant's salary, wages or any other remuneration, including benefits, during the suspension under this section if it considers it appropriate to do so, and may, at the end of the investigation, reimburse amounts that were withheld if it considers it appropriate to do so. 2006, c. 35, Sched. A, s. 36 (3).

Probationary period

37 (1) Where the Public Service Commission appoints a public servant to employment for a term that is not fixed, the Commission may direct that the public servant be on probation for a period of not more than one year. 2006, c. 35, Sched. A, s. 37 (1).

Same

(2) While on probation under subsection (1), the public servant may be dismissed for failure to meet the requirements of his or her position. 2006, c. 35, Sched. A, s. 37 (2).

Dismissal without cause

38 (1) The Public Service Commission may without cause dismiss a public servant appointed by it who is employed in a class of position that is prescribed under clause 55 (1) (b) by giving the public servant reasonable notice or by giving the public servant compensation in lieu of notice. 2006, c. 35, Sched. A, s. 38 (1).

Reinstatement

(2) An order to reinstate a public servant who is dismissed under subsection (1) shall not be made by any court, tribunal or other arbitrator. 2006, c. 35, Sched. A, s. 38 (2).

Dismissal for certain reasons

39 The Public Service Commission may dismiss a public servant appointed by it for the following reasons:

1. A shortage of work.
2. A shortage of funds.
3. The elimination of the public servant's position.
4. A material change in the ministry or Commission public body in which the public servant works. 2006, c. 35, Sched. A, s. 39.

Effect of dismissal

40 When the dismissal of a public servant takes effect, he or she ceases to be employed by the Crown. 2006, c. 35, Sched. A, s. 40.

Resignation

41 (1) A public servant appointed by the Public Service Commission may resign from his or her position by giving at least two weeks notice in writing of the intention to resign to the Commission. 2006, c. 35, Sched. A, s. 41 (1).

Withdrawal

(2) A public servant may, by giving notice in writing to the Public Service Commission, withdraw the notice of intention to resign at any time before its effective date if,

- (a) no person has been appointed or selected for appointment by the Commission to the position held by the public servant; and
- (b) the Commission approves the withdrawal. 2006, c. 35, Sched. A, s. 41 (2).

Effect of resignation

(3) When the resignation of a public servant takes effect, he or she ceases to be employed by the Crown. 2006, c. 35, Sched. A, s. 41 (3).

Abandonment

42 (1) If a public servant appointed by the Public Service Commission is absent from work without approved leave for a period of two weeks or more, the Commission may declare, in writing, that the public servant has abandoned the position and that his or her employment by the Crown is terminated. 2006, c. 35, Sched. A, s. 42 (1).

Effect of termination

(2) When a declaration with respect to a public servant is made under subsection (1), the termination takes effect and the public servant ceases to be employed by the Crown. 2006, c. 35, Sched. A, s. 42 (2).

Directives, human resources

43 (1) The Public Service Commission may issue directives for effective management and administration of human resources in relation to public servants appointed by it and in relation to deputy ministers. 2006, c. 35, Sched. A, s. 43 (1); 2009, c. 33, Sched. 17, s. 10 (7).

Directives, non-partisan

(2) The Public Service Commission shall ensure by directive that the recruitment and employment of public servants appointed by it are non-partisan. 2006, c. 35, Sched. A, s. 43 (2).

Conflict

(3) In the case of a conflict between a directive issued by the Public Service Commission under subsection (1) and a policy, procedure or directive of the Management Board of Cabinet under the *Management Board of Cabinet Act* or under this Act, the latter prevails. 2006, c. 35, Sched. A, s. 43 (3).

Same

(4) The Management Board of Cabinet shall not set a policy or procedure under the *Management Board of Cabinet Act* or issue a directive under that Act or under this Act that would be inconsistent with the non-partisan nature of the public service of Ontario. 2006, c. 35, Sched. A, s. 43 (4).

General or particular

(5) Directives issued under this section may be general or particular in their application. 2006, c. 35, Sched. A, s. 43 (5).

Non-application

(6) Part III (Regulations) of the *Legislation Act, 2006* does not apply to a directive issued under this section. 2006, c. 35, Sched. A, ss. 43 (6), 157.

Archive

(7) The Public Service Commission shall maintain an archive of all directives issued by it under this section indicating the period during which each directive applies. 2006, c. 35, Sched. A, s. 43 (7).

Delegation by Commission**Delegation, public servants appointed to work in a ministry**

44 (1) The Public Service Commission may delegate any of its powers, duties or functions under subsection 32 (1) and sections 34 to 42 in respect of public servants appointed by it to work in a ministry to the deputy minister of the ministry. 2006, c. 35, Sched. A, s. 44 (1).

Subdelegation by deputy minister

(2) A deputy minister may subdelegate any of the powers, duties or functions delegated to him or her under subsection (1) to one or more public servants employed under this Part who work in his or her ministry. 2006, c. 35, Sched. A, s. 44 (2).

Same

(3) With the permission of the Public Service Commission, a deputy minister may subdelegate to one or more persons any of the powers, duties or functions delegated to him or her under subsection (1), other than the power to dismiss a public servant and the power to make a declaration under subsection 42 (1). 2006, c. 35, Sched. A, s. 44 (3).

Delegation, public servants appointed to work in Commission public body

(4) Subject to subsection (5), the Public Service Commission may delegate any of its powers, duties or functions under subsection 32 (2) and sections 34 to 42 in respect of public servants appointed by it to work in a Commission public body to a deputy minister or to,

- (a) an individual who is prescribed under subsection 55 (1.1) for the body; or
- (b) the chair of the body, if no individual is prescribed under subsection 55 (1.1) for the body. 2006, c. 35, Sched. A, s. 44 (4); 2009, c. 33, Sched. 17, s. 10 (8).

Limitation

(5) The power to dismiss a public servant and the power to make a declaration under subsection 42 (1) may only be delegated under subsection (4) by the Public Service Commission to a deputy minister. 2006, c. 35, Sched. A, s. 44 (5).

Subdelegation by deputy minister

(6) A deputy minister may subdelegate any of the powers, duties or functions delegated to him or her under subsection (4) to one or more public servants employed under this Part who work in his or her ministry. 2006, c. 35, Sched. A, s. 44 (6).

Subdelegation by chair or prescribed individual

(7) A person referred to in clause (4) (a) or (b) may subdelegate any of the powers, duties or functions delegated to him or her under subsection (4) to one or more public servants employed under this Part who work in the body. 2006, c. 35, Sched. A, s. 44 (7).

Same

(8) With the permission of the Public Service Commission, a person referred to in clause (4) (a) or (b) may subdelegate any of the powers, duties or functions delegated to him or her under subsection (4) to one or more persons. 2006, c. 35, Sched. A, s. 44 (8).

Conditions and restrictions

(9) A person or body who delegates or subdelegates powers, duties or functions under this section may impose conditions and restrictions that govern the exercise of the delegated powers or the performance of the delegated duties or functions. 2006, c. 35, Sched. A, s. 44 (9).

Same

(10) Despite a permission provided in this section to subdelegate, a delegation under this section may provide that delegated powers, duties and functions may not be subdelegated. 2006, c. 35, Sched. A, s. 44 (10).

Delegation by Management Board of Cabinet

45 (1) The Management Board of Cabinet may delegate its powers, duties or functions under section 33 to the Public Service Commission. 2006, c. 35, Sched. A, s. 45 (1).

Conditions

(2) The Management Board of Cabinet may impose conditions and restrictions that govern the exercise of the delegated powers or the performance of the delegated duties or functions. 2006, c. 35, Sched. A, s. 45 (2).

Secondment to minister's office

46 At the request of a minister, the Public Service Commission may assign persons appointed under subsection 32 (1) to work in the minister's office for a fixed term. 2006, c. 35, Sched. A, s. 46.

APPOINTMENT TO WORK IN A MINISTER'S OFFICE**Employment in a minister's office**

47 An individual designated by the Premier in relation to a minister's office for the purposes of this section or, if no such individual is designated, the minister may appoint persons to employment by the Crown to work in the minister's office for a fixed term. 2006, c. 35, Sched. A, s. 47.

Creation of positions

48 (1) The Management Board of Cabinet may, by directive, create classes of position for public servants appointed under section 47 and determine the duties of and qualifications for the positions. 2006, c. 35, Sched. A, s. 48 (1).

Salary or wage ranges

(2) The Management Board of Cabinet may, by directive, determine salary ranges or wage ranges for public servants appointed under section 47. 2006, c. 35, Sched. A, s. 48 (2).

Other remuneration

(3) The Management Board of Cabinet may, by directive, determine other remuneration, including benefits, for public servants appointed under section 47. 2006, c. 35, Sched. A, s. 48 (3).

Other terms, conditions of employment

(4) The Management Board of Cabinet may, by directive, establish other terms and conditions of employment for public servants appointed under section 47. 2006, c. 35, Sched. A, s. 48 (4).

General or particular

(5) Directives issued under this section may be general or particular in their application. 2006, c. 35, Sched. A, s. 48 (5).

Non-application

(6) Part III (Regulations) of the *Legislation Act, 2006* does not apply to a directive made under this section. 2006, c. 35, Sched. A, ss. 48 (6), 157.

Archive

(7) The Management Board of Cabinet shall maintain an archive of all directives issued by it under this section indicating the period during which each directive applies. 2006, c. 35, Sched. A, s. 48 (7).

Disciplinary measures

49 Sections 34 to 36 and sections 39 to 42 apply with necessary modifications in respect of public servants appointed under section 47 and, for the purpose,

- (a) a reference to a public servant appointed by the Public Service Commission shall be read as a reference to a public servant appointed under section 47; and
- (b) a reference to the Public Service Commission shall be read as a reference to an individual designated by the Premier in relation to a minister's office for the purposes of section 47 or, if no such individual is designated, the minister. 2006, c. 35, Sched. A, s. 49.

Dismissal without cause

50 (1) An individual designated by the Premier in relation to a minister's office for the purposes of section 47 or, if no such individual is designated, the minister may without cause dismiss a public servant appointed under section 47 by giving the public servant reasonable notice or by giving the public servant compensation in lieu of notice. 2006, c. 35, Sched. A, s. 50 (1).

Reinstatement

(2) An order to reinstate a public servant who is dismissed under subsection (1) shall not be made by any court, tribunal or other arbitrator. 2006, c. 35, Sched. A, s. 50 (2).

Delegation

Delegation by Premier's designate

51 (1) An individual designated by the Premier in relation to a minister's office for the purposes of section 47 may delegate any of his or her powers, duties and functions under sections 47 to 50 to the minister or to the minister's executive assistant. 2006, c. 35, Sched. A, s. 51 (1).

Subdelegation by minister

(2) A minister may subdelegate any of the powers, duties or functions delegated to the minister under subsection (1) to the minister's executive assistant. 2006, c. 35, Sched. A, s. 51 (2).

Delegation by minister

(3) If no individual is designated by the Premier in relation to a minister's office for the purposes of section 47, the minister may delegate any of his or her powers, duties and functions under sections 47 to 50 to the minister's executive assistant. 2006, c. 35, Sched. A, s. 51 (3).

Conditions and restrictions

(4) A person who delegates or subdelegates powers, duties and functions under this section may impose conditions and restrictions that govern the exercise of the delegated powers or the performance of the delegated duties or functions. 2006, c. 35, Sched. A, s. 51 (4).

GENERAL

Status as employee of the Crown

52 (1) A person's status as an employee of the Crown in a ministry or a Commission public body is established only by appointment in writing under this Part. 2006, c. 35, Sched. A, s. 52 (1).

Same

(2) For greater certainty, a person's status as an employee of the Crown in a ministry or in a Commission public body cannot be inferred from his or her workplace or workplace activities. 2006, c. 35, Sched. A, s. 52 (2).

Government appointees employed under this Part

53 A public servant employed under this Part who is also a government appointee is subject to the terms and conditions of employment applicable to him or her under this Part. 2006, c. 35, Sched. A, s. 53.

Fixed term

54 A public servant employed under this Part whose employment is for a fixed term ceases to be employed by the Crown when that period expires. 2006, c. 35, Sched. A, s. 54.

REGULATIONS

Regulations, Part III

55 (1) The Lieutenant Governor in Council may make regulations,

- (a) prescribing the maximum period for a suspension pending an investigation for the purposes of subsection 36 (2);
- (b) prescribing classes of position for the purposes of subsection 38 (1).
- (c) Repealed: 2009, c. 33, Sched. 17, s. 10 (9).

2006, c. 35, Sched. A, s. 55 (1); 2009, c. 33, Sched. 17, s. 10 (9).

Same, Minister

(1.1) The minister responsible for the administration of this Act may make regulations prescribing an individual for the purposes of clause 44 (4) (a). 2009, c. 33, Sched. 17, s. 10 (10).

Scope of regulations

(2) Regulations made under this section may be general or particular in their application. 2006, c. 35, Sched. A, s. 55 (2).

PART IV ETHICAL CONDUCT

APPLICATION OF CONFLICT OF INTEREST RULES TO PUBLIC SERVANTS AND FORMER PUBLIC SERVANTS

Application

56 (1) Sections 57 to 65 apply to public servants and former public servants other than public servants who work or, immediately before ceasing to be a public servant, worked in a minister's office. 2006, c. 35, Sched. A, s. 56 (1).

Same, ministers' offices

(2) Sections 66 to 69 apply to public servants and former public servants who work or who, immediately before ceasing to be a public servant, worked in a minister's office. 2006, c. 35, Sched. A, s. 56 (2).

MINISTRIES (OTHER THAN MINISTERS' OFFICES) AND PUBLIC BODIES

Rules for ministries

57 Every public servant and every former public servant who works or, immediately before ceasing to be a public servant, worked in a ministry shall comply with the conflict of interest rules prescribed under clause 71 (1) (a) that apply in respect of the ministry. 2006, c. 35, Sched. A, s. 57.

Rules for public bodies

58 (1) Every public servant and every former public servant who works or, immediately before ceasing to be a public servant, worked in a public body shall comply with the conflict of interest rules that apply to him or her, determined as follows:

1. The conflict of interest rules that apply to the public servant or former public servant are the rules, if any, approved and published by the Integrity Commissioner under section 59 or 60 for the public body.

2. During the year beginning on the day on which this section comes into force, if no conflict of interest rules are approved and published by the Conflict of Interest Commissioner under section 59 or 60 for a Commission public body, the conflict of interest rules prescribed under clause 71 (1) (a) apply to the public servant or former public servant, with necessary modifications.
3. During the year beginning on the day on which this section comes into force, if no conflict of interest rules are approved and published by the Conflict of Interest Commissioner under section 59 or 60 for a public body that is not a Commission public body, the conflict of interest rules that apply to the public servant or former public servant are the rules that applied to him or her immediately before this section comes into force.
4. On and after August 21, 2008 and before the day section 2 of Schedule 35 to the *Restoring Trust, Transparency and Accountability Act, 2018* comes into force, if no conflict of interest rules are approved and published by the Conflict of Interest Commissioner for a public body, the conflict of interest rules prescribed under clause 71 (1) (a) of this Act apply to the public servant or former public servant, with necessary modifications.
5. On and after the day section 2 of Schedule 35 to the *Restoring Trust, Transparency and Accountability Act, 2018* comes into force, if no conflict of interest rules are approved and published by the Integrity Commissioner for a public body, the conflict of interest rules prescribed under clause 71 (1) (a) of this Act apply to the public servant or former public servant, with necessary modifications. 2006, c. 35, Sched. A, s. 58; 2018, c. 17, Sched. 35, s. 5 (1), 14.

Transition

(2) Subject to subsection 59 (3), rules approved and published by the Conflict of Interest Commissioner before the day section 2 of Schedule 35 to the *Restoring Trust, Transparency and Accountability Act, 2018* comes into force are deemed to be approved by the Integrity Commissioner under section 59 of this Act until they are amended or revoked. 2018, c. 17, Sched. 35, s. 5 (2).

Rules prepared by public bodies

59 (1) A public body may submit proposed conflict of interest rules with respect to the body to the Integrity Commissioner. 2006, c. 35, Sched. A, s. 59 (1); 2018, c. 17, Sched. 35, s. 14.

Approval of proposed rules

(2) The Integrity Commissioner shall approve, in writing, the rules proposed for a public body under subsection (1) if, in the Commissioner's opinion, the proposed rules establish a degree of ethical conduct that is at least equivalent to the degree of ethical conduct established by the conflict of interest rules prescribed under clause 71 (1) (a), having regard to the powers, duties and functions of the public body. 2006, c. 35, Sched. A, s. 59 (2); 2018, c. 17, Sched. 35, s. 14.

Same

(3) Conflict of interest rules approved by the Integrity Commissioner have no effect unless the rules are published in accordance with subsection (4). 2006, c. 35, Sched. A, s. 59 (3); 2018, c. 17, Sched. 35, s. 14.

Same

(4) The Integrity Commissioner shall publish approved conflict of interest rules on the Commissioner's website, and shall indicate on the rules the date on which they were so published. 2006, c. 35, Sched. A, s. 59 (4); 2018, c. 17, Sched. 35, s. 14.

Same

(5) Conflict of interest rules published in accordance with subsection (4) take effect on the date of publication indicated under subsection (4) or on such later date as may be specified on the website by the Integrity Commissioner in respect of the published rules. 2006, c. 35, Sched. A, s. 59 (5); 2018, c. 17, Sched. 35, s. 14.

Non-application

(6) Part III (Regulations) of the *Legislation Act, 2006* does not apply to rules made by a public body and approved by the Commissioner under subsection (2). 2006, c. 35, Sched. A, ss. 59 (6), 157.

Change in rules

60 (1) If the rules prescribed under clause 71 (1) (a) change and, in the Integrity Commissioner's opinion, rules approved and published under section 59 for a public body no longer meet the test set out in subsection 59 (2), the Commissioner may request that the body amend its rules and submit the amended rules to the Commissioner within a time period specified by him or her. 2006, c. 35, Sched. A, s. 60 (1); 2018, c. 17, Sched. 35, s. 6.

Same

(2) The Integrity Commissioner may extend the time period within which the amended rules may be submitted, either before or after the expiry of the period. 2006, c. 35, Sched. A, s. 60 (2); 2018, c. 17, Sched. 35, s. 14.

Same

(3) Subsections 59 (2) to (6) apply, with necessary modifications, to rules submitted under subsection (1). 2006, c. 35, Sched. A, s. 60 (3).

Change in rules

61 (1) Subsections (2) and (3) apply if,

- (a) a public body fails to submit amended rules within the time period specified under subsection 60 (1) or (2);
- (b) the Integrity Commissioner notifies a public body that amended rules submitted by it under subsection 60 (1) do not meet the test set out in subsection 59 (2); or
- (c) the public body rescinds the rules made by it under section 59 or 60 and notifies the Integrity Commissioner of the rescission in writing. 2006, c. 35, Sched. A, s. 61 (1); 2018, c. 17, Sched. 35, s. 14.

Same

(2) The conflict of interest rules that were in effect for the public body cease to apply to the body and the conflict of interest rules prescribed under clause 71 (1) (a) apply to the body with such modifications as are necessary having regard to the body's powers, duties and functions, on and after the date specified by the Integrity Commissioner under subsection (3). 2006, c. 35, Sched. A, s. 61 (2); 2018, c. 17, Sched. 35, s. 14.

Same

(3) The Integrity Commissioner shall publish a notice on the Commissioner's website specifying a date for the purposes of subsection (2). 2006, c. 35, Sched. A, s. 61 (3); 2018, c. 17, Sched. 35, s. 14.

Ethics executive for public servants

62 (1) The ethics executive for a public servant is determined as follows:

1. The ethics executive for a public servant employed under Part III who works in a ministry, other than in a minister's office, is the deputy minister.
2. The ethics executive for a deputy minister is the Secretary of the Cabinet.
3. The ethics executive for a public servant who works in a public body, whether as a government appointee, as an employee under Part III or as an employee of the public body is the individual who is prescribed under subsection 71 (1.1) for the public servant or, if no individual is prescribed under that clause for the public servant, the chair of the body.
4. The ethics executive for the Secretary of the Cabinet, the chairs of public bodies and any individuals prescribed under subsections 55 (1.1) and 71 (1.1) is the Integrity Commissioner.
5. Repealed: 2018, c. 17, Sched. 35, s. 7.

2006, c. 35, Sched. A, s. 62 (1); 2009, c. 33, Sched. 17, s. 10 (11); 2018, c. 17, Sched. 35, s. 7, 14.

Delegation, O.P.P.

(2) The deputy minister of the Ministry of Community Safety and Correctional Services may delegate any of his or her powers, duties and functions as ethics executive with respect to members of the Ontario Provincial Police to the Commissioner of the Ontario Provincial Police. 2006, c. 35, Sched. A, s. 62 (2).

Ethics executive for former public servant

63 The ethics executive for a former public servant is determined as follows:

1. The ethics executive for a former public servant who, immediately before ceasing to be a public servant, was a public servant employed under Part III who worked in a ministry, other than in a minister's office, is the Public Service Commission.
2. The ethics executive for a former public servant who, immediately before ceasing to be a public servant, worked in a public body, whether as a government appointee, as an employee under Part III or as an employee of the public body, is the Integrity Commissioner.
3. The ethics executive for a former deputy minister or a former Secretary of the Cabinet is the Integrity Commissioner. 2006, c. 35, Sched. A, s. 63; 2018, c. 17, Sched. 35, s. 14.

Promotion of ethical conduct

64 The ethics executive for a public servant who works in a ministry, other than in a minister's office, or who works in a public body shall,

- (a) ensure that public servants who work in the ministry or the public body are familiar with the conflict of interest rules that apply in respect of the ministry or the public body; and
- (b) promote ethical conduct by public servants who work in the ministry or the public body. 2006, c. 35, Sched. A, s. 64.

Role of ethics executive

Questions for ethics executive

65 (1) A public servant or former public servant may request that his or her ethics executive determine a question about the application of conflict of interest rules to the public servant or former public servant. 2006, c. 35, Sched. A, s. 65 (1).

Same

(2) A supervisor of a public servant may request that the public servant's ethics executive determine a question about the application of conflict of interest rules to the public servant. 2006, c. 35, Sched. A, s. 65 (2).

Duty to notify

(3) If a public servant or a former public servant has personal or pecuniary interests that could raise an issue under the conflict of interest rules that apply to him or her, the public servant or former public servant shall notify his or her ethics executive. 2006, c. 35, Sched. A, s. 65 (3).

Inquiries

(4) The ethics executive may make such inquiries as he or she considers appropriate in response to a request, a notification or where the ethics executive has concerns that a conflict of interest rule has been or is about to be contravened by a public servant or former public servant. 2006, c. 35, Sched. A, s. 65 (4).

Determinations and directions

(5) An ethics executive shall,

- (a) make a determination with respect to any matter that is brought to the attention of the ethics executive under subsections (1) to (3) or that is the subject of inquiry under subsection (4); and
- (b) in the case of a determination that there is a conflict of interest or potential conflict of interest, give the public servant or former public servant directions, if any, that the ethics executive considers appropriate to address the conflict of interest or potential conflict of interest. 2006, c. 35, Sched. A, s. 65 (5).

Same

(6) If an ethics executive, other than the Integrity Commissioner, considers it appropriate to do so, the ethics executive may refer any matter that is brought to the ethics executive's attention under subsections (1) to (3) or that is the subject of inquiry under subsection (4) to the Integrity Commissioner, to be dealt with by the Commissioner under subsection (5). 2006, c. 35, Sched. A, s. 65 (6); 2018, c. 17, Sched. 35, s. 8, 14.

Same

(7) Where an ethics executive has referred a matter to the Integrity Commissioner under subsection (6), the Commissioner shall inform the ethics executive of any determination made or direction given by the Commissioner under subsection (5) as a result of the referral. 2006, c. 35, Sched. A, s. 65 (7); 2018, c. 17, Sched. 35, s. 14.

Compliance with direction

(8) A public servant or former public servant shall comply with a direction of the ethics executive or the Integrity Commissioner. 2006, c. 35, Sched. A, s. 65 (8); 2018, c. 17, Sched. 35, s. 14.

Contravention by government appointee

(9) If an ethics executive or the Integrity Commissioner makes a determination under subsection (5) that a government appointee has contravened a conflict of interest rule, the ethics executive or the Integrity Commissioner, as the case may be, shall notify the minister responsible for the body to which the government appointee is appointed of the contravention. 2006, c. 35, Sched. A, s. 65 (9); 2018, c. 17, Sched. 35, s. 14.

Same

(10) If the Integrity Commissioner makes a determination under subsection (5) that a former public servant who, immediately before ceasing to be a public servant, worked in a public body as a government appointee has contravened a conflict of interest rule, the Commissioner shall notify the minister responsible for the body to which the government appointee was appointed of the contravention. 2006, c. 35, Sched. A, s. 65 (10); 2018, c. 17, Sched. 35, s. 14.

MINISTERS' OFFICES

Rules for ministers' offices

66 Every public servant and every former public servant who works or, immediately before ceasing to be a public servant, worked in a minister's office shall comply with the conflict of interest rules prescribed under clause 71 (1) (c) that apply in respect of the minister's office. 2006, c. 35, Sched. A, s. 66.

Promotion of ethical conduct

67 A minister shall,

- (a) ensure that public servants who work in the minister's office are familiar with the conflict of interest rules that apply in respect of the minister's office; and
- (b) promote ethical conduct by public servants who work in the minister's office. 2006, c. 35, Sched. A, s. 67.

Ethics executive

68 The ethics executive for a public servant or former public servant who works or, immediately before ceasing to be a public servant, worked in a minister's office is the Integrity Commissioner. 2006, c. 35, Sched. A, s. 68.

Role of ethics executive

Questions for ethics executive

69 (1) A public servant or former public servant who works or, immediately before ceasing to be a public servant, worked in a minister's office may request that his or her ethics executive determine a question about the application of conflict of interest rules to the public servant or former public servant. 2006, c. 35, Sched. A, s. 69 (1).

Same

(2) A supervisor of a public servant who works in a minister's office may request that the public servant's ethics executive determine a question about the application of conflict of interest rules to the public servant. 2006, c. 35, Sched. A, s. 69 (2).

Duty to notify

(3) If a public servant or a former public servant who works or, immediately before ceasing to be a public servant, worked in a minister's office has personal or pecuniary interests that could raise an issue under the conflict of interest rules that apply to him or her, the public servant or former public servant shall notify his or her ethics executive. 2006, c. 35, Sched. A, s. 69 (3).

Inquiries

(4) The ethics executive may make such inquiries as he or she considers appropriate in response to a request, a notification or where the ethics executive has concerns that a conflict of interest rule has been or is about to be contravened by a public servant or a former public servant who works or, immediately before ceasing to be a public servant, worked in a minister's office. 2006, c. 35, Sched. A, s. 69 (4).

Determinations and directions

(5) The ethics executive shall,

- (a) make a determination with respect to any matter that is brought to his or her attention under subsections (1) to (3) or that is the subject of inquiry under subsection (4); and
- (b) in the case of a determination that there is a conflict of interest or potential conflict of interest, give the public servant or former public servant who works or, immediately before ceasing to be a public servant, worked in a minister's office directions, if any, that the ethics executive considers appropriate to address the conflict of interest or potential conflict of interest. 2006, c. 35, Sched. A, s. 69 (5).

Compliance with direction

(6) A public servant or former public servant who works or, immediately before ceasing to be a public servant, worked in a minister's office shall comply with a direction of the ethics executive. 2006, c. 35, Sched. A, s. 69 (6).

Notice to minister

(7) The ethics executive shall notify the minister if the ethics executive,

- (a) makes a determination under subsection (5) that a public servant or former public servant who works or, immediately before ceasing to be a public servant, worked in a minister's office has a conflict of interest or potential conflict of interest; or
- (b) gives a direction under subsection (5) to a public servant or former public servant who works or, immediately before ceasing to be a public servant, worked in a minister's office. 2006, c. 35, Sched. A, s. 69 (7).

PENALTY**Penalty**

70 A public servant who contravenes a conflict of interest rule applicable to him or her or who contravenes a direction under section 65 or 69 is subject to disciplinary measures, including suspension and dismissal. 2006, c. 35, Sched. A, s. 70.

REGULATIONS**Regulations, Part IV**

71 (1) The Lieutenant Governor in Council may make regulations,

- (a) establishing conflict of interest rules for public servants and former public servants who work or, immediately before ceasing to be a public servant, worked in a ministry, other than in a minister's office, for the purposes of section 57;
- (b) Repealed: 2009, c. 33, Sched. 17, s. 10 (12).
- (c) establishing conflict of interest rules for public servants and former public servants who work or, immediately before ceasing to be a public servant, worked in a minister's office, for the purposes of section 66;
- (d) prescribing powers, duties and functions of an ethics executive in relation to conflict of interest matters, in addition to those provided under this Act;

- (e) respecting procedures to be followed in connection with this Part. 2006, c. 35, Sched. A, s. 71 (1); 2009, c. 33, Sched. 17, s. 10 (12).

Same, Minister

(1.1) The minister responsible for the administration of this Act may make regulations prescribing individuals for the purposes of paragraph 3 of subsection 62 (1). 2009, c. 33, Sched. 17, s. 10 (13).

Scope of regulations

(2) Regulations made under this section may be general or particular in their application. 2006, c. 35, Sched. A, s. 71 (2).

PART V POLITICAL ACTIVITY

INTERPRETATION

Political activity

72 For the purposes of this Part, a public servant engages in political activity when,

- (a) the public servant does anything in support of or in opposition to a federal or provincial political party;
- (b) the public servant does anything in support of or in opposition to a candidate in a federal, provincial or municipal election;
- (c) the public servant is or seeks to become a candidate in a federal, provincial or municipal election; or
- (d) the public servant comments publicly and outside the scope of the duties of his or her position on matters that are directly related to those duties and that are dealt with in the positions or policies of a federal or provincial political party or in the positions or policies publicly expressed by a candidate in a federal, provincial or municipal election. 2006, c. 35, Sched. A, s. 72.

Ethics executive

73 (1) For the purposes of this Part, the ethics executive for a public servant is,

- (a) in the case of a public servant who works in a minister's office, the Integrity Commissioner;
- (b) in the case of any other public servant, his or her ethics executive determined under subsection 62 (1). 2006, c. 35, Sched. A, s. 73 (1).

Same

(2) Subsection 62 (2) applies to the deputy minister of the Ministry of Community Safety and Correctional Services as ethics executive with respect to members of the Ontario Provincial Police. 2006, c. 35, Sched. A, s. 73 (2).

RULES FOR POLITICAL ACTIVITY OF MOST PUBLIC SERVANTS

Application

74 Sections 75 to 84 apply to public servants other than,

- (a) specially restricted public servants within the meaning of subsection 85 (2); or
- (b) public servants who work in a minister's office. 2006, c. 35, Sched. A, s. 74.

Right to engage

75 A public servant is entitled to engage in political activity, subject to the restrictions set out under this Part. 2006, c. 35, Sched. A, s. 75.

Right to decline

76 A public servant is entitled to decline to engage in political activity. 2006, c. 35, Sched. A, s. 76.

Prohibited political activities

77 A public servant shall not,

- (a) engage in political activity in the workplace;
- (b) engage in political activity while wearing a uniform associated with a position in the public service of Ontario;
- (c) use government premises, equipment or supplies when engaging in political activity; or
- (d) associate his or her position with political activity, except if the public servant is or is seeking to become a candidate in a federal, provincial or municipal election, and then only to the extent necessary to identify the public servant's position and work experience. 2006, c. 35, Sched. A, s. 77.

Definition, “election period”

78 In sections 79 to 82,

“election period” means,

- (a) in respect of a political activity that relates to a federal or provincial election, the period starting on the day that a writ is issued for the election and ending on the polling day for the election,
- (b) in respect of a political activity that relates to a municipal election, the period starting 60 days before the polling day for the election and ending on the polling day for the election. 2006, c. 35, Sched. A, s. 78.

Restricted political activities

79 (1) Subject to subsection (2), unless a public servant has been granted an unpaid leave of absence under section 80, he or she shall not,

- (a) be or seek to become a candidate in a federal or provincial election;
- (b) solicit funds on behalf of a federal or provincial party or a federal, provincial or municipal candidate if his or her duties include,
 - (i) supervising other public servants, or
 - (ii) dealing directly with members of the public if those members of the public may perceive him or her as a person able to exercise power over them;
- (c) comment publicly, outside the scope of his or her duties as a public servant, on matters that are directly related to those duties and that are addressed in the policies of a federal or provincial party or in the policies of a candidate in a federal, provincial or municipal election;
- (d) engage in political activity if doing so could interfere with the performance of his or her duties as a public servant; or
- (e) engage in political activity if doing so could conflict with,
 - (i) in the case of a public servant who works in a ministry, the interests of the Crown,
 - (ii) in the case of a public servant who works in a public body, the interests of the public body. 2006, c. 35, Sched. A, s. 79 (1).

Exception

(2) A public servant who is or seeks to become a candidate in a federal or provincial election at any time other than during an election period is not required to be on an unpaid leave of absence to do so, if his or her ethics executive determines under subsection 80 (3) that a leave is not necessary in the circumstances. 2006, c. 35, Sched. A, s. 79 (2).

Application to engage in restricted political activity

80 (1) A public servant who wishes to engage in political activity described in subsection 79 (1) may apply under this section to his or her ethics executive and the application shall specify the political activity. 2006, c. 35, Sched. A, s. 80 (1).

Same

(2) Subject to subsection (3), on receiving the application, the ethics executive,

- (a) shall grant the public servant an unpaid leave of absence, in the case of an application to engage in political activity during an election period; and

- (b) may grant the public servant an unpaid leave of absence, in the case of an application to engage in political activity at a time other than during an election period, if the ethics executive considers it appropriate to do so. 2006, c. 35, Sched. A, s. 80 (2).

Same

(3) In the case of an application to be or seek to become a candidate in a federal or provincial election at a time other than during an election period, the ethics executive shall determine whether an unpaid leave of absence is necessary in the circumstances and, if it is necessary, shall grant the leave. 2006, c. 35, Sched. A, s. 80 (3).

Leave of absence for other political activity

81 (1) A public servant may apply under this section to his or her ethics executive for an unpaid leave of absence for the purposes of engaging in political activity other than political activity that is prohibited under section 77 or restricted under subsection 79 (1). 2006, c. 35, Sched. A, s. 81 (1).

Same

(2) On receiving the application, the ethics executive,

- (a) shall grant the public servant an unpaid leave of absence, in the case of an application to engage in political activity during an election period; and
- (b) may grant the public servant an unpaid leave of absence, in the case of an application to engage in political activity at a time other than during an election period, if the ethics executive considers it appropriate to do so. 2006, c. 35, Sched. A, s. 81 (2).

Length of leave

82 If an unpaid leave of absence is granted under section 80 or 81, the following rules apply to the length of the leave:

1. A leave of absence granted to enable a public servant to engage in political activity during an election period shall not begin earlier than the beginning of the election period and shall not end later than the end of the election period.
2. A leave of absence granted to enable a public servant to engage in political activity other than during an election period shall begin and end in accordance with the regulations under clause 107 (1) (a) or, if no regulation applies in respect of the leave, on dates determined by the ethics executive to be appropriate in the circumstances. 2006, c. 35, Sched. A, s. 82.

Continuous service

83 The period of an unpaid leave granted under section 80 or 81 shall not be counted in determining the length of the public servant's service, but the service before and after the period of leave is deemed to be continuous for all purposes. 2006, c. 35, Sched. A, s. 83.

Role of ethics executive

Questions for ethics executive

84 (1) A public servant or his or her supervisor may request that the public servant's ethics executive determine a question about the political activity rights that apply in respect of the public servant. 2006, c. 35, Sched. A, s. 84 (1).

Duty to notify

(2) A public servant shall notify his or her ethics executive if the public servant's political activities could conflict with,

- (a) in the case of a public servant who works in a ministry, the interests of the Crown;
- (b) in the case of a public servant who works in a public body, the interests of the public body. 2006, c. 35, Sched. A, s. 84 (2).

Inquiries

(3) The ethics executive may make such inquiries as he or she considers appropriate in response to a request, a notification or where the ethics executive has concerns that a public servant has engaged or is about to engage in political activity in contravention of this Part or a direction or regulation under this Part. 2006, c. 35, Sched. A, s. 84 (3).

Determinations and directions

(4) An ethics executive shall,

- (a) make a determination with respect to any matter that is brought to the attention of the ethics executive under subsection (1) or (2) or that is the subject of inquiry under subsection (3); and
- (b) in the case of a determination that a public servant has or is about to engage in political activity in contravention of this Part or a direction or regulation under this Part, give the public servant directions, if any, that the ethics executive considers appropriate to address the matter. 2006, c. 35, Sched. A, s. 84 (4).

Same

(5) If an ethics executive, other than the Integrity Commissioner, considers it appropriate to do so, the ethics executive may refer any matter that is brought to the ethics executive's attention under subsection (1) or (2) or that is the subject of inquiry under subsection (3) to the Integrity Commissioner to be dealt with by the Commissioner under subsection (4). 2006, c. 35, Sched. A, s. 84 (5); 2018, c. 17, Sched. 35, s. 9, 14.

Same

(6) Where an ethics executive has referred a matter to the Integrity Commissioner under subsection (5), the Commissioner shall inform the ethics executive of any determination made or direction given by the Commissioner under subsection (4) as a result of the referral. 2006, c. 35, Sched. A, s. 84 (6); 2018, c. 17, Sched. 35, s. 14.

Compliance with direction

(7) A public servant shall comply with a direction of the ethics executive or the Integrity Commissioner. 2006, c. 35, Sched. A, s. 84 (7); 2018, c. 17, Sched. 35, s. 14.

Contravention by government appointee

(8) If an ethics executive or the Integrity Commissioner makes a determination under subsection (4) that a government appointee has engaged in political activity in contravention of this Part or of a direction or regulation under this Part, the ethics executive or the Commissioner, as the case may be, shall notify the minister responsible for the body to which the government appointee is appointed regarding the matter. 2006, c. 35, Sched. A, s. 84 (8); 2018, c. 17, Sched. 35, s. 14.

RULES FOR POLITICAL ACTIVITY OF SPECIALLY RESTRICTED PUBLIC SERVANTS

Application

85 (1) Sections 86 to 93 apply to specially restricted public servants within the meaning of subsection (2). 2006, c. 35, Sched. A, s. 85 (1).

Specially restricted public servants

(2) The following are specially restricted public servants:

1. Repealed: 2018, c. 17, Sched. 35, s. 10.
2. The Secretary of the Cabinet.
3. Every deputy minister or associate deputy minister in a ministry.
4. Every assistant deputy minister in a ministry.
5. Every director in a ministry.
6. Every deputy director of a legal services branch of a ministry.
7. Every Crown Attorney.
8. Every commissioned officer and detachment commander in the Ontario Provincial Police.
9. Every government appointee who is a member of a tribunal prescribed under clause 107 (1) (b).
10. A public servant in a class prescribed under clause 107 (1) (c). 2006, c. 35, Sched. A, s. 85 (2); 2018, c. 17, Sched. 35, s. 10.

No political activity except as permitted

86 A specially restricted public servant shall not engage in political activity except as permitted under this Part. 2006, c. 35, Sched. A, s. 86.

Right to decline

87 A specially restricted public servant is entitled to decline to engage in political activity. 2006, c. 35, Sched. A, s. 87.

Prohibited political activities

88 In engaging in political activity that is permitted under section 89, 90 or 92, a specially restricted public servant shall not,

- (a) engage in political activity in the workplace;
- (b) engage in political activity while wearing a uniform associated with a position in the public service of Ontario;
- (c) use government premises, equipment or supplies when engaging in political activity;
- (d) associate his or her position with political activity, except if the public servant is or is seeking to become a candidate in a federal, provincial or municipal election, and then only to the extent necessary to identify the public servant's position and work experience; or
- (e) engage in political activity if doing so could interfere with the performance of his or her duties as a public servant. 2006, c. 35, Sched. A, s. 88.

Permitted political activities

89 (1) A specially restricted public servant may,

- (a) vote in a federal, provincial or municipal election;
- (b) contribute money to a federal or provincial party or to a federal, provincial or municipal candidate;
- (c) be a member of a federal or provincial party; and
- (d) attend an all-candidates meeting. 2006, c. 35, Sched. A, s. 89 (1).

Limitation

(2) Clauses (1) (b) and (c) do not apply to the Secretary of the Cabinet or a deputy minister. 2006, c. 35, Sched. A, s. 89 (2); 2018, c. 17, Sched. 35, s. 11.

Permitted political activities if authorized

90 (1) A specially restricted public servant, if authorized under subsection (4), may,

- (a) be or seek to become a candidate in a municipal election;
- (b) campaign on behalf of a candidate in a municipal election. 2006, c. 35, Sched. A, s. 90 (1).

Authorization

(2) A specially restricted public servant who wishes to engage in political activity described in subsection (1) may apply under this section for authorization. 2006, c. 35, Sched. A, s. 90 (2).

Same

(3) The application shall specify the political activity for which authorization is sought and shall be made to the ethics executive for the specially restricted public servant. 2006, c. 35, Sched. A, s. 90 (3).

Same

(4) On receiving the application, the ethics executive shall make such inquiries as he or she considers appropriate and shall authorize the specially restricted public servant to engage in all or some of the political activity specified in the application if, in the opinion of the ethics executive, the activities would not interfere with the performance of the public servant's duties and,

- (a) in the case of a public servant who works in a ministry, would not conflict with the interests of the Crown;
 - (b) in the case of a public servant who works in a public body, would not conflict with the interests of the body.
- 2006, c. 35, Sched. A, s. 90 (4).

Same

(5) In granting an authorization, an ethics executive may impose any conditions and restrictions that he or she considers appropriate in the circumstances, including requiring the specially restricted public servant to be on an unpaid leave of absence. 2006, c. 35, Sched. A, s. 90 (5).

Same

(6) If, in granting an authorization, an ethics executive requires that a specially restricted public servant be on an unpaid leave of absence, the leave of absence shall begin and end in accordance with the regulations under clause 107 (1) (a) or, if no regulation applies in respect of the leave, on dates determined by the ethics executive to be appropriate in the circumstances. 2006, c. 35, Sched. A, s. 90 (6).

Continuous service

91 The period of an unpaid leave granted under section 90 shall not be counted in determining the length of the public servant's service, but the service before and after the period of leave is deemed to be continuous for all purposes. 2006, c. 35, Sched. A, s. 91.

Part-time government appointees

92 (1) This section applies to specially restricted public servants who are part-time government appointees. 2006, c. 35, Sched. A, s. 92 (1).

Authorization

(2) A public servant described in subsection (1) may apply under this section for authorization to engage in any political activity that is not permitted to him or her under section 89, other than,

- (a) political activity that is prohibited under section 88; or
- (b) political activity for which he or she may seek authorization under section 90. 2006, c. 35, Sched. A, s. 92 (2).

Same

(3) The application shall specify the political activity and shall be made to the Integrity Commissioner. 2006, c. 35, Sched. A, s. 92 (3); 2018, c. 17, Sched. 35, s. 14.

Same

(4) On receiving the application, the Integrity Commissioner shall make such inquiries as he or she considers appropriate and shall authorize the public servant to engage in all or some of the political activity specified in the application if in the opinion of the Commissioner the activities would not,

- (a) interfere with the performance of the public servant's duties; or
- (b) conflict with the interests of the public body to which the public servant is appointed. 2006, c. 35, Sched. A, s. 92 (4); 2018, c. 17, Sched. 35, s. 14.

Same

(5) In forming an opinion under subsection (4), the Integrity Commissioner shall consider the following:

1. The nature of the political activity specified in the application.
2. The scope of the discretion exercised by the public servant in his or her work, if the exercise of the discretion could reasonably be perceived to be affected by political considerations.
3. The visibility of the public servant's position.
4. Such other factors as the Commissioner considers appropriate. 2006, c. 35, Sched. A, s. 92 (5); 2018, c. 17, Sched. 35, s. 14.

Same

(6) In granting an authorization, the Integrity Commissioner may impose any conditions and restrictions that he or she considers appropriate in the circumstances, including requiring the public servant to be on an unpaid leave of absence. 2006, c. 35, Sched. A, s. 92 (6); 2018, c. 17, Sched. 35, s. 14.

Same

(7) If in granting an authorization the Integrity Commissioner requires that a public servant be on an unpaid leave of absence, the leave shall begin and end,

- (a) in accordance with the regulations under clause 107 (1) (a); or
- (b) if no regulation applies in respect of the leave, on dates determined by the Integrity Commissioner to be appropriate in the circumstances. 2006, c. 35, Sched. A, s. 92 (7); 2018, c. 17, Sched. 35, s. 14.

Role of ethics executive**Questions for ethics executive**

93 (1) A specially restricted public servant or his or her supervisor may request that the public servant's ethics executive determine a question about the political activity rights that apply in respect of the public servant. 2006, c. 35, Sched. A, s. 93 (1).

Duty to notify

(2) A specially restricted public servant shall notify his or her ethics executive if the public servant's political activities could conflict with,

- (a) in the case of a public servant who works in a ministry, the interests of the Crown;
- (b) in the case of a public servant who works in a public body, the interests of the public body. 2006, c. 35, Sched. A, s. 93 (2).

Inquiries

(3) The ethics executive may make such inquiries as he or she considers appropriate in response to a request, a notification or where the ethics executive has concerns that a specially restricted public servant has engaged or is about to engage in political activity in contravention of this Part or a direction or regulation under this Part. 2006, c. 35, Sched. A, s. 93 (3).

Determinations and directions

(4) An ethics executive shall,

- (a) make a determination with respect to any matter that is brought to the attention of the ethics executive under subsection (1) or (2) or that is the subject of inquiry under subsection (3); and
- (b) in the case of a determination that a public servant has or is about to engage in political activity in contravention of this Part or a direction or regulation under this Part, give the public servant directions, if any, that the ethics executive considers appropriate to address the matter. 2006, c. 35, Sched. A, s. 93 (4).

Same

(5) If an ethics executive, other than the Integrity Commissioner, considers it appropriate to do so, the ethics executive may refer any matter that is brought to the ethics executive's attention under subsection (1) or (2) or that is the subject of inquiry under subsection (3) to the Integrity Commissioner to be dealt with by the Commissioner under subsection (4). 2006, c. 35, Sched. A, s. 93 (5); 2018, c. 17, Sched. 35, s. 12, 14.

Same

(6) Where an ethics executive has referred a matter to the Integrity Commissioner under subsection (5), the Commissioner shall inform the ethics executive of any determination made or direction given by the Commissioner under subsection (4) as a result of the referral. 2006, c. 35, Sched. A, s. 93 (6); 2018, c. 17, Sched. 35, s. 14.

Compliance with direction

(7) A specially restricted public servant shall comply with a direction of the ethics executive or the Integrity Commissioner. 2006, c. 35, Sched. A, s. 93 (7); 2018, c. 17, Sched. 35, s. 14.

Contravention by government appointee

(8) If an ethics executive or the Integrity Commissioner makes a determination under subsection (4) that a government appointee has engaged in a political activity in contravention of this Part or a direction or regulation under this Part, the ethics executive or the Integrity Commissioner, as the case may be, shall notify the minister responsible for the body to which the government appointee is appointed regarding the matter. 2006, c. 35, Sched. A, s. 93 (8); 2018, c. 17, Sched. 35, s. 14.

RULES FOR POLITICAL ACTIVITY OF PUBLIC SERVANTS IN MINISTERS' OFFICES**Application**

94 Sections 95 to 98 apply to public servants who work in a minister's office. 2006, c. 35, Sched. A, s. 94.

Right to engage

95 A public servant who works in a minister's office is entitled to engage in political activity, subject to the restrictions set out under this Part. 2006, c. 35, Sched. A, s. 95.

Right to decline

96 A public servant who works in a minister's office is entitled to decline to engage in political activity, unless the political activity is related to the performance of a ministerial power, duty or function. 2006, c. 35, Sched. A, s. 96.

Prohibited political activities

97 A public servant who works in a minister's office shall not,

- (a) engage in a political activity in the workplace that is unrelated to the performance of a ministerial power, duty or function;
- (b) use government premises, equipment or supplies when engaging in political activity that is unrelated to the performance of a ministerial power, duty or function; or
- (c) engage in political activity that could conflict with the interests of the Crown. 2006, c. 35, Sched. A, s. 97.

Role of ethics executive**Questions for ethics executive**

98 (1) A public servant who works in a minister's office or his or her supervisor may request that the public servant's ethics executive determine a question about the political activity rights that apply in respect of the public servant. 2006, c. 35, Sched. A, s. 98 (1).

Duty to notify

(2) A public servant who works in a minister's office shall notify his or her ethics executive if the public servant's political activities could conflict with the interests of the Crown. 2006, c. 35, Sched. A, s. 98 (2).

Inquiries

(3) The ethics executive may make such inquiries as he or she considers appropriate in response to a request, a notification or where the ethics executive has concerns that a public servant who works in a minister's office has engaged or is about to engage in political activity in contravention of this Part or a direction or regulation under this Part. 2006, c. 35, Sched. A, s. 98 (3).

Determinations and directions

(4) The ethics executive shall,

- (a) make a determination with respect to any matter that is brought to his or her attention under subsection (1) or (2) or that is the subject of inquiry under subsection (3); and

- (b) in the case of a determination that a public servant who works in a minister's office has or is about to engage in political activity in contravention of this Part or a direction or regulation under this Part, give the public servant directions, if any, that the ethics executive considers appropriate to address the matter. 2006, c. 35, Sched. A, s. 98 (4).

Compliance with direction

(5) A public servant who works in a minister's office shall comply with a direction of the ethics executive. 2006, c. 35, Sched. A, s. 98 (5).

Notice to minister

(6) If the ethics executive makes a determination under subsection (4) that a public servant who works in a minister's office has or is about to engage in political activity in contravention of this Part or a direction or regulation under this Part, or gives a direction to a public servant who works in a minister's office under subsection (4), the ethics executive shall notify the minister. 2006, c. 35, Sched. A, s. 98 (6).

PENALTY

Penalty

99 A public servant who engages in political activity in contravention of this Part or a direction or regulation under this Part is subject to disciplinary measures, including suspension and dismissal. 2006, c. 35, Sched. A, s. 99.

EFFECT OF ELECTION TO OFFICE

Effect of election, provincial or federal

100 If a public servant is elected to the Parliament of Canada or to a provincial Assembly, his or her employment by the Crown or by a public body, or his or her appointment to a public body, is terminated. 2006, c. 35, Sched. A, s. 100.

Effect of election, municipal

101 (1) If a public servant is elected to a municipal office, his or her employment by the Crown or by a public body, or his or her appointment to a public body, is terminated if it is determined under subsection (3) that termination is warranted. 2006, c. 35, Sched. A, s. 101 (1).

Same

(2) A public servant who is considering seeking election to a municipal office may ask his or her ethics executive to make the determination under subsection (3) before the election. 2006, c. 35, Sched. A, s. 101 (2).

Determination by ethics executive

(3) The ethics executive shall determine that termination is warranted if, in the opinion of the ethics executive, the public servant's responsibilities in the municipal office,

- (a) would interfere with the performance of his or her duties as a public servant; or
- (b) would,
 - (i) in the case of a public servant who works in a ministry, conflict with the interests of the Crown, or
 - (ii) in the case of a public servant who works in a public body, conflict with the interests of the body. 2006, c. 35, Sched. A, s. 101 (3).

Referral by ethics executive

(4) If an ethics executive, other than the Integrity Commissioner, considers it appropriate to do so, the ethics executive may refer the making of the determination under subsection (3) to the Integrity Commissioner. 2006, c. 35, Sched. A, s. 101 (4); 2018, c. 17, Sched. 35, s. 13, 14.

Same

(5) Where an ethics executive has referred the making of the determination under subsection (3) to the Integrity Commissioner, the Commissioner shall inform the ethics executive of his or her determination. 2006, c. 35, Sched. A, s. 101 (5); 2018, c. 17, Sched. 35, s. 14.

Notice to minister

(6) Where a determination under subsection (3) relates to a government appointee to a public body, the ethics executive or the Integrity Commissioner, as the case may be, shall inform the minister responsible for the public body of the determination. 2006, c. 35, Sched. A, s. 101 (6); 2018, c. 17, Sched. 35, s. 14.

Reinstatement

102 (1) This section does not apply to the following:

1. A former public servant whose employment was terminated under section 100 or 101 and whose employment immediately before the termination was for a fixed term.
2. A former government appointee whose appointment was terminated under section 100 or 101. 2006, c. 35, Sched. A, s. 102 (1).

Same

(2) If a former public servant ceases to be a member of the Parliament of Canada within five years after his or her employment is terminated by section 100, the former public servant may apply to be reinstated. 2006, c. 35, Sched. A, s. 102 (2).

Same

(3) If a former public servant ceases to be a member of a provincial Assembly within five years after his or her employment is terminated by section 100, the former public servant may apply to be reinstated. 2006, c. 35, Sched. A, s. 102 (3).

Same

(4) If a former public servant ceases to hold a municipal office within four years after his or her employment is terminated by section 101, the former public servant may apply to be reinstated. 2006, c. 35, Sched. A, s. 102 (4).

Same

(5) An application for reinstatement must be made within 12 months after the applicant ceases to be a member of the Parliament of Canada, a member of a provincial Assembly or the holder of a municipal office, as the case may be. 2006, c. 35, Sched. A, s. 102 (5).

Same

(6) A former public servant appointed by the Public Service Commission whose employment was terminated under section 100 or 101 may apply to the Commission for reinstatement. 2006, c. 35, Sched. A, s. 102 (6).

Same

(7) A former public servant whose employment by a public body was terminated under section 100 or 101 may apply for reinstatement to the public body. 2006, c. 35, Sched. A, s. 102 (7).

Same

(8) An application under subsection (6) or (7) shall be granted if a position for which the applicant is qualified is vacant. 2006, c. 35, Sched. A, s. 102 (8).

Same

(9) Another person's right to be appointed or assigned to the vacant position by virtue of a collective agreement or under a directive issued under section 43 prevails over the right conferred by subsection (8). 2006, c. 35, Sched. A, s. 102 (9).

Continuous service

(10) The period during which the applicant's employment is terminated shall not be counted in determining the length of the public servant's service, but the service before and after the termination is deemed to be continuous for all purposes. 2006, c. 35, Sched. A, s. 102 (10).

PROTECTION FROM REPRISALS

No reprisals

103 (1) No person shall take a reprisal against a public servant because he or she has,

- (a) engaged in political activity in accordance with this Part or the regulations; or
- (b) exercised his or her right under this Part to decline to engage in political activity. 2006, c. 35, Sched. A, s. 103 (1).

Same

(2) For the purposes of subsection (1), a reprisal is any measure taken against a public servant that adversely affects his or her employment or appointment and includes but is not limited to,

- (a) ending or threatening to end a public servant's employment or appointment;
- (b) disciplining or suspending or threatening to discipline or suspend a public servant;
- (c) imposing or threatening to impose a penalty related to the employment or appointment of a public servant;
- (d) intimidating or coercing a public servant in relation to his or her employment or appointment. 2006, c. 35, Sched. A, s. 103 (2).

Complaint about reprisal, discipline

104 (1) A public servant described in subsection (2), (3) or (4) may complain under this section that he or she,

- (a) has suffered a reprisal prohibited by section 103; or
- (b) is disciplined for a contravention of this Part or a direction or regulation under this Part. 2006, c. 35, Sched. A, s. 104 (1).

Public servant subject to collective agreement

(2) A public servant who is subject to the terms and conditions of a collective agreement may have the complaint dealt with by final and binding settlement by arbitration in accordance with the agreement. 2009, c. 33, Sched. 17, s. 10 (14).

Public servant not subject to collective agreement

(3) A public servant employed under Part III who is not subject to the terms and conditions of a collective agreement may file the complaint with the Public Service Grievance Board. 2009, c. 33, Sched. 17, s. 10 (14).

Other public servant

(4) A public servant employed by a public body who is not subject to the terms and conditions of a collective agreement may file the complaint with the Ontario Labour Relations Board. 2009, c. 33, Sched. 17, s. 10 (14).

Inquiry by Board

(5) The Ontario Labour Relations Board may inquire into a complaint filed under subsection (4) and section 96 of the *Labour Relations Act, 1995*, except subsection (5), applies with necessary modifications as if such section, except subsection (5), is enacted in and forms part of this Act. 2006, c. 35, Sched. A, s. 104 (5).

Same

(6) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (4), sections 110, 111, 114 and 116 of the *Labour Relations Act, 1995* apply with necessary modifications. 2006, c. 35, Sched. A, s. 104 (6).

Exception

(7) Despite anything in this section, a person who is a police officer under the *Community Safety and Policing Act, 2019* shall have his or her complaint dealt with under section 191 of that Act. 2006, c. 35, Sched. A, s. 104 (7); 2019, c. 1, Sched. 4, s. 52 (1).

Order

(8) If the Public Service Grievance Board, the Ontario Labour Relations Board or the Grievance Settlement Board determines, on the completion of an inquiry into a complaint made under subsection (2), (3) or (4), that a reprisal has been taken in contravention of subsection 103 (1), or that the employee should not be disciplined or that a lesser penalty would be more appropriate, the Board may make an order that it considers just and reasonable in the circumstances, directing the relevant ministry or public body or a person acting on behalf of the ministry or public body to do or refrain from doing anything in relation to the contravention. 2006, c. 35, Sched. A, s. 104 (8).

Same

(9) Without limiting the generality of subsection (8), an order under that subsection may direct the ministry or public body, or person acting on behalf of the ministry or public body, to do one or more of the following:

1. Cease doing an action that is the subject of a complaint under subsection (1).
2. Take steps to rectify harm related to a complaint under subsection (1).
3. Reinstatement of the employment of a public servant whose employment was terminated.
4. Compensate the public servant for loss of any remuneration, including benefits. 2006, c. 35, Sched. A, s. 104 (9).

Same

(10) A board may not make an order under subsection (8) for punitive damages or for costs. 2006, c. 35, Sched. A, s. 104 (10).

Settlements may be filed with board

105 (1) A written and signed settlement of a complaint made under subsection 104 (1) may, if a party to the settlement believes that the settlement has been breached, be filed,

- (a) in the case of a settlement of a complaint by a public servant described in subsection 104 (2), if the collective agreement is governed by the *Crown Employees Collective Bargaining Act, 1993*, with the Grievance Settlement Board;
- (b) in the case of a settlement of a complaint by a public servant described in subsection 104 (3), with the Public Service Grievance Board;
- (c) in the case of a settlement of a complaint by a public servant described in subsection 104 (4), with the Ontario Labour Relations Board. 2006, c. 35, Sched. A, s. 105 (1).

Same

(2) Where a settlement of a complaint is filed with a board under this section, the board shall inquire into the matter and, if the board concludes that the settlement has been breached, the board may,

- (a) make an order requiring compliance with the settlement; or
- (b) make an order respecting the complaint that could have been made in respect of that complaint under subsection 104 (8). 2006, c. 35, Sched. A, s. 105 (2).

Same

(3) Subsections 104 (5) and (6) apply with necessary modifications to the Ontario Labour Relations Board acting under subsection (2). 2006, c. 35, Sched. A, s. 105 (3).

Order may be filed in court

106 (1) An order of the Grievance Settlement Board, the Public Service Grievance Board or the Ontario Labour Relations Board under subsection 104 (8) or 105 (2) may be filed in the Superior Court of Justice. 2006, c. 35, Sched. A, s. 106 (1).

Same

(2) An order that is filed under subsection (1) is enforceable as if it were an order of the Superior Court of Justice. 2006, c. 35, Sched. A, s. 106 (2).

Same

(3) Section 129 of the *Courts of Justice Act* applies in respect of an order filed with the Superior Court of Justice under subsection (1) and, for the purpose, the date on which the order is filed is deemed to be the date of the order. 2006, c. 35, Sched. A, s. 106 (3).

REGULATIONS**Regulations, Part V**

107 (1) The Lieutenant Governor in Council may make regulations,

- (a) respecting the length of unpaid leaves of absence granted under section 82, subsection 90 (6) or clause 92 (7)
 - (a), including specifying dates on which a leave may begin and end and establishing maximum periods for a leave;
- (b) prescribing tribunals for the purposes of paragraph 9 of subsection 85 (2);
- (c) on the recommendation of the Public Service Commission, prescribing classes of public servants for the purposes of paragraph 10 of subsection 85 (2);
- (d) governing political activities of public servants who work in a minister's office;
- (e) prescribing powers, duties and functions of an ethics executive in relation to political activity matters, in addition to those provided under this Act;
- (f) respecting procedures to be followed in connection with this Part. 2006, c. 35, Sched. A, s. 107 (1).

Delegation

(2) The Public Service Commission may delegate any of its advisory responsibilities associated with clause (1) (c) to the Integrity Commissioner. 2006, c. 35, Sched. A, s. 107 (2); 2018, c. 17, Sched. 35, s. 14.

Same

(3) In prescribing classes under clause (1) (c), the Lieutenant Governor in Council shall consider,

- (a) the extent to which public servants in a prescribed class are likely to be involved in providing policy advice directly to a minister;
- (b) the scope of discretion likely to be exercised by public servants in a prescribed class, where the exercise of the discretion could reasonably be perceived to be affected by political considerations;
- (c) the visibility of public servants in a prescribed class; and
- (d) any other matter that the Lieutenant Governor in Council considers appropriate. 2006, c. 35, Sched. A, s. 107 (3).

Scope of regulations

(4) Regulations made under this section may be general or particular in their application. 2006, c. 35, Sched. A, s. 107 (4).

PART VI**DISCLOSING AND INVESTIGATING WRONGDOING****INTERPRETATION AND APPLICATION****Interpretation**

108 (1) In this Part,

“wrongdoing” means,

- (a) a contravention by a public servant, a minister or parliamentary assistant of an Act of the Assembly or of the Parliament of Canada, or of a regulation made under such an Act,
- (b) an act or omission of a public servant, a minister or parliamentary assistant that creates a grave danger to the life, health or safety of persons or to the environment, where the danger is unreasonable having regard to his or her duties, powers and functions and any other relevant circumstance,
- (c) gross mismanagement by a public servant, a minister or parliamentary assistant in the work of the public service of Ontario,
- (d) directing or counselling wrongdoing within the meaning of clauses (a) to (c) by a public servant, a minister or parliamentary assistant. 2006, c. 35, Sched. A, s. 108 (1).

Same

(2) A reference in clauses (a) to (d) of the definition of “wrongdoing” in subsection (1),

- (a) to an act or omission of a public servant includes an act or omission of a former public servant if the act or omission occurred while the individual was a public servant;
- (b) to an act or omission of a minister or parliamentary assistant includes an act or omission of a former minister or a former parliamentary assistant if the act or omission occurred while the individual was a minister or a parliamentary assistant. 2006, c. 35, Sched. A, s. 108 (2).

Interpretation, former public servants

109 In this Part, despite section 3, a reference to a former public servant includes a person who ceased, before the day on which this section comes into force, to be,

- (a) a public servant within the meaning of the *Public Service Act*;
- (b) an employee of a public body within the meaning of this Act;
- (c) a government appointee within the meaning of this Act. 2006, c. 35, Sched. A, s. 109.

Application of Part

110 This Part applies to wrongdoing associated with the public service of Ontario and its work. 2006, c. 35, Sched. A, s. 110.

DISCLOSURE PROCEDURES

Public servants to be informed

111 (1) A deputy minister of a ministry shall ensure that public servants who work in the ministry are familiar with the procedures for disclosure of wrongdoing under this Part and the protections from reprisals for disclosing wrongdoing under this Part. 2006, c. 35, Sched. A, s. 111 (1).

Same

(2) The chair of a public body shall ensure that public servants who work in the body are familiar with the procedures for disclosure of wrongdoing under this Part and the protections from reprisals for disclosing wrongdoing under this Part. 2006, c. 35, Sched. A, s. 111 (2).

Fair and expeditious

112 The Integrity Commissioner and every person or body to whom a matter is referred under subsection 118 (2), 122 (2) or 123 (1) shall carry out their functions under this Part in a manner that,

- (a) is fair and is as informal and expeditious as possible; and
- (b) protects the identities of persons involved in disclosures of wrongdoing, including persons who make disclosures, witnesses and persons alleged to be responsible for wrongdoing except where the interests of fairness require that a person’s identity be disclosed to one or more persons. 2006, c. 35, Sched. A, s. 112.

Disclosure despite conflict with other Acts

113 (1) Subject to subsection (2), a right under this Part to make a disclosure prevails over anything provided under any other Act or otherwise at law that prohibits the disclosure. 2006, c. 35, Sched. A, s. 113 (1).

Restrictions on disclosure

(2) Nothing in this Part authorizes a public servant or former public servant to make a disclosure to the Integrity Commissioner of anything,

- (a) that would reveal the substance of deliberations of the Executive Council or any of its Committees without authority to do so;
- (b) that is subject to solicitor-client privilege; or
- (c) that is prepared by or for counsel for a Ministry or a public body for use in giving legal advice or in contemplation of or for use in litigation. 2006, c. 35, Sched. A, s. 113 (2).

Same

(3) Nothing in this Part shall be interpreted to limit any right that any public servant may have under any other Act or otherwise at law to disclose information about wrongdoing in the public service of Ontario. 2006, c. 35, Sched. A, s. 113 (3).

Disclosure, procedures

114 Where a public servant or former public servant has reason to believe that there has been wrongdoing, he or she may disclose the wrongdoing in accordance with the procedures established under section 115. 2006, c. 35, Sched. A, s. 114.

Directives**Directives, Public Service Commission**

115 (1) The Public Service Commission may by directive establish procedures to deal with disclosures of wrongdoing by,

- (a) a public servant who works in a ministry; and
- (b) a former public servant who worked in a ministry immediately before ceasing to be a public servant. 2006, c. 35, Sched. A, s. 115 (1).

Directives, Management Board of Cabinet

(2) The Management Board of Cabinet may by directive establish procedures to deal with disclosures of wrongdoing by,

- (a) public servants who work in a public body; and
- (b) former public servants who worked in a public body immediately before ceasing to be a public servant. 2006, c. 35, Sched. A, s. 115 (2).

Same

(3) Without limiting the generality of subsections (1) and (2), directives issued under those subsections may,

- (a) establish procedures by which a public servant or former public servant may make disclosures of wrongdoing, including directions as to the persons to whom disclosures may be made;
- (b) establish procedures to protect the identities of persons involved in the disclosure process, including persons who make disclosures, witnesses and persons alleged to be responsible for wrongdoing; and
- (c) provide for exceptions to be made to procedures described in clause (b) where the interests of fairness require that a person's identity be disclosed to one or more persons. 2006, c. 35, Sched. A, s. 115 (3).

Same

(4) Directives issued under this section may be general or particular in their application. 2006, c. 35, Sched. A, s. 115 (4).

Same

(5) Part III (Regulations) of the *Legislation Act, 2006* does not apply to a directive issued under this section. 2006, c. 35, Sched. A, ss. 115 (5), 157.

Archive

(6) The Public Service Commission shall maintain an archive of all directives issued under subsection (1) indicating the period during which each directive applies. 2006, c. 35, Sched. A, s. 115 (6).

Same

(7) The Management Board of Cabinet shall maintain an archive of all directives issued under subsection (2) indicating the period during which each directive applies. 2006, c. 35, Sched. A, s. 115 (7).

DISCLOSURE TO THE INTEGRITY COMMISSIONER**Disclosure to Integrity Commissioner**

116 A public servant or former public servant may disclose wrongdoing to the Integrity Commissioner if,

- (a) the public servant or former public servant has reason to believe that it would not be appropriate to disclose the wrongdoing in accordance with the directives issued under section 115;
- (b) the public servant or former public servant has already disclosed the wrongdoing in accordance with the directives issued under section 115 and has concerns that the matter is not being dealt with appropriately; or
- (c) directives applying to the public servant or former public servant have not been issued under section 115. 2006, c. 35, Sched. A, s. 116.

Initial assessment by Integrity Commissioner

117 Where the Integrity Commissioner receives a disclosure of wrongdoing under section 116, the Commissioner shall refuse to deal with the disclosure if one or more of the following circumstances apply:

1. The subject matter of the disclosure is being dealt with by another person or body as a matter of law enforcement or in accordance with a procedure established under this or any other Act.
2. The subject matter of the disclosure is an employment or labour relations matter that could be dealt with through a dispute resolution mechanism, including a grievance procedure, established under this or any other Act, under a collective agreement or under an agreement of another kind.
3. The subject matter of the disclosure is a matter that could be dealt with under Part XII of the *Community Safety and Policing Act, 2019*.
4. The subject matter of the disclosure is the subject of,
 - i. a decision made in the exercise of an adjudicative function by a court or other tribunal under this or any other Act, or
 - ii. deliberations that have led or may lead to a decision made in the exercise of an adjudicative function by a court or other tribunal under this or any other Act.
5. The subject matter of the disclosure is related to the exercise of discretion by a prosecutor in relation to the prosecution of an offence.
6. The subject matter of the disclosure is not sufficiently important or the disclosure is frivolous, vexatious or made in bad faith.
7. There has been a substantial delay between the disclosure and the incidents that are the subject matter of the disclosure and because of the delay the proceeding would serve no useful purpose.
8. The subject matter of the disclosure relates solely to a public policy decision.
9. There is a valid reason, other than a circumstance described in paragraphs 1 to 8, for not proceeding with the disclosure. 2006, c. 35, Sched. A, s. 117; 2019, c. 1, Sched. 4, s. 52 (2).

Referral by Integrity Commissioner

118 (1) This section applies where the Integrity Commissioner receives a disclosure of wrongdoing under section 116 and does not refuse to deal with the disclosure under section 117. 2006, c. 35, Sched. A, s. 118 (1).

Same

(2) The Integrity Commissioner shall determine, from among the persons mentioned in subsection (3), the person who, in the opinion of the Commissioner, is in the best position to investigate the disclosure and shall,

- (a) provide the person with a written summary of the disclosure and any other information that the Commissioner has received in relation to the matter that the Commissioner considers may assist the person in dealing with the matter;
- (b) direct the person to cause an investigation to be conducted into the subject matter of the disclosure; and
- (c) direct the person to report the results of the investigation to the Commissioner. 2006, c. 35, Sched. A, s. 118 (2).

Same

(3) The persons to whom the Integrity Commissioner may refer a matter under subsection (2) are:

- 1. A deputy minister.
- 2. Any individual prescribed under subsection 71 (1.1).
- 3. The chair of a public body.
- 4. The Secretary of the Cabinet.
- 5. An individual designated by the Premier for the purposes of this section. 2006, c. 35, Sched. A, s. 118 (3).

Same

(4) Where a matter respecting the Ontario Provincial Police is referred to the deputy minister of the Ministry of Community Safety and Correctional Services under subsection (2), the deputy minister may delegate any of his or her powers, duties and functions associated with the referral to the Commissioner of the Ontario Provincial Police. 2006, c. 35, Sched. A, s. 118 (4).

Same

(5) Subject to subsections (6) and (7), a person who receives a referral under subsection (2) shall deliver the report mentioned in clause (2) (c) to the Integrity Commissioner within 30 days of receiving the direction under clause (2) (b). 2006, c. 35, Sched. A, s. 118 (5).

Same

(6) On request from the person who receives a referral under subsection (2), the Integrity Commissioner may extend the time period within which the report must be delivered, either before or after the expiry of the period. 2006, c. 35, Sched. A, s. 118 (6).

Same

(7) The Integrity Commissioner may reduce the time period within which the report must be delivered if in his or her opinion circumstances make it appropriate to do so. 2006, c. 35, Sched. A, s. 118 (7).

Referral not appropriate

119 A person who has received a referral under subsection 118 (2) shall refer the disclosure of wrongdoing back to the Integrity Commissioner if, in the opinion of that person, it is not appropriate for him or her to investigate the disclosure because of lack of appropriate resources, actual or apparent conflict of interest or other reason. 2006, c. 35, Sched. A, s. 119.

Report after referral

120 (1) A report from a person who has received a referral under subsection 118 (2) shall be in writing and shall include:

1. A summary of the subject matter of the disclosure.
2. A description of the steps taken in the investigation conducted by the person to whom the referral is made.
3. A summary of the evidence obtained during the investigation.
4. A statement of the findings resulting from the investigation of the disclosure, including a statement about any wrongdoing that was discovered.
5. A description of any corrective action that has been taken or that is proposed to be taken as a result of the investigation. 2006, c. 35, Sched. A, s. 120 (1).

Same

(2) The Integrity Commissioner may waive or abridge a requirement of this section in order to expedite the report if in his or her opinion circumstances make it appropriate to do so. 2006, c. 35, Sched. A, s. 120 (2).

Receipt of report by Integrity Commissioner

121 (1) On receiving a report from a person who has received a referral under subsection 118 (2), the Integrity Commissioner may,

- (a) require the person to provide a written report to the Commissioner containing such further information as the Commissioner specifies;
- (b) make recommendations to the person;
- (c) require the person to provide a written report to the Commissioner respecting the implementation of any recommendations made under clause (b) and, to the extent that a recommendation has not been implemented, explain why that is the case. 2006, c. 35, Sched. A, s. 121 (1).

Time periods

(2) The Integrity Commissioner shall specify time periods for meeting the requirements of subsection (1). 2006, c. 35, Sched. A, s. 121 (2).

Same

(3) On request, the Integrity Commissioner may extend the time periods within which requirements under subsection (1) must be met, either before or after the expiry of the period. 2006, c. 35, Sched. A, s. 121 (3).

Same

(4) The Integrity Commissioner may reduce the time periods within which requirements under subsection (1) must be met if in his or her opinion circumstances make it appropriate to do so. 2006, c. 35, Sched. A, s. 121 (4).

INVESTIGATION BY INTEGRITY COMMISSIONER

Investigation by Integrity Commissioner

122 (1) The Integrity Commissioner may initiate an investigation of a disclosure of wrongdoing only if,

- (a) the Commissioner is not satisfied with a report about the disclosure received under section 118 or 121;
- (b) a person who has received a referral under subsection 118 (2) has referred the disclosure back to the Commissioner under section 119; or
- (c) a person who has received a referral under subsection 118 (2) has not delivered a report about the disclosure within the time period required under section 118 or 121. 2006, c. 35, Sched. A, s. 122 (1).

Referral instead of investigation

(2) Instead of initiating an investigation under subsection (1), the Integrity Commissioner may refer the matter to another person or body so that it may be dealt with as a matter of law enforcement or in accordance with a procedure established under this or any other Act if, in the opinion of the Commissioner, this would be more appropriate than initiating an investigation under subsection (1). 2006, c. 35, Sched. A, s. 122 (2).

Same

(3) When referring a matter to another person or body under subsection (2), the Integrity Commissioner shall provide the person or body with a written summary of the disclosure and any other information that the Commissioner has received in relation to the matter that the Commissioner considers may assist the person or body in dealing with the matter. 2006, c. 35, Sched. A, s. 122 (3).

Same

(4) Where the Integrity Commissioner has referred a matter to a person or body under subsection (2), the Commissioner shall not initiate an investigation unless the person or body has informed the Commissioner,

- (a) that it will not proceed with an investigation of the matter;
- (b) that it has concluded its investigation of the matter; or
- (c) that it will not provide information referred to in subsection (6). 2006, c. 35, Sched. A, s. 122 (4).

Exception

(5) Despite subsection (4), the Integrity Commissioner may initiate an investigation under subsection (1) if, in the opinion of the Commissioner, doing so is in the public interest and would not interfere with or impede the other person or body in dealing with the matter. 2006, c. 35, Sched. A, s. 122 (5).

Same

(6) A person or body to which a matter is referred under subsection (2) shall promptly inform the Integrity Commissioner if it decides not to proceed with an investigation or when it concludes an investigation. 2006, c. 35, Sched. A, s. 122 (6).

Same

(7) Where the person or body decides that informing the Integrity Commissioner in accordance with subsection (6) would be contrary to the public interest, it shall instead promptly inform the Commissioner that it will not provide information referred to in that subsection. 2006, c. 35, Sched. A, s. 122 (7).

Referral in course of investigation

123 (1) At any time during the course of an investigation by the Integrity Commissioner under this Part, he or she may refer the matter to another person or body so that it may be dealt with as a matter of law enforcement or in accordance with a procedure established under this or any other Act if, in the opinion of the Commissioner, this would be more appropriate than continuing the investigation. 2006, c. 35, Sched. A, s. 123 (1).

Same

(2) When referring a matter to another person or body under subsection (1), the Integrity Commissioner shall provide the person or body with a written summary of the disclosure and any other information that the Commissioner has received in relation to the matter that the Commissioner considers may assist the person or body in dealing with the matter. 2006, c. 35, Sched. A, s. 123 (2).

Same

(3) Where the Integrity Commissioner has referred a matter to a person or body under subsection (1), the Commissioner shall suspend the investigation and may continue it only if the person or body has informed the Commissioner,

- (a) that it will not proceed with an investigation of the matter;
- (b) that it has concluded its investigation of the matter; or
- (c) that it will not provide information referred to in subsection (5). 2006, c. 35, Sched. A, s. 123 (3).

Same

(4) Despite subsection (3), the Integrity Commissioner may continue an investigation under subsection (1) if, in the opinion of the Commissioner, doing so is in the public interest and would not interfere with or impede the other person or body in dealing with the matter. 2006, c. 35, Sched. A, s. 123 (4).

Same

(5) A person or body to which a matter is referred under subsection (1) shall promptly inform the Integrity Commissioner if it decides not to proceed with an investigation or when it concludes an investigation. 2006, c. 35, Sched. A, s. 123 (5).

Same

(6) Where the person or body decides that informing the Integrity Commissioner in accordance with subsection (5) would be contrary to the public interest, it shall instead promptly inform the Commissioner that it will not provide information referred to in that subsection. 2006, c. 35, Sched. A, s. 123 (6).

Investigation to cease in certain circumstances

124 The Integrity Commissioner shall cease his or her investigation under this Part of a disclosure if, in his or her opinion, one or more of the circumstances described in paragraphs 2 to 9 of section 117 apply. 2006, c. 35, Sched. A, s. 124.

Right to answer allegation

125 (1) If, at any time during the course of an investigation by the Integrity Commissioner under this Part, it appears to the Integrity Commissioner that there may be grounds to make a report under section 129 that might adversely affect a person or body, the Commissioner shall take reasonable measures to provide that person or body with an opportunity to be heard on the relevant matters. 2006, c. 35, Sched. A, s. 125 (1).

Same

(2) The person or body may be represented by a person authorized to practise law or provide legal services under the *Law Society Act*. 2006, c. 35, Sched. A, s. 156.

Same

(3) Except as provided in this section, the Commissioner need not hold a hearing and no person or body has a right to be heard by the Commissioner. 2006, c. 35, Sched. A, s. 125 (3).

Powers on investigation

126 (1) The Integrity Commissioner may require any public servant or former public servant to,

- (a) provide any information that he or she may have if, in the opinion of the Commissioner, the information may be relevant to the investigation;
- (b) produce any relevant document or thing that may be in his or her possession or under his or her control if, in the opinion of the Commissioner, the document or thing may be relevant to the investigation. 2006, c. 35, Sched. A, s. 126 (1).

Oral evidence

(2) The Integrity Commissioner may summon any public servant or former public servant who, in the Commissioner's opinion, is able to give evidence about any matter that may be relevant to the investigation and may examine him or her, on oath or affirmation. 2006, c. 35, Sched. A, s. 126 (2).

Inspection of premises

(3) The Integrity Commissioner may enter and inspect any premises of the public service of Ontario, at any reasonable time, for the purposes of the investigation. 2006, c. 35, Sched. A, s. 126 (3).

Same

(4) Before entering premises under subsection (3), the Integrity Commissioner shall notify the head of the organization occupying the premises of his or her intention to do so. 2006, c. 35, Sched. A, s. 126 (4).

Restriction on powers

127 (1) The Integrity Commissioner may not require the provision of information, the production of a document or thing or the giving of an answer if the Deputy Attorney General certifies that the provision, production or answer,

- (a) might interfere with or impede the detection, investigation or prosecution of an offence; or
- (b) might reveal the substance of deliberations of the Executive Council or any of its Committees without authority to do so. 2006, c. 35, Sched. A, s. 127 (1).

Same

(2) The Integrity Commissioner may not require the provision of information, the production of a document or thing or the giving of an answer if the Commissioner of the Ontario Provincial Police certifies that the provision, production or answer might interfere with or impede the detection or investigation of an offence. 2006, c. 35, Sched. A, s. 127 (2).

Same

(3) The Integrity Commissioner may not require the provision of information, the production of a document or thing or the giving of an answer if the provision, production or answer might disclose,

- (a) information that is subject to solicitor-client privilege; or
- (b) information prepared by or for counsel for a Ministry or a public body for use in giving legal advice or in contemplation of or for use in litigation. 2006, c. 35, Sched. A, s. 127 (3).

Same

(4) Unless the disclosure is required by law or permitted under this Act, the Integrity Commissioner and every person acting on behalf of or under the direction of the Commissioner shall not disclose any information that comes to their attention in the performance of their duties, powers or functions under this Part. 2006, c. 35, Sched. A, s. 127 (4).

Privilege

128 (1) A person who is required to provide information, produce a document or thing or give an answer in the course of an investigation by the Integrity Commissioner has the same privileges in relation to the provision of information, the production of documents or things and the answering of questions as witnesses have in any court proceeding. 2006, c. 35, Sched. A, s. 128 (1).

Protection

(2) Except on the trial of a person for perjury, no statement made or answer given by that or any other person in the course of an investigation by the Integrity Commissioner is admissible in evidence against any person in a court or at an inquiry or in any other proceeding, and no evidence in respect of the investigation by the Integrity Commissioner shall be given against any person. 2006, c. 35, Sched. A, s. 128 (2).

Right to object to answer

(3) A person giving a statement or answer in the course of an investigation by the Integrity Commissioner under this Part shall be informed by the person presiding over the investigation or proceeding of the right to object to answer a question under section 5 of the *Canada Evidence Act*. 2006, c. 35, Sched. A, s. 128 (3).

Prosecution

(4) No person is liable for prosecution for an offence under any Act by reason of his or her compliance with a requirement under this Part. 2006, c. 35, Sched. A, s. 128 (4).

REPORT ON CONCLUSION OF INVESTIGATION BY INTEGRITY COMMISSIONER

Report on conclusion of investigation

129 (1) On concluding an investigation of a disclosure under this Part, the Integrity Commissioner shall make a report to the person to whom the Commissioner made the referral under subsection 118 (2). 2006, c. 35, Sched. A, s. 129 (1).

Same

(2) If the person to whom the Integrity Commissioner made the referral under subsection 118 (2) referred the matter back to the Commissioner under section 119 and the Integrity Commissioner considers that it would be inappropriate to make the report required by subsection (1) to that person, the Commissioner shall make the report to such other public servant as the Commissioner considers appropriate in the circumstances. 2006, c. 35, Sched. A, s. 129 (2).

Same

(3) Subsections (1) and (2) apply whether or not the Integrity Commissioner has made a finding of wrongdoing. 2006, c. 35, Sched. A, s. 129 (3).

Same

(4) A report required by subsection (1) shall be in writing and shall include,

- (a) findings of wrongdoing, if any;
- (b) reasons to support any findings;
- (c) any recommendations that the Commissioner considers appropriate. 2006, c. 35, Sched. A, s. 129 (4).

Copy to Minister

(5) The Integrity Commissioner shall provide a copy of the report to a minister where the disclosure alleged wrongdoing,

- (a) in the ministry of the minister; or
- (b) in a public body for which the minister has responsibility. 2006, c. 35, Sched. A, s. 129 (5).

Further report

(6) If the report includes recommendations under clause (4) (c), the Integrity Commissioner may require the person to whom the Commissioner made the report under subsection (1) or (2), as the case may be, to provide a further report to the Commissioner, in writing and within a time period specified by the Commissioner,

- (a) describing any action taken or proposed to be taken in response to the recommendations; and
- (b) explaining why a recommended action was not taken or is not proposed to be taken. 2006, c. 35, Sched. A, s. 129 (6).

Same

(7) On request from the person to whom the Integrity Commissioner made the referral under subsection 118 (2), the Commissioner may extend the time period within which the further report must be provided, either before or after the expiry of the period. 2006, c. 35, Sched. A, s. 129 (7).

Copy to Minister

(8) The Integrity Commissioner shall provide a copy of the further report under subsection (6) to the minister entitled to receive a copy of the report under subsection (5). 2006, c. 35, Sched. A, s. 129 (8).

PUBLIC REPORTS BY INTEGRITY COMMISSIONER**Public report**

130 (1) This section applies where the Integrity Commissioner has made a report respecting a disclosure of wrongdoing under section 129 and is of the opinion that it is in the public interest that a public report be made. 2006, c. 35, Sched. A, s. 130 (1).

Same

(2) In the circumstances described in subsection (1), the Integrity Commissioner shall make a public report respecting the disclosure. 2006, c. 35, Sched. A, s. 130 (2).

Same

(3) If the Integrity Commissioner has required a further report under subsection 129 (6), the Commissioner shall not make a public report until,

- (a) the further report has been delivered to the Commissioner; or
- (b) the time period specified under subsection 129 (6) has expired or, if the Commissioner has extended the time period under subsection 129 (7), the extended period has expired and no further report has been delivered to the Commissioner. 2006, c. 35, Sched. A, s. 130 (3).

Same

(4) The Integrity Commissioner shall ensure that the public report is readily accessible to the public by ensuring that the public report is published on one or more Internet sites and by such other means as the Commissioner considers appropriate. 2006, c. 35, Sched. A, s. 130 (4).

Same

(5) Where the Integrity Commissioner makes a public report, he or she shall also deliver the report to the Speaker of the Assembly, who shall lay the report before the Assembly at the earliest reasonable opportunity. 2006, c. 35, Sched. A, s. 130 (5).

Contents of public report

131 (1) Subject to subsections (2) and (3), the Integrity Commissioner shall not include, in a public report under section 130,

- (a) information that would be subject to an exemption under sections 12 to 21.1 of the *Freedom of Information and Protection of Privacy Act*;
- (b) information that would be excluded under section 65 of the *Freedom of Information and Protection of Privacy Act*; or
- (c) information to which subsection 67 (2) of the *Freedom of Information and Protection of Privacy Act* would apply. 2006, c. 35, Sched. A, s. 131 (1).

Same

(2) With the consent of the person who received the Integrity Commissioner's report under subsection 129 (1) or (2), the Commissioner may disclose, in a public report under section 130,

- (a) information that would be subject to an exemption under sections 13, 14, 18, 19, 20 or 21.1 of the *Freedom of Information and Protection of Privacy Act*; or
- (b) information that would be excluded under subsection 65 (6) of the *Freedom of Information and Protection of Privacy Act*. 2006, c. 35, Sched. A, s. 131 (2).

Same

(3) The Commissioner may disclose, in a public report under section 130, information that would be subject to an exemption under section 13, 17, 18, 20, 21 or 21.1 of the *Freedom of Information and Protection of Privacy Act* or that would be excluded under subsection 65 (6) of that Act if, in his or her opinion,

- (a) disclosure of the information is necessary to establish the grounds for the Commissioner's findings of wrongdoing or recommendations; and
- (b) there is a compelling public interest in the disclosure that outweighs the harm that the disclosure may cause. 2006, c. 35, Sched. A, s. 131 (3).

Same

(4) The Integrity Commissioner, rather than the head, shall determine whether information would be subject to an exemption or an exclusion under a provision of the *Freedom of Information and Protection of Privacy Act*. 2006, c. 35, Sched. A, s. 131 (4).

Same

(5) Before making the determination under subsection (4), the Integrity Commissioner shall make reasonable efforts to obtain advice on the matter from the head. 2006, c. 35, Sched. A, s. 131 (5).

Before making public report

132 (1) Before making the determination under subsection 131 (4), the Integrity Commissioner,

- (a) shall ask the person to whom the report was made under subsection 129 (1) or (2) for submissions as to the making of the determination under subsection 131 (4); and

(b) shall, if the Commissioner considers it appropriate to do so in the interests of fairness, provide any information contained in the report to a person to whom the information relates and ask the person for submissions as to the making of the determination under subsection 131 (4). 2006, c. 35, Sched. A, s. 132 (1).

Same

(2) The Integrity Commissioner shall specify time periods within which submissions may be made under subsection (1). 2006, c. 35, Sched. A, s. 132 (2).

Same

(3) On request from a person referred to in clause (1) (a) or (b), the Integrity Commissioner may extend the time periods within which the submissions must be made, either before or after the expiry of the period. 2006, c. 35, Sched. A, s. 132 (3).

Same

(4) The Integrity Commissioner shall not make a public report or deliver it to the Speaker of the Assembly until the time periods specified for submissions under subsection (2) or (3) has expired. 2006, c. 35, Sched. A, s. 132 (4).

Annual report, activities under this Part

133 (1) The annual report of the Integrity Commissioner required by section 24 of the *Members' Integrity Act, 1994* shall include,

- (a) the number of disclosures received by the Commissioner under section 116 during the year;
- (b) the number of refusals made by the Commissioner under section 117 during the year;
- (c) the number of referrals made by the Commissioner under subsection 118 (2) during the year;
- (d) the number of reports in which the Commissioner makes recommendations under section 121 during the year;
- (e) a summary of what the Commissioner knows respecting responses to recommendations under section 121 during the year;
- (f) the number of investigations initiated by the Commissioner under section 122 during the year;
- (g) a summary of what the Commissioner knows respecting the outcomes during the year of findings of reprisals under this Part;
- (h) anything else that the Commissioner considers relevant in respect of his or her activities under this Part during the year. 2006, c. 35, Sched. A, s. 133 (1).

Same

(2) Sections 131 and 132 apply, with necessary modifications, to the contents of the annual report that are required by subsection (1). 2006, c. 35, Sched. A, s. 133 (2).

INTEGRITY COMMISSIONER'S DUTY TO INFORM PERSON WHO MADE DISCLOSURE

Duty to inform discloser, refusal to deal

134 (1) Where the Integrity Commissioner refuses to deal with a disclosure under section 117, he or she shall so inform the person who made the disclosure under section 116. 2006, c. 35, Sched. A, s. 134 (1).

Same

(2) Subject to section 137, the Integrity Commissioner may inform the person of his or her reasons for refusing to deal with the disclosure under section 117. 2006, c. 35, Sched. A, s. 134 (2).

Duty to inform discloser, no investigation

135 (1) Where the Integrity Commissioner receives a report under section 118 or 121 and does not initiate an investigation under section 122, the Commissioner shall so inform the person who made the disclosure under section 116. 2006, c. 35, Sched. A, s. 135 (1).

Same

(2) Subject to section 137, the Integrity Commissioner may give the person who made the disclosure such information respecting the investigation and findings as the Commissioner considers appropriate in the circumstances. 2006, c. 35, Sched. A, s. 135 (2).

Duty to inform discloser, no public report

136 (1) Where the Integrity Commissioner has a duty to report under section 129 but does not have a duty to make a public report under section 130, the Commissioner shall inform the person who made the disclosure under section 116 that he or she has concluded the investigation. 2006, c. 35, Sched. A, s. 136 (1).

Same

(2) Subject to section 137, the Integrity Commissioner may give the person who made the disclosure such information respecting the investigation and findings as the Commissioner considers appropriate in the circumstances. 2006, c. 35, Sched. A, s. 136 (2).

Limitation on duty to inform

137 (1) The Integrity Commissioner shall not give the person who made the disclosure,

- (a) information that would be subject to an exemption under sections 12 to 21.1 of the *Freedom of Information and Protection of Privacy Act*;
- (b) information that would be excluded under section 65 of the *Freedom of Information and Protection of Privacy Act*; or
- (c) information to which subsection 67 (2) of the *Freedom of Information and Protection of Privacy Act* applies. 2006, c. 35, Sched. A, s. 137 (1).

Same

(2) In determining whether information would be subject to an exemption or an exclusion under a provision of the *Freedom of Information and Protection of Privacy Act*, the Integrity Commissioner shall exercise the discretion that the head has under the provision. 2006, c. 35, Sched. A, s. 137 (2).

Same

(3) Before exercising discretion under subsection (2), the Integrity Commissioner shall make reasonable efforts to obtain advice on the matter from the head. 2006, c. 35, Sched. A, s. 137 (3).

Duty to inform discloser, public report

138 Where the Integrity Commissioner has a duty to make a public report under section 130, he or she shall provide the report to the person who made the disclosure under section 116. 2006, c. 35, Sched. A, s. 138.

PROTECTION FROM REPRISALS**No reprisals**

139 (1) No person shall take a reprisal against a public servant because he or she has,

- (a) sought advice about making a disclosure about wrongdoing in accordance with this Part;
- (b) made a disclosure about wrongdoing in accordance with this Part;
- (c) co-operated in an investigation or other process related to a disclosure of wrongdoing made in accordance with this Part;
- (d) acted in compliance with this Part; or
- (e) sought enforcement of this Part. 2006, c. 35, Sched. A, s. 139 (1).

Same

(2) For the purposes of subsection (1), a reprisal is any measure taken against a public servant that adversely affects his or her employment or appointment and includes but is not limited to,

- (a) ending or threatening to end a public servant's employment or appointment;
- (b) disciplining or suspending or threatening to discipline or suspend a public servant;
- (c) imposing or threatening to impose a penalty related to the employment or appointment of a public servant;
- (d) intimidating or coercing a public servant in relation to his or her employment or appointment. 2006, c. 35, Sched. A, s. 139 (2).

Complaint about reprisal

140 (1) A public servant described in subsection (2), (3) or (4) may complain under this section that he or she has suffered a reprisal prohibited by section 139. 2006, c. 35, Sched. A, s. 140 (1).

Public servant subject to collective agreement

(2) A public servant who is subject to the terms and conditions of a collective agreement may have the complaint dealt with by final and binding settlement by arbitration in accordance with the agreement or may file the complaint with the Ontario Labour Relations Board. 2009, c. 33, Sched. 17, s. 10 (15).

Public servant not subject to collective agreement

(3) A public servant employed under Part III who is not subject to the terms and conditions of a collective agreement may file the complaint with the Public Service Grievance Board. 2009, c. 33, Sched. 17, s. 10 (15).

Other public servant

(4) A public servant employed by a public body who is not subject to the terms and conditions of a collective agreement may file the complaint with the Ontario Labour Relations Board. 2009, c. 33, Sched. 17, s. 10 (15).

Inquiry by Board

(5) The Ontario Labour Relations Board may inquire into a complaint filed under subsection (2) or (4) and section 96 of the *Labour Relations Act, 1995*, except subsection (5), applies with necessary modifications as if such section, except subsection (5), is enacted in and forms part of this Act. 2006, c. 35, Sched. A, s. 140 (5).

Same

(6) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2) or (4), sections 110, 111, 114 and 116 of the *Labour Relations Act, 1995* apply with necessary modifications. 2006, c. 35, Sched. A, s. 140 (6).

Exception

(7) Despite anything in this section, a person who is a police officer under the *Community Safety and Policing Act, 2019* shall have his or her complaint dealt with under section 191 of that Act. 2006, c. 35, Sched. A, s. 140 (7); 2019, c. 1, Sched. 4, s. 52 (3).

Order

(8) If the Public Service Grievance Board, the Ontario Labour Relations Board or the Grievance Settlement Board determines, on the completion of an inquiry into a complaint filed under subsection (2), (3) or (4), that a reprisal has been taken in contravention of subsection 139 (1), the Board may make an order that it considers just and reasonable in the circumstances, directing the relevant ministry or public body or a person acting on behalf of the ministry or public body to do or refrain from doing anything in relation to the contravention. 2006, c. 35, Sched. A, s. 140 (8).

Same

(9) Without limiting the generality of subsection (8), an order under that subsection may direct that the ministry or public body, or a person acting on behalf of the ministry or public body, do one or more of the following:

1. Cease doing an act or acts complained of under subsection (1).
2. Take steps to rectify harm related to a complaint under subsection (1).
3. Reinstate the employment of a public servant whose employment was terminated.

4. Compensate the public servant for loss of any remuneration, including benefits. 2006, c. 35, Sched. A, s. 140 (9).

Same

(10) Without limiting the generality of subsection (8), where the board is of the view that continuation of the employment relationship is inappropriate, the board may direct the ministry or public body, or person acting on behalf of the ministry or public body to terminate the public servant's employment and provide compensation in lieu of reasonable notice of the termination. 2006, c. 35, Sched. A, s. 140 (10).

Same

(11) A board may not make an order under subsection (8) for punitive damages or for costs. 2006, c. 35, Sched. A, s. 140 (11).

Same

(12) Where a board has made a finding under subsection (8) that a reprisal has been taken, the board shall inform the Integrity Commissioner of the finding. 2006, c. 35, Sched. A, s. 140 (12).

Onus of proof

(13) On an inquiry into a complaint filed with the Public Service Grievance Board, the Ontario Labour Relations Board or the Grievance Settlement Board under this section, the burden of proof that an employer or a person acting on behalf of an employer did not act contrary to subsection 139 (1) lies on the employer or the person acting on behalf of the employer. 2006, c. 35, Sched. A, s. 140 (13).

Settlements may be filed with Board

141 (1) A written and signed settlement of a complaint made under subsection 140 (1) may, if a party to the settlement believes that the settlement has been breached, be filed,

- (a) in the case of a settlement of a complaint by a public servant described in subsection 140 (2) where the complaint is filed with the Ontario Labour Relations Board under that subsection, with the Ontario Labour Relations Board;
- (b) in the case of a complaint by a public servant described in subsection 140 (2) that is not filed with the Ontario Labour Relations Board under that subsection and that was settled by the parties to a collective agreement governed by the *Crown Employees Collective Bargaining Act, 1993*, with the Grievance Settlement Board;
- (c) in the case of a settlement of a complaint by a public servant described in subsection 140 (3), with the Public Service Grievance Board;
- (d) in the case of a settlement of a complaint by a public servant described in subsection 140 (4), with the Ontario Labour Relations Board. 2006, c. 35, Sched. A, s. 141 (1).

Same

(2) Where a settlement is filed with a board under this section, the board shall inquire into the matter and, if the board concludes that the settlement has been breached, the Board may,

- (a) make an order requiring compliance with the settlement; or
- (b) make an order respecting the complaint that could have been made in respect of that complaint under subsection 140 (8). 2006, c. 35, Sched. A, s. 141 (2).

Same

(3) Subsections 140 (5) and (6) apply with necessary modifications to the Ontario Labour Relations Board acting under subsection (2). 2006, c. 35, Sched. A, s. 141 (3).

Order may be filed in court

142 (1) An order of the Grievance Settlement Board, the Public Service Grievance Board or the Ontario Labour Relations Board under subsection 140 (8) or 141 (2) may be filed in the Superior Court of Justice. 2006, c. 35, Sched. A, s. 142 (1).

Same

(2) An order that is filed under subsection (1) is enforceable as if it were an order of the Superior Court of Justice. 2006, c. 35, Sched. A, s. 142 (2).

Same

(3) Section 129 of the *Courts of Justice Act* applies in respect of an order filed with the Superior Court of Justice under subsection (1) and, for the purpose, the date on which the order is filed is deemed to be the date of the order. 2006, c. 35, Sched. A, s. 142 (3).

PENALTIES, PROHIBITIONS AND OFFENCES**Penalties**

143 A public servant who contravenes subsection 139 (1) or any of subsections 144 (1) to (4) is subject to disciplinary measures, including suspension or dismissal. 2006, c. 35, Sched. A, s. 143.

Prohibitions

144 (1) No person shall wilfully obstruct the Integrity Commissioner in the exercise of his or her powers or the performance of his or her duties or functions under this Part. 2006, c. 35, Sched. A, s. 144 (1).

Same

(2) No person shall, in disclosing a wrongdoing under this Part, or in the course of an investigation or other proceeding under this Part, knowingly make a false or misleading statement. 2006, c. 35, Sched. A, s. 144 (2).

Same

(3) No person shall, knowing that a document or other thing is likely to be relevant to an investigation or other proceeding under this Part,

- (a) destroy or alter the document or other thing;
- (b) falsify the document or other thing or make a false document or other thing;
- (c) conceal the document or other thing. 2006, c. 35, Sched. A, s. 144 (3).

Same

(4) No person shall direct, counsel or cause in any manner any person to do anything described in this section. 2006, c. 35, Sched. A, s. 144 (4).

Offence

145 (1) A person who contravenes any of subsections 144 (1) to (4) is guilty of an offence. 2006, c. 35, Sched. A, s. 145 (1).

Same

(2) A person who contravenes subsection 139 (1) is guilty of an offence. 2006, c. 35, Sched. A, s. 145 (2).

Same

(3) A prosecution for an offence under subsection (2) shall not be commenced unless there has been a finding by a board under subsection 140 (8) that a reprisal was taken in contravention of subsection 139 (1). 2006, c. 35, Sched. A, s. 145 (3).

MISCELLANEOUS**Assistance to the Commissioner**

146 The Integrity Commissioner may engage, on a temporary basis, the services of a person with technical or specialized knowledge to advise or assist the Commissioner in the exercise of his or her powers or the performance of his or her duties or functions. 2006, c. 35, Sched. A, s. 146.

Provision of legal services

147 Subject to regulations under subsection 150 (1), the Integrity Commissioner may arrange and pay for the provision of legal services to a public servant or other person involved in any investigation or other proceeding under this Part. 2006, c. 35, Sched. A, s. 147; 2009, c. 33, Sched. 17, s. 10 (16).

Disclosure does not waive privilege

148 A disclosure under this Part does not constitute waiver of any privilege that may exist with respect to the information or other thing disclosed. 2006, c. 35, Sched. A, s. 148.

FIVE-YEAR REVIEW

Five-year review

149 (1) Five years after this section comes into force, the minister responsible for the administration of this Act shall ensure that a review is conducted of the administration and operation of this Part and that a report setting out the findings from the review is prepared. 2006, c. 35, Sched. A, s. 149 (1).

Same

(2) The minister shall deliver the report to the Speaker of the Assembly, who shall lay the report before the Assembly at the earliest reasonable opportunity. 2006, c. 35, Sched. A, s. 149 (2).

REGULATIONS

Regulations, Part VI

150 (1) The Lieutenant Governor in Council may make regulations respecting the provision of legal services under section 147. 2006, c. 35, Sched. A, s. 150 (1).

Same

(2) Regulations made under this section may be general or particular in their application. 2006, c. 35, Sched. A, s. 150 (2).

PART VII MISCELLANEOUS

Statutory Powers Procedure Act

151 The *Statutory Powers Procedure Act* does not apply to proceedings and decisions under this Act, except as provided under section 23. 2006, c. 35, Sched. A, s. 151.

Agreement in conflict with regulation, directive

152 Where a provision in a collective agreement conflicts with a provision of a regulation or a directive made under this Act, the provision in the collective agreement prevails over the provision of the regulation or directive. 2006, c. 35, Sched. A, s. 152.

Implementation of collective agreements, etc.

153 Subject to section 10 of the *Ontario Provincial Police Collective Bargaining Act, 2006*, the minister responsible for the administration of this Act shall by order implement collective agreements made in accordance with the collective bargaining procedures applicable to public servants employed under Part III of this Act. 2006, c. 35, Sched. A, s. 153.

REGULATIONS

Regulations, general

154 (1) The Lieutenant Governor in Council may make regulations,

(a) providing for the collection, use and disclosure of personal information about public servants and former public servants,

(i) for the purposes of this Act, and

- (ii) for the purposes of managing and administering human resources in the public service of Ontario, including but not limited to providing integrated human resources programs for the public service of Ontario;
- (b) providing for any transitional matter that the Lieutenant Governor in Council considers necessary or advisable for the effective implementation of this Act or the regulations or directives under it;
- (b.1) providing for any transitional matter arising from the enactment of Schedule 35 to the *Restoring Trust, Transparency and Accountability Act, 2018*;
- (c) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act. 2006, c. 35, Sched. A, s. 154 (1); 2018, c. 17, Sched. 35, s. 15 (1).

Same

(2) Regulations made under this section may be general or particular in their application. 2006, c. 35, Sched. A, s. 154 (2).

Conflict

(3) If there is a conflict between a regulation made under clause (1) (b.1) and a provision of this or any other Act or a provision of another regulation made under this or any other Act, the regulation made under clause (1) (b.1) prevails. 2018, c. 17, Sched. 35, s. 15 (2).

TRANSITIONAL MATTERS

Status of employees

155 (1) A person who was, immediately before this section comes into force, a public servant within the meaning of the *Public Service Act*, as that Act read immediately before its repeal by section 1 of Schedule C to the *Public Service of Ontario Statute Law Amendment Act, 2006*, and who at that time worked in a ministry, other than in a minister's office, is, on the day this section comes into force, a public servant appointed under Part III of this Act to employment in a ministry. 2006, c. 35, Sched. A, s. 155 (1).

Same

(2) A person who was, immediately before this section comes into force, a public servant within the meaning of the *Public Service Act*, as that Act read immediately before its repeal by section 1 of Schedule C to the *Public Service of Ontario Statute Law Amendment Act, 2006*, and who at that time worked in a minister's office, is, on the day this section comes into force, a public servant appointed under Part III of this Act to employment in a minister's office. 2006, c. 35, Sched. A, s. 155 (2).

Same

(3) A person who was, immediately before this section comes into force, appointed under the *Public Service Act*, as that Act read immediately before its repeal by section 1 of Schedule C to the *Public Service of Ontario Statute Law Amendment Act, 2006*, to work in a Commission public body is, on the day this section comes into force, a public servant appointed by the Public Service Commission under Part III of this Act to employment in a Commission public body. 2006, c. 35, Sched. A, s. 155 (3).

156, 157 Omitted (provides for amendments to this Act). 2006, c. 35, Sched. A, ss. 156, 157.

158 Omitted (provides for coming into force of provisions of this Act). 2006, c. 35, Sched. A, s. 158.

159 Omitted (enacts short title of this Act). 2006, c. 35, Sched. A, s. 159.

Tab 70

Conflict of Interest Commissioner: Powers, Duties and Functions, O Reg 384/07



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Public Service of Ontario Act, 2006

ONTARIO REGULATION 384/07

INTEGRITY COMMISSIONER: POWERS, DUTIES AND FUNCTIONS UNDER THE ACT

Consolidation Period: From May 1, 2019 to the [e-Laws currency date](#).

Last amendment: 83/19.

This is the English version of a bilingual Regulation.

Advice, education and training

1. The Integrity Commissioner has the following additional powers, duties and functions:

1. Upon request, to advise the Public Service Commission or its delegate in respect of conflict of interest matters relating to the appointment or proposed appointment of a person under subsection 32 (1) or (2) of the Act to employment by the Crown.
2. Upon request, to advise the Public Service Commission and ethics executives about conflict of interest matters affecting the public service of Ontario.
3. Upon the request of the Public Service Commission or an ethics executive, to act as a conflict of interest advisor to consultants or other independent contractors who provide services to a ministry or a Commission public body and to persons who are seconded to a position in a ministry or a Commission public body from a position outside the public service of Ontario.
4. Upon request, to provide advice about conflicts of interest to a minister or to the Director of the Public Appointments Secretariat in respect of the proposed appointment of a person to a public body.

5. If a public servant makes the declaration to the Commissioner respecting the public servant's financial interests that is required by the conflict of interest rules established under Part IV of the Act, to advise the public servant's ethics executive about the actions that may be taken by the public servant in order to avoid contravening the conflict of interest rules, including advice concerning the transfer of ownership or control of an asset to a neutral third party.
6. To educate and train ethics executives about their responsibilities under the Act. O. Reg. 384/07, s. 1; O. Reg. 83/19, s. 2.

Decisions under subsection 65 (5) of the Act

2. (1) This section applies with respect to matters referred to the Integrity Commissioner under subsection 65 (6) of the Act. O. Reg. 384/07, s. 2 (1); O. Reg. 83/19, s. 3.

(2) Without limiting the generality of the Commissioner's powers under subsection 65 (5) of the Act, he or she may take any of the following actions in respect of a matter referred to him or her under subsection 65 (6) of the Act:

1. Recommend that the Crown not do business with a person or entity that employs or uses the services of a former public servant whose employment or services would contravene the conflict of interest rules.
2. Require a public servant to take or refrain from taking specified actions in order to avoid contravening the conflict of interest rules, including requiring the public servant to transfer ownership or control of an asset to a neutral third party.
3. Require a public servant to notify his or her supervisor of decisions that the public servant proposes to make that could result in a contravention of the conflict of interest rules, and require the public servant to obtain the supervisor's approval for the proposed decisions.
4. Recommend disciplinary measures that may be imposed on a public servant, including suspension or dismissal, or recommend that the public servant's resignation be accepted.
5. Recommend that a public servant be transferred to another position or assigned to perform other duties in order to avoid or remedy a contravention of the conflict of interest rules.
6. Recommend that a public servant be temporarily relieved from duties that have resulted in a contravention of the conflict of interest rules or that may result in such a contravention. O. Reg. 384/07, s. 2 (2).

Collection, use and disclosure of personal information

3. (1) The Integrity Commissioner shall collect and use the personal information that is necessary to enable him or her to perform his or her duties under section 65 of the Act and under the conflict of interest rules established under Part IV of the Act. O. Reg. 384/07, s. 3 (1); O. Reg. 83/19, s. 4.

(2) The Commissioner shall not disclose personal information collected under subsection (1) unless one or more of the following circumstances exist:

1. The person to whom the information relates consents to the disclosure.
2. The disclosure is required in connection with a legal proceeding relating to the Act or a regulation made under it.
3. The disclosure is made for the purpose of complying with an Act of the Legislature or an Act of Parliament or a treaty, agreement or arrangement made thereunder.
4. The disclosure is made to a law enforcement agency in Canada to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result.
5. The Commissioner considers it to be reasonably necessary to disclose the information to a person or entity in order to verify information given to the Commissioner or to an ethics executive by the public servant.
6. The Commissioner considers it to be reasonably necessary to disclose the information to a person or entity in order to determine whether the public servant has contravened, or may have contravened, the conflict of interest rules.
7. The Commissioner considers it to be reasonably necessary to disclose the information to a person or entity in order to enable the person or entity to perform his, her or its duties under the Act. O. Reg. 384/07, s. 3 (2).

4. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 384/07, s. 4.

Tab 71

Conflict of Interest Commissioner: Powers, Duties and Functions, O Reg 384/07



Current version: in force since 2019-05-01

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Public Service of Ontario Act, 2006

ONTARIO REGULATION 384/07

INTEGRITY COMMISSIONER: POWERS, DUTIES AND FUNCTIONS UNDER THE ACT

Consolidation Period: From May 1, 2019 to the [e-Laws currency date](#).

Last amendment: 83/19.

This is the English version of a bilingual Regulation.

Advice, education and training

1. The Integrity Commissioner has the following additional powers, duties and functions:

1. Upon request, to advise the Public Service Commission or its delegate in respect of conflict of interest matters relating to the appointment or proposed appointment of a person under subsection 32 (1) or (2) of the Act to employment by the Crown.
2. Upon request, to advise the Public Service Commission and ethics executives about conflict of interest matters affecting the public service of Ontario.
3. Upon the request of the Public Service Commission or an ethics executive, to act as a conflict of interest advisor to consultants or other independent contractors who provide services to a ministry or a Commission public body and to persons who are seconded to a position in a ministry or a Commission public body from a position outside the public service of Ontario.
4. Upon request, to provide advice about conflicts of interest to a minister or to the Director of the Public Appointments Secretariat in respect of the proposed appointment of a person to a public body.

5. If a public servant makes the declaration to the Commissioner respecting the public servant's financial interests that is required by the conflict of interest rules established under Part IV of the Act, to advise the public servant's ethics executive about the actions that may be taken by the public servant in order to avoid contravening the conflict of interest rules, including advice concerning the transfer of ownership or control of an asset to a neutral third party.
6. To educate and train ethics executives about their responsibilities under the Act. O. Reg. 384/07, s. 1; O. Reg. 83/19, s. 2.

Decisions under subsection 65 (5) of the Act

2. (1) This section applies with respect to matters referred to the Integrity Commissioner under subsection 65 (6) of the Act. O. Reg. 384/07, s. 2 (1); O. Reg. 83/19, s. 3.

(2) Without limiting the generality of the Commissioner's powers under subsection 65 (5) of the Act, he or she may take any of the following actions in respect of a matter referred to him or her under subsection 65 (6) of the Act:

1. Recommend that the Crown not do business with a person or entity that employs or uses the services of a former public servant whose employment or services would contravene the conflict of interest rules.
2. Require a public servant to take or refrain from taking specified actions in order to avoid contravening the conflict of interest rules, including requiring the public servant to transfer ownership or control of an asset to a neutral third party.
3. Require a public servant to notify his or her supervisor of decisions that the public servant proposes to make that could result in a contravention of the conflict of interest rules, and require the public servant to obtain the supervisor's approval for the proposed decisions.
4. Recommend disciplinary measures that may be imposed on a public servant, including suspension or dismissal, or recommend that the public servant's resignation be accepted.
5. Recommend that a public servant be transferred to another position or assigned to perform other duties in order to avoid or remedy a contravention of the conflict of interest rules.
6. Recommend that a public servant be temporarily relieved from duties that have resulted in a contravention of the conflict of interest rules or that may result in such a contravention. O. Reg. 384/07, s. 2 (2).

Collection, use and disclosure of personal information

3. (1) The Integrity Commissioner shall collect and use the personal information that is necessary to enable him or her to perform his or her duties under section 65 of the Act and under the conflict of interest rules established under Part IV of the Act. O. Reg. 384/07, s. 3 (1); O. Reg. 83/19, s. 4.

(2) The Commissioner shall not disclose personal information collected under subsection (1) unless one or more of the following circumstances exist:

1. The person to whom the information relates consents to the disclosure.
2. The disclosure is required in connection with a legal proceeding relating to the Act or a regulation made under it.
3. The disclosure is made for the purpose of complying with an Act of the Legislature or an Act of Parliament or a treaty, agreement or arrangement made thereunder.
4. The disclosure is made to a law enforcement agency in Canada to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result.
5. The Commissioner considers it to be reasonably necessary to disclose the information to a person or entity in order to verify information given to the Commissioner or to an ethics executive by the public servant.
6. The Commissioner considers it to be reasonably necessary to disclose the information to a person or entity in order to determine whether the public servant has contravened, or may have contravened, the conflict of interest rules.
7. The Commissioner considers it to be reasonably necessary to disclose the information to a person or entity in order to enable the person or entity to perform his, her or its duties under the Act. O. Reg. 384/07, s. 3 (2).

4. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 384/07, s. 4.

Tab 72

Ethics Executive: Additional Powers, Duties and Functions Under Part IV of the Act, O Reg 383/07



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Public Service of Ontario Act, 2006

ONTARIO REGULATION 383/07

ETHICS EXECUTIVE: ADDITIONAL POWERS, DUTIES AND FUNCTIONS UNDER PART IV OF THE ACT

Consolidation Period: From February 3, 2016 to the [e-Laws currency date](#).

Last amendment: 17/16.

This is the English version of a bilingual regulation.

Decisions under subsection 65 (5) of the Act

1. Without limiting the generality of the powers of an ethics executive under subsection 65 (5) of the Act, he or she may take any of the following actions in respect of a matter referred to in that subsection:

1. Require a public servant to notify his or her supervisor of decisions that the public servant proposes to make that could result in a contravention of the conflict of interest rules established under Part IV of the Act, and require the public servant to obtain the supervisor's approval for the proposed decisions.
2. Recommend disciplinary measures that may be imposed on a public servant, including suspension or dismissal, or recommend that the public servant's resignation be accepted.
3. Recommend that a public servant be transferred to another position or assigned to perform other duties in order to avoid or remedy a contravention of the conflict of interest rules.
4. Recommend that a public servant be temporarily relieved from duties that have resulted in a contravention of the conflict of interest rules or that may result in such a contravention.
5. Direct a public servant to transfer ownership or control of an asset to a neutral third party in order to avoid contravening the conflict of interest rules. O. Reg. 383/07, s. 1.

Collection, use and disclosure of personal information

2. (1) An ethics executive shall collect and use the personal information that is necessary to enable him or her to perform his or her duties under section 65 of the Act and under the conflict of interest rules established under Part IV of the Act. O. Reg. 383/07, s. 2 (1).

(2) An ethics executive shall not disclose personal information collected under subsection (1) unless one or more of the following circumstances exist:

1. The person to whom the information relates consents to the disclosure.
 2. The disclosure is required in connection with a legal proceeding relating to the Act or a regulation made under it.
 3. The disclosure is made for the purpose of complying with an Act of the Legislature or an Act or Parliament or a treaty, agreement or arrangement made thereunder.
 4. The disclosure is made to a law enforcement agency in Canada to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result.
 5. The ethics executive considers it to be reasonably necessary to disclose the information to a person or entity in order to verify information given to the ethics executive by the public servant.
 6. The ethics executive considers it to be reasonably necessary to disclose the information to a person or entity in order to determine whether the public servant has contravened, or may have contravened, the conflict of interest rules.
 7. The ethics executive considers it to be reasonably necessary to disclose the information to a person or entity in order to enable the person or entity to perform his, her or its duties under the Act. O. Reg. 383/07, s. 2 (2).
3. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 383/07, s. 3.

Tab 72

Oaths and Affirmations, O Reg 373/07



Current version: in force since 2017-11-06

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Public Service of Ontario Act, 2006

ONTARIO REGULATION 373/07

OATHS AND AFFIRMATIONS

Consolidation Period: From November 6, 2017 to the [e-Laws currency date](#).

Last amendment: 385/17.

This is the English version of a bilingual regulation.

Definitions

0.1 In this Regulation,

“Indigenous peoples” includes the First Nations, Inuit and Métis peoples within Canada; (“peuples autochtones”)

“Indigenous person” means an individual who forms part of the Indigenous peoples. (“Autochtone”) O. Reg. 385/17, s. 1.

Oath or affirmation of allegiance

1. (1) The following oath or affirmation of allegiance to the Crown is prescribed for the purposes of subsection 5 (1) of the Act:

“I swear (or solemnly affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second (*or the reigning sovereign for the time being*), her heirs and successors according to law. So help me God. (Omit this phrase in an affirmation.)”

O. Reg. 373/07, s. 1 (1).

(2) The public servant may make the oath or affirmation in either English or French. O. Reg. 373/07, s. 1 (2).

Exemptions, oath or affirmation of allegiance

2. (1) A public servant who is not a citizen of Canada but is a citizen of another country is exempt from the requirement under subsection 5 (1) of the Act to swear or affirm his or her allegiance to the Crown if the public servant asserts that making the oath or affirmation could result in the loss of that citizenship. O. Reg. 373/07, s. 2.

(2) A public servant who identifies as an Indigenous person is exempt from the requirement under subsection 5 (1) of the Act to swear or affirm his or her allegiance to the Crown if the public servant asserts that making the oath or affirmation would be inconsistent with his or her views regarding the relationship between the Crown and Indigenous peoples. O. Reg. 385/17, s. 2.

Oath or affirmation of office

3. (1) The following oath or affirmation of office is prescribed for the purposes of section 6 of the Act:

"I swear (or solemnly affirm) that I will faithfully discharge my duties as a public servant; I will respect the laws of Canada and Ontario, including the recognition and affirmation of the aboriginal and treaty rights of Indigenous peoples in the Constitution; and, except as I may be legally authorized or required, I will not disclose or give to any person any information or document that comes to my knowledge or possession by reason of my being a public servant. So help me God. (Omit this phrase in an affirmation.)"

O. Reg. 385/17, s. 3 (1).

(2) The public servant may make the oath or affirmation in either English or French. O. Reg. 373/07, s. 3 (2).

(3) Subsection (1), as remade by Ontario Regulation 385/17, applies to a public servant who is making the oath or affirmation on or after the day that that Regulation comes into force. O. Reg. 385/17, s. 3 (2).

Administration of oath or affirmation

4. (1) Any of the persons described in Column 2 of the Table to this section is authorized to administer an oath or affirmation by a public servant who is appointed to a position described in Column 1 in the same row. O. Reg. 111/08, s. 1.

(2) In the Table to this section,

"appointed commissioner for taking affidavits" means a person who is appointed under subsection 4 (1) of the *Commissioners for taking Affidavits Act* as a commissioner for taking affidavits; ("commissaire aux affidavits nommé")

"lawyer in the public service of Ontario" means a person employed as legal counsel,

(a) under subsection 32 (1) of the Act to work in a ministry, other than in a minister's office,

(b) under subsection 32 (2) of the Act to work in a Commission public body, or

(c) by a public body that is not a Commission public body. ("avocat de la fonction publique de l'Ontario")

TABLE
PERSONS AUTHORIZED TO ADMINISTER OATHS AND AFFIRMATIONS

Item	Column 1 Public servant making the oath or affirmation	Column 2 Persons authorized to administer the oath or affirmation
1.	A public servant who works in a ministry, but not in a minister's office	· the deputy minister of the ministry, · a public servant who is employed under Part III of the Act and who exercises managerial functions in a ministry, · a lawyer in the public service of Ontario, · any other public servant who is an appointed commissioner for taking affidavits.
2.	A public servant who works in a minister's office	· a minister, · a public servant who is employed under Part III of the Act and who exercises managerial functions in the Office of the Premier, the Cabinet Office or the minister's office, · a lawyer in the public service of Ontario, · any other public servant who is an appointed commissioner for taking affidavits.

3.	A public servant, other than a government appointee, who works in a Commission public body	· the public servant's ethics executive as determined under subsection 62 (1) of the Act,
		· a public servant who is employed under Part III of the Act and who exercises managerial functions in the Commission public body or in the ministry to whom the Commission public body reports,
		· a lawyer in the public service of Ontario,
		· any other public servant who is an appointed commissioner for taking affidavits.
4.	A public servant, other than a government appointee, who works in a public body that is not a Commission public body	· the public servant's ethics executive as determined under subsection 62 (1) of the Act,
		· a public servant who exercises managerial functions in the public body,
		· a lawyer in the public service of Ontario,
		· any other public servant who is an appointed commissioner for taking affidavits.
5.	A government appointee to a public body	· the chair of the public body,
		· a lawyer in the public service of Ontario,
		· any other public servant who is an appointed commissioner for taking affidavits.
6.	The chair of a public body	· a public servant employed under Part III of the Act who works in the Cabinet Office and who is an appointed commissioner for taking affidavits,
		· a lawyer in the public service of Ontario.

O. Reg. 111/08, s. 1.

5. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 373/07, s. 5.

Tab 74

Provision of Legal Services Under Section 147 of the Act, O Reg 385/07



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Public Service of Ontario Act, 2006

ONTARIO REGULATION 385/07

PROVISION OF LEGAL SERVICES UNDER SECTION 147 OF THE ACT

Consolidation Period: From August 20, 2007 to the [e-Laws currency date](#).

No amendments.

This is the English version of a bilingual regulation.

Restrictions on eligibility

1. (1) The Integrity Commissioner is not permitted to arrange or pay for the provision of legal services under section 147 of the Act to a public servant or former public servant involved in any investigation or other proceeding under Part VI of the Act unless,

- (a) the investigation or other proceeding relates to a disclosure that has been received by the Commissioner under [section 116](#) of the [Act](#), other than a disclosure which the Commissioner has refused under [section 117](#) of the Act to deal with; or

(b) the investigation or other proceeding relates to a complaint that has been made under [section 140](#) of the [Act](#). O. Reg. 385/07, s. 1 (1).

(2) The Integrity Commissioner is not permitted to arrange or pay for the provision of legal services under section 147 of the Act to a public servant or former public servant if the Crown, another employer or a bargaining agent has offered to provide or pay for legal services in whole or in part but the offer has not been accepted. O. Reg. 385/07, s. 1 (2).

(3) The Integrity Commissioner is not permitted to arrange or pay for the provision of legal services under section 147 of the Act to a person who is not a public servant or former public servant. O. Reg. 385/07, s. 1 (3).

Limit on amount

2. (1) The maximum amount that the Integrity Commissioner is permitted to pay for legal services under [section 147](#) of the [Act](#) provided to a public servant or former public servant is \$3,000 for a disclosure received under [section 116](#) of the Act and \$3,000 for a complaint made under [section 140](#) of the Act. O. Reg. 385/07, s. 2 (1).

(2) If any legal services for a public servant or former public servant are being paid for by the Crown, another employer or a bargaining agent, the maximum amount that the Integrity Commissioner is permitted by subsection (1) to pay is reduced by the amount paid by the Crown, the employer or the bargaining agent, as the case may be, for the legal services. O. Reg. 385/07, s. 2 (2).

Factors

3. When deciding whether to arrange and pay for the provision of legal services under section 147 of the Act to a public servant or former public servant, the Integrity Commissioner shall consider the following factors and such other matters as the Commissioner considers relevant:

1. The ability of the public servant or former public servant to pay for legal services.
2. The degree to which the public interest may be affected by the alleged wrongdoing or reprisal. O. Reg. 385/07, s. 3.

Recommendation

4. Two years after this Regulation comes into force, the Integrity Commissioner shall give a recommendation about the efficacy of this Regulation to the minister responsible for the administration of the Act. O. Reg. 385/07, s. 4.

5. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 385/07, s. 5.

Tab 75

Public Bodies and Commission Public Bodies - Definitions, O Reg 146/10



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Public Service of Ontario Act, 2006

ONTARIO REGULATION 146/10

PUBLIC BODIES AND COMMISSION PUBLIC BODIES — DEFINITIONS

Consolidation Period: From January 1, 2025 to the e-Laws currency date.

Last amendment: 567/24.

This is the English version of a bilingual regulation.

Public bodies

1. Each body that is listed in Column 1 of Table 1 is prescribed as a public body for the purposes of the Act. O. Reg. 146/10, s. 1.

Commission public bodies

2. A public body that is listed in Column 1 of Table 1 is prescribed as a Commission public body for the purposes of the Act if so indicated in the corresponding row in Column 2. O. Reg. 286/16, s. 1.

3. OMITTED (REVOKES OTHER REGULATIONS). O. Reg. 146/10, s. 3.

4. OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS REGULATION). O. Reg. 146/10, s. 4.

TABLE 1

Item	Column 1 Public bodies	Column 2 Commission public body?
1.	Accessibility Standards Advisory Council	Yes
2.	REVOKED: O. Reg. 88/24, s. 1 (1).	
3.	Advisory Council on Drinking Water Quality and Testing Standards	Yes
4.	REVOKED: O. Reg. 567/24, s. 1 (1).	
5.	Advisory Council to the Order of Ontario	Yes
6.	AgriCorp	No
7.	Agricultural Research Institute of Ontario	Yes
8.	Agriculture, Food and Rural Affairs Appeal Tribunal	Yes
9.	Alcohol and Gaming Commission of Ontario	No
10.	Algonquin Forestry Authority	No
11.	Animal Care Review Board	Yes
12.	Assessment Review Board	Yes
13.	REVOKED: O. Reg. 88/24, s. 1 (1).	
13.1	Big Game Management Advisory Committee	Yes
14.	REVOKED: O. Reg. 903/21, s. 1 (2).	
15.	REVOKED: O. Reg. 270/21, s. 1 (2).	
16.	Building Code Commission	Yes

17.	REVOKED: O. Reg. 270/21, s. 1 (2).	
18.	Building Materials Evaluation Commission	Yes
18.0.1	Building Ontario Fund	No
18.1	Business Risk Management Review Committee	Yes
19.	REVOKED: O. Reg. 270/21, s. 1 (2).	
20.	The Centennial Centre of Science and Technology	Yes
20.1	Centralized Supply Chain Ontario	No
21.	Child and Family Services Review Board	Yes
22.	REVOKED: O. Reg. 88/24, s. 1 (1).	
23.	REVOKED: O. Reg. 440/22, s. 1 (1).	
24.	Committee on the Status of Species at Risk in Ontario	Yes
25.	Committee to Evaluate Drugs	Yes
26.	Consent and Capacity Board	Yes
27.	REVOKED: O. Reg. 903/21, s. 1 (2).	
28.	Constable Joe MacDonald Public Safety Officers' Survivors Scholarship Fund Committee	Yes
29.	REVOKED: O. Reg. 440/22, s. 1 (1).	
30.	Crown Employees Grievance Settlement Board	Yes
31.	REVOKED: O. Reg. 270/21, s. 1 (2).	
32.	Custody Review Board	Yes
33.	Death Investigation Oversight Council	Yes

34.	REVOKED: O. Reg. 106/19, s. 1 (1).	
35.	Education Quality and Accountability Office	Yes
36.	Education Relations Commission	Yes
37.	REVOKED: O. Reg. 270/21, s. 1 (2).	
38.	REVOKED: O. Reg. 903/21, s. 1 (2).	
39.	REVOKED: O. Reg. 270/21, s. 1 (2).	
39.1	Financial Services Regulatory Authority of Ontario	No
40.	Financial Services Tribunal	Yes
41.	Fire Marshal's Public Fire Safety Council	No
42.	Fire Safety Commission	Yes
43.	Fish and Wildlife Heritage Commission	Yes
44.	French Language Health Services Advisory Council	Yes
45.	Grain Financial Protection Board	Yes
46.	Greenbelt Council	Yes
47.	REVOKED: O. Reg. 270/21, s. 1 (2).	
48.	Health Professions Appeal and Review Board	Yes
49.	REVOKED: O. Reg. 903/21, s. 1 (2).	
50.	Health Services Appeal and Review Board	Yes
50.1	REVOKED: O. Reg. 270/21, s. 1 (2).	
51.	Higher Education Quality Council of Ontario	No
51.1	Housing Supply Action Plan Implementation Team	Yes

52.	Human Rights Legal Support Centre	No
53.	Human Rights Tribunal of Ontario	Yes
53.1	iGaming Ontario	No
53.1.1	Indigenous Justice Group	Yes
53.2	Intellectual Property Ontario	No
54.	Investment Advisory Committee of the Public Guardian and Trustee	Yes
54.1	Invest Ontario	No
55.	REVOKED: O. Reg. 88/24, s. 1 (3).	
56.	Lake Simcoe Coordinating Committee	Yes
57.	Lake Simcoe Science Committee	Yes
58.	Landlord and Tenant Board	Yes
59.	Languages of Instruction Commission of Ontario	Yes
59.1	Law Enforcement Complaints Agency	Yes
60.	Legal Aid Ontario	No
61.	Licence Appeal Tribunal	Yes
62.	Liquor Control Board of Ontario	No
63.	Livestock Financial Protection Board	Yes
64.	REVOKED: O. Reg. 270/21, s. 1 (2).	
65.	REVOKED: O. Reg. 345/24, s. 1 (1).	
66.	REVOKED: O. Reg. 88/24, s. 1 (3).	
66.1	REVOKED: O. Reg. 394/19, s. 1 (1).	
66.2	REVOKED: O. Reg. 903/21, s. 1 (2).	

67.	McMichael Canadian Art Collection	No
68.	REVOKED: O. Reg. 270/21, s. 1 (2).	
69.	Metrolinx	No
70.	Metropolitan Toronto Convention Centre Corporation	No
71.	Minister's Advisory Council on Special Education	Yes
72.	Nawiinginokiima Forest Management Corporation	No
73.	Niagara Escarpment Commission	Yes
74.	Niagara Parks Commission	No
75.	Normal Farm Practices Protection Board	Yes
76.	Northern Ontario Heritage Fund Corporation	Yes
77.	Office for Victims of Crime	Yes
78.	REVOKED: O. Reg. 106/19, s. 1 (2).	
79.	Office of the Employer Adviser	Yes
80.	Office of the Fairness Commissioner	Yes
81.	REVOKED: O. Reg. 345/24, s. 1 (1).	
82.	Office of the Worker Adviser	Yes
83.	Ontario Advisory Committee on HIV/AIDS	Yes
84.	Ontario Agency for Health Protection and Promotion	No
84.1	Ontario Cannabis Retail Corporation	No
85.	REVOKED: O. Reg. 88/24, s. 1 (3).	
86.	Ontario Civilian Police Commission	Yes

87.	Ontario Clean Water Agency	Yes
87.1	Ontario Combative Sport Advisory Council	Yes
88.	Ontario Educational Communications Authority	No
89.	Ontario Electricity Financial Corporation	No
90.	Ontario Energy Board	No
91.	Ontario Farm Products Marketing Commission	Yes
92.	Ontario Financing Authority	Yes
93.	Ontario Food Terminal Board	No
94.	Ontario French-language Educational Communications Authority	No
95.	Ontario Geographic Names Board	Yes
95.1	Ontario Health	No
96.	Ontario Health atHome	No
97.	Ontario Heritage Trust	Yes
98.	REVOKED: O. Reg. 88/24, s. 1 (5).	
99.	Ontario Honours Advisory Council	Yes
100.	Ontario Human Rights Commission	Yes
101.	REVOKED: O. Reg. 88/24, s. 1 (5).	
102.	Ontario Infrastructure and Lands Corporation	No
102.1	REVOKED: O. Reg. 345/24, s. 1 (1).	
103.	Ontario Internal Audit Committee	Yes
104.	Ontario Labour Relations Board	Yes

104.1	Ontario Land Tribunal	Yes
105.	Ontario Lottery and Gaming Corporation	No
106.	Ontario Media Development Corporation	Yes
107.	REVOKED: O. Reg. 270/21, s. 1 (2).	
108.	REVOKED: O. Reg. 270/21, s. 1 (2).	
109.	REVOKED: O. Reg. 88/24, s. 1 (7).	
110.	REVOKED: O. Reg. 368/18, s. 1 (8).	
111.	Ontario Northland Transportation Commission	No
112.	Ontario Parks Board	Yes
113.	Ontario Parole Board	Yes
114.	Ontario Place Corporation	Yes
115.	Ontario Police Arbitration and Adjudication Commission	Yes
116.	Ontario Public Service Pension Board	No
117.	REVOKED: O. Reg. 199/17, s. 1 (4).	
118.	Ontario Research Fund Advisory Board	Yes
119.	Ontario Review Board	Yes
120.	Ontario Securities Commission	No
121.	Ontario Special Education Tribunal (English)	Yes
122.	Ontario Special Education Tribunal (French)	Yes
123.	Ontario Tourism Marketing Partnership Corporation	Yes
124.	Ontario Trillium Foundation	No

125.	Ottawa Convention Centre Corporation	No
126.	Owen Sound Transportation Company Limited	No
126.1	Patient and Family Advisory Council	Yes
127.	Pay Equity Hearings Tribunal	Yes
128.	Pay Equity Office	Yes
129.	REVOKED: O. Reg. 270/21, s. 1 (2).	
130.	REVOKED: O. Reg. 88/24, s. 1 (7).	
131.	REVOKED: O. Reg. 270/21, s. 1 (2).	
132.	Post Secondary Education Quality Assessment Board	Yes
133.	Premier's Council on Equality of Opportunity	Yes
134.	Province of Ontario Council for the Arts	No
135.	Provincial Advisory Committee on Francophone Affairs	Yes
136.	Provincial Judges Pension Board	No
136.1	Provincial Land and Development Facilitator	Yes
137.	Provincial Schools Authority	No
138.	Public Service Grievance Board	Yes
139.	Rabies Advisory Committee	Yes
140.	Royal Ontario Museum	No
141.	Rural Economic Development Advisory Panel	Yes
142.	Science North	No

142.1	Skilled Trades Ontario	No
143.	Social Benefits Tribunal	Yes
144.	Soldiers' Aid Commission	Yes
144.1	Special Investigations Unit	Yes
144.2	Species at Risk Conservation Trust	No
145.	Species at Risk Program Advisory Committee	Yes
146.	St. Lawrence Parks Commission	Yes
146.1	Temagami Forest Management Corporation	No
147.	Toronto Islands Residential Community Trust Corporation	No
148.	REVOKED: O. Reg. 88/24, s. 1 (9).	
149.	REVOKED: O. Reg. 88/24, s. 1 (9).	
149.1	Venture Ontario	Yes
150.	Walkerton Clean Water Centre	No
151.	Workplace Safety and Insurance Appeals Tribunal	No
152.	Workplace Safety and Insurance Board	No

O. Reg. 286/16, s. 2; O. Reg. 199/17, s. 1; O. Reg. 368/18, s. 1; O. Reg. 106/19, s. 1; O. Reg. 394/19, s. 1; O. Reg. 270/21, s. 1; O. Reg. 903/21, s. 1; O. Reg. 440/22, s. 1; O. Reg. 88/24, s. 1; O. Reg. 345/24, s. 1; O. Reg. 567/24, s. 1.

Tab 76

Tab 77

Suspension Pending Investigation (Part III of the Act), O Reg 379/07



Current version: in force since 2016-10-12

Link to the latest version ⓘ: <https://canlii.ca/t/s4t>

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Public Service of Ontario Act, 2006

ONTARIO REGULATION 379/07

SUSPENSION PENDING INVESTIGATION (PART III OF THE ACT)

Consolidation Period: From October 12, 2016 to the [e-Laws currency date](#).

Last amendment: 343/16.

This is the English version of a bilingual regulation.

Suspension pending investigation

1. The maximum period of a suspension under subsection 36 (2) of the Act is two years. O. Reg. 379/07, s. 1.
2. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 379/07, s. 2.

Tab 78

Tab 79

Ontario (Attorney General) (Re), 2008 CanLII 68865 (ON IPC)

Source:	Information and Privacy Commissioner Ontario
Date:	2008-12-04
File number:	PO-2739; PA07-37
Citation:	Ontario (Attorney General) (Re), 2008 CanLII 68865 (ON IPC), < https://canlii.ca/t/22187 >, retrieved on 2026-03-23

ORDER PO-2739

Appeal PA07-37

Ministry of the Attorney General

NATURE OF THE APPEAL:

Request and Exchange of Representations

A request was submitted, by a member of the media, to the Ministry of the Attorney General (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to annual and monthly reports generated by the Ontario Ministry of the Attorney General entitled “Offence Type Statistics by Location” for the period from 2000 to the date of the request.

The requester (now the appellant) appealed the Ministry’s decision to this office. During mediation, a sample copy of the responsive records was provided to this office. Mediation did not resolve the issues in this appeal so the matter was moved to the adjudication stage of the appeal process.

I began my inquiry by issuing a Notice of Inquiry to the Ministry inviting it to make representations on the issues identified in the notice and on any other relevant issues. Among other things, the notice invited the Ministry to make representations in the alternative, on the possible application of any exemptions, in the event that I find that the requested records are within its custody or control. I received representations from the Ministry in which it stated, among other things, that it claims no alternate exemptions in the event that it is found to have custody or control of the record.

Subsequently, I issued a modified Notice of Inquiry to the appellant inviting him to submit representations on the issues in the notice and in response to the representations of the Ministry, which were shared in full. I also decided to invite the Office of the Chief Justice of Ontario (the CJO) to submit representations on the basis that it may have an interest in the records at issue in this appeal. I provided the CJO with a complete copy of the Ministry representations.

I received correspondence from the CJO in which it stated that it would not be submitting representations in this appeal. I also received representations from the appellant. In his representations, in addition to addressing the issues in the appeal, the appellant requested that the record be disclosed to him at no charge. Staff in this office contacted the appellant and advised him that if he wished to claim a fee waiver in this appeal, he must make his request for such directly to the Ministry. As a result, the appellant then wrote to the Ministry requesting a fee estimate and a fee waiver.

Following my review of the appellant's representations, I provided a complete copy to the Ministry and invited it to submit representations in reply. I received reply representations from the Ministry.

I had a number of questions arising out of my review of the Ministry's reply representations and decided to write to the Ministry and invite further representations in response to my specific questions. The Ministry submitted further representations.

Subsequent Release by the Ministry

In June of 2008, the Ministry issued a press release announcing its *Justice on Target* strategy and announcing the disclosure to the public of criminal court statistics. That press release read in part:

Under the province's new *Justice on Target* strategy, Ontario is setting targets to reduce court delays and appearances by 30 per cent over the next four years.

This is the first time the province has set targets to reduce the provincial average of days and court appearances needed to complete a criminal case.

To ensure transparency and accountability, the province is also making available criminal court statistics to the public for the first time. The public will be able to follow the progress of the strategy and see the impact on courthouses in their local communities.

The multi disciplinary *Justice on Target* implementation team will be led by Regional Senior Justice Bruce Durno and Senior Crown Attorney Kenneth Anthony. The team will work with justice sector partners in local courthouses to develop and implement new initiatives that improve coordination, focus justice resources and move cases through the justice system faster.

The first two initiatives being implemented as part of the *Justice on Target* Strategy are expansions of programs that have proven successful in reducing court appearances and delays.

A copy of the press release was posted on the Ministry website and a link was provided to "the criminal court statistics" referred to in the release. The criminal court statistics disclosed on the website include information and statistics that are also contained in the records at issue in this appeal.

Shortly after the date of the press release, the Ministry wrote to the appellant and advised him that it was prepared to disclose portions of the responsive records to him. Other portions were being withheld on the basis that the disclosure of the withheld information “would compromise the independence of the judiciary.” In its letter, the Ministry explained:

I am now pleased to inform you that the Office of the Chief Justice of the Ontario Court of Justice has consented to the release of most of the available data you have requested. The only information for which consent was denied is data that would compromise the independence of the judiciary.

Enclosed please find copies, and a CD in PDF format, of the Offence Type Statistics by Location report. This information consists of yearly reports for the period 2000 to 2004, and quarterly reports for the period 2005 to December 2007. Please note that the report was never issued on a monthly basis and so quarterly reports are provided instead. No quarterly reports were created prior to 2005 and so annual reports are provided for this period....

A copy of the information disclosed to the appellant on CD was provided to this office.

I instructed staff in this office to contact the appellant and determine whether he wished to pursue access to the information that was severed from the responsive records. The appellant advised that he wished to pursue access to this information.

As the Ministry had not responded to the appellant’s request for a fee waiver in this appeal, staff in this office contacted the Ministry to determine what its position was with respect to the fee waiver request. The Ministry advised that if it was ordered to disclose the information remaining at issue from the database to the appellant it would waive the fee. Therefore, fee waiver is not at issue in this appeal.

RECORDS:

The responsive records are statistical reports entitled “Offence Type Statistics by Location”. They include provincial, regional and local level statistical information about criminal law proceedings. All of the information in the database at the provincial and regional level was disclosed to the appellant in June of 2008. The information severed was statistical information at the local level namely, information in a field headed “Disposed At Trial With Trial.” This field includes 5 separate columns of information, entitled:

1. Total
2. Dismissed at Trial
3. Stayed at Trial
4. Committed for Trial at Preliminary Hearing
5. Plead Not Guilty/Found Guilty at Trial

The information under the column entitled “Total” was disclosed to the appellant therefore the information remaining undisclosed is the information under the other four columns. However, I intend to make a determination as to whether the entire report is in the custody or under the control of the Ministry as that is the issue before me.

DISCUSSION:

CUSTODY OR CONTROL

Where a request is made to a body recognized as an institution under the *Act*, the threshold question for the application of the *Act* is whether the institution (in this case, the Ministry) has custody or control of the records within the meaning of section 10(1). This section reads:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 12 to 22.

If the answer to that question is yes, then this office has jurisdiction to make a determination regarding the records.

Previous orders of this office have found that the courts are not institutions under the *Act* and therefore, applying section 10(1), if records are found to be in the custody or under the control of the courts and not in the custody and/or under the control of the Ministry, then the *Act* does not apply. [Order P-994]. In this appeal, the Ministry claims that while its employees may have possession of the responsive records, the records are not in its custody or under its control because the records are “judicial information” which is in the custody or under the control of the courts.

As noted above, the Ministry indicates that if the *Act* is found to apply, it does not claim that any exemptions under the *Act* apply in the alternative to its argument that the records are not in its custody or under its control. Therefore, the only issue before me is whether the Ministry has custody or control of the records. Subject to the application of any mandatory exemptions, I will order that the information be disclosed to the appellant, if I find that the records are within the custody or under the control of the Ministry.

The courts and this office have applied a broad and liberal interpretation to the custody and control issue. In Order 120, former Commissioner Sidney Linden stated that the concepts of custody and control should be given a broad and liberal interpretation in order to give effect to the purposes and principles of the *Act*. A purposive interpretative approach was found to be appropriate in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, 1999 CanLII 3805 (ON CA), [1999] O.J. No. 4072 where the Court of Appeal for Ontario adopted the following passage from the Federal Court of Appeal judgement in *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 1995 CanLII 3574 (FCA), 30 Admin. L. R. (2d) 242 (Fed. C.A.), at 244-245:

The notion of control referred to in subsection 4(1) of the *Access to Information Act* is left undefined and unlimited. Parliament did not see fit to distinguish between ultimate and immediate, full and partial, transient and lasting or de jure and de facto control. Had Parliament intended to qualify and restrict the notion of control to the power to dispose of the information, as suggested by the appellant, it could certainly have done so by limiting the citizen’s right of access only to those documents that the Government can dispose of or which are under the lasting or ultimate control of the Government.

It is, in my view, as much the duty of courts to give subsection 4(1) of the *Access to Information Act* a liberal and purposive construction, without reading in limiting words not found in the *Act* or otherwise circumventing the intention of the legislature as “it is the duty of boards and courts,” as Chief Justice Lamer of the Supreme Court of Canada reminded us in relation to the *Canadian Human Rights Act* “to give s. 3 a liberal interpretation and purposive construction, without reading limiting words out of the *Act* or otherwise circumventing the intention of the

legislature.” It is not in the power of this court to cut down the broad meaning of the word “control” as there is nothing in the *Act* which indicates that the word should not be given its broad meaning. On the contrary, it was Parliament’s intention to give the citizen a meaningful right of access under the *Act* to government information.

A “purposive” interpretation of section 10(1) is therefore mandated by the Court of Appeal’s decision in *Criminal Code Review Board* (cited above). This requires a consideration of section 1 of the *Act*, which states:

The purposes of this Act are,

- (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
 - (i) information should be available to the public,
 - (ii) necessary exemptions from the right of access should be limited and specific, and
 - (iii) decisions on the disclosure of government information should be reviewed independently of government; and
- (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

Applying this approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or under the control of an institution [Orders 120, MO-1251]. The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Were the records created by an officer or employee of the institution? [Order P-120]
- What use did the creator intend to make of the records? [Orders P-120, P-239]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the records? [Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, above]
- Is the activity in question a “core”, “central” or “basic” function of the institution? [Order P-912]
- Does the content of the records relate to the institution’s mandate and functions? [Orders P-120, P-239]
- Does the institution have physical possession of the records, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement? [Orders P-120, P-239]
- If the institution does not have possession of the records, are they being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee? [Orders P-120, P-239]

- Does the institution have a right to possession of the records? [Orders P-120, P-239]
- Does the institution have the authority to regulate the records' use and disposal? [Orders P-120, P-239]
- Are there any limits on the use to which the institution may put the records, what are those limits, and why do they apply to the record?
- To what extent has the institution relied upon the records? [Orders P-120, P-239]
- How closely are the records integrated with other records held by the institution? [Orders P-120, P-239]
- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]

The following factors may apply where an individual or organization other than the institution holds the record:

- If the records are not in the physical possession of the institution, who has possession of the records, and why?
- Is the individual, agency or group who or which has physical possession of the records an "institution" for the purposes of the *Act*?
- Who owns the records? [Order M-315]
- Who paid for the creation of the records? [Order M-506]
- What are the circumstances surrounding the creation, use and retention of the records?
- Are there any provisions in any contracts between the institution and the individual who created the records in relation to the activity that resulted in the creation of the records, which expressly or by implication give the institution the right to possess or otherwise control the records? [*Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.)]
- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the records were not to be disclosed to the Institution? [Order M-165] If so, what were the precise undertakings of confidentiality given by the individual who created the records, to whom were they given, when, why and in what form?
- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the records by the institution?
- Was the individual who created the records an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the records? [*Walmsley v. Ontario (Attorney General)* (1997), [1997 CanLII 3017 \(ON CA\)](#), 34 O.R. (3d) 611 (C.A.)]

- What is the customary practice of the individual who created the records and others in a similar trace, calling or profession in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]
- To what extent, if any, should the fact that the individual or organization that created the records has refused to provide the institution with a copy of the records determine the control issue? [Order MO-1251]

Previous orders of this office have considered the question of whether or not the Ministry has custody or control of “court records”. For example, Order P-994 dealt with an application to the Ministry for access to a copy of the “Information” regarding an assault charge initiated by the appellant against a named individual. The Ministry argued that the records were “court records” in the custody or under the control of the courts. Adjudicator Laurel Cropley noted that “court records” are not specifically identified as a category of records to which the *Act* does not apply. For that reason, she concluded that the relevant question is whether the records are within the custody or under the control of the Ministry.

In Order P-994, Adjudicator Cropley began her analysis of the issues with a consideration of whether the courts are institutions under the *Act*. She stated:

In my view, the discussions surrounding the evolution of the Act clearly contemplate that the courts and the judiciary (that is, the judicial branch of government) are to be set apart from other types of institutions and from the other branches of government generally. The unique function the courts fulfil within our society is distinct from the usual perception of “government.” Accordingly, I find that the courts are not part of any Ministry and are not included in paragraph (a) of the definition of “institution.”

Since I have found that the courts are not included in either paragraph (a) or (b) of the definition of “institution,” they are not institutions under the Act.

Having found that the courts are not “institutions” under the *Act*, Adjudicator Cropley states:

In its representations, the Ministry [of the Attorney General] has acknowledged that it has a special relationship with the courts. *In my view, this special relationship impacts on the issue of whether or not records in a court file are in the custody and/or control of an institution.*

With respect to the relationship between the Ministry and the courts, Adjudicator Cropley noted:

I have found that the courts are not institutions under the Act. Moreover, I recognize that the independence of the judiciary is well established in the common law and reflected in the [*Courts of Justice Act*]. In my view, the objectives of the Act as set out in section 1 are, to a certain degree, met by the “public” nature of court proceedings and the ability of the judiciary to control the dissemination of sensitive information. *In order for the judiciary to maintain its independence with respect to its adjudicative function, this must necessarily entail the ability to control those records which are directly related to this function. However, because of the administrative relationship of the Ministry to records in a court file, the question remains, does the Ministry have custody and/or control over these records for the purposes of the Act.* [Emphasis added.]

After reviewing the indicia of custody and control set out by former Commissioner Linden in Order 120, and the representations of the parties, Adjudicator Cropley stated:

The record at issue was generated by the appellant, not the Ministry, for the purpose of placing the matter before a court. Although the Ministry may become involved once process is issued, in this case, process was not issued, and the Ministry had no role to play in the matter.

As I indicated above, the Ministry submits that it has possession of the record as a "custodian" only and any authority it has over the record's use is subject to supervision by the courts.

Moreover, the Ministry submits that the record does not relate to its mandate and functions, but rather relates to the court proceedings for which the record was created. Further, the record is not integrated with Ministry records in any way.

With respect to the disposition of the record, section 95a of the Courts of Justice Amendment Act, 1989, S.O. 1989, c.55 [[section 79](#), [Courts of Justice Act](#), 1990] provides that court records are to be disposed of in accordance with the directions of the Deputy Attorney General. However, these directions are subject to the approval of the chief judge of the relevant court.

Further, in this regard, the Ministry indicates that the responsibility for making decisions about access is vested in the "head". The head of the Ministry is the Attorney General. The Ministry submits that if court records were subject to the access requirements of the Act, the Attorney General would be responsible for making access decisions and this would alter the common law approach, which vests judges with this authority. This could, the Ministry argues, impair the constitutional separation between the courts and the executive branch of government.

I have carefully considered the Ministry's representations, and I find that although the Ministry is in "possession" of records relating to a court action in a court file, its limited ability to use, maintain, care for, dispose of and disseminate them does not amount to "custody" for the purposes of the Act. Nor do I find, in applying the factors set out in Order 120 to the evidence before me, that there are indicia of "control" over these records by the Ministry.

For these reasons, I find that the Ministry does not have custody or control over records relating to a court action in a court file within the meaning of section 10(1) of the Act and, accordingly, to the extent that such records are located in a "court file", they cannot be subject to an access request under the Act.

I am not satisfied, however, that this conclusion extends to copies of such records which exist independently of the "court file". Accordingly, to the extent that copies of these records also exist independently of the "court file", they would fall within the custody and/or control of the Ministry and, therefore, would be subject to the Act.

This office has considered the issue of custody or control of "court records" in a number of other orders, including: Order PO-2446 (informations); Orders P-995, P-1397 (tape recordings of testimony and evidence); and Order P-1151 (jury roll information). With the exception of Order P-1151, the records at issue in these orders were all records that related to specific proceedings in the courts and were contained in the court file relating to the proceeding, and for those reasons the records were found not to be in the custody or under the control of the Ministry.

The information at issue in Order P-1151 was postal code information of jurors that was located in a Ministry database relating to the jury roll. In that order, former Assistant Commissioner Tom Mitchinson found that the information contained in the jury roll was prepared under the *Juries Act* by the Sheriff who was an employee of the courts. He also found that the responsibility for the preparation and the administration of the jury list, and the supervision and management of the jury selection process is under judicial control. Most significantly, he found that the information contained in the database was not integrated with other records held by the Ministry. Having regard to all of these circumstances, Assistant Commissioner Mitchinson found that the information requested was not in the custody and/or under the control of the Ministry. This order is an important illustration of the manner in which the *Act* respects judicial independence over court records and over administrative matters under judicial control.

I adopt the approach taken in these previous decisions, including Order P-994, and will apply it in this appeal.

Representations

In its representations, the Ministry provided the following background information regarding the responsive records:

The *Offence Type Statistics by Location* report (“the report”) was produced at the request of the Chief Justice of the Ontario Court of Justice in 2004.

During discussions in 2003 between the ministry and the Ontario Court of Justice about court activity statistics and tracking of cases in the Ontario Court of Justice, the judiciary expressed a desire to have a comprehensive report that integrated specific data measures by offence type. No such reports existed. The Office of the Chief Justice required more detailed reporting of offence data by court location for its own purposes.

Instructions on the desired data elements and format for the report were provided by the Office of the Chief Justice to ministry staff who maintained the databases of court based information.

Ministry Court Services Division staff are responsible for maintaining court activity information databases as part of the ministry responsibility to support the judiciary and the administration of the courts. To minimize duplication of resources, ministry staff provide support to the constitutionally independent judiciary and to the ministry.

The ministry submits that the preparation of this report is an example of “judicial information”, in this case judicial management information, which the constitutionally independent judiciary requires in order to properly and effectively fulfill its role in the administration of the court system in Ontario.

The first report was produced for the Chief Justice in 2004 and is produced on a quarterly basis. No reports exist for the period 2000-2004, although such reports could be prepared at the direction of the judiciary.

In order to properly monitor and effectively administer the operation of the Ontario Court of Justice, the Chief Justice has agreed to the report being made available to senior court staff and senior Crown Attorneys in order to inform their planning and management decision-making to support court operations.

As noted above, the Ministry states that the record is “judicial information of the Ontario Court of Justice” and therefore is not “in the custody” or “under the control of an institution” as the courts are not an institution under the *Act*.

The Ministry argues that the constitutional independence of the judiciary is of paramount importance in its consideration of the appellant’s request. It refers to the decision of the Supreme Court of Canada in *Valente v. R.* [1985] S.C. R. 673 where the court considered the relationship between the provincial criminal court and the Ministry, and identified three essential conditions of judicial independence for the purposes of s. 11(d) of the *Charter of Rights and Freedoms*. One of the conditions is institutional independence “with respect to matters of administration bearing directly on the exercise of its judicial function.” The Ministry states:

The “fine line” between interference and management controls in court administration is often quite nuanced but it must be based on a fundamental respect for the constitutional independence of judiciary, including the protections afforded judicial information required by the court to effectively and appropriately fulfill its separate role in the administration of the court system.

The Ministry also refers to *Attorney General of Nova Scotia v. MacIntyre*, 1982 CanLII 14 (SCC), [1982] 1 S.C.R. 175 and *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, 1991 CanLII 90 (SCC), [1991] 1 S.C.R. 671 which the Ministry states “recognize the overall protecting and supervisory power of the court over all court records and documents.”

The Ministry describes the information at issue in this appeal as “judicial information.” It states:

Judicial information is a kind of court record that is information gathered, produced or used for judicial purposes, but does not include, for example, exhibits, affidavits and other written evidence filed with the court or judgments and reasons for judgment that have been issued. Judicial information is created by judges or judicial staff. (*Canadian Judicial Council Blueprint for the Security of Judicial Information*, November 2004, pp. 10 and 11)

In support, the Ministry refers to the *Canadian Judicial Council's Model Policy for Access to Court Records in Canada* (2005), (the CJC Model Policy). The Ministry states:

The Council’s Model Policy also makes clear that access to court records policies and over all control over court records and documents rests with the judiciary alone.

Any access policy developed by the judiciary on the basis of this model policy will be founded upon the **inherent jurisdiction of the judiciary to maintain supervisory and protective power over its own records**. Thus, it must be clear that any reference made in this policy to the “court” does not include the administrative aspects of the court for which the executive branch of the government is responsible, but only the judiciary in the exercise of a judicial function such as its supervisory and protective powers regarding court records. [Emphasis added.] (p.1)

Elsewhere in its representations, the Ministry characterizes the responsive records as “court activity data” and seems to suggest that although it had the “implied right” to use and disclose this information in the past, its rights are now subject to the terms of an “implied consent to use this information” as the information is now in the control of the courts. The Ministry states:

Following the release of the Council's model policy and as a result of a national and international trend among courts to more closely consider the use of court based information, the ministry and the courts have instituted active discussions concerning access to court records, including electronic access and access to court information and data, such as this record. The courts have asked that the terms of the implied consent to use this information be documented.

The Ontario Court of Justice takes the position that all information and statistics based on court information is in the control of the courts. In the past it was not explicitly understood by the ministry that the information held by the ministry was not in its custody and control nor were the terms of any implied consent documented.

The ministry exercised responsible judgment in handling past requests for court activity data.

Since engaging in the recent discussions with the courts on this issue and having the court's position clearly articulated, the ministry has been careful to respect the court's position and the independence of the judiciary. As a result the ministry does not currently provide access to data or records that previously the ministry felt it had implicit judicial consent to release or distribute, without explicit judicial consent.

...

The ministry submits that it is exclusively within the constitutional jurisdiction of the judiciary to develop policies and practices with respect to both court records and judicial information. While respecting openness as the core principle in determining access to court record policies (balanced with protection of privacy and the administration of justice), the court is likely to be more protective about policies related to access to judicial information.

Regarding the Ministry's role in court administration, the Ministry refers to [section 71](#) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 which provides "statutory authority to the Attorney General to superintend the administration of the courts '...other than matters that are assigned by law to the judiciary.'" It states:

The Supreme Court in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, *supra*, confirms that provincial jurisdiction over court administration contains "an implied limitation that the independence of those courts cannot be undermined." (para. 108)

The Ministry also states:

Inappropriate release of judicial information would seriously jeopardize the ministry's relationship with the courts and would likely be perceived as a breach of the judiciary's constitutionally protected independence.

[T]he courts alone are free to determine policies concerning release of judicial information – or to agree to the release of individual requests. Inappropriate ministry sharing of judicial information could have serious long-term consequences on the court's willingness to rely on, or share information with, the ministry, which would have a serious negative impact on the effective operation of the courts.

The Ministry provided the following representations in response to the specific questions set out in the Notice of Inquiry:

Was the record created by an officer or employee of the institution? (OrderP-120)

Ministry staff created the report under the specific direction of, and for the use of, the Chief Justice of the Ontario Court of Justice. As noted above, Canadian jurisprudence recognizes the delicate and nuanced role ministry staff have in working for both the executive branch of government but also serving the needs and providing services for the constitutionally independent judiciary. Employees of the ministry routinely undertake tasks under the direction of the judiciary. The mere fact that an employee of the ministry undertakes a task cannot be considered evidence that the ministry (institution) has directed the task or controls the resulting document, report or information.

What use did the creator intend to make of the record?

The creator intended to provide the report for the use of the Chief Justice of the Ontario Court of Justice. The ministry is not aware of the Chief Justice's specific intentions for the use of the report. The ministry considers the report to be judicial information, specifically judicial management information, for the use of the Chief Justice.

Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the records?

The *Ministry of the Attorney General Act, supra*, gives the Attorney General the duty to "superintend all matters connected with the administration of justice in Ontario". Further the *Courts of Justice Act, supra*, provides the authority to the Attorney General to superintend the administration of the courts "...other than matters that are assigned by law to the judiciary."

...

The ministry's statutory authority to provide support to the judiciary means that ministry staff routinely provide services and undertake tasks under the direction and control of the constitutionally independent judiciary. The preparation of judicial information based on court records and data is one such service the ministry provides to the courts.

Is the activity in question a "core", "central" or "basic" function of the institution?

The administration of justice and the courts are core, central and basic functions of the institution. However, as noted above, Canadian jurisprudence is very clear that any provincial statutory authority to carry out the ministry's duty for the administration of justice and courts administration must be exercised within the context of constitutionally protected judicial independence, including court control over court records and documents. Any suggestion that ministry staff exercising their core function in support of the judiciary might be interpreted to compromise

the institutional independence of the judiciary would have grave consequences for the ministry and the administration of the court system in the province.

Does the content of the record relate to the institution's mandate and functions?

The report relates to the ministry's mandate and function to provide support to the independent judiciary in their administration of the courts in Ontario.

Does the institution have possession of the record either because it has been voluntarily provided by the creator or pursuant to a mandatory, statutory or employment requirement?

The ministry has possession of the report as ministry staff are responsible for compiling the report for the Chief Justice. The Office of the Chief Justice has also agreed to the report being made available to senior court staff and Crown Attorneys for the purpose of planning and decision-making to support court operations.

...

Employees of the ministry routinely undertake tasks, including the preparation of handling of judicial information, under the direction of the judiciary.

...

Possession of the report is with the consent of the court, whose report it is. The ministry submits that mere possession of the report by the ministry does not place the report in the custody or under the control of the ministry.

If the institution does have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or an employee?

Employees of the ministry have access to the report to assist the court in the effective administration of justice and court administration in Ontario. The court does not consider the ministry's possession of the report to interfere with its definition as constitutionally protected judicial information.

Does the institution have a right to possession of the record?

The ministry has no right to possess the report.

The ministry has possession of the report in one instance as staff support to the courts (as compiler of the report) and in another capacity (senior court staff and senior Crown Attorneys in order to support their planning and decision making to support court operations) at the discretion of the Chief Justice of the Ontario Court of Justice.

Does the institution have the authority to regulate the record's use and disposal?

The ministry does not have the authority to regulate the use or disposal of the report. The report was created for, and at the direction of, the Office of the Chief Justice. Only the court can regulate the use or disposal of the report.

Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the records?

The ministry is not free to independently determine uses of or limits on the report. Only the court can determine any limits on the use of the report.

As noted above, the ministry is actively engaged in discussions with the judiciary on a range of issues related to access to court records and information. The discussions will assist in determining principles and approaches to be used in making court records and court based information publicly available.

To what extent has the record been relied upon by the institution?

Senior court officials and Crown Attorneys use the report, in conjunction with the judiciary, to support the effective administration of justice in the province.

The report is considered an effective tool, among others, to support senior ministry staff in their planning and decision making to support court operations.

How closely is the record integrated with other records held by the institution?

The report is independent of other records the ministry holds. The report is available to a limited set of senior court officials and Crown Attorneys. Data used to compile the report is used by the ministry for other court administration purposes.

What is the customary practice of the institution and the institutions similar to the institution in relation to the possession or control of records of this nature, in similar circumstances?

As noted above the ministry respects the overall protecting and supervisory power of the court over all court records and documents, including judicial information.

...

Prior to the current discussions with the court, initiated in 2006, the ministry believed it had the implied consent of the courts to share the court based information and data on a limited basis. As noted above in paragraph 31, the courts have taken the position that court based information and statistics based on court information is in the control of the courts. As a result of these discussions, the ministry has been careful to respect the court's position and does not currently provide access to data or reports, without explicit judicial consent.

The Ministry adds:

The report is in the possession of the judiciary and selected ministry staff, with the implied consent of the judiciary. No other individual or organization has possession of the report.

...

The report has no distinct costs associated with it. Ministry staff undertakes the compilation of the data and the report itself in their capacity supporting the constitutionally independent judiciary. Ministry funding supports the staff cost associated with the data and report compilation, as it does for all court staff. The ministry submits that given the previously noted unique role ministry staff play in both supporting the judiciary in their independent administration of the courts, as well as functioning as part of the executive branch of government, the funding of the staff positions ought not to be a significant factor in establishing ministry care [sic] or control of the report.

In conclusion, the Ministry states:

The ministry submits that the impact of finding judicial information being within the scope of the *Act*, would have far reaching implications for the administration of the court system and the ministry's relationship with the constitutionally independent judiciary.

The courts alone are constitutionally charged with determining access to judicial information, including court records, data and statistics. Administrative information and data about court administration that is in the custody and control of the ministry is publicly available and is routinely made available through the *Act*.

The appellant submitted representations in response. He states:

The data in those reports are housed by, controlled by, updated by, administered by, relied on by, crunched by, acted on by, and reflective of the work of the Crown (Ministry). Both the data, and the reports, are in the Ministry's custody and possession, given that senior managers in MAG prosecutions and Ministry staff with the Court Services division rely on this information.

...

In paragraph 14, the Ministry contends that the "preparation of this report is an example of judicial information" thus placing it beyond the reach of the public. ... The act of collating Ministry data does not fundamentally change the information. It is all well and good the judiciary will use the MAG statistics to better manage the courts. But that ought not make it beyond the reach of me, or [named media outlet] (as the "eyes and ears of the public") for our purposes – which are journalistic – to observe, expose, cast light on, call in to account the issues raised by the information.

The appellant argues that although the judiciary has an interest in the objective measurement of how caseloads and prosecutions are being handled, the Ministry also has an interest. He states:

The Ministry has both a statutory power and a duty to collect these data and monitor them.

The monitoring function is a core, central and basic function of the Ministry, relating directly to the Ministry's prosecutions, and Court Services mandates and responsibilities.

The Ministry has physical possession of both the data, and the reports in question, and has a right to possess both. (The data is collected by Court Services, regardless of whether the judiciary requests the creation of specific reports. There is nothing stopping the Ministry from generating its own similar reports from its databases, or for members of the public requesting the information.)

The Ministry relies heavily on this data to better manage prosecutions and court staffing in Ontario.

The Ministry has the right to regulate the data (if not the records), subject to its legal, ethical and moral obligations as a public institution – including the Freedom of Information Act.

...

This is a matter of common sense. The Ministry gathers data in the course of its work supporting the administration of justice in Ontario. Whether the Judiciary asked for some of that data, or the CBC asks for a version of similar information – it is the Ministry's to provide.

...[T]his is not about 'court documents' or data about the judiciary, or trends in judicial findings. It is about access to the Ministry's own tracking data of court prosecutions

As noted above, following receipt of the appellant's representations, I invited the Ministry to submit representations in reply. In its reply, the Ministry repeated that, although its staff may have possession of the reports, the Ministry does not have custody and control of the report. It also acknowledged that Ministry staff do make use of the report, without providing details, but it argued that they do so under the control and direction of the Ontario Court of Justice.

Following my review of the reply representations, I wrote to the Ministry and asked it to provide me with answers to a number of questions. In response, the Ministry stated:

The Ministry has been producing court activity statistical reports for over a decade in order to support management decision making about the justice system and to support the Chief Justices of the Ontario Court of Justice and the Superior Court of Justice. The reports based on these earlier statistics were not satisfactory, however, and were terminated. Subsequently in 2004, the "Offence Type Statistics by Location" report was prepared at the request of Chief Justice Lennox.

Prior to 2004, the Ministry gathered and used statistical data about offences to support management decision-making by the judiciary and the Ministry.

The report is available to management in the Court Services Division and the Criminal Law Division and to senior Crown Attorneys to support management decision making such as resource planning and allocation.

Crown and court staff use statistics on a local basis for planning and scheduling purposes to support timely case processing.

Crown Attorneys use the statistical data and reports to monitor trends such as increases/decreases in charges and court activities over time. Statistical data and reports are also used to assist in allocating resources.

...

Criminal Law Division posts this report on its intranet with restricted access to Divisional Management Committee, Directors of Crown Operations, Crown Attorneys (not Assistant Crown Attorneys) and a few analysts in the Corporate Branch Divisional Planning and Administration. The Court Services Division posts the report on its intranet site and it is available to directors, Managers and Supervisors of Court Operation and to the 7 Managers of Business Support.....
[Emphasis added.]

I also asked whether the Ministry had any written correspondence between the courts and the Ministry relating to the collection, maintenance and use of the statistical information and/or the report. The Ministry responded that it did not understand the question and it sought clarification. Staff in this office provided Ministry staff with the clarification. The Ministry responded that it frequently exchanges electronic communications with the court about specific requests for access to court information; however, it did not provide me with copies of any communications regarding the collection, maintenance and use of the reports and/or the statistical information in the reports at issue here with the exception of a blank template that it uses when consulting with the CJO about access requests.

Analysis and Findings

Having carefully reviewed the representations of the parties and the records, I find that the records are in the custody of the Ministry and also under its control. The reasons for my decision follow.

Ministry Role and Mandate

One of the factors to be considered in an analysis of the custody and control issue is whether there is a relationship between the core, basic and central functions of the Ministry and the record at issue. I will therefore begin my analysis with a review of the Ministry's mandate.

The Ministry has the responsibility for, among other things, the support of and administration of the constitutionally independent courts, as well as responsibility for other aspects of the administration of justice in Ontario, and the conduct of litigation for and against the Crown. As the Ministry supports the statutory mandate of the Attorney General, it derives its authority through the Attorney General. The statutory responsibilities of the Attorney General are set out in section 5 of the *Ministry of the Attorney General Act*, which states:

The Attorney General,

- (a) is the Law Officer of the Executive Council;
- (b) shall see that the administration of public affairs is in accordance with the law;
- (c) shall superintend all matters connected with the administration of justice in Ontario;
- (d) shall perform the duties and have the powers that belong to the Attorney General and Solicitor General of England by law or usage, so far as those duties and powers are applicable to Ontario, and also shall perform the duties and have the powers that, until the [Constitution Act, 1867](#) came into effect, belonged to the offices of the Attorney General and Solicitor General in the provinces of

Canada and Upper Canada and which, under the provisions of that Act, are within the scope of the powers of the Legislature;

(e) shall advise the Government upon all matters of law connected with legislative enactments and upon all matters of law referred to him or her by the Government;

(f) shall advise the Government upon all matters of a legislative nature and superintend all Government measures of a legislative nature;

(g) shall advise the heads of the ministries and agencies of Government upon all matters of law connected with such ministries and agencies;

(h) shall conduct and regulate all litigation for and against the Crown or any ministry or agency of Government in respect of any subject within the authority or jurisdiction of the Legislature;

(i) shall superintend all matters connected with judicial offices;

(j) shall perform such other functions as are assigned to him or her by the Legislature or by the Lieutenant Governor in Council.

The organizational chart that is available on the Ministry website reveals that the Ministry is divided into eight distinct divisions: Court Services, Criminal Law, Legal Services, Corporate Services, Family Justice Services, Victim Services Secretariat, Policy and Communications.

The information at issue in this record includes information relating to the timely processing of criminal proceedings, the types of charges under consideration and the disposition of the charges. This is all information that relates to the Ministry's mandate to superintend matters connected with the administration of justice (5(c)) and the conduct and regulation of litigation for and against the Crown (4(h)). Accordingly, I find that the information contained in the records does relate to the Ministry's core, central and basic functions. I also find that the information is relevant to the mandate and functions of both the Court Services division and the Criminal Law division, a factor which I will discuss in more detail below.

Characterization of the Records

The Ministry acknowledges that the records at issue here are not "court records" (that is, they are not records found in a court file relating to a particular proceeding – or, put slightly differently, "court records in a court file" as referred to in Order P-994) and I agree with that position.

In Order P-994 Adjudicator Cropley distinguished between records that were located in the court file and that related to the court proceeding and records that might have been copied from the court file that exist independently in another location. She stated:

For these reasons, I find that the Ministry does not have custody or control over records relating to a court action in a court file within the meaning of section 10(1) of the Act and, accordingly, to the extent that such records are located in a "court file", they cannot be subject to an access request under the Act.

I am not satisfied, however, that this conclusion extends to copies of such records which exist independently of the "court file". Accordingly, to the extent that copies of these records also exist independently of the "court file", they would fall within

the custody and/or control of the Ministry and, therefore, would be subject to the Act.

In British Columbia, “record[s] in a court file” are expressly excluded from the *Freedom of Information and Protection of Privacy Act* (BC FOIPPA). In the Alberta legislation (Alberta FOIPPA), “information in a court file” is excluded. While these terms are neither defined nor used in the *Act*, a review of the definitions and the treatments of these records in British Columbia and Alberta is of some guidance. Adjudicator Cropley noted:

Both the Alberta and British Columbia Freedom of Information and Protection of Privacy Acts (FOIPPA) contain similarly worded sections which outline the types of records that are subject to their legislation. Section 3(1)(a) of the British Columbia FOIPPA provides, for example, that:

This Act applies to all records in the custody or under the control of a public body, **including court administration records**, but does not apply to the following:

a record in a **court file**, a record of a judge of the Court of Appeal, Supreme Court or Provincial Court, a record of a master of the Supreme Court, a record of a justice of the peace, a **judicial administration record** or a **record relating to support services provided to the judges of those courts**. [emphasis added]

Both Alberta and British Columbia distinguish between “court administration records” and records in “court files”. British Columbia defines court administration records in its Policy and Procedures Manual, Volume I, produced by the Information and Privacy Branch of the Ministry of Government Services as those files pertaining to non-judicial staffing which deal with personnel issues, position competitions and office management. Although what constitutes a “court file” has not been defined and is, therefore, not clear, I agree, in general, with the distinction between court administration records and other court records.

Alberta and British Columbia have expressly excluded records in a court file from the application of their respective legislation. Although this may provide some guidance in analyzing this issue in the current appeal, it is not, in my view, determinative of the issue.

It is possible that a “court file” may contain many types of records, such as administrative records, records directly related to the action, and records relating to enforcement of orders. The factual circumstances of this appeal do not facilitate extensive discussion of the scope of what constitutes a record in a court file. This issue may, in fact, have to be determined on a case by case basis depending on the nature of the records requested. In my view, future decisions regarding this issue might also include discussion of the distinction between court administration records and records which are normally found in court files, as well as other types of records that find their way into a court file. Generally speaking, however, I am prepared to accept that, what the Ministry refers to as “court records”, consist of those records which relate to a court action and which are found in a court file.

Consistent with the comments of Adjudicator Cropley in Order P-994 quoted above, the British Columbia Information and Privacy Commissioner has found that *copies* of records in the possession

of other government institutions that are also located in a court file, are not “record[s] in a court file” and therefore are within the scope of the British Columbia FOIPPA [see Orders 234, Order 01-27].

These provisions are not determinative of the issue before me, but these approaches to the characterization of records provide some guidance in analyzing the custody and control issue in this appeal.

I agree with the approach taken in British Colombia and suggested by Adjudicator Cropley in Order P-994, that copies of records contained in a court file but found in a different location within the Ministry’s records should be treated differently from the actual records in the court file. In my view, generally, copies of records found in the possession of the Ministry should not be treated in the same way as records that are located in a court file that directly relate to the court proceedings and the adjudicative function.

Turning to the records before me, I note that the “Offence Type Statistics by Location” report includes statistics, by offence and location, relating to the number of charges received, charges disposed of, average number of appearances, the disposition of the charges and the time involved to process criminal cases. In my view, the best description of the information in the report is the one used by the Ministry in its press release of June 3, 2008 in which it described this information as “criminal court statistics” since the information in the records is general statistical information gathered or obtained from the processing of criminal cases.

Although the precise source of the information contained in the records is not clear, the Ministry submits:

Ministry Court Services Division staff are responsible for maintaining court activity information databases as part of the ministry responsibility to support the judiciary and the administration of the courts.

Elsewhere the Ministry suggests that the information in the records is based on information contained in court records. It states:

The preparation of judicial information based on court records and data is one such service the ministry provides to the courts.

In my view, the records at issue here are analogous to copies of court records outside the “court file” that are in the custody of the Ministry and found in its other record holdings. Although they are prepared based on information that may be contained in the court files, they are prepared, maintained, manipulated, produced and used by the Ministry staff whose responsibility is the administration of the courts. They are also used by other Ministry staff whose responsibility is the administration of justice and the prosecution of offences. Although they are analogous to *copies of court records*, they are even farther removed from the actual contents of any court file because they are not in fact copies. They consist of aggregate information and data relating to the progress of criminal cases that might originate from information that is also located in court files, but this information has been manipulated and formatted to create a statistical report.

I do not agree with the Ministry’s position that the information at issue here falls within the term “judicial information” as defined by the *Canadian Judicial Council Blueprint for the Security of Judicial Information* (the CJC Blueprint) which states, at page 10, that “judicial information” is information that is “gathered, produced or used for judicial purposes.” Given that there is a significant amount of evidence, reviewed in detail below, that the information in the records is gathered, produced and used for purposes other than judicial purposes, I do not agree that, in the hands of the Ministry, the information falls within this definition.

Moreover, in my view, the definition of “judicial information” used in the CJC Blueprint is not helpful in analysing the issues in this appeal. The CJC Blueprint describes its purpose as “provid[ing] guidelines to improve the security, accessibility and integrity of computer systems containing judicial information” (at page 5). Its recommendations address issues such as the security of remote access technologies, encryption, and anti-virus protections. In addition, the threshold for the application of the *Act* is custody or control, and as demonstrated in Order P-994, the principle of judicial independence is a factor to be taken into account in assessing whether that threshold has been met. This is discussed in more detail below. In my view, the definition of “judicial information” relied on by the Ministry is not applicable in the context of the *Act*.

As part of its argument in relation to “judicial information”, the Ministry also states that, although the records were created by Ministry staff, they were created on the instructions of the CJO, given in 2004, for “judicial management purposes.” However, the Ministry also acknowledges that the information contained in the records at issue has been collected and maintained by the Ministry since 2000 (elsewhere the Ministry states that it has been collecting this information for a decade) and that it was not until 2004 that the CJO requested that the existing information be compiled and formatted in a different manner. In other words, although the statistical information was placed in its current format at the request of the CJO in 2004, that information has been collected, and was available to Ministry staff, since 2000. In my view, the format of the records is not relevant to the determination of whether they are in the Ministry’s custody or control in the circumstances of this appeal.

The Ministry has also relied on the CJC Model Policy regarding access to court records. As the purpose of the CJC Model Policy is to “define principles of access to court records,” it is also not relevant to the issues before me which, as I have previously stated, relate to records other than “court records.”

More importantly, any access scheme that the courts may have to records in their custody or under their control exists independently of the access scheme under the *Act*. Accordingly, although the courts have developed a policy regarding access to what they have defined as “court records”, that policy does not override the application of the *Act* to those records which may also be in the custody or under the control of the Ministry.

I give significant weight to the fact that the statistical information in these records does not reveal in any way the substance or content of records that Adjudicator Cropley and previous orders of this office have described as “court records”. Nor is the information in the report directly related to a specific court proceeding or more generally to the adjudicative function of the courts. In addition, although the contents of the records relate to the mandate of the Ministry to support the administration of the courts, the contents of the records also relate to the Ministry’s mandate to manage the criminal justice system and to conduct litigation on behalf of the Crown which is in the purview of the Criminal Law Division.

Having reviewed the records and the representations of the parties, I am satisfied that they are properly characterized as relating to the management of the courts and the prosecution of offences by the Crown, and therefore relate to administrative and prosecutorial functions of the Ministry.

Other Factors

I accept the position of the Ministry that mere possession of the reports by senior employees of the Ministry does not place the reports within the scope of the *Act*. However, the evidence before me is that staff at the Ministry have more than mere possession of the report. As analysed above, and discussed in more detail below, the records are relied on by the Ministry for its own independent

purposes and relate to its core functions. Also, as previously stated, the information contained in the reports at issue has been collected, prepared and maintained by the Ministry since at least 2000, long before the CJO made its request in 2004 for a copy of this report in its current format. Although the Ministry states that it was not until 2004 that it began to prepare the report in its current *format* based on instructions provided by the CJO to Ministry staff, in fact, it acknowledges that it had the ability to generate the report based on the data previously collected and maintained by its staff.

Previous orders of this office (P-267, PO-1725) have found that where the records at issue have been integrated into the operations of the institution, they are in the custody of the institution for the purposes of the *Act*. I agree with this approach and adopt it here.

I find that there is a high degree of integration and co-mingling of this report in Ministry operations across divisions and among staff involved in other aspects of the administration of justice. Although I accept that many Ministry staff provide support to the constitutionally independent judiciary, the Ministry representations state that the primary responsibility for the support of the judiciary and the administration of the courts lies with the Court Services Division of the Ministry. Indeed, the Ministry acknowledges that this division is responsible for maintaining court activity information databases.

Most significantly, and as alluded to previously, the Ministry acknowledges that the report is also available to management in the Criminal Law Division and to senior Crown Attorneys to assist with their staff and other resource planning and allocation. The Criminal Law Division posts this report on its intranet and access is given to staff including the Directors of Crown Operations and to the Corporate Branch Divisional Planning and Administration. The Ministry's representations acknowledge that "the report is an effective tool, among others, to support senior ministry staff in their planning and decision making to support court operations." For example, these court statistics would be a valuable tool in deciding where and when to construct new court houses, a decision that would be made by the Ministry in supporting court operations and which would entail fiscal, administrative and political considerations. This is not the kind of decision that would be made by the courts. In my view, it is very significant that other staff in the Ministry who are not directly involved in the administration of the courts *have access* to this information and *use* the information for purposes unrelated to the exercise of judicial functions or the administration of court proceedings.

The Ministry states that its use and distribution of this report was based on an "implied consent" to do so. In this regard, I found the Ministry's representations to be vague and confusing. In addition, I have not been provided with any documentation, other than the bald assertions in the representations, to demonstrate that these activities were undertaken with the judiciary's consent, nor that the judiciary was of the view that it had the authority to give or withhold consent regarding such uses of the information. I also note that the Ministry was not able to provide me with evidence of any written communication between the courts and the Ministry regarding the preparation, maintenance and use of these records, which I would have expected to exist if the courts had the degree of control over the records that is alleged by the Ministry. I find that there is not sufficient evidence before me to support a finding that the courts have exclusive control over the records in a manner that would prevent the Ministry from having custody or control of them for the purposes of the *Act*.

For these reasons, I find that the findings of Adjudicator Cropley in Order P-994 that the Ministry had "limited ability to use, maintain, care for, dispose of and disseminate" the court records, do not apply in the circumstances of the records at issue in this appeal.

I have also taken into account the fact that the press release that was issued in June of 2008 announcing the disclosure to the public of some of the information contained in this report was

issued by the Ministry as part of its *Justice on Target* Strategy. This evidence weighs in favour of a finding that the Ministry has custody or control of the record.

Independence of the Judiciary

The Ministry appears to argue that the application of the *Act* to the records would violate the constitutional principle of judicial independence. For example, the Ministry states:

The courts alone are constitutionally charged with determining access to judicial information, including court records, data and statistics.

Elsewhere the Ministry states:

Inappropriate release of judicial information would seriously jeopardize the ministry's relationship with the courts and would likely be perceived as a breach of the judiciary's constitutionally protected independence.

The Ministry's constitutional arguments are included in its representations on custody and/or control of the records. In one aspect of this argument, the Ministry suggests that in the exercise of its role and mandate, it has only bare possession of records that are not in its custody and/or under its control but are in the custody and control of the courts due to its administrative relationship with the courts. I have already addressed this argument. In addition, however, the Ministry appears to make the additional argument that, regardless of my view of the evidence of custody and control under the *Act*, a finding that the Ministry has custody and/or control of these records would violate the constitutional independence of the judiciary.

However, I note that the Ministry stops short of arguing that the *Act* is constitutionally inapplicable to the records based on the principle of judicial independence, an argument that would require a Notice of Constitutional Question under [section 109](#) of the *Courts of Justice Act*. As stated in Order P-994, the Ministry's special relationship with the courts "impacts on the issue" of custody and/or control because the relationship with the judiciary may result in "a limited ability to use, maintain, care for, dispose of and disseminate the records." Put slightly differently, the principle of judicial independence may have a bearing on the issue of custody or control, as I have already noted above. However, the principle of the independence of the judiciary is not engaged where the records are not directly related to the courts' adjudicative functions, and where the evidence about the ability to use, maintain, care for, dispose of and disseminate the records, along with evidence of the integration and co-mingling of the records across Ministry divisions, supports a finding that the records are in the custody and/or under the control of the Ministry.

It should be noted at the outset that the relationship between the judiciary and the Ministry is a factor that I have taken into account in my analysis of the issues in this appeal. However, in the circumstances of this appeal, and for the reasons that follow, I am not persuaded that a finding that the Ministry has custody and control of these records would interfere with the independence of the judiciary.

In this regard, the Ministry refers in its representations to the Supreme Court of Canada decision in *Valente v. R*, [1985 CanLII 25 \(SCC\)](#), [1985] 2 S.C.R. 673 in support of its position that disclosure of the statistics comprising the record would meet the test developed for infringing on judicial independence. In *Valente*, LeDain J. states the following:

Howland C.J.O. drew a distinction, for the purposes of the issues in the appeal, between adjudicative independence and administrative independence, which is reflected in the following passages from his reasons for judgment at pp. 432-33:

...

When considering the independence of the judiciary, it is necessary to draw a careful distinction between independent adjudication and independent administration. It is independent adjudication about which the Court is concerned in this appeal.

...

In Ontario, the primary role of the judiciary is adjudication. The Executive on the other hand is responsible for providing the court rooms and the court staff. The assignment of judges, the sittings of the court, and the court lists are all matters for the judiciary. The Executive must not interfere with, or attempt to influence the adjudicative function of the judiciary. However, there must necessarily be reasonable management constraints. At times there may be a fine line between interference with adjudication and proper management controls. The heads of the judiciary have to work closely with the representatives of the Executive unless the judiciary is given full responsibility for judicial administration.

With respect to the elements of judicial independence, LeDain stated:

The third essential condition of judicial independence for purposes of s. 11(d) is in my opinion the institutional independence of the tribunal with respect to matters of administration *bearing directly on the exercise of its judicial function*. The degree to which the judiciary should ideally have control over the administration of the courts is a major issue with respect to judicial independence today. (emphasis added)

In my view, the analysis in *Valente* supports a finding that the Ministry has custody or control of the records at issue in this appeal. As the Court notes, “[i]n Ontario, the primary role of the judiciary is adjudication.” Having carefully considered the representations and the records, I am not persuaded that the information contained in this report relates to or impacts the independence of the judiciary, judicial functions and the adjudicative role. On the contrary, I believe that copies of this report would not be distributed as it is to senior Crown Attorneys who appear before the judiciary in the role as prosecutors of criminal proceedings if it was felt that the information in the report affected in any way the independence of the judiciary.

In Order P-994, the Ministry argued that records in a court file are central to the adjudicative process and intimately related to the judicial function of the courts. In response to this position Adjudicator Cropley recognized that:

In order for the judiciary to maintain its independence with respect to its adjudicative function, this must necessarily entail the ability to control those records which are directly related to this function.

However, the records at issue in Orders P-994 and P-2446, referred to by the Ministry, are different from the record at issue in this appeal. The Offence Type Statistics by Location reports are not “central to” and “intimately related to” the judicial function, nor are they contained in a court file as was the case in both of these orders. Therefore, although these orders do reflect the balancing referred to by the Ministry and sensitivity to the relationship between the Ministry and the courts, in my view their conclusions are confined to the unique circumstances of the records at issue in those appeals.

Based on my assessment of all of the factors referred to in the parties’ representations, and bearing in mind the character of the information, its lack of specific connection to the adjudicative function

of the courts, its use by Ministry staff in performing administrative functions that are not the province of the courts, and its evident integration into Ministry records, I find that the Ministry has both custody and control of the “Offence Type Statistics by Location” reports requested by the appellant. The Ministry has not claimed that the information severed is subject to any exemptions in the *Act*, and in my view, none of the mandatory exemptions apply to this information. Accordingly, I will order that it be disclosed.

ORDER:

I find that the Ministry has custody and control of the Offence Type Statistics by Location reports.

I order the Ministry to disclose to the appellant the severed portions of the “Offence Type Statistics by Location” reports for the periods from 2000 to the date of the request by **January 5, 2009**

Brian Beamish

December 4, 2008

Tab 80

Tab 81

Friends of the Oldman River Society v. Canada (Minister of Transport), 1992 CanLII 110 (SCC), [1992] 1 SCR 3

Source:	Supreme Court of Canada
Date:	1992-01-23
File number:	21890
Other citations:	132 NR 321 — 48 FTR 160 — 88 DLR (4th) 1 — 31 ACWS (3d) 250 — [1992] 2 WWR 193 — 84 Alta LR (2d) 129 — 7 CELR (NS) (2d) 1 — 3 Admin LR (2d) 1 — [1992] CarswellNat 1313 — EYB 1992-67211 — JE 92-180 — [1992] SCJ No 1 (QL) — [1992] ACS no 1
Citation:	Friends of the Oldman River Society v. Canada (Minister of Transport), 1992 CanLII 110 (SCC), [1992] 1 SCR 3, < https://canlii.ca/t/1bqn8 >, retrieved on 2026-03-23
Most recent unfavourable mention	Alberta Wilderness Association v. Canada (Attorney General) , 2008 FC 1061 (CanLII) [...] [20] The decision in Friends of the Oldman River Society v. Canada (Minister of Transport), 1992 CanLII 110 (SCC) , [1992] 1 S.C.R. 3 , is not applicable to these facts. [...]

Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3

**Her Majesty the Queen in right of Alberta,
as represented by the Minister of
Public Works, Supply and Services**

Appellant

and

**The Minister of Transport and
the Minister of Fisheries and Oceans**

Appellants

Friends of the Oldman River Society

Respondent

and

**The Attorney General of Quebec,
the Attorney General for New Brunswick,
the Attorney General of Manitoba,
the Attorney General of British Columbia,
the Attorney General for Saskatchewan,
the Attorney General of Newfoundland,
the Minister of Justice of the Northwest Territories,
the National Indian Brotherhood/Assembly of First Nations,
the Dene Nation and the Metis Association of the Northwest Territories,
the Native Council of Canada (Alberta),
the Sierra Legal Defence Fund,
the Canadian Environmental Law Association,
the Sierra Club of Western Canada,
the Cultural Survival (Canada),
the Friends of the Earth and
the Alberta Wilderness Association**

Interveners

Indexed as: Friends of the Oldman River Society v. Canada (Minister of Transport)

File No.: 21890.

1991: February 19, 20; 1992: January 23.

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

on appeal from the federal court of appeal

Constitutional law -- Distribution of legislative powers -- Environment -- Environmental assessment -- Whether federal environmental guidelines order intra vires Parliament -- [Constitution Act, 1867, ss. 91, 92](#) -- Environmental Assessment and Review Process Guidelines Order, SOR/84-467.

Environmental law -- Environmental assessment -- Statutory validity of federal environmental guidelines order -- Whether guidelines order authorized by s. 6 of Department of the Environment Act -- Whether guidelines order inconsistent with Navigable Waters Protection Act -- Department of the Environment Act, R.S.C., 1985, c. E-10, s. 6 -- Navigable Waters Protection Act, R.S.C., 1985, c. N-22, ss. 5, 6 -- Environmental Assessment and Review Process Guidelines Order, SOR/84-467.

Environmental law -- Environmental assessment -- Applicability of federal environmental guidelines order -- Alberta building dam on Oldman River -- Dam affecting areas of federal responsibility such as navigable waters and fisheries -- Whether guidelines order applicable only to new federal projects -- Whether Minister of Transport and Minister of Fisheries and Oceans must comply with guidelines order -- Department of the Environment Act, R.S.C., 1985, c. E-10, ss. 4(1)(a), 5(a)(ii), 6 -- Environmental Assessment and Review Process Guidelines Order, SOR/84-467, ss. 2 "proposal", "initiating department", 6 -- Navigable Waters Protection Act, R.S.C., 1985, c. N-22, s. 5 -- Fisheries Act, R.S.C., 1985, c. F-14, ss. 35, 37.

Crown -- Immunity -- Provinces -- Whether Crown in right of province bound by provisions of Navigable Waters Protection Act, R.S.C., 1985, c. N-22 -- Interpretation Act, R.S.C., 1985, c. I-21, s. 17.

Administrative law -- Judicial review -- Remedies -- Discretion -- Alberta building dam on Oldman River -- Dam affecting areas of federal responsibility such as navigable waters and fisheries -- Environmental group applying for certiorari and mandamus in Federal Court to compel Minister of Transport and Minister of Fisheries and Oceans to comply with federal environmental guidelines order -- Applications dismissed on grounds of unreasonable delay and futility -- Whether Court of Appeal erred in interfering with motions judge's discretion not to grant remedy sought.

The respondent Society, an Alberta environmental group, brought applications for *certiorari* and *mandamus* in the Federal Court seeking to compel the federal departments of Transport and Fisheries and Oceans to conduct an environmental assessment, pursuant to the federal *Environmental Assessment and Review Process Guidelines Order*, in respect of a dam constructed on the Oldman River by the province of Alberta -- a project which affects several federal interests, in particular navigable waters, fisheries, Indians and Indian lands. The Guidelines Order was established under s. 6 of the federal *Department of the Environment Act* and requires all federal departments and agencies that have a decision-making authority for any proposal (i.e., any initiative, undertaking or activity) that may have an environmental effect on an area of federal responsibility to initially screen such proposal to determine whether it may give rise to any potentially adverse environmental effects. The province had itself conducted extensive environmental studies over the years which took into account public views, including the views of Indian bands and environmental groups, and, in September 1987, had obtained from the Minister of Transport an approval for the work under s. 5 of the *Navigable Waters Protection Act*. This section provides that no work is to be built in navigable waters without the prior approval of the Minister. In assessing Alberta's application, the Minister considered only the project's effect on navigation and no assessment under the Guidelines Order was made. Respondent's attempts to stop the project in the Alberta courts failed and both the federal Ministers of the Environment and of Fisheries and Oceans declined requests to subject the project to the Guidelines Order. The contract for the construction of the dam was awarded in 1988 and the project was 40 per cent complete when the respondent commenced its action in the Federal Court in April 1989. The Trial Division dismissed the applications. On appeal, the Court of Appeal reversed the judgment, quashed the approval under s. 5 of the *Navigable Waters Protection Act*, and ordered the Ministers of Transport and of Fisheries and Oceans to comply with the Guidelines Order. This appeal raises the constitutional and statutory validity of the Guidelines Order as well as its nature and applicability. It also raises the question whether the motions judge properly exercised his discretion in deciding not to grant the remedy sought on grounds of unreasonable delay and futility.

Held (Stevenson J. dissenting): The appeal should be dismissed, with the exception that there should be no order in the nature of *mandamus* directing the Minister of Fisheries and Oceans to comply with the Guidelines Order.

Statutory Validity of the Guidelines Order

The Guidelines Order was validly enacted pursuant to s. 6 of the *Department of the Environment Act*, and is mandatory in nature. When one reads s. 6 as a whole, rather than focusing on the word "guidelines" in isolation, it is clear that Parliament has elected to adopt a regulatory scheme that is "law", and amenable to enforcement through prerogative relief. The "guidelines" are not merely authorized by statute but must be formally enacted by "order" with the approval of the Governor in Council. That is in striking contrast with the usual internal ministerial policy guidelines intended for the control of public servants under the minister's authority.

The Guidelines Order, which requires the decision maker to take socio-economic considerations into account in the environmental impact assessment, does not go beyond what is authorized by the *Department of the Environment Act*. The concept of "environmental quality" in s. 6 of the Act is not confined to the biophysical environment alone. The environment is a diffuse subject matter and, subject to the constitutional imperatives, the potential consequences for a community's livelihood, health and other social matters from environmental change, are integral to decision making on matters affecting environmental quality.

The Guidelines Order is consistent with the *Navigable Waters Protection Act*. There is nothing in the Act which explicitly or implicitly precludes the Minister of Transport from taking into consideration any matters other than marine navigation in exercising his power of approval under s. 5 of the Act. The Minister's duty under the Order is supplemental to his responsibility under the *Navigable Waters Protection Act*, and he cannot resort to an excessively narrow interpretation of his existing statutory powers to avoid compliance with the Order. There is also no conflict between the requirement for an initial assessment "as early in the planning process as possible and before irrevocable decisions are taken" in s. 3 of the Guidelines Order, and the remedial power under s. 6(4) of the Act to grant approval after the commencement of construction. That power is an exception to the general rule in s. 5 of the Act requiring approval prior to construction, and in exercising his

discretion to grant approval after commencement, the Minister is not precluded from applying the Order.

Applicability of the Guidelines Order

The scope of the Guidelines Order is not restricted to "new federal projects, programs and activities"; the Order is not engaged every time a project may have an environmental effect on an area of federal jurisdiction. However, there must first be a "proposal" which requires an "initiative, undertaking or activity for which the Government of Canada has a decision making responsibility". The proper construction to be placed on the term "responsibility" is that the federal government, having entered the field in a subject matter assigned to it under [s. 91](#) of the [Constitution Act, 1867](#), must have an affirmative regulatory duty pursuant to an Act of Parliament which relates to the proposed initiative, undertaking or activity. "Responsibility" within the definition of "proposal" means a legal duty or obligation and should not be read as connoting matters falling generally within federal jurisdiction. Once such a duty exists, it is a matter of identifying the "initiating department" assigned responsibility for its performance, for it then becomes the "decision making authority" for the proposal and thus responsible for initiating the process under the Guidelines Order.

The Oldman River Dam project falls within the ambit of the Guidelines Order. The project qualifies as a proposal for which the Minister of Transport alone is the "initiating department" under [s. 2](#) of the Order. The [Navigable Waters Protection Act](#), in particular [s. 5](#), places an affirmative regulatory duty on the Minister of Transport. Under that Act there is a legislatively entrenched regulatory scheme in place in which the approval of the Minister is required before any work that substantially interferes with navigation may be placed in, upon, over or under, through or across any navigable water.

The Guidelines Order does not apply to the Minister of Fisheries and Oceans, however, because there is no equivalent regulatory scheme under the [Fisheries Act](#) which is applicable to this project. The discretionary power to request or not to request information to assist a Minister in the exercise of a legislative function does not constitute a "decision making responsibility" within the

meaning of the Order. The Minister of Fisheries and Oceans under s. 37 of the *Fisheries Act* has only been given a limited *ad hoc* legislative power which does not constitute an affirmative regulatory duty.

The scope of assessment under the Guidelines Order is not confined to the particular head of power under which the Government of Canada has a decision-making responsibility within the meaning of the term "proposal". Under the Order, the initiating department which has been given authority to embark on an assessment must consider the environmental effect on all areas of federal jurisdiction. The Minister of Transport, in his capacity of decision maker under the *Navigable Waters Protection Act*, must thus consider the environmental impact of the dam on such areas of federal jurisdiction as navigable waters, fisheries, Indians and Indian lands.

Crown Immunity

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.: The Crown in right of Alberta is bound by the *Navigable Waters Protection Act* by necessary implication. The proprietary right the province may have in the bed of the Oldman River is subject to the public right of navigation, legislative jurisdiction over which has been exclusively vested in Parliament. Alberta requires statutory authorization from Parliament to erect any obstruction that substantially interferes with navigation in the Oldman River, and the *Navigable Waters Protection Act* is the means by which it must be obtained. The Crown in right of Alberta is bound by the Act, for it is the only practicable procedure available for getting approval. The purpose of the Act would be wholly frustrated if the province was not bound by the Act. The provinces are among the bodies that are likely to engage in projects that may interfere with navigation. Were the Crown in right of a province permitted to undermine the integrity of the essential navigational networks in Canadian waters, the legislative purpose of the *Navigable Waters Protection Act* would effectively be emasculated.

Per Stevenson J. (dissenting): The province of Alberta is not bound by the *Navigable Waters Protection Act*. The Crown is not bound by legislation unless it is mentioned or referred to in

the legislation. Here, there are no words in the Act "expressly binding" the Crown and no clear intention to bind "is manifest from the very terms of the statute". As well, the failure to include the Crown would not wholly frustrate the purpose of the Act or produce an absurdity. There are many non-governmental agencies whose activities are subject to the Act and there is thus no emasculation of the Act. If the Crown interferes with a public right of navigation, that wrong is remediable by action. There is no significant benefit in approval under the Act. Tort actions may still lie.

Constitutional Validity of the Guidelines Order

The "environment" is not an independent matter of legislation under the *Constitution Act, 1867*. Understood in its generic sense, it encompasses the physical, economic and social environment and touches upon several of the heads of power assigned to the respective levels of government. While both levels may act in relation to the environment, the exercise of legislative power affecting environmental concerns must be linked to an appropriate head of power. Local projects will generally fall within provincial responsibility, but federal participation will be required if, as in this case, the project impinges on an area of federal jurisdiction.

The Guidelines Order is *intra vires* Parliament. The Order does not attempt to regulate the environmental effects of matters within the control of the province but merely makes environmental impact assessment an essential component of federal decision making. The Order is in pith and substance nothing more than an instrument that regulates the manner in which federal institutions must administer their multifarious duties and functions. In essence, the Order has two fundamental aspects. First, there is the substance of the Order dealing with environmental impact assessment to facilitate decision making under the federal head of power through which a proposal is regulated. This aspect of the Order can be sustained on the basis that it is legislation in relation to the relevant subject matters enumerated in s. 91 of the *Constitution Act, 1867*. The second aspect of the Order is its procedural or organizational element that coordinates the process of assessment, which can in any given case touch upon several areas of federal responsibility, under the auspices of a designated decision maker (the "initiating department"). This facet of the Order has as its object the regulation of the institutions and agencies of the Government of Canada as to the manner in which they perform

their administrative functions and duties. This is unquestionably *intra vires* Parliament. It may be viewed either as an adjunct of the particular legislative powers involved, or, in any event, be justifiable under the residuary power in s. 91.

The Guidelines Order cannot be used as a colourable device to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power. The "initiating department" is only given a mandate to examine matters directly related to the areas of federal responsibility potentially affected. Any intrusion under the Order into provincial matters is merely incidental to the pith and substance of the legislation.

Discretion

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.: The Federal Court of Appeal did not err in interfering with the motions judge's discretion not to grant the remedies sought on the grounds of unreasonable delay and futility. Respondent made a sustained effort, through legal proceedings in the Alberta courts and through correspondence with federal departments, to challenge the legality of the process followed by the province to build the dam and the acquiescence of the appellant Ministers, and there is no evidence that Alberta has suffered any prejudice from any delay in taking the present action. Despite ongoing legal proceedings, the construction of the dam continued. The province was not prepared to accede to an environmental impact assessment under the Order until it had exhausted all legal avenues. The motions judge did not weigh these considerations adequately, giving the Court of Appeal no choice but to intervene. Futility was also not a proper ground to refuse a remedy in the present circumstances. Prerogative relief should only be refused on that ground in those few instances where the issuance of a prerogative writ would be effectively nugatory. It is not obvious in this case that the implementation of the Order even at this late stage will not have some influence over the mitigative measures that may be taken to ameliorate any deleterious environmental impact from the dam on an area of federal jurisdiction.

Per Stevenson J. (dissenting): The Federal Court of Appeal erred in interfering with the motions judge's discretion to refuse the prerogative remedy. The court was clearly wrong in overruling his conclusion on the question of delay. The common law has always imposed a duty on an applicant to act promptly in seeking prerogative relief. Given the enormity of the project and the interests at stake, it was unreasonable for the respondent Society to wait 14 months before challenging the Minister of Transport's approval. It is impossible to conclude that Alberta was not prejudiced by the delay. The legal proceedings in the Alberta courts brought by the respondent and others need not have been taken into account by the motions judge. These proceedings were separate and distinct from the relief sought in this case and were irrelevant to the issues at hand. The present action centres on the constitutionality and applicability of the Guidelines Order. It raises new and different issues. In determining whether he should exercise his discretion against the respondent, the motions judge was obliged to look only at those factors which he considered were directly connected to the application before him. Interference with his exercise of discretion is not warranted unless it can be said with certainty that he was wrong in doing what he did. The test has not been met in this case.

Costs

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.: It is a proper case for awarding costs on a solicitor-client basis to the respondent, given the Society's circumstances and the fact that the federal Ministers were joined as appellants even though they did earlier not seek leave to appeal to this Court.

Per Stevenson J. (dissenting): The appellants should not be called upon to pay costs on a solicitor and client basis. There is no justification in departing from our own general rule that a successful party should recover costs on the usual party and party basis. Public interest groups must be prepared to abide by the same principles as apply to other litigants and be prepared to accept some responsibility for the costs.

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S.C.R. 338; *Canadian National Railway Co. v. Courtois*, [1988 CanLII 82 \(SCC\)](#), [1988] 1 S.C.R. 868; *Polylok Corp. v. Montreal Fast Print (1975) Ltd.*, [1983 CanLII 4999 \(FCA\)](#), [1984] 1 F.C. 713; *Charles Osenton & Co. v. Johnston*, [1942] A.C. 130; *Harelkin v. University of Regina*, [1979 CanLII 18 \(SCC\)](#), [1979] 2 S.C.R. 561; *Friends of the Oldman River Society v. Alberta (Minister of the Environment)* (1987), [1987 CanLII 3224 \(AB KB\)](#), 85 A.R. 321; *Friends of Oldman River Society v. Alberta (Minister of the Environment)* (1988), [1988 CanLII 3884 \(AB KB\)](#), 89 A.R. 339; *Friends of the Old Man River Society v. Energy Resources Conservation Board (Alta.)* (1988), [1988 ABCA 63 \(CanLII\)](#), 89 A.R. 280; *Champion v. City of Vancouver*, [1917 CanLII 693 \(SCC\)](#), [1918] 1 W.W.R. 216; *Isherwood v. Ontario and Minnesota Power Co.* (1911), 18 O.W.R. 459.

By Stevenson J. (dissenting)

Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission), [1989 CanLII 78 \(SCC\)](#), [1989] 2 S.C.R. 225; *Province of Bombay v. Municipal Corporation of Bombay*, [1947] A.C. 58; *Champion v. City of Vancouver*, [1917 CanLII 693 \(SCC\)](#), [1918] 1 W.W.R. 216; *Harelkin v. University of Regina*, [1979 CanLII 18 \(SCC\)](#), [1979] 2 S.C.R. 561; *Polylok Corp. v. Montreal Fast Print (1975) Ltd.*, [1983 CanLII 4999 \(FCA\)](#), [1984] 1 F.C. 713; *P.P.G. Industries Canada Ltd. v. Attorney General of Canada*, [1975 CanLII 204 \(SCC\)](#), [1976] 2 S.C.R. 739; *Syndicat des employés du commerce de Rivière-du-Loup (section Émilio Boucher, C.S.N.) v. Turcotte*, [1984 CanLII 2812 \(QC CA\)](#), [1984] C.A. 316.

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APPEAL from a judgment of the Federal Court of Appeal, [1990 CanLII 8039 \(FCA\)](#), [1990] 2 F.C. 18, 68 D.L.R. (4th) 375, [1991] 1 W.W.R. 352, 108 N.R. 241, 76 Alta. L.R. (2d) 289, 5 C.E.L.R. (N.S.) 1, reversing a judgment of the Trial Division, [1989 CanLII 7289 \(FC\)](#), [1990] 1 F.C. 248, [1990] 2 W.W.R. 150, 30 F.T.R. 108, 70 Alta. L.R. (2d) 289, 4 C.E.L.R. (N.S.) 137. Appeal dismissed, with the exception that there should be no order in the nature of mandamus directing the Minister of Fisheries and Oceans to comply with the Guidelines Order. Stevenson J. is dissenting.

D. R. Thomas, Q.C., T. W. Wakeling and G. D. Chipeur, for the appellant Her Majesty the Queen in right of Alberta.

E. R. Sojonky, Q.C., B. J. Saunders and J. de Pencier, for the appellants the Minister of Transport and the Minister of Fisheries and Oceans.

B. A. Crane, Q.C., for the respondent.

J.-K. Samson and A. Gingras, for the intervener the Attorney General of Quebec.

P. H. Blanchet, for the intervener the Attorney General for New Brunswick.

G. E. Hannon, for the intervener the Attorney General of Manitoba.

G. H. Copley, for the intervener the Attorney General of British Columbia.

R. G. Richards, for the intervener the Attorney General for Saskatchewan.

B. G. Welsh, for the intervener the Attorney General of Newfoundland.

R. A. Kasting and *J. Donihee*, for the intervener the Minister of Justice of the Northwest Territories.

P. W. Hutchins, *D. H. Soroka* and *F. S. Gertler*, for the intervener the National Indian Brotherhood/Assembly of First Nations.

J. J. Gill, for the interveners the Dene Nation and the Metis Association of the Northwest Territories, and the Native Council of Canada (Alberta).

G. J. McDade and *J. B. Hanebury*, for the interveners the Sierra Legal Defence Fund, the Canadian Environmental Law Association, the Sierra Club of Western Canada, the Cultural Survival (Canada) and the Friends of the Earth.

M. W. Mason, for the intervener the Alberta Wilderness Association.

//La Forest//

The judgment of Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ. was delivered by

LA FOREST J. -- The protection of the environment has become one of the major challenges of our time. To respond to this challenge, governments and international organizations have been engaged in the creation of a wide variety of legislative schemes and administrative structures. In Canada, both the federal and provincial governments have established Departments of the Environment, which have been in place for about twenty years. More recently, however, it was realized that a department of the environment was one among many other departments, many of which pursued policies that came into conflict with its goals. Accordingly at the federal level steps were taken to give a central role to that department, and to expand the role of other government departments and agencies so as to ensure that they took account of environmental concerns in taking decisions that could have an environmental impact.

To that end, s. 6 of the *Department of the Environment Act*, R.S.C., 1985, c. E-10, empowered the Minister for the purposes of carrying out his duties relating to environmental quality, by order, with the approval of the Governor in Council, to establish guidelines for use by federal departments, agencies and regulatory bodies in carrying out their duties, functions and powers. Pursuant to this provision the *Environmental Assessment and Review Process Guidelines Order* ("*Guidelines Order*") was established and approved in June 1984, SOR/84-467. In general terms, these guidelines require all federal departments and agencies that have a decision-making authority for any proposal, i.e., any initiative, undertaking or activity that may have an environmental effect on an area of federal responsibility, to initially screen such proposal to determine whether it may give rise to any potentially adverse environmental effects. If a proposal could have a significant adverse effect on the environment, provision is made for public review by an environmental assessment panel whose members must be unbiased, free of political influence and possessed of special knowledge and experience relevant to the technical, environmental and social effects of the proposal.

The present case raises the constitutional and statutory validity of the *Guidelines Order* as well as its nature and applicability. These issues arise in a context where the respondent Society, an environmental group from Alberta, by applications for *certiorari* and *mandamus*, seeks to compel two federal departments, the Department of Transport and the Department of Fisheries and Oceans, to conduct a public environmental assessment pursuant to the *Guidelines Order* in respect of a dam

constructed on the Oldman River by the Government of Alberta. That government had itself conducted extensive environmental studies which took into account public views. However, since the project affects navigable waters, fisheries, Indians and Indian lands, federal interests are involved. Specifically, the Society argues that the Minister of Transport must approve the project under the *Navigable Waters Protection Act*, R.S.C., 1985, c. N-22, and in doing so is required to provide for public assessment of the project pursuant to the *Guidelines Order*. It also argues that the Minister of Fisheries and Oceans has a similar duty in the performance of his functions under the *Fisheries Act*, R.S.C., 1985, c. F-14.

The case also raises the question whether the motions judge properly exercised his discretion in deciding whether or not to grant *certiorari* or *mandamus*. Accordingly the material background must be set forth in some detail.

Background

The history of the project begins in May 1958 when Alberta asked the Prairie Farm Rehabilitation Administration ("P.F.R.A.") of the federal Department of Agriculture to determine the feasibility of constructing a storage reservoir on the Oldman River, at a site called Livingstone Gap. In December 1966 the P.F.R.A. submitted its report and proposed another location, the Three Rivers site on the Oldman River, for further study. There followed a federal-provincial water supply study which lasted from 1966 to 1974. After this, in July 1974, the Alberta Department of the Environment initiated an examination of water demand and potential storage sites on the Oldman River and its tributaries, to be conducted in two phases.

The first phase consisted of an initial evaluation of sites in the Oldman basin for water storage carried out by a Technical Advisory Committee comprised of representatives from several provincial government departments including Environment, Culture and Multiculturalism, Energy Resources Conservation Board, Fish and Wildlife Division, Agriculture, as well as representatives from local municipal districts and industry. The Committee's report was released on July 14, 1976 and was followed by a series of public consultations with local authorities and other groups and

individuals. The responses received were evaluated and issues arising from them were identified for further study in the second phase.

The second phase began on February 4, 1977 when the Minister of the Environment announced the creation of the Oldman River Study Management Committee consisting of six representatives of the public and three representatives of the provincial government. Its task was to address the issues raised by the public during the first study, and to make recommendations concerning overall water management in the river basin, including the incorporation of the concerns of area residents. This it was required to do in a more comprehensive way than the first phase by, *inter alia*, studying issues affecting the whole of the river basin such as salinization, sedimentation, recreation, fish habitat and other environmental issues. Public participation was encouraged, a series of public meetings and public workshops was held, and oral and written submissions were made by a variety of interest groups including Indian bands and environmental groups. The Management Committee released its final report in 1978.

That same year, a panel of the Environment Council of Alberta was constituted to hold public hearings on the management of water resources within the Oldman basin. Again, several public hearings were held throughout southern Alberta and the Council received briefs from a wide cross-section of Albertans representing the interests of business, agriculture, local governments, Indian bands and others. The Council submitted its report to the Minister of the Environment in August 1979 and recommended yet another location, the Brocket site on the Peigan Indian Reserve, should a dam be needed.

The provincial government then reviewed this report and the 1978 report and on August 29, 1980 announced its decision to build a dam on the Oldman River. It also stated that the Three Rivers site was the preferred location, but added that the final decision would be deferred until the Peigan Indian Band had an opportunity to submit a proposal for construction at the Brocket site. In November 1983 the Peigan Band presented a position to the Minister of the Environment describing its expected economic compensation if the dam were to be built at the Brocket site.

On August 8, 1984 the Premier of Alberta announced the government's decision to proceed with construction of the dam at the Three Rivers site. Before that announcement was made, however, the dam proposal was reviewed by the Regional Screening and Co-ordinating Committee ("R.S.C.C."), a committee of the federal Department of the Environment. The purpose of the R.S.C.C. was to ensure that proposals that may affect federal areas of concern are subjected to environmental review, and it actively followed the progress of the dam proposal until it was decided that the dam would not be built on Indian land.

Following the Three Rivers site announcement, Alberta commenced the design of the dam and launched an "Environmental Mitigation/Opportunities Action Plan" which spawned further environmental studies and public meetings. The provincial Department of the Environment opened a project information office close to the Three Rivers site to answer public enquiries. Several subcommittees were established by the Municipal District of Pincher Creek to provide input to the Alberta Department of the Environment on areas of local concern, including land use, fish and wildlife, recreation, and agriculture. In addition, the provincial Minister of the Environment ordered the appointment of a Local Advisory Committee to advise the Minister on such matters as road relocation, fish and wildlife concerns, and recreational opportunities. After gathering information from public meetings, the Committee submitted a report to the Minister with recommendations concerning fisheries, wildlife, historical resources, agriculture, recreation and transportation systems.

In 1987 the federal R.S.C.C. once again became involved in the project at the request of the Department of Indian and Northern Affairs to study its impact on federal interests, particularly on the Peigan Indian Reserve located approximately 12 kilometres downstream from the dam site. Alberta had already provided the Peigans with funding to conduct an independent study of the project's effect on the Reserve and its inhabitants. The Peigan report was submitted to the provincial Minister of the Environment in February 1987. It addressed such subjects as irrigation, surface and ground water considerations, dam safety, fisheries assessment, and spiritual and cultural assessment. The report prepared at the behest of the R.S.C.C. in July 1987 concluded that the project's effects on the Reserve would be either favourable or mitigable, but did note the possibility of negative

environmental impacts affecting the Reserve -- i.e., increased dust storms, increased mercury levels in fish and the extinction of flood plain cottonwood forests.

I come now to a step of prime importance in this action. On March 10, 1986 the Alberta Department of the Environment applied to the federal Minister of Transport for approval of the work under s. 5 of the *Navigable Waters Protection Act*. That provision provides that no work is to be built in navigable waters without the prior approval of the Minister. In assessing the application, the Minister considered the project's effect on marine navigation and approved the application on September 18, 1987 subject to certain conditions relating to marine navigation. I underline, however, that he did not subject the application to an assessment under the *Guidelines Order*. As we shall see, whether he should have done so raises several of the major issues in this appeal.

It is not until after this transpired that the respondent Society came into the picture. The Society was incorporated on September 8, 1987 to oppose the project and became aware of the approval granted by the Minister of Transport on February 16, 1988. However, earlier efforts to check the progress of the development had been made by certain individuals who later became members of the Society on its formation. Thus in the summer of 1987 the Southern Alberta Environmental Group had written a letter to the Minister of Fisheries and Oceans asking that an initial assessment be conducted under the *Guidelines Order*. The request was refused for the reason that the potential problems were being addressed and because of the "long-standing administrative arrangements that are in place for the management of fisheries in Alberta". This, like the Minister of Transport's action described earlier, plays an important part in the legal arguments that were subsequently made. Another early effort came on December 3, 1987 when the respondent Society wrote to the Minister of the Environment asking that the matter be subjected to the *Guidelines Order* but again the request was declined, this time principally on the grounds that the dam project fell primarily within provincial jurisdiction and that Environment Canada was satisfied that Alberta's proposed mitigation plan would remedy any detrimental effects on the fisheries. The Society tried once again to have the Minister of the Environment invoke the *Guidelines Order* on February 22, 1988, but was turned down in June 1988 for the same jurisdictional reason.

The Society was also busy on the provincial front to have the project stopped. On October 26, 1987 it brought an application in the Court of Queen's Bench of Alberta to quash an interim licence granted under the *Water Resources Act*, R.S.A. 1980, c. W-5. The licence was, in fact, quashed by order on December 8, 1987. A second interim licence was granted on February 5, 1988 and the Society applied in the Court of Queen's Bench to have that one quashed as well. However, that application was dismissed on April 21, 1988. The Society also asked the Alberta Energy Resources Conservation Board to conduct a public hearing under the *Hydro and Electric Energy Act*, R.S.A. 1980, c. H-13, but its request was refused. That decision was affirmed by the Alberta Court of Appeal. In August 1988 the vice-president of the Society swore an information before a justice of the peace alleging that an offence had been committed against the *federal Fisheries Act* but the Attorney General for Alberta stayed the proceedings.

The contract for construction of the dam was awarded in February 1988, and as of March 31, 1989 the dam was 40 percent complete. The present action was commenced on April 21, 1989 in the Trial Division of the Federal Court, [1989 CanLII 7289 \(FC\)](#), [1990] 1 F.C. 248. In the action, the Society sought an order in the nature of *certiorari* to quash the approval granted by the Minister of Transport as well as an order in the nature of *mandamus* requiring the Minister of Transport and the Minister of Fisheries and Oceans to comply with the *Guidelines Order*. Jerome A.C.J. dismissed the application but the Society's appeal to the Federal Court of Appeal was successful, [1990 CanLII 8039 \(FCA\)](#), [1990] 2 F.C. 18. This Court granted leave to appeal on September 13, 1990, [1990] 2 S.C.R. x.

Legislation

Before going further, it will be useful to set forth the major parts of the relevant legislation.

The *Department of the Environment Act* reads in relevant part:

4. (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to
 - (a) the preservation and enhancement of the quality of the natural environment, including water, air and soil quality;

...

5. The Minister, in exercising his powers and carrying out his duties and functions under section 4, shall

(a) initiate, recommend and undertake programs, and coordinate programs of the Government of Canada that are designed

(i) to promote the establishment or adoption of objectives or standards relating to environmental quality, or to control pollution,

(ii) to ensure that new federal projects, programs and activities are assessed early in the planning process for potential adverse effects on the quality of the natural environment and that a further review is carried out of those projects, programs, and activities that are found to have probable significant adverse effects, and the results thereof taken into account, and

(iii) to provide to Canadians environmental information in the public interest;

(b) promote and encourage the institution of practices and conduct leading to the better preservation and enhancement of environmental quality, and cooperate with provincial governments or agencies thereof, or any bodies, organization or persons, in any programs having similar objects; and

(c) advise the heads of departments, boards and agencies of the Government of Canada on all matters pertaining to the preservation and enhancement of the quality of the natural environment.

6. For the purposes of carrying out his duties and functions related to environmental quality, the Minister may, by order, with the approval of the Governor in Council, establish guidelines for use by departments, boards and agencies of the Government of Canada and, where appropriate, by corporations named in Schedule III to the *Financial Administration Act* and regulatory bodies in the exercise of their powers and the carrying out of their duties and functions.

Pursuant to s. 6, the Minister, by order, with the approval of the Governor in Council, established the *Guidelines Order*. It reads in relevant part as follows:

2. In these Guidelines,

...

"initiating department" means any department that is, on behalf of the Government of Canada, the decision making authority for a proposal;

...

"proponent" means the organization or the initiating department intending to undertake a proposal;

"proposal" includes any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility.

3. The Process shall be a self assessment process under which the initiating department shall, as early in the planning process as possible and before irrevocable decisions are

taken, ensure that the environmental implications of all proposals for which it is the decision making authority are fully considered and where the implications are significant, refer the proposal to the Minister for public review by a Panel.

...

6. These Guidelines shall apply to any proposal

(a) that is to be undertaken directly by an initiating department;

(b) that may have an environmental effect on an area of federal responsibility;

(c) for which the Government of Canada makes a financial commitment; or

(d) that is located on lands, including the offshore, that are administered by the Government of Canada.

Reference must also be made to [s. 5](#) of the *Navigable Waters Protection Act* which reads as follows:

5. (1) No work shall be built or placed in, on, over, under, through or across any navigable water unless

(a) the work and the site and plans thereof have been approved by the Minister, on such terms and conditions as the Minister deems fit, prior to commencement of construction;

(b) the construction of the work is commenced within six months and completed within three years after the approval referred to in paragraph (a) or within such further period as the Minister may fix; and

(c) the work is built, placed and maintained in accordance with the plans, the regulations and the terms and conditions set out in the approval referred to in paragraph (a).

Judicial History

Trial Division

Jerome A.C.J. identified the four main issues in the action as follows: (1) the standing of the applicant to bring the application; (2) whether the federal Ministers named were bound to invoke the *Guidelines Order*; (3) the applicability of *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)*, [1989 CanLII 7273 \(FC\)](#), [1989] 3 F.C. 309 (T.D.), aff'd (1989), 99 N.R. 72 (F.C.A.), to the facts of this case; and (4) whether he should exercise his discretion to grant the

remedies sought. He dealt with the first issue by simply assuming, without deciding, that the Society had the requisite standing to bring the application.

With respect to the *Guidelines Order*, Jerome A.C.J. first held that the Minister of Transport was not bound to apply it in assessing the application under the *Navigable Waters Protection Act*, and indeed he found that the Minister would have exceeded his jurisdiction had he invoked the *Guidelines Order*. The reasoning was that the Act sets out no requirement for environmental review but instead confines the Minister to consider only factors affecting marine navigation. Similarly, the Minister of Fisheries and Oceans was without jurisdiction to apply the *Guidelines Order* because his department had not undertaken a project. In the alternative, if the *Guidelines Order* could be said to apply to provincially initiated projects, it would only apply where a federal department received a "proposal" requiring its approval. As the *Fisheries Act* did not contemplate an approval procedure for a permit or licence, the *Guidelines Order* did not apply. Nor were environmental factors raised under either the *Fisheries Act* or the *Department of Fisheries and Oceans Act*, R.S.C., 1985, c. F-15.

Jerome A.C.J. then turned to the *Canadian Wildlife* case. In that case, which I shall discuss with more particularity later, the Federal Court of Appeal had held that before the project in question there, the Rafferty-Alameda Dam, could be undertaken, it was necessary to obtain the approval of the Minister of the Environment. Jerome A.C.J. distinguished that case on two grounds. First, the case involved authorization under the *International River Improvements Act*, R.S.C., 1985, c. I-20, which required prior approval from the Minister of the Environment, as opposed to the instant case where approval may be granted under the *Navigable Waters Protection Act* after the project is commenced. Second, the Rafferty-Alameda project involved the Minister of the Environment whose statutory duties under the *Department of the Environment Act* included consideration of environmental factors.

Lastly, on the issue of the discretionary nature of the relief sought, Jerome A.C.J. found against the Society because of delay and the unnecessary duplication that would result. Between the grant of approval on September 18, 1987 and the commencement of this action on April 21, 1989, he noted, no steps had been taken to quash the approval and compel the application of the *Guidelines*

Order. By the time the action was started the project was 40 percent complete. Furthermore, Alberta had already conducted an extensive environmental review of the project and had "identified every possible area of environmental social concern and ha[d] given every citizen, including the members of the applicant organization, ample opportunity to voice their views and to mobilize their opposition" (pp. 273-74). That being so, applying the *Guidelines Order* would be needlessly repetitive. Accordingly, he dismissed the application.

The Society then launched an appeal to the Federal Court of Appeal.

Court of Appeal

Stone J.A., writing for the court, began by noting that the Oldman River Dam may have an environmental effect on at least three areas of federal responsibility, namely fisheries, Indians and Indian lands. He disagreed with the view that the Minister of Transport was restricted to considering matters affecting marine navigation only. He found that the dam project fell within the ambit of the *Guidelines Order* and that the Department of Transport was an "initiating department" for the purposes of the *Guidelines Order* thereby engaging the application of the *Guidelines Order*. Stone J.A. referred to the *Canadian Wildlife* case for authority that the *Guidelines Order* was a law of general application, and as such imposed on the Minister a "superadded" duty over and above his other statutory powers. Nor was there any conflict between the requirement for an initial assessment "as early in the planning process as possible and before irrevocable decisions are taken" in the *Guidelines Order*, and the remedial power under s. 6 of the *Navigable Waters Protection Act* to grant approval after the commencement of construction. That power, he held, is an exception to the general rule in s. 5 of the Act requiring approval prior to construction, and in exercising his discretion to grant approval after commencement, the Minister is not precluded from applying the *Guidelines Order*.

Stone J.A. next turned to the question whether the Minister of Fisheries and Oceans was compelled to apply the *Guidelines Order*. He first considered whether the Minister had been seized with a "proposal" as defined in the Act so as to make him subject to the *Guidelines Order*. He concluded in the affirmative. "Proposal", in Stone J.A.'s view, is there used in a far broader sense than

its ordinary meaning. In particular it is not limited to something in the nature of an application. An application is but one way in which an "initiative, undertaking or activity" can come to the attention of the Minister but it is not the only way. Another way is for an individual to request that the Minister take action under the appropriate statute, as was done here, and since the Minister was aware of an initiative within a federal area of responsibility, there was a "proposal" as defined in the *Guidelines Order*. Moreover, the Minister's decision not to intervene constituted him as a "decision making authority" and thus triggered his obligations under the *Guidelines Order*.

Stone J.A. then dealt with the issue of discretion and reviewed the relevant principles which apply to an appellate court interfering with a trial judge's exercise of discretion. Shortly put, such interference is not warranted absent a finding that the trial judge proceeded on an erroneous principle or a misapprehension of the facts, or where the order is not just and reasonable. Parenthetically, and by way of footnote, Stone J.A. was of the view that refusing to grant prerogative relief on the ground of delay was not "well-founded in principle", because the delay was explained by the facts, especially that the respondent did not become aware of the approval granted by the Minister of Transport until only two months before the action was commenced. Further, the respondent was otherwise engaged in challenging the provincial licence issued, and it was not until the eve of this action that the Trial Division of the Federal Court handed down its decision in the *Canadian Wildlife* case holding that the *Guidelines Order* was binding on the Minister of the Environment.

As to the unnecessary duplication that could result from granting the relief sought, Stone J.A. found that the provincial environmental review process was deficient in two respects when contrasted with the environmental impact assessment required by the *Guidelines Order*. First, the provincial legislation did not place the same emphasis on public participation in the process as the *Guidelines Order*. Secondly, there was nothing in the provincial legislation requiring the same degree of independence of the review panel.

The last issue addressed by Stone J.A. that has been raised in this appeal is whether the *Navigable Waters Protection Act* binds the Crown in right of Alberta. Referring to this Court's decision in *Alberta Government Telephones v. Canada (Canadian Radio-television and*

Telecommunications Commission), 1989 CanLII 78 (SCC), [1989] 2 S.C.R. 225, he held that the Act, especially s. 4 when read in context, evidenced an intention to bind the Crown. Furthermore, the purpose of the Act would be wholly frustrated if the Crown were not bound, it being well known that many obstructions placed in navigable waters are sponsored by government.

As a result the appeal was allowed, the approval was quashed and the Ministers of Transport and Fisheries and Oceans ordered to comply with the *Guidelines Order*.

The Appeal to this Court

As earlier noted, leave to appeal to this Court was sought and granted, and the Chief Justice stated the following constitutional question on October 29, 1990:

Is the *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467, so broad as to offend ss. 92 and 92A of the *Constitution Act, 1867* and therefore constitutionally inapplicable to the Oldman River Dam owned by the appellant, Her Majesty the Queen in right of Alberta?

Interventions were then filed by the Attorneys General of Quebec, New Brunswick, Manitoba, British Columbia, Saskatchewan and Newfoundland and the Minister of Justice of the Northwest Territories, and a number of environmental groups, namely the Sierra Legal Defence Fund, the Canadian Environmental Law Association, the Sierra Club of Western Canada, the Cultural Survival (Canada), Friends of the Earth and the Alberta Wilderness Association, as well as several Indian organizations, namely, the National Indian Brotherhood and the Assembly of First Nations, the Dene Nation and the Metis Association of the Northwest Territories, and the Native Council of Canada (Alberta).

Issues

The many issues arising in this appeal have been variously ordered by the parties in their written submissions, but I prefer to deal with them as follows:

1. Statutory Validity of the *Guidelines Order*

a. Is the *Guidelines Order* authorized by s. 6 of the *Department of the Environment Act*?

b. Is the *Guidelines Order* inconsistent with the *Navigable Waters Protection Act* and the *Fisheries Act*?

2. Obligation of the Ministers to Comply with the *Guidelines Order*

a. Does s. 4(1) of the *Department of the Environment Act* preclude the application of the *Guidelines Order* to the Ministers?

b. Does the *Guidelines Order* apply to projects other than new federal projects?

c. Are the Ministers "initiating departments"?

d. Is the *Navigable Waters Protection Act* binding on the Crown in right of Alberta?

3. Constitutional Question

Is the *Guidelines Order* so broad as to offend ss. 92 and 92A of the *Constitution Act, 1867* and therefore constitutionally inapplicable to the Oldman River Dam owned by Alberta?

4. Discretion

Did the Federal Court of Appeal err in interfering with the discretion of Jerome A.C.J. whereby he declined to grant the remedies sought?

Statutory Validity of the Guidelines Order

Is the *Guidelines Order* Authorized by s. 6 of the *Department of the Environment Act*?

The appellant Alberta argued that the *Guidelines Order* is *ultra vires* because it does not fall within the scope of the powers conferred under its enabling legislation, s. 6 of the *Department of the Environment Act*. For convenience, I shall repeat this provision:

6. For the purposes of carrying out his duties and functions related to environmental quality, the Minister may, by order, with the approval of the Governor in Council, establish guidelines for use by departments, boards and agencies of the Government of Canada and, where appropriate, by corporations named in Schedule III to the *Financial Administration Act* and regulatory bodies in the exercise of their powers and the carrying out of their duties and functions.

The principal ground on which it is contended that the *Guidelines Order* is invalid is that by using the term "guidelines" s. 6 does not empower the enactment of mandatory subordinate legislation, but instead only contemplates a purely administrative directive not intended to be legally binding on those to whom it is addressed. There is of course no doubt that the power to make subordinate legislation must be found within the four corners of its enabling statute, and it is there that one must turn to determine if the Act can support delegated legislation of a mandatory nature, the non-compliance with which can found prerogative relief.

This issue was addressed in *Canadian Wildlife, supra*. In that case the applicant challenged the issuance of a licence by the Minister of the Environment under the *International River Improvements Act* and sought an order in the nature of *certiorari* quashing the licence, and mandamus requiring the Minister to comply with the *Guidelines Order*. In the Trial Division, Cullen J. found that the *Guidelines Order* is an enactment or regulation as defined in s. 2(1) of the *Interpretation Act*, R.S.C., 1985, c. I-21, which provides:

2. (1) In this Act,

...

"enactment" means an Act or regulation or any portion of an Act or regulation;

...

"regulation" includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

(a) in the execution of a power conferred by or under the authority of an Act, or

(b) by or under the authority of the Governor in Council;

Cullen J. then concluded, at p. 322:

Therefore, EARP Guidelines Order is not a mere description of a policy or programme; it may create rights which may be enforceable by way of *mandamus* (see *Young v. Minister of Employment and Immigration* (1987), 8 F.T.R. 218 (F.C.T.D.) at page 221).

In the Court of Appeal, Hugessen J.A. relied on both the English and French versions of s. 6 of the *Department of the Environment Act* to find that it was capable of supporting a power to enact binding subordinate legislation. "The word 'guidelines'", he stated, "in itself is neutral in this regard." Turning then, to the question whether the Guidelines were so written as to make them mandatory, he observed, at pp. 73-74:

Finally, there is nothing in the text of the Guidelines themselves which indicates that they are not mandatory; on the contrary, the repeated use of the word "shall" . . . throughout, and particularly in ss. 6, 13 and 20, indicates a clear intention that the Guidelines shall bind all those to whom they are addressed, including the Minister of the Environment himself.

I would agree with him on both points. The first question depends on legislative intent. The guidelines under the Act reviewed by this Court in the *Reference re Anti-Inflation Act*, 1976 CanLII 16 (SCC), [1976] 2 S.C.R. 373, for example, were clearly mandatory in nature. I am satisfied that s. 6 of the Act can sustain the enactment of mandatory guidelines, and that the Guidelines as framed are mandatory in nature.

There is nothing here to indicate that the *Guidelines Order* is merely another form of administrative directive which cannot confer enforceable rights, as was the case in *Martineau v. Matsqui Institution Inmate Disciplinary Board*, 1977 CanLII 4 (SCC), [1978] 1 S.C.R. 118. In *Martineau* the issue was whether a directive concerning the discipline of inmates, authorized by s. 29(3) of the *Penitentiary Act*, R.S.C. 1970, c. P-6, was "law" within the wording of s. 28 of the *Federal Court Act*, S.C. 1970-71-72, c. 1, and thus gave the Federal Court jurisdiction to review a disciplinary order made by the Board. This Court, by majority, held that the directive was not "law" within s. 28, Pigeon J. noting, at p. 129:

It is significant that there is no provision for penalty and, while they are authorized by statute, they are clearly of an administrative, not a legislative, nature. It is not in any legislative capacity that the Commissioner is authorized to issue directives but in his administrative capacity. I have no doubt that he would have the power of doing it by virtue of his authority without express legislative enactment. [Emphasis added.]

There is little doubt that ordinarily a Minister has an implicit power to issue directives to implement the administration of a statute for which he is responsible; see for example *Maple Lodge Farms Ltd. v. Government of Canada*, 1982 CanLII 24 (SCC), [1982] 2 S.C.R. 2. It is also clear that a violation of such directives will only give rise to administrative rather than judicial sanction because they do not have the full force of law.

Here though we are dealing with a directive that is not merely authorized by statute, but one that is required to be formally enacted by "order", and promulgated under s. 6 of the *Department of the Environment Act*, with the approval of the Governor in Council. That is in striking contrast with the usual internal ministerial policy guidelines intended for the control of public servants under the minister's authority. To my mind this is a vital distinction. Its effect is thus described by R. Dussault and L. Borgeat in *Administrative Law* (2nd ed. 1985), vol. 1, at pp. 338-39:

When a government considers it necessary to regulate a situation through norms of behaviour, it may have a law passed or make a regulation itself, or act administratively by means of directives. In the first case, it is bound by the formalities surrounding the legislative or regulatory process; conversely, it knows that once these formalities have been observed, the new norms will come within a framework of "law" and that by virtue of the Rule of Law they will be applied by the courts. In the second case, that is, when it chooses to proceed by way of directives, whether or not they are authorized by legislation, it opts instead for a less formalized means based upon hierarchical authority, to which the courts do not have to ensure obedience. To confer upon a directive the force of a regulation is to exceed legislative intent. It is said that the Legislature does not speak without a purpose; its implicit wish to leave a situation outside the strict framework of "law" must be respected.

The word "guidelines" cannot be construed in isolation; s. 6 must be read as a whole. When so read it becomes clear that Parliament has elected to adopt a regulatory scheme that is "law", and thus amenable to enforcement through prerogative relief.

Alberta also argues that the *Guidelines Order* is *ultra vires* on the ground that the scope of the subject matter covered in the delegated legislation goes far beyond that authorized by the

Department of the Environment Act. More specifically, it contends that the authority to establish guidelines for the purposes of carrying out the Minister's duties related to "environmental quality" does not comprehend a process of environmental impact assessment, such as found in the *Guidelines Order*, in which the decision maker is required to take into account socio-economic considerations. Rather, it is argued, the Act only permits the enactment of delegated legislation that is strictly concerned with matters relating to environmental quality as understood in a physical sense.

I cannot accept that the concept of environmental quality is confined to the biophysical environment alone; such an interpretation is unduly myopic and contrary to the generally held view that the "environment" is a diffuse subject matter; see *R. v. Crown Zellerbach Canada Ltd.*, 1988 CanLII 63 (SCC), [1988] 1 S.C.R. 401. The point was made by the Canadian Council of Resource and Environment Ministers, following the "Brundtland Report" of the World Commission on Environment and Development, in the *Report of the National Task Force on Environment and Economy*, September 24, 1987, at p. 2:

Our recommendations reflect the principles that we hold in common with the World Commission on Environment and Development (WCED). These include the fundamental belief that environmental and economic planning cannot proceed in separate spheres. Long-term economic growth depends on a healthy environment. It also affects the environment in many ways. Ensuring environmentally sound and sustainable economic development requires the technology and wealth that is generated by continued economic growth. Economic and environmental planning and management must therefore be integrated.

Surely the potential consequences for a community's livelihood, health and other social matters from environmental change are integral to decision-making on matters affecting environmental quality, subject, of course, to the constitutional imperatives, an issue I will address later.

I have therefore concluded that the *Guidelines Order* has been validly enacted pursuant to the *Department of the Environment Act*, and is mandatory in nature.

Inconsistency With the *Navigable Waters Protection Act* and *Fisheries Act*

The appellants Alberta and the federal Ministers argue that the *Guidelines Order* is inconsistent with and therefore must yield to the requirements of the *Navigable Waters Protection Act* for obtaining an approval under s. 5 of that Act. Specifically, they say, the Minister of Transport is confined by the Act to a consideration of matters pertaining to marine navigation alone, and that the *Guidelines Order* cannot displace or add to the criteria mentioned in the Act. Alberta also submits that the *Guidelines Order* is similarly inconsistent with the *Fisheries Act*, but for the reasons set out later I do not find it necessary to address that issue.

The basic principles of law are not in doubt. Just as subordinate legislation cannot conflict with its parent legislation (*Belanger v. The King* (1916), 1916 CanLII 87 (SCC), 54 S.C.R. 265), so too it cannot conflict with other Acts of Parliament (*R. & W. Paul, Ltd. v. Wheat Commission*, [1937] A.C. 139 (H.L.)), unless a statute so authorizes (*Re George Edwin Gray* (1918), 1918 CanLII 533 (SCC), 57 S.C.R. 150). Ordinarily, then, an Act of Parliament must prevail over inconsistent or conflicting subordinate legislation. However, as a matter of construction a court will, where possible, prefer an interpretation that permits reconciliation of the two. "Inconsistency" in this context refers to a situation where two legislative enactments cannot stand together; see *Daniels v. White*, 1968 CanLII 67 (SCC), [1968] S.C.R. 517. The rule in that case was stated in respect of two inconsistent statutes where one was deemed to repeal the other by virtue of the inconsistency. However, the underlying rationale is the same as where subordinate legislation is said to be inconsistent with another Act of Parliament -- there is a presumption that the legislature did not intend to make or empower the making of contradictory enactments. There is also some doctrinal similarity to the principle of paramountcy in constitutional division of powers cases where inconsistency has also been defined in terms of contradiction -- i.e., "compliance with one law involves breach of the other"; see *Smith v. The Queen*, 1960 CanLII 12 (SCC), [1960] S.C.R. 776, at p. 800.

The inconsistency contended for is that the *Navigable Waters Protection Act* implicitly precludes the Minister of Transport from taking into consideration any matters other than marine navigation in exercising his power of approval under s. 5 of the Act, whereas the *Guidelines Order* requires, at a minimum, an initial environmental impact assessment. The appellant Ministers concede that there is no explicit prohibition against his taking into account environmental factors, but argue

that the focus and scheme of the Act limit him to considering nothing other than the potential effects on marine navigation. If the appellants are correct, it seems to me that the Minister would approve of very few works because several of the "works" falling within the ambit of s. 5 do not assist navigation at all, but by their very nature interfere with, or impede navigation, for example bridges, booms, dams and the like. If the significance of the impact on marine navigation were the sole criterion, it is difficult to conceive of a dam of this sort ever being approved. It is clear, then, that the Minister must factor several elements into any cost-benefit analysis to determine if a substantial interference with navigation is warranted in the circumstances.

It is likely that the Minister of Transport in exercising his functions under s. 5 always did take into account the environmental impact of a work, at least as regards other federal areas of jurisdiction, such as Indians or Indian land. However that may be, the *Guidelines Order* now formally mandates him to do so, and I see nothing in this that is inconsistent with his duties under s. 5. As Stone J.A. put it in the Court of Appeal, it created a duty which is "superadded" to any other statutory power residing in him which can stand with that power. In my view the Minister's duty under the *Guidelines Order* is indeed supplemental to his responsibility under the *Navigable Waters Protection Act*, and he cannot resort to an excessively narrow interpretation of his existing statutory powers to avoid compliance with the *Guidelines Order*.

Section 8 of the *Guidelines Order* already recognizes that the environmental impact assessment thereunder will not apply where it would conflict with other statutory provisions. It reads:

8. Where a board or an agency of the Government of Canada or a regulatory body has a regulatory function in respect of a proposal, these Guidelines shall apply to that board, agency or body only if there is no legal impediment to or duplication resulting from the application of these Guidelines.

A broad interpretation of the application of the *Guidelines Order* is consistent with the objectives stated in both the Order itself and its parent legislation -- to make environmental impact assessment an essential component of federal decision-making. A similar approach has been followed in the United States with respect to their *National Environmental Policy Act*. As Pratt J. put it in *Environmental Defense Fund, Inc. v. Mathews*, 410 F.Supp. 336 (D.D.C. 1976), at p. 337:

NEPA does not supersede other statutory duties, but, to the extent that it is reconcilable with those duties, it supplements them. Full compliance with its requirements cannot be avoided unless such compliance directly conflicts with other existing statutory duties.

To hold otherwise would, in my view, set at naught the legislative scheme for the protection of the environment envisaged by Parliament in enacting the *Department of the Environment Act*, and in particular s. 6.

Nor do I think s. 3 of the *Guidelines Order*, which requires that the assessment process be initiated "as early in the planning process as possible and before irrevocable decisions are taken", is in any way inconsistent with s. 6 of the *Navigable Waters Protection Act*. Section 6 is largely concerned with empowering the Minister to remove or take other remedial action in relation to works constructed without complying with s. 5, but the appellants draw attention to s. 6(4) which permits the Minister to approve of a work that has already been built. On this point, I am in complete agreement with Stone J.A. where, at p. 41, he stated:

As I see it, the provisions of section 6 of that Act pertain to the remedial powers of the Minister in deciding what action he might take in the event of a failure to secure a section 5 approval prior to the commencement of construction. Subsection (4) thereof is an exception to the general rule, is entirely discretionary and clearly subservient to the fundamental requirement set out in paragraph 5(1)(a) that an approval be obtained prior to the commencement of construction. Nor can I see anything in the Guidelines Order that would prevent the Minister from complying with its terms to the fullest extent possible in exercising his discretion under subsection 6(4) of the *Navigable Waters Protection Act*. That being so, I can find no inconsistency or conflict between these two pieces of federal legislation.

It is thus clear to me that the *Guidelines Order* not only falls within the powers given by the *Department of the Environment Act*, but is completely consistent with the *Navigable Waters Protection Act*. It therefore falls to be decided whether the order applies in the instant case.

Obligation of the Ministers to Comply with the Guidelines Order

Section 4(1) of the *Department of the Environment Act*

Section 4(1)(a) of the *Department of the Environment Act* reads as follows:

4. (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to

(a) the preservation and enhancement of the quality of the natural environment, including water, air and soil quality;

Alberta contends that by restricting the Minister of the Environment's jurisdiction to "matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada" (emphasis added), s. 4 has rendered the *Guidelines Order* inoperative in the present case. Because the *Fisheries Act* regulates the management of Canada's fisheries resource, it is argued, the Minister of the Environment's jurisdiction has been ousted in respect of all matters affecting fish habitat. This argument can be dealt with shortly. Its premise entirely misapprehends the "matters" covered by the respective pieces of legislation. The *Guidelines Order* establishes an environmental assessment process for use by all federal departments in the exercise of their powers and the performance of their duties and functions, whereas the *Fisheries Act* embraces the substantive matter of protecting fish and fish habitat. There is, of course, a connection between the two, but the crucial difference is that one is fundamentally procedural while the other is substantive in nature. Again, the approach suggested by the appellants would make the power given by s. 6 of the *Department of the Environment Act* virtually meaningless.

New Federal Projects

Alberta next takes issue with the purported application of the *Guidelines Order* to proposals other than "new federal projects, programs and activities" mentioned in s. 5(a)(ii) of the *Department of the Environment Act*. That provision reads:

5. The Minister, in exercising his powers and carrying out his duties and functions under section 4, shall

(a) initiate, recommend and undertake programs, and coordinate programs of the Government of Canada that are designed

...

- (ii) to ensure that new federal projects, programs and activities are assessed early in the planning process for potential adverse effects on the quality of the natural environment and that a further review is carried out of those projects, programs, and activities that are found to have probable significant adverse effects, and the results thereof taken into account [Emphasis added.]

The wording of that subparagraph, it is argued, is determinative of Parliament's intention to restrict the scope of the *Guidelines Order* to new federal projects, and consequently cannot apply to any project that is provincially sponsored. Here again, as I see it, Alberta seeks to place an unduly narrow construction on the extent of the Minister of the Environment's duties and functions under s. 6 of the Act. The *Guidelines Order* was enacted under s. 6, not s. 5, and the powers, duties and functions of the Minister there referred to encompass matters found in s. 4 as well as s. 5, including, *inter alia*, "the preservation and enhancement of the quality of the natural environment" (s. 4(1)(a)). Section 6 is thus not confined to new projects, programs and activities. Section 5 merely defines the Minister's minimum duties under s. 4. Section 4 is much broader. It is there that one finds the true range of the Minister's duties and functions related to environmental quality for which guidelines may be established.

Initiating Departments

Central to the arguments of the appellant Ministers is whether the *Guidelines Order* by its own terms has any application to the Oldman River Dam project. That question was not addressed by Alberta, and the Ministers concede that the Minister of Transport is an "initiating" department but argue that the *Guidelines Order* is inconsistent with and thus cannot stand with the *Navigable Waters Protection Act*. I have found the two enactments compatible for reasons already given, so there remains no issue between the parties that the provisions of the *Guidelines Order* govern the Minister of Transport. For the Minister of Fisheries and Oceans, it is argued that he is not bound to invoke the *Guidelines Order* in the instant case because he does not have "decision making authority" pursuant to the relevant provisions of the *Fisheries Act*. Because the matter of the *Guidelines Order*'s application was the subject of profound disagreement in the courts below, I feel that it is necessary to first consider the terms of the *Guidelines Order* to construe its general application provisions.

The starting point, in my view, must be s. 6 of the *Guidelines Order* which sets out its governing principle of application. It bears repeating here:

6. These Guidelines shall apply to any proposal

(a) that is to be undertaken directly by an initiating department;

(b) that may have an environmental effect on an area of federal responsibility;

(c) for which the Government of Canada makes a financial commitment; or

(d) that is located on lands, including the offshore, that are administered by the Government of Canada. [Emphasis added.]

There can be no serious doubt that the Oldman River Dam project may have an environmental effect on an area of federal responsibility, including the matters falling within s. 91 of the *Constitution Act, 1867* already identified -- i.e., navigation, Indians, lands reserved for the Indians and inland fisheries. Thus, the *Guidelines Order* applies if the project here is a "proposal" within the meaning of s. 2, which defines that term as follows:

2. In these Guidelines,

...

"proposal" includes any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility. [Emphasis added.]

If there is such a proposal, the *Guidelines Order* under ss. 3 and 10 allocates responsibility for the application of the process to the "initiating department" to ensure that it fully considers the environmental implications of a proposal properly before it and subjects such proposal to an initial assessment to determine whether there may be any potentially adverse environmental effects from it. The entity designated as an "initiating department" is also defined by s. 2. It provides that an:

2. In these Guidelines,

...

"initiating department" means any department that is, on behalf of the Government of Canada, the decision making authority for a proposal; [Emphasis added.]

It has been argued that the definite article "the" in the definition of "initiating department", as contrasted with the indefinite article "a" used in the definition of "proposal", may evince an intention to narrow the scope of the application of the *Guidelines Order* to projects where the federal government is the predominant or sole decision-making authority; see for example C. J. Gillespie, "Enforceable Rights from Administrative Guidelines?" (1989-1990), 3 *C.J.A.L.P.* 204. I do not agree. As I see it, the only consequence of shifting from the indefinite in "proposal" to the definite in "initiating department" is to designate the particular emanation of the Government of Canada that is charged with the implementation of the *Guidelines Order* once it has been determined that the federal government has a decision-making responsibility.

In *Angus v. Canada*, 1990 CanLII 7938 (FCA), [1990] 3 F.C. 410 (C.A.), Décary J.A. adopted a similar approach to construing the *Guidelines Order* but in a different context. There the issue was whether the *Guidelines Order* applied to an order in council issued by the Governor in Council under s. 64 of the *National Transportation Act*, 1987, R.S.C., 1985, c. 28 (3rd Supp.), which required VIA Rail to eliminate or reduce certain passenger services. Although the case turned on the narrow issue of whether the *Guidelines Order* was binding on the Governor in Council, which does not arise here, and Décary J.A. was dissenting on this point, his overall analysis of the application of the *Guidelines Order* is helpful where he stated, at p. 434:

The emphasis has been put by the learned Trial Judge and by the respondents on the words "initiating department" which relate to the administration of the Guidelines. I would rather put the emphasis on the words "proposal" and "Government of Canada", which relate to the "application" of the Guidelines. There is no requirement, in the definition of "proposal", that it be made by an initiating department within the meaning of the Guidelines. The intention of the drafter seems to be that whenever there is an activity that may have an environmental effect on an area of federal responsibility and whoever the decision-maker may be on behalf of the Government of Canada, be it a department, a Minister, the Governor in Council, the Guidelines apply and it then becomes a matter of practical consideration, when the final decision-maker is not a department, to find which department or Minister is the effective original decision-maker or the effective decision-undertaker, for there is always a department or a Minister involved "in the planning process" and "before irrevocable decisions are taken" or in the "direct undertaking" of a proposal.

Since the issue does not arise, I do not wish to comment on the application of the *Guidelines Order* to the Governor in Council, but the foregoing passage does capture the essence of its framework.

That is not to say that the *Guidelines Order* is engaged every time a project may have an environmental effect on an area of federal jurisdiction. There must first be a "proposal" which requires an "initiative, undertaking or activity for which the Government of Canada has a decision making responsibility". (Emphasis added.) In my view the proper construction to be placed on the term "responsibility" is that the federal government, having entered the field in a subject matter assigned to it under s. 91 of the *Constitution Act, 1867*, must have an affirmative regulatory duty pursuant to an Act of Parliament which relates to the proposed initiative, undertaking or activity. It cannot have been intended that the *Guidelines Order* would be invoked every time there is some potential environmental effect on a matter of federal jurisdiction. Therefore, "responsibility" within the definition of "proposal" should not be read as connoting matters falling generally within federal jurisdiction. Rather, it is meant to signify a legal duty or obligation. Once such duty exists, it is a matter of identifying the "initiating department" assigned responsibility for its performance, for it then becomes the decision-making authority for the proposal and thus responsible for initiating the process under the *Guidelines Order*.

That there must be an affirmative regulatory duty for a "decision making responsibility" to exist is evident from other provisions found in the *Guidelines Order* which suggest that the initiating department must have some degree of regulatory power over the project. For example s. 12 provides:

12. Every initiating department shall screen or assess each proposal for which it is the decision making authority to determine if

...

(f) the potentially adverse environmental effects that may be caused by the proposal are unacceptable, in which case the proposal shall either be modified and subsequently rescreened or reassessed or be abandoned.

Again, s. 14 reads:

14. Where, in any case, the initiating department determines that mitigation or compensation measures could prevent any of the potentially adverse environmental effects of a proposal from becoming significant, the initiating department shall ensure that such measures are implemented.

Those provisions amplify the regulatory authority with which the Government of Canada must have clothed itself under an Act of Parliament before it will have the requisite decision-making responsibility.

Applying that interpretation to the present case, it will be seen that the Oldman River Dam project qualifies as a proposal for which the Minister of Transport alone is the initiating department. In my view the *Navigable Waters Protection Act* does place an affirmative regulatory duty on the Minister of Transport. Under that Act there is a legislatively entrenched regulatory scheme in place in which the approval of the Minister is required before any work that substantially interferes with navigation may be placed in, upon, over or under, through or across any navigable water. Section 5 gives the Minister the power to impose such terms and conditions as he deems fit on any approval granted, and if those terms are not complied with the Minister may order the owner to remove or alter the work. For these reasons I would hold that this is a "proposal" for which the Minister of Transport is an "initiating department".

There is, however, no equivalent regulatory scheme under the *Fisheries Act* which is applicable to this project. Section 35 prohibits the carrying on of any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat, and s. 40 lends its weight to that prohibition by penal sanction. The Minister of Fisheries and Oceans is given a discretion under s. 37(1) to request information from any person who carries on or proposes to carry on any work or undertaking that will or may result in the alteration, disruption or destruction of fish habitat. However, the purpose of making such a request is not to further a regulatory procedure, but is merely to assist the Minister in exercising an *ad hoc* delegated legislative power granted under s. 37(2) to allow an exemption from the general prohibition. That provision reads:

37. . . .

(2) If, after reviewing any material or information provided under subsection (1) and affording the persons who provided it a reasonable opportunity to make representations, the Minister or a person designated by the Minister is of the opinion that an offence under subsection 40(1) or (2) is being or is likely to be committed, the Minister or a person designated by the Minister may, by order, subject to regulations made pursuant to paragraph (3)(b), or, if there are no such regulations in force, with the approval of the Governor in Council,

(a) require such modifications or additions to the work or undertaking or such modifications to any plans, specifications, procedures or schedules relating thereto as the Minister or a person designated by the Minister considers necessary in the circumstances, or

(b) restrict the operation of the work or undertaking,

and, with the approval of the Governor in Council in any case, direct the closing of the work or undertaking for such period as the Minister or a person designated by the Minister considers necessary in the circumstances. [Emphasis added.]

In my view a discretionary power to request or not to request information to assist a Minister in the exercise of a legislative function does not constitute a decision-making responsibility within the meaning of the *Guidelines Order*. Whereas the Minister of Transport is responsible under the terms of the *Navigable Waters Protection Act* in his capacity as regulator, the Minister of Fisheries and Oceans under s. 37 of the *Fisheries Act* has been given a limited *ad hoc* legislative power which does not constitute an affirmative regulatory duty. For that reason, I do not think the application for mandamus to compel the Minister to act is well founded.

Crown Immunity

Alberta takes the position that even if the *Guidelines Order* could be said to apply to the project in its own terms, the Crown in right of Alberta is not bound by the *Navigable Waters Protection Act* and hence there can be no "decision making responsibility" on the part of the Government of Canada within the meaning of the *Guidelines Order* which could affect the province. The appellant Ministers agree that the Act is not binding on the Crown in right of a province, but argue that Alberta has waived its immunity by making application for approval under the Act.

The starting point on this issue is s. 17 of the *Interpretation Act* which codifies the presumption that the Crown is not bound by statute:

17. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.

It is agreed by all concerned that there are no express words in the *Navigable Waters Protection Act* binding the Crown, and it therefore remains to be decided whether the Crown is bound by necessary

implication.

It is helpful to turn first to the common law. The leading case is the Privy Council decision in *Province of Bombay v. Municipal Corporation of Bombay*, [1947] A.C. 58. The issue there was whether the province of Bombay was exempt from the *City of Bombay Municipal Act*, 1888, which conferred power on the city to lay water-mains "into, through or under any land whatsoever within the city". The province owned land under which it was proposed to lay a water-main and it objected to the city's plans, unless the city complied with certain conditions which the city found unacceptable. Although there were no express words in the statute binding the Crown, the High Court of Bombay held that the Crown was bound by necessary implication because the statute "cannot operate with reasonable efficiency unless the Crown is bound".

The Privy Council agreed that the rule of Crown immunity admitted of at least one exception, necessary implication. Lord du Parc explained the exception as follows, at p. 61:

If, that is to say, it is manifest from the very terms of the statute, that it was the intention of the legislature that the Crown should be bound, then the result is the same as if the Crown had been expressly named. It must then be inferred that the Crown, by assenting to the law, agreed to be bound by its provisions.

Their Lordships then went on to consider the argument, supported by some early authority, that a statute enacted for the public good must be held to bind the Crown, because the Act was manifestly intended to secure the public welfare. That contention was rejected on the simple ground that all statutes are presumptively for the public good. That, however, did not necessarily mean that the purpose of an enactment is altogether irrelevant. At page 63, it is stated:

Their Lordships prefer to say that the apparent purpose of the statute is one element, and may be an important element, to be considered when an intention to bind the Crown is alleged. If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound.

As I mentioned in *Sparling v. Quebec (Caisse de dépôt et placement du Québec)*, 1988 CanLII 26 (SCC), [1988] 2 S.C.R. 1015, at p. 1022, some doubt was expressed in *R. v. Eldorado*

Nuclear Ltd., 1983 CanLII 34 (SCC), [1983] 2 S.C.R. 551, and *Her Majesty in right of Alberta v. Canadian Transport Commission*, 1977 CanLII 150 (SCC), [1978] 1 S.C.R. 61 (cf. *R. v. Ouellette*, 1980 CanLII 9 (SCC), [1980] 1 S.C.R. 568), as to whether the necessary implication exception survived the 1967 revision of what is now s. 17 of the *Interpretation Act*. There may also have been room for doubt as to whether the "wholly frustrated" test articulated in *Bombay* was determinative in finding the Crown bound by necessary implication. Professor Hogg in his text *Liability of the Crown* (2nd ed. 1989), argues that the necessary implication exception set out at the beginning of *Bombay* refers to a contextual analysis of the statute whereby one may discern an intention to bind the Crown by logical implication, and is thus a different species of necessary implication from that which arises when the purpose of the statute is wholly frustrated. He states, at p. 210:

What is contemplated in this passage is that a statute, while lacking an express statement that the Crown is bound, may contain references to the Crown or to governmental activity which make no sense unless the Crown is bound. If these textual indications are sufficiently clear, the courts will hold that the presumption is rebutted and the Crown is bound.

However, any uncertainty in the law on these points was put to rest by this Court's recent decision in *Alberta Government Telephones*, *supra*. After reviewing the authorities, Dickson C.J. concluded, at p. 281:

In my view, in light of *PWA* and *Eldorado*, the scope of the words "mentioned or referred to" must be given an interpretation independent of the supplanted common law. However, the qualifications in *Bombay*, *supra*, are based on sound principles of interpretation which have not entirely disappeared over time. It seems to me that the words "mentioned or referred to" in s. 16 [now s. 17 of the *Interpretation Act*] are capable of encompassing: (1) expressly binding words ("Her Majesty is bound"); (2) a clear intention to bind which, in *Bombay* terminology, "is manifest from the very terms of the statute", in other words, an intention revealed when provisions are read in the context of other textual provisions, as in *Ouellette*, *supra*; and, (3) an intention to bind where the purpose of the statute would be "wholly frustrated" if the government were not bound, or, in other words, if an absurdity (as opposed to simply an undesirable result) were produced. These three points should provide a guideline for when a statute has clearly conveyed an intention to bind the Crown.

In my view, this passage makes it abundantly clear that a contextual analysis of a statute may reveal an intention to bind the Crown if one is irresistibly drawn to that conclusion through logical inference.

That analysis however cannot be made in a vacuum. Accordingly, the relevant "context" should not be too narrowly construed. Rather the context must include the circumstances which led to the enactment of the statute and the mischief to which it was directed. This view is consistent with the reasoning in *Bombay* as is evident from the passages quoted above where the test for necessary implication is expressed in terms of the time of enactment. In fact the approach taken by the High Court of Bombay in that case was criticized by the Privy Council for that very reason, at p. 62:

Even if the High Court were correct in its interpretation of the principle, its method of applying it would be open to the objection that regard should have been had, not to the conditions which it found to be in existence many years after the passing of the Act, but to the state of things which existed, or could be shown to have been within the contemplation of the legislature, in the year 1888.

I begin then by examining the circumstances that existed when the legislation was first enacted, bearing in mind that the general subject matter of the statute concerns navigation.

In so doing, it is useful to return to some of the fundamental principles of water law in this area, particularly those pertaining to navigable waters. It is important to recall that the law of navigation in Canada has two fundamental dimensions -- the ancient common law public right of navigation and the constitutional authority over the subject matter of navigation -- both of which are necessarily interrelated by virtue of [s. 91\(10\)](#) of the [Constitution Act, 1867](#) which assigns exclusive legislative authority over navigation to Parliament.

The common law of England has long been that the public has a right to navigate in tidal waters, but though non-tidal waters may be navigable in fact the public has no right to navigate in them, subject to certain exceptions not material here. Except in the Atlantic provinces, where different considerations may well apply, in Canada the distinction between tidal and non-tidal waters was abandoned long ago; see *In Re Provincial Fisheries* (1896), [1896 CanLII 76 \(SCC\)](#), 26 S.C.R. 444; for a summary of the cases, see my book on *Water Law in Canada* (1973), at pp. 178-80. Instead the rule is that if waters are navigable in fact, whether or not the waters are tidal or non-tidal, the public right of navigation exists. That is the case in Alberta where the Appellate Division of the Supreme Court, applying the *North-West Territories Act*, R.S.C. 1886, c. 50, rightly held in *Flewelling*

v. Johnston (1921), 1921 CanLII 357 (AB CA), 59 D.L.R. 419, that the English rule was not suitable to the conditions of the province. There is no issue between the parties that the Oldman River is in fact navigable.

The nature of the public right of navigation has been the subject of considerable judicial comment over time, but certain principles have held fast. First, the right of navigation is not a property right, but simply a public right of way; see *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839 (H.L.), at p. 846. It is not an absolute right, but must be exercised reasonably so as not to interfere with the equal rights of others. Of particular significance for this case is that the right of navigation is paramount to the rights of the owner of the bed, even when the owner is the Crown. For example, in *Attorney-General v. Johnson* (1819), 2 Wils. Ch. 87, 37 E.R. 240, a relator action to enjoin a public nuisance causing an obstruction in the River Thames and an adjoining thoroughfare along its bank, the Lord Chancellor said, at p. 246:

I consider it to be quite immaterial whether the title to the soil between high and low water-mark be in the Crown, or in the City of *London*, or whether the City of *London* has the right of conservancy, operating as a check on an improper use of the soil, the title being in the Crown, or whether either Lord *Grosvenor* or Mr. *Johnson* have any derivative title by grant from any one having the power to grant. . . . It is my present opinion, that the Crown has not the right either itself to use its title to the soil between high and low water-mark as a nuisance, or to place upon that soil what will be a nuisance to the Crown's subjects. If the Crown has not such a right, it could not give it to the City of *London*, nor could the City transfer it to any other person.

This Court later came to the same conclusion in *Wood v. Esson* (1884), 1884 CanLII 44 (SCC), 9 S.C.R. 239. There, the plaintiffs had extended their wharf so as to interfere with access to the defendant's wharf. The defendant pulled up the piles and removed the obstruction to allow passage to his wharf, and the plaintiffs then brought an action in trespass on the ground that they enjoyed title under a grant from the province of Nova Scotia to the soil of the harbour on which the wharf was constructed. The Court held that the defendant was entitled to abate the nuisance created by the obstruction to navigation in the harbour. Strong J. remarked, at p. 243:

The title to the soil did not authorize the plaintiffs to, extend their wharf so as to be a public nuisance, which upon the evidence, such an obstruction of the harbour amounted to, for the Crown cannot grant the right so to obstruct navigable waters; nothing short of legislative sanction can take from anything which hinders navigation the character of a nuisance. [Emphasis added.]

This passage also underscores another aspect of the paramountcy of the public right of navigation -- that it can only be modified or extinguished by an authorizing statute, and as such a Crown grant of land of itself does not and cannot confer a right to interfere with navigation; see also *The Queen v. Fisher* (1891), 1891 CanLII 202 (CA EXC), 2 Ex. C.R. 365; *In Re Provincial Fisheries*, *supra*, at p. 549, *per* Girouard J.; and *Reference re Waters and Water-Powers*, 1929 CanLII 72 (SCC), [1929] S.C.R. 200.

What is more, the provinces are constitutionally incapable of enacting legislation authorizing an interference with navigation, since s. 91(10) of the *Constitution Act, 1867* gives Parliament exclusive jurisdiction to legislate respecting navigation. That was made clear by this Court in *Queddy River Driving Boom Co. v. Davidson* (1883), 1883 CanLII 60 (SCC), 10 S.C.R. 222, where an injunction was sought to restrain the defendant company from erecting piers and booms in the Queddy River in New Brunswick. The defendant relied on its constituent legislation, passed by the provincial legislature, which permitted a certain degree of interference with navigation. The only issue before the Court was the authority of the legislature to pass the Act incorporating the defendant. Ritchie C.J. concluded, at p. 232:

. . . the legal question in this case, which is, to which legislative power, that of the Dominion Parliament or the Assembly of *New Brunswick*, belongs the right to authorize the obstruction by piers or booms of a public tidal and navigable river, and thereby injuriously interfere with and abridge the public right of navigation in such tidal navigable waters. It is not disputed that this legislation interfered with the navigation of the river . . .

I think there can be no doubt that the legislative control of navigable waters, such as are in question in this case, belongs exclusively to the Dominion Parliament. Everything connected with navigation and shipping seems to have been carefully confided to the Dominion Parliament, by the B.N.A. Act.

These cases served as an impetus for the enactment of what ultimately became the *Navigable Waters Protection Act*. Of relevance here is the enactment of one of the antecedent pieces of legislation -- *An Act respecting booms and other works constructed in navigable waters whether under the authority of Provincial Acts or otherwise*, S.C. 1883, c. 43 -- preceding the consolidated Act which was to govern all aspects of the protection of navigable waters. Section 1 provided:

1. No boom, dam or aboiteau shall be constructed whether under the authority of an Act of a Legislature of a Province of Canada, or under the authority of an Ordinance of the North-West Territories or of the District of Keewatin or otherwise, so as to interfere with navigation, unless the site thereof has been approved, and unless the boom, dam or aboiteau has been built and is maintained in accordance with plans approved by the Governor General in Council.

The Act also provided a means whereby existing structures which interfered with navigation, and thus created a public nuisance, could be legalized by seeking approval from the Governor General in Council.

That statute was but one enactment in which Parliament exercised its jurisdiction to prevent the erection or continuation of impediments to navigation. It had already legislated, *inter alia*, in respect of bridges (*An Act respecting Bridges over navigable waters, constructed under the authority of Provincial Acts*, S.C. 1882, c. 37); the removal of obstructions and wrecks from navigable waters (*An Act for the removal of obstructions, by wreck and like causes, in Navigable Waters of Canada, and other purposes relative to wrecks*, S.C. 1874, c. 29); and effluent from sawmills into navigable waters (*An Act for the better protection of Navigable Streams and Rivers*, S.C. 1873, c. 65).

The consolidation process began with the passage of *An Act respecting certain works constructed in or over Navigable Waters*, S.C. 1886, c. 35, dealing with construction of any "work" in navigable waters, and its companion legislation *An Act respecting the protection of Navigable Waters*, S.C. 1886, c. 36, concerning obstruction of navigable waters by wrecks. Section 1 of the former compendiously defined the term "work" to mean:

1. In this Act, unless the context otherwise requires, the expression "work" means and includes any bridge, boom, dam, aboiteau, wharf, dock, pier or other structure, and the approaches or other works necessary or appurtenant thereto; . . .

The definition was far more comprehensive in scope than its predecessors, and this aspect of the law, coupled with the requirement for approval from the Governor in Council of all such works, caused considerable consternation at the time as to the breadth of its potential retrospective effect for existing structures erected in navigable waters.

However, the statute was merely declaratory of the common law. To the extent that a structure interfered with the public right of navigation, it was a public nuisance, and the provinces were constitutionally powerless to authorize an interference of that nature. The retrospective effect of the law with respect to works built under the statutory authority of a provincial legislature, however, only went back as far as the time the province joined Confederation. Section 7 provided:

7. Nothing hereinbefore contained, except the provisions of the first and fifth sections hereof, shall apply to any work constructed under the authority of any Act of the Parliament of Canada, or of the legislature of the late Province of Canada, or of the legislature of any Province now forming part of Canada, passed before such Province became a part thereof.

Thus, no permission would be required for a work authorized by the legislature of a province before it joined Canada. That is because the province would then have had the constitutional jurisdiction to authorize the work. Similarly, the Act did not apply to works constructed under any other Act of Parliament so that it was clear which Act governed. Parliament had already passed legislation authorizing certain works of that nature; see for example *An Act to authorize the Corporation of the Town of Emerson to construct a Free Passenger and Traffic Bridge over the Red River in the Province of Manitoba*, S.C. 1880, c. 44.

The 1886 Acts were re-enacted in R.S.C. 1886, cc. 91 and 92, and consolidated in R.S.C. 1906, c. 115, when they were given the short title *Navigable Waters' Protection Act*. The Act has remained substantially the same since. In particular, s. 7 of c. 35 of the 1886 statute has remained materially unaltered, and is now found in s. 4 of the present Act. It was this provision that the Court of Appeal relied upon to find that the Crown in right of Alberta was bound by necessary implication. I agree with this position. By expressly excepting from the operation of the Act works authorized by Parliament since Confederation and by pre-Confederation provincial legislatures, at a time these bodies had power to interfere with navigation, the statute by necessary implication must be taken to provide that post-Confederation works undertaken by the provinces are subject to the Act. There are, however, even more fundamental considerations that lead to the view that the conclusion arrived at by the Court of Appeal was correct. To these I now turn.

In my view, the circumstances surrounding the passage of the legislation, informing as they must the context of the statute, do lead to the logical inference that the Crown in right of a province is bound by the Act by necessary implication. Neither the Crown nor a grantee of the Crown may interfere with the public right of navigation without legislative authorization. The proprietary right the Crown in right of Alberta may have in the bed of the Oldman River is subject to that right of navigation, legislative jurisdiction over which has been exclusively vested in Parliament. Parliament has entered the field principally through the passage of the *Navigable Waters Protection Act* which delegated to the Governor General in Council, and now the Minister of Transport, authority to permit construction of what would otherwise be a public nuisance in navigable waters. The Crown in right of Alberta requires statutory authorization from Parliament to erect any obstruction that substantially interferes with navigation in the Oldman River, and the *Navigable Waters Protection Act* is the means by which it must be obtained. It follows that the Crown in right of Alberta is bound by the Act, for it is the only practicable procedure available for getting approval.

My colleague, Stevenson J., has however referred to the statement of Fitzpatrick C.J. in *Champion v. City of Vancouver*, 1917 CanLII 693 (SCC), [1918] 1 W.W.R. 216 (S.C.C.), to the effect that the Act was merely permissive and did not prevent a third party from bringing action for an interference with the public right of navigation despite the Minister's approval of the work. This statement, however, was mere dicta. The issue there was whether the structure concerned interfered with the plaintiffs' private right of access. The other two majority judges confined their remarks to this matter, and the two minority judges *a fortiori* did not agree with the statement. For my part, I prefer the view expressed in *Isherwood v. Ontario and Minnesota Power Co.* (1911), 18 O.W.R. 459 (Div. Ct.), that the Act does permit interference with the public right of navigation but does not interfere with the private rights of individuals. That is the proposition for which *Champion* is authority.

For these reasons I have concluded that the Crown in right of Alberta is, as a matter of necessary or logical implication, bound by the *Navigable Waters Protection Act*. I am also of the view that the purpose of the Act would be wholly frustrated if this were not the case. I am affected by the

considerations referred to by Stone J.A. that the provinces are among the bodies that are likely to engage in projects -- bridges, for example -- that may interfere with navigation, and that this was the case in this country well before the passage of the Act, but here again I am affected as well by even more fundamental considerations, namely the nature of navigation in this country and of Parliament's legislative power over this activity.

Certain navigable systems form a critical part of the interprovincial transportation networks which are essential for international trade and commercial activity in Canada. With respect to the contrary view, it makes little sense to suggest that any semblance of Parliament's legislative objective in exercising its jurisdiction for the conservancy of navigable waters would be achieved were the Crown to be excluded from the operation of the Act. The regulation of navigable waters must be viewed functionally as an integrated whole, and when so viewed it would result in an absurdity if the Crown in right of a province was left to obstruct navigation with impunity at one point along a navigational system, while Parliament assiduously worked to preserve its navigability at another point.

The practical necessity for a uniform regulatory regime for navigable waters has already been recognized by this Court in *Whitbread v. Walley*, [1990 CanLII 33 \(SCC\)](#), [1990] 3 S.C.R. 1273, and the reasoning given there in support of a single body of maritime law within federal jurisdiction is equally applicable to this case. At pages 1294-95, it is stated:

Quite apart from judicial authority, the very nature of the activities of navigation and shipping, at least as they are practised in this country, makes a uniform maritime law which encompasses navigable inland waterways a practical necessity. Much of the navigational and shipping activity that takes place on Canada's inland waterways is closely connected with that which takes place within the traditional geographic sphere of maritime law. This is most obviously the case when one looks to the Great Lakes and the St. Lawrence Seaway, which are to a very large degree an extension, or alternatively the beginning, of the shipping lanes by which this country does business with the world. But it is also apparent when one looks to the many smaller rivers and waterways that serve as ports of call for ocean going vessels and as the points of departure for some of Canada's most important exports. This is undoubtedly one of the considerations that led the courts of British North America to rule that the public right of navigation, in contradistinction to the English position, extended to all navigable rivers regardless of whether or not they were within the ebb and flow of the tide It probably also explains why the Fathers of Confederation thought it necessary to assign the broad and general power over navigation and shipping to the central rather than the provincial governments

Were the Crown in right of a province permitted to undermine the integrity of the essential navigational networks in Canadian waters, the legislative purpose of the *Navigable Waters Protection Act* would, in my view, effectively be emasculated. In light of these findings, it is unnecessary to comment on the issue of waiver that was raised by the appellant Ministers.

Constitutional Question

The constitutional question asks whether the *Guidelines Order* is so broad as to offend ss. 92 and 92A of the *Constitution Act, 1867*. However, no argument was made with respect to s. 92A for the apparent reason that the Oldman River Dam project does not, in the appellants' view, fall within the ambit of that provision. At all events, the matter is of no moment. The process of judicial review of legislation which is impugned as *ultra vires* Parliament was recently elaborated on in *Whitbread v. Walley*, *supra*, and does not bear repetition here, save to remark that if the *Guidelines Order* is found to be legislation that is in pith and substance in relation to matters within Parliament's exclusive jurisdiction, that is the end of the matter. It would be immaterial that it also affects matters of property and civil rights (*Whitbread*, at p. 1286). The analysis proceeds first by identifying whether in pith and substance the legislation falls within a matter assigned to one or more of the heads of legislative power.

While various expressions have been used to describe what is meant by the "pith and substance" of a legislative provision, in *Whitbread v. Walley* I expressed a preference for the description "the dominant or most important characteristic of the challenged law". Naturally, the parties have advanced quite different features of the *Guidelines Order* as representing its most important characteristic. For Alberta, it is the manner in which it is said to encroach on provincial rights, although no specific matter has been identified other than general references to the environment. Alberta argues that Parliament has no plenary jurisdiction over the environment, it being a matter of legislative jurisdiction shared by both levels of government, and that the *Guidelines Order* has crossed the line which circumscribes Parliament's authority over the environment. The appellant Ministers argue that in pith and substance the *Guidelines Order* is merely a process to

facilitate federal decision-making on matters that fall within Parliament's jurisdiction -- a proposition with which the respondent substantially agrees.

The substance of Alberta's argument is that the *Guidelines Order* purports to give the Government of Canada general authority over the environment in such a way as to trench on the province's exclusive legislative domain. Alberta argues that the *Guidelines Order* attempts to regulate the environmental effects of matters largely within the control of the province and, consequently, cannot constitutionally be a concern of Parliament. In particular, it is said that Parliament is incompetent to deal with the environmental effects of provincial works such as the Oldman River Dam.

I agree that the *Constitution Act, 1867* has not assigned the matter of "environment" *sui generis* to either the provinces or Parliament. The environment, as understood in its generic sense, encompasses the physical, economic and social environment touching several of the heads of power assigned to the respective levels of government. Professor Gibson put it succinctly several years ago in his article "Constitutional Jurisdiction over Environmental Management in Canada" (1973), 23 *U.T.L.J.* 54, at p. 85:

. . . "environmental management" does not, under the existing situation, constitute a homogeneous constitutional unit. Instead, it cuts across many different areas of constitutional responsibility, some federal and some provincial. And it is no less obvious that "environmental management" could never be treated as a constitutional unit under one order of government in any constitution that claimed to be federal, because no system in which one government was so powerful would be federal.

I earlier referred to the environment as a diffuse subject, echoing what I said in *R. v. Crown Zellerbach Canada Ltd.*, *supra*, to the effect that environmental control, as a subject matter, does not have the requisite distinctiveness to meet the test under the "national concern" doctrine as articulated by Beetz J. in *Reference re Anti-Inflation Act*, *supra*. Although I was writing for the minority in *Crown Zellerbach*, this opinion was not contested by the majority. The majority simply decided that marine pollution was a matter of national concern because it was predominately extra-provincial and international in character and implications, and possessed sufficiently distinct and separate characteristics as to make it subject to Parliament's residual power.

It must be recognized that the environment is not an independent matter of legislation under the *Constitution Act, 1867* and that it is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty. A variety of analytical constructs have been developed to grapple with the problem, although no single method will be suitable in every instance. Some have taken a functional approach by describing specific environmental concerns and then allocating responsibility by reference to the different heads of power; see, for example, Gibson, *supra*. Others have looked at the problem from the perspective of testing the ambit of federal powers according to their general description as "conceptual" or "global" (e.g., criminal law, taxation, trade and commerce, spending and the general residuary power) as opposed to "functional" (e.g., navigation and fisheries); see P. Emond, "The Case for a Greater Federal Role in the Environmental Protection Field: An Examination of the Pollution Problem and the Constitution" (1972), 10 *Osgoode Hall L.J.* 647, and M. E. Hatherly, *Constitutional Jurisdiction in Relation to Environmental Law*, background paper prepared for the Protection of Life Project, Law Reform Commission of Canada (1984).

In my view the solution to this case can more readily be found by looking first at the catalogue of powers in the *Constitution Act, 1867* and considering how they may be employed to meet or avoid environmental concerns. When viewed in this manner it will be seen that in exercising their respective legislative powers, both levels of government may affect the environment, either by acting or not acting. This can best be understood by looking at specific powers. A revealing example is the federal Parliament's exclusive legislative power over interprovincial railways under ss. 92(10)(a) and 91(29) of the *Constitution Act, 1867*. The regulation of federal railways has been entrusted to the National Transportation Agency pursuant to the *National Transportation Act, 1987*, which enjoys a broad mandate as summarized in the declaration found in s. 3, which reads in part:

3. (1) It is hereby declared that a safe, economic, efficient and adequate network of viable and effective transportation services making the best use of all available modes of transportation at the lowest total cost is essential to serve the transportation needs of shippers and travellers and to maintain the economic well-being and growth of Canada and its regions and that those objectives are most likely to be achieved when all carriers are able to compete, both within and among the various modes of transportation, under conditions ensuring that, having due regard to national policy and to legal and constitutional requirements,

. . .

(d) transportation is recognized as a key to regional economic development and commercial viability of transportation links is balanced with regional economic development objectives in order that the potential economic strengths of each region may be realized, . . .

This gives some insight into the scope of Parliament's legislative jurisdiction over railways and the manner in which it is charged with the responsibility of weighing both the national and local socio-economic ramifications of its decisions. Moreover, it cannot be seriously questioned that Parliament may deal with biophysical environmental concerns touching upon the operation of railways so long as it is legislation relating to railways. This could involve issues such as emission standards or noise abatement provisions.

To continue with the example, one might postulate the location and construction of a new line which would require approval under the relevant provisions of the *Railway Act*, R.S.C., 1985, c. R-3. That line may cut through ecologically sensitive habitats such as wetlands and forests. The possibility of derailment may pose a serious hazard to the health and safety of nearby communities if dangerous commodities are to be carried on the line. On the other hand, it may bring considerable economic benefit to those communities through job creation and the multiplier effect that will have in the local economy. The regulatory authority might require that the line circumvent residential districts in the interests of noise abatement and safety. In my view, all of these considerations may validly be taken into account in arriving at a final decision on whether or not to grant the necessary approval. To suggest otherwise would lead to the most astonishing results, and it defies reason to assert that Parliament is constitutionally barred from weighing the broad environmental repercussions, including socio-economic concerns, when legislating with respect to decisions of this nature.

The same can be said for several other subject matters of legislation, including one of those before the Court, namely navigation and shipping. Some provisions of the *Navigable Waters Protection Act* are aimed directly at biophysical environmental concerns that affect navigation. Sections 21 and 22 read:

21. No person shall throw or deposit or cause, suffer or permit to be thrown or deposited any sawdust, edgings, slabs, bark or like rubbish of any description whatever that is liable to interfere with navigation in any water, any part of which is navigable or that flows into any navigable water.

22. No person shall throw or deposit or cause, suffer or permit to be thrown or deposited any stone, gravel, earth, cinders, ashes or other material or rubbish that is liable to sink to the bottom in any water, any part of which is navigable or that flows into any navigable water, where there are not at least twenty fathoms of water at all times, but nothing in this section shall be construed so as to permit the throwing or depositing of any substance in any part of a navigable water where that throwing or depositing is prohibited by or under any other Act.

As I mentioned earlier in these reasons, the Act has a more expansive environmental dimension, given the common law context in which it was enacted. The common law proscribed obstructions that interfered with the paramount right of public navigation. Several of the "works" referred to in the Act do not in any way improve navigation. Bridges do not assist navigation, nor do many dams. Thus, in deciding whether a work of that nature is to be permitted, the Minister would almost surely have to weigh the advantages and disadvantages resulting from the interference with navigation. This could involve environmental concerns such as the destruction to fisheries, and all the *Guidelines Order* does then is to extend the ambit of his concerns.

It must be noted that the exercise of legislative power, as it affects concerns relating to the environment, must, as with other concerns, be linked to the appropriate head of power, and since the nature of the various heads of power under the *Constitution Act, 1867* differ, the extent to which environmental concerns may be taken into account in the exercise of a power may vary from one power to another. For example, a somewhat different environmental role can be played by Parliament in the exercise of its jurisdiction over fisheries than under its powers concerning railways or navigation since the former involves the management of a resource, the others activities. The foregoing observations may be demonstrated by reference to two cases involving fisheries. In *Fowler v. The Queen*, 1980 CanLII 201 (SCC), [1980] 2 S.C.R. 213, the Court found that s. 33(3) of the *Fisheries Act* was *ultra vires* Parliament because its broad prohibition enjoining the deposit of "slash, stumps or other debris" into water frequented by fish was not sufficiently linked to any actual or potential harm to fisheries. However, s. 33(2), prohibiting the deposit of deleterious substances in any place where they might enter waters frequented by fish, was found *intra vires* Parliament under s.

91(12) in *Northwest Falling Contractors Ltd. v. The Queen*, 1980 CanLII 210 (SCC), [1980] 2 S.C.R. 292.

The provinces may similarly act in relation to the environment under any legislative power in s. 92. Legislation in relation to local works or undertakings, for example, will often take into account environmental concerns. What is not particularly helpful in sorting out the respective levels of constitutional authority over a work such as the Oldman River dam, however, is the characterization of it as a "provincial project" or an undertaking "primarily subject to provincial regulation" as the appellant Alberta sought to do. That begs the question and posits an erroneous principle that seems to hold that there exists a general doctrine of interjurisdictional immunity to shield provincial works or undertakings from otherwise valid federal legislation. As Dickson C.J. remarked in *Alberta Government Telephones*, *supra*, at p. 275:

It should be remembered that one aspect of the pith and substance doctrine is that a law in relation to a matter within the competence of one level of government may validly affect a matter within the competence of the other. Canadian federalism has evolved in a way which tolerates overlapping federal and provincial legislation in many respects, and in my view a constitutional immunity doctrine is neither desirable nor necessary to accommodate valid provincial objectives.

What is important is to determine whether either level of government may legislate. One may legislate in regard to provincial aspects, the other federal aspects. Although local projects will generally fall within provincial responsibility, federal participation will be required if the project impinges on an area of federal jurisdiction as is the case here.

There is, however, an even more fundamental fallacy in Alberta's argument, and that concerns the manner in which constitutional powers may be exercised. In legislating regarding a subject, it is sufficient that the legislative body legislate on that subject. The practical purpose that inspires the legislation and the implications that body must consider in making its decision are another thing. Absent a colourable purpose or a lack of *bona fides*, these considerations will not detract from the fundamental nature of the legislation. A railway line may be required to locate so as to avoid a nuisance resulting from smoke or noise in a municipality, but it is nonetheless railway regulation.

An Australian case, *Murphyores Incorporated Pty. Ltd. v. Commonwealth of Australia* (1976), 136 C.L.R. 1 (H.C.), illustrates the point well in a context similar to the present. There the plaintiffs carried on the business of mining for mineral sands from which they produced zircon and rutile concentrates. The export of those substances was regulated by the *Customs (Prohibited Exports) Regulations* (passed pursuant to the Commonwealth's trade and commerce power) and approval from the Minister of Minerals and Energy was required for their export. The issue in the case arose when an inquiry was directed to be made under the *Environment Protection (Impact of Proposals) Act 1974-1975* (Cth), into the environmental impact of mineral extraction from the area in which the plaintiffs had their mining leases. The Minister responsible informed the plaintiffs that the report of that inquiry would have to be considered before allowing any further export of concentrates.

The plaintiffs contended that the Minister could only consider matters relevant to "trading policy" within the scope of the Commonwealth's trade and commerce power, rather than the environmental concerns arising from the anterior mining activity which was predominantly a state interest. That argument was unanimously rejected, Stephen J. putting it as follows, at p. 12:

The administrative decision whether or not to relax a prohibition against the export of goods will necessarily be made in the light of considerations affecting the mind of the administrator; but whatever their nature the consequence will necessarily be expressed in terms of trade and commerce, consisting of the approval or rejection of an application to relax the prohibition on exports. It will therefore fall within constitutional power. The considerations in the light of which the decision is made may not themselves relate to matters of trade and commerce but that will not deprive the decision which they induce of its inherent constitutionality for the decision will be directly on the subject matter of exportation and the considerations actuating that decision will not detract from the character which its subject matter confers upon it.

I hasten to add that I do not mean to draw any parallels between the Commonwealth's trade and commerce power as framed in the Australian Constitution and that found in the Canadian Constitution. Obviously there are important differences in the two documents, but the general point made in *Murphyores* is nonetheless valid in the present case. The case points out the danger of falling into the conceptual trap of thinking of the environment as an extraneous matter in making legislative choices or administrative decisions. Clearly, this cannot be the case. Quite simply, the environment is comprised of all that is around us and as such must be a part of what actuates many decisions of any moment.

Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making. Its fundamental purpose is summarized by R. Cotton and D. P. Emond in "Environmental Impact Assessment", in J. Swaigen, ed., *Environmental Rights in Canada* (1981), 245, at p. 247:

The basic concepts behind environmental assessment are simply stated: (1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; (2) decision making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation.

As a planning tool it has both an information-gathering and a decision-making component which provide the decision maker with an objective basis for granting or denying approval for a proposed development; see M. I. Jeffery, *Environmental Approvals in Canada* (1989), at p. 1.2, {SS} 1.4; D. P. Emond, *Environmental Assessment Law in Canada* (1978), at p. 5. In short, environmental impact assessment is simply descriptive of a process of decision-making.

The *Guidelines Order* has merely added to the matters that federal decision makers should consider. If the Minister of Transport was specifically assigned the task of weighing concerns regarding fisheries in weighing applications to construct works in navigable waters, could there be any complaint that this was *ultra vires*? All that it would mean is that a decision maker charged with making one decision must also consider other matters that fall within federal power. I am not unmindful of what was said by counsel for the Attorney General for Saskatchewan who sought to characterize the *Guidelines Order* as a constitutional Trojan horse enabling the federal government, on the pretext of some narrow ground of federal jurisdiction, to conduct a far ranging inquiry into matters that are exclusively within provincial jurisdiction. However, on my reading of the *Guidelines Order* the "initiating department" assigned responsibility for conducting an initial assessment, and if required, the environmental review panel, are only given a mandate to examine matters directly related to the areas of federal responsibility affected. Thus, an initiating department or panel cannot use the *Guidelines Order* as a colourable device to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power.

Because of its auxiliary nature, environmental impact assessment can only affect matters that are "truly in relation to an institution or activity that is otherwise within [federal] legislative jurisdiction"; see *Devine v. Quebec (Attorney General)*, [1988 CanLII 20 \(SCC\)](#), [1988] 2 S.C.R. 790, at p. 808. Given the necessary element of proximity that must exist between the impact assessment process and the subject matter of federal jurisdiction involved, this legislation can, in my view, be supported by the particular head of federal power invoked in each instance. In particular, the *Guidelines Order* prescribes a close nexus between the social effects that may be examined and the environmental effects generally. Section 4 requires that the social effects examined at the initial assessment stage be "directly related" to the potential environmental effects of a proposal, as does s. 25 in respect of the terms of reference under which an environmental assessment panel may operate. Moreover, where the *Guidelines Order* has application to a proposal because it affects an area of federal jurisdiction, as opposed to the other three bases for application enumerated in s. 6, the environmental effects to be studied can only be those which may have an impact on the areas of federal responsibility affected.

I should make it clear, however, that the scope of assessment is not confined to the particular head of power under which the Government of Canada has a decision-making responsibility within the meaning of the term "proposal". Such a responsibility, as I stated earlier, is a necessary condition to engage the process, but once the initiating department has thus been given authority to embark on an assessment, that review must consider the environmental effect on all areas of federal jurisdiction. There is no constitutional obstacle preventing Parliament from enacting legislation under several heads of power at the same time; see *Jones v. Attorney General of New Brunswick*, [1974 CanLII 164 \(SCC\)](#), [1975] 2 S.C.R. 182, and *Knox Contracting Ltd. v. Canada*, [1990 CanLII 71 \(SCC\)](#), [1990] 2 S.C.R. 338, at p. 350. In the case of the *Guidelines Order*, Parliament has conferred upon one institution (the "initiating department") the responsibility, in the exercise of its decision-making authority, for assessing the environmental implications on all areas of federal jurisdiction potentially affected. Here, the Minister of Transport, in his capacity of decision maker under the *Navigable Waters Protection Act*, is directed to consider the environmental impact of the dam on such

areas of federal responsibility as navigable waters, fisheries, Indians and Indian lands, to name those most obviously relevant in the circumstances here.

In essence, then, the *Guidelines Order* has two fundamental aspects. First, there is the substance of the *Guidelines Order* dealing with environmental impact assessment to facilitate decision-making under the federal head of power through which a proposal is regulated. As I mentioned earlier, this aspect of the *Guidelines Order* can be sustained on the basis that it is legislation in relation to the relevant subject matters enumerated in s. 91 of the *Constitution Act, 1867*. The second aspect of the legislation is its procedural or organizational element that coordinates the process of assessment, which can in any given case touch upon several areas of federal responsibility, under the auspices of a designated decision maker, or in the vernacular of the *Guidelines Order*, the "initiating department". This facet of the legislation has as its object the regulation of the institutions and agencies of the Government of Canada as to the manner in which they perform their administrative functions and duties. This, in my view, is unquestionably *intra vires* Parliament. It may be viewed either as an adjunct of the particular legislative powers involved, or, in any event, be justifiable under the residuary power in s. 91.

The Court adopted a similar approach in the related situation that arose in *Jones v. Attorney General of New Brunswick, supra*. There this Court dealt with the constitutional validity, on a division of powers basis, of certain provisions of the *Official Languages Act*, R.S.C. 1970, c. O-2, the *Evidence Act* of New Brunswick, R.S.N.B. 1952, c. 74, and the *Official Languages of New Brunswick Act*, S.N.B. 1969, c. 14. The federal legislation made English and French the official languages of Canada, and the impugned provisions recognized both languages in the federal courts and in criminal proceedings. Laskin C.J. held, at p. 189:

. . . I am in no doubt that it was open to the Parliament of Canada to enact the *Official Languages Act* (limited as it is to the purposes of the Parliament and Government of Canada and to the institutions of that Parliament and Government) as being a law "for the peace, order and good government of Canada in relation to [a matter] not coming within the classes of subjects . . . assigned exclusively to the Legislatures of the Provinces". The quoted words are in the opening paragraph of s. 91 of the *British North America Act*; and, in relying on them as constitutional support for the *Official Languages Act*, I do so on the basis of the purely residuary character of the legislative power thereby conferred. No authority need be cited for the exclusive power of the Parliament of Canada to legislate in relation to the operation and administration of the institutions and agencies of the Parliament and

Government of Canada. Those institutions and agencies are clearly beyond provincial reach. [Emphasis added.]

The Court went on to uphold the federal legislation on the additional grounds that it was valid under Parliament's criminal jurisdiction (s. 91(27)) and federal power over federal courts (s. 101). Laskin C.J. also remarked that there was no constitutional impediment preventing Parliament from adding to the range of privileged or obligatory use of English and French in institutions or activities that are subject to federal control. For similar reasons, the provincial legislation providing for the use of both official languages in the courts of New Brunswick was upheld on the basis of its power over the administration of justice in the province (s. 92(14)).

In the end, I am satisfied that the *Guidelines Order* is in pith and substance nothing more than an instrument that regulates the manner in which federal institutions must administer their multifarious duties and functions. Consequently, it is nothing more than an adjunct of the federal legislative powers affected. In any event, it falls within the purely residuary aspect of the "Peace, Order, and good Government" power under s. 91 of the *Constitution Act, 1867*. Any intrusion into provincial matters is merely incidental to the pith and substance of the legislation. It must also be remembered that what is involved is essentially an information gathering process in furtherance of a decision-making function within federal jurisdiction, and the recommendations made at the conclusion of the information gathering stage are not binding on the decision maker. Neither the initiating department nor the panel are given power to subpoena witnesses, as was the case in *Canadian National Railway Co. v. Courtois*, 1988 CanLII 82 (SCC), [1988] 1 S.C.R. 868, where the Court held that certain provisions of the *Act respecting occupational health and safety*, S.Q. 1979, c. 63, which, *inter alia*, allowed the province to investigate accidents and issue remedial orders, were inapplicable to an interprovincial railway undertaking. I should add that Alberta's extensive reliance on that decision is misplaced. It is wholly distinguishable from the present case on several grounds, most importantly that the impugned provincial legislation there was made compulsory against a federal undertaking and was interpreted by the Court as regulating the undertaking.

For the foregoing reasons I find that the *Guidelines Order* is *intra vires* Parliament and would thus answer the constitutional question in the negative.

Discretion

The last substantive issue raised in this appeal is whether the Federal Court of Appeal erred in interfering with the motions judge's discretion not to grant the remedies sought, namely orders in the nature of *certiorari* and *mandamus*, on the grounds of unreasonable delay and futility. Stone J.A. found that the motions judge had erred in a way that warranted interference with the exercise of his discretion on both grounds.

The principles governing appellate review of a lower court's exercise of discretion were not extensively considered, only their application to this case. Stone J.A. cited *Polylok Corp. v. Montreal Fast Print (1975) Ltd.*, 1983 CanLII 4999 (FCA), [1984] 1 F.C. 713 (C.A.), which in turn approved of the following statement of Viscount Simon L.C. in *Charles Osenton & Co. v. Johnston*, [1942] A.C. 130, at p. 138:

The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

That was essentially the standard adopted by this Court in *Harekin v. University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 S.C.R. 561, where Beetz J. said, at p. 588:

Second, in declining to evaluate, difficult as it may have been, whether or not the failure to render natural justice could be cured in the appeal, the learned trial judge refused to take into consideration a major element for the determination of the case, thereby failing to exercise his discretion on relevant grounds and giving no choice to the Court of Appeal but to intervene. [Emphasis added.]

What, then, are the relevant considerations that should have been weighed by the motions judge in exercising his discretion? The first ground on which the motions judge exercised his

discretion to refuse prerogative relief was delay. There is no question that unreasonable delay may bar an applicant from obtaining a discretionary remedy, particularly where that delay would result in prejudice to other parties who have relied on the challenged decision to their detriment, and the question of unreasonableness will turn on the facts of each case; see S. A. de Smith, *Judicial Review of Administrative Action* (4th ed. 1980), at p. 423, and D. P. Jones and A. S. de Villars, *Principles of Administrative Law* (1985), at pp. 373-74. The motions judge took cognizance of the period of time that elapsed between approval being granted by the Minister of Transport on September 18, 1987 and the filing of the notice of motion in this action on April 21, 1989, and the fact that the project was approximately 40 percent complete by that time. With respect, however, he ignored a considerable amount of activity undertaken by the respondent Society before taking this action, some of which was referred to by Stone J.A. I should note at this point that Stone J.A. was mistaken when he stated that this action was taken only two months after the Society became aware that approval had been granted. During cross-examination on her affidavit in support of the application, Ms. Kostuch, the vice-president of the Society, admitted that the Society became aware of the approval on February 16, 1988, some fourteen months before the present action was launched.

This was not the only action taken by the Society in opposition to the dam, however. The Society first brought an action in October 1987 seeking *certiorari* with prohibition in aid to quash an interim licence issued by the Minister of the Environment of Alberta pursuant to the *Water Resources Act*. On December 8, 1987 Moore C.J.Q.B. quashed all licences and permits issued by the Minister on the grounds that the department had not filed the requisite approvals with its application, that it had not referred the matter to the Energy Resources Conservation Board as required by s. 17 of the Act, and that the Minister's delegate had wrongfully exercised his discretion in waiving the public notice requirements set out in the Act: *Friends of the Oldman River Society v. Alberta (Minister of the Environment)* (1987), [1987 CanLII 3224 \(AB KB\)](#), 85 A.R. 321. Another interim licence was issued on February 5, 1988 and again the respondent brought an application to quash that licence, principally on the ground that the requirement for giving public notice had been improperly waived. The application was dismissed by Picard J. who held that the appropriate material had been filed with the application for the licence and that the Minister's delegate had acted within his jurisdiction in waiving

public notice: *Friends of Oldman River Society v. Alberta (Minister of the Environment)* (1988), [1988 CanLII 3884 \(AB KB\)](#), 89 A.R. 339 (Q.B).

In the meantime, the respondent Society had been petitioning the Alberta Energy Resources Conservation Board to conduct a public hearing into the hydro-electric aspects of the dam pursuant to the *Hydro and Electric Energy Act*. The Board replied on December 18, 1987 refusing the Society's request for the reason that the dam did not constitute a "hydro development" within the meaning of the Act. An application was taken for leave to appeal that decision to the Alberta Court of Appeal which refused leave, agreeing with the Board that the project was not a hydro development, even though it was designed to allow for the future installation of a power generating facility: *Friends of the Old Man River Society v. Energy Resources Conservation Board (Alta.)* (1988), [1988 ABCA 63 \(CanLII\)](#), 89 A.R. 280. Finally, Ms. Kostuch swore an information before a justice of the peace alleging that an offence had been committed under s. 35 of the *Fisheries Act*. After summonses were issued, the Attorney General for Alberta intervened and stayed the proceedings on August 19, 1988. I have already documented the correspondence directed to the federal Minister of the Environment and Minister of Fisheries and Oceans through 1987 and 1988 in which members of the Society sought to have the *Guidelines Order* invoked, all to no avail. This action was taken shortly after the Trial Division of the Federal Court in *Canadian Wildlife* held that the *Guidelines Order* was binding on the Minister of the Environment.

In my view, this chronology of events represents a concerted and sustained effort on the part of the Society to challenge the legality of the process followed by Alberta to build this dam and the acquiescence of the appellant Ministers. While these events were taking place, construction of the dam continued, despite ongoing legal proceedings, and as at the date of the hearing before this Court, counsel for Alberta advised that the dam had been substantially completed. I can find no evidence that Alberta has suffered any prejudice from any delay in taking this action; there is no indication whatever that the province was prepared to accede to an environmental impact assessment under the *Guidelines Order* until it had exhausted all legal avenues, including an appeal to this Court. The motions judge did not weigh these considerations adequately or at all. Accordingly, the Court of Appeal was justified in interfering with the exercise of his discretion on this point.

The remaining ground for refusing to grant prerogative relief was on the basis of futility, namely that environmental impact assessment under the *Guidelines Order* would be needlessly repetitive in view of the studies that were conducted in the past. In my view this was not a proper ground to refuse a remedy in these circumstances. Prerogative relief should only be refused on the ground of futility in those few instances where the issuance of a prerogative writ would be effectively nugatory. For example, a case where the order could not possibly be implemented, such as an order of prohibition to a tribunal if nothing is left for it to do that can be prohibited; see de Smith, *supra*, at pp. 427-28. It is a different matter, though, where it cannot be determined *a priori* that an order in the nature of prerogative relief will have no practical effect. In the present case, aside from what Stone J.A. has already said concerning the qualitative differences between the process mandated by the *Guidelines Order* and what has gone before, it is not at all obvious that the implementation of the *Guidelines Order* even at this late stage will not have some influence over the mitigative measures that may be taken to ameliorate any deleterious environmental impact from the dam on an area of federal jurisdiction. I have therefore concluded that the Court of Appeal did not err in interfering with the motions judge's exercise of discretion to deny the relief sought.

On the matter of costs, it is my view that this is a proper case for awarding costs on a solicitor-client basis to the respondent Society, given the Society's circumstances and the fact that the federal Ministers were joined as appellants even though they did not earlier seek leave to appeal to this Court.

Disposition

For these reasons, I would dismiss the appeal, with the exception that there shall be no order in the nature of mandamus directing the Minister of Fisheries and Oceans to comply with the *Guidelines Order*, with solicitor and client costs to the respondent throughout. I would answer the constitutional question in the negative.

//Stevenson//

The following are the reasons delivered by

STEVENSON J. (dissenting) -- I have had the benefit of reading the judgment of my colleague La Forest J. and respectfully disagree with him on three points. In my view,

1. The Crown is not bound by the *Navigable Waters Protection Act*, R.S.C., 1985, c. N-22 ("N.W.P.A.").
2. The Federal Court of Appeal, 1990 CanLII 8039 (FCA), [1990] 2 F.C. 18, wrongly interfered with the discretion exercised by the motions judge in refusing the prerogative remedy.
3. The appellants should not be called upon to pay costs on a solicitor and client basis.

I agree with his analysis of the constitutional questions and with his interpretation of the provisions implementing the *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467.

1. Crown Immunity

The question here is a simple one: is the Crown bound by the *N.W.P.A.*? For the purposes of this discussion, no distinction is to be drawn between the federal and provincial Crowns. The Crown is indivisible for this purpose: *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, 1989 CanLII 78 (SCC), [1989] 2 S.C.R. 225, at pp. 272-73.

Pursuant to the *Interpretation Act*, R.S.C., 1985, c. I-21 (formerly R.S.C. 1970, c. I-23), the Crown is not bound by legislation unless it is mentioned or referred to in the legislation. This has been interpreted in *Alberta Government Telephones*, at p. 281, as follows:

It seems to me that the words "mentioned or referred to" in s. 16 [now s. 17] are capable of encompassing: (1) expressly binding words ("Her Majesty is bound"); (2) a clear intention to bind which, in *Bombay* terminology, "is manifest from the very terms of the statute", in other words, an intention revealed when provisions are read in the context of other textual provisions, as in *Ouellette, supra*; and, (3) an intention to bind where the purpose of the statute would be "wholly frustrated" if the government were not bound, or, in other words, if an absurdity (as opposed to simply an undesirable result) were produced. These three points should provide a guideline for when a statute has clearly conveyed an intention to bind the Crown.

All parties agree that there are no words in the *N.W.P.A.* "expressly binding" the Crown. In my view, it also cannot be said that a clear intention to bind the Crown "is manifest from the very terms of the statute". In making that determination, one is confined to the four corners of the statute. We must not forget that *Province of Bombay v. Municipal Corporation of Bombay*, [1947] A.C. 58 (P.C.), is no longer applicable in light of the express provisions of the *Interpretation Act*, except to the extent that it is adopted as it was in *Alberta Government Telephones*, which I take to be governing.

The respondent Society must therefore show that excluding the Crown would wholly frustrate the purpose of the *N.W.P.A.* or produce an absurdity. I am reminded by the Privy Council in *Bombay* that if the intention is to bind the Crown, "nothing is easier than to say so in plain words" (p. 63).

Does the failure to include the Crown work an absurdity? It is not enough that there be a gap: *Alberta Government Telephones*, at p. 283. The *N.W.P.A.* applies to private and municipal undertakings and a moment's reflection reveals that there are many non-governmental agencies whose activities are thus subject to the *N.W.P.A.* There is thus no emasculation of the *N.W.P.A.*

Nor are the courts to assume bad faith on the part of the Crown in carrying out activities which might otherwise be regulated.

If the Crown interferes with public rights of navigation, that wrong is remediable by action. In short, there is no ground for saying that the *N.W.P.A.* will be frustrated by actions of government. There is ample scope in the regulation of non-governmental activities, and it cannot be said the object of the *N.W.P.A.* is frustrated.

I must mention briefly an argument that in invoking the *N.W.P.A.*, the appellant Alberta accepted the burden of the environmental regulation regime. There is no significant benefit in approval under the *N.W.P.A.* Tort actions may still lie. The *N.W.P.A.* does not expressly confer benefits of any type. Moreover, it is not clear that approval under s. 5 of the *N.W.P.A.* would necessarily provide any protection from possible actions in tort. In *Champion v. City of Vancouver*, 1917 CanLII 693 (SCC), [1918] 1 W.W.R. 216 (S.C.C.), Fitzpatrick C.J. of this Court held at pp. 218-19 that:

In considering the interpretation to be put upon this Act [the *N.W.P.A.*, R.S.C. 1906, c. 115], it must be borne in mind that every work constructed in navigable waters is not necessarily such an interference with navigation as to constitute an illegal obstruction. It may, however, be so and, as such, liable to be removed by the proper authority. It is therefore of great advantage to persons proposing to construct works for which there is no sanction to be able to obtain beforehand the approval of the Governor-in-Council under sec. 7; the provision is, however, purely permissive and the section does not provide for any consequences following upon the approval, certainly not that it shall render legal anything which would be illegal. Any interference with a public right of navigation is a nuisance which the Courts can order abated notwithstanding any approval by the Governor-in-Council under sec. 7. [Emphasis added.]

2. Discretion

The remedies sought by the respondent Society are discretionary: *Harekin v. University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 S.C.R. 561, at p. 574: "The principle that *certiorari* and *mandamus* are discretionary remedies by nature cannot be disputed", and D. P. Jones and A. S. de Villars, *Principles of Administrative Law* (1985), at pp. 372-73.

Interference by an appellate court is only warranted when a lower court has "gone wrong in principle" or "has given no weight (or no sufficient weight) to those considerations which ought to have weighed with [it]": *Polylok Corp. v. Montreal Fast Print (1975) Ltd.*, 1983 CanLII 4999 (FCA), [1984] 1 F.C. 713 (C.A.), at p. 724.

The Federal Court of Appeal was clearly wrong in dismissing the motions judge's conclusion on the question of delay, which it was "not persuaded" was well-founded in principle. The

Court of Appeal says the respondent Society did not become aware of the grant of the approval under the [N.W.P.A.](#) until some two months before the proceedings were actually launched. In fact, it knew of the approval some 14 months beforehand and the principal promoters of the Society knew even before then.

The common law has always imposed a duty on an applicant to act promptly in seeking extraordinary remedies:

Owing to their discretionary nature, extraordinary and ordinary review remedies must be exercised promptly. Donaldson J. of the Court of Appeal of England aptly explained the principle in *R. v. Aston University Senate* [[1969] 2 Q.B. 538, at p. 555]: "The prerogative remedies are exceptional in their nature and should not be made available to those who sleep upon their rights".

(R. Dussault and L. Borgeat, *Administrative Law* (2nd ed. 1990), vol. 4, at pp. 468-69.)

That duty was recognized by Laskin C.J. on behalf of this Court in *P.P.G. Industries Canada Ltd. v. Attorney General of Canada*, [1975 CanLII 204 \(SCC\)](#), [1976] 2 S.C.R. 739, at p. 749:

In my opinion, discretionary bars are as applicable to the Attorney General on motions to quash as they admittedly are on motions by him for prohibition or in actions for declaratory orders. The present case is an eminently proper one for the exercise of discretion to refuse the relief sought by the Attorney General. Foremost among the factors which persuade me to this view is the unexplained two year delay in moving against the Anti-dumping Tribunal's decision. [Emphasis added.]

The importance of acting promptly when seeking prerogative relief has also been recognized in much of the legislation now governing judicial review. For example, [Ontario's Judicial Review Procedure Act](#), R.S.O. 1990, c. J.1, empowers a court to extend the prescribed time for initiating an application for judicial review, but only where it is satisfied that there are *prima facie* grounds for relief and no substantial prejudice or hardship will result to those who would be affected by the delay (s. 5). Under British Columbia's *Judicial Review Procedure Act*, R.S.B.C. 1979, c. 209, an application for judicial review may be barred by the affluxion of time if a court considers that substantial prejudice or hardship will result by reason of the delay (s. 11). The [Federal Court Act](#), R.S.C., 1985, c. F-7, s. 28(2) stipulates that an application for judicial review before the Federal

Court of Appeal must be made within ten days from the time the impugned decision or order is first communicated. That time limit can only be extended with leave of the court. In Alberta, Rule 753.11(1) of the *Alberta Rules of Court* (Alta. Reg. 390/68) stipulates that where the relief sought is the setting aside of a decision or act, the application for judicial review must be filed and served within six months after that decision or act. Finally, in art. 835.1 of *Quebec's Code of Civil Procedure*, R.S.Q., c. C-25, which applies to all extraordinary remedies, it is stipulated that motions must be served "within a reasonable time". The Court of Appeal of Quebec held in *Syndicat des employés du commerce de Rivière-du-Loup (section Émilio Boucher, C.S.N.) v. Turcotte*, 1984 CanLII 2812 (QC CA), [1984] C.A. 316, at p. 318, that: [TRANSLATION] "This article [835.1] merely codified the common law rule that the remedy must be exercised within a reasonable time".

By the time this application was brought, the dam was 40 per cent complete. A significant amount of public money had already been spent. It is a matter of public record that individual members of the respondent Society were aware of the approval issued under the *N.W.P.A.* prior to February, 1988. Even if such were not the case, the respondent Society still could have launched its action in early 1988. At that time, major construction had not yet taken place. Had the respondent Society initiated proceedings then as compared to April of 1989, the appellant Alberta would have been in a much better position objectively to assess any potential legal risk associated with continuing. Faced with the possibility of invalid federal approval, it may well have chosen at that point not to put out the public funds that it did.

After years of extensive planning, innumerable public hearings, environmental studies and reports, and after the establishment of various councils and committees for the purpose of reviewing proposals that were put forward, the appellant Alberta embarked upon an enormous undertaking to meet the needs of its constituents. It did so at the expense of the public. And it did so after having been advised by the federal government that it could legitimately proceed. The Oldman River dam no doubt necessitates comprehensive administration. Its construction also involves a significant number of contracts with third parties. Given the enormity of the project and the interests at stake, it was unreasonable for the respondent Society to wait 14 months before challenging the decision of the

Minister of Transport. In the context of this case, it was imperative that the respondent Society respect the common law duty to act promptly.

Had the respondent Society acted more promptly, the appellant Alberta would have been able to assess its position without regard to the economic and administrative commitment that was a reality by the time these proceedings were launched. It is impossible to conclude that the appellant Alberta was not prejudiced by the delay. Moreover, the motions judge made a finding on prejudice, and found that there was no justification for waiting to launch the attack until the dam was nearly 40 per cent completed.

The rationale for requiring applicants for prerogative relief to act promptly is to enable their erstwhile respondents to act upon the authority given to them. The applicant cannot invoke the fact that the respondent did what he or she was legally entitled to do as an answer to its own delay. Such a view would put a premium on delay and deliver the wrong message to those who plan prerogative challenges.

My colleague, La Forest J., would also give some weight to the fact that the appellant Alberta was aware of the opposition of the respondent Society and others because of the other unsuccessful challenges by the Society and others. In my view, those challenges are completely irrelevant to this question. Those attacks were all ill-founded, and the appellant Alberta was not bound to expect that these peripheral and collateral proceedings presaged a fundamental attack on the original permit. The fact that detractors are harassing a travelling train does not put one on guard against the proposition that they are going to attack the authority to depart in the first instance. In my opinion, those activities need not have been taken into consideration by the motions judge. None of the activities undertaken by the Society or its members precluded the respondent Society from undertaking this challenge.

The activities referred to by my colleague were qualitatively different from that which is sought in this action, and irrelevant to the issue at hand. The applications for *certiorari* brought by the respondent Society in October 1987 and early 1988 respectively, were directed at interim licences

issued by Alberta's Minister of Environment pursuant to that province's *Water Resources Act*, R.S.A. 1980, c. W-5. The petitioning of the Alberta Energy Resources Conservation Board focused on the hydro-electric aspects of the dam. The information sworn before a justice of the peace alleged an offence pursuant to the *federal Fisheries Act*, R.S.C., 1985, c. F-14.

This action centres on the constitutionality and applicability of the *Environmental Assessment and Review Process Guidelines Order*. It raises new and different issues. The previous efforts of the respondent Society were not necessary preliminaries; they were separate and distinct from the relief sought here. It is my view that in determining whether he should exercise his discretion against the respondent Society, Jerome A.C.J. was obliged to look only at those factors which he considered were directly connected to the application before him. He was clearly in the best position to assess the relevancy of that put forward by the parties. Interference with his exercise of discretion is not warranted unless it can be said with certainty that he was wrong in doing what he did. For the reasons stated above, I am of the opinion that the test has not been met in this case.

3. Costs

I see no justification for awarding the respondent Society costs on a solicitor and client basis. The general rule in this Court is that a successful party recovers costs on the usual party and party basis. That was the rule applied by the courts below. My colleague proposes an award of solicitor and client costs extending to the courts below. I see no ground for suggesting they were in error, and I see no ground for our departing from our own general rule. Public interest groups must be prepared to abide by the same principles as apply to other litigants. Were we to produce special rules for such litigants, we would jeopardize an important principle: those undertaking litigation must be prepared to accept some responsibility for the costs. I see nothing here to justify calling upon the taxpayers to meet the solicitor and client costs of this party.

4. Conclusion

I would allow the appeal with costs.

Appeal dismissed, with the exception that there should be no order in the nature of mandamus directing the Minister of Fisheries and Oceans to comply with the Guidelines Order.
STEVENS J. is dissenting.

*Solicitors for the appellant Her Majesty the Queen in right of Alberta: Milner & Steer,
Edmonton.*

*Solicitor for the appellants the Minister of Transport and the Minister of Fisheries and
Oceans: John C. Tait, Ottawa.*

Solicitors for the respondent: Gowling, Strathy & Henderson, Ottawa.

*Solicitors for the intervener the Attorney General of Quebec: Jean-K. Samson, Alain
Gingras and Denis Lemieux, Ste-Foy.*

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

*Solicitor for the intervener the Attorney General of Manitoba: The Attorney General of
Manitoba, Winnipeg.*

*Solicitor for the intervener the Attorney General of British Columbia: The Attorney
General of British Columbia, Victoria.*

*Solicitor for the intervener the Attorney General for Saskatchewan: Brian
Barrington-Foote, Regina.*

*Solicitor for the intervener the Attorney General of Newfoundland: Paul D. Dicks, St.
John's.*

Solicitor for the intervener the Minister of Justice of the Northwest Territories: The Department of Justice, Yellowknife.

Solicitors for the intervener National Brotherhood/Assembly of First Nations: Hutchins, Soroka & Dionne, Montréal.

Solicitors for the intervener the Dene Nation and the Metis Association of the Northwest Territories: McCuaig Desrochers, Edmonton.

Solicitors for the intervener the Native Council of Canada (Alberta): McCuaig Desrochers, Edmonton.

Solicitors for the interveners the Sierra Legal Defence Fund, the Canadian Environmental Law Association, the Sierra Club of Western Canada, the Cultural Survival (Canada) and the Friends of the Earth: Gregory J. McDade, Vancouver; Judith B. Hanebury, Calgary.

Solicitor for the intervener the Alberta Wilderness Association: Martin W. Mason, Ottawa.

Tab 82

Young v. Young, 1993 CanLII 34 (SCC), [1993] 4 SCR 3

Source:	Supreme Court of Canada
Date:	1993-10-21
File number:	22227
Other citations:	108 DLR (4th) 193 — 160 NR 1 — 43 ACWS (3d) 410 — [1993] 8 WWR 513 — 56 WAC 161 — AZ-93111122 — 84 BCLR (2d) 1 — 49 RFL (3d) 117 — 34 BCAC 161 — 18 CRR (2d) 41 — [1993] CarswellBC 264 — EYB 1993-67111 — JE 93-1766 — [1993] SCJ No 112 (QL) — [1993] ACS no 112 — [1993] RDF 703
Citation:	Young v. Young, 1993 CanLII 34 (SCC), [1993] 4 SCR 3, < https://canlii.ca/t/1frwv >, retrieved on 2026-03-23
Most recent unfavourable mention	A.L.J. v P.N.A.J. , 2017 BCSC 1738 (CanLII) [...] While I appreciate the Young case is distinguishable in a number of ways, it is nevertheless of assistance in that the Court addresses the fundamental importance of the best interests of the child in the context of religious upbringing and observance. [...]

Young v. Young, [1993] 4 S.C.R. 3

Irene Helen Young

Appellant

v.

James Kam Chen Young

Respondent

and

W. Glen How *Respondent*

and

Watch Tower Bible and Tract Society of Canada *Respondent*

and

**The Attorney General of Canada,
the Attorney General for Ontario,
the Attorney General of Quebec,
the Attorney General of Manitoba,
the Attorney General of British Columbia,
the Law Society of British Columbia and
the Seventh-day Adventist Church in Canada** *Interveners*

Indexed as: Young v. Young

File No.: 22227.

1993: January 25, 26; 1993: October 21.

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

on appeal from the court of appeal for british columbia

*Family law -- Custody -- Access -- Best interests of the child -- Access parent insisting on
instructing children on religion -- Custodial parent and children objecting to religious instruction --
Court ordering that access parent discontinue religious activities with children -- Scope of "best
interests of the child" -- Whether or not "best interests of the child" equivalent of absence of harm --
Whether or not restriction on access in best interests of the children.*

Family law -- Children -- Best interests of the child -- Access parent insisting on instructing children on religion -- Custodial parent and children objecting to religious instruction -- Court ordering that access parent discontinue religious activities with children -- Scope of "best interests of the child" -- Whether or not "best interests of the child" equivalent of absence of harm -- Whether or not restriction on access in best interests of the children.

Family law -- Property and financial awards -- Lump sum payment -- Family debts -- Principles governing reallocation of property.

Constitutional law -- [Charter of Rights](#) -- Freedom of religion -- Freedom of expression -- [Divorce Act](#) requiring that orders concerning children only take into account "the best interests of the child" -- Access parent insisting on instructing children on religion -- Custodial parent and children objecting to religious instruction -- Court ordering that access parent discontinue religious activities with children -- Whether or not access restriction infringing freedom of religion -- Whether or not access restriction infringing freedom of expression -- Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.), ss. 16(8), 17(5) -- [Canadian Charter of Rights and Freedoms](#), s. 2(a), (b).

Courts -- Costs -- Principles governing awards of costs on solicitor-client basis.

Torts -- Maintenance -- Religious society carrying cost of action -- Common religious action -- Whether or not tort of maintenance.

Appellant's and respondent's separation was marked by a protracted series of court battles. Appellant was awarded custody of the couple's three daughters and respondent was granted access subject to court imposed restrictions arising from appellant's objection to his religious activity with the children. Respondent was ordered not to discuss the Jehovah's Witness religion with the children, take them to any religious services, canvassing or meetings, or expose them to religious discussions with third parties without appellant's prior consent. Organized religion was not important to appellant although she wanted the children to be raised within the United Church.

The two older daughters liked their father but came to dislike his religious instruction to the extent that it was damaging his relationship with them and was contributing to the stress the children were experiencing in adjusting to their parents' separation.

The trial judge also made orders for the distribution of property and for costs. The respondent's interest in the matrimonial home was ordered transferred to the appellant because any remaining interest in the house, after respondent paid what was already owing to appellant, was to be transferred in the form of lump sum maintenance. Respondent was found responsible for debts incurred by the appellant for the support of herself and the children pending maintenance and for a debt made to a family corporation. Costs were awarded on a solicitor-client basis against respondent, his lawyer and a religious society not a party to the proceedings.

Respondent appealed. The Court of Appeal set aside the limitations on religious discussion and attendance, on the ground that it was in the best interests of the children that they come to know their non-custodial parent fully, including his religious beliefs, unless the evidence established the existence of or the potential for real harm or the child did not consent to being subject to the access parent's views or practices. The Court of Appeal also altered the division of property and the awards of costs made by the trial judge. Appellant appealed these rulings to this Court.

Four constitutional questions queried (1) whether ss. 16(8) and 17(5) of the *Divorce Act* (requiring that judicial decisions regarding custody and access be made "in the best interests of the child") denied the *Charter* guarantees of freedom of religion, of expression and of association (s. 2(a), (b), and (d)), and if so, (2) were they justified under s. 1; (3) whether ss. 16(8) and 17(5) violated the equality guarantee of the *Canadian Charter of Rights and Freedoms* (s. 15(1)), and (4) if so, were they justified under s. 1. The Court considered the requirements of the "best interests of the child" and whether this standard infringed the guarantees of freedom of religion and expression under the *Charter*. A main consideration was unrestricted access by a non-custodial parent and the conditions necessary to curtail that access.

Held (L'Heureux-Dubé J. dissenting in the result): The appeal should be allowed in part.

The issues should be decided as follows:

1. The test regarding access is the best interests of the child (L'Heureux-Dubé J., La Forest and Gonthier JJ., and Iacobucci and Cory JJ.). McLachlin J. suggests that in cases such as this harm is usually an important element in determining the best interests of the child. Sopinka J. would recognize a threshold element of harm.

2. Sections 16(8) and 17(5) of the *Divorce Act* do not violate ss. 2(a), (b), (d) or 15(1) of the *Charter*. L'Heureux-Dubé J. (and La Forest and Gonthier JJ.) found the *Charter* to be inapplicable. McLachlin J. found the impugned legislation did not violate the *Charter*. Cory and Iacobucci JJ. agreed that there was no *Charter* violation. Sopinka J. found that the *Charter* applied and could only be overridden in limited circumstances.

3. The restrictions on access should be removed (L'Heureux-Dubé J. and La Forest and Gonthier JJ. dissenting).

4. The judgment dealing with property and financial matters and the award of costs should be varied (L'Heureux-Dubé J. dissenting).

Best Interest of the Child, *Charter* Considerations and Access

Per L'Heureux-Dubé J.: The power of the custodial parent is not a "right" with independent value granted by courts for the benefit of the parent. Rather, the child has a right to a parent who will look after his or her best interests and the custodial parent a duty to ensure, protect and promote the child's best interests. That duty includes the sole and primary responsibility to oversee all aspects of day-to-day life and long-term well-being, as well as major decisions with

respect to education, religion, health and well-being. The non-custodial parent retains certain residual rights over the child as one of his or her two natural guardians.

Child placement decisions should safeguard the child's need for continuity of relationships, reflect the child's (not the adult's) sense of time, and take into account the law's inability to supervise interpersonal relationships and the limits of knowledge to make long-range predictions. This need for continuity generally requires that the custodial parent have the autonomy to raise the child as he or she sees fit without interference with that authority by the state or the non-custodial parent. A custody award is a matter of whose decisions to prefer, as opposed to which decisions to prefer. Courts cannot make the necessary day-to-day decisions which affect the best interests of the child. Once a court has determined who is the appropriate custodial parent, it must presume that that parent will act in the best interests of the child.

Decisions are made according to the best interests of the child without the benefit of a presumption in favour of either parent. The [Act](#) envisages contact between the child and each of his or her parents as a worthy goal which should be in the best interests of the child. Maximum contact, however, is not an unbridled objective and must be curtailed wherever the welfare of the child requires it.

The right to access is limited in scope and is conditioned and governed by the best interests of the child. The legislation makes it quite explicit that only the best interests of the child as it is comprehensively understood should be considered in custody and access orders. The role of the access parent is that of a very interested observer, giving love and support to the child in the background. He or she has the right to know but not the right to be consulted. Access rights recognize that the best interests of the child normally require that the relationship developed with both parents prior to the divorce or separation be continued and fostered. The right to access and the circumstances in which it takes place must be perceived from the vantage point of the child. Wherever the relationship to the non-custodial parent conflicts with the best interests of the child, the furtherance and protection of the child's best interests must take priority over the desires and interests of the parent.

As the ultimate goal of access is the continuation of a relationship which is of significance and support to the child, access must be crafted to preserve and promote that which is healthy and helpful in that relationship so that it may survive to achieve its purpose. Sources of ongoing conflict which threaten to damage or prevent the continuation of a meaningful relationship should be removed or mitigated. Notwithstanding a general concern about the vulnerability of access rights to the caprices of a vengeful custodial parent, courts should not be too quick to presume that the access concerns of the custodial parent are unrelated to the best interests of the child. Courts should also not be blind to issues, such as financial support, which form part of the broader context in which these rights are exercised. The access parent has no obligation to exercise those rights and cannot be forced to comply with such an order even if that contact has been determined to be in the child's best interest.

Where there is a genuine problem with access, the non-custodial parent is not without recourse in any case. This stems from the statutory directive to facilitate access where it is in the child's best interests and the role of the judge as the arbiter of those interests in the case of a dispute between the parents. Generally, courts will grant liberal access to the non-custodial parent and usually this is consistent with the best interests of the child. Parents will also normally respect their children's wishes and best interests with regard to access. When disagreements between parents do reach the courts, the judge must always draw the line in favour of the best interests of the child, from a child-centred perspective.

The best interests of the child cannot be equated with the mere absence of harm: it encompasses a myriad of considerations. Courts must attempt to balance such considerations as the age, physical and emotional constitution and psychology of both the child and his or her parents and the particular milieu in which the child will live. One of the most significant factors in many cases will be the relationship that the child entertains with his or her parents. Since custody and access decisions are pre-eminently exercises in discretion, the wide latitude under the best interests test permits courts to respond to the spectrum of factors which can both positively and negatively affect a child. What may constitute stressful or damaging circumstances for one child may not necessarily have the same effect on another.

The most common presumption now governing the best interests test is the primary caregiver presumption. It explicitly restores the values of commitment and demonstrated ability to nurture the child and recognizes the obligations and supports the authority of the parent engaged in day to day tasks of childrearing.

The order of the trial judge is not subject to the *Charter*. Even if it were, the best interests test is nevertheless value neutral and does not, on its face, violate any *Charter* right. Its objective, the protection of a vulnerable segment of society, is completely consonant with the *Charter's* values. Broad judicial discretion is crucial to the proper implementation of the legislative objective of securing the best interests of the child. Such discretion in a legislative provision does not of itself give rise to an inference of *Charter* infringement. It cannot be considered in the absence of an examination of the legislative objectives and must be rationally tied to those objectives.

The standard for finding a legislative provision unconstitutional because of vagueness is high. The provisions need only permit the framing of an intelligible legal debate with respect to the objectives contained in the legislation. The best interests test is not so uncertain as to be incapable of guiding a consideration of the factors relevant to custody and access determinations. The fact that it must be applied to the facts of each case does not militate in favour of its unconstitutionality.

The vagueness of a legislative provision cannot be examined in the abstract but must be considered within the context of the particular legislative objectives in question, bearing in mind that some objectives will require a panoply of judicial remedies for their meaningful fulfilment. Among the factors with which courts should be concerned when the vagueness of a law is at issue are: (a) the need for flexibility and the interpretive role of the courts, (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist.

The custodial parent need not show harm in order to restrict access to the children by the non-custodial parent. There is no rationale for defining the best interests of the child with the absence

of harm. Nothing in the [Act](#) mandates or even suggests that "real danger of significant harm to the child" be the sole consideration in matters of custody and access. Indeed, the harm test would require courts to ignore the very factors which are set out in the Act and invert the basic focus of the inquiry into custody and access. The welfare of children is put at considerable risk if the prospect of harm becomes the sole prerequisite for restrictions on access. The best interests of the child is not simply the right to be free of demonstrable harm; it is the positive right to the best possible arrangements in the circumstances of the parties. The harm test cannot meet the legal system's primary goal in divorce situations -- minimizing the adverse effects of children. This goal requires a vision of the best interests of the child that is more than neutral to the conditions under which custody and access occur. Judges must exercise their discretion to prevent harm to the child rather than merely identify or establish its presence after the damage is done.

Expert evidence should not be routinely required to establish the best interests of the child. Expert testimony, while helpful in some circumstances, is often inconclusive and contradictory because such assessments are both speculative and may be affected by the professional values and biases of the assessors themselves. Experts are not always better placed than parents to assess the needs of the child. The person involved in day to day care may observe changes in the child that could go unnoticed by anyone else and normally has the best vantage point from which to assess the interests of the child. The custodial parent, therefore, will often provide the most reliable and complete source of information to the judge on the needs and interests of that child. The importance of the evidence of children in custody and access disputes, too, must be emphasized.

Restrictions on access do not necessarily prevent children from coming to know their parents in meaningful ways. Interpreting the goal of maximum contact as requiring unrestricted access may defeat the [Act's](#) objective if the pre-eminence of unlimited "knowledge" results in the ultimate destruction of the relationship. In this case, the purpose of the restrictions was to ensure that the children will continue to know their father "at all".

Freedom of religion and freedom of expression are public in nature and encompass the freedom of the individual from state compulsion or restraints. The state's role in custody and access

decisions does not transform the essentially private character of parent-child interchanges into activity subject to *Charter* scrutiny. Legitimate questions may arise about the role of the state, and hence the application of the *Charter* in regulating other aspects of family law. A valid purpose can hardly be served, however, by importing the discourse of freedom of expression and religion into orders made in the resolution of custody and access disputes. Once the best interests test itself has been found to accord with *Charter* values, the trial judge's order itself is not subject to further constitutional review, as the necessary state infringement of religious rights required to sustain a *Charter* challenge is not present. The principles enunciated in *Dolphin Delivery* apply as custody and access matters are essentially private in nature and there exists no state action to be impugned.

Decisions regarding custody and access must not be based on the parents' faith. The religion of the parties, however, may be relevant as one of the circumstances to be assessed in the determination of the best interests of the child. Where there is conflict over religion, the court is not engaged in adjudicating a "war of religion" and the religious beliefs of the parties themselves are not on trial. Rather, it is the manner in which such beliefs are practised together with the impact and effect they have on the child which must be considered. In all cases where the effects of religious practices are at issue, the best interests of the child must prevail.

Ordinarily, the exposure of a child to different religions or beliefs may be of value to the child. Where religion becomes a source of conflict between the parents or is the very cause of the marriage breakdown, it is generally not in the best interests of the child and may in some circumstances be very detrimental for the child to be drawn into the controversy over religious matters. Where there is conflict over religion, courts must secure the longstanding authority of the custodial parent to make decisions over religious activities. This ensures that stress occasioned by such issues does not become a continuing and ultimately destructive feature in the life of the child after divorce.

Freedom of religion is not an absolute value. Here, powerful competing interests must also be recognized, not the least of which, in addition to the best interests of the children, are the freedoms of expression and religion of the children themselves.

Respondent's religious beliefs and practices and his general rights of access were not threatened. The restrictions were aimed at reducing the area of conflict which had arisen on account of the respondent's behaviour with his children during access and the effects of that behaviour on their best interests. Much of the stress the children were experiencing was related to their resistance to becoming involved in their father's religious practices. The restrictions were to further the best interests of these children by removing the source of conflict, particularly as the ultimate purpose of the restrictions was to preserve the relationship between the respondent and his children. Evidence supported the conclusion that the respondent would not respect the wishes of the children without an order to do so.

Per La Forest and Gonthier JJ.: Agreement was expressed for the reasons of L'Heureux-Dubé J. holding that access be determined on the basis of what is in the best interests of the child and for her resolution of the constitutional issue.

Per Iacobucci and Cory JJ.: The best interests of the child standard does not violate in ss. 2(a), (b), (d) and 15 of the *Canadian Charter of Rights and Freedoms* substantially for the reasons given by L'Heureux-Dubé and McLachlin JJ. No opinion was expressed on the questions of whether a *Charter* infringement, if found, would be so trivial as not to warrant *Charter* protection and of whether or not the *Charter* applies to judicial orders made in custody or access proceedings.

For many of the reasons advanced by L'Heureux-Dubé J., access to children should be determined on the basis of what is in the best interests of the child. Expert evidence, while sometimes helpful, is not always necessary to establish the best interests of the child; that question can be determined normally from the evidence of parties themselves and the testimony, where appropriate, of the children concerned.

The matters of the children's attending religious services with the respondent and accompanying him on his proselytizing activities were resolved by the respondent's undertaking to respect his children's wishes in this regard. The order forbidding the respondent from discussing his

religion was not supported by a proper application of the best interests of the child test. Indeed, curtailment of explanatory or discursive conversations between a parent and his or her child should only be rarely ordered.

Per McLachlin J.: The *Divorce Act* mandates that, on matters of access, the ultimate test in all cases is the best interest of the child. This is a positive test, encompassing a wide variety of factors, including the desirability of maximizing contact between the child and each parent if compatible with the best interests of the child. The custodial parent has no "right" to limit access. The judge must consider all factors relevant to determining what is in the child's best interests. The risk of harm to the child, while not the ultimate legal test, may also be a factor to be considered. This is particularly so where the issue is the quality of access -- what the access parent may say or do with the child. In such cases, it will generally be relevant to consider whether the conduct in question poses a risk of harm to the child which outweighs the benefits of a free and open relationship which permits the child to know the access parent as he or she is. The judge must act not on his or her personal views but on the evidence.

The legislative provision for the "best interests of the child" does not limit and therefore does not violate the *Charter* right to religious and expressive freedom. Religious expression not in the best interests of the child is not protected by the *Charter* because the guarantee of freedom of religion is not absolute and does not extend to religious activity which harms or interferes with the parallel rights of other people. Conduct not in the best interests of the child, even absent the risk of harm, amounts to an "injury" or intrusion on the rights of others and is clearly not protected by this *Charter* guarantee. "Injure" in this context is a broad concept. To deprive a child of what a court has found to be in his or her best interests is to "injure", in the sense of not doing what is best for the child. A child's vulnerability heightens the need for protection and any error should be made in favour of the child's best interests and not in favour of the exercise of the alleged parental right. An additional factor which may come into play in the case of older children is the "parallel right" of others to hold and manifest beliefs and opinions of their own.

The ambit of freedom of expression is broader than that of freedom of conscience and religion because even harmful expression may be protected. Some forms of harmful expression, however, are not constitutionally protected: violence or threats of violence or a direct attack on the physical integrity and liberty of another. Criminal conduct is an indication, although not a conclusive one, that expressive conduct is constitutionally unprotected.

A *prima facie* case for protection under the guarantee of freedom of expression can be made out here. The expression challenged does not take the form of the non-protected categories of expression. The harm done, if any, is of a psychological nature.

A purposive approach to *Charter* interpretation requires that associated rights -- religious freedom and freedom of expression -- be interpreted in a consistent and coherent manner. The ambit of a particular right or freedom, moreover, cannot be defined in the abstract but rather should be defined in the context of the particular activity in question.

The teaching of religious beliefs and practices to one's children, while it has an expressive aspect, is predominantly religious. In seeking to reconcile the rights of freedom of religion and freedom of expression in this context, it is the religious aspect which must dominate. Reading the two guarantees together, the limits of the guarantee of freedom of expression should govern in the context of religious instruction of children.

The custodial parent does not have the "right" to determine limits on access. The only question to be considered, where limitation of access is in issue, is what is in the best interests of the child. The custodial parent's obligation to make certain basic decisions as to how the child is educated (which may extend to religious matters) does not automatically mean that religious contacts with the access parent of a different faith are to be excluded. The failure of the child to consent to instruction on the part of the access parent does not necessarily preclude such instruction's being in the child's best interests.

The benefits which might enure to the children from coming to know their father as he was -- as a devoutly religious man devoted to the Jehovah's Witness faith -- were not considered at trial and no reference was made to Parliament's instruction that a child have as much contact with both parents as is compatible with his or her best interests. The question of whether there was any evidence of a risk of harm to the children which might offset the benefit of full access to their father's values, including those related to religion, was not adequately considered. While access may be limited in some circumstances on grounds unrelated to harm, where the issue is whether entirely lawful discussions and activities between the access parent and the child should be curtailed, the judge should enquire into whether the conduct poses a risk of harming the child. The evidence did not establish that harm was being caused to the children.

The order restricting respondent's access was unnecessary given his undertaking and the order enjoining him from preventing blood transfusions was unnecessary from a practical point of view. Parents should not make disparaging comments about the other parent's religion, but the matter might best be left to the parents' good sense.

Per Sopinka J.: While the "best interests of the child" test is the ultimate determination in deciding issues of custody and access, it must be reconciled with the *Charter*. General language in a statute which, in its breadth, potentially confers the power to override *Charter* values must be interpreted to respect those values. Here, the best interests test must be interpreted to allow the *Charter* right to freedom of religious expression to be overridden only if its exercise would occasion consequences that involve more than inconvenience, upset or disruption to the child and incidentally to the custodial parent.

The long-term value to a child of a meaningful relationship with both parents is a policy that is affirmed in the *Divorce Act*. Each parent, therefore, can engage in those activities which contribute to identify the parent for what he or she really is. The access parent is not expected to act out a part or assume a phony lifestyle during access periods. The policy favouring activities that promote a meaningful relationship is not displaced unless there is a substantial risk of harm to the child.

The best interests of a child are more aptly served by a law which recognizes the right of that child to a meaningful post-divorce relationship with both parents. The "rights" must be distributed between the custodial and the access parent so as to encourage such a relationship. The traditional notion of guardianship giving the custodial parent the absolute right to exercise full control over the child, even when the other parent is exercising his or her right of access, is at odds with this concept.

"Harm", in this context, connotes an adverse effect on the child's upbringing that is more than transitory. The impugned exercise by the access parent must be shown to create a substantial risk that the child's physical, psychological or moral well-being will be adversely affected. Exposure to new experiences and ideas may upset children and cause them considerable discomfort but these experiences are not necessarily in the long-term best interests of the child. Similarly, conflict between parents on many matters including religion is not uncommon, but in itself cannot be assumed to be harmful unless it produces a prolonged acrimonious atmosphere.

Risk of substantial harm must be shown if religious expression is to be restricted in applying the best interests of the child test. The statutory test in [s. 16\(10\)](#) of the *Divorce Act* does not constitute a limitation on freedom of religious expression. This freedom does not extend to protect conduct which is harmful to others. However, the concept of harm should not be expanded to reach the conclusion that anything which is not in the best interests of the children is injurious within the meaning of [s. 2\(b\)](#) and thus not protected by the *Charter*.

Financial Considerations and Costs

Per McLachlin J.: A judge, to fix lump sum maintenance, must fix it in a sum certain with reference to the principles applicable to such an award. The goal of conveying the entire interest in the matrimonial home to the wife did not support an award of lump sum maintenance; more was required. There was ample basis here for an order under [s. 51](#) of the *Family Relations Act* awarding appellant a greater portion of the family assets because respondent, for a considerable time, paid little

or nothing for the support of the family. The debts incurred during this period can serve as a consideration supporting reduction of respondent's interest in the family property. The equity in the home was not substantial and respondent was permitted to retain other assets.

The trial judge, in effecting a *de facto* reapportionment of the interest in the family assets to do justice, as was permitted on the facts and the law, did not expressly allude to the factors for reallocation. This omission should not result in a new trial being ordered because of the length and cost of the current litigation. The result achieved by the trial judge should be endorsed because the evidence was capable of supporting an order for reallocation of the parties' interest in the family assets to the extent required to give the appellant the entire interest in the matrimonial home.

The money owed by the family's jewelry corporation was not, in law, a debt for which respondent was personally liable. Only the corporation was liable. The debt appellant incurred to support herself and the children before she applied for maintenance is similarly unenforceable against respondent as a debt, although it could be taken into consideration in an order for reduction of his interest in the family assets.

Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties. The facts that an application has little merit and that part of the cost of the litigation may have been paid for by others do not justify awarding solicitor-client costs.

No order for costs should have been made against respondent's barrister. Costs are awarded as compensation for the successful party, not to punish a lawyer. Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which he or she was involved, and that the lawyer acted in bad faith in encouraging this abuse and delay. The courts have jurisdiction to make such an award, often under statute and as part of their inherent jurisdiction to control abuse of process and contempt of court. The proceedings here, despite their length and acrimonious progress, did not fall within these characterizations. Courts, moreover, must

be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her profession.

Since the Society did not appear as a party, the costs awarded against it must be taken to be the equivalent of an award for the tort of maintenance. A person must intervene "officially or improperly" to be liable for the tort of maintenance. Provision of financial assistance to a litigant by a non-party will not always constitute maintenance. Funding by a relative or out of charity must be distinguished from cases where a person wilfully and improperly stirs up litigation and strife. The society's support was "out of charity and religious sympathy" and so did not constitute maintenance. It did not put forward respondent in an attempt to escape liability for costs. Its interest in the constitutional issue was insufficient to distinguish it from interveners who appear on constitutional cases and who have never been liable for costs.

Per La Forest and Gonthier JJ.: The reasons of McLachlin J. were agreed with on the property and monetary issues and on the principles governing costs.

Per Iacobucci and Cory JJ.: The reasons of McLachlin J. were agreed with on the property, monetary and costs issues.

Per L'Heureux-Dubé J. (dissenting): The reasons of the trial judge on the issues of maintenance, division of property and costs were agreed with.

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Distinguished: *Hockey v. Hockey* (1989), [1989 CanLII 4299 \(ON SC\)](#), 21 R.F.L. (3d) 105; **referred to:** *Anson v. Anson* (1987), 10 B.C.L.R. (2d) 357; *Andrews v. Andrews*, B.C.S.C., June

9, 1983, unreported; *Brown v. Brown* (1983), [1983 CanLII 2311 \(SK CA\)](#), 39 R.F.L. (2d) 396; *DeLaurier v. Jackson*, [1934 CanLII 2 \(SCC\)](#), [1934] S.C.R. 149; *R. v. Big M Drug Mart Ltd.*, [1985 CanLII 69 \(SCC\)](#), [1985] 1 S.C.R. 295; *In re Agar-Ellis*, [1883] Ch. D. 317; *R. v. De Manneville* (1804), 5 East. 221, 102 E.R. 1054; *Re Orr*, [1933 CanLII 110 \(ON CA\)](#), [1933] O.R. 212; *Talsky v. Talsky*, [1975 CanLII 29 \(SCC\)](#), [1976] 2 S.C.R. 292; *Re Moores and Feldstein*, [1973 CanLII 535 \(ON CA\)](#), [1973] 3 O.R. 921; *Kruger v. Kruger* (1979), [1979 CanLII 1663 \(ON CA\)](#), 25 O.R. (2d) 673; *Baker v. Baker* (1979), [1979 CanLII 1962 \(ON CA\)](#), 8 R.F.L. (2d) 236; *C.(G). v. V.-F.(T.)*, [1987 CanLII 20 \(SCC\)](#), [1987] 2 S.C.R. 244; *Dussault v. Ladouceur* (1987), [1987 CanLII 876 \(QC CA\)](#), 14 R.F.L. (3d) 185; *Gunn v. Gunn* (1975), [1975 CanLII 1938 \(PE PC\)](#), 24 R.F.L. 182; *Benoit v. Benoit* (1972), [1972 CanLII 1869 \(ON CJ\)](#), 6 R.F.L. 180 (Ont. Prov. Ct.), rev'd (1972), [1972 CanLII 1936 \(ON CA\)](#), 10 R.F.L. 282 (Ont. C.A.); *Charlton v. Charlton* (1980), [1980 CanLII 545 \(BC SC\)](#), 15 R.F.L. (2d) 220; *Hewer v. Bryant*, [1970] 1 Q.B. 357; *Clarke v. Clarke* (1987), [1987 CanLII 2745 \(BC SC\)](#), 7 R.F.L. (3d) 176; *McCahill v. Robertson* (1974), [1974 CanLII 2225 \(ON SC\)](#), 17 R.F.L. 23; *Fougere v. Fougere* (1987), [1987 CanLII 7842 \(NB CA\)](#), 77 N.B.R. (2d) 381; *Dipper v. Dipper*, [1980] 2 All E.R. 722; *Keyes v. Gordon* (1985), [1985 CanLII 123 \(NS CA\)](#), 45 R.F.L. (2d) 177; *Droit de la famille -- 316*, [1986] R.D.F. 651; *Moge v. Moge*, [1992 CanLII 25 \(SCC\)](#), [1992] 3 S.C.R. 813; *Pierce v. Pierce*, [1977 CanLII 2206 \(BC SC\)](#), [1977] 5 W.W.R. 572; *Gubody v. Gubody*, [1955 CanLII 405 \(ON SC\)](#), [1955] O.W.N. 548; *Sudeyko v. Sudeyko* (1974), [1974 CanLII 2223 \(BC SC\)](#), 18 R.F.L. 273; *Frame v. Smith*, [1987 CanLII 74 \(SCC\)](#), [1987] 2 S.C.R. 99; *Tocco v. Tocco* (1977), [1977 CanLII 2628 \(ON CA\)](#), 4 R.F.L. (2d) 174; *Racine v. Woods*, [1983 CanLII 27 \(SCC\)](#), [1983] 2 S.C.R. 173; *In re McGrath (Infants)*, [1893] 1 Ch. 143; *King v. Low*, [1985 CanLII 59 \(SCC\)](#), [1985] 1 S.C.R. 87; *Beson v. Director of Child Welfare (Nfld.)*, [1982 CanLII 32 \(SCC\)](#), [1982] 2 S.C.R. 716; *M. (B.P.) v. M. (B.L.D.E.)*, (1992), [1992 CanLII 8642 \(ON CA\)](#), 97 D.L.R. (4th) 437; *R. v. Swain*, [1991 CanLII 104 \(SCC\)](#), [1991] 1 S.C.R. 933; *R. v. Beare*, [1988 CanLII 126 \(SCC\)](#), [1988] 2 S.C.R. 387; *Baron v. Canada*, [1993 CanLII 154 \(SCC\)](#), [1993] 1 S.C.R. 416; *R. v. Morales*, [1992 CanLII 53 \(SCC\)](#), [1992] 3 S.C.R. 711; *R. v. Morgentaler*, [1988 CanLII 90 \(SCC\)](#), [1988] 1 S.C.R. 30; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989 CanLII 87 \(SCC\)](#), [1989] 1 S.C.R. 927; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990 CanLII 105 \(SCC\)](#), [1990] 1 S.C.R. 1123; *R. v. Keegstra*, [1990 CanLII 24 \(SCC\)](#), [1990] 3 S.C.R. 697; *Canada (Human Rights Commission) v. Taylor*, [1990 CanLII 26 \(SCC\)](#), [1990] 3 S.C.R. 892; *Committee for the Commonwealth of Canada v.*

Canada, 1991 CanLII 119 (SCC), [1991] 1 S.C.R. 139; *Osborne v. Canada (Treasury Board)*, 1991 CanLII 60 (SCC), [1991] 2 S.C.R. 69; *R. v. Butler*, 1992 CanLII 124 (SCC), [1992] 1 S.C.R. 452; *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), [1992] 2 S.C.R. 606; *R. v. LeBeau* (1988), 1988 CanLII 3271 (ON CA), 41 C.C.C. (3d) 163; *R. v. Khan*, 1990 CanLII 77 (SCC), [1990] 2 S.C.R. 531; *RWDSU v. Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573; *Tremblay v. Daigle*, 1989 CanLII 33 (SCC), [1989] 2 S.C.R. 530; *B.C.G.E.U. v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214; *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038; *Hills v. Canada (Attorney General)*, 1988 CanLII 67 (SCC), [1988] 1 S.C.R. 513; *Canada (Attorney General) v. Mossop*, 1993 CanLII 164 (SCC), [1993] 1 S.C.R. 554; *Re Bennett Infants*, 1952 CanLII 293 (ON CA), [1952] O.W.N. 621; *Delvenne v. Nabbie* (1977), 1977 CanLII 2270 (MB CA), 4 R.F.L. (2d) 21; *Irmert v. Irmert* (1984), 1984 ABCA 286 (CanLII), 64 A.R. 342; *Harvey v. Lapointe* (1988), 1988 CanLII 8787 (QC CS), 13 R.F.L. (3d) 134; *McQuillan v. McQuillan* (1975), 1975 CanLII 1946 (ON SC), 21 R.F.L. 324; *Struncova v. Guay* (1984), 1984 CanLII 4817 (QC CS), 39 R.F.L. (2d) 298; *Sullivan v. Fox* (1984), 1984 CanLII 4805 (PE PC), 38 R.F.L. (2d) 293; *Droit de la famille -- 955*, 1991 CanLII 3838 (QC CA), [1991] R.J.Q. 599; *Droit de la famille -- 353*, 1987 CanLII 398 (QC CA), [1987] R.J.Q. 545; *Zummo v. Zummo*, 574 A.2d 1130 (1990); *Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326; *Fraser v. Public Service Staff Relations Board*, 1985 CanLII 14 (SCC), [1985] 2 S.C.R. 455; *Adams v. McLeod*, 1978 CanLII 5 (SCC), [1978] 2 S.C.R. 621; *Novic v. Novic*, 1983 CanLII 55 (SCC), [1983] 1 S.C.R. 696.

By McLachlin J.

Considered: *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295;
referred to: *R. v. De Manneville* (1804), 5 East. 221, 102 E.R. 1054; *In re Taylor* (1876), 4 Ch. D. 157; *In re Agar-Ellis* (1883), 24 Ch. D. 317; *Talsky v. Talsky*, 1975 CanLII 29 (SCC), [1976] 2 S.C.R. 292; *Kades v. Kades* (1961), 35 A.L.J.R. 251; *J. v. C.*, [1970] A.C. 668; *Re K. (minors)*, [1977] 1 All E.R. 647; *King v. Low*, 1985 CanLII 59 (SCC), [1985] 1 S.C.R. 87; *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927; *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, 1990

[CanLII 105 \(SCC\)](#), [1990] 1 S.C.R. 1123; *RWDSU v. Dolphin Delivery Ltd.*, [1986 CanLII 5 \(SCC\)](#), [1986] 2 S.C.R. 573; *Edmonton Journal v. Alberta (Attorney General)*, [1989 CanLII 20 \(SCC\)](#), [1989] 2 S.C.R. 1326; *R. v. Sturmer and Town of Beaverton* (1912), [1912 CanLII 588 \(ON SCDC\)](#), 25 O.L.R. 566; *Goodman v. The King*, [1939 CanLII 21 \(SCC\)](#), [1939] S.C.R. 446; *Newswander v. Giegerich* (1907), [1907 CanLII 33 \(SCC\)](#), 39 S.C.R. 354.

By Sopinka J.

Referred to: *Slaight Communications Inc. v. Davidson*, [1989 CanLII 92 \(SCC\)](#), [1989] 1 S.C.R. 1038; *R. v. Big M Drug Mart Ltd.*, [1985 CanLII 69 \(SCC\)](#), [1985] 1 S.C.R. 295.

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APPEAL from a judgment of the British Columbia Court of Appeal (1990), [1990 CanLII 3813 \(BC CA\)](#), 50 B.C.L.R. (2d) 1, 75 D.L.R. (4th) 46, allowing an appeal in part from a judgment of Proudfoot J. (1989), [1989 CanLII 8903 \(BC SC\)](#), 24 R.F.L. (3d) 193. Appeal allowed in part, L'Heureux-Dubé J. dissenting in the result. [Sections 16\(8\)](#) and [17\(5\)](#) of the *Divorce Act* did not violate [ss. 2\(a\), \(b\), \(d\)](#) or [15\(1\)](#) of the *Canadian Charter of Rights and Freedoms*.

Lorne N. MacLean and *Fred C. Lowther*, for the appellant.

W. Glen How, Q.C., and *Sarah E. Mott-Trille*, for the respondent James K. C. Young.

Gordon Turriff, for the respondent W. Glen How.

John M. Burns and *Linda How*, for the respondent Watch Tower Bible and Tract Society of Canada.

Brian Evernden, for the intervener the Attorney General of Canada.

Michel Y. Hélie, for the intervener the Attorney General for Ontario.

Monique Rousseau and *Isabelle Harnois*, for the intervener the Attorney General of Quebec.

Shawn Greenberg, for the intervener the Attorney General of Manitoba.

Written submission only for the intervener the Attorney General of British Columbia.

Gerald D. Chipeur and *Karnick Doukmetzian*, for the intervener the Seventh-day Adventist Church in Canada.

The reasons of La Forest and Gonthier JJ. were delivered by

LA FOREST J. -- I have had the advantage of reading the reasons of my colleagues. I am in agreement with the reasons of Justice L'Heureux-Dubé that the issue of access should be determined on the basis of what is in the best interest of the child. I also agree with her on the constitutional issue.

On the property and monetary issues, I am in agreement with the reasons of Justice McLachlin. I also agree with her on the principles that should govern costs and accordingly with the order of the Court of Appeal respecting the costs at trial. However, since the appellant was largely successful in the final result, I would allow her costs on this appeal and the Court of Appeal.

Accordingly, I would allow the appeal and restore the order of the trial judge on all matters except the monetary issues, which I would dispose of in the manner proposed by McLachlin J. I would award the appellant her costs at trial as set forth by the Court of Appeal, as well as costs on a party and party basis in this Court and in the Court of Appeal.

The following are the reasons delivered by

L'HEUREUX-DUBÉ J. (dissenting in result) -- I have had the advantage of reading the opinion of my colleague, Justice McLachlin. With great deference, I disagree both with her reasons and the result she has reached. Since I do not characterize the issue quite as my colleague does, I will pursue my own analysis.

The main issue in this case, in my view, concerns access by a non-custodial parent to his children whose custody was granted to the other parent. More precisely, this Court must determine whether curtailment of access is warranted in the circumstances of this case. The focus of the inquiry is the standard applicable to such a determination. According to the Court of Appeal, the test is one of harm to the children. I disagree. In my view, the only applicable test is the best interests of the children, assessed from a child-centred perspective, a test which is mandated by the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.) (the "Act"), as well as provincial legislation and which is universally

applied and constitutionally sound. While the respondent, the father in this case, raises the issues of freedom of religion and expression and the infringement of his guarantees under s. 2(a) and (b) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") due to the trial judge's order restricting access to his children, these questions simply do not arise in the circumstances of this case. If they do, I agree with my colleague that there is no infringement of the *Charter*.

On the related issues of maintenance, division of property and costs, I agree with the trial judge for the reasons that she expressed at length, given her privileged vantage point and her findings of fact. Accordingly, I will deal only with the main issue: access.

Facts and Judgments

Since the facts leading to the dispute between the parties have been set out by my colleague, I will only point out those most relevant to my subsequent discussion.

The parties, who had two children when they first separated in February, 1987, resumed cohabitation and finally separated in August, 1987, shortly after the birth of their third child. It appears from the evidence that the breakdown of their marriage was due, to a great extent, to religious differences between the parties. The respondent became involved, unbeknownst to the appellant, in the Jehovah's Witnesses faith some two years before the separation. The children had been baptized in the United Church, and the appellant, an Anglican, apparently did not favour any involvement for herself or the children in her husband's new faith. At the time, the older children were six and eight years of age.

Upon separation, it was common ground between the parties that the appellant should have custody of the children and they have remained at all times since in the care of their mother. On July 12, 1988, the appellant brought an application for divorce and sought spousal and child support, interim and permanent custody of the children and an order enjoining the respondent from inculcating the children in the Jehovah's Witness faith or involving them in church activities. The respondent brought a cross-application for interim joint custody with care and control to the appellant and a

declaration that the restrictions sought by his wife violated his and the children's rights under the *Charter*.

In the interim order of August 16, 1988, Scarth L.J.S.C. dismissed the respondent's motion for a declaration and order pursuant to s. 24 of the *Charter*. He granted custody to the appellant, awarded her \$3,500 a month in spousal and child support and specified the following restrictions on the respondent's access:

- a) the Respondent will not take the said children of the marriage to the Respondent's church without the Petitioner's consent and if the Petitioner withholds consent, the Respondent may make application to this court;
- b) the Respondent will not suggest that the three children of the marriage will have to separate from the Petitioner if she does not convert to the Jehovah's Witnesses [*sic*] faith, or that the Petitioner will be punished by God for failing to adhere to that faith;
- c) the Respondent will not deprecate the Petitioner's religion in the presence of the three infant children of the marriage;
- d) the Respondent is enjoined from preventing the said infants from having blood transfusions in the event blood transfusions are required and the Petitioner shall be solely responsible for all health care decisions and choices relative to the said infant children of the marriage.

The respondent appealed the order and instituted a number of further applications in which he sought to vary the interim custody order and the terms and conditions imposed on access. He also applied to set the dates and times of access and sought overnight access. The appeal of the interim order was dismissed by the B.C. Court of Appeal on September 23, 1988 and the applications for interim and permanent custody of the children and variation of the restrictions were rejected by Scarth L.J.S.C. on October 7, 1988. The respondent then appealed the order of October 7, 1988 and sought a declaration that both the order and s. 16(1), (2), (6) and (8) of the *Act* violated his *Charter* rights. This appeal was dismissed on November 15, 1988. Prior to trial, the respondent also unsuccessfully contested the amount of support to be paid and applied to list the matrimonial home for sale and have the arrears of support accumulated to that date cancelled.

At trial (1989), 1989 CanLII 8903 (BC SC), 24 R.F.L. (3d) 193, on the issue of custody and access, Proudfoot J. (now J.A.) found that the respondent's attempts to argue loss of freedom of

religion were but a guise under which he was attempting to gain control of the children's religious upbringing. She held that the respondent would not be denied custody or access because of his religious beliefs and that his freedom of religion had not been infringed. Rather, custody and access would be decided only according to the best interests of the children. She found that the appellant did not oppose access by the respondent, and that the difficulty was created solely by their religious differences. Distinguishing the decision of the Divisional Court of the Supreme Court of Ontario in *Hockey v. Hockey* (1989), [1989 CanLII 4299 \(ON SC\)](#), 21 R.F.L. (3d) 105, and relying on *Anson v. Anson* (1987), 10 B.C.L.R. (2d) 357 (Co. Ct.), and *Andrews v. Andrews*, B.C.S.C., June 9, 1983, unreported, Proudfoot J. found that both the right and the responsibility to determine a child's education, health care and religion rest with the custodial parent. Citing the decision of the Saskatchewan Court of Appeal in *Brown v. Brown* (1983), [1983 CanLII 2311 \(SK CA\)](#), 39 R.F.L. (2d) 396, she found that the *Charter* has not affected the general principle enunciated in *DeLaurier v. Jackson*, [1934 CanLII 2 \(SCC\)](#), [1934] S.C.R. 149, that the father's rights in respect of the religious upbringing of his child must yield to the welfare of the child.

Proudfoot J. noted that the original custody order had been made with the respondent's consent and that all the experts agreed that custody should remain with the appellant. The children had indicated in letters written to the judge that they wished to remain with their mother. The evidence was clear that they were opposed to any involvement in the respondent's religious activities and that there had been total disregard for their wishes. The reports of both court experts indicated that the two older children's relationship with their father was deteriorating, that they were under increasing pressure regarding family issues and needed to settle the conflict so they could proceed with their lives. Proudfoot J. found that there was no doubt on the evidence that the religious conflict was causing a problem for the children and that it should be resolved. She granted the appellant custody and guardianship of the children with sole responsibility for their religious upbringing, health care and education and granted the respondent access subject to the following conditions:

- a) that the Respondent shall not discuss the Jehovah's Witness religion with the children and shall not take any of the children to any religious services, canvassing or meetings, without the written consent of the Petitioner and shall not expose the children to religious discussions with a third party or parties without the written consent of the Petitioner;

- b) that the Respondent is enjoined from preventing any of the three infant children of the marriage from having blood transfusions in the event blood transfusions are required;
- c) and that the Respondent shall not make any adverse remarks with respect to the religious beliefs of the Petitioner....

She further declared that neither the custody order nor the access restrictions infringed the respondent's freedom of religion under the *Charter* and made other incidental findings as to support, the division of matrimonial property and costs, with which I agree as already indicated.

On appeal (1990), [1990 CanLII 3813 \(BC CA\)](#), 50 B.C.L.R. (2d) 1, the respondent abandoned his custody claim but sought an order for joint guardianship of the children, unrestricted access and a declaration that the restrictions on access violated his and the children's *Charter* rights. Upon reviewing the rights of custodial parents and the historical development of access, Wood J.A. for the majority (Cummings J.A. concurring on this issue) noted that the concept of access did not receive statutory recognition until the *Act*. Wood J.A. found that the terms of *s. 16* of the *Act*, when taken as a whole, indicate an intention by Parliament to foster substantial changes in the law of custody and access and to facilitate a meaningful and continuing relationship with the children of the marriage and the access parent. In his opinion, the word "contact" within *s. 16(10)* should be given a broad meaning, and a proper construction of the *Act* requires the distribution of "rights" between the custodial and the access parent. He found that an order for custody under *s. 16(1)* of the *Act* necessarily gives the custodial parent the power to determine the religious upbringing of the child, but does not give that parent the right to prevent the other from sharing his or her views with the child, whether that takes the form of discussions, observances or other related activities. The right of the access parent to share those beliefs is subject only to two limitations: (a) the unwillingness of the child to participate and (b) the power of the court to restrict the access if exposure to the beliefs or practices is, or is likely to be, harmful to the well-being of the child. Such harm must be "real psychological or physical harm", established on a civil standard of proof and must be distinguished from the general emotional distress which every child experiences upon divorce.

As to freedom of religion, Wood J.A. was of the view that the issue was whether or not the access parent's fundamental freedom of religion under *s. 2(a)* of the *Charter* is infringed by the

long-standing common law rule which would give the custodial parent, as guardian of the child of the marriage, the absolute right to control the extent to which the access parent can expose that child to his or her religious beliefs. After considering the nature of freedom of religion set out in *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, Wood J.A. held that an important element of the right to teach and disseminate one's beliefs must be the right to share those beliefs with one's children. In his view, it would be a rare case in which a court would be required to determine whether or not the exposure to conflicting religious beliefs or the beliefs themselves was threatening real physical or psychological harm to the child. Before embarking on such an inquiry, a court would require the evidence of an independent expert.

Applying these principles to the facts of the case, Wood J.A. concluded at p. 109 that:

No such harm was diagnosed or anticipated by either of the expert witnesses which the learned trial judge found to be credible. Nor did the evidence establish that the conflict in the religious beliefs of the parents was causing, or likely to cause, such harm.

The evidence went no further than to establish that the children were under some stress, the cause of which was "multi-factorial", but which obviously included some component related to the religious dispute between the parents. As I have attempted to show such evidence would not even justify the court embarking on any inquiry into the religious beliefs of a parent. It is therefore axiomatic that it would not support any interference with Mr. Young's fundamental freedom of religion under s. 2(a) of the Charter, in the form of the restrictions imposed.

Nonetheless, Wood J.A. held that the respondent was bound to respect the girls' wishes not to accompany him to his place of worship or on his proselytization efforts. Finding no reason to disbelieve the respondent's willingness to do so, Wood J.A. held that there was no basis for the imposition of any restrictions on his rights of access. In the result, he struck out the restrictions on access, found the declaration that the appellant have sole responsibility for the religious upbringing, health care and education of the children unnecessary and struck out the order that neither party make adverse remarks with reference to the religious beliefs of the other.

Southin J.A., dissenting on this issue, after a comprehensive review of parental authority, concluded that the custodial parent today enjoys the "full plenitude" of parental powers historically enjoyed by a guardian even during the time that the child is with the access parent. In her view,

nothing in either the [Act](#) or the B.C. *Family Relations Act*, R.S.B.C. 1979, c. 121, was intended to limit the long-standing rule that the custodial parent is entitled to "lay down the law" concerning all matters relating to the children even during the time of access. In her view, the word "contact" in [s. 16\(10\)](#) of the Act did not contemplate a right in anyone granted access to disregard the determinations of the custodial parent, as it is a principle of statutory interpretation that (at p. 32) "if Parliament intends to set at naught a long-standing concept of the common law, it does so plainly and not by woolly words capable of more than one interpretation." With respect to the [Charter](#), Southin J.A. held that the rights within s. 2 must not be construed in such a way as to deny the existence of parental rights, which are preserved by [s. 26](#) of the *Charter*. She concluded that the appellant may control the children's activities but that she may not control the conversations which take place during the time of access. In her view, the appellant was entitled to establish that it would not be in the best interests of the children to be exposed to the religious observances of the respondent. In the result, she would have ordered that the respondent not take the children to any religious service or have the children accompany him in any religious activity without the written consent of the Petitioner.

Relevant Statutory Provisions

In the present case, the Court is concerned with the statutory criteria which guide courts in matters of custody and access. A proper starting point, then, is to spell out those provisions of the [Divorce Act](#), which are relevant to a discussion of custody and access:

16. (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

...

(4) The court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons.

(5) Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.

(6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

...

(8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

(9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

(10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

17. . . .

(5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change. [Emphasis added.]

Custody

Leaving aside for the moment the constitutional questions stated by Lamer C.J., I wish to focus on the matter of custody and access. While the issue of custody is no longer in dispute, the parties having agreed that the appellant should retain custody of their three children, it is still necessary, to set the stage fully, to examine the rationale underlying the granting of custody.

At common law, the right to custody of children was originally incontestable and reposed with the father to the exclusion of any claims of the mother. The father possessed the full bundle of rights which are an inherent feature of the relationship between parent and child. This right reflected the dominant ideology of the family before this century and was composed of several interrelated concepts. The patriarchal family was the preferred, indeed the only recognized family structure. Fathers were regarded as possessing a natural right to their children, which flowed from the belief that they knew best about the interests of their children and that those interests were best served by upholding their proprietary rights (see S. Maidment, *Child Custody and Divorce* (1984), at pp. 5-6; *In re Agar-Ellis*, [1883] Ch. D. 317). Thus, the sole concern in custody matters was for the rights of the father with little regard for the effect of such decisions on the child. As the famous case of *R. v. De*

Manneville (1804), 5 East. 221, 102 E.R. 1054, illustrates, under such a regime, a mother could be denied custody and even access to a child still breast-feeding notwithstanding that the undisputed cause of the marriage breakdown was the cruelty of the father.

Since the 19th century, along with a gradual move toward equality of the sexes in custody presumptions, the focus has shifted from the rights of the parents to those of the child. The first statutory inroads were made in England with the passage of *Talfourd's Act* in 1839 (*An Act to amend the Law relating to the Custody of Infants* (U.K.), 2 & 3 Vict., c. 54) which allowed courts to make an order of access to the mother, and even to award her the custody of children of "tender years", those under the age of seven. However, fathers still retained the presumptive right to custody, a right which would only be disturbed where there was serious reason to believe that his behaviour would be detrimental to the child. In contrast, mothers who engaged in adulterous behaviour were deemed to have threatened the family structure and were presumed unfit to protect the interests of the child and routinely denied custody.

The best interests of the child gained ascendancy as the proper focus of custody decisions at the same time as courts moved toward the equality of women in custody decisions. The power of courts to rule in the best interests of the child was originally found in the equitable *parens patriae* jurisdiction of the Courts of Chancery. Although this power was at first only exercised in respect of the property rights of the child, the concept of the best interests of the child was gradually expanded to include the emotional, physical and spiritual welfare of the child. Changes in the social landscape affecting both the nature of work and the family and growing recognition of the needs of children began to inform custody decisions. With the merger of the courts of equity and common law in the *Supreme Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict., c. 66, the ability of courts to overrule any common law parental right where found to be in the best interests of the child was confirmed, as s. 25(10) of the *Act* specifically provided that "In questions relating to the custody and education of infants the rules of equity shall prevail". In England, Parliament specifically recognized as important a consideration of the welfare of the child in the *Guardianship of Infants Act, 1886* (U.K.), 49 & 50 Vict., c. 27. Upon the passage of the *Guardianship of Infants Act, 1925* (U.K.), 15 & 16 Geo. 5, c. 45, the welfare of the child became the "the first and paramount consideration". The welfare, or what is

now called the best interests, of the child thus prevailed over any potential rights that parents previously held at common law.

A number of rules were developed by courts, presumably predicated on the best interests test, which made the outcome of custody matters dependent upon assumptions as to parents' suitability. The most important of these rules was the tender years doctrine, which was described by an Ontario court in 1933 as the common sense proposition that, in general, children under the age of seven needed the care of their mothers (*Re Orr*, [1933 CanLII 110 \(ON CA\)](#), [1933] O.R. 212 (C.A.)). A related presumption favoured the placement of older children with the parent of the same sex. The *Guardianship of Infants Act, 1925*, granted women equal rights to custody over their children in England. In Canada, statutes providing for equality in entitlement to custody were passed in some provinces as early as 1923, although the process of legislative entrenchment was not completed until 1977 (see R. S. Abella, "Family Law in Ontario: Changing Assumptions" (1981), 13 *Ottawa L. Rev.* 1, at p. 13). The net effect of both legislative enactments and judicially developed presumptions was that women were granted custody of children in the majority of cases.

Although the welfare principle long predates the 1970s, it was at that time that the emerging focus on the rights of children began to supplant the tender years doctrine, as courts adopted the principle expressed by de Grandpré J. in *Talsky v. Talsky*, [1975 CanLII 29 \(SCC\)](#), [1976] 2 S.C.R. 292, at p. 293, that "the paramount consideration in custody matters is the welfare of the infants". Concurrent with this shift was the dissociation of notions of matrimonial fault from assumptions about parenting ability. Following the Law Reform Commission of Canada's report on *Family Law* in 1976, the best interests test was entrenched as the sole criterion for the determination of custody and access in the *Divorce Act*. Since then, not only has the best interests of the child become the paramount consideration, legislation has dictated that it be the sole consideration.

Despite these changes over time with respect to who is regarded as the appropriate custodial parent, the nature and scope of custody itself have remained relatively constant. The chief feature of such orders was, and still is, the implied, if not explicit, conferral of parental authority on the person granted custody. The long-standing rule at common law is that an order of custody entails

the right to exercise full parental authority. In the case of a sole custody order, that authority is vested in one parent to the exclusion of the other.

The power of the custodial parent is not a "right" with independent value which is granted by courts for the benefit of the parent, but is designed to enable that parent to discharge his or her responsibilities and obligations to the child. It is, in fact, the child's right to a parent who will look after his or her best interests. Indeed, courts have recognized that there is no magic to the parental tie and will, when the best interests of the child warrant, grant custody to a third party. As Dubin J.A. (now C.J.O.) held in *Re Moores and Feldstein*, [1973 CanLII 535 \(ON CA\)](#), [1973] 3 O.R. 921, at p. 928:

. . . it is the duty of the Court to view all the circumstances relevant to what is in the interest of the child, including a consideration as to whether the evidence disclosed that the child would benefit from the tie of a child to its mother.

It has long been recognized that the custodial parent has a duty to ensure, protect and promote the best interests of the child. That duty includes the sole and primary responsibility to oversee all aspects of day to day life and long-term well-being, as well as major decisions with respect to education, religion, health and well-being. This is reflected in the decision of the Ontario Court of Appeal in *Kruger v. Kruger* (1979), [1979 CanLII 1663 \(ON CA\)](#), 25 O.R. (2d) 673, at p. 677, in which Thorson J.A. stated:

In my view, to award one parent the exclusive custody of a child is to clothe that parent, for whatever period he or she is awarded the custody, with full parental control over, and ultimate parental responsibility for, the care, upbringing and education of the child, generally to the exclusion of the right of the other parent to interfere in the decisions that are made in exercising that control or in carrying out that responsibility.

See also *Baker v. Baker* (1979), [1979 CanLII 1962 \(ON CA\)](#), 8 R.F.L. (2d) 236 (Ont. C.A.).

A parallel situation exists with respect to the exercise of parental authority on separation or divorce under the *Civil Code of Quebec*. Article 647 of the *C.C.Q.* grants equal rights to parents in the exercise of authority over their children, stating that "[t]he father and mother have the rights and duties of custody, supervision and education of their children". However, art. 569 requires courts to

decide questions of custody, maintenance and education of children "in their interest and in the respect of their rights", and art. 570 preserves only the right of the non-custodial parent to surveillance over such matters. As Beetz J., writing for this Court, held in *C.(G.) v. V.-F.(T.)*, [1987 CanLII 20 \(SCC\)](#), [1987] 2 S.C.R. 244, at p. 280, the effect of a custody award is to remove the right of the non-custodial parent to exercise his or her parental authority.

The rationale for granting this authority to the custodial parent is described by Gendreau J.A. in *Dussault v. Ladouceur* (1987), [1987 CanLII 876 \(QC CA\)](#), 14 R.F.L. (3d) 185 (Que. C.A.), at p. 191, as follows:

[TRANSLATION] It goes without saying that as a general rule, when custody of a child is granted to one parent, he or she then exercises all the attributes of parental authority and the other parent does not normally interfere in the custodial parent's way of doing things, except in the exercise of his or her supervising role. The child's unity of development is preserved in this manner and any scatterings or dislocations that might be harmful to him or her are avoided.

See also *Gunn v. Gunn* (1975), [1975 CanLII 1938 \(PE PC\)](#), 24 R.F.L. 182 (P.E.I.S.C.); *Benoit v. Benoit* (1972), [1972 CanLII 1869 \(ON CJ\)](#), 6 R.F.L. 180 (Ont. Prov. Ct.), reversed on other grounds (1972), [1972 CanLII 1936 \(ON CA\)](#), 10 R.F.L. 282 (Ont. C.A.). Similarly, under the B.C. *Family Relations Act*, the custodial parent has the full bundle of rights over the child (*Charlton v. Charlton* (1980), [1980 CanLII 545 \(BC SC\)](#), 15 R.F.L. (2d) 220 (B.C.S.C.); *Anson v. Anson*, *supra*).

As Professor Julien Payne has observed in *Payne on Divorce* (2nd ed. 1988), at p. 144, it has, at times, been thought, both in Canada and elsewhere, that custody and guardianship of a child were different in scope. While the case law is not consistent on this point, the term "custody" has been used in two senses. When used in its wider sense, custody is akin to the concept of guardianship and encompasses the full bundle of parental rights. In its narrower sense, the term refers only to the right to physical custody or day to day care and control of the child (see *Hewer v. Bryant*, [1970] 1 Q.B. 357; *Anson v. Anson*, *supra*, at p. 363). However, as Payne notes at pp. 144-45, at this point in time, the wider concept of custody is well entrenched in Canadian law:

In the context of Canadian divorce proceedings, the case law tends to support the conclusion that, in the absence of directions to the contrary, an order granting "sole custody" to one parent

signifies that the custodial parent shall exercise all the powers of the legal guardian of the child. The non-custodial parent with access privileges is thus deprived of the rights and responsibilities that previously vested in that parent as a joint custodian of the child.

This view is reflected in the decision of Huddart Co. Ct. J. in *Anson v. Anson*, *supra*, at p. 366:

There seems to be no limit other than that of the imagination of the bar and bench to the variety of orders that can be devised to ensure the best interests of a child are served by the distribution of custodial rights and duties between the interested adults. The law reports resound with examples. Key, however, is where the residual authority lies. It seems too late to suggest that the term custody be confined to physical care and control with guardianship of the person being the residual concept, including general supervision of the upbringing of the child. The wide meaning is entrenched in federal legislation and in the case law here and elsewhere. [Emphasis added.]

See also *Clarke v. Clarke* (1987), [1987 CanLII 2745 \(BC SC\)](#), 7 R.F.L. (3d) 176 (B.C.S.C.).

Southin J.A., the dissenting judge on this issue in the Court of Appeal, dealt at p. 31 with the question of custody under the B.C. provincial legislation in the following terms:

I can find nothing in the 1978 [Act](#) which warrants an inference that the Legislature intended by it to cut down the powers of guardians as those powers have long been understood. It follows that, if the order giving custody to Mrs. Young is sustained, she has under the Family Relations Act the full right to lay down the law concerning all matters relating to the children even during the time they are with their father for the purpose of his exercise of access.

The non-custodial parent retains certain residual rights over the child as one of its two natural guardians, among which is the right to apply to the court for variation of custody and access terms. Various other entitlements have been recognized at common law, including, subject to the best interests of the child, the right to access, the right to contest the child's adoption, the right to claim guardianship of the person of the child upon the death of the custodial parent and the right to succeed to the child's property among others (see *Maidment*, *supra*, at p. 34; *Dussault v. Ladouceur*, *supra*; Law Reform Commission of Canada, report on *Family Law*, *supra*; Law Reform Commission of Canada, *The Custody, Care and Upbringing of Children of Divorcing Spouses*, 1973).

The traditional decision-making power of the custodial parent recognized by law is intimately connected to the welfare of the child, as the need for a secure and constant source of

parental responsibility in the life of the child is well understood among those who are knowledgeable in the psychology of children. J. Goldstein, A. Freud and A. J. Solnit in *Beyond the Best Interests of the Child* (1979) identified three imperatives that must govern child placement decisions such as custody arrangements. Such decisions should: safeguard the child's need for continuity of relationships, reflect the child's, not the adult's, sense of time, and take into account the law's inability to supervise interpersonal relationships and the limits of knowledge to make long-range predictions (*supra*, at pp. 31, 40 and 49). The need for continuity generally requires that the custodial parent have the autonomy to raise the child as he or she sees fit without interference with that authority by the state or the non-custodial parent, as it is the inability of the custodial parent to protect those interests sufficiently which poses the real threat to the welfare of the child. A custody award can thus be regarded as a matter of whose decisions to prefer, as opposed to which decisions to prefer. In the words of B. M. Dickens, "The Modern Function and Limits of Parental Rights" (1981), 97 *L.Q. Rev.* 462, at p. 473 "the identification of who is allowed to decide is no less important in theory, and more important in practice, than how choice is to be exercised between options". (See also J. Goldstein, "In Whose Best Interest?", in R. S. Abella and C. L'Heureux-Dubé, eds., *Family Law: Dimensions of Justice* (1983), at p. 124.)

As Goldstein, Freud and Solnit stress, an important function of the law on divorce or separation is to reinforce the remainder of the family unit so that children may get on with their lives with as little disruption as possible. Courts are not in a position, nor do they presume to be able, to make the necessary day-to-day decisions which affect the best interests of the child. That task must rest with the custodial parent, as he or she is the person best placed to assess the needs of the child in all its dimensions. In my view, this was eloquently expressed by Weatherston J. (later J.A.) in *McCahill v. Robertson* (1974), [1974 CanLII 2225 \(ON SC\)](#), 17 R.F.L. 23 (Ont. S.C), at pp. 23-24:

A child must know where its home is and to whom it must look for guidance and admonition and the person having custody and having that responsibility must have the opportunity to exercise it without any feeling by the infant that it can look elsewhere. It may be an unfortunate thing for the spouse who does not have custody that he or she does lose a great deal of the authority and indeed to some extent the love and affection of the child that might otherwise be gained, but this is one of the things which is inherent in separation and divorce. The parents cannot have it both ways. As I say, in my view, it is vitally necessary that the child know where its home is, to whom it is responsible and that there be no doubt in the mind of the child as to that. Within those limits, the parent who does not have custody should, of course, have access to the child under terms which are

as reasonably generous as possible, but without interfering with that basic responsibility on the parent having custody. [Emphasis added.]

Once a court has determined who is the appropriate custodial parent, it must, indeed it can do no more than, presume that that parent will act in the best interests of the child. As the New Brunswick Court of Appeal stated in *Fougere v. Fougere* (1987), [1987 CanLII 7842 \(NB CA\)](#), 77 N.B.R. (2d) 381, at p. 384:

Once courts award custody they must, in our view, support the custodial parent in that parent's reasonable efforts to bring up the children, including the right of the custodial parent to decide questions relating to the religious upbringing of the children.

As has been widely observed by those studying the nature and sources of changes in family institutions, popular notions of parenthood and parenting roles have undergone a profound evolution both in Canada and elsewhere in the world in recent years (see generally M. A. Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (1991); L. J. Weitzman, *The Divorce Revolution* (1985); J. Drakich, "In Whose Best Interests? The Politics of Joint Custody", in B. Fox, ed., *Family Bonds and Gender Divisions: Readings in the Sociology of the Family* (1988); C. Smart and S. Sevenhuijsen, *Child Custody and the Politics of Gender* (1989), and S. B. Boyd, "Women, Men and Relationships with Children: Is Equality Possible?", in K. Busby, L. Fainstein and H. Penner, eds., *Equality Issues in Family Law: Considerations for Test Case Litigation* (1990)). One of the central tenets of this new vision is that child care both is no longer and should no longer be exclusively or primarily the preserve of women. Society has largely moved away from the assumptions embodied in the tender years doctrine that women are inherently imbued with characteristics which render them better custodial parents (for a discussion, see D. L. Chambers, "Rethinking the Substantive Rules for Custody Disputes in Divorce" (1984), 83 *Mich. L. Rev.* 477). Moreover, both economic necessity and the movement toward social and economic equality for women have resulted in an increase in the number of women in the paid workforce. Many people have tended to assume that a natural result of this change would be the concurrent sharing of household and childcare responsibilities with spouses, companions and, of course, fathers. In addition, the increased emphasis on the participation of fathers in the raising of children and financial

support after divorce gave rise to claims by fathers and fathers' rights groups for legislative changes that would entitle them to the benefit of neutral presumptions in custody decisions.

A corollary of the acceptance of neutral parenting roles is the notion that children after divorce need to maintain contact with both parents. It is now widely assumed to be self-evident in the child's best interests to ensure the non-custodial parent's involvement in the life of the child. One result of these changes has been the emergence of joint custody awards which are predicated explicitly on equality of parental responsibilities and the belief that children's interests are served by maximizing the involvement of both parents in decisions concerning the child.

The custody provisions of the [Act](#) reflect, to some degree, this evolving view of parental roles. Under the best interests test, courts no longer automatically grant custody according to the tender years doctrine. Instead, decisions are made according to the best interests of the child without the benefit of a presumption in favour of the mother, or, for that matter, the father. [Subsection 16\(4\)](#) of the Act, for the first time, specifies that a court may make joint custody orders. [Subsection 16\(10\)](#) of the Act contains the "friendly parent" rule which directs courts when granting custody to take into account the willingness of the parent seeking custody to maximize the contact of the other parent with the child of the marriage. It is clear, then, that the Act envisages contact between the child and each of its parents as a worthy goal which should be, all other things being equal, in the best interests of the child. This is a value which courts have always recognized in generally granting generous access to the non-custodial parent.

Wood J.A., however, has interpreted the [Act](#) as reflecting significant changes to the traditional law of custody and access. More specifically, he expressed the view that [s. 16\(10\)](#) of the Act indicates a desire on the part of Parliament to enlarge the concept of access beyond its traditional scope. Therefore, according to him, the traditional decision-making power of custodial parents has been curtailed by s. 16 which, taken as a whole, requires a distribution of rights between the parents.

To that end, Wood J.A. relies on the views expressed about the nature of custody in the English decision of *Dipper v. Dipper*, [1980] 2 All E.R. 722, as approximating the philosophy found

in the [Act](#). In that case, the English Court of Appeal held at p. 733:

. . . it [is] a fallacy which continues to raise its ugly head that, on making a custody order, the custodial parent has a right to take all the decisions about the education of the children in spite of the disagreements of the other parent. That is quite wrong. The parent is always entitled, whatever his custodial status, to know and be consulted about the future education of the children and any other major matters. If he disagrees with the course proposed by the custodial parent he has the right to come to the court in order that the difference may be determined by the court.

The "right to know" is, of course, embodied in the [Act](#), but the "right to be consulted" and to have disagreements aired in Court is not. The only ground set out in the Act on which to contest a decision of the custodial parent is to show that the decision is contrary to the best interests of the child. Courts in Canada have never adopted the view that the custodial parent's decisions are subject to the approval of the non-custodial parent, and that such disagreements must be resolved in court.

Furthermore, in my view, there is nothing in the [Act](#) which mandates such a reversal in the philosophy of custody as held up to now. The Law Reform Commission of Canada, report on *Family Law*, *supra*, on which the Act is based, defines custody at p. 46 in the following manner:

4.4 "Custody" has several legal meanings. It stands for the whole collection of legal powers (many of which connote parental obligations as much as "rights") of fathers and mothers over their children: the power to raise and control the child, to determine the nature and amount of the child's education, to determine his or her religious upbringing, to administer the child's property, to grant or withhold consent to the marriage of an under-age child, to apply to the courts on his or her behalf, and so on. In its narrower sense, it means simply "care and upbringing" or, to use a more vivid but unfortunate phrase, "possession".

4.5 Where custody is granted to one parent, the courts afford the other the right to "reasonable access" -- usually worked out between the parents, but where they cannot agree, as directed by the judge.

This description of custody mirrors the traditional elements of parental authority and in no way suggests a blending of the rights of the access parent with those of the custodial parent. While the Act specifies that access is a value to be preserved, the objective in s. 16(10) that a child have "as much contact with each spouse" is immediately qualified by the proviso "as is consistent with the best interests of the child" (emphasis added). Thus, it is clear that maximum contact is not an

unbridled objective, and that it must be curtailed wherever the welfare of the child requires it. The best interests of the child remain the prism through which all other considerations are refracted.

Professor Payne, in *Payne on Divorce, supra*, at p. 144, shares the view that the access provisions in the [Act](#) do not confer any authority on the non-custodial parent to participate in the major decisions of a child's life. Rather, s. 16(5) of the Act provides that "[u]nless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child". It does not mandate that the custodial parent consult with the access spouse when making such decisions with respect to the child. (See also *Anson v. Anson, supra*). Custody as defined in [s. 2\(1\)](#) of the Act "includes care, upbringing and any other incident of custody". Payne states at pp. 145-46:

The provisions of the *Divorce Act, 1985*, and particularly the definitions of "custody" and "accès" in [subsection 2\(1\)](#) of the [Act](#), apparently preclude Canadian courts from reverting to a narrow definition of custody. The word "includes" in the definition of custody necessarily implies that the term embraces a wider range of powers than those specifically designated in subsection 2(1).... The opinions expressed in *Kruger v. Kruger, supra*, have thus been statutorily endorsed by the *Divorce Act, 1985*. Consequently, in the absence of a successful application to vary an unqualified sole custody disposition with respect to all or any of the incidents of custody, the non-custodial spouse with access privileges is a passive bystander who is excluded from the decision-making process in matters relating to the child's welfare, growth and development. This remains true notwithstanding that subsection 16(10) of the Divorce Act, 1985 provides that the court shall promote "maximum contact" between the child and the non-custodial parent to the extent that this is consistent with the best interests of the child. [Emphasis added.]

I could not agree more, given the wording of the [Act](#) itself and the generally accepted view of custody both before and since its enactment. The Act neither suggests nor requires the division of parental responsibilities between the custodial and access parent. If Parliament had intended such a result, it would have used much clearer and less ambiguous language.

It goes without saying that I do not share the assertion of my colleague that "the proposition, put to us in argument, that the custodial parent should have the right to forbid certain types of contact between the access parent and the child, must fail" (p. 119). The proposition is not one of "rights"; it is one of duty and obligation to the child's best interests. For example, a custodial parent, aware of sexual or other abuse by the non-custodial parent would be remiss in his or her duty

to the child not to cut off access by the abuser immediately, with or without a court order. One cannot stress enough that it is from the perspective of the child's interests that these powers and responsibilities must be assessed, as the "rights" of the parent are not a criterion.

The arguments in favour of increased authority over the child by the access parent are closely related to those which support a presumption in favour of joint custody (see J. Folberg, "Joint Custody", in R.S. Abella and C. L'Heureux-Dubé, eds., *supra*, at p. 185). They rest on the premise that the relationship of authority and obligation that existed between each of the parents and the child during the marriage should and can continue, despite the fact that the parents may no longer be willing or able to cooperate on its exercise. While joint custody may remain an ideal solution in proper cases, particularly when parents are willing and able to cooperate, such premises are often based on illusion rather than reality and may, in the words of Thorson J.A., amount to "a triumph of optimism over prudence" (*Kruger v. Kruger*, *supra*, at p. 681).

Unlike in other jurisdictions, the [Act](#) contains no presumption in favour of joint custody. Nor have Canadian courts generally accepted the view that joint custody is to be preferred in judicial orders as to custody and access. Beside the fact that the term "joint custody" is a misnomer (see C. L'Heureux-Dubé, "La garde conjointe, concept acceptable ou non?" (1979), 39 *R. du B.* 835), courts have demonstrated a strong hesitation to making joint custody orders, since in those custody disputes which end up before the courts, the animosity between parents does not generally favour such dispositions. Thorson J.A. observed in *Kruger v. Kruger*, *supra*, at p. 678 that:

Above all, [joint custody] requires a willingness by both parents to work together to ensure the success of the arrangement. Such a willingness must be sincere and genuine; *by its very nature it is not something that can be imposed by a Court* on two persons, one or both of whom may be unwilling or reluctant to accept it in all its implications. Like marriage itself if it is to succeed, it is an arrangement that has to be worked out by two persons who are determined, or their own will and in good faith, to make it work. [Emphasis in original.]

When parents are willing and able to share parenting responsibilities, they usually do so by agreement, which courts generally uphold (*Kruger v. Kruger*, *supra*; *Baker v. Baker*, *supra*; *Keyes v. Gordon* (1985), [1985 CanLII 123 \(NS CA\)](#), 45 R.F.L. (2d) 177 (N.S.C.A.); *Dussault v. Ladouceur*,

supra; *Droit de la famille* -- 316, [1986] R.D.F. 651 (Que. C.A.)). Courts are also reluctant to interfere with shared parenting arrangements that have survived for a period of time after parental separation or divorce (see J. D. Payne and B. Edwards, "Co-operative Parenting After Divorce: A Canadian Perspective" (1989), 11 *Advocates' Q.* 1, at pp. 13-15; S. M. Holmes, "Imposed Joint Legal Custody: Children's Interests or Parental Rights?" (1987), 45 *U.T. Fac. L. Rev.* 300).

But the reality of divorce and the circumstances of the parties cannot easily be dismissed. When implementing the objectives of the [Act](#), whether considering joint custody or fashioning access orders, courts, in my view, must be conscious of the gap between the ideals of shared parenting and the social reality of custody and childcare decisions. Despite the neutrality of the Act, forces such as wage rates, job ghettos and socialization about care giving still operate in a manner that cause many women to "choose" to take on the care giving role both during marriage and after divorce. Hence, "we remain a good distance away from the kind of equality which would make decisions between mothers and fathers as to who is going to leave the workforce to care for young children truly gender neutral" (S.B. Boyd, "Women, Men and Relationships with Children: Is Equality Possible?", *supra*, at p. 76; S. B. Boyd, "Child Custody Law and the Invisibility of Women's Work" (1989), 96 *Queen's Q.* 831). Moreover, research uniformly shows that men as a group have not yet embraced responsibility for childcare. The vast majority of such labour, both before and after divorce, is still performed by women, whether those women work outside the home or not, and women remain the sole custodial parent in the majority of cases by mutual consent of the parties (see *Evaluation of the Divorce Act -- Phase II: Monitoring and Evaluation*, at p. 99; J. Drakich, "In Search of the Better Parent: The Social Construction of Ideologies of Fatherhood" (1989), 3 *C.J.W.L.* 69). Nor does a joint custody order in most cases result in truly shared custody. Rather, in day-to-day practice, joint custody tends to resemble remarkably sole custody, as in many such orders care and control remain with one person (C. J. Richardson, *Court-based Divorce Mediation in Four Canadian Cities: An Overview of Research Results* (1988), at p. 35; S.B. Boyd, "Women, Men and Relationships with Children: Is Equality Possible?", *supra*, at p. 72; M. Fineman, "Dominant Discourse, Professional Language and Legal Change in Child Custody Decisionmaking" (1988), 101 *Harv. L. Rev.* 727). The person who has performed the primary care giving role within the marriage as a rule retains that obligation upon separation and divorce. Thus, the lived experience of childcare for both women and children after

divorce has changed much less than we might suppose or wish. As J. D. Payne and B. Edwards advise, "[i]n light of such empirical data, which encompass the *Divorce Act* of 1968 and the *Divorce Act*, 1985, popular assumptions that public attitudes towards sexual stereotyping and parenting roles after divorce have undergone radical change must be viewed with caution" ("Co-operative Parenting After Divorce: A Canadian Perspective", *supra*, at p. 8. See also F. Furstenberg and A. J. Cherlin, *Divided Families: What Happens to Children When Parents Part* (1991), at p. 74).

Since in the present case, the respondent requested joint custody at trial but abandoned this claim on appeal and since his claim for joint guardianship also failed, it is not necessary to labour the point. One can only note that the trial judge made a finding of fact that the respondent desired custody simply in order to control the religious upbringing of the children.

Support for the decisions of the custodial parent in the discharge of his or her responsibilities remains crucial if the child is to flourish. The conferral of decision-making authority on the custodial parent acknowledges and reflects the actual day-to-day reality of this task. It is well documented that the single parent bearing primary responsibility for the care of children often labours under increased social, economic and emotional burdens that far exceed those of the intact family. That burden is acutely felt by the children, who typically experience a myriad of hardships in this situation (see M. Grassby, "Women in Their Forties: The Extent of Their Rights to Alimentary Support" (1991), 30 R.F.L. (3d) 369). These may include a reduction in the standard of living, fewer resources for discretionary activities such as sports, artistic and leisure activities, frequent changes of residence, disruptions of friendships and often less parental attention, as the custodial parent is commonly required to devise new ways of fulfilling continuing needs with diminished resources. In the face of the enduring tasks and obligations of the custodial parent, courts must be wary of any expansion of the traditional rights of the non-custodial parent. The clear risk is that such changes will simply reduce the decision-making power of the custodial parent, without any parallel reduction in the responsibilities. This creates no benefit, and may amount to pure disturbance, both to the women who, as a rule, provide the primary care and to the children who must function within such a regime.

The perception that upholding the authority of the custodial parent emphasizes the rights of the parent at the expense of the interests of the child misconceives the problem. It is precisely to ensure the best interests of the child that the decision-making power is granted to the custodial parent, as that person is uniquely situated to assess, understand, ensure and promote the needs of the child. This, of course, is also consistent with the fact that the custodial parent bears both the legal obligation to care for the child and the legal liability for the child's acts.

As a practical matter, the unending litigation occasioned by disputes over parental authority exacts a financial cost that few custodial parents can bear. It is no secret that the vast majority of such parents are women. As emphasized in *Moge v. Moge*, [1992 CanLII 25 \(SCC\)](#), [1992] 3 S.C.R. 813, women are often severely disadvantaged economically upon separation and divorce. Both women and, of necessity, the children under their care often suffer a dramatic fall in the standard of living upon divorce. The cost of ongoing litigation can only exacerbate this decline by diverting whatever scarce resources exist away from day-to-day needs of the remaining family.

As I stated at the outset, the custodial parent remains the decision-maker in all aspects of the child's life. It is to avoid the spectre of the child as the field upon which the battle of competing parental rights is played out that the law confirms the authority of the custodial parent. This policy serves two functions: it precludes such contests entirely and it provides the necessary support to the parent who bears the responsibility for the child. The wisdom of this approach lies in recognizing the ease with which the interests of the child could be obscured or forgotten were courts to get into the business of parcelling out jurisdiction over the emotional, spiritual and physical welfare of the child between parents who no longer agree. This brings us to the heart of this case, a consideration of the nature of access.

Access

As indicated previously, the [Act](#) specifies the powers of courts in matters of access. Under s. 16(6), the trial judge possesses broad discretion to "impose such other terms, conditions or restrictions in connection therewith" as he or she thinks "fit and just". However, that discretion is to

be exercised strictly from the perspective of the interests of the child, as s. 16(8) requires courts to "take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child". Section 16(5) confers on a parent granted access, again subject to the discretion of the judge, the right to be informed about the child. Finally, s. 16(10) directs courts to give effect to the principle that "a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child".

I am in agreement with my colleague that s. 16(10) indicates that Parliament has expressed its opinion that contact with each parent is valuable. On the other hand, it must also be recognized that the goal of maximum contact is not absolute and that access may be restricted where there is evidence that such contact would otherwise conflict with the best interests of the child. This limitation on maximum contact is both abundantly clear on a straightforward reading of the section and consistent with the spirit of the Act and its focus on the best interests of the child. In my view, the analysis may and should stop at this point. However, the Court of Appeal adopts quite a different test, that of "real psychological or physical harm" as the proper criterion which should govern access. Given McLachlin J.'s assertion, at p. 127, that:

The majority of the Court of Appeal, by contrast, saw the matter less in terms of the custodial parent's "right" to decide all religious matters affecting the children, and more in terms of the best interests of the children. Unfettered by notions of the custodial parent's rights, the majority of the Court of Appeal asked simply what was in the best interests of the child.

...

Thus, for the majority in the Court of Appeal, the prime concern was the best interests of the child.

I find it useful to contrast such analysis with what, in fact Wood J.A., for the majority of the Court of Appeal, said in the following extract:

at p. 98:

The right of the access parent to share his or her religious beliefs with the child flows from the provisions of [s. 16\(10\)](#) of the [Divorce Act](#) of 1985. In my view it is subject to only two limitations:

(a) the unwillingness of the child to participate in such sharing, and

(b) the powers of the court to restrict that right on the grounds that exposure to the religious beliefs or practices of the access parents is, or is likely to be, harmful to the well being of the child.

...

The second [limitation] also seems straightforward, but it contains a complexity that requires discussion. Obviously if it can be established, on a civil standard of proof, that exposure to conflicting religious doctrines is causing the child psychological harm, or that by engaging in the observance of, or activities associated with, the religious beliefs of the access parent, the child is suffering real psychological or physical harm, the well being of that child would clearly require the court to intervene by way of an order which would eliminate the potential for such harm to continue. In those cases where such harm could be anticipated on a balance of probabilities, there would be grounds for an order that would avoid the problems before it begins.

But, in the exercise of the court's duty to protect the well being of the child, care must be taken to ensure that real harm of the sort, and arising in the manner, just described is distinguished from the general emotional distress which every child experiences when confronted with both the reality of divorce and the turmoil which characterizes the post-divorce relationship of many ex-spouses. The former can properly be addressed by judicial intervention. The latter is inevitable, and in most cases lies beyond the influence of any order of the court.

at p. 103:

Obviously, if the exercise by each [parent] of their individual freedom of religion, caused or threatened the probability of real psychological or physical harm to their children, state sanctioned intervention to preserve those interests would be justified under s. 1 of the Charter, but such action would only be justified to the extent that its purpose was accomplished in the manner* least intrusive to the fundamental freedoms of each parent.

While I do not share the doubt which Southin J.A. has expressed concerning the existence of the *parens patriae* jurisdiction of the Supreme Court of this province, I do agree that any interference with the exercise of parental judgement, on what constitutes the best interests of their children, could only be justified on the basis of evidence establishing the probability of real harm, either physical or psychological. The jurisdiction to interfere, of course, exists in connection with any matter which creates, or threatens such real harm, and does not depend upon the harm originating in any disagreement between the parents. Thus any such harm occasioned by a religious doctrine or practice in which both parents joined would equally justify state sanctioned interference with their freedom of religion.

at pp. 104-5:

Of necessity, however, there are limitations to the exercise of that freedom. From what has been said so far, the obvious limitations are:

(a) the consent of the child to participate in the process of teaching or dissemination, and

(b) the power of the court to restrict the right of the access parent to teach and disseminate his or her religious beliefs to the child on the grounds that exposure to the religious beliefs or practices of the access parent is, or is likely to be, harmful to the well being of the child.

at p. 105:

. . . I do not believe that it can be invoked as a rule which would oblige the court to shrink from its duty to determine whether or not the exposure to conflicting religious beliefs, or the content of a religious doctrine, is threatening real harm to the welfare of a child of the marriage.

But it will be a rare case where such an issue could legitimately arise. As has been noted, it could arise in those few cases where it could credibly be asserted that exposure either to conflicting religious doctrines, or to the doctrines of the religious belief of one of the parents, is causing or is likely to cause the child real harm of a physical or psychological nature.

In such cases the evidence which will establish such harm will not come from a critical evaluation of the religious beliefs of either parent. That sort of evidence takes its force exclusively from the personal value judgments of either person whose evaluation is offered or the judge who hears it. Rather the threshold evidence, which will justify the court embarking on an inquiry into real physical or psychological harm caused by a religious doctrine, will be that of an independent expert whose opinion is based upon generally accepted, objective, scientific criteria for the diagnosis and evaluation of the harm alleged.

at pp. 107-8:

It reinforces my view that the following principles of law are applicable to the issue of access restrictions which this case presents:

. . .

(g) Mr. Young's fundamental freedom of religion under [s. 2\(a\)](#) of the [Charter](#), to teach and disseminate his religious beliefs to his children, is limited only to the extent that the exercise of that freedom causes, or threatens the probability of, real physical or psychological harm to the children.

at p. 108:

In my view both [Huddart J. and Proudfoot J.] correctly perceived that no issue of real harm, either physical or psychological, arose in this case. If any such issue had presented itself, it would have been manifest from the evidence of the expert witnesses who examined the children on a number of occasions, and who undoubtedly would have identified the existence of, or the potential for, real harm to the children arising from their father's religious beliefs, if such existed. In the absence of any such evidence, there was no basis upon which the court could legitimately entertain any inquiry into the substance of his religious beliefs.

At no time did the learned trial judge refuse to admit any evidence relevant to the issue of the children's best interests. Her decision not to admit any evidence related to the tenets of the Jehovah's Witness faith was the natural and irresistible result of the fact that the dispute between these two parents had its genesis in the intolerance of each for the religious beliefs of the other. Theirs was a dispute between beliefs, not a dispute over whether real harm would befall their children as a result of the religious beliefs of one or the other.

and, finally, at p. 109:

I have reviewed the evidence which was offered in support of those restrictions. In my view it fell far short of establishing that any real harm would befall the children from Mr. Young's exercise of his fundamental freedom to teach and disseminate his religious beliefs to them. No such harm was diagnosed or anticipated by either of the expert witnesses which the learned trial judge found to be credible. Nor did the evidence establish that the conflict in the religious beliefs of the parents was causing, or was likely to cause, such harm.

The evidence went no further than to establish that the children were under some stress, the cause of which was "multi-factorial", but which obviously included some component related to the religious dispute between the parents. [Emphasis (by underlining) added.]

This, in my view, leaves absolutely no doubt that the only basis for the Court of Appeal's reversal of the orders of the trial judge, which the court could not have said more clearly, was the absence of harm, which, in their view, was not established in evidence. We are far from the best interests of children test. Affirming the Court of Appeal's judgment on this point, my colleague, while repeating profusely that the best interests of children is the sole test, is in fact applying the harm test, which is the only basis on which the Court of Appeal reversed the trial judge who, in their opinion, did not apply that test.

Neither logic, necessity nor the terms of the [Act](#) mandate such an equation. As I will discuss later, the best interests of the child encompasses more than the absence of harm and I cannot agree that this objective compels the conclusion that there must be evidence of "real and significant harm to the child" before contact with the access parent can be limited in any manner.

In contrast to custody, there is little jurisprudence or doctrine on the nature of access rights, probably because access has never been understood to confer entitlements on the non-custodial parent other than those which are specified in court orders. The fundamental principle, however, that has always been recognized by courts is that the right to access is limited in scope and is conditioned and governed by the best interests of the child. *Anson v. Anson, supra*, at p. 368, in my view, properly circumscribes the right of access at this stage in time as follows:

Access can thus be regarded as a form of temporary possession with the powers granted by an access order being limited to those necessary to ensure the well-being of the child

during the visitation periods. Access confers no right in the parent to influence the upbringing of the child -- that is for the parent with custody or guardianship. . . . However, under the [Divorce Act](#), 1985 s. 16(5), a parent granted access has a right to make inquiries and to be given information as to the health, education and welfare of the child, unless otherwise ordered by a court.

Thus, the role of the access parent is "that of a very interested observer, giving love and support to [the child] in the background" (*Pierce v. Pierce*, [1977 CanLII 2206 \(BC SC\)](#), [1977] 5 W.W.R. 572 (B.C.S.C. in chambers), at p. 575. See also *Gubody v. Gubody*, [1955 CanLII 405 \(ON SC\)](#), [1955] O.W.N. 548 (H.C.), and *Sudeyko v. Sudeyko* (1974), [1974 CanLII 2223 \(BC SC\)](#), 18 R.F.L. 273 (B.C.S.C.)).

In the words of Wilson J., "there is considerable support for the view that access as a distinct juridical concept is purely a creature of statute" (*Frame v. Smith*, [1987 CanLII 74 \(SCC\)](#), [1987] 2 S.C.R. 99, at p. 130). Apart from legislative provisions, there are no pre-existing or parallel rights of access at common law.

The [Civil Code of Quebec](#) for its part recognizes no right of access but states simply:

570 Whether custody is entrusted to one of the spouses or to a third person, the father and mother retain the right of watching over the maintenance and education of the children, and are obliged to contribute thereto in proportion to their means.

However, art. 30 of the *Civil Code of Lower Canada* provides that "[i]n every decision concerning a child, the child's interest and the respect of his rights must be the determining factors". [Article 543](#) of the [Civil Code of Quebec](#) obliges courts "to see to the interests of the child, at all stages of divorce proceedings". Article 569 directs courts to decide matters of custody, maintenance and education of the children, in their interest and in the respect of their rights. Thus, in both civil and common law jurisdictions, access exists only to the extent it is provided by statute and where it is in the best interests of the child.

One can find in both case law and doctrine discussion and debate as to whether access is more properly understood as a right of the parent or of the child. (See Weitzman, *supra*, at p. 230; R.

Deech, "The Unmarried Father and Human Rights" (1992), 4 *J. Child L.* 3; and Maidment, *supra*, at p. 40. See also *Frame v. Smith*, *supra*). Some have regarded access as an entitlement which belongs to the parent absent any compelling reason to disallow it, such as the safety of the child (*Tocco v. Tocco* (1977), 1977 CanLII 2628 (ON CA), 4 R.F.L. (2d) 174 (Ont. C.A.)). However, as is consistent with the focus on the best interests of the child in the [Act](#), the more perceptive view at this time both in the literature and case law is that access is more properly regarded as a right of the child, not a right of the parent. As Bernard Dickens has stated, the modern function of parental rights is not to enforce powers of custody and control parents enjoy over their children, but to permit parents to discharge their duties to their children (*supra*, at p. 471). This view accords with the decision of this Court in *Racine v. Woods*, 1983 CanLII 27 (SCC), [1983] 2 S.C.R. 173, in which Wilson J. summarized the proper focus in the following words, at p. 185:

... it is the parental tie as a meaningful and positive force in the life of the child and not in the life of the parent that the court has to be concerned about. As has been emphasized many times in custody cases, a child is not a chattel in which its parents have a proprietary interest; it is a human being to whom they owe serious obligations.

Some years later, in *Frame v. Smith*, *supra*, at p. 132, Wilson J., although dissenting on another point, clearly said that:

The access right has become the child's right, not the parent's right, and it would be a regressive step to recognize today a cause of action in the parent based on an outmoded concept of parental rights in children....

Access rights exist in recognition of the fact that it is normally in the interests of the child to continue and foster the relationship developed with both parents prior to the divorce or separation. This being said, the right to access and the circumstances in which it takes place must be perceived from the vantage point of the child. Wherever the relationship to the non-custodial parent conflicts with the best interests of the child, the furtherance and protection of the child's best interests must take priority over the desires and interests of the parent.

As the ultimate goal of access is the continuation of a relationship which is of significance and support to the child, access must be crafted to preserve and promote that which is healthy and

helpful in that relationship so that it may survive to achieve its purpose. Accordingly, it is in the interests of the child, and arguably also in the interests of the access parent, to remove or mitigate the sources of ongoing conflict which threaten to damage or prevent the continuation of a meaningful relationship.

Wood J.A. expressed the general concern that access rights remain vulnerable to the caprices of a vengeful custodial parent. In my view, courts should not be too quick to presume that the access concerns of the custodial parent are unrelated to the best interests of the child. Although the myth is that the custodial parent typically attempts to obstruct access of the other parent, studies in Canada, England and the United States indicate that the problem tends to be quite the reverse (see Richardson, *supra*; Weitzman, *supra*, at p. 230; and Maidment, *supra*, at p. 68). At the outset, it must not be forgotten that a parent who is granted access has no obligation to exercise those rights, and neither the child nor the custodial parent can force an access parent to comply with such an order, even though access might have been determined to be in the best interests of the child.

In Canada, the *Evaluation of the Divorce Act -- Phase II: Monitoring and Evaluation*, *supra*, at p. 111, discloses that access is denied to non-custodial parents by courts in only 2.4 percent of cases. However, those access rights which are granted by courts are often not exercised, and over the long run there is a process of gradual disengagement of many non-custodial parents from active involvement with their children, particularly if they remarry or become part of new family constellations (see N. Weisman, "On Access After Parental Separation" (1992), 36 R.F.L. (3d) 35). The authors of the *Evaluation* report at pp. 114-15 that over 40 percent of parents granted access either never see their children or see them no more than once a month. Moreover, those parents who exercise access do so less frequently than in the previous study (*Evaluation of the Divorce Act, 1985 -- Phase I: Collection of Baseline Data* (1987)), and the level and involvement of access parents is low and appears to be worsening over time. By contrast, many custodial parents express concern about the effects on their children of fathers' absence and the most commonly voiced complaint concerning access is that such rights are not exercised, or are exercised irregularly (Richardson, *supra*, at p. 36). Thus, as the authors of the *Evaluation* conclude, any lack of contact between non-custodial parents and their children can rarely be attributed to a denial of access (pp. 134-35). (Similar results were

recently reported in D. Perry, *Access to Children Following Parental Relationship Breakdown in Alberta* (1992).)

Furthermore, when considering the role of access parents with respect to their children, courts should not be blind to the broader context in which custody and access are exercised. A vast number of non-custodial parents are in default of their most serious obligations to their children, as is the respondent in this appeal: the responsibility to provide economic support. In 1985, E. Finnbogason and M. Townson reported in *The Benefits and Cost- Effectiveness of a Central Registry of Maintenance and Custody Orders* (1985), that all existing studies indicated default rates in child support payments of over 50 percent, and the Law Reform Commission estimated the true rate to be as high as 75 percent. (See also A. M. Delorey, "Joint Legal Custody: A Reversion to Patriarchal Power" (1989) 3 *C.J.W.L.* 33, at p. 43, and Drakich, "In Whose Best Interests? The Politics of Joint Custody", *supra*). The most pressing issue in child custody and access is the burden borne by women and children as a consequence of the failure of men to accept their responsibilities to their children. As Ruth Deech noted, *supra*, at p. 6, "[t]he reality is the call on fathers to pay more, not to enjoy more rights." There is a certain irony in the claim to greater contact and control on the part of access parents in the face of such widespread neglect of children's basic needs.

Where there is a genuine problem with access, the non-custodial parent is not without recourse in any case. This stems from the statutory directive to facilitate access where it is in the child's best interests and the role of the judge as the arbiter of those interests in the case of a dispute between the parents. Generally, courts will grant liberal access to the non-custodial parent and usually this is consistent with the best interests of the child. Parents will also normally respect their children's wishes and best interests with regard to access. Most of the time, parents are able to reach an agreement as to custody and access without the intervention of courts, sometimes with the help of psycho-social services attached to courts or elsewhere. This, of course, is to be encouraged as it is in the best interests of children to minimize conflict in this area. Unfortunately, however, disagreements between parents do reach the courts and in such cases the judge must draw the line. That line must always be drawn in favour of the best interests of the child, from a child-centred perspective.

The difficulty, of course, always lies in determining what does constitute the best interests of the child, which brings us to the next issue.

Best Interests of the Child

The issue of the best interests of the child raises considerations at a number of different levels. First, the content of the rule must be discussed. Second, its constitutionality must be determined. Finally, the appropriate standard for its application must be established. All of these issues form the basis of the respondent's arguments in support of the Court of Appeal's ruling as to access.

1. *Content of the Rule*

As I discussed in the context of custody, the statutory recognition of the best interests of the child in the [Act](#) marks the culmination of a long evolution of the focus in custody and access decisions. From the era in which the enforcement of paternal rights was at the forefront of the courts' concern, through a time where the merits of each parent's claims were weighed, we have now reached the point where the sole question to be determined in custody and access arrangements is the best interests of the child. Indeed, the legislation makes it quite explicit that only the best interests of the child as they are comprehensively understood should be considered in such adjudications. This evolution was recognized by Wilson J. in *Frame v. Smith, supra*, at p. 132:

At first the courts were much more comfortable assessing the competing claims of parents than they were in trying to decide what was in the best interests of children. But over time the best interest of children increasingly became an important concern of the court and today it is the paramount concern. ... In light of these developments it can be said with some assurance that the concept of "parental rights" has fallen into disfavour. Parental responsibilities yes, but rights no.

The courts have moved inevitably and steadfastly in this direction since the 19th century. In *In re McGrath (Infants)*, [1893] 1 Ch. 143, at p. 148, the English Court of Appeal determined that a court should have unfettered scope to consider the best interests of the child, even where it interfered with the father's rights with respect to religion, holding:

The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being.

This Court has followed suit and unremittingly endorsed the position that in the face of any threat to the welfare of the child, parental interests must give way. As long ago as *DeLaurier v. Jackson*, *supra*, at pp. 153-54, Crocket J. held:

If the general welfare of the child requires that the father's rights in respect of the religious faith in which his offspring is to be reared, should be suspended or superseded, the courts in the exercise of their equitable jurisdiction have undoubted power to override them, as they have the power to override all other parental rights, though in doing so they must act cautiously. . . .

Due consideration is, of course, to be given in all cases to the father's wishes but if the court is satisfied in any case upon a consideration of all the facts and circumstances, as shown by the evidence, that the father's wishes conflict with the child's own best interests, viewed from all angles -- material, physical, moral, emotional and intellectual as well as religious -- then the father's wishes must yield to the welfare of the child.

The Court reached the same conclusion in *King v. Low*, [1985 CanLII 59 \(SCC\)](#), [1985] 1 S.C.R. 87, finding that such a result was consistent with both modern authority in other jurisdictions and previous decisions of this Court in *Racine v. Woods*, *supra*, and *Beson v. Director of Child Welfare (Nfld.)*, [1982 CanLII 32 \(SCC\)](#), [1982] 2 S.C.R. 716. The nature of the judicial determination of the best interests was described by McIntyre J. in *King v. Low* at p. 101 as follows:

. . . the dominant consideration to which all other considerations must remain subordinate must be the welfare of the child. This is not to say that the question of custody will be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. The welfare of the child must be decided on a consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the Court, when resolving disputes between rival claimants for the custody of a child, to choose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult. Parental claims must not be lightly set aside, and they are entitled to serious consideration in reaching any conclusion. Where it is clear that the welfare of the child requires it, however, they must be set aside. [Emphasis added].

These words express the important notion that courts must be directed to create or support the conditions which are most conducive to the flourishing of the child. They are, in my view, as

applicable in the context of access arrangements as they are in the determination of custody.

A determination of the best interests of the child encompasses a myriad of considerations, as child custody and access decisions have been described as "ones of human relations in their most intense and complex form". In contrast to most issues that come before the courts, such decisions are "person-oriented" rather than "act-oriented" and require an evaluation of "the whole person viewed as a social being" (L. LaFave, "Origins and Evolution of the 'Best Interests of the Child' Standard" (1989), 34 *S.D.L. Rev.* 459; R. H. Mnookin, "Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy" (1975), 39 *Law & Contemp. Probs.* 226). Courts are required to predict the happening of future events rather than to assess the legal import of past acts and judge the effect of various relationships on the best interests of the child, all the while weighing innumerable variables without the benefit of a simple formula.

In making a determination as to the best interests of the child, courts must attempt to balance such considerations as the age, physical and emotional constitution and psychology of both the child and his or her parents and the particular milieu in which the child will live. These considerations, which underlie the common law, are clearly set out in art. 30 of the *Civil Code of Lower Canada*:

30 In every decision concerning a child, the child's interest and the respect of his rights must be the determining factors.

Consideration may be given in particular to the child's age, sex, religion, language, character and family surroundings, and the other circumstances in which he lives.
[Emphasis added.]

Probably one of the most significant factors in many cases will be the relationship that the child entertains with his or her parents. This must necessarily encompass such considerations as the strength of the emotional ties and the role of the person who has provided primary care in the life of the child.

Goldstein, Freud and Solnit's *Beyond the Best Interests of the Child*, *supra*, while perhaps lacking in empirical data, remains an influential analysis of the psychological needs of children

following divorce. The authors emphasize, among other factors, the importance of continuity in the child's relationships and conclude that the major focus of custody decisions should be to preserve and protect the relationship between the child and his or her psychological parent. As Weisman reports, *supra*, at p. 47, there is some consensus in favour of this view in recent research. Goldstein later went as far as to say that, while continuing access is normally in the best interests of the child, this is the case only where there is agreement between parents and no court order to effect access is required (Goldstein, "In Whose Best Interests?", in R.S. Abella and C. L'Heureux-Dubé, eds., *supra*). While the Act places the emphasis on the best interests of the child rather than the wishes of the custodial parent, Weisman observes at p. 62, *supra*, that research indicates that "the child's relationship with the custodial parent may well be the most important factor affecting long-term outcome. Judges should therefore exercise caution before intervening in any manner that may introduce added stress to this relationship".

Custody and access decisions are pre-eminently exercises in discretion. Case by case consideration of the unique circumstances of each child is the hallmark of this process. This Court recognized in *Moge v. Moge*, *supra*, in the context of spousal support decisions, that the discretion vested in the trial judge is essential to effect the very purposes outlined in the [Act](#). The wide latitude under the best interests test permits courts to respond to the spectrum of factors which can both positively and negatively affect a child. Such discretion also permits the judge to focus on the needs of the particular child before him or her, recognizing that what may constitute stressful or damaging circumstances for one child may not necessarily have the same effect on another.

While the best interests test provides the focus and perspective from which to assess custody and access decisions, the test has nonetheless been subject to evaluation and criticism from various sources. The most common concern is that it is essentially indeterminate and fails to provide the necessary direction and criteria with which to make custody and access decisions (Mnookin, *supra*). Some commentators have observed that the broad scope of the test may permit the best interests of the child to become hostage to parental rights rhetoric (K. M. Munro, "The Inapplicability of Rights Analysis in Post-Divorce Child Custody Decision Making" (1992), 30 *Alta. L. Rev.* 852). Others note that, devoid of presumptions, the test becomes a competition between psychological

experts and lawyers concerning the prevailing psychological notions of child rearing (Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform*, *supra*). Women in particular have become concerned that the importance of women's work in caring for young children can be devalued under the best interests test, as judges consider such factors as the superior financial position of most fathers when deciding custody matters (S. B. Boyd, "Potentialities and Perils of the Primary Caregiver Presumption" (1991), 7 *C.F.L.Q.* 1). Others claim that the test permits cultural bias in custody and access decisions and is a recipe for the abuse of judicial discretion (S. J. Toope, "Riding the Fences: Courts, Charter Rights and Family Law" (1991), 9 *Can. J. Fam. L.* 55, at p. 67). See also A. Ehrcke, "Limiting Judicial Discretion in Custody Proceedings on Divorce" (1987), 6 *Can. J. Fam. L.* 211; J. P. Ryan, "Joint Custody in Canada: Time for a Second Look" (1986), 49 *R.F.L.* (2d) 119; Department of Justice of Canada, *Custody and Access: Public Discussion Paper* (1993).

In my view, without minimizing these concerns and risks, it is crucial to distinguish between the criticism of the best interests test and the best interests of the child as an objective. Despite concerns about the application of the test, no one has questioned the best interests of the child as the proper focus of custody and access determinations. In the words of Maidment, *supra*, at p. 161:

. . . the welfare of the child holds the central position in the resolution of custody cases. Whatever the practice, the law places the child protection or nurturance philosophy at the centre of the decision-making process, and whatever interpretations are given to the welfare principle, nowadays the pre-eminence of the child-centred approach receives universal support.

Furthermore, it is significant that no other test has been broadly endorsed to replace it. At the end of the day, the test has been described as "the least detrimental available alternative for safeguarding the child's growth and development" and most of the suggested guidelines or presumptions are in fact designed to give content to the test in furtherance of the welfare of the child. (See Goldstein, Freud and Solnit, *supra*, at p. 53. See also Mnookin, *supra*.)

It is also worthwhile to recall that the best interests test initially fulfilled its purpose because the presumptions such as the tender years doctrine provided the necessary content on which to base custody and access decisions (Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform*, *supra*, at p. 84). Courts not only presumed that mothers were naturally better

custodial parents, but also relied on the parent who had since the beginning provided primary care to the child to continue to act in its best interests. As this Court noted in *Talsky v. Talsky*, *supra*, at p. 293, the tender years doctrine was not so much a rule of law as "purely . . . a principle of common sense".

With the removal of such presumptions however, courts are now faced with competing claims concerning the best interests of the child. In the result, a number of presumptions have been suggested to govern the best interests test in custody decisions, the most common of which is the primary caregiver presumption. (See Boyd, "Potentialities and Perils of the Primary Caregiver Presumption", *supra*). This presumption has developed in response to the trend toward joint custody, and the resultant erosion in both the financial resources and the authority of the parent with day-to-day obligations for child rearing. Boyd expresses the concerns underlying this presumption as follows at p. 6:

. . . a misplaced application of "equality" is evident in legislative and judicial trends toward entrenching fathers' rights in child custody law, such as joint custody and access enforcement. The importance of ensuring "equal" fatherly input into children's lives after family breakdown even if they were not "equally" involved before, has been elevated to arguably too high a level in recent years. The form which this trend often takes -- retaining an active and full role for both father and mother in making decisions concerning the child (joint legal custody) -- potentially inhibits the autonomy and exercise of discretion by the parent with physical care of the child.

However, as she points out, one of the principal rationales for endorsing this presumption is not to supplant the best interests of the child as the ultimate objective but to ensure that those interests are protected. The presumption explicitly restores the values of commitment and demonstrated ability to nurture as well as continued psychological parenting to the child, factors which may be overshadowed by other considerations in custody disputes. The primary caregiver presumption thus recognizes the obligations and supports the authority of the parent engaged in day-to-day tasks of child rearing.

In assessing all the relevant considerations, courts must be careful that the ideals of parental sharing and equality do not overcome the lived reality of custody and access arrangements and that the child's needs and concerns are accommodated and not obscured by abstract claims of parental rights. This is not to say that the parent's interests may not coincide with the child's interests

or that a court may never validly take a parent's interests into consideration. However, to further the best interests of the child, a recognition of the close relationship between the needs of the child and the needs of the remaining family unit of which he or she is a part is essential. As Abella J.A. held in *M. (B.P.) v. M. (B.L.D.E.)*, (1992), [1992 CanLII 8642 \(ON CA\)](#), 97 D.L.R. (4th) 437, for the majority, at p. 459:

[The best interests of the child] by no means excludes the parental perspective. The needs of children and their parents are obviously inextricable, particularly between children and the parent on whom they depend for their day-to-day care, where only one parent has this primary responsibility. The structure of an environment that fits the child's interests would undoubtedly be reinforced if the economic and emotional needs, especially of custodial parents, were factored in, given the symbiosis of their sense of well-being.

Moreover, as Weisman, *supra*, concludes at p. 36:

. . . access issues often present the most intractable problems in all family law. On occasion, fairness and enforceability are impossible to achieve, and the most for which one can hope is the least detrimental alternative for the child.

In the final analysis, when considering the best interests of the child, it may be a virtue rather than a sin for the judge to be pragmatic and take into consideration both the strengths and shortcomings of the parties and the limits of human nature. To do so is only to recognize that, in some circumstances, the perfect may be the enemy of the good. Courts must always be mindful that not only the benefit but also the real cost and burden of all custody and access arrangements ultimately falls on the children themselves.

2. *Constitutionality of the Best Interests Test*

It would seem to be self-evident that the best interests test is value neutral, and cannot be seen on its face to violate any right protected by the [Charter](#). Indeed, as an objective, the legislative focus on the best interests of the child is completely consonant with the articulated values and underlying concerns of the *Charter*, as it aims to protect a vulnerable segment of society by ensuring that the interests and needs of the child take precedence over any competing considerations in custody and access decisions.

Nonetheless, in his claim that the access order infringes his freedom of religion under the *Charter*, the respondent challenges the constitutionality of the best interests test on a number of grounds. First, he alleges that the discretion conferred on judges under the best interests test violates the *Charter*. Second, he claims that the test is so vague that it cannot be said to be "prescribed by law" and, accordingly, any violation of his freedom of religion, cannot be justified by the test under s. 1 of the *Charter*. Leaving aside for the moment the alleged infringement of freedom of religion of the respondent and his children under the *Charter*, in my opinion, both of these contentions must fail.

As I observed in *R. v. Swain*, 1991 CanLII 104 (SCC), [1991] 1 S.C.R. 933, this Court has previously found that the mere existence of broad judicial discretion in a legislative provision is not in itself sufficient to attract the application of the *Charter*, nor can the presence or scope of such discretion alone give rise to an inference that *Charter* rights are thereby infringed. One such instance was the decision in *R. v. Beare*, 1988 CanLII 126 (SCC), [1988] 2 S.C.R. 387, where the issue arose in the context of a challenge to the wide discretion of the police to fingerprint suspects. In that case, La Forest J., writing for the Court, stated at p. 410:

The existence of the discretion conferred by the statutory provisions does not, in my view, offend principles of fundamental justice.

Indeed, this Court recently held in *Baron v. Canada*, 1993 CanLII 154 (SCC), [1993] 1 S.C.R. 416, that the presence of the residual discretion of a judge may itself be a constitutional requirement in some instances, in order that there be a means of balancing the competing rights and interests of the individual and the state.

In *R. v. Morales*, 1992 CanLII 53 (SCC), [1992] 3 S.C.R. 711, Gonthier J., dissenting, observed at p. 754 that:

. . . the identification of a measure of discretion conferred by means of a legislative provision cannot alone provide the basis for a constitutional evaluation of that provision. Nor can the identification of possible parameters of that discretion, for a discretion which is referred to as being fettered can be one which is limited not only by appropriate constraints but also by those which are inappropriate or unsuitable. The more important issue which remains, therefore, is what kind of discretion is conferred, and the capacity of the words

of the legislative provision to support the type of reasoning which the matter under adjudication requires. [Emphasis added.]

Thus, discretion cannot be considered in the absence of an examination of the legislative objectives, and the important question is whether the presence of such discretion can be rationally tied to those objectives. For the reasons which I shall delineate hereinafter when considering the vagueness of the best interests test, it is clear that broad judicial discretion is crucial to the proper implementation of the legislative objective of securing the best interests of the child.

This Court has had occasion to consider the concept of vagueness of legislative provisions in the context of the *Charter* on a number of occasions in recent years (see *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30; *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, 1990 CanLII 105 (SCC), [1990] 1 S.C.R. 1123; *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697; *Canada (Human Rights Commission) v. Taylor*, 1990 CanLII 26 (SCC), [1990] 3 S.C.R. 892; *Committee for the Commonwealth of Canada v. Canada*, 1991 CanLII 119 (SCC), [1991] 1 S.C.R. 139; *Osborne v. Canada (Treasury Board)*, 1991 CanLII 60 (SCC), [1991] 2 S.C.R. 69; *R. v. Butler*, 1992 CanLII 124 (SCC), [1992] 1 S.C.R. 452; *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), [1992] 2 S.C.R. 606). While these cases all dealt with vagueness in the criminal context, a number of principles may be derived from this jurisprudence which are useful in the present context. The underlying concern is that a legislative provision be capable of providing a framework or guide within which judicial decisions can be made. The threshold for constitutional violation due to vagueness in legislative provisions is relatively high, and it is not necessary that such provisions carry a precise technical meaning or provide certainty as to the result (*R. v. Butler*, *supra*; *Osborne v. Canada (Treasury Board)*, *supra*, and *R. v. Nova Scotia Pharmaceutical Society*, *supra*). Rather, the standard requires that the provisions permit the framing of an intelligible legal debate with respect to the objectives contained in the legislation.

The doctrine of vagueness was defined most recently by Gonthier J. for this Court in *R. v. Nova Scotia Pharmaceutical Society*, *supra*, at p. 643 as follows:

. . . a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate.

The question which arises, then, under the vagueness requirements of constitutional validity, is whether the best interests test is so uncertain as to be incapable of guiding a consideration of the factors relevant to custody and access determinations. In my opinion, it is not.

A similar question arose concerning the concept of the "public interest" in the recent decision of this Court in *R. v. Morales, supra*, where Gonthier J., while dissenting on this issue, set out a framework for considering the constitutional validity of broad legislative concepts which are nonetheless designed to encompass a specific set of concerns and interests. He described "public interest" in the following manner at p. 751:

. . . a notion which has traditionally been recognized as affording a means of referring to the special set of considerations which are relevant to those legal determinations concerned with the relationship of the represented private interest or interests and the broader interest of the public.

The same type of characterization is appropriate to the best interests test. The "best interests of the child" can be regarded as the term employed to refer to the spectrum of considerations encompassed by the needs of the child, as distinct from those of any other party, in the determination of custody and access disputes. The fact that it must be applied to the facts of each case does not militate in favour of its unconstitutionality. Rather, this feature is part and parcel of what makes decisions in the best interests of the child possible at all.

As its widespread adoption and application suggest, the best interests of the child standard cannot be regarded as unconstitutionally vague. On the contrary, the best interests test is universally recognized as the foundation of modern family law around the world and is legislatively entrenched in both common law and civil jurisdictions in the United States, Australia and Europe. Moreover, the need to make the best interests of the child the primary consideration in all actions concerning children, including legal proceedings, is specifically recognized in international human rights documents such as the United Nations *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, Art. 3(1). In my view, this amply demonstrates both the enduring value of the best interests test as a

legal norm capable of meaningful application and the broad recognition of the interests of children in the field of human rights.

It is important to recall that the vagueness of a legislative provision cannot be examined in the abstract but must be considered within the context of the particular legislative objectives in question, bearing in mind that some objectives will require a panoply of judicial remedies for their meaningful fulfilment. As Beetz J. observed in *R. v. Morgentaler*, *supra*, at p. 107, "[f]lexibility and vagueness are not synonymous". Nor should the vagueness of a provision be considered solely with reference to the words of the statute. The Ontario Court of Appeal held in *R. v. LeBeau* (1988), 1988 CanLII 3271 (ON CA), 41 C.C.C. (3d) 163, at p. 173:

It has been recognized that the void for vagueness doctrine is not to be applied to the bare words of the statutory provision but, rather, to the provision as interpreted and applied in judicial decisions.

See also *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, *supra*, at p. 1157.

This Court held recently in *R. v. Nova Scotia Pharmaceutical Society*, *supra*, at p. 627 that, among the factors with which courts should be concerned when the vagueness of a law is at issue are:

- . . . (a) the need for flexibility and the interpretive role of the courts, (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist. . . .

Child custody and access decisions engage all of these considerations, as the best interests of the child remain, in the words of Abella J.A., "as fluid as each child's circumstances" (*M. (B.P.) v. M. (B.L.D.E.)*, *supra*, at p. 459). As I have discussed earlier in these reasons, when fashioning custody and access orders, courts are concerned with the design of future living arrangements which may be affected by a multitude of different factors. In establishing this *modus vivendi*, courts must consider not only the circumstances which might ideally be in the best interests of the child, but must also weigh the capacity of the parties to fulfil and endure the conditions which are set for custody and access. Thus, family law statutes, and child custody provisions in particular, probably best exemplify

the type of legislation in which broad judicial discretion is necessary to fulfil the legislative purpose effectively.

Furthermore, the best interests test has been judicially applied for decades, and the case law provides a large body of jurisprudence to which courts may resort when considering factors relevant to the best interests test.

In my opinion, the prophetic caution of Gonthier J. in *R. v. Nova Scotia Pharmaceutical Society, supra*, at p. 642, is particularly apposite in the circumstances of this case:

One must be wary of using the doctrine of vagueness to prevent or impede State action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself.

It should not be assumed that a grant of discretion is an invitation to exercise personal prejudice, as it is well established in the jurisprudence that discretion in every instance must be exercised judicially and in conformity with the objectives and standards of the legislation. The application of the best interests test, if done in an individual case according to irrelevant or improper criteria, remains subject to the normal process of review on appeal.

Having analyzed the content of the best interests of the child standard prescribed in the [Act](#) in matters of custody and access and determined its constitutionality, what burden of proof must the custodial parent meet to obtain an order restricting access?

3. *Evidence*

One might have thought that the clear and unequivocal language of the [Act](#) makes the best interests of the child the only consideration in matters of custody and access, and that the only evidence required for an order limiting access would be evidence indicating that the exercise of access in a particular manner is in the best interests of the child. This is the test which was applied in this case by all of the judges, including those at the Court of Appeal, who were seized of the matter at the

interim stage, as well as the trial judge. The Court of Appeal, however, relying in particular on the decision of the Ontario Supreme Court in *Hockey v. Hockey*, *supra*, would elevate the test to one of harm which the custodial parent must show in order to restrict access to the children by the non-custodial parent. I say at the outset that, even under such a severe test, the appellant has established that restrictions are required. However, the question is whether harm is the test. My answer is a clear no for the reasons that follow.

As I noted above, the Court of Appeal has equated the alleged absence of harm in this case with the best interests of the child. However, no rationale is proposed for so defining the best interests of the child. Moreover, nothing in the [Act](#) mandates or even suggests that "real danger of significant harm to the child" be the sole consideration in matters of custody and access.

[Subsection 16\(8\)](#) of the [Act](#) directs that the best interests of the child are to be determined "by reference to the condition, means, needs and other circumstances of the child". There is no mention of harm at all in this list of considerations, and nothing supports the inference that the best interests of the child not only can but also should be encompassed by the simple concept of absence of harm, thus making harm the controlling factor in custody and access decisions. On the contrary, the adoption of the harm test would require courts to ignore the very factors which are set out in the Act and which have guided the courts up until now in custody and access decisions. While it is self-evident that if the exercise of access by the non-custodial parent harms the child, access must be curtailed; even in the absence of harm the best interests of the child may also warrant such curtailment.

The harm test by which the Court of Appeal proposes to qualify the best interests test inverts the basic focus of the inquiry into custody and access. Under the best interests test, courts must consider how to best foster the child's overall development and protect the child from conflict and the disruptive effects of divorce at a vulnerable point in his or her life. In contrast, the harm test essentially requires a court to determine how much conflict and stress a child should be required to endure in order that the parent's wishes may prevail. Once the pendulum swings in that direction, it is difficult to control. If not this much stress, why not a little more? If one type of conflict, why not

that? Moreover, it may be difficult if not impossible, even for an expert, to determine with any degree of accuracy whether the child has been harmed or will be harmed in the long run. However, the most serious deficiency of the harm test is the following. While the effects of custody and access decisions always remain uncertain to some degree, the harm test places any risk of miscalculation in the degree of stress or conflict occasioned by such decisions squarely on the back of the child, depriving the child of any presumption in his or her favour. Obviously this cannot be correct from the perspective of the interests of the child. To wait until harm has occurred to correct the situation is not only to waive the benefit of prevention, but also to increase the possibility of error. Instead of minimizing the risks, the harm test would maximize them.

A discussion of the research data on the long-term effects of divorce, as well as custody and access decisions, on children is helpful at this point to assess the consequences of adopting the harm standard as regards the welfare of children and the importance of adhering to the best interests of the child as the overarching goal in custody and access determinations. While this remains an area of social science that has yet to be comprehensively researched, studies of both the effects of divorce and the role of conflict in the subsequent family life indicate that children often suffer more extensively than is generally acknowledged on divorce, and that those who must endure continuing conflict after divorce stand at serious risk of harm down the road. The resounding message is that courts must pay more, not less, attention to the needs of children on divorce.

I acknowledge at the outset the limits in applying such research to the wider population, as the studies to date have tended to focus on groups within a particular social class or locale. Furthermore, the conclusions of some studies, for example those by J. S. Wallerstein and J. B. Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce* (1980), have been used to support a number of different propositions concerning the best interests of the child on divorce. (See Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform*, *supra*, at p. 118.) In addition, notions concerning the optimum child rearing conditions on the breakdown of the marriage are subject to a degree of difference and controversy between professionals working in the field. This is illustrated, for example, in the contrasting conclusions reached by Goldstein, Freud and Solnit, *supra*, and those of Wallerstein and Kelly, *supra*.

Nonetheless, a number of conclusions about the effects of divorce on children emerge with remarkable consistency in all of the major studies and psychological literature on children after divorce. One of the most important of these is the role of conflict in the welfare of the child. Along with the quality of the relationship with the custodial parent and the ability to maintain contact with the non-custodial parent, there is substantial evidence that continuing conflict is the most important factor affecting the ability of children to readjust to the new family situation after divorce (Weisman, *supra*, at pp. 47-48). It appears that, above and beyond the disruption caused by divorce or separation itself, it is the discord and disharmony within the family which are most damaging to children in the aftermath of divorce.

Two of the major studies on divorce and the effects of conflict on the emotional and psychological well-being of children forcefully make the point that the ability to reduce conflict is crucial to the welfare of children. The study of Wallerstein and Kelly, *supra*, although limited to white middle class families in California without previous clinical histories who volunteered to participate in the study, is the most comprehensive long-term study on the effects of divorce on children. A ten-year follow up of the same subjects is reported in J. S. Wallerstein and S. Blakeslee, *Second Chances: Men, Women and Children a Decade After Divorce* (1989). Among the most significant findings of these two reports is that separation or divorce cannot be regarded as a discrete event to be dealt with once and for all, but is most often the beginning in a continuum of disruptive events in the life of the child. The stress resulting from changing family structures and reduced financial support following divorce in many cases continues to be experienced by children long after the divorce is final. While many children do adjust in such situations, the notion that children automatically can and do "get used to" new family situations in a relatively short period of time is not borne out by the results of the study. By all such indicators as success at educational endeavours and the later ability to establish stable personal and professional lives, children of divorce appear in general to be subject to more stresses than their counterparts in intact families. While the authors found considerable evidence that divorce was beneficial to the parents, there was no comparable evidence regarding children. The majority of such children neither experienced relief at the time of the divorce nor felt it had resulted in an improvement in their lives five years later. Moreover,

Wallerstein and Blakeslee reported in the later study that problems and conflicts in some children resulting from divorce did not manifest themselves until much later, particularly in the case of girls who in the earlier study had generally appeared to cope better with divorce than boys. Rather, it appears that the long-term effects of divorce cannot always be predicted from the reactions of children at the outset. (See Wallerstein and Blakeslee, *supra*, at p. 15.)

At the five-year point, Wallerstein and Kelly concluded that, while no factor could in every case be associated with a good outcome, the extent to which conflict between the parents had been resolved was the single most important factor in the well-being of the child. Following interviews ten years after their initial contact with the subjects, Wallerstein and Blakeslee again identified prolonged hostility between the parents as the single most destructive outcome for the children on divorce. Children subject to fierce legal battles between parents appear to be the most vulnerable group, and ongoing litigation is consistently identified as detrimental to the welfare of children (Wallerstein and Blakeslee, *supra*, at p. 196). Wallerstein and Kelly also determined, as have other researchers, that children generally fare best when they are able to maintain a continuing relationship with both parents. However, an equally important corollary to this conclusion is often ignored. That is, continued contact may only be in the best interests of the child where parents are not adversarial and where interaction between the child and the access parent is not beset by conflict. Where conflict cannot be resolved or minimized, the detriment of continued contact may outweigh the benefit, as forced cooperation between hostile parents may lead to further litigation and conflict, which itself extends and increases the difficulties faced by children. (See also Weitzman, *supra*, at pp. 253-54.)

These findings are largely corroborated in another U.S. study of the impact of divorce on children. E. M. Hetherington, M. Cox and R. Cox in "Effects of Divorce on Parents and Children" in M. E. Lamb, ed., *Nontraditional Families: Parenting and Child Development* (1982), in a study of white middle class pre-school children in the custody of their mothers, focused on the effects of conflict on children by comparing its effects in both divorced and intact families. The role of conflict in the welfare of children is highly visible in this study, as the authors determined that two years after divorce, children in low conflict divorced families actually fared better than those in high conflict intact families. Other studies which have come to similar conclusions about the role of conflict in the

adjustment of the child after divorce include: E. S. Ellison, "Issues Concerning Parental Harmony and Children's Psychosocial Adjustment" (1983), 53 *Amer. J. Orthopsychiat.* 73; R. E. Emery, "Interparental Conflict and the Children of Discord and Divorce" (1982), 92 *Psych. Bull.* 310; M. Rutter, "Protective Factors in Children's Responses to Stress and Disadvantage", in M. W. Kent and J. E. Rolf, eds., *Primary Prevention of Psychopathology: Social Competence in Children*, vol. III (1979); J. R. Johnston, M. Kline and J. M. Tschann, "Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access" (1989), 59 *Amer. J. Orthopsychiat.* 576. For further discussion, see also Boyd, "Women, Men and Relationships with Children: Is Equality Possible?" *supra*; Drakich, "In Whose Best Interests? The Politics of Joint Custody", *supra*; Weitzman, *supra*, at pp. 248, 254; LaFave, *supra*, at p. 489; J. F. Burrett, *Child Access and Modern Family Law* (1988); Weisman, *supra*.

Thus, while most research discloses that continued contact with both parents after divorce is normally in the best interests of the child, that finding cannot be separated from a consideration of the degree of conflict to which the child will be subject (Weisman, *supra*). Ironically, unrestricted access may, in some circumstances, cause the continuation of the very stresses from which the parties sought relief when they divorced, and the desire to maintain the pre-existing roles of each parent may in fact result in no ending at all. (See Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform*, *supra*, at p. 164.)

Bearing in mind these concerns, in particular the fact that harm to a child may only become perceptible at a much later date, it is evident that the welfare of children is put at considerable risk if the prospect of harm becomes the sole prerequisite for restrictions on access. In my view, the proper approach to access was stated by Abella J.A. in *M. (B.P.) v. M. (B.L.D.E.)*, *supra*, at p. 461.

It is not a question of what standard should be used to deprive a parent of access, it is a question of what standard should be used in deciding what form of access, if any, should be ordered. The answer is clear from the statute: the standard is the child's best interests.

The best interests of the child is not simply the right to be free of demonstrable harm. It is the positive right to the best possible arrangements in the circumstances of the parties. This could not

be more clearly indicated than in the report on *Family Law, supra*, as the Law Reform Commission of Canada begins its recommendations on children and the dissolution of marriage with the following words at p. 63:

1. Children should have two fundamental rights when their parents' marriage ends:
 - (a) the right to social and psychological support by having the most suitable arrangements possible in the circumstances made for their custody, care and upbringing; and
 - (b) the right to economic support.

Without disregarding the disruption inherent in divorce, courts must do whatever is within their power to alleviate rather than disregard, minimize or normalize difficulties, and should beware of adopting a needlessly cavalier attitude where solutions can be seen to exist. The fact that many children experience stress and disruption upon the breakdown of the marriage, in my view, only increases the obligation of courts to focus their attention on the best interests of the child. The primary goal of the legal system on divorce must be to minimize the adverse effects on children. However, this requires a vision of the best interests of the child that is more than neutral to the conditions under which custody and access occur. The harm test clearly cannot meet this objective.

The Court of Appeal concedes that a court could be obliged to determine whether or not either the content of religious beliefs or conflict arising from exposure to conflicting beliefs is threatening "real harm" to the child. However, in the view of the majority, at p. 105, "it will be a rare case where such an issue could legitimately arise". The Court of Appeal also concludes that restrictions on access should only be allowed where harm can be demonstrated by independent experts.

It is clear that the proposed test falls far short of protecting the best interests of the child, as it may well be impossible to demonstrate the high level of harm the test envisions in many cases even where there are real concerns for the welfare of the child. It is unrealistic to expect that the accumulated evidence of ill effects engendered by separation or divorce will be immediate or readily demonstrable to a court as, in the usual case, custody decisions are made shortly after separation. However this does not mean that such concerns should therefore be readily dismissed. Rather, judges

must exercise their discretion in order to prevent harm to the child, rather than merely to identify or establish its presence after the damage is done.

I would also point out that to adopt the harm test would be a regression back to the era when the interests of the child were subjugated to those of the parents. Despite the fact that the test purports to further the best interests of the child by promoting unfettered contact between non-custodial parents and their children, in reality the test subordinates the best interests of children to a presumptive right of the non-custodial parent to unrestricted access.

Finally, it is important to place this issue in its proper context by noting that the vast majority of access orders contain no restrictions on access. Over 96 percent of divorces are now finalized with either an uncontested hearing or no court hearing at all (*Evaluation of the Divorce Act -- Phase II, supra*, at p. 44). Of the remainder that are contested, most result in orders for liberal or reasonable access without restrictions. As a practical matter then, the question of restrictions only arises where something in the evidence or the circumstances of the parties suggests a concern or a potential problem. Where those concerns emanate from the custodial parent, that parent will, of course, bear the evidentiary burden of establishing that access should be curtailed. However, the standard that must be met is not the harm standard but evidence that restrictions are in the best interests of the child or, to put it otherwise, that unlimited access is not in the best interests of the child.

I agree with my colleague that expert evidence should not be routinely required to establish the best interests of the child. In my view, it is a modern day myth that experts are always better placed than parents to assess the needs of the child. Common sense requires us to acknowledge that the person involved in day to day care may observe changes in the behaviour, mood, attitude and development of a child that could go unnoticed by anyone else. The custodial parent normally has the best vantage point from which to assess the interests of the child, and thus will often provide the most reliable and complete source of information to the judge on the needs and interests of that child.

Furthermore, it is important to emphasize the importance of the evidence of children in custody and access disputes, and I would not wish to suggest that their testimony alone might not be a sufficient evidentiary basis upon which to restrict access. Courts have increasingly come to accept and understand in the criminal context that children themselves can be a reliable source of evidence to the judge (*R. v. Khan*, 1990 CanLII 77 (SCC), [1990] 2 S.C.R. 531). To disregard their evidence when their own interests are directly at issue would, in my opinion, be at odds with this clear evolutionary trend in the law.

Many legal commentators have noted the degree to which custody and access disputes have become a contest between experts, involving increasing amounts of time and money. (See N. Bala, "Assessing the Assessor: Legal Issues" (1990), 6 *C.F.L.Q.* 179; P. J. Caplan and J. Wilson, "Assessing the Child Custody Assessors" (1990), 27 *R.F.L.* (3d) 121; L. G  linas and B. M. Knoppers, "Le r  le des experts en droit qu  b  cois en mati  re de garde, d'acc  s et de protection" (1993), 53 *R. du B.* 3; Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform*, *supra*.) In the absence of clear legal presumptions about the best interests of children, judges have increasingly come to rely on the recommendations of experts to determine custody and access issues, believing that such experts possess objective, scientific knowledge and can in fact "know" what is in the best interests of the child. However, expert testimony, while helpful in some and perhaps many circumstances, is often inconclusive and contradictory (G  linas and Knoppers, *supra*, at p. 17). That this should be so is not surprising, since such assessments are both speculative and may be affected by the professional values and biases of the assessors themselves.

Even where such expertise is valuable, there are impediments in such reliance. Assessments may occasion delays in resolving proceedings and may at times constitute a significant disruption in the lives of both parents and children. The cost involved in routinely hiring experts to establish the best interests of the child only increases the expense of custody litigation and is far beyond the resources of most divorcing couples. Furthermore, as Professor Bala, *supra*, points out, at p. 224, "much of what assessors ultimately recommend may simply be a matter of 'common experience and common sense'".

Given these concerns, while the evidence of experts may form a valuable and necessary part of some custody and access decisions, most of the time they are unnecessary to an ordinary determination of the best interests of the child. Nor does the prospect of access restrictions inevitably require resort to expert opinion, as it may be apparent to the judge from the evidence of the parties and often the children themselves that access should only be granted subject to certain conditions.

I am compelled to address the issue of the right of the children to "know" their father, as Wood J.A. suggested at several points that "contact" in [s. 16\(10\)](#) of the [Act](#) encompasses the opportunity for the access parent and the child to know each other well and to appreciate each other as individuals. My colleague has also found that the trial judge erred in failing to consider the interest of the children in coming to "know" their father as he is, and is of the view that unrestricted access, even if it causes the deterioration of the relationship, is preferable to the alternative which prevents them from "knowing" him as he is. In my view, the reproaches addressed by my colleague to the trial judge are totally unfounded. The trial judge carefully assessed all the interests at play and not only did she not ignore the best interest of the children involved but also her whole decision is based on their best interest. That is, in fact, what the Court of Appeal reproached her for since, in their view, she should have applied the harm test.

However, to find that unrestricted access is the only available means by which a child may know a parent is to construct a false choice. Restrictions on access, in general or in the particular circumstances of this case, do not necessarily prevent children from coming to know their parents in meaningful ways. In this case, the purpose of the restrictions is to ensure that the children will continue to know their father "at all". The restrictions only affect the area of religious activities involving the children. Many other activities and topics of communication remain open to the respondent and his children. The children already "know" who their father is and are well aware of the significance of his religious beliefs in his life. Should they choose to, it remains open to them to investigate those beliefs further at some later point when they are ready and able to do so in a manner that is non-threatening to them.

Furthermore, to interpret the goal of maximum contact in such a way as to require unrestricted access may be to defeat the very objective that the [Act](#) itself seeks to promote, if the pre-eminence of unlimited "knowledge" results in the ultimate destruction of the relationship. Once the long-term interest of children in the maintenance of a relationship with the non-custodial parent is acknowledged, it is difficult to see the logic or the value in this approach. For example, a non-custodial parent, during access, may prevent on personal, philosophical or religious grounds, his or her child from attending school. Restricting access may be in the best interests of the child even if such an order impinges on the child's ability to "know" the parent.

In brief, the content of the rule, its constitutionality and the applicable standard of proof do not favour the respondent's position. The respondent's main argument, however, which I will now discuss, relates to the infringement of his freedom of religion under [s. 2\(a\)](#) of the [Charter](#) due to the trial judge's access order.

Freedom of Religion

This Court has held on occasions too numerous to require mention at this point that it will consider both the purpose and the context of a right when determining whether there has been an infringement of the [Charter](#). I must state at the outset that the purposes underlying the protection of religious and expressive freedoms have little if anything to do with regulating activities between family members. Such rights are public in nature and have typically referred to and encompassed freedom of the individual from state compulsion or restraints. Even the most ardent liberal theorists and advocates of rights have never pretended that these fundamental freedoms should provide a basis on which an individual could, for example, claim the protection of the state either to say or refrain from saying something to a spouse or child. The mere fact that the state plays a role in custody and access decisions in formalizing the circumstances of parent-child interaction does not transform the essentially private character of such interchanges into activity which should be subject to *Charter* scrutiny.

An examination of our traditional understanding of freedom of religion and expression reveals that those notions are inappropriate and ill-suited to the family, if only because of the differences in power and development and the nature of rights and obligations between parent and child. While legitimate questions may arise about the role of the state, and hence the application of the *Charter*, in regulating other aspects of family law, in my view, it is difficult to imagine that any valid purpose is served by importing the discourse of freedom of expression and religion into orders made in the resolution of custody and access disputes.

It follows that, once the best interests test itself has been found to accord with *Charter* values, the trial judge's order itself is not subject to further constitutional review, as the necessary state infringement of religious rights required to sustain a challenge based on the *Charter* is no longer present.

As s. 32 dictates, the *Charter* applies to governments and legislatures. Its purpose is to provide a measure of protection from the coercive power of the state and a mechanism of review to persons who find themselves unjustly burdened or affected by the actions of government. It is not meant to provide a means to regulate the affairs of private citizens. Thus, the *sine qua non* to any application of the *Charter* is the presence of state action, whether by legislation or other means.

In *RWDSU v. Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573, this Court first considered the meaning of "government action", and articulated the principle which established the threshold for judicial review under the *Charter*: the *Charter* applies to the legislative, executive and administrative branches of government but does not apply to judicial orders made in the resolution of private disputes. The issue arose again in *Tremblay v. Daigle*, 1989 CanLII 33 (SCC), [1989] 2 S.C.R. 530, when the appellant sought to uphold an injunction preventing his former girlfriend from obtaining an abortion, relying on, among other grounds, the alleged rights of the foetus under s. 7 of the *Charter*. The Court held that, as there was no state action to be impugned and the *Charter* could not be invoked in a civil action between two parties, the principle outlined in *Dolphin Delivery* provided a complete answer to the *Charter* argument.

Exceptions to this rule have been recognized in certain specific circumstances. The first such instance arose in *B.C.G.E.U. v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214, when the Court considered the application of the *Charter* to the order of a judge who, acting on his own motion, issued an injunction restraining picketing outside a court house. Dickson C.J. in that case found the order subject to the *Charter*, on the basis that the ruling was entirely public in nature and was required to ensure continuing access to the courts and the protection of the rule of law and the *Charter* rights of others. In *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038, the Court found the order of an adjudicator pursuant to the *Canada Labour Code* properly subject to *Charter* review. The Court distinguished the exercise of the arbitrator's powers in that case from judicial decision-making on the basis that the adjudicator was appointed pursuant to a legislative provision and derived all his powers from the statute.

The present case clearly falls to be decided under the principles enunciated in *Dolphin Delivery* as custody and access matters are essentially private in nature and there exists no state action to be impugned. In contradistinction to the situation in *Slaight Communications*, the powers of a judge making an order under the *Act* cannot be equated with those of an adjudicator who derives his authority from a legislative enactment. The judiciary is a separate branch of the government, and possesses the inherent jurisdiction under its *parens patriae* power to rule in the interests of the child. This power is both distinct from and long predates the statutory entrenchment of the best interests test. In the result, the *Charter* will not apply to the order.

As the Court has stressed on previous occasions, *Charter* values nonetheless remain an important consideration in judicial decision-making. Courts must strive to uphold *Charter* values, and preference should be given to such values in the interpretation of legislation over those which run contrary to them (*Slaight Communications, supra*; *Hills v. Canada (Attorney General)*, 1988 CanLII 67 (SCC), [1988] 1 S.C.R. 513, at p. 558; *Canada (Attorney General) v. Mossop*, 1993 CanLII 164 (SCC), [1993] 1 S.C.R. 554).

There is no question that, had the order been based on the sole fact that the respondent adheres to the Jehovah's Witness faith, the order could not be legitimized, as it has long been a tenet of

the common law that courts will not prefer one religion over another in the adjudication of custody disputes. (See *In re McGrath (Infants)*, *supra*; *Re Bennett Infants*, [1952 CanLII 293 \(ON CA\)](#), [1952] O.W.N. 621 (Ont. C.A.) at p. 624; *Delvenne v. Nabbie* (1977), [1977 CanLII 2270 \(MB CA\)](#), 4 R.F.L. (2d) 21 (Man. C.A.); *Irmert v. Irmert* (1984), [1984 ABCA 286 \(CanLII\)](#), 64 A.R. 342 (C.A.); *Harvey v. Lapointe* (1988), [1988 CanLII 8787 \(QC CS\)](#), 13 R.F.L. (3d) 134 (Que. C.A.).) Nor is a court authorized to dictate to a parent his or her religious philosophy (*McQuillan v. McQuillan* (1975), [1975 CanLII 1946 \(ON SC\)](#), 21 R.F.L. 324 (Ont. H.C.)). Decisions regarding custody and access must not be based on the parents' faith, whether or not that religion is that of the majority. However, the religion of the parties may be relevant as one of the circumstances to be assessed along with all the others in the determination of the best interests of the child, as it is in this case.

In instances where there is conflict over religion, it is important to emphasize that the court is not engaged in adjudicating a "war of religion" nor are the religious beliefs of the parties themselves on trial. Rather, as courts have often recognized, it is the manner in which such beliefs are practised together with the impact and effect they have on the child which must be considered (*Struncova v. Guay* (1984), [1984 CanLII 4817 \(QC CS\)](#), 39 R.F.L. (2d) 298 (Que. S.C.); *Brown v. Brown*, *supra*; *Irmert v. Irmert*, *supra*; *Harvey v. Lapointe*, *supra*; *Fougere v. Fougere*, *supra*). In all cases where the effects of religious practices are at issue, the best interests of the child must prevail (*Sullivan v. Fox* (1984), [1984 CanLII 4805 \(PE PC\)](#), 38 R.F.L. (2d) 293 (P.E.I.S.C.)). See also C. E. Schneider, "Religion and Child Custody" (1992), 25 *U. Mich. J.L. Ref.* 879.

In the vast majority of cases, social values such as religion are shared between the parents and pose no threat to the exercise of access. It is when such values clash, whether over religion, education, ethnic traditions, mores or the lifestyles of the parents that problems arise. It is probably safe to say that in the "best case" scenario, courts would prefer to avoid orders which touch on peoples' beliefs and religion, as few issues are more likely to evoke the passions of both the parties and the wider community. However, it must be remembered that courts are only called to adjudicate such issues when the differences between the parties themselves have become irreconcilable. At this point, courts have no choice but to resolve the matter according to the best interests of the child.

Moreover, even if the [Charter](#) were to apply to custody and access orders, no infringement of religious freedoms would occur where such orders are made in the best interests of the child. As this Court recognized in *R. v. Big M Drug Mart Ltd.*, *supra*, at pp. 336-37:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

Freedom can primarily be characterized by the absence of coercion or constraint. . . . Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience. [Emphasis added.]

Thus, freedom of religion is inherently limited by a number of considerations, including the rights and freedoms of others. While parents are free to engage in religious practices themselves, those activities may be curtailed where they interfere with the best interests of the child without thereby infringing the parent's religious freedoms.

There is no dispute in the case law as regards this principle since, even where the religious rights of the non-custodial parent in access disputes have been recognized, courts have nonetheless imposed conditions on their exercise where warranted by the interests of the child. As Malouf J.A. for the Quebec Court of Appeal held in *Droit de la famille -- 955*, [1991 CanLII 3838 \(QC CA\)](#), [1991] R.J.Q. 599 (C.A.), at p. 606:

Such constraints, provided they are reasonable in their content and application, do not interfere in any way with a particular parent's freedom of religion. They simply reaffirm the principle that the best interest of the child must be protected. They are not inconsistent with the basic freedoms referred to in the [Charter](#).

(See also *Droit de la famille -- 353*, [1987 CanLII 398 \(QC CA\)](#), [1987] R.J.Q. 545 (C.A.).)

The only question is the applicable standard for imposing such conditions. As I have indicated above, that standard is not one of harm but must at all times be the best interests of the child.

Both the Court of Appeal and the respondent rely on the decision of *Hockey v. Hockey*, *supra*, for the proposition that access orders which restrict the ability of non-custodial parents to involve their children in religious activities contrary to the wishes of the custodial parent violate freedom of religion. In that case, the custodial parent's solicitor had sent a letter to the access parent which included the following statement: "[t]o ensure that there is no misunderstanding let me state unequivocally that the restrictions of your exercise of access to the children has been precipitated primarily because of your acceptance of the Jehovah's Witness faith" (p. 106). Not surprisingly, the court found the subsequent denial of access by the custodial parent for a period of six months, despite a court order permitting access, to be a form of religious discrimination. The court concluded in those circumstances that, in the absence of any finding that the sharing of beliefs or practices with the children by the non-custodial parent was contrary to the best interests of the children, the [Act](#) must be interpreted in a manner compatible with the religious freedom of the access parent.

It appears that the basis of that particular decision was the absence of any evidence before the court of adverse effects on the children. Moreover, the court in *Hockey v. Hockey* explicitly recognized that the religious rights of the access parent could be curtailed in the interests of the child. Despite a contrary interpretation by the Court of Appeal in the present case, in my view that case does not support the conclusion that restrictions on religious activities during access cannot be sustained unless harm, or the threat of harm, to the child has been established.

The respondent also invokes the decision of *Zummo v. Zummo*, 574 A.2d 1130 (Pa. 1990), in support of his submissions that the religious freedom of an access parent may only be curtailed where harm can be conclusively demonstrated. In *Zummo v. Zummo*, the Pennsylvania Superior Court engaged in a comprehensive historical review of the protection of freedom of religion under the First Amendment to the United States Constitution. On that basis, Kelly J. concluded that limits to the non-custodial parent's involvement in the religious upbringing of the child could not be sustained in the absence of clear evidence that access without restrictions would pose a substantial threat of present or future harm to the child.

In my view, it is important, when considering the applicability of such a standard in Canadian jurisprudence, to be conscious of the differences in both the history and the constitutional protection of freedom of religion in Canada and the United States. Without delving into the development of freedom of religion in the United States, it is sufficient to note that American courts have strictly interpreted the requirement of non-interference by the state in any matter touching on religion. In addition, we must recall that under the *Charter*, a court order pursuant to the litigation of a private issue such as access does not constitute state infringement of religious freedoms.

In *Zummo v. Zummo*, the court accepted the conclusions of a number of studies which demonstrated that exposure to conflicting religious doctrines should not give rise to a presumption of harm to the child. I am in complete agreement that there is ordinarily nothing wrong with the exposure of a child to different religions or beliefs and that such exposure may be of value to the child. However, it is crucial to acknowledge that there may at times be important differences between intermarried intact families and those in the process of separation or divorce. Indeed, the authors of two of the studies relied on in *Zummo v. Zummo* later expressly disavowed the application and relevance of their findings where parents were not in agreement or where children were, by virtue of divorce, thrust into two religions. (See M. Weiss and R. Abramoff, "The Enforceability of Religious Upbringing Agreements" (1991), 25 *J. Mar. L. Rev.* 655, at pp. 714-15). The missing element is conflict. In intact families, parents are normally in agreement about how to raise their children and have accommodated the presence of two religions. However, where religion becomes a source of conflict between the parents or is the very cause of the marriage breakdown, it is generally not in the best interests of the child and may in some circumstances be very detrimental for the child to be drawn into the controversy over religious matters.

As one commentator has pointed out, it is precisely the cases in which children become embroiled in religious conflict that cast doubt on the wisdom of the decisions which have allowed the religious rights of the access parent to prevail (J. T. Syrtash, *Religion and Culture in Canadian Family Law* (1992), at p. 90). Where there is conflict over religion, courts must secure the longstanding authority of the custodial parent to make decisions over religious activities. This ensures that stress occasioned by such issues does not become a continuing and ultimately destructive feature in the life

of the child after divorce. (See S. M. Zarowny, "The Religious Upbringing of Children After Divorce" (1980), 56 *Notre Dame Law* 160, at p. 173; Weiss and Abramoff, *supra*.)

Freedom of Expression

The respondent also argues that the restrictions on communicating his religious views to his children infringe his rights to expressive freedom. Wood J.A. agreed, although he subsumed this right under the rubric of freedom of religion, holding that an important part of the right to teach and disseminate religious beliefs is the right to share those beliefs with one's children. Southin J.A., for her part, was of the view that the appellant does not have the right to control the conversations which take place between the respondent and his children during access, reasoning that the child has a right to know anyone to whom the court grants access and that a child cannot know anyone unless he or she is able to speak freely to that person.

I have no quarrel with these conclusions as general principles, and would observe that they normally reflect and enhance the very purpose of access itself. In the overwhelming majority of cases, courts do in fact recognize and give effect to them, if only through the absence of any restrictions regarding communication between the child and the access parent. However, it is beyond contention that rights do not exist in a vacuum but are shaped and formed both by the particular context in which they are exercised and the rights of others (*Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326). Dickson C.J. in *Fraser v. Public Service Staff Relations Board*, 1985 CanLII 14 (SCC), [1985] 2 S.C.R. 455, at p. 463, after acknowledging the centrality and importance of freedom of expression in our society, observed:

But it is not an absolute value. Probably no values are absolute. All important values must be qualified, and balanced against, other important, and often competing, values.

In this case, there are other powerful competing interests which must be recognized, not the least of which, in addition to the best interests of the children, are the freedoms of expression and religion of the children themselves. There is cogent, persuasive evidence, found credible by the trial judge, that the children themselves do not want to discuss religion with their father or be subject to his

comments about beliefs which are at odds with their own religious upbringing, whether they take the form of indoctrination, instruction or mere observations. Indeed, the letters written to the trial judge disclose that, not only do they not want it, but also that the prospect of such discussions has so profoundly disturbed the children and coloured the periods of access that they no longer wish to continue to see the respondent according to a schedule.

In such circumstances, it is obviously inadequate merely to invoke freedom of religion or expression of an access parent without considering the effect on the children and their inability to assert their own desires and rights. Rather, both the best interests of the children and a respect for their rights may require restrictions on communication, if only so that the larger interest, maintenance and development of the relationship between the access parent and child, is not frustrated by the means by which it is carried out.

In the result, I would dismiss the respondent's argument that his freedoms of religion and expression have been infringed by the trial judge's order. He remains totally free to practise his religion. I also reject his submission that he has the right to engage his children in religious observances with him where it is determined that such observances are detrimental to their best interests.

In summary, as a matter of statutory interpretation, the *Divorce Act* mandates that, in decisions of custody and access, the sole consideration be the best interests of the child. The focus must remain at all times on the child, not the needs or interests of the parents, and parental rights play no role in such decisions except in so far as they are necessary to ensure the best interests of the child.

The custodial parent is responsible for the care and upbringing of the child, including decisions concerning the education, religion, health and well-being of the child. Parental authority rests with the custodial parent, not for his or her own benefit, but in order to enable that parent to discharge effectively the obligations and responsibilities owed to the child.

As set out in the [Act](#), maximum contact between the child and the non-custodial parent is a worthwhile goal which should be pursued to the extent that it is in the best interests of the child. Generous and unrestricted access, which is the norm, should be favoured except when such access would not be in the best interests of the child. However, ongoing conflict between parents which adversely affects the child must be minimized or avoided, as it is the single factor which has consistently proven to be severely detrimental to children upon separation or divorce.

The best interests of the child must be approached from a child-centred perspective. It is not simply the right to be free of significant harm. It is the right of the particular child in question to the best possible arrangements in the circumstances of the parties, taking into consideration the wide spectrum of factors which may affect the child's physical, spiritual, moral and emotional well-being and the milieu in which the child lives.

Where the question of restrictions on access arises, the best interests of the child must be determined by considering the "condition, means, needs and other circumstances of the child" as required by the [Act](#). The totality of these circumstances must be considered. Nothing in the Act suggests that harm should be the controlling factor. To adopt the harm standard would be to invert the focus of the best interests test and place the risk of error on the child, contrary to the objectives of the Act.

Expert evidence, while helpful in some cases, is not routinely required to establish the best interests of the child. That determination is normally possible from the evidence of the parties themselves and, in some cases, the testimony of the children involved.

Freedom of religion and expression are fundamental values protected by the [Charter](#). However, the best interests of the child standard in the [Divorce Act](#) does not offend *Charter* values, but is completely consonant with the underlying objectives of the *Charter*. The *Charter* has no application to private disputes between parents in the family context, nor does it apply to court orders in the area of custody and access. While a child's exposure to different parental faiths or beliefs may

be of value, when such exposure is a source of conflict and is not in the best interests of the child, such exposure may be curtailed.

This brings us to the evidence in this case which led to the trial judge's order restricting the respondent's access.

Application to the Case

At the outset, it must be remembered that this Court has always emphasized the caution with which an appellate court should interfere with the decision of a trial judge in custody matters. (See *Talsky v. Talsky*, *supra*; *Adams v. McLeod*, 1978 CanLII 5 (SCC), [1978] 2 S.C.R. 621; *Novic v. Novic*, 1983 CanLII 55 (SCC), [1983] 1 S.C.R. 696.) Because the trial judge has the inestimable advantage of observing the parties and assessing the witnesses first hand, such decisions should not be interfered with unless there is a gross distortion of the evidence or misapprehension of the relevant legal principles. As the foregoing discussion demonstrates, Proudfoot J. did not err in law as to the proper standard applicable to the case. She was entirely correct in holding that the only relevant consideration is the best interests of the child. The sole remaining question therefore, is whether there is evidence that the best interests of the children would be jeopardized by the respondent's unrestricted access to his children.

The majority of the Court of Appeal found no evidence of harm which would support the order made at trial. Even if I were to agree that some measure of harm must be demonstrated before the trial judge is entitled to restrict the respondent's religious activities with the children, a view I do not share, the evidence amply demonstrates the harm such religious activity has brought about. While the rationale underlying the right of access and the objective of maximum contact is to permit the relationship to flourish, in this case the contrary result has occurred, as it has antagonized the children.

I would begin by noting that the appellant has always favoured access by the respondent to his children. This is not an iota of evidence that the respondent's general rights of access were

threatened. Rather, the only restrictions that were requested were aimed at reducing the area of conflict which had arisen on account of the respondent's behaviour with his children during access.

Although the respondent characterizes this litigation as an attack on his religious freedom, those beliefs are not at risk, as the restrictions place no limits on the respondent's ability to engage in religious practices himself. It is the effect of his practices on the best interests of his three daughters that is in question here.

In reaching her decision about the impact of these practices on the children, the trial judge relied in large measure on the reports of the two witnesses for the court, Donna MacLean, the family court counsellor whom she found to be thorough and highly credible in both her reports and testimony, and Dr. Williams, a psychologist.

In his first report, dated November 28, 1988, Dr. Williams found that the major obstacle to smooth access was the matter of religion. He found that the children were not significantly distressed by the issue at that time, but regarded it as a potential problem in the future. He stated:

I see Natalie as being particularly vulnerable to such issues in light of the dynamics of her personality as well as her age. As such, in my judgement some agreement and/or understanding will need to be arrived at as to the degree of religious dogma to which Mr. Young can expose the children, bearing in mind that such beliefs and related activities are anathema to Mrs. Young.

In his assessment the following year (September 22, 1989), he reported that, although they were continuing to deal with the separation adequately, the children were under increasing pressure regarding family issues. They expressed antagonism to their father, no longer trusted him and generally did not view him in a positive light. They were firmly opposed to attending religious services or being schooled in the tenets of his beliefs. The expert found that they were under stress from the religious issue and ongoing litigation and conveyed a need to get it settled in order to get on with their lives. Dr. Williams found, with respect to the children's emotional and social foundation, that:

. . . I am of the opinion that it is in the best interests of the children that the dispute over tangible and philosophical/religious issues be settled conclusively . . . nothing has been broken and thus there is no apparent need for repair. If, however, the children are obliged to labor at length under the pressures they are presently experiencing a destabilizing influence -- particularly in the case of Natalie -- will likely be exerted.

Donna MacLean, in her report of January 30, 1989 essentially corroborated this finding. In the updated report of April 18, 1989, she noted that the children were unhappy with the access visits and that their relationship with their father was deteriorating because he was making the children feel guilty and uncomfortable by questioning them.

The trial judge also had access to the direct testimony of the two older children who wrote letters to the judge which are most revealing of their state of mind. From the letters, it is evident that both are afraid to disclose their thoughts about the visits to their father for fear that he will make them feel guilty. Adrienne, the eldest, wrote that she did not want to visit him or sleep overnight because she thinks he will trick her into doing things and quiz her about the Jehovah's Witness religion. She expressed frustration regarding access, visitation and the court proceedings, saying "It's driving me crazy." Natalie, the middle child, evinced considerable distress about the family situation, stating that her father makes her feel guilty and makes her cry when she wants to go home from access visits, and that she is afraid to tell him. She repeated that she wanted the court proceedings to be over.

In my opinion, this evidence amply demonstrates the stress the children were under, much of it related to the children's resistance to becoming involved in their father's religious practices. The trial judge can in no way be said to have erred in finding that the best interests of these children were served by removing the source of conflict, particularly as the ultimate purpose of the restrictions was to preserve the relationship between the respondent and his children.

Moreover, there was evidence leading the trial judge to conclude that the respondent would not respect the wishes of the children without an order to do so. As the family court counsellor reported, "it is of concern that Mr. Young does not acknowledge the choice of the older children to remain with their mother". Proudfoot J. found as a fact that the respondent wanted custody in order to control the religious upbringing of the children. In other words, she found that his interest was not

simply to share or communicate these beliefs; rather he fundamentally disagreed with allowing the appellant control over religious matters. This finding of fact is difficult to reconcile with the Court of Appeal's ruling that the trial judge was in error since, in their view, the respondent was bound to respect his children's wishes not to attend at his place of worship or accompany him on his proselytization efforts, which is exactly what the trial judge ordered. However, they discarded the evidence that the respondent was not willing to do so voluntarily. The trial judge had made a finding that the respondent could not be relied upon to act in the best interests of the children as regards his religious practices when exercising access. That finding should have been respected by the Court of Appeal.

In my opinion, the fact that the circumstances in this case were found by the Court of Appeal not to meet the harm threshold clearly demonstrates the difficulty, if not the impossibility, of reconciling such a standard with the best interests of the child even where experts testify, as they did in this case.

As the trial judge observed, the respondent was quite unconcerned with the conflict and stress on the children caused by the pursuit of his own religious interests. At the same time as he found the resources to press his claims to religious rights, he apparently did not find the payment of maintenance a top priority. Upon reading the evidence, I cannot disagree with the trial judge that the respondent's concern with religious rights had clearly overtaken the practical realities of parenthood and overshadowed his larger responsibilities to his children in this case.

Since writing these reasons, I have had the opportunity to read the joint reasons of my colleagues Justices Cory and Iacobucci. They invite the following comments.

First, as to the first part of the trial judge's order, contrary to their affirmation, the issue is not moot. It is precisely because the trial judge found, as a fact, that the respondent could not be trusted for the reasons she outlined, that she issued that order. How can a court of appeal reverse those findings of fact, and yet, on the same facts, affirm that such an order is no longer necessary,

particularly when the court of appeal has not indicated where the trial judge has erred in her assessment of those facts?

As to the second part of the order, my colleagues assert that the best interests test does not support an order preventing the respondent from discussing religion with his children, on the ground that it is (at p. 110) "difficult to accept that any genuine and otherwise proper discussion between a parent and his or her child should be curtailed by court orders". Otherwise, they suggest, a non-custodial parent who espouses a theory of evolution would be ordered, under the best interests test, not to discuss or explain his or her views to a child in the custody of a parent who is a member of a fundamentalist religion.

However, this scenario has nothing to do with the facts of this case. With respect, to equate the two scenarios is to misapprehend fundamentally the focus of the best interests test. It is not the fact that the parents differ in their fundamental beliefs that warrants the restrictions in this case. It is the finding of fact made by the trial judge, on the basis of evidence she found credible, that continuing conflict over religion, including the respondent's repeated attempts to discuss religious matters with the children against their clearly expressed desires, profoundly disturbed the children and was contrary to their best interests. At the time of trial, the respondent was not engaging in other religious activities with the children, as they had already been curtailed by the interim order almost a year and a half earlier. Therefore, it is precisely these continuing "discussions" that were disturbing the children, causing the deterioration of their relationship with their father and which, therefore, had to be curtailed.

I wish to emphasize two points. As I thought I made clear earlier in my reasons, a child's exposure to different parental faiths or beliefs may generally be of value and even of great value; there is no presumption that such exposure is not in the best interests of the child. Rather, the contrary is true. Second, as I also emphasized earlier, generous and unrestricted access should be favoured except where it is not in the best interests of the child. Hence, restrictions such as the trial judge found to be required in the second part of her order will be rare indeed and there is no reason to suppose that, absent a threat to the best interests of the child, any question of such restrictions will arise. However,

it is important to acknowledge that in those rare cases where parents cross the line and engage in conduct which constitutes, in the words of my colleagues at p. 110, "indoctrination, enlistment or harassment", courts have a duty to intervene in the best interests of children. The evidence strongly suggests that this is just such a case and that is the finding of the trial judge. In my view, these findings of fact must be respected absent, as here, an error in the applicable principles.

In the result, I would allow the appeal and restore the order at trial, the whole with costs throughout. I would answer the constitutional questions in the negative.

The following are the reasons delivered by

SOPINKA J. -- I have read the reasons of my colleagues Justice L'Heureux-Dubé and Justice McLachlin and I find myself in agreement with McLachlin J. as to the disposition of the appeal and with most of her reasons. While I agree with McLachlin J. that the ultimate determination in deciding issues of custody and access is the "best interests of the child test", it must be reconciled with the *Canadian Charter of Rights and Freedoms*. General language in a statute which, in its breadth, potentially confers the power to override *Charter* values must be interpreted to respect those values. See *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038. It cannot be done the other way around and allow the best interests test in its broadest interpretation to read down *Charter* rights so as to accommodate this interpretation.

In my view, the test in s. 16(10) of the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.), and the *Charter* right involved in this case, namely freedom of religious expression, can best be reconciled by interpreting the best interests test to allow the right to be overridden only if its exercise would occasion consequences that involve more than inconvenience, upset or disruption to the child and incidentally to the custodial parent. The long-term value to a child of a meaningful relationship with both parents is a policy that is affirmed in the *Divorce Act*. This means allowing each to engage in those activities which contribute to identify the parent for what he or she really is. The access parent is not expected to act out a part or assume a phony lifestyle during access periods. The policy

favouring activities that promote a meaningful relationship is not displaced unless there is a substantial risk of harm to the child.

In this regard, I agree with Wood J.A. in the Court of Appeal (1990), [1990 CanLII 3813 \(BC CA\)](#), 50 B.C.L.R. (2d) 1. In his reasons he states, at p. 96:

I believe the whole of [s. 16](#) of the [Divorce Act](#) of 1985, when properly construed, reflects the modern view that the best interests of a child are more aptly served by a law which recognizes the right of that child to a meaningful post-divorce relationship with both parents. That construction in turn requires that the distribution of "rights", between the custodial and the access parent, be such as to encourage such a relationship. And such a construction is inconsistent with the full-blooded traditional notion of guardianship which would give the custodial parent the absolute right to exercise full control over the child even when the other parent is exercising his or her right of access.

"Harm" is a term which in this context connotes an adverse effect on the child's upbringing that is more than transitory. The impugned exercise by the access parent must be shown to create a substantial risk that the child's physical, psychological or moral well-being will be adversely affected. Exposure to new experiences and ideas may upset children and cause them considerable discomfort. Anything from starting school to having to go to bed may evoke a strong emotional response. This does not mean that these experiences are not in the long-term best interests of the child. Similarly, conflict between parents on many matters including religion is not uncommon, but in itself cannot be assumed to be harmful unless it produces a prolonged acrimonious atmosphere.

I would, therefore, go a step further than my colleague McLachlin J. and conclude that what is in the best interests of the child is the generally applicable test, but in its application to restrict religious expression, risk of substantial harm is not only an important factor but also must be shown.

Interpreted in this way, the statutory test in [s. 16\(10\)](#) of the [Divorce Act](#) does not constitute a limitation on freedom of religious expression. As my colleague points out, this freedom does not extend to protect conduct which is harmful to others. I would not, however, adopt her expansion of the term "injure" as used in *R. v. Big M Drug Mart Ltd.*, [1985 CanLII 69 \(SCC\)](#), [1985] 1 S.C.R. 295, to arrive at the conclusion that anything that is not in the best interests of the child (on the basis of her definition of this test) is subtracted from the [Charter](#) right involved.

I would dispose of the appeal and the constitutional questions as proposed by McLachlin J.

The following are the reasons delivered by

CORY AND IACOBUCCI JJ. -- We have read with great interest the excellent reasons of Justice L'Heureux-Dubé and Justice McLachlin. We are in agreement with their conclusions that the best interests of the child standard provided in ss. 16(8) and 17(5) of the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.), does not violate ss. 2(a), (b) and (d), and s. 15 of the *Canadian Charter of Rights and Freedoms* substantially for the reasons given by our colleagues. In this respect, however, we wish to refrain from expressing any opinion on McLachlin J.'s discussion of whether, if an infringement of the *Charter* were found, such an infringement would be so trivial as not to warrant *Charter* protection. We similarly wish to reserve our views on the question discussed by L'Heureux-Dubé J. of whether or not the *Charter* applies to judicial orders made in custody or access proceedings.

We agree, again for many of the reasons she advances, with L'Heureux-Dubé J. that the issue of access to children should be determined on the basis of what is in the best interests of the child. In that respect, we also agree with both our colleagues that expert evidence is, while admittedly helpful in some cases, not always necessary to establish the best interests of the child; that question can be determined normally from the evidence of parties themselves and the testimony, where appropriate, of the children concerned.

We note that the majority of the British Columbia Court of Appeal (1990), 1990 CanLII 3813 (BC CA), 50 B.C.L.R. (2d) 1, held that the matters of the children attending religious services with the respondent and accompanying him on his proselytizing activities were resolved by the respondent's undertaking to respect his children's wishes in this regard. This leaves as the only remaining issue, whether the order forbidding the respondent from discussing his religion is valid. On this point, we agree with McLachlin J. that a proper application of the best interests of the child test does not support such an order. We find it difficult to accept that any genuine and otherwise proper discussion between a parent and his or her child should be curtailed by court orders. Indeed,

curtailment of explanatory or discursive conversations or exchanges between a parent and child should be rarely ordered in our view. To take an example, suppose custodial Parent A is a member of a fundamentalist religion and access Parent B is a scientist who espouses the pure Darwinian theory of evolution. We find it unacceptable that Parent B should be ordered, under the rubric of the best interests of the child test, not to discuss or explain his views to his child as opposed to being forbidden from indoctrinating or otherwise undermining the religious choice made by the custodial parent for the child or children involved. Surely the best interests of the child test embraces genuine discussion of religious belief as opposed to indoctrination, enlistment or harassment having the aim or effect of undermining the religious decision made by the custodial parent.

On the property, monetary, and costs issues, we agree with the reasons of McLachlin J. and would dispose of the appeal in the manner proposed by her.

The following is the judgment delivered by

MCLACHLIN J. -- This case raises the question whether a divorced parent, who does not have custody, should be able to offer his children his religious views over the objection of the custodial parent. This issue raises, in turn, the question of the place of the "best interests of the child" standard in the Canadian constitutional system.

The Background

Mr. and Mrs. Young were married in 1974. They had three daughters. In 1987 the Youngs separated. Mrs. Young took custody of the children; Mr. Young had access, subject to court-imposed restrictions following from Mrs. Young's objection to his religious activity with the children.

The separation was marked by a protracted series of court battles. It is unnecessary to detail the many disputes over which the parties joined issue before the case finally came on for trial. Suffice it to say that one of those issues was the disagreement between the parents over which religious activities Mr. Young might appropriately undertake with his daughters. Mrs. Young was

brought up in the Anglican church. She expressed a wish that her children be brought up in the United Church, although the evidence suggests that religion, particularly organized religion, does not play an important role in the life of Mrs. Young. Mr. Young converted to the Jehovah's Witness faith two years prior to separation from his spouse. He wished, at the very least, to communicate his faith to his children. To this end, he read bible stories, and discussed his beliefs with his children during his periods of access. He also questioned them about religious matters during these periods.

The evidence shows that the elder two daughters like their father but, as time went on, came to dislike his religious instruction. There was evidence that by exposing his elder children to his religious beliefs, Mr. Young was damaging his relationship with his children and contributing to the stress the children were experiencing in adjusting to their parent's separation. On the other hand, the evidence also established that the children were functioning in an entirely normal fashion, suggesting that neither their mental nor physical health had been adversely affected by the dispute between their parents over Mr. Young's religious instruction, or by that instruction itself.

The trial judge granted custody of the children to Mrs. Young and access to Mr. Young. But Mr. Young's access was again restricted by court order. The order provided that Mr. Young not discuss the Jehovah's Witness religion with the children, not take them to any religious services, canvassing or meetings, and not expose the children to religious discussions with third parties without the prior consent of Mrs. Young. Both parties were ordered not to make adverse remarks about the other's beliefs. Mr. Young was also enjoined from preventing blood transfusions for the children, should the need arise. The basis of the order was the trial judge's finding (1989), [1989 CanLII 8903 \(BC SC\)](#), 24 R.F.L. (3d) 193, at p. 211, that "the religious conflict [between the parents] was causing a problem for the children." She wrote at p. 215:

There will be certain restrictions because that is necessary to protect the best interests of these children. That can only be done by putting an end to this religious conflict. The respondent has become so involved in enforcing his rights he has completely overlooked the welfare of the children. The respondent can have a meaningful relationship with his children without promoting his religious beliefs If the respondent is seriously interested in retaining a relationship with his children, he will have no difficulty abiding by the restrictions I propose to place on him when he has access.

The trial judge also made orders for the distribution of property and for costs which are considered later in these reasons.

Mr. Young appealed. The Court of Appeal (1990), [1990 CanLII 3813 \(BC CA\)](#), 50 B.C.L.R. (2d) 1, Southin J.A. dissenting in part, set aside the limitations on religious discussion and attendance, on the ground that it is in the best interests of children that they come to know their non-custodial parent fully, including his or her religious beliefs. The majority concluded, at p. 108, that restrictions should not be placed on the freedom of an access parent to discuss religion with his or her child, or to involve the child in religious activities, unless either "the existence of, or the potential for, real harm" to the child was established on the evidence, or the evidence established that the child did not consent to being subject to the access parent's views or practices. The Court of Appeal also altered the division of property and the awards of costs made by the trial judge. Mrs. Young appeals these rulings to this Court. I will consider each issue in turn.

A. The Limitations on Mr. Young's Access

1. *The Constitutional Validity of the Best Interest of the Child Standard*

The [Divorce Act](#), R.S.C., 1985, c. 3 (2nd Supp.), provides that a court shall abide by the following matters in deciding questions of custody and access:

16. . . .

(8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

. . .

(10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact. [Emphasis added.]

The courts are to heed the following provision in s. 17 when varying a custody order made under s. 16:

17. . . .

(5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change. [Emphasis added.]

Two questions arise. First, what does the "best interests of the child" test require? Second, does this test, properly understood, infringe upon the guarantees of freedom of religion, expression, association and equality under the *Canadian Charter of Rights and Freedoms*? The sections of the *Charter* relevant to the case at bar read as follows:

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

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

. . .

- (d) freedom of association.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The answers to the questions set out above depend upon an examination of what is meant by the "best interests of the child" test and the constitutional guarantees which are put in issue.

(a) The Best Interests of the Child Test

The Historical Perspective

The express rule that matters of custody and access should be resolved in accordance with the "best interests of the child" is of relatively recent origin. Under the common law regime of the 18th and 19th centuries the governing principle in a custody dispute was the rule of near-absolute paternal preference: see *R. v. De Manneville* (1804), 5 East. 221, 102 E.R. 1054; *In re Taylor* (1876), 4 Ch. D. 157. The rule was defended on pragmatic grounds, including what was thought to be the general interest of children: see *In re Agar-Ellis* (1883), 24 Ch. D. 317. In truth, the rule probably had more to do with the acceptance of the father's dominant right in all family matters, which in turn found its roots in the notion of the inherent superiority of men over women.

The rule of paternal preference was displaced by a rule establishing in the mother a primary right to custody of a child of tender years: see, for instance, *An Act to Amend the Law relating to the custody of Infants*, S. Prov. Can. 1855, c. 126, s. 1. Later still there arose a presumption, in many foreign jurisdictions and to a more limited extent in Canada, of maternal preference: *Talsky v. Talsky*, 1975 CanLII 29 (SCC), [1976] 2 S.C.R. 292, *Kades v. Kades* (1961), 35 A.L.J.R. 251 (Aust. H.C.); see also Susan Maidment, *Child Custody and Divorce* (1984), Robert H. Mnookin, "Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy" (1975), 39 *Law & Contemp. Probs.* 226, and Allan Roth, "The Tender Years Presumption in Child Custody Disputes" (1976-77), 15 *J. Fam. L.* 423. This presumption, like the paternal preference rule, was justified on pragmatic grounds; the welfare of the child was the often cited reason for the presumption. So justified, the presumption carried the seeds of its own demise. Courts increasingly looked behind the preference to focus directly upon what was in the child's interest, which was sometimes found to conflict with a maternal preference.

By the 1970s, a number of western countries had accorded statutory recognition to a "best interests" or "welfare of the child" test. Questions relating to the weight to be given these interests, and the proper means of understanding these interests, remained. In England, the child's welfare is stipulated as the "first and paramount" consideration: *Guardianship of Minors Act, 1971* (U.K.), 1971, c. 3, s. 1. English jurisprudence indicates that the child's welfare has, in fact, become the sole consideration: *J. v. C.*, [1970] A.C. 668; *Re K. (minors)*, [1977] 1 All E.R. 647. In Norway, decisions in respect of custody shall "mainly" (or "primarily") consider the interests of the child: *Lov 8 April nr*

7 om barn og foreldre, s. 34 (Law about Children and Parents, of April 7, 1981, no. 7, s. 34). In practice it appears that other criteria do not simply function as "tiebreakers" where the interests of the child would be equally well served by either parent, but can, in certain cases, determine the issue: see Jon Elster, "Solomonic Judgments: Against the Best Interest of the Child" (1987), 54 *U. Chi. L. Rev.* 1; also Lucy Smith and Peter Lødrup, "The Child in the Divorce Situation -- Factors Determining the Custody Question and the Use of Experts in Custody Cases in Norway", in Ian F. G. Baxter and Mary A. Eberts, eds., *The Child and the Courts* (1978).

Some variant of the best interests of the child test is in place in most American states, although in certain states the application of the test is delimited by a renewed concern that the debate be organized by certain presumptions, either a "primary caregiver" presumption, or a presumption in favour of the mother of a child of tender years: see David L. Chambers, "Rethinking the Substantive Rules for Custody Disputes in Divorce" (1984), 83 *Mich. L. Rev.* 477, and Roth, "The Tender Years Presumption in Child Custody Disputes", *supra*.

The Wording of the Act

Parliament has adopted the "best interests of the child" test as the basis upon which custody and access disputes are to be resolved. Three aspects of the way Parliament has done this merit comment.

First, the "best interests of the child" test is the only test. The express wording of [s. 16\(8\)](#) of the [Divorce Act](#) requires the court to look only at the best interests of the child in making orders of custody and access. This means that parental preferences and "rights" play no role.

Second, the test is broad. Parliament has recognized that the variety of circumstances which may arise in disputes over custody and access is so diverse that predetermined rules, designed to resolve certain types of disputes in advance, may not be useful. Rather, it has been left to the judge to decide what is in the "best interests of the child", by reference to the "condition, means, needs and other circumstances" of the child. Nevertheless, the judicial task is not one of pure discretion. By

embodying the "best interests" test in legislation and by setting out general factors to be considered, Parliament has established a legal test, albeit a flexible one. Like all legal tests, it is to be applied according to the evidence in the case, viewed objectively. There is no room for the judge's personal predilections and prejudices. The judge's duty is to apply the law. He or she must not do what he or she wants to do but what he or she ought to do.

Third, s. 16(10) provides that in making an order, the court shall give effect "to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child." This is significant. It stands as the only specific factor which Parliament has seen fit to single out as being something which the judge must consider. By mentioning this factor, Parliament has expressed its opinion that contact with each parent is valuable, and that the judge should ensure that this contact is maximized. The modifying phrase "as is consistent with the best interests of the child" means that the goal of maximum contact of each parent with the child is not absolute. To the extent that contact conflicts with the best interests of the child, it may be restricted. But only to that extent. Parliament's decision to maintain maximum contact between the child and both parents is amply supported by the literature, which suggests that children benefit from continued access: Michael Rutter, *Maternal Deprivation Reassessed* (1981), Robin Benians, "Preserving Parental Contact: a Factor in Promoting Healthy Growth and Development in Children", in Jo Tunnard, ed., *Fostering Parental Contact: Arguments in Favour of Preserving Contact Between Children in Care and Their Families* (1982).

Wood J.A. in the Court of Appeal, put the matter as follows at p. 93:

It seems to me that at the very least, by enacting this subsection [[s. 16\(10\)](#) of the [Divorce Act](#)], Parliament intended to facilitate a meaningful, as well as a continuing, post-divorce relationship between the children of the marriage and the access parent.

Without limiting the generality of the adjective "meaningful", such a relationship would surely include the opportunity on the part of the child to know that parent well and to enjoy the benefit of those attributes of parenthood which such person has to share. In most cases that would clearly be in the best interests of the child, and the best interests of the child, not parental rights, are the focus of the whole of [s. 16](#) of the [Act](#).

I would summarize the effect of the provisions of the *Divorce Act* on matters of access as follows. The ultimate test in all cases is the best interests of the child. This is a positive test, encompassing a wide variety of factors. One of the factors which the judge seeking to determine what is in the best interests of the child must have regard to is the desirability of maximizing contact between the child and each parent. But in the final analysis, decisions on access must reflect what is in the best interests of the child.

It follows from this that the proposition, put to us in argument, that the custodial parent should have the right to forbid certain types of contact between the access parent and the child, must fail. The custodial parent's wishes are not the ultimate criterion for limitations on access: see *King v. Low*, 1985 CanLII 59 (SCC), [1985] 1 S.C.R. 87, at p. 101. The only circumstance in which contact with either parent can be limited is where the contact is shown to conflict with the best interests of the child.

Risk of harm to the child is not a condition precedent for limitations on access. The ultimate determinant in every case must be the best interests of the child. Many decisions on access may involve no reference to harm. For example, a judge might conclude that it is not in the best interests of a child that he or she see the access parent every day on the ground that this would result in undue disruption to the child's schedule of activities. Again, a judge might conclude that it is in the best interests of the child that he or she move with the custodial parent to a distant location, notwithstanding that this will limit the access of the other parent. Optimum access may simply not be in the best interests of the child for a variety of circumstances.

On the other hand, in some cases the risk of harm may be a factor to be considered in determining what is in the child's best interests. For example, where the limits on access relate to the quality of the access -- what the access parent may say or do with the child -- the question of harm may become highly relevant. Given the interest of the child in coming to know his or her access parent as fully as possible, judges may well be reluctant to impose limits on what the access parent may say or do with the child in the absence of some evidence suggesting that the activity may harm the child. The legal test is not harm; the *Divorce Act* makes this clear. However, in some

circumstances, the risk of harm to the child or the absence thereof may become an important factor to be considered. To this extent I agree with the Court of Appeal that, in determining whether religious discussions and activities between parent and child should be curtailed, it may well behoove the judge to enquire whether the proposed conduct poses a risk of harming the child. In doing so, the judge should bear in mind that conflict between parents over the access issue does not necessarily indicate harm, nor does the objection of the child necessarily impose that conclusion. In some circumstances they may; in some they may not.

I conclude that the ultimate criterion for determining limits on access to a child is the best interests of the child. The custodial parent has no "right" to limit access. The judge must consider all factors relevant to determining what is in the child's best interests; a factor which must be considered in all cases is Parliament's view that contact with each parent is to be maximized to the extent that this is compatible with the best interests of the child. The risk of harm to the child, while not the ultimate legal test, may also be a factor to be considered. This is particularly so where the issue is the quality of access -- what the access parent may say or do with the child. In such cases, it will generally be relevant to consider whether the conduct in question poses a risk of harm to the child which outweighs the benefits of a free and open relationship which permits the child to know the access parent as he or she is. It goes without saying that, as for any other legal test, the judge, in determining what is in the best interests of the child, must act not on his or her personal views, but on the evidence.

(b) The Constitutionality of the Test

The first question is whether the *Charter* applies. Because of my conclusion later in these reasons that valid orders under the "best interests of the child" standard cannot violate the *Charter*, I find it unnecessary to decide whether the *Charter* applies to an action for access under the *Divorce Act* between two parents. For the purposes of this section, I assume that it does.

The constitutional focus in this case centres on the guarantee of freedom of religion in s. 2(a) of the *Charter* and the guarantee of freedom of expression in s. 2(b) of the *Charter*. The

guarantees of freedom of association and equality apply only tangentially, if at all, and were not emphasized in argument.

The respondent says that legislative provision for the "best interests of the child" violates his religious and expressive freedom. The argument is that in some cases the "best interests of the child" will require a judge to make an order limiting expressive or religious freedom. Therefore, it is submitted, the test is unconstitutional, unless it can be saved under s. 1.

In my view, this argument cannot stand. The reason is that the guarantees of religious freedom and expressive freedom in the *Charter* do not protect conduct which violates the best interests of the child test.

*Whether Application of the Best Interests Standard Violates the *Charter**

Does the *Charter* protect religious expression which is not in the best interests of the child? In my view, the answer to this question is no.

It is established that the guarantee of freedom of religion does not extend to religious activity which harms other people. In *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, this Court held that freedom of religion is not absolute; in particular, it does not extend to conduct that would injure or interfere with the parallel rights of others. Dickson J., (as he then was), after a lengthy historical review of freedom of religion in our society and legal system, concluded at p. 346:

Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. [Emphasis added.]

The next question is whether conduct which is not in the best interests of the child amounts to an "injury" or intrusion on the rights of others within the meaning of this comment. If so, the

guarantee of freedom of religion will not protect such conduct.

It is clear that conduct which poses a risk of harm to the child would not be protected. As noted earlier, religious expression and comment of a parent which is found to violate the best interests of a child will often do so because it poses a risk of harm to the child. If so, it is clear that the guarantee of religious freedom can offer no protection. But I think a case can be made that even in cases where a risk of harm may not have been established, the guarantee of freedom of religion should not be understood to extend to protecting conduct which is not in the best interests of the child. I understand "injure" in the passage cited from *R. v. Big M Drug Mart Ltd.*, *supra*, to be a broad concept. To deprive a child of what a court has found to be in his or her best interests is to "injure", in the sense of not doing what is best for the child. The vulnerable situation of the child heightens the need for protection; if one is to err, it should not be in favour of the exercise of the alleged parental right, but in favour of the interests of the child. An additional factor which may come into play in the case of older children is the "parallel right" of others referred to by Dickson J., "to hold and manifest beliefs and opinions of their own". For these reasons, I conclude that the *Charter* guarantee of freedom of religion does not extend to protect conduct which is not in the best interests of the child under the *Divorce Act*.

I come then to freedom of expression. The ambit of this right has been more broadly drawn than freedom of conscience and religion, in that even harmful expression may be protected: *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927; *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, 1990 CanLII 105 (SCC), [1990] 1 S.C.R. 1123. On the other hand, some forms of harmful expression are not constitutionally protected. Violence or threats of violence are not protected: see *RWDSU v. Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573, *Keegstra*, *supra*, at p. 733. Nor is expression which takes the form of "direct attacks by violent means on the physical liberty and integrity of another person" protected: *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, *supra*, at p. 1186. The fact that conduct has been criminalized by Parliament is an indication, although not a conclusive one, that expressive conduct falls in the latter category: *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, *supra*, at p. 1185.

The expression challenged in the case at bar does not take the form of violence or threats of violence, nor does it constitute a direct attack on the physical integrity or liberty of another. The harm done, if any, is of a psychological nature. (In saying this, I do not overlook the fact that some religious practices or forms of expression may involve psychological violence or physical violence.) Thus a *prima facie* case for protection under the guarantee of freedom of expression can be made out.

This poses a problem. Virtually every form of religious practice is expressive. Interpreting freedom of expression broadly, in the religious context, will nullify the principle that freedom of religion does not protect conduct which injures others or which conflicts with their parallel rights to hold and manifest beliefs of their own.

The answer to this apparent dilemma is found in the admonition of Dickson J. in *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 344, that a purposive approach to *Charter* interpretation requires that associated rights -- in this case religious freedom and freedom of expression -- be interpreted in a consistent and coherent manner:

. . . the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. [Emphasis added.]

This admonition must be coupled with the canon that the ambit of a particular right or freedom cannot be defined in the abstract but should rather be defined in the context of the particular activity in question: *Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326. Taking these two injunctions together, one arrives at the conclusion that the court, focusing on the context of the particular case, must strive to interpret the related rights in a coherent manner.

The conduct with which this appeal is concerned -- the teaching of religious beliefs and practices to one's children -- while it has an expressive aspect, is predominantly religious. In seeking to reconcile the rights of freedom of religion and freedom of expression in this context, it is the

religious aspect which must dominate. Reading the two guarantees together, it is my view that the limits of the guarantee of freedom of expression should govern in the context of religious instruction of children.

For these reasons, I conclude that the best interests of the child test under the *Divorce Act* does not violate the *Charter* and is constitutionally valid.

Whether the Order of the Trial Judge is Valid Under the Divorce Act

The question is whether the trial judge correctly applied the "best interests of the child" test set out in s. 16(8) and (10) of the *Divorce Act*.

The trial judge took a custody-oriented approach to the question of whether the father should be allowed to discuss and practise his religion with the children. For her the first question (at p. 205) was "who gets custody and guardianship of the children and what flows from that." She concluded that custody confers on the custodial parent the exclusive "right" to make all decisions with respect to the child's education, health care and religion. It followed inevitably from this (at p. 205) that she saw the custodial parent as possessing the "sole responsibility for . . . the religious instruction of the child." This exclusive right in Mrs. Young to determine the child's religious instruction led directly to her conclusion that Mr. Young should be prevented from discussing his religious ideas with the children. Having concluded that the religious conflict "must stop", she ordered it stopped in the manner which the custodial parent desired, without further discussion of whether another alternative might better serve the interests of the children.

This reasoning departs from the best interests of the child test as outlined earlier in these reasons in three respects. First, it places undue emphasis on the wishes of the custodial parent. The custodial parent is viewed as having the "right" to determine limits on access. In my respectful opinion, this rights-based approach is erroneous. The only question to be considered where limitation of access is in issue is what is in the best interests of the child. While the custodial parent has the obligation to make certain basic decisions as to how the child is educated, which may extend to

religious matters, this does not automatically mean that religious contacts with the access parent of a different faith are to be excluded. It is not the wishes of the custodial parent that govern terms of access, but the best interests of the child.

Second, the trial judge failed to consider the benefits which might enure to the children from coming to know their father as he was -- that is, as a devoutly religious man devoted to the Jehovah's Witness faith. She made no reference to Parliament's instruction in s. 16(10) that the child shall have as much contact with both parents as is compatible with her best interests.

Thirdly, the trial judge failed to consider adequately whether there was any evidence of a risk of harm to the children which might offset the benefit of full access to their father's values, including those related to religion. While in some circumstances access may be limited on grounds unrelated to harm, in cases such as this, where the issue is whether entirely lawful discussions and activities between the access parent and the child should be curtailed, it behooves the judge to enquire whether the conduct poses a risk of harming the child.

While the trial judge alluded to the possibility that if Mr. Young continued to share his religion with the children, he would damage his relationship with the elder two, she failed to allude to any other suggestion of harm and failed to consider whether such harm might outweigh the benefit to be gained from a freer, fuller relationship with their father.

The trial judge's undue emphasis on the "rights" of the custodial parent, coupled with her failure to consider the benefits to be gained from unrestricted contact with the access parent or whether those benefits were offset by a greater risk of harm to the children, may have clouded her appreciation of what was in their best interests. It was therefore open to the Court of Appeal to reconsider the matter and seek to give further guidance as to the factors to be considered in determining what is in the child's best interests in cases such as these.

Southin J.A. in the Court of Appeal took a similar but less absolute view of the rights conferred by custody. The custodial parent, according to her, has the "final say" on all matters of religion, although the "right to know" the access parent and the problems with the enforceability of

any order restricting the conversation of the access parent, led her to conclude that the trial judge's restriction in respect of religious conversations could not stand.

The majority of the Court of Appeal, by contrast, saw the matter less in terms of the custodial parent's "right" to decide all religious matters affecting the children, and more in terms of the best interests of the children. Unfettered by notions of the custodial parent's rights, the majority of the Court of Appeal asked simply what was in the best interests of the child. Wood J.A. began by noting at p. 92 that "the provisions of [s. 16](#) of the [Divorce Act](#) of 1985 must be applied in a manner which is both consistent with the intentions of Parliament and relevant to the evolving role of parents in the modern structure of today's society". He found s. 16(10) to be particularly important in determining Parliament's intent in respect of access, stating at p. 93:

Viewed in that way, real contact would necessarily include the opportunity for an access parent to whom a religious belief is important to share that belief, at least in a consensual way, with his or her children.

Thus, for the majority in the Court of Appeal, the prime concern was the best interests of the child. An order for custody vests the custodial parent with the power to determine the child's religious upbringing, to the extent that this parent can require the child to observe a faith until the age of discretion; this is in the child's best interests where the parents cannot agree. A custody order does not, however, give the custodial parent the "right" to limit the access parent's ability to share his or her religious views with the child, unless that is shown on the evidence not to be in the child's best interests. Viewed thus, the notions of custody and access unite in a common purpose of promoting the child's best interests.

The majority held that an access parent's conduct with his child may be limited where the evidence shows the existence of, or potential for, real harm to the child, or where the child does not consent to the instruction. On the latter point, Wood J.A. noted that while it may be in the best interests of the child that the custodial parent be allowed to enforce religious practices against the child's wishes, that rationale did not extend to the access parent. Both limitations on the right to access found by the Court of Appeal are grounded in the best interests of the child. The majority also

held that expert evidence, based on scientific criteria, is required to show harm. While, for the reasons discussed earlier, I would not agree as a general proposition that in every case the risk of harm to the child must be established to justify limitations on access, in the context of the dispute in this case, I do not think that the majority of the Court of Appeal erred in placing considerable emphasis on the absence on the evidence of a risk of harm to the child.

I do not share the view of the majority of the Court of Appeal that expert evidence is required in all cases. Nor am I convinced that the failure of the child to consent to instruction necessarily precludes the conclusion that such instruction by the access parent is in the best interests of the child. Apart from these caveats, I substantially subscribe to the views expressed by Wood J.A.

The majority of the Court of Appeal held that the evidence did not establish that harm was being caused to the children. On the issue of the children's consent, Wood J.A. concluded that no order was necessary because Mr. Young had confirmed under oath that he would respect his children's wishes with respect to the activities they objected to -- attending services with him and accompanying him on his proselytizing missions. In the end, the majority did not find that it was in the best interests of the children, all factors considered, that even this limited form of religious activity by the access parent be restricted.

If one accepts, as did the majority of the Court of Appeal, that the issue of the children's accompanying Mr. Young to services and in his evangelical efforts is resolved by Mr. Young's undertaking -- and I see no reason not to do so given his record of compliance to date -- the only issue is whether the order forbidding Mr. Young to discuss religion with his children is valid. Apart from the value of getting to know their father and the difficulty of enforcement which led Southin J.A. to reject this restriction, it is questionable that a proper application of the "best interests of the child" test supports it. Conflict between the parents is, in and of itself, not a sufficient basis for assuming that the child's interests will not be served. There was, in this case, evidence that the children were functioning in an entirely normal fashion, and had not been adversely affected by the dispute between their parents or by their father's religious instruction. We are left then with the trial judge's concern

that Mr. Young's relationship with his children would deteriorate if he persisted in his religious instruction during his periods of access.

With the greatest respect to the trial judge, this was not on the record in this case a sufficient reason for restricting access. In so far as the possible deterioration of Mr. Young's relationship with his daughters can be considered unfortunate, the alternative -- a relationship which prevents them from knowing him as he is -- is also undesirable. In these circumstances, any perceived harm to the children cannot be said to outweigh the benefits of unrestricted access. In short, this is not a case where the evidence supports the view that the best interests of the children requires further curtailment of the father's communication of religious views and practices than already had been agreed to.

I conclude that the trial judge's orders preventing Mr. Young from discussing religion with his children were not supportable on the evidence. In view of Mr. Young's undertakings, the orders relating to church attendance and proselytizing were unnecessary. The order enjoining the respondent from preventing blood transfusions was unnecessary from a practical point of view. Parents should, of course, not make disparaging comments about the other parent's religion, but the matter might, on the record here, best have been left to the parents' good sense.

B. Financial Matters

The trial judge found that each party initially had a one-half interest in the family home where the wife was living with the three children of the marriage. She held that the husband's half interest was extinguished by the costs ordered against him, half the value of the family car which he kept, arrears of maintenance, and lump sum maintenance over and above the monthly maintenance awarded to the wife. As the trial judge put it, at p. 202, "[a]ny further interest that the [husband] has in the matrimonial home will be transferred to the petitioner in the form of lump sum maintenance to assist in the petitioner's efforts to become self-sufficient."

The trial judge ordered that \$80,000 owed to the wife's mother by a corporation, which the parties had formed to begin a jewellery business, was a family debt for which the husband and wife were jointly liable. She also held that the sum of \$27,586.57 which the appellant had borrowed to support herself before she obtained an order for interim maintenance was a family debt for half of which the respondent was liable.

The trial judge ordered that the husband pay to the wife monthly maintenance in the sum of \$1400, and \$400 a month support for each of his children.

Two aspects of these orders are appealed to this Court. The first is the trial judge's determination that whatever interest the husband might have in the matrimonial home, after setting off costs and arrears of maintenance, should be absorbed by an order for lump sum maintenance. The Court of Appeal set this order aside. The power to award lump sum maintenance is found in the *Divorce Act*, s. 15(2):

15. . . .

(2) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring one spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of

- (a) the other spouse;
- (b) any or all children of the marriage; or
- (c) the other spouse and any or all children of the marriage.

Southin J.A. stated at p. 41:

If the learned judge wished to fix lump sum maintenance, she was obliged to fix it in a sum certain and to fix it with reference to the principles applicable to such an award.

I agree that she was obliged to fix the maintenance with reference to the principles applicable to such an award. The trial judge did not express any jurisprudential or evidentiary basis for awarding the lump sum maintenance. The goal was no doubt to achieve the end of conveying the entire interest in

the matrimonial home to the wife. But this justification does not support an award of lump sum maintenance; more is required.

That said, the fact remains that the trial judge was convinced that a fair allocation of the assets of the marriage required that the house be transferred entirely to the wife. The British Columbia *Family Relations Act*, R.S.B.C. 1979, c. 121, permits an unequal division of family assets where the trial judge is satisfied that this is required having regard to various enumerated factors. The relevant sections are ss. 51 and 52 of this [Act](#). Section 51 reads:

51. Where the provisions for division of property between spouses under section 43 or their marriage agreement, as the case may be, would be unfair having regard to

- (a) the duration of the marriage;
- (b) the duration of the period during which the spouses have lived separate and apart;
- (c) the date when property was acquired or disposed of;
- (d) the extent to which property was acquired by one spouse through inheritance or gift;
- (e) the needs of each spouse to become or remain economically independent and self sufficient; or
- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 43 or the marriage agreement, as the case may be, be divided into shares fixed by the court. Additionally or alternatively the court may order that other property not covered by section 43 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

Section 52 of the [Act](#) provides that where a determination of an unequal allocation has been made, the trial judge may, by way of remedy, make an order as to the ownership of property.

In the case at bar there was ample basis for an order under s. 51 awarding Mrs. Young a greater portion of the family assets on the ground that, for a considerable period of time, Mr. Young had paid little or nothing for the support of his family. As will be seen below, I do not agree that the debts incurred during this period can, in law, be attributed to Mr. Young. However, they can serve as a consideration supporting reduction of his interest in the family property. It may also be noted that the equity in the home was not substantial and that Mr. Young was permitted to retain other assets. It is on these grounds that I depart from Southin J.A.'s view that there were insufficient reasons to order a

reapportionment. Although the matter is not free from difficulty, I incline to the view that a trial judge, looking at all the circumstances, could have made such an order.

The problem, as noted by Southin J.A., is that the trial judge made no reference to s. 51 of the *Family Relations Act* or the factors on which reapportionment of the presumed equal interest in family assets can be made. This presents this Court with two alternatives: return the matter for a new trial or make the order which it thinks the trial judge should have made. The Court of Appeal chose the latter, and I think they were right in so doing. In this case it is open to inference that the trial judge concluded that a *de facto* reapportionment of the interest in the family assets was required to do justice. It also appears that there was, on the facts and the law, a method of achieving this end. The fact that the trial judge did not expressly allude to the factors for reallocation under s. 51, which in other circumstances might be sufficient reason for ordering a new trial, must here be weighed against the fact that this litigation has already gone on far too long and cost far too much. Like the Court of Appeal, I am loath to send the matter back to the trial division for further proceedings. In these circumstances, it seems to me that the better course is to endorse the result achieved by the trial judge on the ground that the evidence is capable of supporting an order for reallocation of the parties' interest in the family assets to the extent required to give Mrs. Young the entire interest in the matrimonial home.

I come finally to the matter of the family debts. The \$80,000 owed by the corporation to Mrs. Young's mother cannot in law be characterized as a debt for which Mr. Young is personally liable, as ordered by the trial judge. The only entity liable for repayment is the corporation. There is no legal basis on which either Mr. or Mrs. Young can be said to be legally liable to repay the money borrowed by the company. The debt incurred by Mrs. Young to support herself and the children before she applied for maintenance is similarly unenforceable against Mr. Young as a debt, although it can be taken into consideration in an order for reduction of his interest in the family assets, as suggested above. I agree with Southin J.A., at p. 39, that "[t]he court cannot make a spouse jointly liable to a creditor for a debt of the other spouse, no matter for what purpose it was incurred, or, in the absence of some contractual foundation, make one spouse liable to indemnify the other, either in

whole or in part, for a liability of the latter." Accordingly, the paragraphs of the order making Mr. Young liable for one-half of these debts must be struck out.

C. Costs

1. *Costs Against the Respondent*

The trial judge ordered solicitor-client costs against the respondent. This award was made on the basis that the custody claim had "little merit", that the respondent attempted to mislead the court, that the respondent was recalcitrant on matters of custody and maintenance and, finally, on the basis that unnecessary proceedings had resulted. The trial judge also referred to the fact that someone else was promoting and paying for the legal action and that repetitive and irrelevant evidence was tendered.

The Court of Appeal, *per* Cumming J.A., upheld the imposition of solicitor-client costs for four days of the trial and for four days of the interlocutory proceedings concerned with financial issues, on the basis of the husband's non-disclosure of financial information. Otherwise, costs against the respondent were reduced to party-and-party costs.

The Court of Appeal's order was based on the following principles, with which I agree. Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties. Accordingly, the fact that an application has little merit is no basis for awarding solicitor-client costs; nor is the fact that part of the cost of the litigation may have been paid for by others. The Court of Appeal meticulously considered all the proceedings in the light of these principles to arrive at its conclusion that only partial solicitor-client costs were justified.

Finding no error in the reasoning or conclusion of the Court of Appeal on this question, I conclude that its order for costs should remain, save to the extent different conclusions on the merits in this Court require that an adjustment be made. As I have made clear, the only respect in which I

would vary the order of the Court of Appeal is that instead of ordering lump sum maintenance and a moratorium on the sale of the matrimonial home, I would restore the trial judge's order that the entire interest in the home be conferred on the wife. In my view, this difference does not warrant altering the award of costs against the respondent made below.

2. Costs Against the Respondent's Counsel

The trial judge ordered solicitor-client costs against counsel for the husband, Mr. How. For the reasons recited above in connection with costs against the respondent, she concluded that the proceedings had been unnecessarily lengthened. She also referred, at p. 216, to the fact that "[c]ounsel for the respondent had a forum and a cause to pursue. Unfortunately, what was in the best interests of the children, their welfare, was totally lost by the respondent and his counsel in these protracted proceedings. . . . The court was subjected to unwarranted abuse, criticism and insult." She made no finding, however, that Mr. How had been in contempt of court.

The Court of Appeal held that no order for costs should have been made against Mr. How. There is no need to repeat that entirely satisfactory analysis. The basic principle on which costs are awarded is as compensation for the successful party, not in order to punish a barrister. Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in bad faith in encouraging this abuse and delay. It is clear that the courts possess jurisdiction to make such an award, often under statute and, in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court. But the fault that might give rise to a costs award against Mr. How does not characterize these proceedings, despite their great length and acrimonious progress. Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.

The Court of Appeal found that the trial judge's criticism of Mr. How related to his conduct in bringing the action. Assuming that costs might, in certain circumstances, be imposed for contempt of court, none was found. Accordingly, no order for costs should have been made against Mr. How. I see no error in the conclusion of the Court of Appeal in this regard.

3. *Costs Against Burnaby Unit (Watch Tower Bible and Tract Society)*

Since the Watch Tower Bible and Tract Society (the Society) did not appear as a party, the costs awarded against it must be taken to have been premised on the fact that it supported the litigation financially. In effect, this was equivalent to an award for the tort of maintenance: see *Re Sturmer and Town of Beaverton* (1912), [1912 CanLII 588 \(ON SCDC\)](#), 25 O.L.R. 566 (Div. Ct.), at pp. 568-69. To be liable for maintenance, a person must intervene "officiously or improperly": *Goodman v. The King*, [1939 CanLII 21 \(SCC\)](#), [1939] S.C.R. 446. Provision of financial assistance to a litigant by a non-party will not always constitute maintenance. Funding by a relative or out of charity must be distinguished from cases where a person wilfully and improperly stirs up litigation and strife: *Newswander v. Giegerich* (1907), [1907 CanLII 33 \(SCC\)](#), 39 S.C.R. 354.

In this case there was no evidence that the respondent had been induced to allow the Society to use his name in order that it might avoid liability for costs while advancing its own interests, that he would not have advanced his own interests in the absence of its help, that the Society's funding was for other than charitable motives, or that it controlled or directed the proceedings. Its support was "out of charity and religious sympathy" and did not constitute maintenance. The fact that the Society had a common interest with the respondent (as followers of the same religion) did not affect this.

Cumming J.A. so found, and then qualified his position at p. 85 by stating:

I hasten to add that it does not follow that the resources of the Watch Tower Bible & Tract Society can be brought to bear in every dispute between a Jehovah's Witness parent and a non-Jehovah's Witness parent. Once an issue of constitutional law of the kind raised here is settled then, if further litigation of the point between other litigants is supported, another question might arise. It may be that the right to assist without facing an award of

costs cannot itself be used by the rich and powerful, no matter how great their interest in the issue, as an instrument of the oppression of those who must fight their battles alone.

I find again that no error has been made in the Court of Appeal's reasoning or conclusion.

The evidence established that the respondent paid for a considerable portion of the cost of the proceedings personally, that the dispute was instigated at least in part by the appellant, and that the Society could not be considered to have stirred up the litigation, much less to have done so wilfully or improperly.

One argument, however, was not touched on by the Court of Appeal. This is the argument that the Society was an unnamed party to the litigation and, as such, should properly bear its portion of the costs. I would not discount the possibility that a court might properly hold an unnamed party liable for costs. The rule is that a non-party who has put forward another person in whose name the proceedings are taken cannot escape liability for costs in putting forward another: *R. v. Sturmer and Town of Beaverton, supra*. However, it seems to me that the evidence here falls short of establishing that the society was a party in this sense. Even on the constitutional issue, it cannot be said that the Society put Mr. Young forward, in effect bringing its own action in his name. The constitutional issue was first raised by Mrs. Young's objection to Mr. Young's communicating his religious beliefs to the children and was validly pursued by Mr. Young in his own interest. The Society's interest in the constitutional issue is insufficient, as I see it, to distinguish it from interveners who appear on constitutional cases and who have never been liable for costs.

-

Disposition

I would affirm the order of the Court of Appeal, except in respect of the matrimonial home, which should be transferred to Mrs. Young. In the circumstances of this case, I would order that each party bear his or her own costs on this appeal.

I would answer the constitutional questions as follows:

1. Do ss. 16(8) and 17(5) of the *Divorce Act, 1985*, which provide that judicial decisions regarding custody and access be made "in the best interests of the child", deny the rights and

freedoms guaranteed in s. 2(a), (b), and (d) of the *Canadian Charter of Rights and Freedoms*?

No.

2.If the answer to question 1 is affirmative, are ss. 16(8) and 17(5) of the *Divorce Act, 1985*, justified as reasonable limits by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Given my answer to question 1, it is unnecessary that I answer this question.

3.Do ss. 16(8) and 17(5) of the *Divorce Act, 1985*, violate the guarantees to equality set out in s. 15 of the *Canadian Charter of Rights and Freedoms*?

No.

4.If the answer to question 3 is affirmative, are ss. 16(8) and 17(5) of the *Divorce Act, 1985*, justified as reasonable limits by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Given my answer to question 3, it is unnecessary that I answer this question.

Appeal allowed in part, L'HEUREUX-DUBÉ J. dissenting in the result. Sections 16(8) and 17(5) of the Divorce Act, 1985 did not violate ss. 2(a), (b), (d) or 15(1) of the Canadian Charter of Rights and Freedoms.

Solicitors for the appellant: MacLean, Nicol & Wong, Vancouver.

Solicitors for the respondent James K. C. Young: W. Glen How & Associates, Halton Hills (Georgetown), Ontario.

Solicitors for the respondent W. Glen How: Douglas, Symes and Brissenden, Vancouver.

Solicitors for the respondent Watch Tower Bible and Tract Society of Canada: W. Glen How & Associates, Halton Hills (Georgetown), Ontario.

Solicitor for the intervener the Attorney General of Canada: The Attorney General of Canada, Ottawa.

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

Solicitor for the intervener the Attorney General of Quebec: The Attorney General of Quebec, Ste-Foy.

Solicitor for the intervener the Attorney General of Manitoba: The Attorney General of Manitoba, Winnipeg.

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

Solicitors for the intervener the Law Society of British Columbia: Blake, Cassels & Graydon, Vancouver.

Solicitors for the intervener the Seventh-day Adventist Church in Canada: Milner, Fenerty, Edmonton.

* See Erratum [1995] 1 S.C.R. iv

Tab 83

Temoin v. Martin, 2012 BCCA 250 (CanLII)

Source: Court of Appeal for British Columbia
Date: 2012-06-11
File number: CA039611
Other citations: 350 DLR (4th) 558 — 216 ACWS (3d) 238 —
[2012] 8 WWR 413 — 32 BCLR (5th) 1 — 323 BCAC 3 —
77 ETR (3d) 155 — [2012] BCJ No 1174 (QL)
Citation: Temoin v. Martin, 2012 BCCA 250 (CanLII),
<<https://canlii.ca/t/frn9p>>, retrieved on 2026-03-23

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Temoin v. Martin*,
2012 BCCA 250

Date: 20120611
Docket: CA039611

Between:

Lynn Temoin

Appellant
(Petitioner)

And

Llewellyn John Martin aka Pat Martin

Respondent
(Respondent)

Before: The Honourable Madam Justice Neilson
The Honourable Madam Justice Garson
The Honourable Mr. Justice Hinkson

On appeal from: Supreme Court of British Columbia, December 16, 2011
(*Temoin v. Martin*, [2011 BCSC 1727](#), Vancouver Docket S116407)

Counsel for the Appellant:

F. Lamer

Counsel for the Respondent:

D. Manson

Place and Date of Hearing:

Vancouver, British Columbia
April 26, 2012

Place and Date of Judgment:

Vancouver, British Columbia
June 11, 2012

Written Reasons by:

The Honourable Madam Justice Neilson

Concurred in by:

The Honourable Madam Justice Garson

The Honourable Mr. Justice Hinkson

Reasons for Judgment of the Honourable Madam Justice Neilson:

Introduction

[1] On September 23, 2011, the appellant, Lynn Temoin, who is the daughter of the respondent, Llewellyn John Martin, brought a petition under [s. 3](#) of the *Patients Property Act*, R.S.B.C. 1996, c. 349, for a declaration that her father is incapable of managing his financial and personal affairs by reason of mental infirmity arising from disease or age. The petition also sought the appointment of Wolridge Mahon Ltd., an accounting firm, as committee of Mr. Martin's estate, and of Ms. Temoin as committee of his person. As well, Ms. Temoin sought a declaration that any will or other transaction made by her father after June 2, 2011 was void.

[2] A precondition for a hearing under s. 3 is affidavits from two medical practitioners setting out their opinions that the person who is the subject of the hearing is incapable. Ms. Temoin asked Mr. Martin to see two physicians for that purpose, and he refused. As a result, her petition also sought an interlocutory order requiring her father to attend two medical examinations by geriatric psychiatrists selected by a third party.

[3] Ms. Temoin's application for those examinations was heard in Supreme Court chambers and dismissed on December 16, 2011, on the basis the evidence was insufficient to establish Mr. Martin was *prima facie* incompetent, or in need of protection: [2011 BCSC 1727](#). Ms. Temoin now appeals that order. Both parties seek to lead new evidence on the appeal.

Background

[4] Mr. Martin is 87 years old. His first marriage ended in divorce in 1964. He had two daughters of that marriage, Ms. Temoin, and her sister, Jo-Anne Gordon, who passed away in 1990. They produced three grandchildren. Mr. Martin married his second wife, Freda Martin, in 1965. She brought four children from her first marriage into the family. Like the chambers judge, I will refer to these two family groups as the first and second families.

[5] Mr. Martin has been a successful businessman, and has amassed a substantial fortune from his business activities. He has been generous to both families over the years, giving gifts of cash and company shares of \$34,775,385 to the first family and \$29,781,572 to the second family. His remaining assets are valued in the range of \$30 million.

[6] In 1997 Mr. Martin developed an estate plan with professional assistance from his long-time lawyer, Mr. Belsher. This included an estate freeze through an entity referred to as “Freezeco” under which Mr. Martin retained 100 percent of the voting shares of his business interests, as well as preference shares valued at over \$6 million. Each of the two families received 50 percent of the non-voting participating shares. On February 12, 1997 Mr. Martin signed a will that left 51 percent of his voting shares to the first family and 49 percent to the second family. The residue of his estate was divided equally between the two families after a gift of \$2.5 million to the first family.

[7] Mrs. Martin was not involved in the estate planning process in 1997, and did not know about Mr. Martin’s 1997 will until October 2010, when they were discussing gifts for both families. She became upset and reminded Mr. Martin he had promised when they married that he would treat the children from both families equally. She understood this meant each of the six children from both families or, if deceased, their offspring, would receive an equal share in his estate.

[8] As a result, the Martins agreed to embark on a review and revision of their estate plans and wills. To assist them they retained Lisa Collins, a lawyer, and Aileen Collings, a chartered accountant, of Sustainable Family Wealth Partners Inc., a company that provides wealth planning consulting to high net worth business owners. Over the next nine months these professionals worked extensively with both Mr. Martin and Mrs. Martin. They collected the records and documents necessary to understand and value their current assets and Mr. Martin’s past gifts to both families, and prepared a detailed picture of the complex business and financial affairs of both Mr. Martin and Mrs. Martin, to provide a basis for recommendations with respect to their estate plans. In the course of these activities Ms. Collins and Ms. Collings met with the Martins seven times, sometimes for many hours, and reviewed with them in detail their progress, the results of their investigations, and their recommendations. They indicated that throughout these dealings they were alive to the advanced age of their clients and the family tensions caused by their activities, and adapted their work accordingly. Ms. Collings says at each step they ensured Mr. Martin had the “capacity, knowledge, and understanding to implement the estate and *inter vivos* estate planning”, including the transfers they intended to make through wills, life insurance beneficiaries and *inter vivos* gifts.

[9] As a result of these consultations, Mr. Martin agreed to revise his estate plan and he and Mrs. Martin agreed to execute new wills. The trial judge summarized the impact of these steps on both families as follows:

[9] ... Very generally, in this will, the residue of his estate will be distributed more equally among the children of both families and each family group will receive 50% of the

voting shares of Freezeco. Part of the estate plan also involves a gift to Mrs. Martin of \$3.3 million and the transfer of an investment account, worth approximately \$10 million, from Mr. Martin's sole name into joint names with Mrs. Martin. There is evidence that the transfer to the joint account is intended to be an interim measure to effect the \$3.3 million gift, and the balance in that account is to be divided under the will. According to the evidence, the lifetime and estate totals under the old plan gave the first family group about \$10 million more than the second family; under the new plan the first family group receives about \$6 million less than the second family. The division under the will, however, reduces the first family's portion by about \$8 million and increases the second family's portion by about \$8 million.

[10] The purpose of the \$3.3 million gift to Mrs. Martin was to provide her estate with funds to pay capital gains taxes due on her death with respect to corporate shares she has owned for many years. The executors of Mr. Martin's will were Ms. Temoin, Ms. Collins, and one of Mrs. Martin's daughters.

[11] The evidence indicated that although Mr. Martin continued to be active in his business, he had experienced diminished cognition in recent years preceding these developments. Ms. Temoin and Mr. Legge, the general manager of Mr. Martin's business, indicated he had begun to demonstrate noticeable memory loss, and his ability to understand and retain information had declined. At one point during the estate planning activities Mr. Martin contacted Mr. Belsher, his lawyer, to obtain copies of relevant documents. Mr. Belsher sent these with a covering letter that included this comment:

... I think it is important, given the recent issues you have had with your memory, that you attend at your physician and obtain his views with respect to your ability to make amendments to your Will.

[12] On April 8, 2011 Ms. Collins and Ms. Collings, with the Martins, held a family meeting at which they explained Mr. Martin's revised estate plans to Ms. Temoin and other family members. Ms. Temoin deposes it was obvious to her that her father did not understand or retain anything that was said at the meeting. As a result, she approached her father's family physician, Dr. Carswell, and asked him to refer Mr. Martin for an assessment of his testamentary capacity.

[13] On April 12, 2011 Dr. Carswell arranged an appointment with Dr. Schovanek, a geriatric psychiatrist. Nicole McAllister, a registered nurse, met with Mr. and Mrs. Martin to do an assessment in anticipation of that appointment. Her report includes these comments:

Mr. Martin describes more difficulty with his cognition in the context of his business. He reports more short term memory loss, with loss of focus and concentration. He is currently working four days per week, mainly working with his managers discussing ongoing projects. He is finding it more difficult to remember the process of tasks and keeping the thread of conversations. On assessment, client deferred many questions to his wife Freda. His thought form was slow, with poverty of content and word finding difficulties. Client is very aware of these deficits [*sic*].

...

He is aware of his deficits [*sic*], and adjusts what he says around his managers. He is very willing to have a psychiatric evaluation to determine if he is capable of signing off on projects and specifically wills and other legal documents.

[14] On June 2, 2011 Dr. Schovanek examined and tested Mr. Martin to assess his testamentary capacity. He initially met with both Mr. and Mrs. Martin, who told him they were restructuring Mr. Martin's estate because Mrs. Martin felt it did not represent what he had initially told her. She reported her concern that under the 1997 will she would be left with very little after a marriage of almost 50 years. Dr. Schovanek then interviewed Mr. Martin alone and reported:

We interviewed Pat on his own regarding his testamentary capacity: He has difficulty actually describing what a will is, other than "its something for when I die." He was not able to specifically name his executors. He did consistently repeat that his current will leaves half to his former family and half to his current family. He was able to specifically name who the people are affected. Mr. Martin was not able to explain what would happen if he died intestate. He estimated the value of his estate as between "20 and 30 million dollars." He was able to list some of the assets but, later, Freda mentioned several others that he had omitted.

When I ask what changes Mr. Martin would like to make to his will, he goes on to describe exactly the same arrangement as is in his current will, i.e. "50% for my first family and 50% for this family." When asked specifically about what shifts he wants to make, he states "not a bit." When I inquire if he is feeling any pressure to make changes, he says that both his daughter from his first marriage, Lynn, and Freda do not get along and this causes him great duress. He feels that his estate is expansive enough that "everyone will be looked after just fine."

[15] Dr. Schovanek reported Mr. Martin had variable performance on his mental status examination, doing well on some aspects and struggling with others. He concluded Mr. Martin had "cognitive and functional impairment consistent with a mild/moderate, primarily degenerative dementia". It was his opinion Mr. Martin should no longer drive. As to testamentary capacity he stated:

5. It is my opinion that Mr. Pat Martin no longer possesses testamentary capacity based on the findings above. I have communicated this to Freda, who is understandably upset. I have both of their permission to discuss this with their estate planners as the conundrum appears to be that, if Freda is to get her "fair share" of the estate that grew during their marriage, she may have no choice but to divorce Pat. Perhaps there is some other interim measure.
6. As of now, however, the will that Pat drew up when capable in the 90s, has to prevail.

[16] At the conclusion of his report, Dr. Schovanek mentioned Ms. Temoin had already attempted to contact him with respect to the results of his examination.

[17] On June 8, 2011 Dr. Schovanek sent Ms. Collins an email advising that in his opinion Mr. Martin lacked testamentary capacity. Ms. Collins forwarded this to Brenda Milbrath, an estate lawyer who had been retained to provide the legal services required in the restructuring process for both Mr. and Mrs. Martin. Because she acted for both of them, Ms. Milbrath contacted Fiona Hunter, another estate lawyer, to obtain an independent assessment of Mr. Martin's capacity to undertake estate planning.

[18] On June 30, 2011 Ms. Milbrath met with both Mr. and Mrs. Martin to confirm their instructions and review drafts of the wills she had prepared. The will had some complexity, given the extent and nature of Mr. Martin's assets. She spent about 1 1/2 hours with Mr. Martin, questioning him, reviewing his estate plan, and going through the draft will. She deposes that at the conclusion of that meeting she was satisfied that Mr. Martin:

- a) understood the nature of a will and specifically the nature and consequence of the draft will I reviewed with him;
- b) was able to identify his next of kin and those individuals to whom he owes an obligation to provide for from his estate;
- c) had a good understanding of what his assets are, including describing what assets his various companies own;
- d) had a good understanding of the extent of the assets which would be given to each of his beneficiaries under his draft will; and
- e) did not appear to be suffering from any delusions that would affect his ability to choose beneficiaries of his will.

[19] On July 13, 2011 Ms. Hunter, who was aware of Dr. Schovanek's opinion, met with Mr. Martin alone at his home for approximately 1 3/4 hours to conduct an assessment of his testamentary capacity. In her affidavit she states that at the conclusion of that meeting she was satisfied that Mr. Martin:

- a) was aware that Ms. Collins, Ms. Collings, and Ms. Milbrath were assisting him with revising his will;
- b) was aware of the nature of a will in general and in particular that his will would govern the disposition of his assets after his death;
- c) was able to identify his next of kin and those to whom he owes an obligation to provide for from his estate;
- d) had a good grasp of what his assets are overall, identifying them and offering approximate values for them; and
- e) did not appear to be suffering from any delusions which would affect his ability to choose beneficiaries to include in his will.

[20] Ms. Collins, Ms. Collings, and the Martins held another family meeting on July 21, 2011, the day before the wills were signed. Several family members, including Ms. Temoin, attended and had their lawyers present by telephone.

[21] On July 22, 2011 Mr. and Mrs. Martin met with Ms. Hunter, Ms. Milbrath, and Ms. Collins to review and sign their wills. Ms. Hunter deposes it was clear to her from Mr. Martin's statements during the meeting that he understood its purpose and understood the terms of his will would govern the disposition of his estate. He identified his next of kin, and the general nature and approximate value of his assets. He also confirmed he trusted Ms. Milbrath to carry out the instructions he had given to Ms. Collins and Ms. Collings with respect to the terms of his will. As well, he requested and made a final change to the will, requiring decisions of his executors to be unanimous rather than by majority.

[22] Ms. Temoin says that on July 28, 2011 she telephoned Mr. Martin about aspects of his estate plan and he was unable to answer her questions cogently. This affirmed her view that Mrs. Martin was taking advantage of his vulnerability to have him sign documents that he would not have agreed to when he established his 1997 estate plan. As a result, she had her lawyer raise concerns about Mr. Martin's choice of executors and whether he had been unduly influenced by Mrs. Martin.

[23] Ms. Hunter and Ms. Collings met with Mr. Martin in early August to address these issues. The meeting lasted approximately 2 hours and 40 minutes. At its conclusion Ms. Hunter was satisfied that Mr. Martin knew and approved his choice of executors, that he had not been coerced by his wife, and that the contents of the will accurately expressed his wishes. Ms. Collings provided similar evidence, and also said Mr. Martin told her he was satisfied with the wealth split between the two families and that it would end up being "close enough" to an overall 50/50 plan when prior gifts were taken into account. She also ensured that Mr. Martin had continued capacity to execute the documents necessary to implement the estate plan. She deposed:

16. During the August 4, 2011 meeting Pat demonstrated to me that he understood what he and Freda owned, what those assets were worth, who he wished to receive what assets, and that he comprehended intricacies of his business affairs and his estate plan. During the meeting Pat also demonstrated to me that he understood his July 22, 2011 will and his estate planning, which takes into account his life time giving to his "first family" line of Lynn and his deceased daughter's two children. He said that he was satisfied with the wealth split between the two family lines and that it would end up being "close enough" to the overall "50/50 plan" after the prior gifting was taken into account. I have no doubt that Pat understands his July 22, 2011 will and how the members of his extended family will benefit from his July 22, 2011 will and his over-all estate planning.

17. During the August 4, 2011 meeting Pat and I discussed the gift of \$3.3 million to Freda which is part of their current estate plan. This money will provide Freda's estate with liquidity to pay the taxes that will become payable when she dies as a result of the increase in value of corporate shares which she has owned for many years. During the meeting Pat was able to assess the capital gains tax which will become payable on those shares when Freda dies and he acknowledged that his prior estate plan had not provided for this eventuality. On this point he stated, "she's entitled to it". Pat also said there are aspects of his revised estate plan that Lynn is not going to be happy with but nevertheless he and Freda were satisfied with their revised estate plan. He thanked me effusively on departure that day for the work which Ms. Collins and I had done to help them reach agreement as to how their estates were to be distributed.

[24] Both Ms. Milbrath and Ms. Hunter stated that Mr. Martin was capable of instructing legal counsel and handling or directing his financial affairs. As well, during the hearing of this appeal, in response to a question from the bench, Mr. Martin's counsel advised us that he was receiving instructions directly from Mr. Martin, and he was satisfied Mr. Martin was capable of giving him those instructions.

[25] Ms. Collings and Ms. Collins continued to work with Mr. and Mrs. Martin to complete various aspects of their estate plans. Ms. Temoin continued to be concerned about her father's competence and testamentary capacity. On September 7, 2011 her lawyer wrote to Ms. Milbrath

suggesting this issue would continue to linger and affect the integrity of the will and other documents Mr. Martin had signed unless his capacity to effect his estate plan was properly supported by medical opinions. He proposed Mr. Martin undergo assessments by two independent geriatric psychiatrists, who would provide opinions on whether he had testamentary capacity and capacity to manage his financial affairs.

[26] When Mr. Martin rejected that proposal, Ms. Temoin commenced this petition on September 23, 2011. In support, she filed an affidavit from Dr. Schovanek that appended his earlier report on testamentary capacity and also addressed Mr. Martin's capacity to manage his affairs. This affidavit states in part:

5. It is my opinion that Mr. Martin no longer possesses testamentary capacity and is very likely to lack the capacity to manage his personal finances and affairs. However, in order to conduct a medically informed assessment of financial capacity, the following must take place:

- a. The person must be assessed on their own in a healthy state (i.e. free of acute illness) for a period of approximately 2 hours;
- b. The reviewing physician must be provided with accurate information regarding:
 - i. the patient's current financial affairs (assets, debts, monthly budget information, corporate holdings and responsibilities) and current banking records are usually helpful in such an assessment;
 - ii. current contracts, wills, powers of attorney, estate plans, trusts, representation agreements and the like.

6. The principal aspects of financial capacity that must be reviewed include the abilities to make decisions, appreciate risks and benefits and consequences of the said decisions and to consider pre-existing values and expressed wishes, all taking into consideration the complexity of the patient's financial affairs. I have not conducted the full amount of investigations that, according to recognized protocols, are required to make a fully considered assessment of his financial capacity. However, based on my observations and subject to what a full examination of financial capacity would demonstrate, it is my opinion that:

- a. Mr. Martin is, as I have concluded in accordance with recognized protocols, unable to take care of an important part of his financial affairs, namely estate planning;
- b. Mr. Martin is currently under considerable pressure on the part of his wife Freda Martin to change the estate planning arrangements he has previously made and Freda Martin has expressed to me considerable distress at my conclusion that he is unable to do so (as described in my June 2, 2011 Report).
- c. Mr. Martin no longer takes care of the day to day family finances and very likely does not properly understand his financial affairs or the administration of his estate;
- d. Mr. Martin is very likely incapable, because of his mental infirmity, of managing his affairs and requires care and supervision and control for the protection of himself and his property;
- e. Mr. Martin suffers from significant cognitive impairment, memory impairment and has a diminished ability to learn new information;
- f. Mr. Martin has evidenced progressive cognitive deterioration since 2000 and, in particular, he has dropped 5 points on the Folstein examination within the year preceding my examination, which is the expected rate of decline;

- g. Mr. Martin is extremely unlikely to demonstrate improved cognitive function in the future.

The Legislative Framework Governing the Petition

[27] The applicable legislation reflects the tension between the right to personal autonomy and the protection of vulnerable individuals that lies at the root of this litigation.

[28] [Section 3\(1\)](#) of the *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, enacts a presumption of capability:

- 3(1) Until the contrary is demonstrated, every adult is presumed to be capable of making decisions about the adult's personal care, health care and financial affairs.

[29] [Sections 3](#) and [5](#) of the *Patients Property Act* set out the procedure to obtain a declaration of incapability. The relevant parts of these provisions state:

3 (1) If, on

(a) hearing an application, and

(b) reading the affidavits of 2 medical practitioners setting out their opinion that the person who is the subject of the application is, because of

(i) mental infirmity arising from disease, age or otherwise, ...

incapable of managing his or her affairs or incapable of managing himself or herself, or incapable of managing himself or herself or his or her affairs,

the court is satisfied that the person is, because of

(c) mental infirmity arising from disease, age or otherwise, ...

incapable of managing his or her affairs or incapable of managing himself or herself, or incapable of managing himself or herself or his or her affairs, it must, by order, declare the person

(e) incapable of managing his or her affairs, ...

5 (1) If

(a) an application is made or an issue is tried under section 3, [or]

(b) an appeal is taken from an order under section 3, ...

the court hearing the appeal or application or trying the issue may order the person who is the subject of the application or the patient to attend and submit at the time and place the order directs to examination.

(2) An examination under this section must be made by

(a) one or more medical practitioners other than those whose affidavits were before the court on the appeal, application or trial, or

(b) a board of 3 or more medical practitioners designated by the College of Physicians and Surgeons of British Columbia at the request of the court.

The Reasons for Judgment of the Chambers Judge

[30] The chambers judge reviewed the evidence and the relief sought by Ms. Temoin in her petition. After summarizing the requirements of ss. 3 and 5 of the *Patients Property Act* she observed, “It has been settled law for many years that the court cannot order a medical examination under the *Act* before two medical affidavits have been produced”, referring to the decision of this Court in *McNeal v. Few* (1975), 1975 CanLII 216 (BC CA), 63 B.C.L.R. 281 (C.A.). She also acknowledged that in *Re Scow* (1985), 63 B.C.L.R. 286 (S.C.), the Supreme Court found this principle was not altered by the introduction of R. 30(1) of the *Rules of Court*, which permitted the court to order an examination where the mental or physical condition of a party was in issue.

[31] The chambers judge, however, accepted Ms. Temoin’s argument that neither of these decisions had considered whether the court’s inherent or *parens patriae* jurisdiction might permit an order for the medical examinations she sought. The judge therefore accepted it was open to her to do so, and addressed the characteristics of these concepts. She described the principles governing the court’s *parens patriae* jurisdiction in these terms:

[45] In a case such as this, I consider the Court’s *parens patriae* jurisdiction to be more appropriate to the issues raised by the Petitioner. Its origins, while unclear, stem from the need to protect those who are unable to make decisions or to care for themselves. In *Re Eve*, 1986 CanLII 36 (SCC), [1986] 2 SCR 388, LaForest J. (for the Court) noted that the jurisdiction is founded in necessity and is to be exercised in the best interest of the protected person. He stated that the situations under which it can be exercised are “legion” and never closed. He described the jurisdiction as “of a very broad nature”, which can be invoked in matters such as custody, protection of property, health problems and protection against harmful associations. He went on to say (at para. 75):

What is more ... a court may act not only on the ground that injury to person or property has occurred, but also on the ground that such injury is apprehended. I might add that the jurisdiction is a carefully guarded one. The courts will not readily assume that it has been removed by legislation where a necessity arises to protect a person who cannot protect himself.
[emphasis added]

[46] Overriding all of this is the requirement of proof of incompetency: *Re Eve* at para. 36.

[47] As with the Court’s inherent jurisdiction, *parens patriae* jurisdiction can only be exercised where legislation has not “occupied the field” and where the exercise would not conflict with the governing statute. There must be is [*sic*] a gap in the legislative framework that provides for the protection of incompetent persons. Even if there is a gap, the jurisdiction must only be exercised in the best interests of the incompetent person: *Johnston v Johnston*, 2003 BCSC 110 at para. 20, citing *L.M. v D.F.* (1999) 1999 CanLII 6429 (BC SC), 68 BCLR (3d) 132 (SC).

[32] The chambers judge then considered whether the framework of the *Patients Property Act* revealed a legislative gap that would permit her to exercise her *parens patriae* jurisdiction to order the medical examinations sought by Ms. Temoin. She found no assistance in the authorities, and so viewed this as a matter of first instance. She acknowledged the presumption of capacity, and found that a person should not be forced to undergo a medical examination directed at establishing

incapacity unless there is evidence of incompetence. She accepted the *Patients Property Act* requires such evidence from two medical practitioners, at a minimum, but found it does not prohibit other evidence of incompetence, nor provide that the medical evidence will be decisive. She found this Court's decision in *Kartsonas v. Kartsonas*, 2009 BCCA 218, 93 B.C.L.R. (4th) 287, of interest because when the Court detected deficiencies in one of the two physician's affidavits submitted under s. 3 of the *Patients Property Act* it did not dismiss the application, but instead ordered an assessment under s. 5(1)(b). The chambers judge viewed this as support for the proposition that further evidence may be adduced if one or both of the required medical affidavits are deficient, and then considered the implications of this for the application before her:

[62] The application in this case takes this issue a step further. The Petitioner has filed only one medical affidavit which is deficient and no other medical evidence is available because Mr. Martin has not agreed to submit to any further assessments. She has also produced lay evidence attesting to Mr. Martin's memory and cognitive problems. The *Patients Property Act* does not specifically address this kind of situation. I view this as a legislative gap. Provided there is evidence of incompetence, and evidence that the person who is the subject of the application needs protection, there must be some way for the Court to ensure that adequate medical evidence is brought before it to determine the issue of capacity. As LaForest J. said in *Re Eve*, the courts will not readily assume that *parens patriae* jurisdiction has been removed by legislation where a necessity arises to protect a person who cannot protect himself.

[63] There is no question that compelling a person to submit to a medical examination is intrusive to personal autonomy and any order doing so would have to respect the values of the *Canadian Charter of Rights and Freedoms*. It is an order that should be made in rare circumstances, where there is "proof of incompetence" and where there is a compelling need for protection. The need for protection may be based on evidence that the person is personally or financially vulnerable due to things such as dangerous or erratic behaviour or abuse by others. The exercise of *parens patriae* jurisdiction requires that any order made is in the best interests of the person requiring protection.

[33] The chambers judge next considered whether it would be appropriate to exercise her *parens patriae* jurisdiction to order medical examinations of Mr. Martin. She considered the evidentiary requirements, and found they were not met in this case:

[64] *Re Eve* is not instructive about what "proof of incompetence" means. In my view, there must be evidence which establishes that the person who is the subject of the application is *prima facie* incompetent. For the purpose of ordering a medical examination, this will be something less than the court being satisfied that the person is incapable of managing himself or his affairs. There must be some medical evidence. There may also be evidence from family, caregivers and close friends, which may provide important insight into the condition of the individual and any need for protection. I agree with the comments of Vickers J. in *Batiuk #1* (at para. 35) that "proper assessments are multi-disciplinary in nature and they will include the observations of persons close to the individual concerned." This is consistent with the commentary in G. B. Robertson, *Mental Disability and the Law in Canada*, 2nd. Ed. at 27.

[65] In this case, I am not satisfied that the evidence is sufficient to establish that Mr. Martin is *prima facie* incompetent or that he is in need of protection. There is evidence that Mr. Martin has memory problems and some cognitive deficits. However, there is little evidence that he is incapable of managing his affairs, and there is conflicting evidence on his ability to make financial decisions. There is no evidence that Mrs. Martin has taken advantage of her husband in any way that requires this Court's protection.

[34] The judge was of the view Ms. Temoin's focus on Mr. Martin's testamentary capacity, rather than his capacity to manage his financial affairs, had complicated the case. It was her opinion these were not the same, and so the evidence about Mr. Martin's testamentary capacity was of little assistance. She described the tests for each as follows:

[68] In my opinion, these tests are not the same. Testamentary capacity is assessed according to a legal test tailored to the issues pertinent to making a will. The test was established long ago in *Banks v Goodfellow* (1870), LR 5 QB 549 (Eng QB) at 565:

It is essential to the exercise of such power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

[69] There is a line of authority which establishes that the capacity to manage financial affairs is not the same as testamentary capacity. It is possible, depending on the circumstances, that an individual may be incapable of managing his affairs yet still be capable of making a will: see, for example, *Canada Permanent Toronto General Trust Co. v Whitton* (1965), [1965 CanLII 791 \(BC SC\)](#), 51 WWR 484 (BCSC); *Royal Trust Co. v Rampone*, [1974 CanLII 1771 \(BC SC\)](#), [1974] 4 WWR 735 (BCSC). Declarations of incapacity are generally questions of fact based on an individual's circumstances and medical opinions. It may be that the more complicated or complex the financial situation, the higher the level of cognition will be required to have the necessary capacity.

[35] The chambers judge then reviewed the evidence relevant to Mr. Martin's capacity to manage his financial affairs. She observed Dr. Schovanek had not conducted a full investigation of Mr. Martin's financial capacity. She found his opinion that Mr. Martin was "very likely" incapable of managing his affairs conditional and incomplete, since his focus had been testamentary capacity. She concluded the information in his report fell short of supporting his opinion that Mr. Martin required care and supervision for the protection of himself and his property.

[36] As to Ms. Temoin's evidence, the chambers judge accepted she sincerely believed Mrs. Martin was taking advantage of her father in securing changes to the disposition of his estate that were inconsistent with his earlier wishes. The judge observed, however, that this was not a case of a stranger preying on a person in need of protection.

[37] The judge gave considerable weight to the evidence of Ms. Collings and Ms. Collins that Mr. Martin had been able to engage in detailed discussions with respect to his estate plans. She observed they had spent considerable time with him and Mrs. Martin over several months, conducting a detailed review of his assets and engaging in extensive dealings about his assets and estate.

[38] She gave little weight to the evidence of the two lawyers, Ms. Milbrath and Ms. Hunter, since their testimony was directed solely to testamentary capacity, a matter she found irrelevant to a determination of capacity to manage financial affairs. She concluded:

[82] ... The most that I can take from their evidence is that it may be inconsistent with the notion that Mr. Martin is unable to make financial decisions and manage his financial affairs. The same applies to Dr. Schovanek's opinion that Mr. Martin lacks testamentary capacity. This evidence may or may not be consistent with the notion that Mr. Martin is incapable of managing his financial affairs. I do not consider it appropriate in the context of this application to assess any of these opinions regarding Mr. Martin's testamentary capacity.

[83] It is apparent to me that the basis for this application was ill conceived. In addition to the declarations that Mr. Martin is incapable of managing himself and his affairs, the Petition seeks a declaration that "any will, gift, grant, alienation, conveyance or transfer of property or other transaction" made by Mr. Martin after June 2, 2011 (the date of Dr. Schovanek's consultation report) is void as against the committee. Although Ms. Temoin is concerned about her father's current financial decisions, her primary focus has been on his new will and whether he had testamentary capacity to make it. To make an order requiring Mr. Martin to submit to a medical examination in these circumstances would serve an attempt to elicit evidence to bolster Ms. Temoin's view that her father lacks testamentary capacity. This is clearly not the purpose of any order that this Court could make under *parens patriae* jurisdiction in the context of an application under s. 3 of the *Patients Property Act*.

[84] Moreover, this is not a case of adult abuse. It is really an internal dispute within a family. It may be that Mrs. Martin has put pressure on her husband to make changes to his estate plan and to his will, but as I stated before, he has not made any decisions that could be considered improvident, nor has he dealt with his assets without professional advice or without considering both of his families.

[39] The chambers judge dismissed Ms. Temoin's application on the basis the evidence was insufficient to establish the *prima facie* incompetence required for her to exercise her *parens patriae* jurisdiction, and insufficient to establish Mr. Martin was in need of protection.

Issues on Appeal

[40] I would frame the issues raised on this appeal as follows:

- 1) Did the chambers judge err in finding there was a gap in the legislative scheme that entitled her to exercise her *parens patriae* jurisdiction?
- 2) Did the chambers judge err in finding there must be evidence of *prima facie* incompetence before she was entitled to exercise her *parens patriae* jurisdiction?
- 3) Did the chambers judge err in her assessment of the evidence, in particular in finding the evidence was insufficient to establish *prima facie* incompetence or that Mr. Martin was in need of protection?

The Parties' Motions to Introduce New Evidence on the Appeal

[41] Ms. Temoin filed an application to introduce new evidence in the form of surreptitious recordings of telephone calls she and her nephew placed to Mr. Martin about estate matters in January 2012. She says these clearly demonstrate he is confused and does not understand the

changes that have been made to the disposition of his assets. Mr. Martin, who did not file an affidavit for the hearing before the chambers judge, has responded with an affidavit that provides his account of these conversations, but also addresses other matters known to him at the time of the hearing below.

[42] The tests for the admission of new evidence, which did not exist when the case was heard in the Supreme Court, and fresh evidence, which did exist at that time, are explained in *Jens v. Jens*, 2008 BCCA 392, 300 D.L.R. (4th) 136. Ms. Temoin’s affidavit is new evidence. Such testimony is admitted only rarely, where events subsequent to the initial hearing and prior to the appeal demonstrate assumptions made by the judge were incorrect. I am not persuaded the calls recorded subsequent to the decision below demonstrate the judge’s conclusions were erroneous. The material before her included evidence of similar calls, the new evidence does not add anything of significance to these, and I would not admit it.

[43] Mr. Martin’s affidavit contains both new and fresh evidence. He says it is submitted solely to rebut Ms. Temoin’s affidavit. Since that evidence is not admissible it is unnecessary to address Mr. Martin’s application.

Analysis

1. *Did the chambers judge err in finding there was a gap in the legislative scheme that entitled her to exercise her parens patriae jurisdiction?*

[44] This argument is raised by Mr. Martin. It is common ground that a superior court may only exercise its inherent jurisdiction or *parens patriae* jurisdiction if it can do so without contravening a statutory provision. In other words, there must be a legislative gap to attract this jurisdiction: *W.A.M. and P.L.M. v. British Columbia (Superintendent of Family and Child Service)* (1985), 1985 CanLII 560 (BC CA), 65 B.C.L.R. 229 at 232, 47 R.F.L. (2d) 173 (C.A.); *R. v. Caron*, 2011 SCC 5 at para. 32, [2011] 1 S.C.R. 78. The question is whether the chambers judge erred in finding a legislative gap in the *Patients Property Act* because it does not offer protection for a recalcitrant adult who appears to be incompetent but refuses to undergo the medical assessments required by the *Act*.

[45] Mr. Martin argues the laws of British Columbia clearly recognize the importance of personal autonomy through the presumption of capability, and provide a comprehensive legislative scheme that exhaustively sets out the circumstances in which that presumption may be displaced. He maintains that if competence to manage one’s affairs is questioned, the *Patients Property Act* has “occupied the field”, and mandates the procedure and evidence required to rebut the presumption. The manifest legislative intent is that nothing short of two affidavits from medical practitioners will suffice. In support, he relies on *McNeal* and *Re Scow*.

[46] Ms. McNeal was an heiress who decided to give a substantial part of her inheritance to a 17-year-old boy who styled himself as a “guru” and reportedly used 60 percent of donations to his

Divine Light Mission to maintain himself “in a grand style”: (1975), 1975 CanLII 1034 (BC SC), 57 D.L.R. (3d) 724 (B.C.S.C.). Her sister sought to intervene by bringing proceedings to have Ms. McNeal declared incapable under provisions of the *Patients’ Estates Act*, S.B.C. 1962, c. 44, which mirror ss. 3 and 5 of the *Patients Property Act*. Ms. McNeal would not consent to the required medical examinations, and the sister succeeded in obtaining an order for her examination by a board of qualified medical practitioners, pursuant to the equivalent of s. 5(2)(b) of the *Patients Property Act*. On appeal, this Court set aside that order. It rejected the contention that the legislation provided for a “first step or preliminary application” if the petitioner did not have two affidavits from medical practitioners. As well, the Court affirmed at 284 that no declaration of incapacity could be made in the absence of such affidavits:

I think that basically there must be a very sound reason for the legislature having enacted the legislation in this way, and [it] supports an interpretation which I think ought to be given if the words are reasonably capable of it, namely, that to ask a court to make an order that a person may not handle his own affairs and have a committee appointed is a very serious matter indeed, and it seems to me altogether proper that as a condition of such an order being made the evidence of at least two duly qualified medical practitioners should be required as a preliminary necessity.

[47] In *Re Scow*, Murphy L.J.S.C. affirmed that view and found the introduction of R. 30(1), which permits the court to direct medical examinations where the physical or mental condition of a person is in issue in a proceeding, did not alter the requirement of two preliminary medical affidavits under the *Patients Property Act*. He viewed the legislation as “a code in itself”, and said if the legislature believed it necessary to provide for medical opinions where a subject of such proceedings was unwilling, it would have enacted such provisions.

[48] Taken together, *McNeal* and *Re Scow* establish that there is no statutory authority to order medical examinations. They do not address the related question at issue in this appeal: whether that absence of statutory authority results in a legislative gap that might be filled by the court’s inherent or *parens patriae* jurisdiction. As a result, the chambers judge properly described this as a matter of first instance, and proceeded to consider whether the *Patients Property Act* revealed a legislative gap that permitted examination of this issue.

[49] For the following reasons, I am satisfied the chambers judge did not err in identifying such a gap with respect to individuals who are in need of the protection of the *Act*, but will not cooperate in obtaining the required medical opinions. Nor did she err in finding her *parens patriae* powers permitted her to consider whether to order medical examinations of Mr. Martin.

[50] Whether a legislative gap exists is a question of legislative intent. The *Patients Property Act* reveals two objectives, both of which serve the goal of free choice. First, it guards the autonomy of capable individuals by requiring a minimum of two medical affidavits to rebut the presumption of capability. Second, it protects the interests of vulnerable adults whose capacity has been compromised by mental infirmity, and who are therefore incapable of making autonomous choices.

[51] The legislative framework of the *Act*, however, presupposes a willing participant in two medical assessments, as well as ready access to two properly qualified physicians. It provides no protection for individuals who appear to be incapable but have no access to physicians, or who refuse to be medically examined. This gap is particularly acute if the refusal to undergo examinations flows from the apparent incapability. In these cases, the requirement of two medical opinions, designed to protect individual autonomy, become an impediment that places individuals who are incapable of making free choices beyond assistance. The inability to order medical examinations to provide an evidentiary foundation for a hearing under s. 3 of the *Patients Property Act* leaves these individuals without autonomy or protection, and creates a gap that is incompatible with its legislative objectives.

[52] As the chambers judge observed, there is some support for this conclusion in the decision of this Court in *Kartsonas*. Two children obtained a declaration under s. 3 of the *Patients Property Act* that their father was incapable of managing his financial affairs. On appeal, this Court found one of the physician's affidavits deficient. While the Court affirmed the serious nature of a committee order and the requirement for clear and unambiguous medical opinions, it directed a further assessment under s. 5(1)(b) of the *Act* instead of dismissing the application due to the absence of a required affidavit.

[53] I also find support for this conclusion in the fact that other provinces have filled this gap by enacting legislation that permits an application for professional assessments related to determination of capacity: *Adult Guardianship and Trusteeship Act*, S.A. 2008, c. A-4.2, ss. 104-105; *Infirm Persons Act*, R.S.N.B. 1973, c. I-8, ss. 5 and 8; *Substitute Decisions Act*, S.O. 1992, c. 30, s. 79; *The Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3, ss. 30 and 38. As the chambers judge noted, s. 4 of Bill 29, *Adult Guardianship and Planning Statutes Amendment Act*, 3rd Sess, 38th Parl, British Columbia, 2007, addresses the same issue in this province, but it has never been proclaimed and so has no status in this debate.

[54] The chambers judge considered whether the court's inherent jurisdiction or its *parens patriae* jurisdiction provided the better means of addressing the gap she discovered in the *Patients Property Act*, and found the latter more conducive to the intervention sought by Ms. Temoin. I see no basis for interfering with that decision.

[55] In *E. (Mrs.) v. Eve*, 1986 CanLII 36 (SCC), [1986] 2 S.C.R. 388 ("*Re Eve*") the Supreme Court conducted an extensive analysis of the history and characteristics of the *parens patriae* jurisdiction. Justice La Forest, writing for the Court, summarized these as follows:

The *parens patriae* jurisdiction is, as I have said, founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the "best interest" of the protected person, or again, for his or her "benefit" or "welfare".

The situations under which it can be exercised are legion; the jurisdiction cannot be defined in that sense. As Lord MacDermott put it in *J. v. C.*, [1970] A.C. 668, at p. 703, the authorities are not consistent and there are many twists and turns, but they have inexorably

“moved towards a broader discretion, under the impact of changing social conditions and the weight of opinion ...” In other words, the categories under which the jurisdiction can be exercised are never closed. Thus I agree with Latey J. in *Re X*, *supra*, at p. 699, that the jurisdiction is of a very broad nature, and that it can be invoked in such matters as custody, protection of property, health problems, religious upbringing and protection against harmful associations. This list, as he notes, is not exhaustive.

What is more, as the passage from *Chambers* cited by Latey J. underlines, a court may act not only on the ground that injury to person or property has occurred, but also on the ground that such injury is apprehended. I might add that the jurisdiction is a carefully guarded one. The courts will not readily assume that it has been removed by legislation where a necessity arises to protect a person who cannot protect himself.

...

Though the scope or sphere of operation of the *parens patriae* jurisdiction may be unlimited, it by no means follows that the discretion to exercise it is unlimited. It must be exercised in accordance with its underlying principle. Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised; see the passages from the reasons of Sir John Pennycuik in *Re X*, at pp. 706-07, and Heilbron J. in *Re D*, at p. 332, cited earlier. The discretion is to be exercised for the benefit of that person, not for that of others. It is a discretion, too, that must at all times be exercised with great caution, a caution that must be redoubled as the seriousness of the matter increases. This is particularly so in cases where a court might be tempted to act because failure to do so would risk imposing an obviously heavy burden on some other individual.

[56] These considerations clearly have direct relevance to the legislative objectives of the *Patients Property Act*, and the gap found by the chambers judge. The exercise of *parens patriae* powers, however, is traditionally confined to the protection of children or adults who have been proven incompetent: *Re Eve* at 426. Thus, the question arises as to whether employing it to obtain medical assessments of an adult not yet judged incompetent, for the purpose of establishing an evidentiary basis for a hearing under s. 3 of the *Act*, represents an unwarranted extension of the jurisdiction. In my view it does not. The court’s powers under *parens patriae* are broad and should be available in these circumstances to permit what is effectively a provisional finding of incapacity for the limited purpose of bringing the individual within the purview of the *Act* and its procedural safeguards. It is essential, however, that this power be exercised cautiously, and only on a proper evidentiary basis.

2. *Did the chambers judge err in finding there must be evidence of prima facie incompetence before she was entitled to exercise her parens patriae jurisdiction?*

[57] The chambers judge addressed the evidentiary requirements, and found an order compelling medical examinations of Mr. Martin for the purpose of s. 3 of the *Patients Property Act* could only be made if there was *prima facie* proof of incompetence and a compelling need for protection.

[58] Ms. Temoin argues this set the threshold too high. She points out the *Patients Property Act* is directed to the protection of vulnerable individuals and stipulates medical evidence is essential in accomplishing that aim. She maintains the evidentiary test should reflect the importance of these objectives by adopting a lower threshold that errs in favour of obtaining the required medical

evidence. Ms. Temoin submits that once a person's capacity is properly raised in a proceeding, an order for a medical examination is justified if the evidence supports a reasonable apprehension that the person lacks capacity. She also complains the threshold set by the chambers judge is impractical as it is circular. It requires the applicant to establish incompetence before an order for medical proof of that incompetence can be made.

[59] I do not find these arguments persuasive as they fail to recognize the significance of personal autonomy and the serious consequences of an order for committeehip or the intrusive nature of compelling an individual to undergo medical examination against his or her will. As well, a less onerous test has the potential to invite unwarranted harassment and abuse by individuals who bring proceedings under the *Patients Property Act* for self-serving motives.

[60] There is considerable support for a high evidentiary threshold in these circumstances. The analysis must begin with the premise that Mr. Martin enjoys the benefit of the presumption of capability. The decisions of this Court in *McNeal* and *Kartsonas* affirm the significance of losing personal autonomy to a committee. The Supreme Court in *Re Eve* advocated a cautionary approach to exercising *parens patriae* jurisdiction, and emphasized it must be used for the benefit of the person in need of protection, and not to benefit others. That Court has also repeatedly affirmed that the common law should be informed and guided by the values set out in the *Canadian Charter of Rights and Freedoms*: *R.W.D.S.U. v. Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573 at 603, 33 D.L.R. (4th) 174; *Hill v. Church of Scientology of Toronto* (1995), 1995 CanLII 59 (SCC), 126 D.L.R. (4th) 129 at 155 (S.C.C.); *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 at paras. 18 and 21, [2002] 1 S.C.R. 156. Ms. Temoin's application unquestionably implicates principles of liberty, autonomy and equality, and *Charter* values are thus inescapably engaged. Those values are given meaning by requiring a level of proof that is commensurate with both the importance of the individual interests and the seriousness of the intervention at stake.

[61] Ultimately, the exercise of the *parens patriae* power is discretionary, and will be governed by the facts of the individual case. Thus, flexibility is required and I decline to endorse one evidentiary standard for all cases of this nature. It is, however, beyond dispute that the applicant must present evidence establishing a serious question to be tried, both with respect to the individual's capacity and his or her need for protection. In this case, I am satisfied the chambers judge made no error in requiring *prima facie* evidence of incompetence and a compelling need for protection before she would exercise her *parens patriae* jurisdiction to make the order sought by Ms. Temoin.

[62] Ms. Temoin also argued the court's general inherent jurisdiction would permit the order she sought and would require a less stringent evidentiary test, since this jurisdiction is a "residual source of powers the court may draw upon as necessary whenever it is just or equitable to do so": *Caron* at para. 24. She pointed to several cases in which she maintained the courts have exercised inherent jurisdiction to order litigants to undergo medical examinations: *Kujawa v. Kujawa* (1990),

1990 CanLII 7591 (SK QB), 87 Sask. R. 101, 28 R.F.L. (3d) 386 (Q.B.); *Hayman v. Criddle*, 2010 SKQB 94, 352 Sask. R. 251; *Barnes (Litigation Guardian of) v. London (City) Board of Education* (1994), 34 C.P.C. (3d) 51 (Ont. Div. Ct.).

[63] I am not persuaded that reliance on the court's inherent jurisdiction would produce any lower evidentiary threshold for an order that Mr. Martin undergo medical examinations. It is perhaps arguable that it has a broader base than *parens patriae* jurisdiction, but it is difficult to conceive of how this might provide a rationale for a lower evidentiary threshold in these circumstances, given the presumption of capability, the legislative objectives of the *Patients Property Act*, and the policy considerations at play. The authorities cited by Ms. Temoin on this point are not helpful as they involve orders for medical examinations in circumstances where litigants themselves placed their physical or mental conditions in issue, and the opposing parties were entitled to the examinations in the course of reply.

[64] I would not accede to this ground of appeal.

3. *Did the chambers judge err in her assessment of the evidence, in particular in finding it was insufficient to establish prima facie incompetence or that Mr. Martin was in need of protection?*

[65] In addressing this question it is important to remember that the issue before the chambers judge was not whether Mr. Martin was incapable of managing his affairs, but simply whether the evidence was sufficient to justify an investigation into that question by ordering an independent medical examination. This required an evidentiary assessment stopping short of factual findings that might intrude on a later hearing into his capability under s. 3 of the *Patients Property Act*. Such an assessment is a discretionary process, and this Court will afford deference to the chambers judge's conclusions unless she erred in principle, failed to give sufficient weight to relevant evidence, or her decision led to an injustice.

[66] Ms. Temoin raises four complaints about the chambers judge's treatment of the evidence. First, she says the chambers judge failed to consider the complexity of Mr. Martin's estate and business interests in assessing his mental capacity. I am unable to agree. The judge described the estate planning process and the evidence of the consultants in some detail, which included complicated charts of Mr. Martin's earlier dispositions and his present assets. At para. 69 of her reasons she accepted that a higher level of cognition may be required for a more complicated or complex financial situation. In my view, no more was needed in this provisional assessment of capacity.

[67] Ms. Temoin next argues the chambers judge erred in failing to give sufficient weight to the evidence of Mr. Martin's testamentary capacity, in particular Dr. Schovanek's opinion that Mr. Martin no longer possesses the capacity to make a new will. This complaint necessarily applies to the evidence of Ms. Milbrath and Ms. Hunter as well.

[68] The chambers judge viewed the tests for testamentary capacity and capacity to manage one's affairs as distinct for the reasons I have set out at paragraph 34 of this decision. She summarized her views of the evidence on testamentary capacity at para. 82 of her reasons:

The evidence of the two lawyers regarding Mr. Martin's testamentary capacity is of very limited assistance. They simply attest to facts relevant to the legal test for testamentary capacity that support their opinions that Mr. Martin had such capacity. This is not relevant to a determination about capacity to manage financial affairs. Their opinions that Mr. Martin is capable of "handling" or "directing" his financial affairs is also of limited assistance given their focus on testamentary capacity. The most that I can take from their evidence is that it may be inconsistent with the notion that Mr. Martin is unable to make financial decisions and manage his financial affairs. The same applies to Dr. Schovanek's opinion that Mr. Martin lacks testamentary capacity. This evidence may or may not be consistent with the notion that Mr. Martin is incapable of managing his financial affairs. I do not consider it appropriate in the context of this application to assess any of these opinions regarding Mr. Martin's testamentary capacity.

[69] The chambers judge correctly described the test governing each of these concepts. I do agree with Ms. Temoin, however, that it was not appropriate to ignore the evidence of testamentary capacity. I infer the judge's rejection of that evidence may have been rooted in part in her reluctance to prejudge the question of the validity of Mr. Martin's July 22, 2011 will, given the likelihood of future proceedings on that issue. Nevertheless, as set out above her task was to merely assess the sufficiency of the evidence. It did not necessitate definitive findings of fact. In these circumstances, I do not accept the judge's view that Mr. Martin's ability to understand the scope and disposition of his assets did not have some relevance to that assessment.

[70] Having said that, I am not persuaded consideration of that evidence would lead to a different result. There was a significant conflict between the evidence of Dr. Schovanek, who found Mr. Martin lacked testamentary capacity, and that of the lawyers, who believed he was capable of executing his will. That issue of credibility cannot be resolved on a hearing of this nature so, although relevant, the evidence of testamentary capacity could not be definitive on the issue before the chambers judge.

[71] Ms. Temoin also argues the chambers judge erred in failing to give decisive weight to the evidence of Dr. Schovanek and Mr. Legge about Mr. Martin's capability, based on their objectivity, Mr. Legge's long and close business relationship with Mr. Martin, and Dr. Schovanek's medical expertise.

[72] The chambers judge clearly considered the evidence from these sources, and accepted Mr. Martin displayed diminished cognition. As to Dr. Schovanek's view of financial capability, while the *Patients Property Act* mandates medical evidence, and his was the only physician's opinion on that issue, I do not agree the judge was required to give it a decisive role in her assessment. She was entitled to observe that Dr. Schovanek's opinion on this point was added after the fact and, on his own admission, was not the product of a full and proper assessment in accordance with recognized protocols. Moreover, the estate consultants provided evidence to the contrary. In my

view, the chambers judge conducted a reasonable assessment of the totality of the evidence as to Mr. Martin's financial competence, and cannot be criticized for failing to definitively address issues of conflicting facts and credibility at this interlocutory stage. I would not interfere with her conclusion that his evidence was insufficient to establish *prima facie* incompetence.

[73] Finally, Ms. Temoin maintains the chambers judge erred in considering her motives for bringing the proceeding. She says suspicion as to her self-interest should not stand in the way of an order that will provide her father with the protection he needs.

[74] I agree the family dynamics are not directly relevant to Mr. Martin's competence, and motivation should not stand in the way of a hearing into his financial competence if he is in need of protection. I am satisfied, however, that the chambers judge was entitled to consider motivation relevant in several respects.

[75] First, Ms. Temoin's motives had a bearing on the assessment of her evidence as to her father's competence. While she maintained she had been concerned about his declining cognition for several years, she did nothing about this until the spectre of changes to his will arose. She then instigated inquiries into his testamentary capacity with some alacrity. Her concern about his financial competence only arose later. While her petition seeks a declaration of financial incapacity and appointment of a committee, the ultimate relief she seeks is a declaration that Mr. Martin's new will is void, a questionable remedy to pursue while he is still alive. The chambers judge was entitled to conclude Ms. Temoin's primary focus was her father's testamentary capacity and his new will, and to assess her evidence in that light.

[76] These circumstances required the judge to consider whether the exercise of her *parens patriae* powers to order medical examinations would serve Mr. Martin's interests or those of others. In my view, she properly concluded the evidence was insufficient to establish a compelling need to protect Mr. Martin that justified her intervention. There was nothing to suggest he was personally at risk, or subject to abuse or neglect. The evidence indicated he is financially comfortable, lives with family and caregivers in his own home, and has retained appropriate consultants to assist in managing his business and financial interests. Although the family dispute underlying this proceeding causes him distress, he has apparently remained on good terms and in contact with members of both his first and second families.

[77] The chambers judge properly found this was not a case of abuse, but a family dispute. It was open to her to conclude that although Mrs. Martin may have pressured her husband to effect the changes to his estate, his decisions were not improvident. The changes did not involve foolish gifts to strangers, but were made with professional advice to equalize gifts to the children of both families. While they shifted the disposition of his assets in favour of the second family, no family members were excluded and all still receive a substantial bequest. The gift of \$3.3 million to Mrs. Martin has a rational basis in capital gains tax, arising from shares accumulated during a 47-year marriage. I emphasize that these observations, and the chambers judge's assessment of the

evidence, are directed only to the sufficiency of the evidence on this interlocutory application, and should not be taken to have any bearing on future proceedings that may arise as to the validity of Mr. Martin's will.

[78] In short, I discern no merit in Ms. Temoin's criticisms of the chambers judge's evidentiary assessment. While she erred in rejecting the evidence of testamentary capacity, it made no difference to the outcome. Based on the objectives of the *parens patriae* jurisdiction articulated in *Re Eve*, particularly the cautionary nature of the power, the chambers judge properly concluded the evidence of incapacity and need for protection was insufficient to justify the exercise of that power to order medical examinations of Mr. Martin.

[79] I would dismiss the appeal.

"The Honourable Madam Justice Neilson"

I AGREE:

"The Honourable Madam Justice Garson"

I AGREE:

"The Honourable Mr. Justice Hinkson"

Slaight Communications Inc. v. Davidson, 1989 CanLII 92 (SCC), [1989] 1 SCR 1038

Source:	Supreme Court of Canada
Date:	1989-05-04
File number:	19412
Other citations:	59 DLR (4th) 416 — 93 NR 183 — 15 ACWS (3d) 132 — 26 CCEL 85 — 40 CRR 100 — EYB 1989-67228 — JE 89-775 — [1989] SCJ No 45 (QL) — [1989] ACS no 45
Citation:	Slaight Communications Inc. v. Davidson, 1989 CanLII 92 (SCC), [1989] 1 SCR 1038, < https://canlii.ca/t/1ft6r >, retrieved on 2026-03-23
Most recent unfavourable mention	Certain employees of Brandt Tractor Ltd v International Union of Operating Engineers, Local No 115 , 2012 CanLII 53287 (BC LRB) [...] It submits that Slaight Communications is distinguishable from this case. [...]

Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038

Slaight Communications Incorporated
(operating as Q107 FM Radio) *Appellant*

v.

Ron Davidson *Respondent*

indexed as: slaight communications inc. v. davidson

File No.: 19412.

1987: October 8; 1989: May 4.

Present: Dickson C.J. and Beetz, Lamer, Wilson, Le Dain^{*}, La Forest and L'Heureux-Dubé JJ.

on appeal from the federal court of appeal

Constitutional law -- Charter of Rights -- Freedom of expression -- Adjudicator ordering employer to give unjustly dismissed employee letter of recommendation with specified content -- Adjudicator also ordering employer to answer request for information about employee only by sending letter -- Whether orders infringe employer's freedom of expression guaranteed by s. 2(b) of Canadian Charter of Rights and Freedoms -- If so, whether limitation on freedom of expression justifiable under s. 1 of Charter -- Canada Labour Code, R.S.C. 1970, c. L-1, s. 61.5(9)(c).

Labour relations -- Unjust dismissal -- Jurisdiction of adjudicator -- Adjudicator ordering employer to give unjustly dismissed employee letter of recommendation with specified content -- Adjudicator also ordering employer to answer request for information about employee only by sending letter -- Whether s. 61.5(9)(c) of Canada Labour Code authorizes adjudicator to make such orders -- Whether orders infringe employer's freedom of expression guaranteed by s. 2(b) of Canadian Charter of Rights and Freedoms -- If so, whether limitation on freedom of expression justifiable under s. 1 of Charter -- Whether orders unreasonable in administrative law sense.

Respondent had been employed by appellant as a "radio time salesman" for three and a half years when he was dismissed on the ground that his performance was inadequate. Respondent filed a complaint and an adjudicator appointed by the Minister of Labour under s. 61.5(6) of the *Canada Labour Code* held that respondent had been unjustly dismissed. Based on s. 61.5(9)(c) of the Code, the adjudicator made an initial order imposing on appellant an obligation to give respondent a letter of recommendation certifying (1) that he had been employed by the radio station from June 1980 to January 20, 1984; (2) the sales quotas he had been set and the amount of sales he actually made

during this period; and (3) that an adjudicator had held that he was unjustly dismissed. The order specifically indicated the amounts to be shown as sales quotas and as sales actually made. A second order prohibited appellant from answering a request for information about respondent except by sending the letter of recommendation. The Federal Court of Appeal dismissed an application by appellant to review and set aside the adjudicator's decision. The purpose of the appeal at bar is to determine whether s. 61.5(9)(c) of the Code authorizes an adjudicator to make such orders; and in particular, whether the orders infringed appellant's freedom of expression guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*.

Held (Beetz J. dissenting and Lamer J. dissenting in part): The appeal should be dismissed. The orders infringe s. 2(b) of the *Charter* but are justifiable under s. 1.

The *Charter* applies to orders made by the adjudicator. The adjudicator is a creature of statute. He is appointed pursuant to a legislative provision and derives all his powers from statute. The Constitution is the supreme law of Canada, and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect. It is thus impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require this Court to declare the legislation to be of no force or effect, unless it could be justified under s. 1 of the *Charter*. It follows that an adjudicator, who exercises delegated powers, does not have the power to make an order that would result in an infringement of the *Charter*.

The word "like" in the English version of s. 61.5(9)(c) of the *Canada Labour Code* does not have the effect of limiting the powers conferred on the adjudicator by allowing him to make only orders similar to the orders expressly mentioned in paras. (a) and (b) of that subsection. Interpreting this provision in this way would mean applying the *ejusdem generis* rule. It is impossible to apply this rule in the case at bar since one of the conditions essential for its application -- the presence of a common characteristic or common genus -- has not been met. The interpretation according to which the word "like" in the English version of para. (c) does not have the effect of limiting the general power conferred on the adjudicator is also more consistent with the general scheme of the Code, and in

particular with the purpose of Division V.7, which is to give non-unionized employees a means of challenging a dismissal they feel to be unjust and at the same time to equip the adjudicator with the powers necessary to remedy the consequences of such a dismissal.

Per Dickson C.J. and Wilson, La Forest and L'Heureux-Dubé JJ.: The adjudicator's orders were reasonable in the administrative law sense. Administrative law unreasonableness, as a preliminary standard of review, should not impose a more onerous standard upon government than would *Charter* review. While patent unreasonableness is important to maintain for questions untouched by the *Charter*, such as review of determinations of fact, in the realm of value inquiry the courts should have recourse to this standard only in the clearest of cases in which a decision could not be justified under s. 1 of the *Charter*.

The adjudicator's first order infringed s. 2(b) of the *Charter* but is saved under s. 1.

The adjudicator's second order also infringed s. 2(b) of the *Charter*. It was an attempt to prevent the appellant from expressing its opinion as to the respondent's qualifications beyond the facts set out in the letter. But this order, too, was justifiable under s. 1. First, the objective was of sufficient importance to warrant overriding appellant's freedom of expression. Like the first order, the objective of the second order was to counteract the effects of the unjust dismissal by enhancing the ability of the employee to seek new employment without being lied about by the previous employer. The adjudicator's remedy was a legislatively-sanctioned attempt to remedy the unequal balance of power that normally exists between an employer and employee. The governmental objective, in a general sense, was that of protection of a particularly vulnerable group, or members thereof. To constitutionally protect freedom of expression in this case would be tantamount to condoning the continuation of an abuse of an already unequal relationship. Second, the means chosen were reasonable. Like the first order, the second order was rationally linked to the objective. With the proven history of promoting a fabricated version of the quality of respondent's service and the concern that the employer would continue to treat him unfairly if he went back to work for the employer, it was rational for the adjudicator to attach a rider to the order for a reference letter so as to ensure that the employer's representatives did not subvert the effect of the letter by unjustifiably maligning its

previous employee in the guise of giving a reference. Further, no less intrusive measure could have been taken and still achieved the objective with any likelihood. Monetary compensation would not have been an acceptable substitute because it would only have been compensation for the economic, not the personal, effects of unemployment. Labour should not be treated as a commodity and every day without work as exhaustively reducible to some pecuniary value. The letter was tightly and carefully designed to reflect only a very narrow range of facts which were not really contested. The appellant was not forced to state opinions which were not its own. The prohibition was also very circumscribed. It was triggered only in cases when the appellant was contacted for a reference and there was no requirement to send the letter to anyone other than prospective employers. In short, the adjudicator went no further than was necessary to achieve the objective. Finally, the effects of the measures were not so deleterious as to outweigh the objective of the measures. The objective in this case was a very important one, especially in light of Canada's international treaty commitment to protect the right to work in its various dimensions. For purposes of this final stage of the proportionality inquiry, the fact that a value has the status of an international human right, either in customary international law under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective.

Per Lamer J. (dissenting in part): The adjudicator did not exceed his jurisdiction by ordering appellant to give respondent a letter of recommendation with a specified content. Apart from the [Charter](#), the only limitation imposed by s. 61.5(9)(c) is that the order must be designed to "remedy or counteract any consequence of the dismissal". That is the case here. The order prevents appellant's decision to dismiss respondent from having negative consequences for the latter's chances of finding new employment. Ordering an employer to give a former employee a letter of recommendation containing only objective facts that are not in dispute is not as such unreasonable and there is nothing to indicate that the adjudicator was pursuing an improper objective or acting in bad faith or in a discriminatory manner.

However, the adjudicator exceeded his jurisdiction by prohibiting appellant from answering a request for information about respondent other than by sending the letter of recommendation. Though the order is also meant to remedy or counteract the consequences of the dismissal, its effect, by

prohibiting appellant from adding any comments whatever, is to create circumstances in which the letter could be seen as the expression of appellant's opinions. This type of penalty is totalitarian and as such alien to the tradition of free nations like Canada. Parliament therefore cannot have intended to authorize such an unreasonable use of the discretion conferred by it. The adjudicator lost this jurisdiction when he made a patently unreasonable order.

The first order limits appellant's freedom of expression but this limitation, which is prescribed by law -- the order made by the adjudicator is only an exercise of the discretion conferred on him by statute -- can be justified under s. 1 of the *Charter*. The purpose of the order is clearly, as required by the Code, to counteract the consequences of the unjust dismissal. Such an objective is sufficiently important to warrant a limitation on freedom of expression. It is essential for the legislator to provide mechanisms to restore equilibrium in employer/employee relations so the employee will not be subject to arbitrary action by the employer. Additionally, the means chosen to attain the objective are reasonable in the circumstances. The order is fair and was carefully designed. The purpose of the letter of recommendation is to correct the false impression given by the fact of the dismissal and it contains only facts that are not in dispute. It is rationally connected to the dismissal since in certain cases it is the only way of effectively remedying the consequences of the dismissal. Finally, the consequences of the order are proportional to the objective sought. The latter is important in our society. The limitation on freedom of expression is not what could be described as very serious. It does not abolish that freedom, but simply limits its exercise by requiring the employer to write something determined in advance.

Per Beetz J. (dissenting): Except for the attestation relating to the unjust dismissal, the first order violated the appellant's freedoms of opinion and of expression and could not be justified under s. 1 of the *Charter*. This order forced the employer to write, as if they were his own, statements of facts in which, rightly or wrongly, he may not believe, or which he may ultimately find or think to be inaccurate, misleading or false. In short, the order may force the appellant to lie. To order the affirmation of facts, apart from belief in their veracity by the person who is ordered to affirm them constitutes a *prima facie* violation of the freedoms of opinion and expression. Such a violation was totalitarian in nature and could never be justified under s. 1 of the *Charter*.

The second order, coupled with the first, also violated the former employer's freedoms of opinion and of expression in a manner which was not justified under [s. 1](#) of the [Charter](#). The sending of the letter as drafted by the adjudicator, coupled with the prohibition to say or write anything else could lead to the implication that the former employer had no further comment to make upon the performance of the respondent and that, accordingly, the letter reflected the opinion of the former employer. In any event, the second order was disproportionate and unreasonable. One should view with extreme suspicion an administrative order or even a judicial order which has the effect of preventing the litigants from commenting upon and even criticizing the rulings of the deciding board or court.

Further, in cases of unjust dismissal, the issuance by an adjudicator of a blanket and perpetual prohibition against a former employer to write or say anything to a prospective employer but what the adjudicator has dictated in the letter of recommendation can lead to absurd and even counter-productive results. The adjudicator cannot foresee all the possible types of exchanges which are susceptible to occur between former and prospective employers. The absurdity which results from the adjudicator's second order is sufficient to warrant its reversal. If it is disproportionate and unreasonable from a practical point of view, then it has to be unreasonable from an administrative law point of view and it is difficult to conceive how it could be reasonable within the meaning of [s. 1](#) of the [Charter](#).

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By Dickson C.J.

Distinguished: *National Bank of Canada v. Retail Clerks' International Union*, [1984 CanLII 2 \(SCC\)](#), [1984] 1 S.C.R. 269; **referred to:** *Blanchard v. Control Data Canada Ltd.*, [1984 CanLII 27 \(SCC\)](#), [1984] 2 S.C.R. 476; *R. v. Oakes*, [1986 CanLII 46 \(SCC\)](#), [1986] 1 S.C.R. 103; *R. v. Edwards Books and Art Ltd.*, [1986 CanLII 12 \(SCC\)](#), [1986] 2 S.C.R. 713; *Reference Re Public Service Employee Relations Act (Alta.)*, [1987 CanLII 88 \(SCC\)](#), [1987] 1 S.C.R. 313.

By Lamer J. (dissenting in part)

National Bank of Canada v. Retail Clerks' International Union, 1984 CanLII 2 (SCC), [1984] 1 S.C.R. 269; *Blanchard v. Control Data Canada Ltd.*, 1984 CanLII 27 (SCC), [1984] 2 S.C.R. 476; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227; *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103.

By Beetz J. (dissenting)

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APPEAL from a judgment of the Federal Court of Appeal, [1985 CanLII 5561 \(FCA\)](#), [1985] 1 F.C. 253, 58 N.R. 150, 85 C.L.L.C. {PP} 14,053, dismissing appellant's application pursuant to s. 28 of the *Federal Court Act* to set aside an order made by an adjudicator under s. 61.5(9)(c) of the *Canada Labour Code*. Appeal dismissed, Beetz J. dissenting and Lamer J. dissenting in part.

Brian A. Grosman, Q.C., and John Martin, for the appellant.

Morris Cooper and Fern Weinper, for the respondent.

//The Chief Justice//

The judgment of Dickson C.J. and Wilson, La Forest and L'Heureux-Dubé JJ. was delivered by

THE CHIEF JUSTICE --

I

The respondent, Mr. Ron Davidson, a radio time salesman, was dismissed by his employer, the appellant, Slight Communications Incorporated, operating as Q107 FM Radio. A complaint was filed by Mr. Davidson under the *Canada Labour Code*, R.S.C. 1970, c. L-1, as amended by S.C. 1977-78, c. 27, s. 21, and an inquiry undertaken. As the matter could not be resolved or settled, Mr. Edward B. Joliffe, Q.C., was appointed by the Minister of Labour to act as adjudicator and to render a decision in accordance with the provisions of subss. (6) to (9) of s. 61.5, Division V.7, Part III of the *Canada Labour Code*. Two days of hearings were held in Toronto. Twelve days later, Mr. Joliffe received a letter, written on behalf of the employer, requesting Mr. Joliffe to consider reopening the

adjudication because, the letter read in part, ". . . our client has advised us that it is in possession of certain material which may indicate that Mr. Davidson perjured his testimony before you in one or more respects." Mr. Joliffe demanded particulars of this very serious allegation. The company's counsel failed to comply. The application for another hearing was dismissed.

Adjudicator Joliffe reviewed at length the evidence of Ms. Stitt. Ms. Stitt was the sole witness on behalf of the employer and at the relevant time she was general sales manager of the company, though later dismissed. The adjudicator noted:

In Ms. Stitt's letter to Labour Canada of February 27, 1984 . . . she specified that the "major complaint" was Mr. Davidson's failure to achieve "monthly sales budgets since October of 1983." To select four months (or less) from a total of 43 months of service as evidence of unsatisfactory service is obviously specious.

Later in his ruling the adjudicator stated:

From first to last Ms. Stitt's attitude faithfully reflected the advice she attributes to Mr. Gary Slaight: "If he failed to make budget, I'd hear about it. If he made it, the complaint would be that he could do more." By this perverse logic it appears that the more Mr. Davidson sold, the more unacceptable his performance. Such absurd statements led this adjudicator to suggest disclosure of "the real reason for dismissal," but there was no response.

He concluded:

An attempt has been made in this case to prove unsatisfactory performance as just cause for dismissal. The attempt has failed. I find that Mr. Davidson was dismissed without just cause.

Mr. Joliffe then turned his attention to the question of an appropriate remedy, quoting subs. (9) of s. 61.5 as follows:

61.5. . . .

- (9) Where an adjudicator decides pursuant to subsection (8) that a person has been unjustly dismissed, he may, by order, require the employer who dismissed him to
- (a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;

- (b) reinstate the person in his employ; and
- (c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

He ordered payment of \$46,628.96 plus interest and legal costs of \$2,500. He made a further order, which is central to this appeal, reading:

Under the power given me by paragraph (c) in subsection (9) of Section 61.5, I further order:

That the employer give the complainant a letter of recommendation, with a copy to this adjudicator, certifying that:

- (1) Mr. Ron Davidson was employed by Station Q107 from June, 1980, to January 20, 1984, as a radio time salesman;
- (2) That his sales "budget" or quota for 1981 was \$248,000 of which he achieved 97.3 per cent;
- (3) That his sales "budget" or quota for 1982 was \$343,500 of which he achieved 100.3 per cent;
- (4) That his sales "budget" or quota for 1983 was \$402,200 of which he achieved 114.2 per cent;
- (5) That following termination in January, 1984, an adjudicator (appointed by the Minister of Labour) after hearing the evidence and representations of both parties, held that the termination had been an unjust dismissal.

I further order that any communication to Q107, its management or staff, whether received by letter, telephone or otherwise, from any person or company inquiring about Mr. Ron Davidson's employment at Q107, shall be answered exclusively by sending or delivering a copy of the said letter of recommendation.

An appeal by the employer to the Federal Court of Appeal was dismissed (Urie and Mahoney JJ., Marceau J. dissenting): [1985 CanLII 5561 \(FCA\)](#), [1985] 1 F.C. 253.

The question to be decided by this Court is whether para. (c) of s. 61.5(9) of the *Canada Labour Code* authorizes the adjudicator to order the employer to give the employee a letter of reference of specified content and to order the employer to say nothing further about the employee. Paragraph (c), it will be recalled, reads:

(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

(c) de faire toute autre chose qu'il juge é quitable d'ordonner afin de contrebalancer les effets du congédiement ou d'y remédier.

Resolution of the problem involves (1) the construction and the true meaning and effect of para. (c), (2) whether the adjudicator's order in this case infringed freedom of expression under s. 2(b) of the *Canadian Charter of Rights and Freedoms*, and (3) if so, whether the infringement is justified under s. 1 of the *Charter*.

Two constitutional questions were stated in this appeal as follows:

1. Do the provisions of the adjudicator's order, pursuant to s. 61.5(9) of the *Canada Labour Code*, R.S.C. 1970, c. L-1, as amended, whereby the appellant was ordered to provide the respondent with a letter of recommendation of specified content combined with the further stipulation that any communication to the appellant relating to the respondent's employment with the appellant be answered exclusively by sending or delivering a copy of the letter of recommendation, infringe or deny the rights and freedoms guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*?
2. If the provisions of the adjudicator's order infringe or deny the rights and freedoms guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*, are they justified by s. 1 of the *Charter* and therefore not inconsistent with the *Constitution Act, 1982*?

II

The Relationship Between Administrative Law Review and Review Under the *Charter*

I have had the benefit of reading the opinion of Justice Lamer and I am in complete agreement with his discussion of the applicability of the *Charter* to administrative decision-making. I also agree with his conclusion that the positive order made by adjudicator Joliffe (to draw up and to give the respondent a specified letter of reference) infringes s. 2(b) of the *Charter* but is saved by s. 1. However, with regard to the negative order (that any inquiry about the respondent's employment at Q107 be answered exclusively by the letter of reference which is the subject of the positive order), I must respectfully disagree with the conclusion of Lamer J. that it is patently unreasonable, thereby obviating the need to consider the *Charter*. Furthermore, not only am I of the view that the negative

order is reasonable in the administrative law sense but I also believe that it is reasonable and demonstrably justified in the sense of [s. 1](#) of the *Charter*.

I agree with Mahoney J. of the Federal Court of Appeal, at pp. 260-61, that:

The ordering of provision of a totally factual letter of recommendation and foreclosing the undermining of its effect which, in the circumstances disclosed by the evidence, was patently foreseeable, seems to me to be an equitable remedial requirement. It is not punitive. It is appropriate redress to the wronged employee without, in any way, injuring the employer. In my view, the order was authorized by paragraph 61.5(9)(c).

The precise relationship between the traditional standard of administrative law review of patent unreasonableness and the new constitutional standard of review will be worked out in future cases. A few comments nonetheless may be in order. A minimal proposition would seem to be that administrative law unreasonableness, as a preliminary standard of review, should not impose a more onerous standard upon government than would *Charter* review. While patent unreasonableness is important to maintain for questions untouched by the *Charter*, such as review of determinations of fact (see *Blanchard v. Control Data Canada Ltd.*, [1984 CanLII 27 \(SCC\)](#), [1984] 2 S.C.R. 476, at pp. 494-95), in the realm of value inquiry the courts should have recourse to this standard only in the clearest of cases in which a decision could not be justified under [s. 1](#) of the *Charter*. In contrast to [s. 1](#), patent unreasonableness rests to a large extent on unarticulated and undeveloped values and lacks the same degree of structure and sophistication of analysis. It seems to me that had Lamer J. gone on to conduct a [s. 1](#) inquiry, his excellent analysis of the contending values in the context of the positive order would have been equally applicable to the negative order which he has instead found to be patently unreasonable.

I agree with Lamer J. that the order in this case is considerably different from that at issue in *National Bank of Canada v. Retail Clerks' International Union*, [1984 CanLII 2 \(SCC\)](#), [1984] 1 S.C.R. 269, and, therefore, the determination by Beetz J. that the letter in question in *National Bank* was patently unreasonable is not applicable to the facts of this case. The focus of condemnation in *National Bank* was on the "compelling [of] anyone to utter opinions that [were] not his own" (*per* Beetz J., at p. 296) which was exacerbated by the wide publication of the letter -- to all employees and

management staff of the bank. That is not this case. As the adjudicator noted here, there was no real conflict of evidence about the accounts and reports.

III

The Negative Order and Section 2(b) of the [Charter](#)

Adjudicator Joliffe's order that Slight Communications Inc. answer any reference inquiry exclusively by sending the specified letter is an infringement of s. 2(b) freedom of expression. The government is attempting to prevent Q107 from expressing its opinion as to the qualifications of Mr. Davidson beyond the facts set out in the letter. The harm that it was aiming to prevent, decreased job prospects for Mr. Davidson, is only relevant to s. 1 analysis and not to s. 2(b) analysis.

IV

Section 1 of the [Charter](#)

The basic test for s. 1 analysis formulated in *R. v. Oakes*, [1986 CanLII 46 \(SCC\)](#), [1986] 1 S.C.R. 103, at pp. 138-39, has been reviewed in the reasons of Lamer J. and need not be reproduced here.

1. *Importance of the Objective*

I am in firm agreement with the conclusions of Lamer J. about the importance of the objective sought to be achieved by the positive order, namely, counteracting the effects of the unjust dismissal by enhancing the ability of the employee to seek new employment without being lied about by the previous employer. This is also the objective of the negative order which, in the words of Mahoney J. in the Federal Court of Appeal, at p. 260, was designed to "forclos[e] the undermining of [the] effect" of the positive order. Both orders seek to achieve the same goal, the negative order complementing and reinforcing the positive order.

It cannot be overemphasized that the adjudicator's remedy in this case was a legislatively-sanctioned attempt to remedy the unequal balance of power that normally exists between an employer and employee. Thus, in a general sense, this case falls within a class of cases in which the governmental objective is that of protection of a particularly vulnerable group, or members thereof. In *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713, I stated for the majority at p. 779:

In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons. When the interests of more than seven vulnerable employees in securing a Sunday holiday are weighed against the interests of their employer in transacting business on a Sunday, I cannot fault the Legislature for determining that the protection of the employees ought to prevail.

Consistent with the above view of the place of the *Charter*, I can think of no better way to describe the employment relationship than as expressed in Davies and Freedland, *Kahn-Freund's Labour and the Law* (3rd ed. 1983), at p. 18:

[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination . . . The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. Most of what we call protective legislation -- legislation on the employment of women, children and young persons, on safety in mines, factories, and offices, on payment of wages in cash, on guarantee payments, on race or sex discrimination, on unfair dismissal, and indeed most labour legislation altogether -- must be seen in this context. It is an attempt to infuse law into a relation of command and subordination.

The objective of both the positive and negative orders made by adjudicator Joliffe is sensitive to the reality identified by Kahn-Freund, Davies and Freedland. The courts must be just as concerned to avoid constitutionalizing inequalities of power in the workplace and between societal actors in general. It must be recalled that *Oakes, supra*, at p. 136, stated that "[t]he underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified." As long as the proportionality test is

met, it would not, on the facts of this case, be in accordance with those underlying principles and values for the *Charter* to be successfully invoked by an employer. The inequality in one employment relationship would be continued even after its termination with the result that the worker looking for a new job would be placed in an even more unequal bargaining position *vis-à-vis* prospective employers than is normally the case. On the facts of this case, constitutionally protecting freedom of expression would be tantamount to condoning the continuation of an abuse of an already unequal relationship.

2. *Proportionality*

(a) Rational Connection

The negative order is very much rationally linked to the objective, no less than the positive order. The adjudicator was plainly of the view that the respondent had been the subject of some kind of personal vendetta or "set-up", as Mahoney J. termed it, *supra*, at p. 258, which had been initiated by the employer's general manager and executed by its sales manager, the latter of whom was Mr. Davidson's immediate superior.

As I have indicated, the representative of the employer was found to have engaged in bad faith and duplicitous conduct, giving misleading evidence about the Mr. Davidson's work performance both at the time of his dismissal and during the unjust dismissal hearing. Further, in deciding that reinstatement was not a viable remedy, the adjudicator gave as his reason that "[t]here is no sign that he would receive fair treatment by an employer which has made such vigorous efforts to justify the indefensible". With this proven history of promoting a fabricated version of the quality of Mr. Davidson's service and the concern that the employer would continue to treat him unfairly if he went back to work for the employer, it was rational for the adjudicator to attach a rider to the order for a reference letter so as to ensure that representatives of the employer did not subvert the effect of the letter by unjustifiably maligning its previous employee in the guise of giving a reference.

(b) Minimal Impairment

In my view, there was no less intrusive measure that the adjudicator could have taken and still have achieved the objective with any likelihood. To the extent there was a likelihood that representatives of Q107 would not be content to pass on the letter of reference absent the kind of untrue comments that had resulted in the finding of unjust dismissal, the letter of reference would have been rendered illusory to the same degree of likelihood.

While an order of additional monetary compensation would clearly be less intrusive upon the appellant's freedom of expression, it would not be an acceptable substitute. Even if the adjudicator had ordered that the Mr. Davidson could come back once he had secured a job and be granted compensation, above and beyond unemployment insurance, for the actual period out of work, this would only be compensation for the economic effects of lack of employment not the personal effects. This is directly contrary to the objective sought to be achieved by the order, which is securing new employment in the shortest order possible; the corollary of this objective is, of course, a concern to alleviate the personal problems associated with being out of work. As Professor Beatty puts it in "Labour is not a Commodity" in Reiter and Swan, eds., *Studies in Contract Law* (1980), at pp. 323-24:

The personal meaning of work is seen to go beyond rather than to be completely dependent upon the purposes of production . . . [R]eflecting the characterization of humans as, for the most part, doers and makers, the identity aspect of employment is increasingly seen to serve deep psychological needs . . . It recognizes the importance of providing the members of society with an opportunity to realize some sense of identity and meaning, some sense of worth in the community beyond that which can be taken from the material product of the institution . . . [E]mployment is seen as providing recognition of the individual's being engaged in something worthwhile . . . [E]mployment comes to represent the means by which most members of our community can lay claim to an equal right of respect and of concern from others. It is this institution through which most of us secure much of our self-respect and self-esteem. With such an emphasis on contributing to society one avoids the demoralization that inevitably attends idleness and exile, even when it is assuaged by social assistance.

Monetary compensation can only be an alternative measure if labour is treated as a commodity and every day without work seen as being exhaustively reducible to some pecuniary value. As I had occasion to say in *Reference Re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, at p. 368, "[a] person's employment is an essential component of his or

her sense of identity, self-worth and emotional well-being." Viewing labour as a commodity is incompatible with such a perspective, which is reflected in the remedial objective chosen by the adjudicator. To posit monetary compensation as a less intrusive measure is, in effect, to challenge the legitimacy of the objective.

Consider the facts of this particular case. The letter was tightly and carefully designed to reflect only a very narrow range of facts which, we saw, were not really contested. As already discussed, unlike in *National Bank, supra*, the employer has not been forced to state opinions ("views and sentiments", *per* Beetz J., at p. 295) which are not its own. Rather, the negative order seeks to prevent the employer from passing on an opinion, such prohibition being closely tied to the history of abuse of power which had been found to exist. Furthermore, that prohibition is very circumscribed. Firstly, it is triggered only in cases when the appellant is contacted for a reference and, secondly, there is no requirement to send the letter to anyone other than prospective employers. In sum, this is a much less intrusive and carefully designed order than that in *National Bank* in which the bank was required to send to a very large audience (all the employees and management staff of the bank) what amounted to a letter of contrition which conveyed the impression that certain opinions expressed therein were those of the employer.

Finally, it cannot be ignored that a letter such as this may not have a great beneficial impact on an employee's job hunt. The letter is very neutral in tone, totally unembellished as it is by any opinion customary in letters of reference, and it refers to the fact of the finding of unjust dismissal. It seems to me that the adjudicator went no further than was necessary to achieve the objective and, even then, the measures adopted by the adjudicator cannot be said to have done more than to have enhanced, as opposed to having ensured, the chances of the respondent finding a job. The adjudicator did not in any sense pursue the objective without regard to the appellant's right to free expression.

(c) Deleterious Effects

It is clear to me that the effects of the measures are not so deleterious as to outweigh the objective of the measures. The importance of the above-discussed objective cannot be overemphasized. There

are many diverse values that deserve protection in a free and democratic society such as that of Canada, only some of which are expressly provided for in the *Charter*. The underlying values of a free and democratic society both guarantee the rights in the *Charter* and, in appropriate circumstances, justify limitations upon those rights. As was said in *Oakes, supra*, at p. 136, among the underlying values essential to our free and democratic society are "the inherent dignity of the human person" and "commitment to social justice and equality". Especially in light of Canada's ratification of the *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966), and commitment therein to protect, *inter alia*, the right to work in its various dimensions found in Article 6 of that treaty, it cannot be doubted that the objective in this case is a very important one. In *Reference Re Public Service Employee Relations Act (Alta.)*, *supra*, I had occasion to say at p. 349:

The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the "full benefit of the *Charter*'s protection". I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

Given the dual function of s. 1 identified in *Oakes*, Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights. Furthermore, for purposes of this stage of the proportionality inquiry, the fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective. This is consistent with the importance that this Court has placed on the protection of employees as a vulnerable group in society.

In normal course, the suppression of one's right to express an opinion about a subject or person will be a serious infringement of s. 2(b) and only outweighed by very important objectives. In the foregoing analysis, I have sought to show that the negative order was minimally intrusive in a relative sense and also that the careful tailoring of both parts of the order has made this a much less serious infringement of s. 2(b) than, for instance, occurred in the *National Bank* case.

Conclusion

In conclusion, I am of the opinion that both of the adjudicator's orders at issue (the positive order and the negative order) infringe s. 2(b) but are saved by s. 1. I would answer both constitutional questions in the affirmative and dismiss the appeal with costs.

The following are the reasons delivered by

//Beetz J.//

BEETZ J. (dissenting) --

I - Introduction

I have had the advantage of reading the reasons for judgment written by Justice Lamer and then the reasons for judgment written by the Chief Justice. I refer to their statements of the facts, proceedings and constitutional questions as well as to their summary of the decisions rendered by the adjudicator and the Federal Court of Appeal.

Like the Chief Justice, I am in agreement with Lamer J.'s discussion of the applicability of the *Charter* to administrative decision-making. I also agree with Lamer J.'s construction of s. 61.5(9)(c) of the *Canada Labour Code*, R.S.C. 1970, c. L-1, as amended by S.C. 1977-78, c. 27, s. 21.

However, I have the misfortune of not being able to concur with one of the two main conclusions reached by both my colleagues, and while I agree with the other main conclusion reached by Lamer J., I do so for reasons which differ in part from his own reasons.

The two impugned orders issued by the adjudicator in the case at bar read as follows:

Under the power given me by paragraph (c) in subsection (9) of Section 61.5, I further order:

That the employer give the complainant a letter of recommendation, with a copy to this adjudicator, certifying that:

- (1) Mr. Ron Davidson was employed by Station Q107 from June, 1980, to January 20, 1984, as a radio time salesman;
- (2) That his sales "budget" or quota for 1981 was \$248,000 of which he achieved 97.3 per cent;
- (3) That his sales "budget" or quota for 1982 was \$343,500 of which he achieved 100.3 per cent;
- (4) That his sales "budget" or quota for 1983 was \$402,200 of which he achieved 114.2 per cent;
- (5) That following termination in January, 1984, an adjudicator (appointed by the Minister of Labour) after hearing the evidence and representations of both parties, held that the termination had been an unjust dismissal.

I further order that any communication to Q107, its management or staff, whether received by letter, telephone or otherwise, from any person or company inquiring about Mr. Ron Davidson's employment at Q107, shall be answered exclusively by sending or delivering a copy of the said letter of recommendation.

The first order, which has been labeled the positive order, relates to a letter of recommendation comprising five attestations numbered (1) to (5).

The second order, which has been labeled the negative order, forbids the appellant to answer any inquiry about the respondent's employment at Q107 otherwise than by the letter of recommendation dictated by the adjudicator in the first order.

The main issues are whether these two orders infringe or deny the freedoms guaranteed to the appellant by s. 2(b) of the *Canadian Charter of Rights and Freedoms* and, if so, whether they are justified by s. 1 of the *Charter*.

Sections 1 and 2(b) of the *Charter* provide:

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

...

- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

I state my conclusions at the outset. In my view, the first order, that is the positive one, except attestation number (5) thereof, as well as the second order, that is the negative one in its entirety, violate the appellant's freedom of opinion and expression and cannot be justified under s. 1 of the *Charter*.

I hasten to add that the flaw which I find in the first order can easily be corrected. As for the second order, it can be replaced by another order which tends toward the same end without violating the *Charter*.

II - The First Order

The flaw which I find in the first order, with particular reference to its attestations numbered (1) to (4), is that this order forces the employer to write, as if they were his own, statements of facts in which, rightly or wrongly, he may not believe, or which he may ultimately find or think to be inaccurate, misleading or false. In other words, the first order may force the former employer to tell a lie. In this particular respect, this case cannot in my opinion be distinguished from the case of *National Bank of Canada v. Retail Clerks' International Union*, 1984 CanLII 2 (SCC), [1984] 1 S.C.R. 269, where a majority of this Court held as follows at p. 296:

Remedies Nos. 5 and 6 thus force the Bank and its president to do something, and to write a letter, which may be misleading or untrue.

This type of penalty is totalitarian and as such alien to the tradition of free nations like Canada, even for the repression of the most serious crimes. I cannot be persuaded that the Parliament of Canada intended to confer on the Canada Labour Relations Board the power to impose such extreme measures, even assuming that it could confer such a power bearing in mind the *Canadian Charter of Rights and Freedoms*, which guarantees freedom of thought, belief, opinion and expression. These freedoms guarantee to every person the right to express the opinions he may have: *a fortiori* they must prohibit compelling anyone to utter opinions that are not his own.

It was argued that the case at bar is different in that the letter of recommendation in question is totally factual and that the facts stated therein and found by the adjudicator were undisputed. In the Federal Court of Appeal, [1985 CanLII 5561 \(FCA\)](#), [1985] 1 F.C. 253, Mahoney J. accepted this argument. He wrote at p. 260:

I am, of course, aware of the decision in *National Bank of Canada v. Retail Clerks' International Union et al.*, [1984 CanLII 2 \(SCC\)](#), [1984] 1 S.C.R. 269. The letter ordered in that case required the employer to express, or at least imply, opinions which it did not necessarily hold. Here, the applicant has simply been ordered to tell the truth. The letter sets out bald facts that are neither misleading nor disputed. [Emphasis added.]

With the greatest of respect, in so accepting the argument, Mahoney J. missed the point altogether and begged the essential question: what is the truth? The facts found to be true by the adjudicator are binding for the purpose of establishing whether or not there had been an unjust dismissal. But the former employer cannot be forced to acknowledge and state them as the truth apart from his belief in their veracity. If he states these facts in the letter, as ordered, but does not believe them to be true, he does not tell the truth, he tells a lie. He may not have disputed these facts at the time of the hearing but he could change his mind later, for instance on the basis of evidence discovered after the adjudicator's decision was rendered.

There may be a distinction, somewhat difficult to apply, between being forced to express opinions or views which one does not necessarily entertain, and being compelled to state facts, the veracity of which one does not necessarily believe; but, in my opinion, both types of coercion constitute gross violations of the freedoms of opinion and expression or, at the very least, of the freedom of expression. That is why, with respect, I cannot possibly agree with the suggestion that the restriction to freedom of expression which results from the first order is not very serious or very grave. The superficial innocuousness of the first order should not blind us to the nature of this order and to the positive manner in which it violates the freedom of expression. It is one thing to prohibit the disclosure of certain facts. It is quite another to order the affirmation of facts, apart from belief in their veracity by the person who is ordered to affirm them. The prohibition constitutes a *prima facie* violation of the freedoms of opinion and expression but such a prohibition may, in some circumstances, be justified under s. 1 of the [Charter](#). On the other hand, to order the affirmation of

facts, apart from belief in their veracity by the person who is ordered to affirm them, constitutes a much more serious violation of the freedoms of opinion and expression, as was held in the case of the *National Bank of Canada, supra*. In my view, such a violation is totalitarian in nature and can never be justified under s. 1 of the *Charter*. It does not differ, essentially, from the command given to Galileo by the Inquisition to abjure the cosmology of Copernicus. As was stated in the unanimous reasons of this Court in *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, 1984 CanLII 32 (SCC), [1984] 2 S.C.R. 66, s. 1 of the *Charter* cannot be used to justify a complete negation of a constitutionally protected right or freedom, at p. 88:

The provisions of s. 73 of *Bill 101* collide directly with those of s. 23 of the *Charter*, and are not limits which can be legitimized by s. 1 of the *Charter*. Such limits cannot be exceptions to the rights and freedoms guaranteed by the *Charter* nor amount to amendments to the *Charter*. An Act of Parliament or of a legislature which, for example, purported to impose the beliefs of a State religion would be in direct conflict with s. 2(a) of the *Charter*, which guarantees freedom of conscience and religion, and would have to be ruled of no force or effect without the necessity of even considering whether such legislation could be legitimized by s. 1. [Emphasis added.]

(See also the *Reference re Alberta Statutes*, 1938 CanLII 1 (SCC), [1938] S.C.R. 100, with respect to *The Accurate News and Information Act* of Alberta.)

In spite of its gravity however, and as indicated earlier, the flaw which I find in the first order can easily be corrected. It would suffice to add to the letter a sentence or sentences indicating that the attestations numbered (1) to (4) refer to facts as found by the adjudicator.

As for attestation number (5), it does not give rise to any difficulty in my view since it refers to a matter of record.

III - The Second Order

The second order is in the form of a prohibition to answer enquiries relating to the respondent's employment at Q107 otherwise than be the letter of recommendation described in the first order.

I agree with Lamer J. that the sending of the letter as drafted by the adjudicator, coupled with the prohibition to say or write anything else could lead to the implication that the former employer has no further comment to make upon the performance of the respondent and that, accordingly, the letter reflects the opinion of the former employer. This being the case, the second order, coupled with the first, also violates the former employer's freedoms of opinion and expression in a manner which, for the reasons given above, cannot be justified under [s. 1](#) of the *Charter*.

The risks of such an implication might be reduced and perhaps eliminated should the first order be corrected as I suggested earlier. But I believe that we must decide the case on the basis of the orders as they now stand, and not as we would if they were corrected.

In any event, I find the second order disproportionate and unreasonable. I believe one should view with extreme suspicion an administrative order or even a judicial order which has the effect of preventing the litigants from commenting upon and even criticizing the rulings of the deciding board or court.

Adjudicators and boards who, in cases of unjust dismissal, order the sending of letters of recommendation by former employers face a dilemma. They cannot foresee all the possible types of exchanges which are susceptible to occur between former and prospective employers. They accordingly issue a blanket and perpetual prohibition to write or say anything but what they have dictated in the letter of recommendation. This can lead to absurd and even counter-productive results.

Thus, in the case at bar, if after having received the letter dictated by the adjudicator, a prospective employer were to address specific questions to the former employer, relating for instance to the respondent's health or drinking habits, the appellant would have to go on answering with sales statistics. This could not but compromise the respondent's chances for employment. Or if the former employer finally saw the light and, out of remorse, became inclined to write a letter considerably more complimentary and flattering than the one dictated by the adjudicator, he could not do so.

The absurdity which results from the adjudicator's second order is sufficient to warrant its reversal, in my view. It is disproportionate and unreasonable from a practical point of view. Then it has to be unreasonable from an administrative law point of view and I have difficulty in conceiving how it could be reasonable within the meaning of s. 1 of the *Charter*.

This being said, I agree that the adjudicator was legitimately concerned by the risk that the former employer undermine the effect of the letter of recommendation. While I believe that the prohibition he issued to foreclose that possibility is disproportionate and unreasonable, I think that other legitimate means might have been devised towards the same end. The adjudicator could for instance have ordered the former employer to write in the letter that he had been instructed by the adjudicator to tell prospective employers that they would be well advised to read the adjudicator's decision. I do not believe that such a neutral order would be punitive, but it might alert prospective employers to the animosity displayed by the former employer towards the respondent.

IV - Conclusions

One last point before I reach my conclusions properly so-called.

I would not like it to be thought that I condone the highly reprehensible conduct of the appellant. But under the *Charter*, freedom of opinion and freedom of expression are guaranteed to "everyone", employers and employees alike, irrespective of their labour practices and of their bargaining power.

I would allow the appeal, set aside the judgment of the Federal Court of Appeal as well as the first and second order of the adjudicator quoted in these reasons for judgment, and refer the matter back to the adjudicator so that these orders be replaced by an order or orders compatible with these reasons.

I would give an affirmative answer to the first constitutional question and a negative answer to the second constitutional question.

I would not make any order as to costs.

//Lamer J.//

English version of the reasons delivered by

LAMER J. (dissenting in part) -- An adjudicator appointed by the Minister of Labour pursuant to s. 61.5(6) of the *Canada Labour Code*, R.S.C. 1970, c. L-1, made an order in favour of an employee based on s. 61.5(9) of the Code. The employer challenged the said order but its appeal was dismissed by the Federal Court of Appeal. With leave of this Court, the employer is now appealing here from this judgment of the Federal Court of Appeal. The outcome of this appeal involves determining whether, under s. 61.5(9) of the *Canada Labour Code*, as it read at the time of his decision, the adjudicator had the power to make the order at issue.

Facts

Respondent had been employed by appellant as a "radio time salesman" for three and a half years when he was dismissed on the ground that his performance was inadequate. It is not in dispute that when he was dismissed respondent received all monies to which he was entitled under his employment contract.

However, respondent filed a complaint with an inspector alleging that he had been unjustly dismissed. As the parties were unable to settle this complaint and respondent asked that it be referred to an adjudicator, the Minister of Labour appointed an adjudicator to hear and decide the matter in accordance with the Code.

After hearing the evidence and the submissions of the parties, the adjudicator made an order directing the employer to pay respondent as compensation the sum of \$46,628.96 with interest at the rate of 12 per cent and to pay his counsel the sum of \$2,500 to reimburse him for the legal costs incurred. The said order further imposed on the employer an obligation to give respondent a letter of recommendation certifying that he had been employed by Station Q107 from June 1980 to January

20, 1984, and that an adjudicator had found he was unjustly dismissed and indicating the sales quotas he had been set and the amount of sales he actually made during this period. It should be noted that the order made specifically indicates the amounts to be shown as sales quotas and as sales actually made. Finally, the order directed appellant to answer requests for information about respondent only by sending this letter of recommendation.

This order reads as follows:

In the matter of compensation, I am satisfied that had he not been dismissed, the sales and commissions of the complainant would have at least equalled those of 1983. After taking into consideration the fact that he worked until January 20, 1984, and received certain commissions (at reduced levels) thereafter, my order is that he be paid forthwith the equivalent of 75 per cent of his 1983 earnings of \$62,171.95, being the sum of \$46,628.96.

I further order that interest be paid at the rate of 12 per cent per annum, divided by two, on the said amount from January 20 to November 20, 1984. Thereafter interest will be payable on any unpaid balance at the rate of 12 per cent per annum, which is not to be divided by two.

I say nothing of the U.I.C. payments received by the complainant, which is a matter to be resolved between the complainant and the Commission.

I further order payment of legal costs in the amount of \$2,500.00 to the complainant's solicitor and counsel, Mr. Morris Cooper.

Further orders are necessary, resembling the order made by Adjudicator Adams in the *Roberts* case, but in greater detail.

Under the power given me by paragraph (c) in subsection (9) of Section 61.5, I further order:

That the employer give the complainant a letter of recommendation, with a copy to this adjudicator, certifying that:

- (1) Mr. Ron Davidson was employed by Station Q107 from June, 1980 to January 20, 1984, as a radio time salesman;
- (2) That his sales "budget" or quota for 1981 was \$248,000 of which he achieved 97.3 per cent;
- (3) That his sales "budget" or quota for 1982 was \$343,500 of which he achieved 100.3 per cent;
- (4) That his sales "budget" or quota for 1983 was \$402,200 of which he achieved 114.2 per cent;
- (5) That following termination in January, 1984, an adjudicator (appointed by the Minister of Labour) after hearing the evidence and representations of both parties, held that the termination had been an unjust dismissal.

I further order that any communication to Q107, its management or staff, whether received by letter, telephone or otherwise, from any person or company inquiring about Mr. Ron Davidson's employment at Q107, shall be answered exclusively by sending or delivering a copy of the said letter of recommendation.

Appellant is challenging in this Court only the parts of the order relating to (1) the sending of a letter of recommendation and (2) the prohibition on answering a request for information in any other way than by sending this letter.

Judgments of Lower Courts

Appellant challenged this order by filing an application with the Federal Court of Appeal to set it aside. However, the Federal Court of Appeal, made up of Urie and Mahoney JJ. with Marceau J. dissenting, dismissed this application to set aside: [1985 CanLII 5561 \(FCA\)](#), [1985] 1 F.C. 253.

In his reasons, Mahoney J. first said that the purpose of s. 61.5(9)(c) and the fact that it would be difficult or even impossible to find remedies similar to the remedies expressly authorized in paras. (a) and (b) meant that the presence of the word "like" in the English version of s. 61.5(9)(c) was not intended to restrict the powers conferred on the adjudicator. In his opinion, this paragraph simply expressed a kind of *ejusdem generis* rule which did not have the effect of limiting the scope of the powers conferred.

Ordering the employer to give respondent a letter of recommendation was in his opinion an equitable remedy designed to remedy the consequences of the dismissal, not to punish the employer. This letter, he thought, only stated objective facts that were not in dispute and so simply required the employer to tell the truth.

However, he agreed with appellant's argument that the part of the decision ordering the employer to issue a letter of recommendation imposed limitations on its freedom of expression guaranteed by the [Canadian Charter of Rights and Freedoms](#). In his view, however, such a limitation was justified under s. 1 of that *Charter*. He stressed that the limitation on freedom of expression was prescribed by law, since it was the Act which authorized the adjudicator to make such an order.

Urie J., for his part, agreed with the reasons stated by his brother judge Mahoney. However, he indicated that he was not sure that the *ejusdem generis* rule applied in any way to the interpretation of s. 61.5(9)(c).

Finally, Marceau J. wrote his own reasons, which differ from the majority reasons in certain respects. First, he expressed agreement with Mahoney J. as to the way in which s. 61.5(9)(c) should be construed, but expressed some reservations regarding application of the *ejusdem generis* rule. He noted that the powers conferred on the adjudicator were already clearly limited by the fact that the orders he was empowered to make under para. (c) must be aimed at remedying or counteracting the consequences of the dismissal.

In his view the remedies ordered in the case at bar were of two types, positive and negative. The part of the order directing the employer to furnish respondent and any person seeking information about him with a letter of recommendation having a specified content was, in his opinion, an order that could be characterized as positive. It directed the employer to do something and sought to remedy the consequences of the dismissal found to be unjust: accordingly, it was authorized by s. 61.5(9)(c). The part of the order which also prohibited the employer from answering any request for information about respondent other than by issuing this letter might for its part be characterized as negative, since it prohibited the employer from doing something. Such an order, in his view, was not aimed at remedying the consequences of the dismissal and so was not authorized by the said paragraph.

He also considered that this part of the order infringed the freedom of thought, belief, opinion and expression guaranteed appellant by s. 2(b) of the *Canadian Charter of Rights and Freedoms*. He said he did not think it possible to say that the limitation was prescribed by law, since the extent of the limitation was not indicated by the legislation in question. He added, however, that in any case in his opinion these freedoms were not subject to reasonable limits that could be demonstrably justified in a free and democratic society. He therefore concluded that the application to set aside should be allowed and the matter referred back to the adjudicator concerned for him to determine what remedies it would be appropriate to impose in order to counteract the effects of the dismissal.

Legislation

The following legislation is relevant to this appeal:

Canada Labour Code

61.5. . . .

- (9) Where an adjudicator decides pursuant to subsection (8) that a person has been unjustly dismissed, he may, by order, require the employer who dismissed him to
- (a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
 - (b) reinstate the person in his employ; and
 - (c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
2. Everyone has the following fundamental freedoms:
 - (a) freedom of conscience and religion;
 - (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
 - (c) freedom of peaceful assembly; and
 - (d) freedom of association.

32. (1) This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Analysis

To begin with, appellant argued that the adjudicator had no power to make these parts of the order since the orders he is authorized to make under s. 61.5(9)(c) must be of the same kind as the orders expressly mentioned in s. 61.5(9)(a) and (b), in view of the word "like" that appears in the English version.

As can readily be seen, the English and French versions of s. 61.5(9)(c) are different. Section 61.5(9)(c) of the English version confers a general power on the adjudicator as follows:

61.5. . . .

- (9) Where an adjudicator decides pursuant to subsection (8) that a person has been unjustly dismissed, he may, by order, require the employer who dismissed him to

. . .

- (c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal. [Emphasis added.]

The French version, for its part, does not contain any word or expression equivalent to the word "like" used in the English version. The general power conferred on the adjudicator is conferred in the following language:

61.5. . . .

- (9) Lorsque l'arbitre décide conformément au paragraphe (8) que le congédiement d'une personne a été injuste, il peut, par ordonnance, requérir l'employeur

. . .

- c) de faire toute autre chose qu'il juge équitable d'ordonner afin de contrebalancer les effets du congédiement ou d'y remédier.

First of all, therefore, these two versions have to be reconciled if possible. To do this, an attempt must be made to get from the two versions of the provision the meaning common to them both and ascertain whether this appears to be consistent with the purpose and general scheme of the Code.

In the case at bar I consider, like the Federal Court of Appeal judges, that the presence of the word "like" in para. (c) of the English version was not intended to limit the powers conferred on the adjudicator by allowing him to make only orders similar to the orders expressly mentioned in paras. (a) and (b) of that subsection, and does not have that effect. Interpreting this provision in this way would mean applying the *ejusdem generis* rule. I think it is impossible to apply this rule in the case at bar since one of the conditions essential for its application has not been met. The specific terms (here the orders referred to in paras. (a) and (b)) which precede the general term (the power conferred on the adjudicator in para. (c) to make any order that is equitable) must have a common characteristic, a common genus. As Maxwell writes in *Maxwell on the Interpretation of Statutes* (12th ed. 1969), at p. 299:

Unless there is a genus or class or category, there is no room for any application of the *ejusdem generis* doctrine.

Professor Côté also notes this requirement when he writes in his work titled *The Interpretation of Legislation in Canada* (1984), at p. 245:

As a third condition, the specific terms must have a significant common denominator to be considered within one given category. If this is lacking, *ejusdem generis* does not apply.

In the case at bar I do not see what characteristic could be described as common to a compensation order and a reinstatement order. The only "denominator" which seems to me common to these two orders in the context of s. 61.5(9) is the fact that these orders are both intended to remedy or counteract the consequences of the dismissal found by the adjudicator to be unjust. However, para. (c) expressly provides that an order made under that paragraph must be designed to remedy or counteract any consequence of the dismissal. This "common denominator" cannot therefore assist in the application of the *ejusdem generis* rule, since the legislator has already expressly provided that the orders the adjudicator is empowered to make must have this characteristic. Even if I were to admit that the English version should prevail over the French version, which I do not admit, I would still consider that this provision is ambiguous and that the most rational way of interpreting it is to say that

the presence of the word "like" in this version does not have the effect of limiting the general power conferred on the adjudicator. This interpretation is in any case much more consistent with the general scheme of the Code, and in particular with the purpose of Division V.7, which is to give non-unionized employees a means of challenging a dismissal they feel to be unjust and at the same time to equip the adjudicator with the powers necessary to remedy the consequences of such a dismissal. Section 61.5 is clearly a remedial provision and must accordingly be given a broad interpretation. The consequence of interpreting para. (c) in the manner suggested by appellant would be to limit considerably the type of order the adjudicator could make. It would in fact be very difficult to find remedies like the remedies mentioned in paras. (a) and (b). The extent of the compensation that can be ordered has been carefully limited by the legislator and there is not really any similarity between reinstatement and any other measure. I believe that, on the contrary, by enacting s. 61.5(9) (c), the legislator intended to vest in the adjudicator powers that would be sufficiently wide and flexible for him to adequately perform the duties entrusted to him, in each of the cases that come before him. I therefore consider that the meaning to be given to both versions is what clearly appears on the face of the French version and that accordingly the type of order the adjudicator can make should not be limited to orders like those expressly authorized in paras. (a) and (b).

Appellant further argued that the adjudicator exceeded his jurisdiction since there is no connection between the order made in the case at bar, the dismissal and the consequences of that dismissal. I cannot entirely agree with him in this regard. The part of the order dealing with the sending of a letter of recommendation is, in my view, clearly meant to counteract the consequences of the dismissal found to be unjust by the adjudicator. This part of the order is designed to prevent the employer's decision to dismiss respondent from having negative consequences for the latter's chances of finding new employment. The letter of recommendation is intended to correct the impression given by the fact of the dismissal, by clearly indicating that the dismissal was found by an adjudicator to be unjust and by clearly setting out certain "objective" facts relating to respondent's performance. The situation is therefore very different from that which existed in *National Bank of Canada v. Retail Clerks' International Union*, [1984 CanLII 2 \(SCC\)](#), [1984] 1 S.C.R. 269.

In that case the Canada Labour Relations Board had found that the National Bank of Canada, which had closed a unionized branch and incorporated it in a non-unionized branch, had taken its decision for anti-union reasons and had therefore infringed s. 184(1)(a) and (3)(a) of the *Canada Labour Code*. These provisions prohibit an employer, *inter alia*, from interfering with the formation or administration of a trade union and from suspending, transferring or laying off an employee on the ground that he is a member of a trade union. The Canada Labour Relations Board had therefore ordered the Bank to do a number of things. Among these were that it create a trust fund to further the objectives of the Code among all its employees and send the employees a letter telling them this fund had been created. The order specifically indicated what the wording of this letter should be and prohibited the employer from adding or deleting anything in its wording. Chouinard J., with whose reasons the other members of this Court concurred, said that in his opinion the part of the order prescribing the creation of a trust fund should be set aside since there was no relationship between this remedy and the alleged act and its consequences. He thought that the announcement of the creation of the fund was the key feature of the letter the employer was required to send, and concluded that this part of the order should suffer the same fate as that reserved for the part of the order dealing with the creation of the fund. Beetz J., for his part, added that in his opinion both the creation of the fund and the letter were open to the interpretation that they resulted from an initiative taken by the National Bank of Canada, reflecting the views of the Bank and in particular its approval of the *Canada Labour Code* and its objectives. He stated that in his opinion this part of the order was contrary to the democratic traditions of this country and so could not have been authorized by the Parliament of Canada.

In the case at bar the letter the employer is required to give respondent is of a different nature from the letter the National Bank of Canada was required to send in that case. It expresses no opinions and simply sets out facts which, as counsel for the appellant admitted at the hearing, and it is important to note this, are not in dispute. Ordering an employer to give a former employee a letter of recommendation containing only objective facts that are not in dispute does not seem to me to be as such unreasonable. Such an order may be completely justified in certain circumstances, and in the case at bar there is nothing to indicate that the adjudicator was pursuing an improper objective or acting in bad faith or in a discriminatory manner. As this order was not unreasonable, it is not the

function of this Court to examine its appropriateness or to substitute its own opinion for that of the person making the order, unless of course the decision impinges on a right protected by the *Canadian Charter of Rights and Freedoms*.

Accordingly, I am not prepared to say at this stage that the nature of this part of the order is such that the adjudicator necessarily exceeded his jurisdiction in making it. Quite apart from the constitutional argument that this order infringes the freedom of expression guaranteed by the *Canadian Charter of Rights and Freedoms*, therefore, I consider that the adjudicator had the power to make this part of the order at issue here. The only limitation placed by s. 61.5(9) on the type of order the adjudicator can make is that any order must be designed to "remedy or counteract any consequence of the dismissal". In my view, this part of the order is clearly intended for that purpose.

However, I take a different view of the part of the order that prohibits the employer from answering a request for information about respondent other than by sending this letter of recommendation. Although this part of the order is probably meant to remedy or counteract the consequences of the dismissal, I believe that the issuing of this letter in such a context could be interpreted as meaning that appellant has no comments to make regarding the work done by respondent other than those mentioned in the letter. In such circumstances, it could thus be construed as expressing, at least by implication, appellant's opinion in this regard. Although requiring someone to write a letter is not unreasonable as such, the requirement becomes wholly unreasonable when the circumstances are such that the letter may be seen as reflecting their opinions when that is not necessarily the case. This part of the order does not prohibit the employer from stating facts found to be incorrect at the hearing, which might have been reasonable and justified: it prohibits the employer from making comments of any kind. In my view the effect of this part of the order, by thus prohibiting the employer from adding any comments whatever, is to create circumstances in which the letter of recommendation could be seen as the expression of appellant's opinions. As my brother Beetz J. so admirably phrased it in *National Bank of Canada, supra*, at p. 296:

This type of penalty is totalitarian and as such alien to the tradition of free nations like Canada, even for the repression of the most serious crimes.

Parliament cannot have intended to authorize such an unreasonable use of the discretion conferred by it. A discretion is never absolute, regardless of the terms in which it is conferred. This is a long-established principle. H. W. R. Wade, in his text titled *Administrative Law* (4th ed. 1977), says the following at pp. 336-37:

For more than three centuries it has been accepted that discretionary power conferred upon public authorities is not absolute, even within its apparent boundaries, but is subject to general legal limitations. These limitations are expressed in a variety of different ways, as by saying that discretion must be exercised reasonably and in good faith, that relevant considerations only must be taken into account, that there must be no malversation of any kind, or that the decision must not be arbitrary or capricious. [Emphasis added.]

This limitation on the exercise of administrative discretion has been clearly recognized in our law, by *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227, and *Blanchard v. Control Data Canada Ltd.*, 1984 CanLII 27 (SCC), [1984] 2 S.C.R. 476, *inter alia*. Whether it is the interpretation of legislation that is unreasonable or the order made in my view matters no more than the question of whether the error is one of law or of fact. An administrative tribunal exercising discretion can never do so unreasonably. To reiterate what I said earlier in *Blanchard, supra*, at pp. 494-95:

An administrative tribunal has the necessary jurisdiction to make a mistake, and even a serious one, but not to be unreasonable. The unreasonable finding is no less fatal to jurisdiction because the finding is one of fact rather than law. An unreasonable finding is what justifies intervention by the courts.

Not only is the distinction between error of law and of fact superfluous in light of an unreasonable finding or conclusion, but the reference to error itself is as well. Indeed, though all errors do not lead to unreasonable findings, every unreasonable finding results from an error (whether of law, fact, or a combination of the two), which is unreasonable.

In conclusion, an unreasonable finding, whatever its origin, affects the jurisdiction of the tribunal.

In the case at bar I consider that the adjudicator was not authorized by s. 61.5(9)(c) to order the employer not to answer a request for information about respondent except by sending the letter of recommendation containing the aforementioned wording, since such an order is patently unreasonable. Though the adjudicator clearly had jurisdiction to make an order he felt to be equitable and proper, he lost this jurisdiction when he made a patently unreasonable decision.

Appellant further argued that s. 61.5(9)(c) did not empower the adjudicator to make such an order, since that paragraph does not clearly state that the adjudicator can use a remedy that differs from the remedies usually available under the ordinary rules of common law in such circumstances. The principle underlying this argument is that, in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law. There is no need for me to rule on the merits of this principle, since I consider that in the case at bar, by enacting para. (c), the legislator clearly indicated his intent to confer wider powers on the adjudicator than those he usually has under the ordinary rules of common law in such circumstances.

It now remains to assess in light of the *Canadian Charter of Rights and Freedoms* the part of the order we have found to be not unreasonable in terms of the rules of administrative law. The fact that the part of the order relating to sending the letter of recommendation is not unreasonable from an administrative law standpoint does not mean that it is necessarily consistent with the *Charter*.

The fact that the *Charter* applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1. Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so. This idea was very well expressed by Professor Hogg when he wrote in his text titled *Constitutional Law of Canada* (2nd ed. 1985), at p. 671:

The reference in s. 32 to the "Parliament" and a "legislature" make clear that the [Charter](#) operates as a limitation on the powers of those legislative bodies. Any statute enacted by either Parliament or a Legislature which is inconsistent with the Charter will be outside the power of (*ultra vires*) the enacting body and will be invalid. It follows that any body exercising statutory authority, for example, the Governor in Council or Lieutenant Governor in Council, ministers, officials, municipalities, school boards, universities, administrative tribunals and police officers, is also bound by the Charter. Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.

Section 61.5(9)(c) must therefore be interpreted as conferring on the adjudicator a power to require the employer to do any other thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal, provided however that such an order, if it limits a protected right or freedom, only does so within reasonable limits that can be demonstrably justified in a free and democratic society. It is only if the limitation on a right or freedom is not kept within reasonable and justifiable limits that one can speak of an infringement of the [Charter](#). The *Charter* does not provide an absolute guarantee of the rights and freedoms mentioned in it. What it guarantees is the right to have such rights and freedoms subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. There is thus no reason not to ascribe to Parliament an intent to limit a right or freedom mentioned in the *Charter* or to allow a protected right or freedom to be limited when the language used by Parliament suggests this.

It would be useful, in my view, to describe the steps that must be taken to determine the validity of an order made by an administrative tribunal, which are as follows.

First, there are two important principles that must be borne in mind:

--an administrative tribunal may not exceed the jurisdiction it has by statute; and

--it must be presumed that legislation conferring an imprecise discretion does not confer the power to infringe the [Charter](#) unless that power is conferred expressly or by necessary

implication.

The application of these two principles to the exercise of a discretion leads to one of the following two situations:

1. The disputed order was made pursuant to legislation which confers, either expressly or by necessary implication, the power to infringe a protected right.

--It is then necessary to subject the legislation to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society.

2. The legislation pursuant to which the administrative tribunal made the disputed order confers an imprecise discretion and does not confer, either expressly or by necessary implication, the power to limit the rights guaranteed by the *Charter*.

--It is then necessary to subject the order made to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society;

--if it is not thus justified, the administrative tribunal has necessarily exceeded its jurisdiction;

--if it is thus justified, on the other hand, then the administrative tribunal has acted within its jurisdiction.

There is no doubt in the case at bar that the part of the order dealing with the issuing of a letter of recommendation places, in my opinion, a limitation on freedom of expression. There is no denying that freedom of expression necessarily entails the right to say nothing or the right not to say certain things. Silence is in itself a form of expression which in some circumstances can express something

more clearly than words could do. The order directing appellant to give respondent a letter containing certain objective facts in my opinion unquestionably limits appellant's freedom of expression.

However, this limitation is prescribed by law and can therefore be justified under s. 1. The adjudicator derives all his powers from statute and can only do what he is allowed by statute to do. It is the legislative provision conferring discretion which limits the right or freedom, since it is what authorizes the holder of such discretion to make an order the effect of which is to place limits on the rights and freedoms mentioned in the *Charter*. The order made by the adjudicator is only an exercise of the discretion conferred on him by statute.

To determine whether this limitation is reasonable and can be demonstrably justified in a free and democratic society, therefore, one must examine whether the use made of the discretion has the effect of keeping the limitation within reasonable limits that can be demonstrably justified in a free and democratic society. If the answer is yes, we must conclude that the adjudicator had the power to make such an order since he was authorized to make an order reasonably and justifiably limiting a right or freedom mentioned in the *Charter*. If on the contrary the answer is no, then one has to conclude that the adjudicator exceeded his jurisdiction since Parliament has not delegated to him a power to infringe the *Charter*. If he has exceeded his jurisdiction, his decision is of no force or effect.

The test that must be applied in such an assessment has been largely defined by my brother Dickson C.J. in *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103. According to that test, the objective to be served by the disputed measures must first be sufficiently important to warrant limiting a right or freedom protected by the *Charter*. Second, the party seeking to maintain the limitation must show that the means selected to attain this objective are reasonable and justifiable. To do this, it will be necessary to apply a form of proportionality test involving three separate components: the disputed measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. The means chosen must also be such as to impair the right or freedom as little as possible, and finally, its effects must be proportional to the objective sought.

I consider that the objective sought by the order made in the case at bar is sufficiently important to justify some limitation on freedom of expression. The purpose of the order is clearly, as required by the Code and as I indicated above, to counteract, or at least to remedy, the consequences of the dismissal found by the adjudicator to be unjust. In my opinion such an objective is sufficiently important to warrant a limitation on a right or freedom mentioned in the *Charter*. I think it is important for the legislator to provide certain mechanisms to restore equilibrium in the relations between an employer and his employee, so that the latter will not be subject to arbitrary action by the former. These observations should not be taken as meaning that in my view all employers necessarily try to abuse their position. However, it cannot be denied that some employees are in an especially vulnerable position in relation to their employers and that the forces involved are usually not equal. Accordingly, I think that mechanisms designed to remedy or counteract the consequences of an unlawful action taken by an employer are justified in such a context. It should also be noted that in these circumstances the limitation on rights or freedoms is not in fact made until after the act committed by the employer has been found by an adjudicator to be unlawful, and only in order to remedy the consequences of that act found to be unlawful.

An order directing the employer to give respondent a letter of recommendation containing objective facts also seems to me to be reasonable and justifiable in these circumstances. It has the three characteristics necessary to meet the proportionality test. As I mentioned earlier, the purpose of the letter of recommendation is to correct the impression given by the fact of the dismissal, by clearly indicating that the dismissal was found by an adjudicator to be unjust, and by clearly indicating certain "objective" facts that are not in dispute regarding the respondent's performance. A reinstatement order is not always desirable and a compensation order is not always adequate to remedy the consequences of an unjust dismissal. It is possible in some cases for a dismissal to have very negative consequences on the former employee's chances of finding new employment. It seems to me, therefore, that there will be times when such an order is the only means of attaining the objective sought, that of counteracting or remedying the consequences of the dismissal. It is certainly very rationally connected to the latter, since in certain cases it is the only way of effectively remedying the consequences of the dismissal. It is also limited to requiring that the employer state "objective" facts which, in the case at bar, are not in dispute and do not require the employer to

express any opinion, since the part of the order regarding the prohibition on answering a request for information about respondent other than by issuing this letter has been found to be unreasonable, and accordingly outside the jurisdiction conferred on the adjudicator. The employer may thus, if this part found to be unreasonable is removed, indicate for example that he was directed to write the letter and that it therefore does not necessarily contain all his views about the work done by respondent. Taking these circumstances into account, I do not see any way of attaining this objective in the case at bar without impairing the employer's freedom of expression. Finally, I consider that the consequences of the order are proportional to the objective sought. As I have already said, the latter is important in our society. The limitation on freedom of expression is not what could be described as very serious. It does not abolish that freedom, but simply limits its exercise by requiring the employer to write something determined in advance. This limitation on freedom of expression mentioned in the *Charter* is thus in my opinion kept within reasonable limits that can be demonstrably justified in a free and democratic society. In making this part of the order, therefore, the adjudicator did not infringe the *Charter* and acted within his jurisdiction.

As this appeal is covered by s. 52(d) of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, I would refer the matter back to the adjudicator in question for him to make an order consistent with this judgment.

Accordingly, I would allow the appeal at bar, reverse the judgment of the Federal Court of Appeal, invalidate the order made by the adjudicator and refer the matter back to him so he may make a new order consistent with the instant judgment; the whole with costs.

Appeal dismissed with costs, BEETZ J. dissenting and LAMER J. dissenting in part.

Solicitor for the appellant: Brian A. Grosman, Toronto.

Solicitor for the respondent: Morris Cooper, Toronto.

* Le Dain J. took no part in the judgment.

Tab 85

The Queen v. Beauregard, 1986 CanLII 24 (SCC), [1986] 2 SCR 56

Source:	Supreme Court of Canada
Date:	1986-09-16
File number:	17884
Other citations:	30 DLR (4th) 481 — 70 NR 1 — 26 CRR 59 — [1986] CarswellNat 1004 — [1986] SCJ No 50 (QL)
Citation:	The Queen v. Beauregard, 1986 CanLII 24 (SCC), [1986] 2 SCR 56, < https://canlii.ca/t/1fts8 >, retrieved on 2026-03-23

The Queen v. Beauregard, [1986] 2 S.C.R. 56

Her Majesty The Queen

Appellant

v.

Marc Beauregard *Respondent*

INDEXED AS: BEAUREGARD v. CANADA

File No.: 17884.

1985: October 4; 1986: September 16.

Present: Dickson C.J. and Beetz, Estey, McIntyre and Lamer JJ.

on appeal from the federal court of appeal

Constitutional law -- Judicial independence -- Financial security of federally appointed judges -- Pensions -- Federal legislation requiring superior court judges to contribute to pension -- Whether federal legislation plan violated s. 100 of the [Constitution Act, 1867](#) -- Judges Act, R.S.C. 1970, c. J-1 as amended, s. 29.1.

Civil rights -- Equality before the law -- Federal legislation requiring superior court judges to contribute to pension plan -- Legislative distinction on the basis of the appointment date of judges -- Higher contributions required from judges appointed after the date of first reading of the bill -- Whether federal legislation violated s. 1(b) of the Canadian Bill of Rights -- Judges Act, R.S.C. 1970, c. J-1 as amended, s. 29.1.

Respondent, a Quebec Superior Court judge appointed on July 24, 1975, challenged the constitutional validity of s. 29.1 of the *Judges Act*. This section was introduced in Parliament on February 17, 1975 and was enacted December 20, 1975. Section 29.1(1) provided that judges appointed before February 17, 1975 would contribute one and one-half per cent of their salary toward the cost of pensions, while s. 29.1(2) provided that judges appointed after February 16, 1975 would contribute six and one-half per cent prior to January 1, 1977, and seven per cent thereafter. Prior to the enactment of s. 29.1, superior court judges were not required to contribute to their pension plan. The Federal Court, at trial and on appeal, accepted respondent's allegation, but for different reasons, that s. 29.1 violated s. 100 of the [Constitution Act, 1867](#) but rejected his argument that s. 29.1 was inoperative in that it violated his right to equality before the law recognized by s. 1(b) of the *Canadian Bill of Rights*. This appeal is to determine whether s. 29.1 of the *Judges Act* infringes (1) s. 100 of the *Constitution Act, 1867* and (2) s. 1(b) of the *Canadian Bill of Rights*.

Held (Beetz and McIntyre JJ. dissenting in part): The appeal should be allowed.

(1) *Section 100 of the Constitution Act, 1867*

Per curiam: The principle of judicial independence is fundamental to our Constitution. The role of our courts as resolver of disputes, interpreter of the law and defender of the Constitution, requires that they be completely separate in authority and function from all other participants in the justice system, in particular, from the executive and the legislative branches of government. One of the essential components of the principle of judicial independence is financial security. In the present case, the scheme for contributory pensions established in s. 29.1 of the *Judges Act* does not interfere with the independence of superior court judges. All s. 29.1 does is treat judges, pursuant to the constitutional obligation imposed by s. 100 of the *Constitution Act, 1867*, in accordance with standard, widely used and generally accepted pension schemes in Canada. Canadian judges are Canadian citizens and must bear their fair share of the financial burden of administering the country. Parliament's power to fix the salaries and pensions of superior court judges, however, is not unlimited. If there were any hint that a federal law dealing with these matters was enacted for an improper or colourable purpose, or if there were discriminatory treatment of judges *vis-à-vis* other citizens, then serious issues relating to judicial independence would arise and the law might well be held to be *ultra vires* of s. 100 of the *Constitution Act, 1867*. There is no suggestion of any of these considerations in the present appeal.

There is no "federalism" limitation on Parliament's capacity to change the basis of superior court judges' pensions from non-contributory to contributory. Provincial legislatures under s. 92(14) of the *Constitution Act, 1867* have no jurisdiction with respect to these pensions. Section 100 explicitly subtracts them from provincial jurisdiction respecting the administration of justice. This section states clearly that the salaries and pensions of superior court judges shall be fixed and provided by the Parliament of Canada.

Further, Parliament's ability to implement a widely used and accepted latter-day pension model is not constrained by the words of s. 100. The word "pensions" is not limited to the type of pensions known and in existence for the judiciary in 1867 and the word "provided" does not impose on Parliament an obligation to pay the full cost of judicial pensions.

Finally, although it might well be unconstitutional in most contexts for Parliament to direct how judges are to spend their salaries, the word "pensions" in s. 100 specifically authorizes Parliament to deal with this subject matter. In exercising that jurisdiction Parliament must legislate with respect to both the quantum and the scheme of judicial pensions. The 1975 law enacting s. 29.1 of the *Judges Act* dealt with the scheme. There can be no objection here to Parliament's action since the scheme chosen was a widely used and accepted one and since it was introduced in conjunction with a substantial increase in judicial salaries and other benefits in 1975.

Cases Cited

Referred to: *Valente v. The Queen*, [1985 CanLII 25 \(SCC\)](#), [1985] 2 S.C.R. 673; *Toronto Corporation v. York Corporation*, [1938 CanLII 252 \(UK JCPC\)](#), [1938] A.C. 415; *McEvoy v. Attorney General for New Brunswick*, [1983 CanLII 149 \(SCC\)](#), [1983] 1 S.C.R. 704; *Judges v. Attorney-General of Saskatchewan*, [1937 CanLII 368 \(UK JCPC\)](#), [1937] 2 D.L.R. 209; *Evans v. Gore*, 253 U.S. 245 (1920); *O'Malley v. Woodrough*, 307 U.S. 277 (1939); *Di Iorio v. Warden of the Montreal Jail*, [1976 CanLII 1 \(SCC\)](#), [1978] 1 S.C.R. 152; *Re Residential Tenancies Act, 1979*, [1981 CanLII 24 \(SCC\)](#), [1981] 1 S.C.R. 714; *Crevier v. Attorney General of Quebec*, [1981 CanLII 30 \(SCC\)](#), [1981] 2 S.C.R. 220.

(2) Section 1(b) of the Canadian Bill of Rights

Per Dickson C.J. and Estey and Lamer JJ.: Section 29.1 of the *Judges Act* does not violate s. 1(b) of the *Canadian Bill of Rights*. Once it is accepted that the general substance of the law is

consistent with a valid federal objective--here, to provide for remuneration of s. 96 judges--and that it is not discriminatory for Parliament to draw some line between present incumbents and future appointees, the cases under the *Canadian Bill of Rights* do not permit the courts to be overly critical in reviewing the precise line drawn by Parliament. Some line is fair and is not discriminatory. Thus, while from the respondent's perspective a line drawn on the date of passage of the bill would have been preferable, it cannot be said that the choice of the date of first reading as the cut-off date was contrary to the *Canadian Bill of Rights*.

Per Beetz and McIntyre JJ. (dissenting): The forms of discrimination prohibited by s. 1(b) of the *Canadian Bill of Rights* are not limited to the specifically mentioned grounds such as race, national origin, colour, religion or sex. This Court is also not bound by the Diceyan concept of equality nor is it prevented from adopting a more egalitarian approach.

A legislation passed by Parliament does not offend against the principle of equality before the law if passed in pursuance of a valid federal objective. The question which must be resolved in each case is whether an inequality that may be created by legislation affecting a special class is arbitrary, capricious or unnecessary, or whether it is rationally based and acceptable as a necessary variation from the general principle of the universal application of law to meet special conditions and to attain a necessary and desirable social objective. Where variation from the principle of universal application of the law is justified, the principle cannot be tampered with to a degree or to an extent which goes beyond what is necessary to reach a desirable social objective. This test, including its element of proportionality, clearly extends to the manner or means chosen to achieve a valid federal objective, particularly where this manner or these means introduce the very inequality complained of. This manner or these means must then be carefully scrutinized by the courts and they must be struck down whenever they do not meet the test.

In the case at bar, s. 29.1(2) of the *Judges Act* is inconsistent with s. 1(b) of the *Canadian Bill of Rights*. The policy decision reflected in s. 29.1 of the *Judges Act* is that judges' pension plans

should be on a contributory basis in order to reduce the financial burden on future taxpayers. Parliament chose to phase in the contributory requirement, by requiring contributions at the higher rate only from newly appointed judges so that, through the attrition of senior appointees as a result of death or resignation, the whole body of the judiciary would eventually participate in the contributory scheme. However, in choosing the date of first reading of the bill as the cut-off date to implement the phasing-in feature of the federal legislation, the new measure "grandfathered" certain incumbent superior court judges, but did not "grandfather" them all. A small minority of them--those appointed after February 16, 1975 but before December 20, 1975--were not grandfathered. Applying the test to s. 29.1, it cannot be said that the distinction between incumbent judges, which resulted from the selection of the date of first reading as the cut-off point, was necessary to achieve the federal objective. No rational motives were advanced or appear to exist for the selection of that date as the cut-off point which, with its discriminatory effect, is entirely arbitrary and capricious.

Cases Cited

By the majority

Referred to: *MacKay v. The Queen*, 1980 CanLII 217 (SCC), [1980] 2 S.C.R. 370; *Curr v. The Queen*, 1972 CanLII 15 (SCC), [1972] S.C.R. 889; *R. v. Drybones*, 1969 CanLII 1 (SCC), [1970] S.C.R. 282; *Attorney General of Canada v. Lavell*, 1973 CanLII 175 (SCC), [1974] S.C.R. 1349; *Attorney General of Canada v. Canard*, 1975 CanLII 137 (SCC), [1976] 1 S.C.R. 170; *R. v. Burnshine*, 1974 CanLII 150 (SCC), [1975] 1 S.C.R. 693; *Prata v. Minister of Manpower and Immigration*, 1975 CanLII 7 (SCC), [1976] 1 S.C.R. 376; *Bliss v. Attorney General of Canada*, 1978 CanLII 25 (SCC), [1979] 1 S.C.R. 183.

By the minority

MacKay v. The Queen, 1980 CanLII 217 (SCC), [1980] 2 S.C.R. 370; *Curr v. The Queen*, 1972 CanLII 15 (SCC), [1972] S.C.R. 889; *Attorney General of Canada v. Lavell*, 1973 CanLII 175 (SCC), [1974] S.C.R. 1349; *R. v. Burnshine*, 1974 CanLII 150 (SCC), [1975] 1 S.C.R. 693; *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121; *Attorney General of Canada v. Canard*, 1975 CanLII 137 (SCC), [1976] 1 S.C.R. 170; *Prata v. Minister of Manpower and Immigration*, 1975 CanLII 7 (SCC), [1976] 1 S.C.R. 376; *Bliss v. Attorney General of Canada*, 1978 CanLII 25 (SCC), [1979] 1 S.C.R. 183.

Statutes and Regulations Cited

Act of Settlement, 1700 (Engl.), 12 & 13 Will. 3, c. 2.

Act to amend the Judges Act and certain other Acts or related purposes and in respect of the reconstitution of the Supreme Courts of Newfoundland and Prince Edward Island, S.C. 1974-75-76, c. 48.

Canadian Bill of Rights, R.S.C. 1970, App. III, s. 1(b).

Canadian Charter of Rights and Freedoms.

Constitution Act, 1867, preamble, ss. 55, 91(8), (27), 92(14), 96, 99, 100, 129.

Judges Act, R.S.C. 1970, c. J-1, s. 29.1 [en. S.C. 1974-75-76, c. 81, s. 100].

Statute Law (Superannuation) Amendment Act, 1975, S.C. 1974-75-76, c. 81, s. 100.

Supplementary Retirement Benefits Act, R.S.C. 1970 (1st Supp.), c. 43 as amended.

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APPEAL from a judgment of the Federal Court of Appeal, [1983 CanLII 4990 \(FCA\)](#), [1984] 1 F.C. 1010, 148 D.L.R. (3d) 205, 48 N.R. 252, dismissing appellant's appeal and respondent cross-appeal from a judgment of the Trial Division, [1981 CanLII 2649 \(FC\)](#), [1981] 2 F.C. 543, 130 D.L.R. (3d) 433. Appeal allowed, Beetz and McIntyre JJ. dissenting in part.

W. I. C. Binnie, Q.C., and *D. M. Low*, for the appellant.

David W. Scott, Q.C., and *Carole Brown*, for the respondent.

The judgment of Dickson C.J. and Estey and Lamer JJ. was delivered by

1. THE CHIEF JUSTICE--This appeal concerns the financial position and security of federally appointed judges. Relatively narrow amendments by Parliament to a federal law relating to pension benefits for judges, and pensions for their dependants, gave rise to the case. The legal issues which must be addressed are, however, quite broad. They involve careful consideration of at least three important relationships--the federal Parliament and the judiciary, the executive branch of the federal government and the judiciary, and the federal government and provincial governments. Moreover, it is crucial to the resolution of this appeal to develop a proper understanding and application of the fundamental constitutional principle of judicial independence.

I

Facts

2. The law attacked in this appeal, the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, came into force on December 20, 1975. But the events relevant to the appeal started a year and a day earlier, and there are other important dates in the chronology.

3. On December 19, 1974 the federal Government introduced a bill to amend the *Judges Act*, R.S.C. 1970, c. J-1. At that time the *Judges Act* provided provincial superior court judges with salaries of \$38,000, pensions* after retirement, and pensions for surviving spouses and children of deceased judges. Judges were not required to pay for, or contribute toward, the costs of these pensions. The bill introduced by the Government on December 19, 1974 dealt with only the first and third components of the regime then in existence. The bill made provision for a 39 per cent increase in the salaries of superior court judges and a 50 per cent increase in the pensions for their surviving spouses and children. But further changes were foreshadowed; on the date the bill was introduced the federal Minister of Justice wrote to all federally appointed judges, stating in part:

*In the English version of the *Judges Act*, ss. 23-29 are found under the heading «Annuities» and the benefits to judges, spouses and children provided in these sections are referred to as 'annuities'. The heading at the start of the French version of these sections is *Pensions* and the word *pension* is used throughout the sections. In this judgment I have used the word 'pension' because I think it corresponds more closely to the ordinary understanding of the benefits being considered. Furthermore, s. 100 of the *Constitution Act, 1867*, which is the pivotal constitutional provision in this appeal, uses the word 'Pensions'; in the interests of consistency and ease of understanding I will use it to describe the benefits conferred by the *Judges Act* and in issue in this appeal.

However, these improvements were achieved in the context of a comprehensive review of federal policies in relation to pensions which has just recently been concluded. As a result, it may become necessary at some future time to ask judges now in office to make a modest contribution towards the cost of the improved pensions for widows, and to ask persons who are in the future appointed to judicial office to contribute in some measure to pension benefit costs.

4. On February 17, 1975 the judicial contribution to pension costs, signalled in the Minister's letter, was initiated. On that date the *Statute Law (Superannuation) Amendment Act, 1975* was introduced. It provided that judges appointed before February 17, 1975 would contribute 1.5 per cent of salary toward the cost of pensions (this was intended to be a contribution toward

improved pensions for the spouses and children of judges), and judges appointed after that date would contribute 6 per cent of salary toward the cost of pensions plus ½ per cent, rising later to 1 per cent, toward indexing them to keep pace with inflation. The relevant portion of this amendment, which became s. 29.1 of the *Judges Act*, reads:

29.1(1) Every judge appointed before the 17th day of February, 1975 to hold office as a judge of a superior or county court shall, by reservation from his salary under this Act, contribute to the Consolidated Revenue Fund one and one-half per cent of his salary.

(2) Every judge appointed after the 16th day of February, 1975 to hold office as a judge of a superior or county court, to whom subsection (1) does not apply, shall, by reservation from his salary under this Act,

(a) contribute to the Consolidated Revenue Fund an amount equal to six per cent of his salary; and

(b) contribute to the Supplementary Retirement Benefits Account established in the accounts of Canada pursuant to the *Supplementary Retirement Benefits Act*,

(i) prior to 1977, an amount equal to one-half of one per cent of his salary, and

(ii) commencing with the month of January 1977, an amount equal to one per cent of his salary.

5. The next relevant date is July 4, 1975. On that date the bill amending the *Judges Act* to increase salaries by 39 per cent and pensions to surviving spouses and children by 50 per cent became law.

6. On July 24, 1975 the respondent, Marc Beauregard, was appointed a judge of the Superior Court of Quebec. The financial arrangements for a superior court judge in Quebec on that date were a salary of \$53,000 (an increase of 39 per cent from the salary in effect just three weeks before), entitlement to a non-contributory retirement pension and a pension, in certain circumstances, for his widow and children. When the respondent assumed his position on July 24, 1975 the *Statute Law (Superannuation) Amendment Act, 1975* had not been enacted. It was

still before Parliament and had been before Parliament since the previous February. The respondent contended, however, and the Crown conceded, that he did not know of its existence when he accepted his judicial appointment. In other words, on July 24, 1975 the 'salary and increased benefits' component of the proposed amendments to the *Judges Act* was in place but the negative aspect of the package (from the perspective of the respondent and, presumably, other superior court judges) was not.

7. The contributory requirement of the pension scheme became effective on the last relevant date in the chronology, December 20, 1975. On that date the amendments introduced on February 17, 1975 were enacted. Although the respondent's salary remained at \$53,000, as a consequence of the amendments he was required to contribute 6½ per cent of his total salary to his pension plan until 1977 and 7 per cent thereafter.

8. The respondent, as plaintiff, challenged the constitutionality of the new s. 29.1 of the *Judges Act*. His challenge was two-pronged. First, he alleged that s. 29.1 violated s. 100 of the *Constitution Act, 1867* which provides:

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

Secondly, the respondent contended that the words "before the 17th day of February, 1975" in s. 29.1(1) of the *Judges Act* and the whole of s. 29.1(2) were inoperative because they violated his right to equality before the law recognized by s. 1(b) of the *Canadian Bill of Rights* which provides:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely

...

(b) the right of the individual to equality before the law and the protection of the law;

II

Judgments

Federal Court, Trial Division

9. In his judgment, reported at [1981 CanLII 4558 \(FC\)](#), [1981] 2 F.C. 543, Addy J. held that s. 29.1(2) of the *Judges Act* was *ultra vires* in so far as it applied to the respondent. He said that the effect of this provision was to reduce the salaries of incumbent judges and that this was unconstitutional for two reasons: first, because it intruded into provincial jurisdiction under [s. 92\(14\)](#) of the *Constitution Act, 1867* with respect to the 'administration of justice' (i.e. reductions in salary for superior court judges would require a constitutional amendment in which both the federal and provincial governments would participate); and secondly, because non-reduction of the salaries of incumbent judges is a fundamental principle of constitutional law which Canada inherited from the United Kingdom.

10. Addy J. dismissed the respondent's argument based on s. 1(b) of the *Canadian Bill of Rights*. He said that that provision was not concerned with issues relating to the "mere quantum of remuneration for services rendered". Additionally, following the language of McIntyre J. of this Court in *MacKay v. The Queen*, [1980 CanLII 217 \(SCC\)](#), [1980] 2 S.C.R. 370 at p. 406, he held that the requirement of making contributions for pension and survivor benefits was not "arbitrary, capricious or unnecessary" and therefore did not constitute a denial of equality before the law.

Federal Court of Appeal

11. The majority of the Federal Court of Appeal, in a decision reported at [1983 CanLII 4990 \(FCA\)](#), [1984] 1 F.C. 1010, agreed with the conclusion of Addy J. but disagreed with his reasoning (and with the reasoning of each other).
12. Thurlow C.J. held that Parliament had the power under [s. 100](#) of the *Constitution Act, 1867* to fix the salaries of superior court judges. He further held that the power to fix salaries included the power to reduce them and that this reduction could be achieved by federal statute and did not require constitutional amendment. Thurlow C.J. concluded, however, that s. 100 of the *Constitution Act, 1867* does not give Parliament the power to dictate how judges use their salaries. Both parts of s. 29.1 of the *Judges Act* impermissibly do this by compulsorily taking from judges part of their salaries to help pay for their pension and survivor benefits.
13. Heald J. concluded that the clear wording of [s. 100](#) of the *Constitution Act, 1867* meant that Parliament had to pay the total cost of the pensions of superior court judges. It followed that s. 29.1(2) of the *Judges Act* was *ultra vires* because it compelled a contribution to the pensions of judges by the judges themselves. Section 29.1(1) of the *Judges Act*, however, was *intra vires* because it was dedicated exclusively to the cost of the improved pensions for widowed spouses and other dependants of judges.
14. Pratte J. dissented. He held that the words "fixed and provided" in [s. 100](#) of the *Constitution Act, 1867* gave Parliament a plenary power with respect to the salaries of superior court judges. This included the power to change them.
15. Although the three justices of the Federal Court of Appeal disagreed sharply on the interpretation of [s. 100](#) of the *Constitution Act, 1867* and its application to s. 29.1 of the *Judges Act* they were in agreement, both amongst themselves and with Addy J., that the respondent's argument based on s. 1(b) of the *Canadian Bill of Rights* failed.

16. In summary, the respondent's *Canadian Bill of Rights* attack on s. 29.1 of the *Judges Act* failed in both the Federal Court, Trial Division and the Federal Court of Appeal. He was, however, successful in both courts in his argument based on s. 100 of the *Constitution Act, 1867*. Addy J. held that s. 100 prevented Parliament from reducing the compensation paid to incumbent judges. The majority of the Court of Appeal held that it would be unconstitutional for Parliament to require any superior court judge to contribute to his or her pension plan.

III

Issues

17. Although there are a myriad of legal issues to be addressed, they are all subsumed in the two constitutional questions stated by this Court on March 22, 1984:

1. Is section 29.1 of the *Judges Act*, as amended by s. 100 of the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, inconsistent with s. 100 of the *Constitution Act, 1867* and, therefore, in whole or in part, *ultra vires* the Parliament of Canada?
2. Is section 29.1 of the *Judges Act* as amended by s. 100 of the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, inconsistent with s. 1(b) of the *Canadian Bill of Rights* and to the extent of the inconsistency is it of no force or effect?

IV

Section 100 of the *Constitution Act, 1867* and s. 29.1 of the *Judges Act*

18. For convenience of reference I set out again s. 100 of the *Constitution Act, 1867*:

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

In the context of this appeal, it seems to me that three introductory points can be made about this provision. First, it deals explicitly with both judicial salaries and pensions. Secondly, it stands as a constitutional affirmation that superior, district and county court judges will receive at least some salary and pension benefits. Thirdly, it assigns the responsibility, in both a federalism sense and a separation of powers sense, for providing judicial salaries and pensions. In the federalism sense, the assignment is to Parliament, not the provincial governments. In the separation of powers sense, the assignment is to the federal legislative branch, Parliament, not to any component of the executive branch.

19. The respondent makes three distinct arguments about the relationship between [s. 100](#) of the *Constitution Act, 1867* and s. 29.1 of the *Judges Act*. These arguments correspond quite closely to the different bases for decision in the judgments of Addy J. at trial and Thurlow C.J. and Heald J. on appeal. They include:

(1) Under the Constitution, Parliament could not, on December 20, 1975, diminish, reduce or impair the established benefits of the respondent.

(2) [Section 100](#) of the *Constitution Act, 1867* requires Parliament to provide to superior court judges non-contributory retirement pensions.

(3) Section 100 does not authorize Parliament to compel superior court judges to contribute to a fund through deductions from their salaries.

20. Although different points are made under each of these arguments, there is a common thread running through all three. This common thread is the principle of judicial independence. The respondent contends that judicial independence is an important principle of Canadian constitutional law which must be interpreted to invalidate the legislation under review. Before assessing the merits of the specific arguments above, it is important to examine the principle of judicial independence.

V

Judicial Independence

1. *General Considerations*

21. Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider--be it government, pressure group, individual or even another judge--should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence. Nevertheless, it is not the entire content of the principle.

22. Of recent years the general understanding of the principle of judicial independence has grown and been transformed to respond to the modern needs and problems of free and democratic societies. The ability of individual judges to make decisions in discrete cases free from external interference or influence continues, of course, to be an important and necessary component of the principle. Today, however, the principle is far broader. In the words of a leading academic authority on judicial independence, Professor Shimon Shetreet: "The judiciary has developed from a dispute-resolution mechanism, to a significant social institution with an important constitutional role which participates along with other institutions

in shaping the life of its community" ("The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration", in S. Shetreet and J. Deschênes (eds.), *Judicial Independence: The Contemporary Debate* (1985), at p. 393).

23. There is, therefore, both an individual and a collective or institutional aspect to judicial independence. As stated by Le Dain J. in *Valente v. The Queen*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673, at pp. 685 and 687:

[Judicial independence] connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

...

It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government.

24. The rationale for this two-pronged modern understanding of judicial independence is recognition that the courts are not charged solely with the adjudication of individual cases. That is, of course, one role. It is also the context for a second, different and equally important role, namely as protector of the Constitution and the fundamental values embodied in it--rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important. In other words, judicial independence is essential for fair and just dispute-resolution in individual cases. It is also the lifeblood of constitutionalism in democratic societies.

2. Foundations of Judicial Independence in Canada

25. It is trite history that the Canadian court system has its primary antecedents in the United Kingdom. (This is not true of our substantive law which has deep roots in both the United Kingdom and France.) In the United Kingdom the cornerstone of the constitutional system has been for centuries, and still is today, the principle of parliamentary supremacy. But it is not the only principle. The rule of law is another. Judicial independence is a third. The history of the Constitution of the United Kingdom reveals continuous growth towards independent judicial authority. That history is well-described in Professor Lederman's classic article, "The Independence of the Judiciary" (1956), 34 *Can. Bar Rev.* 769-809 and 1139-1179. Judicial authority in the United Kingdom has matured into a strong and effective means of ensuring that governmental power is exercised in accordance with law. Judicial independence is the essential prerequisite for this judicial authority. In the recent words of Lord Lane: "Few constitutional precepts are more generally accepted there in England, the land which boasts no written constitution, than the necessity for the judiciary to be secure from undue influence and autonomous within its own field" ("Judicial Independence and the Increasing Executive Role in Judicial Administration", in S. Shetreet and J. Deschênes (eds.), *Judicial Independence: The Contemporary Debate* (1985), at p. 525).

26. In Canada, the constitutional foundation for the principle of judicial independence is derived from many sources. Because the sources for the principle are both varied and powerful, the principle itself is probably more integral and important in our constitutional system than it is in the United Kingdom.

27. Indeed, two of the sources of, or reasons for, judicial independence in Canada do not exist in the United Kingdom. First, Canada is a federal country with a constitutional distribution of powers between federal and provincial governments. As in other federal countries, there is a need for an impartial umpire to resolve disputes between two levels of government as well as between governments and private individuals who rely on the distribution of powers. In most federal countries the courts play this umpiring role. In Canada, since Confederation, it has

been assumed and agreed that the courts would play an important constitutional role as umpire of the federal system. Initially, the role of the courts in this regard was not exclusive; in the early years of Confederation the federal government's disallowance power contained in [s. 55](#) of the *Constitution Act, 1867* was also central to federal-provincial dispute- resolution. In time, however, the disallowance power fell into disuse and the courts emerged as the ultimate umpire of the federal system. That role, still fundamental today, requires that the umpire be autonomous and completely independent of the parties involved in federal-provincial disputes.

28. Secondly, the enactment of the *Canadian Charter of Rights and Freedoms* (although admittedly not relevant to this case because of its date of origin) conferred on the courts another truly crucial role: the defense of basic individual liberties and human rights against intrusions by all levels and branches of government. Once again, in order to play this deeply constitutional role, judicial independence is essential.

29. Beyond these two fundamental sources of, or reasons for, judicial independence there is also textual recognition of the principle in the *Constitution Act, 1867*. The preamble to the *Constitution Act, 1867* states that Canada is to have a Constitution "similar in Principle to that of the United Kingdom". Since judicial independence has been for centuries an important principle of the Constitution of the United Kingdom, it is fair to infer that it was transferred to Canada by the constitutional language of the preamble. Furthermore, s. 129 of the *Constitution Act, 1867* continued the courts previously in existence in the federating provinces into the new Dominion. The fundamental traditions of those courts, including judicial independence, were also continued. Additionally, the judicature provisions of the *Constitution Act, 1867*, especially ss. 96, 99 and 100, support judicial authority and independence, at least at the level of superior, district and county courts. As Lord Atkin said in *Toronto Corporation v. York Corporation*, [1938 CanLII 252 \(UK JCPC\)](#), [1938] A.C. 415 at p. 426:

While legislative power in relation to the constitution, maintenance and organization of Provincial Courts of Civil Jurisdiction, including procedure in civil matters, is confided to the

Province, the independence of the judges is protected by provisions that the judges of the Superior, District, and County Courts shall be appointed by the Governor-General (s. 96 of the British North America Act, 1867), that the judges of the Superior Courts shall hold office during good behaviour (s. 99), and that the salaries of the judges of the Superior, District, and County Courts shall be fixed and provided by the Parliament of Canada (s. 100). These are three principal pillars in the temple of justice, and they are not to be undermined.

(Emphasis added.)

30. In summary, Canadian constitutional history and current Canadian constitutional law establish clearly the deep roots and contemporary vitality and vibrancy of the principle of judicial independence in Canada. The role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system.

31. I emphasize the word ‘all’ in the previous sentence because, although judicial independence is usually considered and discussed in terms of the relationship between the judiciary and the executive branch, in this appeal the relevant relationship is between the judiciary and Parliament. Nothing turns on this contextual difference. Although particular care must be taken to preserve the independence of the judiciary from the executive branch (because the executive is so often a litigant before the courts), the principle of judicial independence must also be maintained against all other potential intrusions, including any from the legislative branch. In *McEvoy v. Attorney General for New Brunswick*, 1983 CanLII 149 (SCC), [1983] 1 S.C.R. 704, the Court said, at p. 720:

The judicature sections of the *Constitution Act, 1867* guarantee the independence of the Superior Courts; they apply to Parliament as well as to the Provincial Legislatures.

In a similar vein, these sections, including s. 100, apply to both the executive and legislative branches of government.

3. *Content of the Principle of Judicial Independence*

32. Turning from the general definition and constitutional foundations of judicial independence, it becomes necessary to consider its content or conditions in a Canadian setting. In the context of this appeal, it is particularly important to discuss the question of financial security as a component of judicial independence.

33. There is, and has been at least since the *Act of Settlement*, 1700 (Engl.), 12 & 13 Will. 3, c. 2, agreement that judicial independence requires security of tenure and financial security. In recent years, important international documents have fleshed out in more detail the content of the principle of judicial independence in free and democratic societies: see, for example, the thirty-two articles in the *Syracuse Draft Principles on the Independence of the Judiciary* (1981), the forty-seven standards enunciated in the *International Bar Association Code of Minimum Standards of Judicial Independence* (1982), and, especially, the *Universal Declaration of the Independence of Justice* (adopted at the final plenary session of the First World Conference on the Independence of Justice held in Montréal in 1983). Invariably, financial security has been recognized as a central component of the international concept of judicial independence. For a recent example, the *Universal Declaration of the Independence of Justice* (the Montreal Declaration) provides:

- 2.21 a) During their terms of office, judges shall receive salaries and after retirement, they shall receive pensions.
- b) The salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office, and be regularly adjusted to account fully for price increases.
- c) Judicial salaries shall not be decreased during the judges' term of office, except as a coherent part of an overall public economic measure.

34. This international understanding of one of the essential features of judicial independence is, in my opinion, given powerful expression in a Canadian context by s. 100 of the *Constitution Act, 1867*, earlier quoted. Speaking of financial security in *Valente*, Le Dain J. said, at p. 704:

The second essential condition of judicial independence ...is...what may be referred to as financial security. That means security of salary or other remuneration, and, where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence.

I agree with this passage, although I believe it requires a somewhat broader expression by reason of the circumstances of this appeal. *Valente* dealt substantially, although not exclusively, with the relationship between the executive branch of a provincial government and a statutory court. In that context, Le Dain J.'s discussion of judicial independence in terms of the prevention of arbitrary interference "by the Executive" is, in my opinion, both apposite and correct. In this appeal, the relevant relationship is different; it is between the legislative branch of the federal government and a superior court with its combination of a constitutional position and statutory and equitable jurisdiction. In the context of this appeal it must be declared that the essence of judicial independence for superior court judges is complete freedom from arbitrary interference by both the executive and the legislature. Neither the executive nor the legislature can interfere with the financial security of superior court judges. That security is crucial to the very existence and preservation of judicial independence as we know it.

35. Against this background of the historical foundations for, and contemporary content of, judicial independence in Canada it is now possible to consider the three specific grounds of attack on s. 29.1 of the *Judges Act*.

Grounds of Attack

1. *Parliament cannot diminish, reduce or impair established salary or remunerative benefits*
36. Of the three arguments made by the respondent this is the one, in my opinion, deserving of special consideration. It is contended that Parliament cannot impair or diminish the established salary or benefits of incumbent judges because this might interfere in fact, or be perceived as interfering, with the independence of those judges. Since I have already concluded that judicial independence is an important constitutional value in Canada, the relevant question becomes: does the scheme for contributory pensions established in s. 29.1 of the *Judges Act* violate this principle?
37. The starting point in this inquiry is recognition that someone must provide for judicial salaries and benefits and that, by virtue of s. 100 of the *Constitution Act, 1867*, that someone is, explicitly, Parliament.
38. What then can Parliament do and not do in meeting its constitutional obligation to provide salaries and pensions to superior court judges? As a general observation, Canadian judges are Canadian citizens and must bear their fair share of the financial burden of administering the country. Thus, for example, judges must pay the general taxes of the land. See *Judges v. Attorney-General of Saskatchewan*, 1937 CanLII 368 (UK JCPC), [1937] 2 D.L.R. 209 (P.C.) Judges also have an amount deducted from their salaries as a contribution to the Canada Pension Plan. These two liabilities are, of course, general in the sense that all citizens are subject to them whereas the contributions demanded by s. 29.1 of the *Judges Act* are directed at judges only. (Other legislation, federal and provincial, establishes similar pension schemes for a substantial number of other Canadians.) Conceding the factual difference that s. 29.1 of the *Judges Act* is directed only at judges, I fail to see that this difference translates into any legal consequence. As I have earlier indicated, the essential condition of judicial independence

at the individual level is the necessity of having judges who feel totally free to render decisions in the cases that come before them. On the institutional plane, judicial independence means the preservation of the separateness and integrity of the judicial branch and a guarantee of its freedom from unwarranted intrusions by, or even intertwining with, the legislative and executive branches. It is very difficult for me to see any connection between these essential conditions of judicial independence and Parliament's decision to establish a pension scheme for judges and to expect judges to make contributions toward the benefits established by the scheme. At the end of the day, all s. 29.1 of the *Judges Act* does, pursuant to the constitutional obligation imposed by s. 100 of the *Constitution Act, 1867*, is treat judges in accordance with standard, widely used and generally accepted pension schemes in Canada. From that factual reality it is far too long a stretch, in my opinion, to the conclusion that s. 29.1 of the *Judges Act* violates judicial independence.

39. I want to qualify what I have just said. The power of Parliament to fix the salaries and pensions of superior court judges is not unlimited. If there were any hint that a federal law dealing with these matters was enacted for an improper or colourable purpose, or if there was discriminatory treatment of judges *vis-à-vis* other citizens, then serious issues relating to judicial independence would arise and the law might well be held to be *ultra vires* s. 100 of the *Constitution Act, 1867*.

40. There is no suggestion, however, of any of these considerations in the present appeal. First, the motive underlying s. 29.1 of the *Judges Act*, especially when viewed in the context of the substantial increase in salaries received by superior court judges at virtually the same time, was, without question, to try to deal fairly with judges and with judicial salaries and pensions. Secondly, although superior court judges were required to contribute to their pension benefits commencing December 20, 1975, the contributory scheme was effectively introduced as part of a remuneration package which included a 39 per cent salary increase and a 50 per cent increase in pensions to dependants. The salary and pension changes were intended to be

complementary and, as a comprehensive package, did not diminish, reduce or impair the financial position of federally-appointed judges. Thirdly, there was no discriminatory treatment of judges. Contributory pension schemes are now widespread in Canada; s. 29.1 of the *Judges Act* merely moved superior court judges into the mainstream of Canadian pension schemes. Recognition of that reality draws me, by way of conclusion on this point, to the words of Holmes and Frankfurter JJ. in two American cases. Article III, section 1 of the Constitution of the United States also protects judicial tenure and financial security. Speaking generally about this article, and admittedly in the context of a ‘taxation’, not a ‘pension’, fact situation, Holmes J. (dissenting) said in *Evans v. Gore*, 253 U.S. 245 (1920), at p. 265:

I see nothing in the purpose of this clause of the Constitution to indicate that the judges were to be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being if not their life depends.

In the same vein, Frankfurter J. said in *O'Malley v. Woodrough*, 307 U.S. 277 (1939), at p. 282:

To suggest that it makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article III, s. 1. To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.

2. *Section 100 mandates non-contributory retirement pensions*

41. There are two separate arguments that have been advanced in support of the claim that Parliament must provide non-contributory retirement pensions to superior court judges. I would label one the ‘federalism’ argument and the other the ‘strict construction’ argument.

42. The ‘federalism’ argument is that s. 100 of the *Constitution Act, 1867* must be read against the backdrop of s. 92(14) of the *Constitution Act, 1867* which gives provincial legislatures

jurisdiction to make laws in relation to ‘the administration of justice in the province’. Since that phrase includes matters relating to the judiciary, it follows that Parliament alone cannot change the basis of judicial pensions from non-contributory to contributory. Such a change would require a constitutional amendment following on from the proper degree of legal participation and consent of the federal and provincial governments.

43. It is true that [s. 92\(14\)](#) of the *Constitution Act, 1867* gives the provincial governments jurisdiction over the field of the administration of justice. It is also true that, even more specifically, s. 92(14) entrusts to the provinces "the constitution, maintenance and organization of provincial courts" which, without question, includes superior courts. Without more, it would not be a large step to move from these constitutional foundations to recognition of a provincial role in setting salaries and providing benefits, including pensions, to superior court judges. But s. 92(14) of the *Constitution Act, 1867* cannot be read in isolation. Although it is "intended to have [a] wide meaning" (*Di Iorio v. Warden of the Montreal Jail*, [1976 CanLII 1 \(SCC\)](#), [1978] 1 S.C.R. 152 at p. 204), it must be read in light of other provisions of the Constitution. There are subtractions from what would appear, without more, to be complete provincial jurisdiction with respect to the justice system. One such subtraction, and it is a major one, is federal jurisdiction by virtue of [s. 91\(27\)](#) of the *Constitution Act, 1867* over criminal law and criminal procedure. See *Di Iorio*, at p. 199. A second subtraction flows from s. 96 of the same Act. Although provincial governments have the power to establish, maintain and organize provincial superior courts, s. 96 explicitly provides that only the Governor General, in effect the Governor General in Council, has power to appoint the judges of those courts. See, among many cases, *Re Residential Tenancies Act, 1979*, [1981 CanLII 24 \(SCC\)](#), [1981] 1 S.C.R. 714; *Crevier v. Attorney General of Quebec*, [1981 CanLII 30 \(SCC\)](#), [1981] 2 S.C.R. 220.

44. [Section 100](#) of the *Constitution Act, 1867* provides a third, and particularly explicit, subtraction from provincial jurisdiction with respect to the administration of justice. It states

that the salaries and pensions of superior court judges shall be fixed and provided by the Parliament of Canada. It is difficult to conceive of clearer words. To attempt to create a provincial role in the determination of the salaries and pensions of superior court judges is blithely to ignore this clear mandate. Indeed, it turns s. 100 on its head. Just as s. 96 of the *Constitution Act, 1867* provides for federal appointment of superior court judges, so s. 100 provides for federal jurisdiction over their salaries and pensions. Both the intent and the actual wording of s. 100 are clear. There is no 'federalism' limitation on Parliament's capacity to change the basis of pensions for superior court judges from non-contributory to contributory.

45. I turn now to what I have labelled the 'strict construction' argument. It has two dimensions. First, it is contended that, since judges received non-contributory pensions before and at Confederation, the word 'pensions' in s. 100 of the *Constitution Act, 1867* meant then, and must continue to mean today, non-contributory pensions. Secondly, it is contended that the words 'fixed and provided' mean that Parliament must pay for the full cost of the pensions of superior court judges, which rules out a contributory scheme.

46. With respect to the first of these arguments, I do not think s. 100 imposes on Parliament the duty to continue to provide judges with precisely the same type of pension they received in 1867. The Canadian Constitution is not locked forever in a 119-year old casket. It lives and breathes and is capable of growing to keep pace with the growth of the country and its people. Accordingly, if the Constitution can accommodate, as it has, many subjects unknown in 1867--airplanes, nuclear energy, hydroelectric power--it is surely not straining s. 100 too much to say that the word 'pensions', admittedly understood in one sense in 1867, can today support federal legislation based on a different understanding of 'pensions'.

47. The second 'strict construction' argument is, as noted above, that the words "Pensions ... shall be fixed and provided" in s. 100 impose on Parliament an obligation to pay the full cost of the pension. This is the argument which Heald J. accepted in the Federal Court of Appeal.

He was particularly drawn to this argument because of the contrast he saw between the wording of s. 100 dealing with judicial pensions ("shall be fixed and provided") and s. 91(8) dealing with pensions for federal public servants ("The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada"). In his words, at p. 1040:

In my view, subsection 91(8) is in no way analogous or comparable to section 100. Subsection 91(8) is an enabling section. It empowers Parliament to provide for the salaries of civil servants but does not require it to do so. There is no provision in the subsection at all for the pensions of civil servants. Section 100, on the other hand, imposes a responsibility, *inter alia*, to provide the pensions of judges. The word "for" in subsection 91(8) is absent from section 100. In my view, the obligation imposed by section 100 to provide pensions imposes a duty on Parliament to provide the total amount of those pensions.

48. I accept Heald J.'s description of the mandatory--permissive distinction between ss. 100 and 91(8). Section 100 makes it clear that superior court judges will have some salary and pension benefits. Section 91(8) does not go that far. It merely authorizes, in a federalism sense, Parliament to make laws respecting salaries and pensions for federal public servants; it does not require Parliament to legislate.

49. Agreement with the mandatory--permissive distinction between the two provisions, however, does not necessarily entail acceptance of the conclusion which Heald J. suggests flows from it, namely that Parliament must pay the total cost of the pensions of superior court judges. I fail to see how the absence of the word 'for' in s. 100 leads to this conclusion. My view is that what emerges clearly from the word 'provided' in s. 100 is that Parliament must provide salaries and pensions to superior court judges. What does not emerge clearly from this word is any constitutional qualification on the type, scheme or even amount of these salaries or pensions. In light of the modern-day reality that a great many people pay for a portion of their pension benefits, it is, in my opinion, construing too literally the word 'provided' to say that it means that Parliament must pay every cent of the pensions of superior court judges.

50. In my view, strict construction is rarely controlling in constitutional interpretation. My conclusion on the respondent's 'strict construction' arguments is simply that the word 'pensions' in s. 100 of the *Constitution Act, 1867* is not limited to the type of pensions known and in existence for the judiciary in 1867 and the word 'provided' does not necessarily mean that Parliament must pay the total cost of judicial pensions. Parliament's ability to implement a widely used and accepted latter-day pension model is not constrained by either of these words in terms of their strict construction.

3. *Parliament cannot dictate how judges spend their salaries by requiring pension contributions*

51. The respondent's argument here is that nothing in the *Constitution Act, 1867*, including s. 100, authorizes Parliament to make any deductions from the salaries of superior court judges because such deductions constitute an unconstitutional direction as to how judges are to spend their salaries and therefore a direct interference on judicial independence. For three reasons, I cannot accept what the respondent tries to read into s. 100.

52. First, there is a close relationship between salaries and pensions. They are both remunerative benefits. Superior court judges are not in any sense 'employees' of anyone, including the federal government. Yet, as I have noted, they must be paid by someone and that someone, according to s. 100, is Parliament. In fulfilling its constitutional obligation to establish salaries and pensions for superior court judges, it is reasonable that Parliament would ask: what is an appropriate total benefit package and what components should constitute the package? Salary and pension must be two of the components and Parliament must consider the relationship between them. It did this in 1975; the 1975 'package' significantly raised judicial salaries and increased certain benefits but, at the same time, compelled judges to contribute to their own pension schemes. Parliament could have reached precisely the same financial result by leaving the former non-contributory pension scheme in place but not raising

salaries as much as it did. No one contests that this would have been constitutional. But if that is so, I see no reason why Parliament cannot achieve the same result in the way it chose. There is nothing in the wording of s. 100 to suggest the limitation on Parliament's jurisdiction contended for by the respondent.

53. Indeed, there is wording in s. 100 that points the other way, which brings me to the second reason for holding against the respondent on this issue. The fatal defect of the respondent's argument is that it ignores the word 'pensions' in s. 100 of the *Constitution Act, 1867*. Although it might well be unconstitutional in most contexts for Parliament to direct how judges are to spend their salaries, the word 'pensions' in s. 100 specifically authorizes Parliament to deal with this subject-matter. In exercising that jurisdiction Parliament must legislate with respect to both the quantum and the scheme of judicial pensions. The 1975 law dealt with the scheme. Since the scheme chosen was a widely used and accepted one and since it was introduced in conjunction with other changes to judicial benefits in 1975, I see no objection to it on the ground contended for by the respondent.

54. Thirdly, the limitation proposed by the respondent would have nothing to do with my understanding of proper governmental respect for the independent role of the courts; neither would it bear directly upon the relationship between the judiciary and either Parliament or the executive; nor would it have any meaning in a federal-provincial sense. In short, I simply do not see any conceptual, principled or practical reason for drawing a line in the place contended for by the respondent.

55. For all of these reasons I conclude that s. 29.1 of the *Judges Act* does not violate s. 100 of the *Constitution Act, 1867*.

56. For convenience of reference I set out again the relevant part of s. 1(b) of the *Canadian Bill of Rights*:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

...

(b) the right of the individual to equality before the law and the protection of the law;

I commence by noting that the respondent calls this his subsidiary argument and that it was dismissed by all four of the judges of the Federal Court, Trial Division and Federal Court of Appeal who heard the case.

57. The respondent's argument is not that he or other superior court judges are being treated differently and more harshly than other Canadians. As discussed above, because of the broad use throughout the country of contributory pension schemes, such an argument would not be possible. Rather, the respondent's argument is that s. 29.1 of the *Judges Act* treats him more harshly than other superior court judges and that s. 1(b) of the *Canadian Bill of Rights* protects him from this treatment.

58. The fact situation underlying this claim is somewhat complex and needs to be understood clearly before proceeding. There are three, not two, categories of judges affected by s. 29.1 of the *Judges Act* because, although the section was introduced into Parliament on February 17, 1975 and that date was selected as the cut-off for imposition of the contributory payments on judges, the section was not enacted until December 20, 1975. Accordingly, the three categories of judges are:

1. Judges appointed before February 17, 1975 (they are ‘grandfathered’ from the contributory schemes in s. 29.1(2); they must, however, pay 1½ per cent of their salaries toward improving pension benefits for their spouses and children).

2. Judges appointed after December 20, 1975 (the law would be in force; they must pay under s. 29.1(2) of the Act).

3. Judges appointed after February 17, 1975 but before December 20, 1975 (the law would not be in force when they were appointed but, once enacted, it purports to reach backward and apply to them).

The respondent is in the third category which, I understand, consists of a relatively small number of judges.

59. The respondent's argument is that "equality before the law" in s. 1(b) of the *Canadian Bill of Rights* prohibits the different statutory treatment of some judges *vis-à-vis* other judges with respect to their pensions. In assessing this argument it is important to be aware of the cases in which s. 1(b) has been considered by this Court and the conclusion reached in each such case.

60. Only in *R. v. Drybones*, 1969 CanLII 1 (SCC), [1970] S.C.R. 282, did a majority of the Court hold a federal statute to be inconsistent with s. 1(b) of the *Canadian Bill of Rights*. In that case, a provision of the *Indian Act* made it an offence for an Indian to be intoxicated outside an Indian reserve. The gist of Ritchie J.'s reasons is summarized in the following passage at p. 297:

... I am therefore of opinion that an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty.

There is not the faintest resemblance between *Drybones*, which involved racial discrimination regarding a quasi-criminal offence, and the present case, which involves a legislative distinction on the basis of the appointment date of judges.

61. In *Attorney General of Canada v. Lavell*, [1973 CanLII 175 \(SCC\)](#), [1974] S.C.R. 1349, the Court had occasion to consider another provision of the *Indian Act*. The legislation under review stipulated that an Indian woman who married a non-Indian man lost her Indian status, although an Indian man who married a non-Indian woman retained his Indian status. A majority of the Court held that this did not offend "equality before the law" under s. 1(b).

62. A third provision of the *Indian Act* was assessed against s. 1(b) of the *Canadian Bill of Rights* in *Attorney General of Canada v. Canard*, [1975 CanLII 137 \(SCC\)](#), [1976] 1 S.C.R. 170. In this case the legislation denied the widow of a deceased Indian the right to administer the estate of her late husband. A majority of the Court rejected the claim that such differential treatment of Indians violated the equality provision of the *Canadian Bill of Rights*, noting that this type of legislative distinction was within federal competence under [s. 91\(24\)](#) of the *Constitution Act, 1867*.

63. In *R. v. Burnshine*, [1974 CanLII 150 \(SCC\)](#), [1975] 1 S.C.R. 693, the majority again found no violation of equality before the law under the *Canadian Bill of Rights*. A provision in the *Prisons and Reformatories Act* called for sentences of "indeterminate" length for offenders under the age of twenty-two. A person older than twenty-two would not in the circumstances have been subjected to indeterminate sentences under the *Criminal Code*. The law had application only in Ontario and British Columbia since the requisite special correctional facilities were unavailable in other provinces. The legislation thus created distinctions on the basis of both age and province of residence. Martland J., writing for the majority, noted at p. 702:

I am not prepared to accept the respondent's submission as to the meaning of the phrase "equality before the law" in s. 1(b) of the *Bill of Rights*. Section 1 of the Bill declared that six defined human rights and freedoms "have existed" and that they should "continue to exist". All of them had existed and were protected under the common law. The Bill did not purport to define new rights and freedoms. What it did was to declare their existence in a statute, and, further, by s. 2, to protect them from infringement by any federal statute.

He referred with approval to the passage in the judgment of Ritchie J. in *Lavell*, in which equality before the law was said to mean that the law must apply to all individuals without exemption from the duty to obey it. Martland J. also quoted with approval the following passage from *Curr v. The Queen*, 1972 CanLII 15 (SCC) , [1972] S.C.R. 889 at p. 899:

... compelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so, and exercising its powers in accordance with the tenets of responsible government, which underlie the discharge of legislative authority under the *British North America Act*.

The majority concluded with the observation that in order to have succeeded Burnshine would have to have demonstrated that Parliament was not seeking to achieve a "valid federal objective".

64. In *Prata v. Minister of Manpower and Immigration*, 1975 CanLII 7 (SCC) , [1976] 1 S.C.R. 376, the appellant claimed that a limitation on the discretionary power of the Immigration Appeal Board to quash a deportation order on compassionate grounds was contrary to equality before the law. The limitation was triggered by the filing of a certificate by the Minister, based upon intelligence reports, that it would be contrary to the national interest for the Board to so exercise its discretion. The prospective deportee had no statutory right to a hearing to go behind the Minister's certificate to challenge the accuracy of the intelligence reports. The Court disposed of the s. 1(b) claim easily, saying that the limitation sought to achieve a valid federal objective.

65. *Bliss v. Attorney General of Canada*, 1978 CanLII 25 (SCC), [1979] 1 S.C.R. 183, involved provisions in the *Unemployment Insurance Act, 1971* which denied the standard unemployment insurance benefits to persons whose employment was interrupted by pregnancy. Although the Act provided maternity benefits, it required a longer qualification period for maternity benefits than for standard benefits. Mrs. Bliss had satisfied the qualification period for standard benefits, but not for maternity benefits. In holding that these provisions did not offend the appellant's right to equality before the law, the judgment of the Court, delivered by Ritchie J., emphasized that s. 91 of the *British North America Act, 1867* had been amended in 1940 by the addition of unemployment insurance as a class of subjects reserved to Parliament. Since the impugned legislation was an integral part of Parliament's unemployment insurance scheme it was enacted for the purpose of achieving a valid federal objective. Ritchie J. also quoted the excerpt from *Curr* which I have reproduced above.

66. The last case is *MacKay v. The Queen*, *supra*. The legislation under review created a special criminal procedure and forum for servicemen charged with criminal offences. Amongst other attributes, the court martial procedure deprived the accused serviceman of a preliminary hearing, the right to a jury trial, and in some circumstances the plea of *autrefois convict*. The majority judgment again relied on the "valid federal objective" test in denying any conflict between the *National Defence Act* and s. 1(b) of the *Canadian Bill of Rights*.

67. This short history of "equality before the law" under s. 1(b) of the *Canadian Bill of Rights* demonstrates that a majority of the Court was never prepared to review impugned legislation according to an exacting standard which would demand of Parliament the most carefully tailored, finely crafted legislation. On the contrary, a majority of the Court was consistently prepared to look in a general way to whether the legislation was in pursuit of a valid federal legislative objective. This approach was followed in cases involving legislative distinctions on the basis of race, sex and age, and in cases involving profoundly important interests of the person asserting the equality right. The passages which I have quoted from these cases

indicate that the Court was concerned with the merely statutory status of the *Canadian Bill of Rights* and the declaratory nature of the rights it conferred. I believe the day has passed when it might have been appropriate to re-evaluate those concerns and to reassess the direction this Court has taken in interpreting that document.

68. Against this background of previous cases under s.1(b), the questions in this appeal are:
Was it discriminatory for Parliament to choose any cut-off date in s. 29.1 of the *Judges Act*?
Was the specific cut-off date chosen, February 17, 1975, legal?

69. I have no trouble with the first question. Parliament could have imposed the new scheme on all superior court judges, including those appointed before 1975. However, taking into account the settled expectations of those earlier appointees, Parliament decided to 'grandfather' them. I can see no objection to this decision. Nor, in fairness, does the respondent. His complaint is not so much against the 'old judge/new judge' line drawn by Parliament. Rather, his complaint is against Parliament's assignment of him, by virtue of the February 17, 1975 cut-off date, to the 'new judge' side of the line.

70. That brings me to the second question, which is whether the February 17, 1975 cut-off date chosen by Parliament and reflected in s. 29.1 of the *Judges' Act* unlawfully discriminates against the respondent. I cannot see how it does. Once it is accepted that the general substance of the law is consistent with the valid federal objective of providing for remuneration of s. 96 judges and that it is not discriminatory of Parliament to draw some line between present incumbents and future appointees, I do not think the jurisprudence I have summarized above allows the courts to be overly critical in reviewing the precise line drawn by Parliament in *Canadian Bill of Rights* cases. Some line is fair and is not discriminatory. From the respondent's perspective a line drawn on December 20, 1975 would obviously be preferable. But that does not mean that the choice of a different date, February 17, 1975, is illegal. In light of the validity of the overall policy reflected in the 1975 amendments and the legality and

fairness of Parliament's attempt to protect the settled expectations of incumbent judges, I cannot say that the choice of February 17, 1975 as the cut-off date was contrary to the *Canadian Bill of Rights*.

71. For these reasons, I conclude that s. 29.1 of the *Judges Act* does not violate s. 1(b) of the *Canadian Bill of Rights*. Accordingly, in my view, neither Addy J. at trial nor any of the justices of the Federal Court of Appeal erred in this aspect of their judgments.

VIII

Conclusion

72. I would answer the constitutional questions stated in this appeal as follows:

1. Question: Is section 29.1 of the *Judges Act*, as amended by s. 100 of the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, inconsistent with s. 100 of the *Constitution Act, 1867* and, therefore, in whole or in part, *ultra vires* the Parliament of Canada?

Answer: No.

2. Question: Is section 29.1 of the *Judges Act* as amended by s. 100 of the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, inconsistent with s. 1(b) of the *Canadian Bill of Rights* and to the extent of the inconsistency is it of no force or effect?

Answer: No.

73. The appeal should be allowed, the judgments below set aside and the action dismissed. There should be no costs payable in this Court or in the courts below.

The reasons of Beetz and McIntyre JJ. were delivered by

74. BEETZ J. (dissenting in part)--This is an appeal from a judgment of the Federal Court of Appeal, [1983 CanLII 4990 \(FCA\)](#), [1984] 1 F.C. 1010 (Thurlow C.J., Heald J., concurring in the result but for different reasons, and Pratte J., dissenting), which upheld (but on different grounds) the judgment of the Federal Court, Trial Division, [1981 CanLII 4558 \(FC\)](#), [1981] 2 F.C. 543, wherein Addy J. ordered and declared that s. 29.1(2) of the *Judges Act*, R.S.C. 1970, c. J-1, as amended by s. 100 of the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, is, in so far as the respondent is concerned, *ultra vires* the Parliament of Canada.

I--The Facts

75. As was put by the trial judge (at p. 545):

The facts in this case are undisputed: no witnesses were called and the case was tried on the basis of admissions in the pleadings, an agreed statement of facts and certain exhibits which were filed on consent.

76. On July 24, 1975, the respondent, now a judge of the Quebec Court of Appeal, accepted to be and was appointed a puisne judge of the Superior Court for the District of Montréal, with, as stated in the commission issued to him under the Great Seal of Canada in the name of Her Majesty the Queen,

... all and every the powers, rights, authority, privileges, profits, emoluments and advantages unto the said office of right and by law appertaining during your good behaviour....

77. On the date of the respondent's appointment, the *Judges Act*, R.S.C. 1970, c. J-1, as amended by R.S.C. 1970 (2nd Supp.), c. 16; S.C. 1972, c. 17; S.C. 1973-74, c. 17; S.C. 1974-75-76, c. 19; S.C. 1974-75-76, c. 48, and the *Supplementary Retirement Benefits Act*, R.S.C. 1970 (1st Supp.), c. 43 as amended by R.S.C. 1970 (2nd Supp.), c. 30 and by S.C.

1973-74, c. 36, provided that puisne judges of the Superior Court in and for the Province of Quebec enjoyed the following "profits, emoluments and advantages":

1. Global salaries of \$53,000 (*Judges Act*, as amended, ss. 9 and 20);
2. Non-contributory retirement annuities (*Judges Act*, as amended, s. 23);
3. Non-contributory annuities for the judges' widows and children (*Judges Act*, as amended, s. 25);
4. Non-contributory supplementary retirement benefits (the *Supplementary Retirement Benefits Act* as amended).

78. The *Judges Act* was enacted pursuant to [s. 100](#) of the *Constitution Act, 1867* which provides:

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

It will be observed that the pensions of judges' widowed spouses and children are not a benefit mentioned in [s. 100](#) of the *Constitution Act, 1867*.

79. Subsequent to the date of his appointment, namely from July 24 to December 20, 1975, the respondent's net monthly income was calculated and paid on the basis of the foregoing salary of \$53,000 per annum, the same salary as that of all his fellow puisne judges of the Quebec Superior Court. In addition, he was not required any more than any one of them to contribute or pay anything towards the cost of his pension or that of his widow and children.

80. On December 20, 1975, approximately five months after the respondent's appointment, Parliament enacted the legislative provisions impugned in this case, s. 29.1 of the *Judges Act*, added to this Act by s. 100 of the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, an enactment which, it is important to note, was introduced in the House of Commons and given first reading on February 17, 1975.

81. Section 29.1 of the *Judges Act* provides in part:

29.1 (1) Every judge appointed before the 17th day of February, 1975 to hold office as a judge of a superior or county court shall, by reservation from his salary under this Act, contribute to the Consolidated Revenue Fund one and one-half per cent of his salary.

(2) Every judge appointed after the 16th day of February, 1975 to hold office as a judge of a superior or county court, to whom subsection (1) does not apply, shall, by reservation from his salary under this Act.

(a) contribute to the Consolidated Revenue Fund an amount equal to six per cent of his salary; and

(b) contribute to the Supplementary Retirement Benefits Account established in the accounts of Canada pursuant to the Supplementary Retirement Benefits Act,

(i) prior to 1977, an amount equal to one-half of one per cent of his salary, and

(ii) commencing with the month of January 1977, an amount equal to one per cent of his salary.

Here is how the trial judge characterized the effect of s. 29.1(2) upon the respondent:

Its effect was to oblige the plaintiff thenceforth to contribute six per cent of his salary toward the cost of his own retirement and the annuities for his widow and children as well as one-half of one per cent prior to the 1st of January, 1977 and thereafter one per cent, for the indexing of retirement annuities under the *Supplementary Retirement Benefits Act*. He thus suffered a reduction of seven per cent of the salary to which he was entitled as of the date of his appointment and for some five months following that appointment.

82. The extent of a more global effect upon the respondent has been agreed upon by the parties in the pleadings as amended by the agreed statement of facts:

The Plaintiff's contribution towards his retirement pension plan for the year 1977 will amount to \$3,815.00 and for the year of 1978 to \$3,955.00 and in subsequent years such contribution, it is to be expected, will be calculated on any and all adjustments to the Plaintiff's salary. On the assumption that the Plaintiff retires at the minimum age of 65, after 27 years in office, his contribution towards such annuities and supplementary retirement benefits will be at least \$100,000.00 and in the light of adjustments from time to time to the Plaintiff's salary, his contribution is likely to be in the order of \$125,000.00.

...

Upon his retirement, the Plaintiff's minimum contribution of \$3,815.00 per annum with interest compounded annually using a rate of interest of ten per cent per annum will have established in the hands of the defendant a capital sum in the order of \$400,000.00 an amount more than sufficient to take care of the Plaintiff's retirement annuities and the Plaintiff's supplementary retirement benefits.

83. On the other hand all the respondent's fellow puisne judges of the Superior Court appointed before February 17, 1975 and who until then had received the same salary as that of the respondent and had not been required to contribute and pay anything towards the cost of their pensions or that of their widowed spouses and children, remained entitled to the same salary as well as dispensed from contributions except, under s. 29.1(1), to the extent of one and one-half per cent of their salary, a contribution described as being "in respect of the cost of the improved annuities for widowed spouses and other dependants" in a letter sent on February 17, 1975, by the Minister of Justice and Attorney General of Canada to all federally appointed judges.

84. In other words, the new measure "grandfathered" incumbent superior court judges, but it did not "grandfather" them all; a small minority of them, including the respondent, that is those appointed after February 16, 1975, but before December 20, 1975, were not so "grandfathered": the impugned provisions were not in force when these judges were

appointed, but they were retroactive to the date of first reading and reached the judges in question *ex post facto* on the date of enactment. Until the latter date, the respondent belonged to the class of incumbent puisne superior court judges, all the members of which were treated equally under the *Judges Act*. With respect to non-contributory and contributory retirement annuities, the impugned enactment transferred him from that class into the class of judges who were not incumbent judges at the time of the enactment and who were not treated as favourably as judges who had been "grandfathered". The respondent was no longer the equal of his colleagues. Where there had been equality, the impugned provisions introduced inequality.

85. On the date of his appointment, July 24, 1975, the respondent was unaware of the existence of the bill which was to amend the *Judges Act* by adding s. 29.1 thereto, and the Minister of Justice did not mention the existence of the bill to the respondent at the time that his appointment was discussed.

86. I should state at once however that the respondent's unawareness of the existence of the bill is in my view irrelevant. The bill was before Parliament and was not yet law. One is presumed to know the law and to act accordingly, but not a bill which may or may not become law.

87. In November 1977, the respondent launched a declaratory action in the Trial Division of the Federal Court. The statement of claim concludes with the following prayer for relief:

WHEREFORE the Plaintiff claims:

a) A declaration that the words "before February 17, 1975" of Section 29.1 and that the whole of Section 29.1(2) of the *Judges Act*, as enacted by Section 100 of 1974-75-76, c. 81 are

i) *ultra vires* of the Parliament of Canada, or, in the alternative:

ii) *ultra vires* of the Parliament of Canada insofar as the Plaintiff is concerned:

or, in the alternative,

b) A declaration that the words "before February 17, 1975" of Section 29.1 and the whole Section 29.1 (2) of the *Judges Act*, as enacted by Section 100 of 1974-75-76, c. 81 are inoperative insofar as the Plaintiff is concerned;

c) His costs of the within proceedings;

d) Such further and other relief as to this Honourable Court may seem meet.

88. The declaration claimed in paragraph a) of the prayer for relief is allegedly founded upon s. 99 of the *Constitution Act, 1867*, relating to the tenure of office of judges as well as upon s. 100 of the same Act, quoted above and relating to the salaries, allowances, and pensions of judges.

89. The declaration claimed in paragraph b) of the prayer for relief is allegedly founded upon s. 1(b) of the *Canadian Bill of Rights* which provides:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

...

(b) the right of the individual to equality before the law and the protection of the law;

II--The Judgments of the Courts Below

90. In the Trial Division, Addy J. found that the effect of the impugned amendment to the *Judges Act* was to reduce the salary of the respondent and held that Parliament has no legislative authority to reduce the salary of a judge during his or her tenure of office. However

he rejected the submission that s. 29.1 of the *Judges Act* contravened s. 1(b) of the *Canadian Bill of Rights*. He granted the respondent a declaration that s. 29.1(2) of the *Judges Act* was *ultra vires* of the Parliament of Canada in so far as the respondent was concerned.

91. The appellant appealed to the Federal Court of Appeal and the respondent cross-appealed from the refusal of the trial judge to grant him a declaration that the impugned enactment was inoperative because it infringed s. 1(b) of the *Canadian Bill of Rights*.

92. The Federal Court of Appeal dismissed the appeal by a majority judgment but was unanimous in dismissing the cross-appeal. All three judges of the Federal Court of Appeal held, contrarily to the trial judge, that Parliament can reduce judges' salaries, provided it is not for a colourable purpose such, for instance, as to undermine the independence of the judiciary, which nobody has suggested was the case with respect to the impugned legislation. However, the majority of the Federal Court of Appeal held that it is *ultra vires* of Parliament to require any judge appointed pursuant to s. 96 of the *Constitution Act, 1867*, whenever appointed, to participate in a contributory pension plan for his own or her own pension, an issue not dealt with by the trial judge.

93. Thurlow C.J., who characterized the impugned enactment as effecting a forced contribution to a pension scheme rather than a reduction in salary, took the view that whereas under s. 100 of the *Constitution Act, 1867* Parliament must fix and provide judges salaries, it "has no authority to dictate how they are to be used by the recipient or to require that they be used for any particular purpose". Thurlow C.J. accordingly held that s. 29.1 of the *Judges Act* is wholly *ultra vires*, including s. 29.1(1), which, as stated above, was said to be "in respect of the cost of the improved annuities for widowed spouses and other dependants".

94. Heald J., for his part, was of the opinion that the obligation set out in s. 100 of the *Constitution Act, 1867* imposes a duty on Parliament to provide the total amount of judges'

pensions and s. 29.1(2) is contrary to s. 100 of the *Constitution Act, 1867* and *ultra vires* in that it requires judges to pay a portion of the cost of their own pension. However, s. 29.1(1) of the *Judges Act* is *not ultra vires* in his view since the deduction provided for therein is dedicated to the cost of improved annuities for widowed spouses and other dependants of judges.

95. Pratte J., dissenting, found that s. 29.1 of the *Judges Act* does not affect the judges' right to a pension but rather their right to salaries. The real question then was whether Parliament has the power to reduce the salaries of incumbent judges. He held that Parliament has this power.

96. In the result, the declaration of unconstitutionality granted by the trial judge with respect to s. 29.1(2) of the *Judges Act* remained undisturbed.

97. The appellant appealed to this Court by leave of this Court. The respondent cross-appealed pursuant to s. 29(1) of the Rules of this Court asking for the declaration claimed in paragraph b) of his prayer for relief on the basis of s. 1(b) of the *Canadian Bill of Rights*.

III--Constitutional Questions

98. On March 22, 1984, Dickson J., as he then was, stated the two following constitutional questions:

1. Is section 29.1 of the *Judges Act*, as amended by section 100 of the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, inconsistent with s. 100 of the *Constitution Act, 1867* and therefore in whole or in part, *ultra vires* the Parliament of Canada?
2. Is section 29.1 of the *Judges Act* as amended by s. 100 of the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, inconsistent with s. 1(b) of the *Canadian Bill of Rights* and to the extent of the inconsistency is it of no force or effect?

99. With the greatest of respect for those who hold a contrary view, I have reached the conclusion that, subject to one qualification to be mentioned later, the second constitutional question should receive an affirmative answer. However, this may not be sufficient to dispose of the entire case, given the declaration of unconstitutionality granted by the trial judge. In any event, the variety of opinions expressed in the courts below on the issues raised by the first constitutional question and the need for certainty in this important area of the law make it preferable that I also answer the first constitutional question.

IV--The Constitution Act, 1867 and s. 29.1 of the Judges Act

100. I have had the advantage of reading the reasons for judgment written by the Chief Justice. I agree with his general considerations on judicial independence, on the foundation of judicial independence in Canada and on the content of the principle of judicial independence. I also agree with him that the first constitutional question should be answered in the negative, and I agree with his reasons for so answering it.

101. I now turn to the second constitutional question.

V--Section 1(b) of the Canadian Bill of Rights and s. 29.1 of the Judges Act

102. As was already stated above, all the judges in the courts below held that s. 29.1 of the *Judges Act* was not inconsistent with s. 1(b) of the *Canadian Bill of Rights*. They had different reasons for so deciding however.

103. The reasons of the trial judge read in part as follows at pp. 554 to 557 of the Federal Court Reports:

The plaintiff, in arguing that the words "before the 17th day of February, 1975" in subsection 29.1(1) and "after the 16th day of February, 1975" in subsection 29.1(2) offend

the principle of equality before the law, relied on and referred to the following cases: *The Queen v. Drybones*, 1969 CanLII 1 (SCC), [1970] S.C.R. 282; *Curr v. The Queen*, 1972 CanLII 15 (SCC), [1972] S.C.R. 889; *Attorney General of Canada v. Lavell*, 1973 CanLII 175 (SCC), [1974] S.C.R. 1349; *The Queen v. Burnshine*, 1974 CanLII 150 (SCC), [1975] 1 S.C.R. 693; *Prata v. Minister of Manpower and Immigration*, 1975 CanLII 7 (SCC), [1976] 1 S.C.R. 376; *Bliss v. The Attorney General of Canada*, 1978 CanLII 25 (SCC), [1979] 1 S.C.R. 183; and *MacKay v. The Queen*, 1980 CanLII 217 (SCC), [1980] 2 S.C.R. 370.

All of these cases with the exception of the *Bliss* case, which dealt with entitlement to unemployment insurance benefits and where in fact the *Canadian Bill of Rights* was held not to apply, dealt with loss or denial of very substantive fundamental rights of some kind or involved criminal or quasi-criminal responsibility and had nothing to do with the mere quantum of remuneration for services rendered.

"Equality before the law" in the *Canadian Bill of Rights* has, since its enactment, been interpreted as understood by Dicey, namely, that there are no exemptions from the ordinary law of the land for any privileged class. As Ritchie J. stated in *Curr v. The Queen*, *supra*, at page 916:

... I prefer to base this conclusion on my understanding that the meaning to be given to the language employed in the *Bill of Rights* is the meaning which it bore at the time when the Bill was enacted ...

104. The trial judge then referred to and quoted reasons to the same effect written by Ritchie J. in *Attorney General of Canada v. Lavell*, 1973 CanLII 175 (SCC), [1974] S.C.R. 1349, including the second meaning proposed by Dicey for the principle of the "rule of law":

It means again equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary courts.

The trial judge noted that these reasons of Ritchie J. had been quoted with approval by Martland J. speaking for the majority in *R. v. Burnshine*, 1974 CanLII 150 (SCC), [1975] 1 S.C.R. 693. The trial judge continued:

Even section 3 of the *Canadian Human Rights Act*, S.C. 1976-1977, c. 33 which has been enacted since then (proclaimed in force on the 14th of July, 1977) and by means of which counsel for the plaintiff sought to draw an analogy with the *Canadian Bill of Rights*, does not prohibit discrimination generally on grounds other than "race, national or ethnic origin,

colour, religion, age, sex, marital status, conviction for which a pardon has been granted and, in matters related to employment, physical handicap" It seems obvious that, in the case at bar, there exists no discrimination on any of the above-mentioned grounds.

Counsel for the plaintiff emphasized particularly the following statement of McIntyre J. in the *MacKay* case, *supra*, which is found at page 406 of the above-mentioned report:

The question which must be resolved in each case is whether such inequality as may be created by legislation affecting a special class--here the military--is arbitrary, capricious or unnecessary, or whether it is rationally based and acceptable as a necessary variation from the general principle of universal application of law to meet special conditions and to attain a necessary and desirable social objective.

This statement, in my view, does not support the proposition advanced on behalf of the plaintiff. As Martland J. stated in delivering the judgment for the Supreme Court of Canada in the *Prata* case, *supra*, at page 382 of the above-cited report of the case:

This Court has held that s. 1(b) of the *Canadian Bill of Rights* does not require that all federal statutes must apply to all individuals in the same manner. Legislation dealing with a particular class of people is valid if it is enacted for the purpose of achieving a valid federal objective (*R. v. Burnshine* (1974), 1974 CanLII 150 (SCC), 44 D.L.R. (3d) 584).

Since I find that the plaintiff cannot succeed under paragraph 1(b) of the *Canadian Bill of Rights* because the term "equality before the law" as used in that enactment does not refer and was never intended to refer to a question of equal pay for equal work, I shall refrain from dealing with the further answer advanced on behalf of the defendant to the effect that, even if "inequality": is found to exist, it in effect arises in the pursuit of a valid federal objective and that, in addition, the plaintiff has failed to discharge the onus of establishing that the requirement of making contributions is arbitrary, capricious or unnecessary.

105. To summarize the trial judge's reasons on this issue, as I understand them, s. 29.1 does not contravene the *Canadian Bill of Rights* because: first, s. 29.1 does not offend the kind of equality defined by Dicey in the second meaning he gave to the rule of law; second, the provisions of the *Canadian Bill of Rights* cannot be held to apply to "the mere quantum of remuneration for services rendered" without trivializing these provisions. Furthermore, the trial judge may also have suggested as is indicated by his reference to the *Canadian Human Rights Act*, that discrimination is not prohibited by the *Canadian Bill of Rights*, except on specifically mentioned grounds.

106. In the Federal Court of Appeal, Thurlow C.J. speaking for himself and for Heald J. had this to say on the *Canadian Bill of Rights* issue, at pp. 1016-17 of the Federal Court Reports:

The argument on the last-mentioned point, as I understood it, was that inequality before the law was created by the enactment because under it the respondent no longer enjoyed his right to salary without deductions for contributions to the same extent as other judges who held office before December 20, 1975. Reliance was placed on the reasoning of McIntyre J., in *MacKay v. The Queen*, [1980 CanLII 217 \(SCC\)](#), [1980] 2 S.C.R. 370, at page 406, and it was said that there was no valid federal objective to be attained by discriminating on December 20, 1975 between judges appointed on or before and those appointed after February 16, 1975, and that to do so was arbitrary, capricious and unnecessary.

...

The submission is thus based on the assumption that the legislation is within the legislative powers of Parliament. On that basis it seems to me that it cannot be said that Parliament, in requiring judges to participate in and contribute to a contributory pension scheme, was not seeking to achieve a valid federal objective. Moreover, the distinction made in the statute between judges appointed before a fixed date, for whom non-contributory pension provisions were already in existence, and judges to be appointed after that date so as ultimately, by the attrition of senior appointees through deaths and resignations, the whole body of the judiciary would be participants in and contributors to the contributory pension scheme seems to me to be but a manner of achieving the otherwise valid federal objective. Difficulty arises from the fact that the particular date chosen was earlier than the date of the coming into force of the Act but, harsh as the result may seem to be to one who did not know, as opposed to one who did know when appointed, that a contributory scheme to be applicable to all judges appointed after the date of the introduction of the bill was to be imposed, I do not think it can on that account be said that it has been established, in the sense referred to by Ritchie J., in the same case (*MacKay v. The Queen*, [1980 CanLII 217 \(SCC\)](#), [1980] 2 S.C.R. 370, at page 393, citing *The Queen v. Burnshine*, [1974 CanLII 150 \(SCC\)](#), [1975] 1 S.C.R. 693), that the provisions of the bill, including the choice of the date, were not enacted for the purpose of achieving the valid federal objective or that it was arbitrary or capricious or unnecessary for Parliament to have defined the class required to make contributions by reference to their being appointed after the date of the introduction of the bill. Accordingly, I would reject the contention and dismiss the cross-appeal.

107. At pages 1035 and 1036 of the Federal Court Reports, Pratte J. agreed with Addy J. that the Dicey concept of equality before the law had not been offended by the impugned provision. He also agreed that the whole of s. 29.1 of the *Judges Act* has been enacted by Parliament for the purpose of achieving a valid federal objective.

108. In this Court, counsel for the appellant did not reply upon the reasons of the trial judge to support their submission that the second constitutional question should be answered in the negative. They relied essentially upon the reasons of Thurlow C.J. on this point. They quoted part of these reasons in their factum and amplified them as follows:

The policy decision reflected in section 29.1 is that all federally funded and administered pension plans should be on a contributory basis, so that all those who might eventually receive retirement benefits from the Consolidated Revenue Fund will have contributed toward the cost of those benefits and thereby reduce the financial burden on future taxpayers. It is submitted that a decision to shift part of the costs of the plan to its beneficiaries cannot be considered arbitrary, capricious or unnecessary.

If the policy that the beneficiary should contribute is not unreasonable it is submitted that the means chosen to implement that policy do not render it objectionable or invalid in relation to the right to equality before the law. Parliament could have chosen to impose a contributory requirement at the full rate of 6½% and then 7% on all judges. However, it chose to protect the position of judges who were appointed prior to the introduction of the amending legislation and to phase in the contributory requirements progressively, by requiring contributions at the higher rate only from newly appointed judges. This progressive implementation of full contributions protected the legitimate expectations of the judges appointed prior to April [sic] 17, 1975, but it necessarily put them in a different position from that of judges appointed after the "trigger date" for the higher contributions.

109. While no submissions were made to us by counsel for the appellant with respect to the reasons of the trial judge on the *Canadian Bill of Rights* issue, I feel that these reasons should be addressed.

110. I first wish to dispel any suggestion that, in order to offend the *Canadian Bill of Rights*, a discriminatory provision must be discriminatory on some specifically mentioned ground such as race, national origin, colour, etc. The learned trial judge erred in this respect. In *Curr v. The Queen*, 1972 CanLII 15 (SCC), [1972] S.C.R. 889, Laskin J. as he then was, speaking for himself and six other members of the Court stated at pp. 896-97:

In considering the reach of ... s. 1(b) ... I do not read it as making the existence of any of the forms of prohibited discrimination a *sine qua non* of its operation. Rather, the prohibited discrimination is an additional lever to which federal legislation must respond. Putting the matter another way, federal legislation which does not offend s. 1 in respect of

any of the prohibited kinds of discrimination may nonetheless be offensive to s. 1 if it is violative of what is specified in any of the clauses (a) to (f) of s. 1. It is, *a fortiori*, offensive if there is discrimination by reason of race so as to deny equality before the law. That is what this Court decided in *Regina v. Drybones* and I need say no more on this point.

It is, therefore, not an answer to reliance by the appellant on ... s. 1(b) of the *Canadian Bill of Rights* that [a particular provision] does not discriminate against any person by reason of race, national origin, colour, religion or sex. The absence of such discrimination still leaves open the question whether [a particular provision] can be construed and applied without abrogating, abridging or infringing the rights of the individual listed in ... s. 1(b).

111. See also the *Burnshine* case, *supra*, at p. 700, and *Bliss v. Attorney General of Canada*, 1978 CanLII 25 (SCC), [1979] 1 S.C.R. 183, at p. 191.

112. As for the Diceyan concept of equality and the rule of law, perhaps its most classical application in Canadian jurisprudence was in *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, a case which antedates the *Canadian Bill of Rights*. It is true that this concept was sometimes adopted for the purposes of the *Canadian Bill of Rights*, but the early *dicta* in *Curr* and in *Lavell*, *supra*, to which Addy J. refers, do not represent the opinion of the majority of this Court in those cases. However, that concept was adopted by the majority of this Court in *Burnshine*, *supra*, although the extent to which the latter case turned on this adoption is not clear.

113. The adoption of Dicey's concept of equality for the purposes of the *Canadian Bill of Rights* was criticized in some doctrinal works. Dicey's concept of equality was said to be outdated, unduly narrow and otherwise inappropriate for the purposes of the *Canadian Bill of Rights*: W. S. Tarnopolsky, *The Canadian Bill of Rights* (2nd ed. 1975), pp. 120, 158 to 160, 297 and 298.

114. Of the five equality cases decided by this Court after the *Burnshine* case, *supra*, on the basis of the *Canadian Bill of Rights* that is, *Attorney General of Canada v. Canard*, 1975

CanLII 137 (SCC), [1976] 1 S.C.R. 170, *Prata v. Minister of Manpower and Immigration*, 1975 CanLII 7 (SCC), [1976] 1 S.C.R. 376, the *Bliss* case, *supra*, and *MacKay v. The Queen*, 1980 CanLII 217 (SCC), [1980] 2 S.C.R. 370, only one, the *Bliss* case, alludes to the Dicey concept of equality, at p. 192. But on the same page, Ritchie J., who delivered the judgment of the Court, mentioned a broader test applied by Pratte J. of the Federal Court of Appeal:

... the right to equality before the law could be defined as the right of an individual to be treated as well by the legislation as others who, if only relevant facts were taken into consideration, would be judged to be in the same situation.

Mr. Justice Pratte concluded that where difference in treatment of individuals is based on a relevant distinction, the right to equality before the law would not be offended.

Not only did Ritchie J. not disapprove this other test but, on p. 193, he proceeded to apply it to decide that the legislation challenged in that case did not offend the *Canadian Bill of Rights*. Furthermore, in the *Canard* case, *supra*, Ritchie J. with whom Martland and Judson JJ. agreed, in concurring reasons allowing the appeal, took at p. 191, at least in terms if not in the result, a much broader approach than the narrow Diceyan test:

The *Bill of Rights* was designed to eradicate any discriminatory laws passed by the Parliament of Canada and to guarantee the rights and freedoms therein specified to all Canadian citizens, but these guarantees are expressly declared in the preamble to the Bill to be enacted so as to "reflect the respect of Parliament for its constitution", and s. 91(24) of that document clearly vests in the Parliament of Canada the authority to pass laws concerning Indians which are different from the laws which the provincial legislatures may enact concerning the citizens of the various provinces.

115. I accordingly think that this Court is not bound by the Dicey test of equality nor prevented from adopting a more egalitarian approach.

116. Finally I come to the trivialization point made by the trial judge to the effect that the *Canadian Bill of Rights* should not be applied to "the mere quantum of remuneration for

services rendered" and "to a question of equal pay for equal work".

117. Before I do so however, I should perhaps define my position with respect to the characterization of the impugned enactment. The trial judge and Pratte J. dissenting, held that s. 29.1 of the *Judges Act* operated a reduction in the respondent's salary whereas Thurlow C.J., and as it seems, Heald J., held that the provision did not reduce the amount credited to the respondent as salary but forced him to contribute to a pension scheme. Given the form of s. 29.1, I am rather inclined to share the view of Thurlow C.J. on this point although, on the *Canadian Bill of Rights* issue, it does not matter whether the respondent suffered a reduction in salary or was forced to contribute to a pension scheme with a corresponding reduction of the amount actually paid to him as his salary.

118. In my view however, this case has nothing to do with the "equal pay for equal work" principle. It does have to do with money and the financial benefits attached to the respondent's office, but I think that the uneven distribution of financial benefits is quite capable of producing the type of inequality forbidden by s. 1(b) of the *Canadian Bill of Rights*. It was the entitlement of women to unemployment insurance benefits that was in issue in the *Bliss* case, *supra*, and nobody suggested that on that ground the case was incapable of or somehow unworthy of giving rise to arguable submissions advanced pursuant to the equality provisions of the *Canadian Bill of Rights*. More individuals were affected by the *Bliss* case, than by the case at bar. However, the amounts involved in the case at bar are considerably more substantial than those in the *Bliss* case.

119. Furthermore, the benefits involved in the case at bar represent an important incident attached to the status of a high judicial officer and are linked with the dignity of his office, in real as well as in symbolic terms. The following remarks written by Thurlow C.J. are apposite. They are indicative of the gravity of the issues raised by this case, and that is the sole reason I

quote them. At pages 1024 and 1025 of the Federal Court Reports, the learned Chief Justice wrote:

The commission issues upon appointment of a judge by the Governor General under the authority of section 96 and the provincial statute setting up the office. It constitutes a grant both of the office with its authority and of the salary and other benefits attached by law at that time to the office as fixed by Parliament under section 99. The grant entitles the appointee to the salary so fixed in much the same way as a grant of money or land vests title to the money or the land in the grantee. It is something that cannot be taken from him except by due process of law. Due process may include expropriation by the authority of the legislature, but it is established principle that the legislature is not, in the absence of a clear expression of intent to the contrary, to be taken as intending to expropriate without due compensation. And a taking without compensation is extraordinary. It is something that Parliament, ordinarily at least, avoids. It is, in my view, the reason why, in a number of statutes relating to judges' salaries, provisions referred to as grandfather clauses to protect the position of incumbent judges have been included. But the fact they have been included is not in itself a basis for saying that Parliament does not have the legal power to expropriate without compensation or to take away rights that have been lawfully granted.

As Parliament has under section 100 the responsibility to fix and provide the salaries of judges, it seems to me that as a matter of interpretation of the language of the section Parliament must have a continuing power to fix such salaries and that that power is not restricted to the fixing of salaries for judges to be subsequently appointed. Plainly Parliament can increase the salaries of judges who are in office and it seems to me that as a matter of naked power it can also decrease them even though such decrease may be regarded by the incumbent judges as confiscatory and unjust and may be in substance a derogation from the grant lawfully made by the Governor General in the judge's commission.

120. Finally if, as I think, the impugned enactment contravenes s. 1(b) of the *Canadian Bill of Rights*, it takes on an added dimension in that it treats unevenly judges who are expected to administer justice with an even hand. Furthermore, it emanates from the very Parliament which is the custodian of judges' independence. While the impugned enactment is not sufficiently severe to impair the independence of judges, it is one that tend to affect the serenity of those concerned for the rest of their term of office. Judges may be expected to rise above such considerations but it is difficult to see how it could be conducive to the better administration of justice that they should be put to the test.

121. I now turn to the "valid federal objective" argument retained by the majority of the Federal Court of Appeal and advanced by the appellant in support of the impugned enactment.
122. Relying on the authority of *Burnshine, supra*, at pp. 707 and 708, and of *Bliss, supra*, at p. 194, the appellant submits that the onus lies with the respondent to demonstrate that a valid federal objective was not being sought by Parliament. The extent to which this onus is of an evidentiary or of a persuasive nature, and whether this onus, whatever its weight, can be discharged by inferences drawn from the impugned legislation, are questions which may ultimately require clarification. I should have thought that where a challenged provision *prima facie* offends against the principle of equality before the law and does so for reasons which neither appear on its face nor can be inferred from its nature, then it would be incumbent upon the Attorney General, who is in a much better position to do so, to demonstrate what valid objective was being sought by the legislation.
123. Be that as it may, the question of onus does not really arise in the case at bar since I am quite prepared to accept that s. 29.1 of the *Judges Act* was enacted by Parliament in the pursuit of a valid federal objective, as was held by the Federal Court of Appeal and as is submitted by the appellant.
124. Paraphrasing the above-quoted reasons of Thurlow C.J. and the submissions of the appellant, I would describe the valid federal objective in question as follows: the policy decision reflected in s. 29.1 of the *Judges Act* is that judges' pension plans should be on a contributory basis in order to reduce the financial burden on future taxpayers; Parliament chose to phase in the contributory requirement, by requiring contributions at the higher rate only from newly appointed judges so that, through the attrition of senior appointees as a result of death and resignations, the whole body of the judiciary would eventually participate in the contributory scheme.

125. To repeat, I am prepared to accept that the above-mentioned federal objective is a valid one.

126. What I am not prepared to agree with, on the other hand, with great respect for those who hold a contrary view, is that the manner or means chosen to achieve this valid federal objective, which manner or means themselves establish a new classification and discriminate between incumbent judges, should be immunized from the principle of universal application of the law. So to dispense altogether such manner or means from the equality provision of the *Canadian Bill of Rights* would have the effect of emasculating this provision; in my view, it is in part to guard against this danger that McIntyre J., writing for himself and for Dickson J., as he then was, wrote his concurring reasons in the *MacKay* case, *supra*. I find it appropriate to quote a substantial portion of those reasons. The main issue in that case was set out in these words at p. 401:

Whether the provisions of the *National Defence Act* which authorize the trial by a service tribunal of military personnel charged with criminal offences committed in Canada contrary to the *Narcotic Control Act* or the *Criminal Code* are inoperable by reason of the *Canadian Bill of Rights*.

At page 402, McIntyre J. dealt with the historical background of military law and, at pp. 403 to 405, with the application of s. 2(f) of the *Canadian Bill of Rights* to the facts of that case. Then, at pp. 405 and following, McIntyre J. dealt with the application of s. 1(b) of the *Canadian Bill of Rights*:

The appellant's second point raises the question of whether the trial of servicemen by court martial under military law for an offence under the criminal law of Canada or as here under the *Narcotic Control Act* deprives the serviceman of equality before the law contrary to the provisions of s. 1(b) and s. 2 of the *Canadian Bill of Rights*.

This Court decided in *Regina v. Drybones*, 1969 CanLII 1 (SCC), [1970] S.C.R. 282, that the *Canadian Bill of Rights* was effective to render inoperative validly enacted federal legislation where such legislation infringed the right of a subject to equality before the law. Judicial construction of the words "equality before the law" found in such cases as *The Queen v. Burnshine*, 1974 CanLII 150 (SCC), [1975] 1 S.C.R. 693, *Prata v. The Minister of Manpower and Immigration*, 1975 CanLII 7 (SCC), [1976] 1 S.C.R. 376, and *Bliss v. A.G. Canada*, 1978 CanLII 25 (SCC), [1979] 1 S.C.R. 183, has

advanced the proposition that legislation passed by Parliament does not offend against the principle of equality before the law if passed in pursuance of a "valid federal objective". The significance of these words must be examined.

Prior to the passing of the *Canadian Bill of Rights*, Parliament could have passed in the exercise of its power under s. 91(7) of the *British North America Act* without restriction such legislation in respect of the governance and control of the armed forces as it wished. The *Canadian Bill of Rights*, however, has introduced another dimension and federal legislation must now be construed according to its precepts. Certainly the creation and maintenance of the armed forces of the land constitute a valid federal objective within the legislative competence of the federal Parliament. A valid federal objective, however, must mean something more than an objective which simply falls within the federal legislative competence under the *British North America Act*. Even in the absence of the *Canadian Bill of Rights*, a federal enactment could not be supported constitutionally if it did not embody such an objective. The word "valid" in this context must import a concept of validity not only within the field of constitutional legislative competence but also valid in the sense that it does not offend the *Canadian Bill of Rights*. Our task then is to determine whether in pursuit of an admittedly constitutional federal objective Parliament has, contrary to the provisions of the *Canadian Bill of Rights*, created for those subject to military law a condition of inequality before the law.

It seems to me that it is incontestable that Parliament has the power to legislate in such a way as to affect one group or class in society as distinct from another without any necessary offence to the *Canadian Bill of Rights*. The problem arises however when we attempt to determine an acceptable basis for the definition of such a separate class, and the nature of the special legislation involved. Equality in this context must not be synonymous with mere universality of application. There are many differing circumstances and conditions affecting different groups which will dictate different treatment. The question which must be resolved in each case is whether such inequality as may be created by legislation affecting a special class--here the military--is arbitrary, capricious or unnecessary, or whether it is rationally based and acceptable as a necessary variation from the general principle of universal application of law to meet special conditions and to attain a necessary and desirable social objective.

There are many such acceptable distinctions recognized in the law. If we are to have safety on the highways, the blind or those with deficient sight must be forbidden to drive. If young people and children are to be protected and their welfare fostered in youth, we have long recognized that special legislative provisions must be made for them imposing restrictions and limitations upon their freedom more stringent than upon adults. In matters of criminology, differences which have been considered conducive to the welfare of society and to young offenders have been considered permissible (see *Regina v. Burnshine, supra*). There are many such cases where the needs of society and the welfare of its members dictate inequality for the achievement of socially desirable purposes. It would be difficult, if not impossible, to propound an all-embracing test to determine what departures from the general principle of the equal application of law would be acceptable to meet a desirable social purpose without offence to the *Canadian Bill of Rights*. I would be of the opinion, however, that as a minimum it would be necessary to inquire whether any inequality has been created for a valid federal constitutional objective, whether it has been created rationally in the sense that it is not arbitrary or capricious and not based upon any ulterior motive or motives offensive to the provisions of the *Canadian Bill of*

Rights, and whether it is a necessary departure from the general principle of universal application of the law for the attainment of some necessary and desirable social objective. Inequalities created for such purposes may well be acceptable under the Canadian Bill of Rights.

Applying this test, it seems to me that the creation of a body of military law and the tribunals necessary for its administration, involving as a necessary incident thereto different treatment at law for servicemen in certain cases from that afforded to civilians, does not by itself constitute a denial of equality before the law contrary to the provisions of the *Canadian Bill of Rights*. It is apparent that the creation of military law and its courts was undertaken in pursuit of a constitutional federal objective. It has been done in my view rationally, not arbitrarily or capriciously, and no ulterior motive has been shown which could be construed as an assault upon any of the rights, liberties and freedoms protected by the *Canadian Bill of Rights*. It seems abundantly clear to me that the emergence of a body of military law with its judicial tribunals has been made necessary because of the peculiar problems which face the military in the performance of its varied tasks. In my opinion, the recognition of the military as a class within society in respect of which special legislation exists dealing with legal rights and remedies, including special courts and methods of trial, fulfilling as it does a socially desirable objective, does not offend the Canadian Bill of Rights.

It must not however be forgotten that, since the principle of equality before the law is to be maintained, departures should be countenanced only where necessary for the attainment of desirable social objectives, and then only to the extent necessary in the circumstances to make possible the attainment of such objectives. The needs of the military must be met but the departure from the concept of equality before the law must not be greater than is necessary for those needs. The principle which should be maintained is that the rights of the serviceman at civil law should be affected as little as possible considering the requirements of military discipline and the efficiency of the service. With this concept in mind, I turn to the situation presented in this case.

Section 2 of the *National Defence Act* defines a service offence as "an offence under this Act, the *Criminal Code*, or any other Act of the Parliament of Canada, committed by a person while subject to the Code of Service Discipline". The Act also provides that such offences will be triable and punishable under military law. If we are to apply the definition of service offence literally, then all prosecutions of servicemen for any offences under any penal statute of Canada could be conducted in military courts. In a country with a well-established judicial system serving all parts of the country in which the prosecution of criminal offences and the constitution of courts of criminal jurisdiction is the responsibility of the provincial governments, I find it impossible to accept the proposition that the legitimate needs of the military extend so far. It is not necessary for the attainment of any socially desirable objective connected with the military service to extend the reach of the military courts to that extent. It may well be said that the military courts will not, as a matter of practice, seek to extend their jurisdiction over the whole field of criminal law as it affects the members of the armed services. This may well be so, but we are not concerned here with the actual conduct of military courts. Our problem is one of defining the limits of their jurisdiction and in my view it would offend against the principle of equality before the law to construe the provisions of the *National Defence Act* so as to give this literal meaning to the definition of a service offence. The all-embracing reach of the questioned provisions of the *National Defence Act* goes far beyond any reasonable or required limit.

...

It is of course evident that there are many matters peculiar to the military which require a special code and special courts. I refer to what I would describe as specifically military offences, such as absence without leave, desertion, insubordination, failure to observe and comply with military regulations regarding care and handling and use of military store and equipment, failure to obey lawful commands of officers and a host of other matters dealt with in the *National Defence Act* which relate to service matters and concerns and which require special military rules and procedures. These form part of the proper field of military law and military courts. There are, in addition, other offences which, while offences under the civil law, are also, when committed by servicemen in relation to military service, properly to be considered within the scope of the military courts. Theft is a criminal offence punishable in the civil courts but it would, I suggest, be impossible to say that theft by one soldier from another in barracks is not as well an offence which could be categorized as a military offence and come within the purview of military law. The same is true of trafficking or possession of forbidden narcotics in barracks, the same is true of many other matters and the military courts must have power to deal with them in addition to those offences which could be categorized as military offences pure and simple.

The question then arises: how is a line to be drawn separating the service-related or military offence from the offence which has no necessary connection with the service? In my view, an offence which would be an offence at civil law, when committed by a civilian, is as well an offence falling within the jurisdiction of the courts martial and within the purview of military law when committed by a serviceman if such offence is so connected with the service in its nature, and in the circumstances of its commission, that it would tend to affect the general standard of discipline and efficiency of the service. I do not consider it wise or possible to catalogue the offences which could fall into this category or try to describe them in their precise nature and detail. The question of jurisdiction to deal with such offences would have to be determined on a case-by-case basis. A serviceman charged in a service court who wished to challenge the jurisdiction of the military court on this basis could do so on a preliminary motion. It seems, by way of illustration, that a case of criminal negligence, causing death resulting from the operation of a military vehicle by a serviceman in the course of his duty, would come within the jurisdiction of the court martial, while the same accident, occurring while the serviceman was driving his own vehicle on leave and away from his military base or any other military establishment, would clearly not. It may be observed that, on an admittedly different constitutional basis, this approach has been taken in American courts where a possible conflict of jurisdiction has arisen between the military tribunals and the civil courts.

I would therefore hold that the provisions of the *National Defence Act*, in so far as they confer jurisdiction upon courts martial to try servicemen in Canada for offences which are offences under the penal statutes of Canada for which civilians might also be tried, and where the commission and nature of such offences has no necessary connection with the service, in the sense that their commission does not tend to affect the standards of

efficiency and discipline of the service, are inoperative as being contrary to the *Canadian Bill of Rights* in that they create inequality before the law for the serviceman involved.

Turning to the case at bar, I have no difficulty in holding that the offences here under consideration are sufficiently connected with the service to come within the jurisdiction of the military courts. Trafficking and possession of narcotics, in a military establishment, can have no other tendency than to attack the standards of discipline and efficiency of the service and must clearly come within the jurisdiction of the military courts and I would, therefore, dismiss the appeal.

127. I adopt the above-quoted reasons in MacKay, *supra*.

128. The test which is emphasized throughout those reasons is that of the necessity of a specific discrimination with respect to the attainment of a desirable social objective:

The question which must be resolved in each case is whether such inequality as may be created by legislation affecting a special class ... is arbitrary, capricious or unnecessary, or whether it is rationally based and acceptable as a necessary variation from the general principle of universal application of law to meet special conditions and to attain a necessary and desirable social objective.

(Emphasis added.)

129. Furthermore, the test is all the more exacting in that it includes an essential element of proportionality; even where variation from the principle of universal application of the law is justified, the principle cannot be tampered with to a degree or to an extent which goes beyond what is necessary to reach a desirable social objective:

... since the principle of equality before the law is to be maintained, departures should be countenanced only where necessary for the attainment of desirable social objectives, and then only to the extent necessary in the circumstances to make possible the attainment of such objectives. The needs of the military must be met but the departure from the concept of equality before the law must not be greater than is necessary for those needs.

(Emphasis added.)

130. To the extent that a specific discrimination is unnecessary to achieve a valid social objective, it is arbitrary or capricious and in violation of the principle of equality.
131. It seems to me that this test, including its element of proportionality, clearly extends to the manner or means chosen to achieve a valid federal objective, particularly where this manner or these means introduce the very inequality complained of. This manner or these means must then be carefully scrutinized by the courts and they must be struck down whenever they do not meet the test.
132. Applying this test to the facts of the case at bar, it evidently cannot be said that the distinction made by s. 29.1 of the *Judges Act* between incumbent judges was necessary to achieve the above-mentioned federal objective. This distinction was effected by the selection of the date of first reading of the bill as a cut-off point to implement the phasing-in feature of the federal enactment and there was clearly no necessity to select this date.
133. In order to prevent hoarding and other type of speculation, budgetary measures are sometimes enforced from the time they are announced in the House of Commons and there might be similar rational motives to make a law retroactive to the time it was introduced in Parliament. But no such rational motives have been advanced or appear to exist in the case at bar where the selection of the cut-off point, with its discriminatory effect, is entirely arbitrary and capricious. The selection of a cut-off point reaching back two or three years earlier for instance would appear even more glaringly arbitrary and in my view, in the circumstances of the case at bar, there is no difference in the date of first reading that makes its selection any less arbitrary and capricious than the selection of an earlier date.
134. It may well be that if Parliament wanted to phase-in the implementation of the new measure and to abide by s. 1(b) of the *Canadian Bill of Rights*, its only choice as to the cut-off date was the date of enactment. The selection of the latter date would admittedly have put all

incumbent judges and judges appointed after the date of enactment on a different footing. But that is what "grandfather" clauses are about and it is accepted in the case at bar that "grandfathering" was an essential feature of the valid federal objective pursued by Parliament. The only alternative would be to hold that Parliament could not "grandfather" incumbent judges at all without offending the principle of equality before the law. Nobody has made such a far-reaching submission which would run contrary to a seemingly ancient and constant usage, as was indicated by Addy J. at p. 557 of the Federal Court Reports:

. . . the numerous Canadian statutes effecting judges' salaries enacted since 1846 until 1932 quoted by the defendant . . . clearly establish various categories of compensation for judges of equal rank from time to time, without the slightest objection being raised even indirectly on the grounds that the legislation was discriminatory. It is important to note also, however, that in this legislation whenever required to protect the compensation being paid to incumbents, "grandfather" clauses were inserted in the legislation and that, in the one or two cases where that precaution was not taken at the time of the passing of the legislation, an amending statute was subsequently enacted to rectify the situation. (V.g.: S.C. 1927, c. 33 which reduced the retirement annuity of certain judges to two-thirds of salary was amended by S.C. 1930, c. 27 where retirement at full salary of those judges was restored).

135. Furthermore, judges appointed after the date of enactment know or are presumed to know the law when they freely accept the appointment, and none of them has ever been treated on the same footing as judges who have been "grandfathered": they are members of a new class the creation of which was necessary to attain a valid federal objective.

136. Assuming that Parliament is under no constitutional obligation to "grandfather" any incumbent judge, it may appear anomalous, at first, that it should be blamed for not "grandfathering" all incumbent judges, but only some of them, albeit the majority in this case. The apparent anomaly is explained however when it is remembered that the principle of equality is capable of being offended against by the uneven granting of favourable treatment within a class, as well as by the uneven imposition of unfavourable treatment.

137. In the above-quoted passage of their factum, counsel for the appellant write that the

. . . progressive implementation of full contributions protected the legitimate expectations of the judges appointed prior to April [*sic*] 17, 1975 . . .

(Emphasis added.)

And I note that in his reasons for judgment, the Chief Justice characterizes the same concept as "the settled expectations" of earlier appointees. With the greatest of respect, I fail to see why the respondent's expectations were any less settled or legitimate than those of his fellow judges appointed before the date of first reading of the bill.

138. Implicit in the position of the appellant is the following proposition: if the respondent, unlike judges appointed before February 17, 1975 could have no expectations susceptible to be protected, it must be because he was put on notice that the *Judges Act* was likely to be amended by the mere fact of first reading of the bill, and he should have been alerted to the risk of changing his position. It is the only rational explanation that comes to mind for the selection of the cut-off date and it is the only one that is inferentially suggested in appellant's factum. It is also an explanation which must have crossed the mind of the trial judge who, at p. 548 of the Federal Court Reports wrote as follows, and correctly so in my view:

Although one is deemed to know the law of the land, there is no such presumption in the case of Bills not yet enacted. No one is bound by their contents. Having regard to the substantive and progressive emasculation of certain Bills in their stormy passage through Parliament, such Bills as are finally passed into law frequently bear little resemblance either in substance or in form to the original proposal. It would be grossly unjust to impute to anyone, other than perhaps a Member of Parliament, constructive knowledge of the business of Parliament.

139. The suggestion that the respondent may have been put on notice by the mere fact of first reading is not only factually erroneous in this case where it is conceded that he was unaware of that fact: it is also founded on a dangerous and far-reaching error in law in that it presumes knowledge of and reliance upon a bill as opposed to knowledge of and reliance upon the law.

140. On January 27, 1976, the Minister of Justice and Attorney General of Canada responded in writing to a letter written to him by the respondent. After stating that the impugned enactment had received Royal Assent on December 20, 1975, with its provisions unchanged, the Minister's letter continues as follows:

Prior to this event I had raised your concerns with several of my colleagues and indeed, an attempt was made while the Bill was before the joint House of Commons-Senate Committee to amend the clause so that the higher rate of contributions would apply only to judges appointed to office after the Royal Assent date. Unfortunately, the amendment that would have had this result was ruled out of order on procedural grounds.

141. In my opinion, this late and unsuccessful attempt to have the bill amended along the lines indicated by the Minister, and the Minister's letter constitute an admission that the bill in question was flawed in that it unnecessarily discriminated against certain incumbent judges.

142. I have reached the conclusion that s. 29.1(2) of the *Judges Act* is inconsistent with s. 1(b) of the *Canadian Bill of Rights* and that the respondent is entitled to a declaration that this subsection is inoperative in so far as the respondent is concerned.

143. In addition, the respondent seeks a declaration that the words "before February 17, 1975" in s. 29.1(1) of the *Judges Act* are inoperative in so far as he is concerned. The reason why the respondent is seeking such a declaration, according to his factum, is to avoid being placed on a higher footing than that of his senior colleagues, appointed before February 17, 1975, who at present, have to contribute one and one-half per cent of their salary to the Consolidated Revenue Fund. In other words, the respondent is asking us to remedy one element of inequality with his colleagues, but not at the cost of creating or leaving another element of inequality within the same class of judges.

144. On the face of it, we could not grant such a declaration at large without creating an insoluble problem: judges appointed after February 16, 1975 would then have to contribute one and one-half per cent of their salary in addition to the seven per cent they have to contribute under s. 29.1(2). However, no problem would arise, so far as I can see, if the effect of the declaration is limited to the respondent.
145. The respondent is not asking us to redraft the impugned enactment but simply to declare these few words inoperative in so far as he is concerned, in order to restore complete equality within the class to which he belongs. I have reached the conclusion that it is legitimate for him to seek complete redress in a case of this sort and that he is entitled to the full declaration he is requesting.
146. Before I reach my final conclusion, I should perhaps state that a short time before the respondent's appointment, judges' salaries were increased by 39 per cent, and pensions to widowed spouses and children by 50 per cent: An Act to amend the Judges Act and certain other Acts for related purposes and in respect of the reconstitution of the *Supreme Courts of Newfoundland and Prince Edward Island*, S.C. 1974-75-76, c. 48. These increases together with the subsequent enactment of s. 29.1 of the *Judges Act* were sometimes referred to as a "package" and may be relevant to a discussion of the first constitutional question. In my view however, these increases are entirely irrelevant in so far as the second constitutional question is concerned since all incumbent judges profited by these increases, including those appointed before February 17, 1975.

VI--Conclusion

147. I would allow the appeal, set aside the judgment of the Federal Court of Appeal and the declaration granted by the trial judge. I would allow the cross-appeal and, to the declaration granted by the trial judge, I would substitute the following declaration:

148. The words "before February 17, 1975" of s. 29.1(1) and the whole of s. 29.1(2) of the *Judges Act*, as enacted by s. 100 of S.C. 1974-75-76, c. 81, are inoperative in so far as the plaintiff is concerned.
149. I would answer the first constitutional question in the negative.
150. I would answer the second constitutional question as follows:
151. The words "before February 17, 1975" of s. 29.1(1) and the whole of s. 29.1(2) of the *Judges Act* as amended by s. 100 of the *Statute law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, are inconsistent with s. 1(b) of the *Canadian Bill of Rights* and, to the extent of the inconsistency, of no force or effect in so far as the respondent is concerned.
152. I would allow the respondent his costs throughout.

Appeal allowed, BEETZ and MCINTYRE JJ. dissenting in part.

Solicitor for the appellant: Roger Tassé, Ottawa.

Solicitor for the respondent: David W. Scott, Ottawa.

Tab 86

McEvoy v. Attorney General for New Brunswick et al., 1983 CanLII 149 (SCC), [1983] 1 SCR 704

Source:	Supreme Court of Canada
Date:	1983-06-07
File number:	16773
Other citations:	46 NBR (2d) 219 — 148 DLR (3d) 25 — 48 NR 228 — 121 APR 219 — 4 CCC (3d) 289 — 10 WCB 30 — [1983] SCJ No 51 (QL)
Citation:	McEvoy v. Attorney General for New Brunswick et al., 1983 CanLII 149 (SCC), [1983] 1 SCR 704, < https://canlii.ca/t/1xv7b >, retrieved on 2026-03-23
Most recent unfavourable mention	Luo v. Canada (Attorney General) , 1997 CanLII 16265 (ON SC) [...] In that respect, the situation is distinguishable from that which existed in McEvoy v. New Brunswick (Attorney General), 1983 CanLII 149 (SCC) , [1983] 1 S.C.R. 704, 148 D.L.R. (3d) 25, where a province and Parliament together attempted to confer jurisdiction protected by s. 96 on a court presided over by provincially [...]

Supreme Court of Canada

McEvoy v. Attorney General for New Brunswick et al., [1983] 1 S.C.R. 704

Date: 1983-06-07

John P. McEvoy *Appellant*;

and

The Attorney General for New Brunswick *Respondent*;

and

The Attorney General of Canada *Respondent*.

File No.: 16773.

1983: February 8; 1983: June 7.

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

Constitutional law—Proposal to establish unified criminal court—Transfer of criminal jurisdiction to new court—Judges provincially appointed—Inferior court transformed into a superior court—Whether proposal constitutional—Constitution Act, 1867, R.S.C 1970, Appendix II, ss. 91(2), 92(14), 96.

Appeal—Reference—Abstract questions—Whether the Court should answer referred questions—Judicature Act, R.S.N.B. 1973, c. J-2 as amended, s. 23(1).

The Lieutenant-Governor in Council of New Brunswick referred three questions to the Court of Appeal to determine the constitutional validity of a proposal to establish a unified criminal court in the province. The new court, which would exercise complete criminal jurisdiction, would replace the present Provincial Court and its judges would be provincially appointed. Parliament would be requested to amend the *Criminal Code* and other federal statutes to confer jurisdiction in criminal matters upon the new court. The Court of Appeal answered the three questions in the affirmative. Hence this appeal to determine whether s. 96 of the *Constitution Act, 1867* bars the proposal.

Held: The appeal should be allowed and the three questions answered in the negative.

Parliament can no more give away federal constitutional powers than a province can usurp them. Here, what was being contemplated was the complete obliteration of superior court criminal law jurisdiction. The effect of this proposal to transfer the present superior court criminal jurisdiction over indictable offences to a

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provincial court would be to deprive the Governor General of his power under s. 96 to appoint the judges who try indictable offences in New Brunswick. This is contrary to s. 96. This section bars Parliament and the provincial legislatures from altering the constitutional scheme envisaged by the judicature sections of the *Constitution Act, 1867* which guarantee the independence of the superior courts from both levels of government. The result would be the same if the new court was given concurrent criminal jurisdiction with the superior court, since s. 96 is an insuperable obstacle to any attempt to transform an inferior court into a superior court.

Re The Educational System in the Island of Montreal, 1926 CanLII 67 (SCC), [1926] S.C.R. 246; *Reference re Waters and Water-Powers*, 1929 CanLII 72 (SCC), [1929] S.C.R. 200; *Reference re Angliers Railway Crossing*, 1937 CanLII 51 (SCC), [1937] S.C.R. 451; *Re Authority of Parliament in Relation to the Upper House*, 1979 CanLII 169 (SCC), [1980] 1 S.C.R. 54; *Attorney-General for Manitoba v. Manitoba Egg and Poultry Association*, 1971 CanLII 135 (SCC), [1971] S.C.R. 689; *Reference re Regulation and Control of Aeronautics in Canada*, 1930 CanLII 79 (SCC), [1930] S.C.R. 663; *In Re Marriage Laws* (1912), 1912 CanLII 35 (SCC), 46 S.C.R. 132; *Re Resolution to amend the Constitution*, 1981 CanLII 25 (SCC), [1981] 1 S.C.R. 753; *Re Vancini* (1904), 1904 CanLII 72 (SCC), 34 S.C.R. 621; *Papp v. Papp*, 1969 CanLII 219 (ON CA), [1970] 1 O.R. 331; *Nanaimo Community Hotel v. Board of Referees*, 1945 CanLII 302 (BC CA), [1945] 3 D.L.R. 225; *O. Martineau & Sons, Ltd. v. City of Montreal*, 1931 CanLII 387 (UK JCPC), [1932] A.C. 113; *Toronto Corporation v. York Corporation*, 1938 CanLII 252 (UK JCPC), [1938] A.C. 415; *Valin v. Langlois* (1879), 1879 CanLII 29 (SCC), 3 S.C.R. 1; *Re Residential Tenancies Act*, 1979, 1981 CanLII 24 (SCC), [1981] 1 S.C.R. 714; *Crevier v.*

Attorney General of Quebec, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220; *In re Storgoff*, 1945 CanLII 17 (SCC), [1945] S.C.R. 526; *Re Rex v. Thompson*, 1946 CanLII 115 (ON CA), [1946] O.R. 560; *R. v. Marathon Paper Mills of Canada Ltd.*, 1947 CanLII 57 (ON CA), [1947] O.R. 532, referred to.

APPEAL from a judgment of the New Brunswick Court of Appeal (1981), 1981 CanLII 2602 (NB CA), 127 D.L.R. (3d) 214, 62 C.C.C. (2d) 164, 36 N.B.R. (2d) 609, 94 A.P.R. 609, answering in the affirmative three questions referred by the Lieutenant-Governor in Council and concerning the constitutional validity of a proposal to establish a unified criminal court in New Brunswick. Appeal allowed.

B.A. Crane, Q.C., and John P. McEvoy, for the appellant.

Bruce Judah and Barry Athey, for the respondent the Attorney General for New Brunswick.

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John R. Power, Q.C., and M.L. Basta, for the respondent the Attorney General of Canada.

Judgment delivered by

THE COURT—This is an appeal from a unanimous judgment of the New Brunswick Court of Appeal, delivered by Hughes C.J.N.B., answering in the affirmative three questions put before that Court on a reference by the provincial Lieutenant-Governor in Council pursuant to s. 23(1) of the *Judicature Act*, R.S.N.B. 1973, c. J-2, as amended. The questions, attached as a schedule to the reference Order, are stated to be draft questions directed to determine the constitutional validity of a proposed course of action with respect to the establishment of a unified criminal court in New Brunswick.

The three questions posed to the Court in New Brunswick, and the very same questions are now before this Court on appeal, read as follows:

1. Is it *intra vires* the Parliament of Canada to amend the *Criminal Code* to confer upon a court constituted by the legislature of a province, the judges of which are appointed by the Lieutenant-Governor in Council, exclusive jurisdiction to try all indictable offences under that Act?
2. Is it *intra vires* the Parliament of Canada to amend the *Criminal Code* to confer upon a court constituted by the legislature of a province, the judges of which are appointed by the Lieutenant-Governor in Council, jurisdiction to try all indictable offences under that Act, if that jurisdiction is concurrent with that of courts whose judges are appointed pursuant to section 96 of the *British North America Act*?
3. Is it *intra vires* the legislature of a province to constitute a court, the judges of which are appointed by the Lieutenant-Governor in Council, to exercise such jurisdiction in criminal law matters as is conferred upon it by the Parliament of Canada, if the jurisdiction conferred by Parliament is to try all indictable offences under the *Criminal Code*, and is either

(a) exclusive; or

(b) concurrent with that of courts whose judges are appointed pursuant to section 96 of the *British North America Act*?

It will be noted that Questions 1 and 2 relate to the constitutional power of the Parliament of

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Canada. Only Question 3 relates to the powers of the Provincial Legislature. The New Brunswick Court of Appeal answered all three questions in the affirmative.

In general terms the issue is whether s. 96 of the *Constitution Act, 1867* is a bar to a plan whereby the federal government and a provincial government would by conjoint action transfer the criminal jurisdiction of Provincial Superior Courts to a new court to be called the “unified criminal court” the judges of which would be provincially appointed.

1) Should this Court answer the Questions?

There is no draft legislation nor even any draft proposals to infuse the three questions which, in our view, suffer from excessive abstractness. There is no explanatory material, no supplementary notes, no draft report which would give concreteness to what is proposed. We are left to speculate as to the form the legislative schemes contemplated by the questions might take. When one realizes that what is intended is a drastic realignment of criminal law authority, an intended transfer, either exclusively or concurrently with existing provincial Superior Courts, to a new provincial Court in which judges appointed by the Province will sit to try all indictable offences, and that serious questions arise whether the proposed provincial Court is to have unreviewable jurisdiction subject perhaps to statutory rights of appeal, it will be seen how necessary or at least advantageous it would have been to have some direction as to the thrust of the proposed legislation under New Brunswick law and under federal law.

The Government of Canada has not adopted any policy for establishing a unified criminal Court nor, it appears, has the Government of New Brunswick, although the Attorney General of the Province is a proponent.

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This Court is entitled to exercise its judgment on whether it should answer referred questions if it concludes that they do not exhibit sufficient precision to permit cogent answers. This is irrespective of the fact that the reference power is couched in broad terms, as it is here. Section 23(1) of the *Judicature Act* of New Brunswick provides:

23. (1) Important questions of law or fact touching

(a) the interpretation of The British North America Acts,

(b) the constitutionality or interpretation of any Canadian or Provincial legislation,

(c) the powers of the Legislature of the Province, or the Gouvernement thereof, whether or not the particular power in question has been or is proposed to be exercised, or

(d) any other matter, whether or not in the opinion of the Court ejusdem generis with the foregoing enumeration, with reference to which the Lieutenant-Governor in Council sees fit to submit any such question,

may be referred by the Lieutenant-Governor in Council to the Court of Appeal for hearing and consideration, and any question touching any of the matters aforesaid, so referred by the Lieutenant-Governor in Council, shall be conclusively deemed to be an important question.

It will be observed that the Lieutenant-Governor in Council may refer questions touching the powers of the Legislature of the Province or the Government thereof “whether or not the particular power in question has been or is proposed to be exercised”.

Section 23(1) empowers a reference on the constitutionality or interpretation of any Canadian or provincial legislation. There is, however, no such legislation here, and it is a nice question whether proposed legislation of Parliament can be embraced unless it is subsumed under one of the other powers in s. 23(1), for example the interpretation of the *British North America Act*, now the [Constitution Act, 1867](#). The constitutional propriety of provincial legislation which invites the placing before the provincial courts of questions concerning the constitutionality of existing or pending

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federal legislation was not argued by any counsel before this Court and we expressly refrain from comment on such issue.

The first thing the Court has to decide then is whether we have been provided with an adequate base on which to answer the Lieutenant-Governor’s questions. Stripped to their essentials the questions are:

(1) Can Parliament confer exclusive jurisdiction to try all indictable offences under the *Criminal Code* on a new court whose judges are appointed by the province?

(2) Can Parliament do this if the new provincial court has concurrent jurisdiction with the New Brunswick Superior Courts?

(3) Can the New Brunswick Legislature constitute and appoint the judges to the new court if that court has either exclusive or concurrent jurisdiction?

This Court has from time to time refused to answer reference questions when it considered them lacking in specificity. The first such instance was *Re The Educational*

System in the Island of Montreal, [1926 CanLII 67 \(SCC\)](#), [1926] S.C.R. 246 (the *Montreal Schools* case). In that case the Quebec Legislature had passed *An Act to amend the law concerning education, with respect to persons professing the Jewish religion*. The Act provided, *inter alia*, that “persons professing the Jewish religion shall, for school purposes, be treated in the same manner as Protestants”. Numerous constitutional questions were submitted to the Quebec Court of Appeal. One of the questions was this:

Can the provincial legislature pass legislation providing that persons professing the Jewish religion be appointed: (a) To the Protestant Board of School Commissioners of the city of Montreal; or (b) To the Protestant Committee of Public Instruction; or (c) As advisory members of these bodies?

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On appeal from the decision of the Quebec Court of Appeal, this Court answered parts (a) and (b) of Question 3, but as to part (c) it said (at p. 270):

This question can be answered only when the powers and duties of such advisory members shall have been defined.

In *Reference re Waters and Water-Powers*, [1929 CanLII 72 \(SCC\)](#), [1929] S.C.R. 200 (the *Water-Powers* case), a Reference from the Governor General in Council, this Court declined to answer several questions, for example:

Question 2: Where the bed of a navigable river is vested in the Crown in the right of the province, has the Dominion power, for navigation purposes, to use or occupy part of such bed or to divert, diminish, or change the flow over such bed (a) without the consent of the province; (b) without compensation?

Question 3: Has the Parliament of Canada the power, by appropriate legislative enactment, to authorize the Dominion Government to expropriate the lands of the Crown in the right of the province for the purposes of navigation with provision or without provision for compensation?

Duff J. explained why the Court could not reply to these questions “categorically” (at p. 224):

...it is impossible to affirm, in respect of every “navigation purpose”, within the purport of these questions that the authority in relation thereto, whether derived from s. 92(10) and s. 91(29) or from one of the other heads of s. 91—whether within the exclusive sphere of the Dominion Parliament, or only referable to its incidental or ancillary powers—invests the Dominion with the right to override by its legislation the proprietary rights of the provinces.

There is no general formula for deciding whether or not, in respect of any such given purpose, the nature of the Dominion authority imports the existence of such a right. That can only be determined after an examination of the nature of the purpose, the character of the power invoked and the character of the means proposed to be employed in order to effectuate the purpose.

The Court also refused to answer questions 6(a) and 6(b) for the reasons given in the headnote.

The second part of question 8 read:

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In the case of river flowing between two provinces may such provinces jointly control, regulate and use the water in the same manner?

The Court replied (at p. 203):

As to the second branch, considering the variety of meanings which might attach to the phrase “jointly control, regulate or use”, no precise or useful answer is possible.

In *Reference re Angliers Railway Crossing*, [1937 CanLII 51 \(SCC\)](#), [1937] S.C.R. 451, this Court was concerned with certain questions of law submitted by way of stated case by the Board of Railway Commissioners for Canada pursuant to s. 43 of the *Railway Act*. The municipality of St. Eugène de Guigues, Quebec, had applied for a level crossing over the Canadian Pacific Railway tracks at Angliers. The Board of Railway Commissioners had authority to apportion the cost of such projects between the municipality and the railway. The determining circumstance, under the practice of the Board, was “seniority”, by which was meant, apparently, that when the railway was constructed on land over which the public had a right of passage the cost of the works necessary to provide a highway crossing fell upon the railway; while, if, when the railway was constructed, there were no such rights of passage, the cost of the works was borne by the municipality. The third question submitted to this Court was:

Whether the Chief Commissioner was right in holding that the railway company occupies a position of seniority in respect of the railway crossing, the subject of this application.

Referring to the Board’s “practice” of apportioning costs on the “seniority” basis, Duff C.J. explained the Court’s reason for declining to answer this question (at p. 455):

I do not profess to be stating with accuracy or completeness the practice of the Board; and, indeed, one of the questions submitted to us would seem to indicate that the practice is not so definitely settled as to enable one, with confidence, to sum it up in a precise rule.

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It is, perhaps, unnecessary to say that it is not part of the functions of this Court to define that practice. Accordingly, we shall not attempt to do so, and no answer will be given to the third question.

The most recent example of this Court declining to answer a reference question occurred in *Re Authority of Parliament in Relation to the Upper House*, [1979 CanLII 169 \(SCC\)](#), [1980] 1 S.C.R. 54 (the *Senate reference*). In that case the Governor General in Council

asked this Court to determine whether Parliament, without the consent of the provinces, had authority to repeal the sections of the *British North America Act* referring to the Senate, and to enact legislation altering or providing a replacement for the Senate. The Court held that Parliament could not repeal the relevant sections of the *British North America Act*; that it could not enact legislation to change the numbers and proportions of members by whom provinces and territories are represented in the Upper House; that it could not provide for the direct election of all or some of the members of the Upper House; and that it could not provide that bills approved by the House of Commons could be given assent and the force of law after the passage of a certain period of time notwithstanding that the Upper House has not approved them. The Court declined, however, to answer the following question:

2. Is it within the legislative authority of the Parliament of Canada to enact legislation altering, or providing a replacement for, the Upper House of Parliament, so as to effect any or all of the following:

(a) to change the name of the Upper House;

...

(c) to change the qualifications of members of that House;

(d) to change the tenure of members of that House;

(e) to change the method by which members of that House are chosen by

(i) conferring authority on provincial legislative assemblies to select, on the nomination of the respective Lieutenant Governors in Council, some members of the Upper House, and, if a legislative

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assembly has not selected such members within the time permitted, authority on the House of Commons to select those members on the nomination of the Governor General in Council, and

(ii) conferring authority on the House of Commons to select, on the nomination of the Governor General in Council, some members of the Upper House from each province, and, if the House of Commons has not selected such members from a province within the time permitted, authority on the legislative assembly of the province to select those members on the nomination of the Lieutenant Governor in Council,

(iii) conferring authority on the Lieutenant Governors in Council of the provinces or on some other body or bodies to select some or all of the members of the Upper House, or

...

As to sub-question 2(a) which asks whether Parliament could change the name of the Senate the Court said (at p. 76):

We would assume that a change of name would be proposed only as a part of some scheme for the alteration of the Senate itself. If that scheme were to be held *ultra vires* of Parliament, then the change of name would probably go with it. We do not think the question can properly be answered in the absence of such a context.

As to sub-question 2(c) dealing with changes to the qualifications of Senators the Court said:

The difficulty here is that we have not been told what changes are contemplated. Some of the qualifications for senators prescribed in s. 23, such as the property qualifications, may not today have the importance which they did when the Act was enacted. On the other hand, the requirement that a senator should be resident in the province for which he is appointed has relevance in relation to the sectional characteristic of the make-up of the Senate. In our opinion, the question cannot be answered categorically.

As to sub-question 2(d) dealing with the tenure of senators, the Court said “to answer this question we need to know what change of tenure is proposed” (at p. 77). As to sub-question 2(e)(i)(ii)(iii) the Court said:

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Sub-question (e), paragraphs (i), (ii), and (iii), contemplates changing the method of appointment of senators, presently the function of the Governor General, by having “some” members selected by provincial legislatures, “some” members by the House of Commons, “some” members selected by the Lieutenant Governor in Council or “some other body or bodies”. The selection of senators by a provincial legislature or by the Lieutenant Governor of a province would involve an indirect participation by the provinces in the enactment of federal legislation and is contrary to the reasoning of this Court in the *Lord Nelson Hotel* case previously cited.

Again, we do not feel that we have a factual context in which to formulate a satisfactory answer.

See also *Attorney-General for Manitoba v. Manitoba Egg and Poultry Association*, [1971 CanLII 135 \(SCC\)](#), [1971] S.C.R. 689; *Reference re Regulation and Control of Aeronautics in Canada*, [1930 CanLII 79 \(SCC\)](#), [1930] S.C.R. 663, and *In Re Marriage Laws* (1912), [1912 CanLII 35 \(SCC\)](#), 46 S.C.R. 132, wherein a majority of the judges either felt bound to, or found it unnecessary to, answer certain questions while a minority thought the questions should not be answered.

In *Re Resolution to amend the Constitution*, [1981 CanLII 25 \(SCC\)](#), [1981] 1 S.C.R. 753, the Chief Justice and Estey and McIntyre JJ., relying on the *Water-Powers* case gave this statement of the law (at p. 851):

Where there is ambiguity, or where questions are phrased in such general terms that a precise answer is difficult or impossible to give, the Court may qualify the answers, answer in general terms, or refuse to answer.

In two instances, the *Senate Reference* and the *Water-Powers* case, the Court refused to answer questions referred by the federal government; in one instance, the *Montreal Schools* case, the Court refused to answer a question referred by a provincial government to the provincial court of appeal; in the fourth example the Court refused to answer a question referred by the Board of Railway Commissioners.

While we deprecate the practice of bringing before the Court as important constitutional questions as are raised in this case on extremely flimsy

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material, we would not abort the appeal on this ground. We believe for the reasons which follow that the Court has enough of the essential features of the proposed scheme to be compelled to the conclusion that all three questions must be answered in the negative.

2) The Reasons of the New Brunswick Court of Appeal

The Attorney General of New Brunswick outlined the proposed scheme for the New Brunswick Court of Appeal as follows:

The proposal envisages a new court constituted to accept and to exercise complete criminal jurisdiction: Dealing exclusively with all criminal law matters, including criminal code offences, other federal offences and provincial offences. This court would replace the present Provincial Court and its judges would be appointed by the Lieutenant-Governor in Council. It would not be constituted by the Legislature as a superior court and it would exercise statutory jurisdiction only.

Amendments to the Criminal Code and other federal statutes would be requested of the Parliament of Canada to confer jurisdiction in criminal matters upon the new court. The implementation of the proposal thus is conceived as a blending of the authority of the two legislative bodies.

The New Brunswick Court of Appeal had no difficulty in concluding that because the Parliament of Canada had plenary authority in relation to the criminal law under [s. 91\(27\)](#) of the [Constitution Act, 1867](#) it was fully empowered to endow a provincially-established provincial Court presided over by a provincial appointee with power to administer the federal criminal law and to do so exclusively as well as concurrently with existing s. 96 provincial Superior Courts. Relying on *Re Vancini* (1904), [1904 CanLII 72 \(SCC\)](#), 34 S.C.R. 621 and on *Papp v. Papp*, [1969 CanLII 219 \(ON CA\)](#), [1970] 1 O.R. 331, and drawing in aid the British Columbia judgment in *Nanaimo Community Hotel v. Board of Referees*, [1945 CanLII 302 \(BC CA\)](#), [1945] 3 D.L.R. 225, it supported affirmative answers to questions 1 and 2, rejecting an adverse argument based on [s. 96](#) of the *Constitution Act, 1867*.

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Hughes C.J.N.B., speaking for the New Brunswick Court, noted that neither *O. Martineau & Sons, Ltd. v. City of Montreal*, 1931 CanLII 387 (UK JCPC), [1932] A.C. 113 nor *Toronto Corporation v. York Corporation*, 1938 CanLII 252 (UK JCPC), [1938] A.C. 415, both judgments of the Privy Council, assisted the argument on s. 96 against affirmative answers to questions 1 and 2 because in those cases the issue as to s. 96 concerned provincial competence to vest judicial power in a provincial Court or tribunal and did not prohibit the action here proposed when taken by the Parliament of Canada in the exercise of its exclusive power.

The New Brunswick Court rejected a statement on s. 96 in an article on that subject by Professor John Willis ("Section 96 of The British North America Act", (1940) 18 Can. Bar Rev. 517, at p. 523) where he said this:

It is *ultra vires* a provincial legislature "to take away (the whole of) the jurisdiction of a Court presided over by a Judge appointed by Federal authority and transfer that jurisdiction to a Judge (or other officer) appointed by the Provincial Executive", for such legislation is an indirect method of appointing a Judge of a Superior, District or County Court.

The New Brunswick Court gave the following answer to this s. 96 objection, saying:

In my opinion the conclusion so stated has no application where as here the court to be established is one which would derive its powers and jurisdiction from Parliament under s. 91(27). The establishment of the proposed Court would not create a situation where the Provincial Legislature was purporting to "take away the jurisdiction of a Judge appointed by Federal authority and transfer that jurisdiction to a judge of a Court appointed by the Provincial Executive". Any transfer of jurisdiction to the proposed court could be made only by Parliament.

The New Brunswick Court of Appeal also rejected an argument (one that was repeated in this Court) that there was a core of exclusive criminal jurisdiction inherent in Superior Courts by virtue of s. 96, jurisdiction which cannot be conferred upon an inferior court administered by provincial appointees. Reliance was placed upon

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Valin v. Langlois (1879), 3. S.C.R. 1 and especially upon the reasons of Taschereau J. at p. 74 of the case. (We shall return to this case later in these reasons). What the New Brunswick Court of Appeal emphasized was that criminal jurisdiction was not frozen at Confederation and, indeed, Parliament had since that time altered the jurisdiction of the Courts of criminal jurisdiction and that this Court had affirmed the power of Parliament to confer upon or remove from any court any criminal jurisdiction as it may deem proper. In short, the New Brunswick Court did not see any constitutional limitation upon Parliament arising under s. 96; only provincial Legislatures were under its control.

The answer to question 3 gave the New Brunswick Court little difficulty. It said this:

...the Legislature of each of the Provinces has exclusive jurisdiction to make laws respecting the constitution, maintenance and organization of provincial courts of both civil and criminal jurisdiction. It follows that a Legislature may establish a so-called Court of Unified Criminal Jurisdiction, to exercise such jurisdiction to try all or any indictable offences and other matters as may be conferred upon it by the Parliament of Canada, whether that power is conferred upon such court exclusively and concurrently with courts whose judges are appointed under authority of s. 96 of the *B.N.A. Act*.

3) The Other Side of the Issue

There is no doubt that jurisdiction to try indictable offences was part of the Superior Court's jurisdiction in 1867; none of the parties suggests otherwise. Nor does anyone argue that inferior courts had concurrent jurisdiction to try indictable offences in 1867. Although this fact is not conclusive (see *Re Residential Tenancies Act*, 1979, 1981 CanLII 24 (SCC), [1981] 1 S.C.R. 714) none of the other considerations which might save the scheme from the force of s. 96 apply here. The proposed court is obviously a judicial body; its judicial aspect does not change colour when considered in the factual setting in which the court will operate; nor will the court exercise administrative powers to which its adjudicative functions are incidental. The proposed

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body is clearly and only a criminal court.

The questions posed for decision leave open many matters which cannot be ignored when it is intended to replace provincial Superior Courts in the administration of the criminal law, including indictable offences. We have already raised the question whether unreviewable authority is to be given to the new provincial court in the proposed grant of exclusive jurisdiction or, at best, only a statutory right of appeal. Unreviewable authority might put the provincially-established Court and its provincially-appointed Judges in a s. 96 position notwithstanding that its jurisdiction comes from Parliament. The *Crevier* case, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220, might be considered as apt.

We do not intend to pursue this here, nor do we intend to pursue such questions as whether mandamus, prohibition or *certiorari*, or their present-day equivalents, are still to be available before the provincial Superior Courts. It must be remembered that those writs take their colour from the issues to which they are addressed: see *In re Storgoff*, 1945 CanLII 17 (SCC), [1945] S.C.R. 526; *Re Rex v. Thompson*, 1946 CanLII 115 (ON CA), [1946] O.R. 560; *R. v. Marathon Paper Mills of Canada Ltd.*, 1947 CanLII 57 (ON CA), [1947] O.R. 532. If the provincial Superior Courts are to be denuded of all criminal law jurisdiction, would the above-mentioned writs still be within their authority?

What is proposed in the New Brunswick proposals is the establishment of a statutory Court. As distinguished from what? Certainly not from existing provincial courts which

must be fed criminal jurisdiction by federal legislation. No doubt, however, to separate the new Court from provincial Superior Courts. Will that help or advance the matter if functional considerations have to be considered? It has long been the rule that s. 96, although in terms an appointing power, must be addressed in functional terms lest its application be eroded. What then, is the relation between the proposed new statutory Court and s. 96? This is the key constitutional issue in the present case and,

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as we view the matter, the result is to defeat the new statutory Court because it will effectively be a s. 96 Court.

Sections 96, 97, 98, 99 and 100 are couched in mandatory terms. They do not rest merely on federal statutory powers as does s. 91(27). This is how they read:

VII. JUDICATURE

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those on the Courts of Probate in Nova Scotia and New Brunswick.

97. Until the laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

99. (1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.

(2) A judge of a superior court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of the seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

What is being contemplated here is not one or a few transfers of criminal law power, such as has already been accomplished under the *Criminal Code*, but a complete obliteration of Superior Court criminal law jurisdiction. Sections 96 to 100

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do not distinguish between courts of civil jurisdiction and courts of criminal jurisdiction. They should not be read as permitting the Parliament of Canada through use of its criminal law power to destroy Superior Courts and to deprive the Governor General of appointing power and to exclude members of the Bar from preferment for Superior Court appointments.

Parliament can no more give away federal constitutional powers than a province can usurp them. Section 96 provides that “The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province”. The proposal here is that Parliament transfer the present Superior Courts’ jurisdiction to try indictable offences to a provincial court. The effect of this proposal would be to deprive the Governor General of his power under s. 96 to appoint the judges who try indictable offences in New Brunswick. That is contrary to s. 96. Section 96 bars Parliament from altering the constitutional scheme envisaged by the judicature sections of the *Constitution Act, 1867* just as it does the provinces from doing so.

The traditional independence of English Superior Court judges has been raised to the level of a fundamental principle of our federal system by the *Constitution Act, 1867* and cannot have less importance and force in the administration of criminal law than in the case of civil matters. Under the Canadian constitution the Superior Courts are independent of both levels of government. The provinces constitute, maintain and organize the Superior Courts; the federal authority appoints the judges. The judicature sections of the *Constitution Act, 1867* guarantee the independence of the Superior Courts; they apply to Parliament as well as to the Provincial Legislatures.

Both sides of the proposal under review are flawed. Parliament cannot in effect give away the Governor General’s s. 96 appointing power under colour of legislation vesting jurisdiction to try all

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indictable offences in a provincial court. New Brunswick cannot exercise an appointing power in respect of courts with s. 96 jurisdiction under colour of legislation in relation to the constitution, maintenance and organization of courts with criminal jurisdiction.

Nor is much gained for the proposed new provincial statutory Court by providing for concurrent Superior Court jurisdiction. The theory behind the concurrency proposal is presumably that a Provincial court with concurrent rather than exclusive powers would not oust the Superior Courts’ jurisdiction, at least not to the same extent; since the Superior Courts’ jurisdiction was not frozen as of 1867, it would be permissible to alter that jurisdiction so long as the essential core of the Superior Courts’ jurisdiction remained; s. 96 would be no obstacle because the Superior Court would retain jurisdiction to try indictable offences. With respect, we think this overlooks the fact that what is being

attempted here is the transformation by conjoint action of an inferior court into a superior court. Section 96 is, in our view, an insuperable obstacle to any such endeavour.

We wish before ending these reasons to say a word about *Valin v. Langlois* to which we referred earlier. The case concerned a federal controverted election petition, and federal legislation had assigned authority to try such issues in provincial Superior Courts. There was no doubt of Parliament's power to make the assignment, when it was concerned with legal issues which fell within its legislative jurisdiction. The issues there were widely canvassed by the Court, and particular attention was paid by the New Brunswick Court of Appeal in this case to ascertain views expressed by Taschereau J. He said this at pp. 74-75:

...I think that to decide that the Federal Parliament can never or in any way add to or take from the jurisdiction of the Provincial Courts, would be curtailing its powers to an extent, perhaps, not thought of by the Appellant, and that it would destroy, in a very large measure, the rights and privileges which are given to the

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federal power by sections 91 and 101 of the Act. I take, for one instance, the criminal law. The constitution, maintenance and organization of Provincial Courts of criminal jurisdiction is given to the Provincial Legislatures, as well as the constitution, maintenance and organization of courts of civil jurisdiction, yet, cannot Parliament, in virtue of section 101 of the Act, create new courts of criminal jurisdiction, and enact that all crimes, all offences shall be tried exclusively before these new courts? I take this to be beyond controversy.

Yet, would not that be altering, diminishing, in fact, taking away all the Provincial Criminal Court's jurisdiction?

With great respect, we do not accept these *obiter* observations as governing the proposed transfer of criminal law power from the provincial Superior Courts to a new provincial statutory Court presided over by a provincial appointee. There is, in our view, a cardinal difference between mere alteration or diminution of criminal jurisdiction and complete exclusion of such jurisdiction. Insofar as this latter point was taken by Taschereau J., we find it unacceptable.

It is hardly necessary to say that the proposed provincial scheme is not saved by preserving civil jurisdiction for the provincial Superior Courts.

We have taken perhaps a limited view of the important issues that are thrown up by the three referred questions but, having decided to address them, we felt it best to consider only those provisions of the Constitution which we think are beyond conjoint provincial and federal action.

We would, therefore, allow the appeal and answer all three questions in the negative. There will be no order as to costs.

Appeal allowed; the three questions were answered in the negative.

[Page 723]

Solicitor for the appellant: John P. McEvoy, Fredericton.

Solicitor for the respondent the Attorney General for New Brunswick: The Attorney General for New Brunswick, Fredericton.

Solicitor for the respondent the Attorney General of Canada: Roger Tassé, Ottawa.

Tab 87

MacMillan Bloedel Ltd. v. Simpson, 1995 CanLII 57 (SCC), [1995] 4 SCR 725

Source:	Supreme Court of Canada
Date:	1995-12-14
File number:	24171
Other citations:	130 DLR (4th) 385 — 191 NR 260 — 59 ACWS (3d) 199 — 112 WAC 161 — [1996] 2 WWR 1 — 14 BCLR (3d) 122 — 103 CCC (3d) 225 — 44 CR (4th) 277 — 68 BCAC 161 — 29 WCB (2d) 160 — 33 CRR (2d) 123 — [1995] CarswellBC 974 — JE 96-63 — [1995] SCJ No 101 (QL) — [1995] ACS no 101
Citation:	MacMillan Bloedel Ltd. v. Simpson, 1995 CanLII 57 (SCC), [1995] 4 SCR 725, < https://canlii.ca/t/1frdw >, retrieved on 2026-03-23

MacMillan Bloedel Ltd. v. Simpson, [1995] 4 S.C.R. 725

J.P.

Appellant

v.

MacMillan Bloedel Limited

Respondent

and

The Attorney General of British Columbia

Respondent

and

The Attorney General of Canada

Intervener

Indexed as: MacMillan Bloedel Ltd. v. Simpson

File No.: 24171.

1995: June 12; 1995: December 14.

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

on appeal from the court of appeal for british columbia

Constitutional law -- Courts -- Transfer of superior court powers to inferior tribunal -- Youth courts granted exclusive jurisdiction to try youths for ex facie contempt of superior courts -- Whether exclusive grant of jurisdiction constitutional -- [Constitution Act, 1867, s. 96](#) -- [Young Offenders Act, R.S.C., 1985, c. Y-1, s. 47\(2\)](#).

The appellant, a young person, contravened an injunction of the British Columbia Supreme Court prohibiting protest activities interfering with the respondent's logging operations in the Clayoquot Sound area of Vancouver Island. He was charged with contempt of court and, at trial, made an application to be tried in youth court pursuant to [s. 47\(2\)](#) of the [Young Offenders Act](#). This section states that exclusive jurisdiction over *ex facie* contempt of court committed by a young person is transferred to the youth court. The application was dismissed and the appellant was later convicted and sentenced to 45 days' imprisonment and a fine. He appealed his conviction on the ground that the British Columbia Supreme Court had no jurisdiction to try him. The Court of Appeal upheld the conviction. The court found [s. 47\(2\)](#) unconstitutional, concluding that the contempt power is within the core jurisdiction of the superior courts and that it is beyond the jurisdiction of Parliament to

remove any part of it from those courts. The main issue in this appeal is whether Parliament, pursuant to its criminal law power, can confer upon youth courts the exclusive power to try youths for contempt *ex facie* of superior courts.

Held (L'Heureux-Dubé, McLachlin, Iacobucci and Major JJ. dissenting): The appeal should be dismissed.

Per Lamer C.J. and La Forest, Sopinka, Gonthier and Cory JJ.: This Court's approval of the *Young Offenders Act* in *Reference re Young Offenders Act* does not preclude a separate analysis of whether a particular provision of that Act meets constitutional requirements. That case left open the specific question of whether individual provisions of the *Young Offenders Act* may offend s. 96 of the *Constitution Act, 1867* even though the overall scheme of the *Young Offenders Act* does not. To determine the validity of the transfer of power in question in this case, a two-stage analysis is required: first, using the *Residential Tenancies* test, the Court must decide whether the grant of jurisdiction is permissible; second, if it is, it must decide whether the superior court's jurisdiction can be ousted. The second stage of the analysis only arises when the core or inherent jurisdiction of superior courts is affected. That jurisdiction is integral to their operations and no part of it can be removed by either level of government in the absence of a constitutional amendment.

The history of contempt of court, academic commentary, and the overall scheme of the *Criminal Code* and the *Young Offenders Act* all reinforce the view that criminal contempt of court has distinct characteristics from other crimes. The dispute is one between the individual and the court itself. *Ex facie* criminal contempt of superior courts committed by youths has some aspects of a crime and some aspects of a *sui generis* court power. To reflect both these aspects, the jurisdiction transferred by s. 47(2) of the *Young Offenders Act* should be characterized as the power to punish youths for *ex facie* contempt of a superior court. Once s. 47(2) is properly characterized, the three-part test outlined in the *Residential Tenancies* case shows that this power or jurisdiction may be constitutionally given to an inferior court. Although the power to punish youths for *ex facie* contempt of superior courts was within the jurisdiction of superior courts at Confederation and this power obviously remains judicial in nature even in its new institutional setting, when one considers the

institutional function of the youth courts, a transfer of this power is permissible. The policy objectives of the youth court system are clear and laudable. Our society wishes to establish different treatment for youths accused of criminal offences than for adults. Youth courts have an expertise in providing procedural protections appropriate for youths and in deciding punishments for convicted young offenders. The power to punish youths for *ex facie* contempt of superior courts is merely ancillary to these primary functions. Accordingly, granting jurisdiction to punish youths for *ex facie* contempt of superior courts does not infringe s. 96 of the *Constitution Act, 1867*.

This jurisdiction, however, cannot be granted to the youth court to the exclusion of provincial superior courts. Although the inherent jurisdiction of superior courts is difficult to define, there is no doubt that the power to punish for all forms of contempt is within that jurisdiction. The rule of law requires a judicial system that can ensure that its orders are enforced and its process respected. The provincial superior court is the only court of general jurisdiction in Canada. To remove the power to punish contempt *ex facie* by youths would maim the institution which is at the heart of our judicial system. Such an alteration is impermissible in Canada in the absence of a constitutional amendment. Thus, in light of its importance to the very existence of a superior court, no aspect of the contempt power may be removed from a superior court without infringing our Constitution and the principle of the rule of law recognized both in the preamble to the *Constitution Act, 1867* and in all our conventions of governance. It will, in most instances, be preferable for the youth court to try and punish a youth in *ex facie* contempt of a superior court, but the provincial superior court's jurisdiction cannot be ousted. It will always be for the superior court to elect whether to hold contempt proceedings against a youth in order to exert control over its process, or to defer to the youth court. In addition, in cases where the youth court does proceed against a youth for contempt *ex facie* of a superior court, the provincial superior court retains its supervisory power to ensure that the lower court's disposition of the matter is correct.

Section 47(2) of the *Young Offenders Act* is therefore unconstitutional to the extent that it purports to confer exclusive jurisdiction on the youth court and to deprive a superior court of general jurisdiction of its *ex facie* contempt power. Section 47(2) is valid to the extent that it confers jurisdiction on the youth court. The section should be read down accordingly. Section 47(2) is thus

inoperative to deprive the superior court of its jurisdiction to convict the appellant of contempt in this case.

Per L'Heureux-Dubé, McLachlin, Iacobucci and Major JJ. (dissenting): The three-step test outlined in *Residential Tenancies* is the appropriate approach in determining whether a transfer of power from a s. 96 court to an inferior court is valid. The test permits only incidental derogations of powers from s. 96 courts, and then only to the extent that the judicial nature of such powers is transformed by the administrative context in which they are exercised. By focusing on the function of the power in the administrative context rather than the nature of the power conferred, this test provides sufficient flexibility to equip administrative tribunals with the powers they need to do their work, while preserving the constitutional position of the s. 96 courts. There is no need for an additional condition that the transfer not involve any aspect of the "core" inherent powers of the superior court. The proposed "core test" needlessly derogates from the functional approach of the *Residential Tenancies* test, making a shift toward a more categorical approach. This new test would amount to an important new fetter on the ability of Parliament and the provincial legislatures to create effective tribunals to ensure compliance with regulatory schemes.

The conferral of exclusive power over *ex facie* contempt of the court committed by juveniles on the youth court, and its removal from s. 96 courts, brings this case directly within the ambit of the *Residential Tenancies* test. There is nothing exceptional in the exclusive nature of the transfer of the s. 96 power to the inferior tribunal. If an administrative scheme is to operate effectively with a minimum of procedural confusion, it is typically essential that the tribunal have exclusive power to decide the matters at issue.

Further, the inherent power of superior courts to regulate their process does not preclude elected bodies from enacting legislation affecting that process. The court's inherent powers exist to complement the statutory assignment of specific powers, not override or replace them. Courts must conform to the rule of law and, while they can exercise more power in the control of their process than is expressly provided by statute, they must generally abide by the dictates of the legislature. It follows that Parliament and the legislatures can legislate to limit and define the superior courts'

inherent powers, including their powers over contempt, provided that the legislation is not otherwise unconstitutional. Parliament may thus enact s. 47(2) of the *Young Offenders Act*, provided that the conditions of the *Residential Tenancies* test are met.

The functional approach of the *Residential Tenancies* test is adequate to protect the s. 96 courts. Transfers of s. 96 jurisdiction to inferior tribunals have not ousted the power of the superior courts. These courts still have their rights of review of inferior tribunals' decisions and ensure that the law is followed and fair process maintained. Moreover, the facts of this case do not support the contention that powers essential to the proper functioning of s. 96 courts are in danger of being eroded. What is essential to maintaining the authority of a court is that consequences attach to the disobedience of its order, not the source of those consequences. *Ex facie* contempt of court is generally prosecuted, like any other crime, by the Attorney General, who gathers the evidence and presents the case to the court, and the youth court is just as able to protect the validity and efficacy of a superior court order as is the superior court. If the youth court errs, or fails to proceed where it should, it is subject to the corrective power of the superior court on judicial review or of the Court of Appeal on appeal. The superior court itself may initiate proceedings by referring a charge of *ex facie* contempt of court to the youth court. More importantly, the residual inherent jurisdiction of the superior courts to take such measures as may be required to preserve their process guarantees that the process of the superior courts will not be undermined by a transfer of juvenile contempt of court *ex facie* to the youth courts. Should the administration of justice require that a particular case be tried in superior court, that court possesses the inherent power to hold such a trial. Where the use of a legislative provision or rule of court would itself amount to an abuse of the court's process, the court may invoke its inherent jurisdiction to ensure that justice is done. Section 47(2) of the *Young Offenders Act* is no exception. That section, however, poses no threat to the authority of the superior courts. In leaving the power to try youths for *in facie* contempt of court with the superior courts, Parliament has carefully considered and weighed what is necessary to permit the superior courts to preserve their authority.

Parliament's transfer of contempt of court *ex facie* by youths from the s. 96 superior courts to the youth courts is valid. The test for transfer laid down in *Residential Tenancies* is met and this

test alone suffices to determine this appeal. The power was historically possessed by s. 96 courts, it is judicial, and it is merely ancillary to the larger role of the youth courts in relation to the special problems and needs of young offenders. Since the constitutionality of s. 47(2) of the *Young Offenders Act* has not been successfully challenged, it follows that the appellant should have been tried in youth court. His conviction in superior court should be set aside and the charges remitted to youth court for trial.

Cases Cited

By Lamer C.J.

Applied: *Re Residential Tenancies Act, 1979*, 1981 CanLII 24 (SCC), [1981] 1 S.C.R. 714; **considered:** *Reference re Young Offenders Act (P.E.I.)*, 1991 CanLII 11713 (SCC), [1991] 1 S.C.R. 252; **referred to:** *Sobeys Stores Ltd. v. Yeomans*, 1989 CanLII 116 (SCC), [1989] 1 S.C.R. 238; *McEvoy v. Attorney General for New Brunswick*, 1983 CanLII 149 (SCC), [1983] 1 S.C.R. 704; *B.C.G.E.U. v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214; *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220; *Attorney General of Canada v. Law Society of British Columbia*, 1982 CanLII 29 (SCC), [1982] 2 S.C.R. 307; *R. v. Vermette*, 1987 CanLII 51 (SCC), [1987] 1 S.C.R. 577; *United Nurses of Alberta v. Alberta (Attorney General)*, 1992 CanLII 99 (SCC), [1992] 1 S.C.R. 901; *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, 1992 CanLII 68 (SCC), [1992] 2 S.C.R. 394; *British Columbia (Attorney-General) v. Mount Currie Indian Band* (1991), 1991 CanLII 130 (BC SC), 64 C.C.C. (3d) 172.

By McLachlin J. (dissenting)

Re Residential Tenancies Act, 1979, 1981 CanLII 24 (SCC), [1981] 1 S.C.R. 714; *Toronto v. York*, 1938 CanLII 252 (UK JCPC), [1938] A.C. 415; *Reference re Adoption Act*, 1938 CanLII 2 (SCC), [1938] S.C.R. 398; *Labour Relations Board of Saskatchewan v. John East Iron Works, Ltd.*, 1948 CanLII 266 (UK JCPC), [1949] A.C. 134; *Tomko v. Labour Relations Board (Nova Scotia)*,

1975 CanLII 183 (SCC), [1977] 1 S.C.R. 112; *City of Mississauga v. Regional Municipality of Peel*, 1979 CanLII 37 (SCC), [1979] 2 S.C.R. 244; *Attorney General of Quebec v. Grondin*, 1983 CanLII 165 (SCC), [1983] 2 S.C.R. 364; *Sobeys Stores Ltd. v. Yeomans*, 1989 CanLII 116 (SCC), [1989] 1 S.C.R. 238; *Reference re Young Offenders Act (P.E.I.)*, 1991 CanLII 11713 (SCC), [1991] 1 S.C.R. 252; *McEvoy v. Attorney General for New Brunswick*, 1983 CanLII 149 (SCC), [1983] 1 S.C.R. 704; *Glover v. Glover (No. 1)* (1980), 1980 CanLII 63 (ON CA), 113 D.L.R. (3d) 161, aff'd 1981 CanLII 64 (SCC), [1981] 2 S.C.R. 561; *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220.

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Constitution Act, 1867, ss. 91(27), 92(14), 96, 97 to 101, 129.

Young Offenders Act, R.S.C., 1985, c. Y-1, ss. 2(1) "offence", 5(1), 47.

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APPEAL from a judgment of the British Columbia Court of Appeal (1994), 1994 CanLII 1731 (BC CA), 90 B.C.L.R. (2d) 24, 113 D.L.R. (4th) 368, 89 C.C.C. (3d) 217, 21 C.R.R. (2d) 116, 43 B.C.A.C. 1, 69 W.A.C. 1, dismissing the young person's appeal from his conviction for contempt

of court (1993), 12 C.E.L.R. (N.S.) 81. Appeal dismissed, L'Heureux-Dubé, McLachlin, Iacobucci and Major JJ. dissenting.

Marilyn E. Sandford, for the appellant.

Peter W. Ewert, Q.C., for the respondent the Attorney General of British Columbia.

John R. Haig, Q.C., for the intervener.

The judgment of Lamer C.J. and La Forest, Sopinka, Gonthier and Cory JJ. was delivered by

LAMER C.J. --

I. Introduction

1 This case requires us to decide whether Parliament, pursuant to its criminal law power, can confer upon youth courts the exclusive power to try youths for contempt *ex facie* of superior courts. To put the question another way, must superior courts retain the power to try charges of contempt, both *in facie* and *ex facie*. The problematic aspect of the impugned legislative provision is precisely the exclusivity of the grant of jurisdiction. The historical evolution of the provincial superior courts and their importance to our constitutional structure require that these superior courts retain the full range of their inherent contempt powers. While it need not have exclusive jurisdiction, curbing the power of a superior court to control its own process alters its essence, making it something less than a superior court. Such an alteration is impermissible in Canada in the absence of a constitutional amendment.

2 To resolve this issue we must consider both whether the grant of jurisdiction to the youth court is permissible and whether removing the corresponding jurisdiction from the superior court is equally so. The jurisprudence concerning [s. 96](#) of the *Constitution Act, 1867* gives

guidance in considering the grant of jurisdiction. The removal of jurisdiction is better analyzed in a broader constitutional context, considering this jurisprudence along with the preamble to the *Constitution Act, 1867*, the principle of the rule of law, and the central place of the superior courts in our system of governance.

II. Constitutional Question

3 The following constitutional question was stated:

Is it within the jurisdiction of Parliament to grant exclusive jurisdiction to youth courts, through the operation of [s. 47\(2\)](#) of the *Young Offenders Act*, R.S.C., 1985, c. Y-1, over contempt of court committed by a young person against a superior court otherwise than in the face of that court?

III. Factual Background

4 On July 19, 1993, the appellant was arrested and charged with contempt of court while participating in protest activities in the Clayoquot Sound area of Vancouver Island. Along with many others, a large number of whom were also arrested, the appellant stood on a logging road and refused to move thus preventing employees of MacMillan Bloedel Limited from reaching their job sites. This activity contravened an injunction of the British Columbia Supreme Court ordering that MacMillan Bloedel's operations not be obstructed. The appellant was 17 years old at the time of his arrest.

5 At trial, counsel for the appellant made an application for him to be tried in youth court. Bouck J., relying on the decision in *British Columbia (Attorney-General) v. Mount Currie Indian Band* (1991), [1991 CanLII 130 \(BC SC\)](#), 64 C.C.C. (3d) 172 (B.C.S.C.), dismissed this application. The appellant was convicted on October 6, 1993, and on October 13, 1993, was sentenced to 45 days' imprisonment and a \$1000 fine: (1993), 12 C.E.L.R. (N.S.) 81 and 104.

IV. Statutory Provisions

6 The impugned legislative provision in this case is:

Young Offenders Act, R.S.C., 1985, c. Y-1

47. . . .

(2) The youth court has exclusive jurisdiction in respect of every contempt of court committed by a young person against the youth court whether or not committed in the face of the court and every contempt of court committed by a young person against any other court otherwise than in the face of that court.

Other provisions relevant to resolving the case are:

Young Offenders Act

2. (1) In this Act,

. . .

"offence" means an offence created by an Act of Parliament or by any regulation, rule, order, by-law or ordinance made thereunder other than an ordinance of the Yukon Territory or the Northwest Territories;

5. (1) Notwithstanding any other Act of Parliament but subject to the *National Defence Act* and section 16, a youth court has exclusive jurisdiction in respect of any offence alleged to have been committed by a person while he was a young person and any such person shall be dealt with as provided in this Act.

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

9. Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 736

(a) of an offence at common law,

. . .

but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or provincial court judge had, immediately before April 1, 1955, to impose punishment for contempt of court.

V. The British Columbia Court of Appeal

The issue before this Court is but one of the many addressed in the Court of Appeal judgment. We denied leave to appeal with respect to the various other issues. The Court of Appeal was called upon to decide numerous questions pertaining to the joint contempt of court trial of 44 individuals who had defied the injunction. Thirty-one individuals appealed their convictions and another group appealed their sentences in a separate proceeding. While other trials arising from breaches of the same injunction were held later, J.P. was the only youth involved in this particular appeal. The British Columbia Court of Appeal unanimously upheld the contempt of court convictions: (1994), [1994 CanLII 1731 \(BC CA\)](#), 90 B.C.L.R. (2d) 24, 113 D.L.R. (4th) 368, 89 C.C.C. (3d) 217, 21 C.R.R. (2d) 116, 43 B.C.A.C. 1, 69 W.A.C. 1. The sentence appeals were allowed to the extent that all fines were removed from the sentences: (1994), [1994 CanLII 3302 \(BC CA\)](#), 47 B.C.A.C. 264.

McEachern C.J.B.C. penned the reasons of the court. In response to the argument that J.P. should be tried before a youth court pursuant to s. 47(2) of the *Young Offenders Act*, he struck down s. 47(2) as unconstitutional. In his reasons, McEachern C.J.B.C., like Bouck J. at trial, followed the principles set out by Macdonald J. in *Mount Currie Indian Band*, *supra*. McEachern C.J.B.C. considered both the nature of the contempt power and the jurisprudence which recognizes that superior courts have a "core" or "inherent" jurisdiction that is beyond the reach of Parliament and the provincial legislatures in the absence of constitutional amendment. In particular, he noted the decisions of this Court in *McEvoy v. Attorney General for New Brunswick*, [1983 CanLII 149 \(SCC\)](#), [1983] 1 S.C.R. 704, and in *Reference re Young Offenders Act (P.E.I.)*, [1991 CanLII 11713 \(SCC\)](#), [1991] 1 S.C.R. 252; the former for the proposition that the superior courts are independent of both levels of government and the latter for the principle that superior courts have a core jurisdiction which is, in McEachern C.J.B.C.'s words, "untouchable". Throughout his reasons, McEachern C.J.B.C. carefully separated criminal law jurisdiction from the contempt power of superior courts. He concluded that as the contempt power is within the core jurisdiction of the superior courts, no part of it can be transferred away from those courts to the youth courts.

9 I agree in part with McEachern C.J.B.C.'s analysis, particularly with his consideration of the inherent jurisdiction of superior courts and the nature of the contempt power. Nonetheless, in keeping with my conclusion that the essence of the problem before us is the exclusivity of the grant of jurisdiction to the youth court, I find that our jurisprudence on this question mandates a two-part analysis. After reviewing our s. 96 jurisprudence, therefore, I will first consider whether this grant of jurisdiction can be made and next consider whether the superior court's jurisdiction can be ousted. The first inquiry involves examining the nature of the contempt power; the second necessitates elaboration of the inherent jurisdiction of superior courts and recognition of their importance to our constitutional structure.

A. The Section 96 Jurisprudence

10 This Court's decision in *McEvoy*, *supra*, establishes that s. 96 of the *Constitution Act, 1867*, limits both Parliament and the provincial legislatures. Accordingly, the first analytic step is to consider the s. 96 jurisprudence to date to determine how that limitation takes effect.

11 Writing for the Court in *Re Residential Tenancies Act, 1979*, 1981 CanLII 24 (SCC), [1981] 1 S.C.R. 714, Dickson J. (as he then was) reviewed the s. 96 jurisprudence up to that time and fashioned its principles into a three-part test for determining which powers, under which circumstances, can be transferred to inferior courts or to administrative tribunals without infringing the guarantee of judicial independence which s. 96 has come to stand for. Dickson J. asserted that the judicature sections of the *Constitution Act, 1867* limit the power of the provincial legislatures under s. 92(14) over the administration of justice in a province and provide a unifying force to the Canadian judicial system (at p. 728):

Section 92(14) and ss. 96 to 100 represent one of the important compromises of the Fathers of Confederation. It is plain that what was sought to be achieved through this compromise, and the intended effect of s. 96, would be destroyed if a province could pass legislation creating a tribunal, appoint members thereto, and then confer on the tribunal the jurisdiction of the superior courts. What was conceived as a strong constitutional base for national unity, through a unitary judicial system, would be gravely undermined.

After reviewing the jurisprudence, Dickson J. concluded that there was a general trend towards an increasingly broad test of constitutional validity, except in cases where the judicial function in question is isolated from the rest of the administrative structure of the legislation in question. Having thus stated his view of the purpose of the constitutional provisions and the directions in the jurisprudence, he elaborated the test which is now our standard for analysing grants of jurisdiction to tribunals not presided over by s. 96 judges.

12 The first branch of the test is an historical inquiry into "whether the power or jurisdiction conforms to the power or jurisdiction exercised by superior, district or county courts at the time of Confederation" (p. 734). He emphasizes that this phase involves a temporary isolation of the power or jurisdiction in question, which is to be considered in its context at the second and third stages of the test. Of course, if the power in question does not conform to one exercised by a superior court in 1867, the inquiry ends here. The second step asks whether the function in question is "judicial" in its institutional setting, and he contrasts "judicial" functions with policy making functions. The final branch of the test involves an assessment of the "tribunal's function as a whole in order to appraise the impugned function in its entire institutional context" (p. 735). Under this branch of the test it is permissible for administrative tribunals and inferior courts to exercise powers historically belonging to courts with s. 96 judges provided those judicial powers are "merely subsidiary or ancillary" to the general administrative functions assigned to the tribunal (at p. 736).

13 Applying this three-part test to the legislative scheme set out in the Act before the Court, Dickson J. found that the creation of the Residential Tenancy Commission infringed s. 96. The legislation could not be saved by either the second or third branches of the test. In his analysis of the third branch, Dickson J. noted that the chief role of the Commission was not to administer policy or to carry out an administrative function. While the legislation aimed to address an acknowledged social problem, he stated (at p. 750):

. . . however worthy the policy objectives, it must be recognized that we, as a Court, are not given the freedom to choose whether the problem is such that provincial, rather than federal, authority should deal with it. We must seek to give effect to the Constitution as we

understand it and with due regard for the manner in which it has been judicially interpreted in the past. If the impugned power is violative of s. 96 it must be struck down.

Following *McEvoy, supra*, this conclusion is equally applicable to devolution of powers to a federally created court or tribunal. Essential historic functions of superior courts cannot be removed from those courts and granted to other adjudicative bodies to meet social policy goals if the resulting transfer contravenes our Constitution.

14 An important addition to the *Residential Tenancies* test was elaborated in *Sobeys Stores Ltd. v. Yeomans*, 1989 CanLII 116 (SCC), [1989] 1 S.C.R. 238, where Wilson J. described the characterization of the transferred power as preliminary to the first or historical branch of the test. Considering that the second and third branches of the test are designed to preserve some grants of power despite the fact that the powers were within the exclusive jurisdiction of the superior courts at Confederation, Wilson J. concluded that the test requires a strict, or narrow, approach to characterization to prevent large accretions of power (at p. 254). As many present day remedies were not available in 1867, characterization should highlight the type of dispute rather than the type of remedy sought. She also states that the same characterization must be used at each stage of the test. The complexity of the characterization question is demonstrated in the *Reference re Young Offenders Act* case.

15 The decision in *Reference re Young Offenders Act* is important to my analysis in this case both because it continues the development of the s. 96 jurisprudence and because it addresses in a broad manner the same Act which is before the Court now. I opened my analysis in *Reference re Young Offenders Act* by stating (at p. 264):

Section 96 of the *Constitution Act, 1867* is regarded as a means of protecting the "core" jurisdiction of the superior courts so as to provide for some uniformity throughout the country in the judicial system. The case law has developed principles to ensure that s. 96 would not be rendered meaningless through the use of the provincial competence to constitute, maintain and organize provincial courts staffed with provincially appointed judges having the same jurisdiction and powers as superior courts.

. . . if the jurisdiction conferred on Youth Courts by Parliament is within the core of jurisdiction of superior courts, Parliament cannot confer such jurisdiction on courts presided over by judges not appointed in accordance with s. 96.

While there were three judgments in the case, none of my colleagues took issue with my statement of the law regarding the core jurisdiction of the superior courts. The superior courts have a core or inherent jurisdiction which is integral to their operations. The jurisdiction which forms this core cannot be removed from the superior courts by either level of government, without amending the Constitution. Without this core jurisdiction, s. 96 could not be said either to ensure uniformity in the judicial system throughout the country or to protect the independence of the judiciary. Furthermore, the power of superior courts to fully control their own process is, in our system where the superior court of general jurisdiction is central, essential to the maintenance of the rule of law itself. I discuss the contents and contours of the core jurisdiction below.

16 The second aspect of the *Reference re Young Offenders Act* decision which figures in my analysis here is the precise issue which was determined at that time. In that case, four constitutional questions were addressed:

1. Is the *Young Offenders Act* . . . unconstitutional on the basis and to the extent that it does not specifically require that the Youth Court be presided over by a Judge appointed pursuant to s. 96 of the *Constitution Act, 1867*?
2. Is the establishment by a Province of a Youth Court as defined by s. 2 of the *Young Offenders Act* within the legislative competence of the Province pursuant to s. 92 of the *Constitution Act, 1867*?
3. (a) Is the appointment of a Youth Court Judge an appointment which must be made by the Governor in Council pursuant to s. 96 of the *Constitution Act, 1867*?
- (b) If the answer to (a) is no,
 - (i) Can a Provincial Court Judge be appointed a Judge of the Youth Court by the Lieutenant Governor in Council?
 - (ii) Can a Supreme Court Judge be appointed a Judge of the Youth Court by the Lieutenant Governor in Council?

These questions demonstrate that our review of the legislation at the time was undertaken from a broad perspective in light of the overall policy aims of the Act. In particular, the focus of the inquiry was judicial appointments and the establishment of youth courts. Our approval of the *Young Offenders Act* at that time does not preclude a separate analysis in this case of whether a particular provision of that Act meets constitutional requirements.

17 In addition, my characterization of the issue, which was accepted by my colleagues, stated (at p. 268):

I am of the view that the jurisdiction in issue here should be characterized as jurisdiction over young persons charged with a criminal offence. I do not mean to say that Youth Courts' jurisdiction is limited to criminal offences but I think it appropriate to limit the inquiry of this Court to the facts of this case. The Court has not had the benefit of hearing arguments on the jurisdiction of the superior and inferior courts on matters other than criminal offences, nor has the issue been examined in the factums. [Emphasis added.]

In the *Young Offenders Act* "offence" is defined as "an offence created by an Act of Parliament or by any regulation, rule, order, by-law or ordinance made thereunder other than an ordinance of the Yukon Territory or the Northwest Territories". As a common law provision, contempt of court is not, therefore, an offence within the meaning of the Act. On this strict interpretation, the *Young Offenders Act* decision cannot be said to preclude us from considering whether the contempt of court provisions of that Act offend s. 96. Reasoning more broadly, my characterization of the issue clearly stated that some aspects of the youth courts' jurisdiction were not considered by the Court at that time. Contempt of court powers granted by s. 47 of the Act were one of those aspects.

18 The *Reference re Young Offenders Act* decision states explicitly that there is a core jurisdiction of superior court powers which cannot be removed by either level of government in the absence of a constitutional amendment. It also leaves open the specific question of whether individual provisions of the Act may offend s. 96 even though the overall scheme of the Act does not. While it was not required in that case, *Reference re Young Offenders Act* mandates a two-stage analysis in cases like the present. The first stage, following the jurisprudence of *Residential Tenancies* and *Sobeys Stores*, is to consider whether the grant of jurisdiction is permissible. The second stage, considering the emphasis on core jurisdiction in *Reference re Young Offenders Act*, is to decide whether the superior court's jurisdiction can be ousted. In other words, the second stage weighs whether an exclusive grant of jurisdiction is permissible.

B. *Is the Grant of Jurisdiction Permissible?*

(1)Characterization

19 The first step in analysing whether a grant of jurisdiction infringes s. 96 is to properly characterize the provision in question. The provision here is not adequately described by the characterization I set out in *Reference re Young Offenders Act*. There the jurisdiction at stake was "jurisdiction over young persons charged with a criminal offence" (p. 268). In addition to being overly broad for this case, this characterization is inappropriate given the nature of criminal contempt of court. Unlike my colleague, I find that the history of contempt of court, academic commentary, and indeed the provisions of the *Young Offenders Act* and the *Criminal Code*, all reinforce the view that criminal contempt of court is unique among crimes. It may even be inappropriate to call it a crime. A careful consideration of the nature of criminal contempt of court is essential to properly characterizing the power being transferred by s. 47(2) of the *Young Offenders Act*.

20 The authoritative history of contempt of court was written by Sir John Fox in 1927 (*The History of Contempt of Court: The Form of Trial and the Mode of Punishment* (reprinted 1972)). In his introductory remarks, he states that contempt of court has been a recognized phrase in English law from the twelfth century to the present time, and continues (at p. 1):

The punishment of contempt is the basis of all legal procedure and implies two distinct functions to be exercised by the Court: (a) enforcement of the process and orders of the Court, disobedience to which may be described as 'civil contempt', and (b) punishment of other acts which hinder the administration of justice, such as disturbing the proceedings of the Court while it is sitting (contempt in court) or libelling a Judge or publishing comments on a pending case (contempt out of court), which are both distinguished as 'criminal contempt'.

The distinction he draws between civil and criminal contempt does not precisely correspond with the distinction drawn in contemporary Canadian law, but this is of little import given the difficulties in establishing that distinction. He does note, also, that some contempts are both civil and criminal. Fox's work demonstrates that the punishment of contempt predated the development of criminal law.

21 Discussing the law of contempt in England, which has been partially codified by the *Contempt of Court Act 1981* (U.K.), 1981, c. 49, C. J. Miller states:

Although criminal contempt of court is a criminal offence punishable in the superior courts by an unlimited fine or a fixed period of imprisonment of up to two years it has many characteristics which distinguish it from ordinary crimes. Indeed these characteristics are so marked that criminal contempt may be said to be an offence *sui generis*.

(*Contempt of Court* (1989), at p. 5.)

Among the unique characteristics of contempt which Miller notes are the summary process by which some contempts are tried, the manner of initiating proceedings, how evidence is given, and sentencing. Borrie and Lowe also address the relationship between criminal contempt and other crimes:

In so far as contempt constitutes a crime it is best to regard it as a crime that is *sui generis* since there are a number of peculiarities associated with the offence of which perhaps the outstanding example is the summary process by which such crimes are prosecuted.

(*Borrie and Lowe's Law of Contempt* (2nd ed. 1983), at p. 3.)

22 Commenting in the Canadian context on the parallels between certain *Criminal Code* provisions which create offences dealing with the administration of justice, Adrian Popovici writes:

[TRANSLATION] The parallel and complementary role of contempt of court in our system is explained by the characterization of *power* which we have given it. Contempt of court can only be understood by considering that it is part power and part offence. In fact, one could imagine a system in which contempt of court was eliminated completely and replaced by a number of criminal offences or penal sanctions. The elimination of contempt of court would be the elimination of the summary procedure, which can be explained historically only by the power aspect of contempt of court. [Emphasis in original.]

(*L'outrage au tribunal* (1977), at p. 130.)

While it is indeed possible to conceive of a system where all of the contempt powers are transformed into codified offences, such a system would be antithetical to ours, where the superior court of general jurisdiction plays the central role.

23 Both the *Criminal Code* and the *Young Offenders Act* treat contempt of court distinctly from criminal offences. When common law offences were abolished in 1955, the power to punish contempt of court was specifically preserved for the courts. This provision in the *Code* remains to this day in s. 9. Section 47 of the *Young Offenders Act*, dealing with various contempt of court provisions, is included in the Act separately from the main body of the statute dealing with criminal offences. Despite a general grant of exclusive jurisdiction to the youth courts in s. 5, a separate exclusive grant of jurisdiction is made in s. 47(2). As I noted above, the definition of "offence" in the Act excludes contempt of court.

24 On the basis of the history of contempt of court, academic commentary, and the overall scheme of the *Criminal Code* and the *Young Offenders Act*, I am persuaded that criminal contempt of court has distinct characteristics from other crimes. By history and procedure, as well as its links with the inherent jurisdiction of superior courts which I discuss below, criminal contempt of court can be distinguished from other criminal offences. While other crimes occur in society and the law merely defines or criminalizes them, contempt of court does not occur in the absence of a court. Having considered the nature of criminal contempt of court, I will now proceed to characterize the power transferred by s. 47(2) of the *Young Offenders Act* and apply the test outlined in *Residential Tenancies*.

25 A proper characterization for s. 96 purposes must be narrow and consider the nature of the dispute. While I noted in *Reference re Young Offenders Act* that the nature of the dispute provides little assistance in criminal law, this is not the case here as contempt of court is distinctive. The dispute is one between the individual and the court itself. *Ex facie* criminal contempt of superior courts committed by youths has some aspects of a crime and some aspects of a *sui generis* court power. A proper characterization must be narrow enough to reflect both these aspects. I would therefore characterize the jurisdiction transferred by s. 47(2) as the power to punish youths for *ex facie* contempt of a superior court.

(2) The Residential Tenancies Test

Having settled on a characterization of the power being transferred, the three branches of the *Residential Tenancies* test are quickly dealt with in this case. Power to punish youths for *ex facie* contempt of superior courts was within the jurisdiction of superior courts at Confederation. Under the second branch of the test, this power obviously remains judicial in nature even in its new institutional setting. Nonetheless, when considering the institutional function of the youth courts, a transfer of this power is permissible. As we elaborated in *Reference re Young Offenders Act*, the policy objectives of the youth court system are clear and laudable. Our society wishes to establish different treatment for youths accused of criminal offences than for adults. Youth courts have an expertise in providing procedural protections appropriate for youths and in deciding punishments for convicted young offenders. The power to punish youths for *ex facie* contempt of superior courts is indeed a mere ancillary to these primary functions. Accordingly, granting jurisdiction to punish youth for *ex facie* contempt of superior courts does not infringe s. 96. What remains to be considered, however, is whether this jurisdiction can be granted to the exclusion of superior courts.

C. Can the Superior Courts' Jurisdiction Be Removed?

In the case of transfers of jurisdiction which are within the inherent powers of a superior court, the *Residential Tenancies* test does not provide a framework for analysing the most important aspect of constitutional infringement. The true problem in this case is the exclusivity of the grant. The impugned section of the *Young Offenders Act* clearly states that exclusive jurisdiction over *ex facie* contempt of court is transferred to the youth court. The plain meaning of this section is that the corresponding part of the superior court's jurisdiction is removed. Otherwise, the word "exclusive" would have no meaning in this sentence. Indeed, it is not used in s. 47(3) which deals with *in facie* contempt. As my colleague McLachlin J. notes, in most instances where a s. 96 analysis is employed, the grant of jurisdiction is exclusive. The requirement to consider whether the corresponding removal of jurisdiction is valid only arises when the core jurisdiction of superior courts is affected. In

many instances, therefore, the *Residential Tenancies* test provides a complete answer to the constitutional query.

28 To determine whether either Parliament or a provincial legislature may remove part of the superior court's jurisdiction, we must consider the contours and contents of the "core" or "inherent" jurisdiction of superior courts. On the facts of this appeal, the British Columbia Supreme Court being the superior court involved, we need only consider whether this jurisdiction can be removed from superior courts of general jurisdiction, that is, the provincial superior courts. Whether jurisdiction to punish youth for *ex facie* contempt of statutorily constituted superior courts can be removed from those courts is a question for another day since neither the parties nor the courts below addressed the issue of whether a distinction might exist between these two kinds of superior courts.

29 The seminal article on the core or inherent jurisdiction of superior courts is I. H. Jacob's "The Inherent Jurisdiction of the Court" (1970), 23 *Current Legal Problems* 23. Jacob's work is a starting point for many discussions of the subject, figures prominently in analyses of contempt of court, and was cited with approval by Dickson C.J. in *B.C.G.E.U. v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214. While the particular focus of Jacob's work is the High Court of Justice in England, he notes that "[t]he English doctrine of the inherent jurisdiction of the court is reflected in most, if not all, other common law jurisdictions, though not so extensively in the United States" (p. 23, fn. 1). Moreover, the English judicial system is the historic basis of our system and is explicitly imported into the Canadian context by the preamble of the *Constitution Act, 1867*. The superior courts of general jurisdiction are as much the cornerstone of our judicial system as they are of the system which is Jacob's specific referent.

30 Discussing the history of inherent jurisdiction, Jacob says (at p. 25):

. . . the superior courts of common law have exercised the power which has come to be called "inherent jurisdiction" from the earliest times, and . . . the exercise of such power developed along two paths, namely, by way of punishment for contempt of court and of its process, and by way of regulating the practice of the court and preventing the abuse of its process.

Regarding the basis of inherent jurisdiction, Jacob states (at p. 27):

. . . the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent." This description has been criticised as being "metaphysical" [cite omitted], but I think nevertheless that it is apt to describe the quality of this jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. [Emphasis added.]

While inherent jurisdiction may be difficult to define, it is of paramount importance to the existence of a superior court. The full range of powers which comprise the inherent jurisdiction of a superior court are, together, its "essential character" or "immanent attribute". To remove any part of this core emasculates the court, making it something other than a superior court.

31 Jacob also states that an inferior court of record has the inherent jurisdiction to punish summarily for *in facie* contempt, but jurisdiction to punish for *ex facie* contempt must be conferred explicitly by statute. This point is important in framing the issue before the Court in this case, for the problem with s. 47(2) of the *Young Offenders Act* is not the grant of jurisdiction to the youth court, but the removal of jurisdiction from the superior court.

32 Addressing the Canadian superior courts in particular, in the context of a discussion of constitutional judicial review, T. A. Cromwell states:

At the center of the Canadian conception of constitutional judicial review is the notion of the general jurisdiction superior courts of the provinces, which are the direct descendants of the English superior courts. The importance of these tribunals has been emphasized and reinforced in a variety of contexts. For example, the superior courts are said to possess "inherent jurisdiction" and to have original jurisdiction in any matter unless jurisdiction is clearly taken away by statute.

("Aspects of Constitutional Judicial Review in Canada" (1995), 46 *S.C. L. Rev.* 1027, at pp. 1030-31.)

33 Although the inherent jurisdiction of superior courts is difficult to define, there is no doubt that the power to control its process and enforce its orders, through, in part, punishing for contempt, is within that jurisdiction. In an article which concludes that the inherent jurisdiction of superior courts is growing, at least in Australia, Keith Mason states that the "ubiquitous nature" of inherent jurisdiction "precludes any exhaustive enumeration of the powers which are thus exercised by the courts" ("The Inherent Jurisdiction of the Court" (1983), 57 *A.L.J.* 449, at p. 449). Following this qualification, Mason attempts to classify the functions of inherent jurisdiction which are clearly knowable by grouping them under four headings: (i) ensuring convenience and fairness in legal proceedings; (ii) preventing steps being taken that would render judicial proceedings inefficacious; (iii) preventing abuse of process; and (iv) acting in aid of superior courts and in aid or control of inferior courts and tribunals. He includes the power to punish for contempt both *in facie* and *ex facie* under the first heading (at p. 452). That is, Mason recognizes that the power of a court to punish all forms of contempt is integral to its process.

34 The supervisory role which superior courts exercise over inferior courts, Mason's fourth category, is of note here because s. 47(2) of the *Young Offenders Act* also limits the ability of the superior court to exercise its supervisory function in relation to the youth court by proscribing the superior court from punishing contempts of the youth court and of other inferior courts. Borrie and Lowe, *supra*, state that "[s]uperior courts of record have an inherent superintendent jurisdiction to punish contempts committed in connection with proceedings before inferior courts" (p. 316).

35 This Court's jurisprudence has also contributed to outlining the contours of the inherent jurisdiction of superior courts. In *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220, the Court considered whether the provincial legislature could grant the power to make final decisions on questions of jurisdiction to an appeal tribunal under *Quebec's Professional Code*. Writing for the Court, Laskin C.J. stated (at pp. 236-37):

It is true that this is the first time that this Court has declared unequivocally that a provincially-constituted statutory tribunal cannot constitutionally be immunized from

review of decisions on questions of jurisdiction. In my opinion, this limitation, arising by virtue of s. 96, stands on the same footing as the well-accepted limitation on the power of provincial statutory tribunals to make unreviewable determinations of constitutionality. There may be differences of opinion as to what are questions of jurisdiction but, in my lexicon, they rise above and are different from errors of law, whether involving statutory construction or evidentiary matters or other matters. . . . [G]iven that s. 96 is in the *British North America Act* and that it would make a mockery of it to treat it in non-functional formal terms as a mere appointing power, I can think of nothing that is more the hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review. [Emphasis added.]

This decision establishes, therefore, that powers which are 'hallmarks of superior courts' cannot be removed from those courts.

36 In *Attorney General of Canada v. Law Society of British Columbia*, 1982 CanLII 29 (SCC), [1982] 2 S.C.R. 307, the Court considered whether the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, ousted the jurisdiction of provincial superior courts to consider the constitutional validity of federal statutes. Estey J., writing for the Court, described the superior courts as follows (at pp. 326-27):

The provincial superior courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction. They cross the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction

Finding that Parliament lacked the authority to remove the power of superior courts to rule on the validity of federal statutes, he stated (at p. 328) that:

To do so would strip the basic constitutional concepts of judicature of this country, namely the superior courts of the provinces, of a judicial power fundamental to a federal system as described in the *Constitution Act*.

This decision emphasizes the centrality of the superior courts to our constitutional and judicial system. In order for the superior courts to fulfil that central role, they must have the powers which are part of their essence as superior courts.

37 Commenting on the constitutional jurisprudence regarding courts, Cromwell, *supra*, concludes (at p. 1032):

Thus, through generous interpretation of the constitutional provisions governing appointment and independence of provincial superior court judges and a restrictive reading of the constitutional limits of jurisdiction on the Federal Court, the primacy of the provincial superior courts in constitutional judicial review has been maintained. The basic proposition is that the Canadian conception of constitutional judicial review is deeply committed to the supervisory role of the provincial superior courts, that is, the general jurisdiction trial courts in each province.

In the constitutional arrangements passed on to us by the British and recognized by the preamble to the *Constitution Act, 1867*, the provincial superior courts are the foundation of the rule of law itself. Governance by rule of law requires a judicial system that can ensure its orders are enforced and its process respected. In Canada, the provincial superior court is the only court of general jurisdiction and as such is the centre of the judicial system. None of our statutory courts has the same core jurisdiction as the superior court and therefore none is as crucial to the rule of law. To remove the power to punish contempt *ex facie* by youths would maim the institution which is at the heart of our judicial system. Destroying part of the core jurisdiction would be tantamount to abolishing the superior courts of general jurisdiction, which is impermissible without constitutional amendment.

38 The core jurisdiction of the provincial superior courts comprises those powers which are essential to the administration of justice and the maintenance of the rule of law. It is unnecessary in this case to enumerate the precise powers which compose inherent jurisdiction, as the power to punish for contempt *ex facie* is obviously within that jurisdiction. The power to punish for all forms of contempt is one of the defining features of superior courts. The *in facie* contempt power is not more vital to the court's authority than the *ex facie* contempt power. The superior court must not be put in a position of relying on either the provincial attorney general or an inferior court acting at its own instance to enforce its orders. Furthermore, *ex facie* contempt is not limited to the enforcement of orders. It can include activities such as threatening witnesses or refusing to attend a proceeding (see *R. v. Vermette*, 1987 CanLII 51 (SCC), [1987] 1 S.C.R. 577). In addition, the distinction between *in facie* and *ex facie* contempt is not always easily drawn (see *B.C.G.E.U.*, *supra*), increasing the difficulty of saying one is more essential to the court's process than the other.

39 Borrie and Lowe, *supra*, state that "[t]he power that courts of record enjoy to punish contempts is part of their *inherent* jurisdiction" (p. 314 (emphasis in original)). After referring to Jacob's work, which I have discussed earlier, they continue:

Such a power [to punish for contempt] is not derived from statute nor truly from the common law but instead flows from the very concept of a court of law.

Miller, *supra*, also links the contempt power directly to the core jurisdiction of superior courts (at p. 18):

From its ancient origins contempt of court has developed over the years as a creation of the superior courts, building on their inherent powers.

And later (at pp. 49-50):

In the case of contempt this inherent jurisdiction was linked historically to the notion of an affront to the King's justice with the equivalence between the sovereign and the courts in matters of contempt being relatively straightforward.

40 Canadian contempt of court case law also attests to the intertwining of superior court core jurisdiction and the contempt power. Writing for the Court in *Vermette, supra*, a case involving *ex facie* contempt, McIntyre J. said (at p. 581):

The power to deal with contempt as part of the inherent and essential jurisdiction of the courts has existed, it is said, as long as the courts themselves. . . . This power was necessary, and remains so, to enable the orderly conduct of the court's business and to prevent interference with the court's proceedings.

In *United Nurses of Alberta v. Alberta (Attorney General)*, [1992 CanLII 99 \(SCC\)](#), [1992] 1 S.C.R. 901, Sopinka J., dissenting on another point, stated (at p. 944):

The common law has always jealously restricted the power to punish for criminal contempt. This is particularly true for contempt *ex facie* which was reserved to courts of superior jurisdiction.

Writing about contempt for the majority in *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992 CanLII 68 \(SCC\)](#), [1992] 2 S.C.R. 394, Gonthier J. asserted (at p. 405):

Barring constitutional considerations, if a statute, read in context and given its ordinary meaning, clearly confers upon an inferior tribunal a jurisdiction that is enjoyed by the superior court at common law, while not depriving the superior court of its jurisdiction, it should be given effect. [Emphasis added.]

Later in the judgment he states (at p. 414):

Even if the Tribunal exercises powers that at common law belong to a superior court, it is still subject to full review by the Federal Court of Appeal. The Tribunal has none of the characteristics that would inspire fear for the integrity of the powers of superior courts.

These cases attest to the role of the contempt power as an essential attribute of superior courts.

41 In light of its importance to the very existence of a superior court, no aspect of the contempt power may be removed from a superior court without infringing all those sections of our Constitution which refer to our existing judicial system as inherited from the British, including ss. 96 to 101, s. 129, and the principle of the rule of law recognized both in the preamble and in all our conventions of governance. I agree with Macdonald J. who made the following statement in dealing with the identical issue:

In this case, the question should be whether parliament can remove from this court its inherent jurisdiction to maintain its authority by contempt proceedings. I would have no difficulty with a concurrent jurisdiction in the youth court in that regard in so far as young persons are concerned. The philosophy which underlies the Act is entitled to support, and has certainly received it from the Supreme Court of Canada. Just as adult offenders could be charged in the provincial courts under the *Criminal Code* for failure to comply with a court order, so young persons should be subject to being charged under the Act and dealt with in youth court.

It is quite another thing to deny this court the right to maintain its own authority.

(*Mount Currie Indian Band*, *supra*, at pp. 177-78.)

42 While it will in most instances be preferable for the youth court to try and punish a youth in *ex facie* contempt of a superior court, the provincial superior court's jurisdiction cannot be ousted. It will always be for the superior court to elect whether to hold contempt proceedings against a youth in order to exert control over its process, or to defer to the youth court. In addition, in cases where the youth court does proceed against a youth for contempt *ex facie* of a superior court, the provincial superior court retains its supervisory power to ensure that the

lower court's disposition of the matter is correct. The full panoply of contempt powers is so vital to the superior court that even removing the jurisdiction in question here and transferring it to another court with judges appointed pursuant to s. 96 would offend our Constitution.

VII. Disposition

43 I would dismiss the appeal on the grounds that s. 47(2) is unconstitutional to the extent that it purports to confer exclusive jurisdiction on the youth court and to deprive a superior court of general jurisdiction of its *ex facie* contempt power. Section 47(2) is valid to the extent that it confers jurisdiction on the youth court. The section should be read down accordingly. As read down, the section is inoperative to deprive the superior court of its jurisdiction to convict the appellant of contempt in this case.

44 In light of this conclusion, I would answer the constitutional question as follows:

Is it within the jurisdiction of Parliament to grant exclusive jurisdiction to youth courts, through the operation of [s. 47\(2\)](#) of the *Young Offenders Act*, R.S.C., 1985, c. Y-1, over contempt of court committed by a young person against a superior court otherwise than in the face of that court?

Answer: No, not exclusive jurisdiction.

The reasons of L'Heureux-Dubé, McLachlin, Iacobucci and Major JJ. were delivered by

45 MCLACHLIN J. (dissenting) -- J.P., aged 16, defied a court order which prohibited protest activities interfering with logging in Clayoquot Sound in British Columbia. He was tried in the British Columbia Supreme Court, convicted, and sentenced to 45 days in prison and fined \$1000: (1993), 12 C.E.L.R. (N.S.) 81 and 104. He appealed that conviction on the ground that the Supreme Court of British Columbia had no jurisdiction to try him, since [s. 47\(2\)](#) of the *Young Offenders Act*, R.S.C., 1985, c. Y-1, grants exclusive jurisdiction over *ex facie* contempt of court to the provincial youth courts.

46 The issue before us is a narrow one. Can Parliament confer upon youth courts the power to try youths for the offence of contempt outside the face of the court? Or do the superior courts created by s. 96 of the *Constitution Act, 1867* have exclusive power to try all charges of contempt, whether in or not in the face of the court?

The Enactments

47 Section 91(27) of the *Constitution Act, 1867*, gives Parliament exclusive power over criminal law and procedure:

91. . . . it is hereby declared that . . . the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, --

. . .

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

48 Pursuant to its power over criminal law and procedure, Parliament enacted s. 47 of the *Young Offenders Act*, which gives the youth courts exclusive jurisdiction to try contempt of court not in the face of the court committed by a young person, regardless of the court against which the contempt was committed:

47. . . .

(2) The youth court has exclusive jurisdiction in respect of every contempt of court committed by a young person against the youth court whether or not committed in the face of the court and every contempt of court committed by a young person against any other court otherwise than in the face of that court. [Emphasis added.]

49 The Court of Appeal ruled that the underlined portion of s. 47(2) is invalid because it transfers from the superior courts to the youth courts powers which can be transferred only by constitutional amendment, given the constitutionally protected status of s. 96 superior courts:

(1994), [1994 CanLII 1731 \(BC CA\)](#), 90 B.C.L.R. (2d) 24, 113 D.L.R. (4th) 368, 89 C.C.C. (3d) 217, 21 C.R.R. (2d) 116, 43 B.C.A.C. 1, 69 W.A.C. 1.

50 [Section 96](#) of the *Constitution Act, 1867* creates and confers constitutional status on the superior courts:

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Analysis

1. The Test for Determining When Power May Be Transferred from Superior Courts

(a) The Problem

51 One of the fundamental pillars upon which the Canadian Constitution rests is a unified national judiciary. This pillar in turn rests on a compromise made by the Fathers of Confederation in 1867. The provinces were given responsibility for the administration of justice under [s. 92\(14\)](#) of the *Constitution Act, 1867* but under s. 96 the Governor General was given the power to appoint judges to the superior, district and county courts in each province. Section 100 obliges the Parliament of Canada to fix and pay the salaries of these judges. These sections, taken together, impose a regime of compulsory cooperation which has served for over a century to maintain a strong unified judicial presence throughout the country. The provinces establish and administer the s. 96 courts, the successors of the provincial superior courts in each territory at the time of Confederation. These courts in turn are united by the fact that they exercise similar jurisdiction, by the fact that their judges are federally appointed and paid, and by the fact that appeals lie from all to the Supreme Court of Canada, which exercises a unifying influence. The result is a network of related Canadian courts ensuring judicial independence, interprovincial uniformity, and minimum standards of decision making throughout the country. This in turn provides "a strong constitutional base for national unity":

Re Residential Tenancies Act, 1979, [1981 CanLII 24 \(SCC\)](#), [1981] 1 S.C.R. 714, at p. 728, *per* Dickson J.

52 In this way the Canadian Constitution confers a special and inalienable status on what have come to be called the "section 96 courts". The unified national judicial system thus created cannot be destroyed or weakened. At the same time, however, the Constitution does not prevent either Parliament or the legislatures from passing laws regulating the powers and operations of the s. 96 courts; a strict separation of judicial and legislative powers is not a feature of the Canadian Constitution:

There is no general "separation of powers" in the [Constitution Act, 1867](#). The Act does not separate the legislative, executive and judicial functions and insist that each branch of government exercise only "its own" function.

(P. W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992), at p. 184.)

Moreover, ss. 96 to 100 do not prevent Parliament or the legislatures from creating other courts and tribunals, provided they do not threaten the constitutional position of the s. 96 courts.

53 In the years since Confederation, Parliament and the legislatures have created many specialized tribunals to supplement the work of the s. 96 courts. New problems have given rise to new schemes of regulation. New schemes of regulation in turn have created new problems of adjudication. And new problems of adjudication have given rise to new administrative tribunals. A number of reasons for the preference of Parliament and the legislatures for administrative tribunals with decision-making powers have been identified: the desire for a specialist body; the desire for innovation; the desire for a comprehensive investigative, adjudicative and policy-formation approach; and the problem of volume: see Hogg, *supra*, at p. 190. If they are to discharge their tasks, administrative tribunals must inevitably be clothed with powers which, before their time, were exercised exclusively by the s. 96 courts.

54 This brings us to the heart of the problem posed on this appeal: when may Parliament or the provincial legislatures confer powers exercised by s. 96 courts on inferior tribunals created for special purposes? Clearly, Parliament and the legislatures cannot be allowed to set up shadow courts exercising all or some of the powers of s. 96 courts. As Dickson J. stated in *Residential Tenancies*, *supra*, at p. 728:

. . . the intended effect of s. 96, would be destroyed if a province could pass legislation creating a tribunal, appoint members thereto, and then confer on the tribunal the jurisdiction of the superior courts. What was conceived as a strong constitutional base for national unity, through a unitary judicial system, would be gravely undermined.

On the other hand, short of impairing s. 96 courts, nothing in the Constitution suggests that Parliament should not be able to clothe inferior tribunals with s. 96 powers ancillary or necessary to their functioning. Moreover, many of the complex problems created by modern society require regulation by specialized administrative agencies. Effective regulation, in turn, may require a system of internal enforcement by specialized tribunals wielding some of the powers traditionally exercised by s. 96 courts.

55 Initially, the courts refused to accept that Parliament or the legislatures could ever transfer s. 96 powers to inferior tribunals. Over the years, however, they have come to recognize that such a draconian response is neither required to preserve the constitutional role of s. 96 courts, nor desirable in a society whose problems increasingly require specialized regulation. What is required is a test for transfer of s. 96 powers which balances the need to maintain a strong constitutional position of s. 96 courts with the need to provide sufficient scope for the creation of effective administrative tribunals.

(b) Development of the Current Test

56 In 1938, the Judicial Committee of the Privy Council held that the Ontario legislature could not confer judicial powers on the Ontario Municipal Board: *Toronto v. York*, 1938 CanLII 252 (UK JCPC), [1938] A.C. 415. Lord Atkin described s. 96 as one of the "three

principal pillars in the temple of justice" (p. 426). His reasons proceed on the assumption that any attempt to confer a s. 96 function on an administrative tribunal is *ultra vires*.

57

This injunction against any transfer of s. 96 powers was quickly recognized as unworkable. In *Reference re Adoption Act*, [1938 CanLII 2 \(SCC\)](#), [1938] S.C.R. 398, this Court, *per* Duff C.J., held at p. 418 that the jurisdiction of inferior courts was not "fixed forever as it stood at the date of Confederation". Powers enjoyed by s. 96 courts at the time of Confederation could be removed from them and transferred to courts of inferior jurisdiction, provided the power removed "conform[s] to a type of jurisdiction generally exercisable by courts of summary jurisdiction" (p. 421). Reasoning that powers over adoption matters were similar to powers exercised by summary courts in England under the Poor Laws, Duff C.J. concluded that the transfer of power over such matters to magistrates was constitutional.

58

Duff C.J.'s formulation in the *Reference re Adoption Act* in turn proved too restrictive. It effectively froze the jurisdiction to transfer s. 96 powers at those of the summary courts of England. In *Labour Relations Board of Saskatchewan v. John East Iron Works, Ltd.*, [1948 CanLII 266 \(UK JCPC\)](#), [1949] A.C. 134 (P.C.), Lord Simonds suggested that it was not necessary to establish an analogy with summary court jurisdiction; it sufficed to show that the power was not one traditionally falling to s. 96 courts.

59

The *John East* test also was ultimately found to unduly fetter the legislative prerogative. In *Tomko v. Labour Relations Board (Nova Scotia)*, [1975 CanLII 183 \(SCC\)](#), [1977] 1 S.C.R. 112, the validity of a cease and desist order issued by the Nova Scotia Labour Relations Board was challenged on the ground that the power to issue such an order was analogous to the jurisdiction of the s. 96 courts to issue mandatory injunctions, and hence, on the test in *John East*, *ultra vires*. The Supreme Court resiled from the *John East* test. Clearly the mandatory orders at issue fell within the jurisdiction of s. 96 courts. But that was not the end of the matter. The transferred power must be considered in the context of the tribunal's larger task: "it is not the detached jurisdiction or power alone that is to be considered but rather its setting in

the institutional arrangements in which it appears and is exercisable under the provincial legislation" (p. 120).

60 *Tomko* marks the debut of the modern test affirmed by this Court in *Residential Tenancies*. It was applied in *City of Mississauga v. Regional Municipality of Peel*, 1979 CanLII 37 (SCC), [1979] 2 S.C.R. 244, to uphold powers granted to the Ontario Municipal Board to resolve certain property disputes, a matter within the historical purview of the s. 96 courts. The Court asked itself what role this power played in the general role of the Municipal Board, and concluded that viewed in their "institutional setting, the 'judicial powers' to determine rights and liabilities . . . had been validly granted to the Municipal Board" (*Residential Tenancies*, *supra*, at p. 732).

61 The issue came before this Court once more in 1980 in *Residential Tenancies*. Dickson J., speaking for the Court, concluded at p. 733 that "[t]he teaching of *John East*, *Tomko*, and *Mississauga* is that one must look to the 'institutional setting' in order to determine whether a particular power or jurisdiction can validly be conferred on a provincial body". He went on to state the following test (at pp. 733-34):

An administrative tribunal may be clothed with power formerly exercised by s. 96 courts, so long as that power is merely an adjunct of, or ancillary to, a broader administrative or regulatory structure. If, however, the impugned power forms a dominant aspect of the function of the tribunal, such that the tribunal itself must be considered to be acting 'like a court', then the conferral of the power is *ultra vires*.

On this approach, a "scheme is only invalid when the adjudicative function is a sole or central function of the tribunal . . . so that the tribunal can be said to be operating 'like a s. 96 court'" (p. 736).

62 Dickson J. suggested a three-step approach to determining whether a transfer of power from a s. 96 court to an inferior court was valid. The first step, echoing *John East*, asked whether the power historically fell within the jurisdiction of the s. 96 courts. The second step asked whether the power was judicial or administrative. These two steps may be seen as serving to determine if there is in fact a transfer of s. 96 power. If the answer on the first two

steps is yes, the inquiry moves to its final stage. This requires consideration of the institutional and legislative framework in which the judicial power is employed in order to determine whether its exercise is either (i) "subsidiary or ancillary" to what is predominantly an administrative function, or (ii) "necessarily incidental" to the achievement of a broader policy goal of the legislature. If it is, the transfer of s. 96 powers will be valid. If, on the other hand, "the impugned power forms a dominant aspect of the function of the tribunal, such that the tribunal itself must be considered to be acting 'like a court', then the conferral of the power is *ultra vires*" (*Residential Tenancies*, *supra*, at pp. 733-34). In short, transfer of limited ancillary functions is permitted. Shadow courts are not.

63

The first branch of the *Residential Tenancies* test has been amplified by this Court in *Attorney General of Quebec v. Grondin*, 1983 CanLII 165 (SCC), [1983] 2 S.C.R. 364, *Sobeys Stores Ltd. v. Yeomans*, 1989 CanLII 116 (SCC), [1989] 1 S.C.R. 238, and *Reference re Young Offenders Act (P.E.I.)*, 1991 CanLII 11713 (SCC), [1991] 1 S.C.R. 252. In *Grondin*, this Court held that the question was whether the matter was within the exclusive power of the s. 96 courts at the time of Confederation; if inferior courts could exercise it then, modern tribunals could surely do so now. In *Sobeys*, Wilson J. suggested that the issue was not the particular remedies exercised by the superior courts at the time of Confederation, but whether the dispute was one which would have fallen within their exclusive jurisdiction. The dispute should be narrowly defined, so as not to preclude legitimate transfers at the outset. In *Reference re Young Offenders Act*, Lamer C.J. added a further qualification. He suggested that the legislative purpose of the grant of power, and the nature of the scheme of which it forms a part, should be considered in characterizing the power for purposes of the first stage of the test. On this approach, he concluded that the powers granted to youth courts and the administrative scheme set up under the *Young Offenders Act* could be viewed as creating a "novel jurisdiction" not within the power of the superior courts at the time of Confederation. Viewed thus, the answer to the question of whether the power was one exercised by the superior courts in 1867 was no, and the transfer of power was held valid.

The parties to this appeal agree that the first and second stages of the *Residential Tenancies* test are met. Hence I comment on them no further, except to note their function in relation to the test as a whole. The first and second stages of the test may be viewed as devoted to determining whether there is an impingement on the powers of s. 96 courts. If the powers were not historically within the exclusive purview of the s. 96 courts, their conferral on the inferior tribunal can pose no problem. Similarly, if the power is not judicial, no problem arises. But if the first two stages are passed and a derogation from s. 96 powers is established, that is not the end of the matter. Some derogations are permitted. To determine whether the identified transfer of s. 96 power is permitted, the power must be viewed in its institutional setting to determine whether it is ancillary or necessary to the policy objectives of the scheme in which it is exercised. If so, "the power in its institutional setting has changed its character sufficiently to negate the broad conformity with superior, district or county court jurisdiction" (Hogg, *supra*, at p. 191). To use the words of this Court in *McEvoy v. Attorney General for New Brunswick*, [1983 CanLII 149 \(SCC\)](#), [1983] 1 S.C.R. 704, at p. 717, the "judicial aspect . . . change[s] colour when considered in the factual setting in which the court will operate". The derogation from s. 96 powers established by the first and second inquiries of the test is rendered valid by its administrative function.

If the third stage of the inquiry under the *Residential Tenancies* test is satisfied, there can be no fear that the constitutional status of the s. 96 courts will be threatened. A tribunal exercising a judicial power ancillary or necessary to a broader administrative scheme is still performing an administrative function. In exercising that power, it will not be, to use the language of Dickson J. in *Residential Tenancies*, "acting 'like a court'".

The *Residential Tenancies* test may thus be seen as a functional test. It does not attempt to define precluded areas of transfer by how the power itself is characterized, for example, by calling it a criminal power, or contract power, or the exercise of an inherent jurisdiction. Rather, it identifies precluded transfers by how the power functions in the setting Parliament or the legislature has proposed. Does the tribunal use the power as a mere aid to the

achievement of a larger administrative goal, or does it use the power to make itself a shadow court?

67 This functional approach to determining whether a transfer of s. 96 power is valid or not possesses merits which a categorical approach lacks. The fundamental problem which arises when one attempts to identify protected areas of s. 96 jurisdiction by the type of power conferred is that any test threatens to be at once under and over inclusive. For example, if one suggests that important areas of common law, like criminal law, contract law or the inherent powers of the courts cannot be transferred from s. 96 courts, one is faced with the difficulty that aspects of criminal and contract law and inherent powers of the courts figure prominently in the administrative machinery of this country, without apparent harm to s. 96 courts. On the other hand, if one reduces the core of non transferable powers, suggesting that only the inherent powers of s. 96 courts to control their process are sacrosanct, one faces the problem that vast areas of contract, tort and criminal jurisdiction could be transferred to shadow courts with impunity, thus destroying the compromise of the Fathers of Confederation and the intended effect of s. 96. By contrast, the *Residential Tenancies* test, by focusing on the function of the power in the administrative context rather than the nature of the power conferred, provides sufficient flexibility to equip administrative tribunals with the powers they need to do their work, while preserving the constitutional position of the s. 96 courts.

68 Viewed in retrospect, the *Residential Tenancies* test may be seen to have evolved over the years in response to the needs of Canadian society. Without suggesting that further refinements may not, as time passes, prove desirable, the test meets the basic requirements of the Constitution and of society in a way in which proposed alternatives, such as a rule precluding any transfer from a nebulous, indeterminate shopping list of "core" powers, does not.

69 These considerations lead me to conclude that the *Residential Tenancies* test, developed over the past 50 years in response to the changing social conditions of this country, should not be lightly discarded. It is against this background that I approach the case for an alternative

approach found in the reasons of the Court of Appeal of British Columbia and the Chief Justice of this Court.

(c) The Proposed Changes to the *Residential Tenancies* Test

70 The *Residential Tenancies* test is based on the premise that any judicial power can be transferred from a s. 96 court to an inferior tribunal, provided that the power is ancillary to the tribunal's larger mandate. Shadow courts, devoted exclusively or primarily to rendering judgments which s. 96 courts have traditionally rendered, are forbidden. Only if the tribunal's major focus is a larger one and the powers can be said to lose their judicial character in the administrative context, is the tribunal permitted to incidentally exercise judicial powers traditionally exercised by s. 96 courts.

(i) *The Proposed "Core" Test*

71 The Court of Appeal below and the Chief Justice in this Court propose a modification of this test. Acknowledging that the *Residential Tenancies* test is satisfied in this case, the Chief Justice argues that an additional question must be asked: is the power transferred a "core" power of s. 96 courts? The boundaries and constituent elements of this core are unspecified but seem to extend at least to the inherent powers of s. 96 courts. This is a new test which in my respectful opinion needlessly derogates from the functional approach of the *Residential Tenancies* test. As I understand the proposed test, it would no longer be sufficient that the transfer of judicial power historically exercised by s. 96 courts be ancillary to the larger function of inferior tribunal; it would also be necessary to show that the particular power transferred is not one of the "core" powers of s. 96 courts. This "core" is not defined by reference to the functions of the tribunal, but by the nature of the s. 96 power transferred. What is proposed is a class of "core" powers which, by their very nature, are essential to s. 96 courts and cannot be transferred to other courts regardless of whether or not the three inquiries of the *Residential Tenancies* test are satisfied. This marks a shift from the functional approach

of the *Residential Tenancies* test for transfer of s. 96 powers toward a more categorical approach.

72 This revised version of the *Residential Tenancies* test finds its source in a passage from the reasons of Lamer C.J. in *Reference re Young Offenders Act, supra*. In considering the limits imposed by s. 96, he stated (at p. 264):

. . . if the jurisdiction conferred on Youth Courts by Parliament is within the core of jurisdiction of superior courts, Parliament cannot confer such jurisdiction on courts presided over by judges not appointed in accordance with s. 96.

However, this reference to "core" jurisdiction must be read in conjunction with the paragraph that follows it:

The test for determining if a power can be constitutionally given to an inferior court or an administrative tribunal was set out in *Re Residential Tenancies* . . .

Read in this context, the "core" referred to by Lamer C.J. in *Reference re Young Offenders Act* might have been seen simply as a shorthand reference to impermissible transfers under the *Residential Tenancies* test -- i.e., transfers where the adjudicative function "is a sole or central function of the tribunal ... that the tribunal can be said to be operating 'like a s. 96 court'" (*per* Dickson J., in *Residential Tenancies, supra*, at p. 736).

73 In the reasons of the Court of Appeal in this case, however, the notion of "core" was given a different meaning. It was understood as designating a class of judicial powers -- contempt and the like -- which can never, under any circumstances, be transferred to inferior tribunals. The significance of this change should not be underestimated. If accepted, it would amount to an important new fetter on the ability of Parliament and the provincial legislatures to create effective tribunals to ensure compliance with regulatory schemes. The significance of the additional fetter is enhanced by the fact that it is constitutional, and hence incapable of being legislatively overridden, as well as by the fact that what falls within the core remains largely undefined.

74 Having suggested that the reasons of the Court of Appeal below and of the Chief Justice in this Court represent a significant departure from the existing test for the transfer of s. 96 judicial power to inferior tribunals, it remains to determine whether the departure is one which this Court should endorse. Before embarking on that inquiry, however, it may be useful to deal with two related notions which may otherwise cloud the analysis.

75 The first is the Chief Justice's observation that the problem lies in the exclusive nature of the transfer of the s. 96 power to the inferior tribunal. The second is his insistence that the focus of the problem is not the conferral of power on the inferior tribunal, but its removal from the s. 96 courts. I agree with both observations. It is rare for Parliament or a legislature to offer a choice between having one's case adjudicated by a s. 96 court or an administrative tribunal. If the administrative scheme is to operate effectively with a minimum of procedural confusion, it is typically essential that the tribunal have exclusive power to decide the matters at issue. As the facts of the cases on the question of transfer of s. 96 powers demonstrate, the issue is almost always whether Parliament or the legislatures can transfer the s. 96 power to the inferior tribunal and exclude the s. 96 courts from adjudication in that area. To point this out is not, with respect, to advance the analysis, but merely to define the problem which has preoccupied the courts since Lord Atkin's opinion in *Toronto v. York, supra*. Viewed thus, it becomes apparent that the issues of whether a power can be taken from a s. 96 court and whether it can be conferred on an independent tribunal, which the Chief Justice seeks to separate, are in fact reverse sides of the same coin. There is nothing exceptional in this respect in what Parliament did when it conveyed exclusive power over contempt not in the face of the court committed by juveniles to youth court. Rather, the conferral of exclusive power over the offence on the youth court brings this case directly within the ambit of the central problem addressed in *Residential Tenancies* and its predecessors.

76 Against this background, I come to the essential question on this appeal: should this Court alter the *Residential Tenancies* test by adding the additional concept of an immutable core of powers which can never be transferred from s. 96 courts to inferior tribunals? It is my

conclusion, with the greatest respect to the Court of Appeal and the Chief Justice of this Court, that it should not.

(ii) *The Argument in Principle for a "Core" Test*

77 The crux of the Chief Justice's argument is that the superior courts can never be deprived of their "core" powers, which include the power to regulate their own process, including contempt not in the face of the court.

78 The difficulty which this argument faces is that it has long been settled that under the rule of law Parliament and the legislatures may limit and structure the ways in which the superior courts exercise their powers. These inherent powers of superior courts are simply innate powers of internal regulation which courts acquire by virtue of their status as courts of law. The inherent power of superior courts to regulate their process does not preclude elected bodies from enacting legislation affecting that process. The court's inherent powers exist to complement the statutory assignment of specific powers, not override or replace them: "The two heads of powers are generally cumulative, and not mutually exclusive" (I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Current Legal Problems* 23, at p. 25).

79 In fact, the superior courts of this country are controlled by an elaborate matrix of statute and regulation limiting the way they exercise powers over their own process. Legislation intrudes on a number of areas traditionally within the domain of the court's inherent power, including matters such as contempt of court, testimonial compulsion, the attendance of spectators, hours of sitting and the imposition of publication bans over court proceedings. Parliament and the legislatures routinely make rules limiting the scope for the exercise of the court's inherent powers in these and other areas. In every province Rules of Court limit and define the ways in which superior courts can exercise their inherent powers. The *Income Tax Act* restricts the circumstances in which courts may exercise their inherent jurisdiction to order the Minister of National Revenue to release confidential information: *Glover v. Glover* (No. 1) (1980), 1980 CanLII 63 (ON CA), 113 D.L.R. (3d) 161 (Ont. C.A.), aff'd 1981 CanLII 64

(SCC), [1981] 2 S.C.R. 561. In the criminal sphere, s. 486(4) of the *Criminal Code*, R.S.C., 1985, c. C-46, removes the discretion a judge would have at common law to refuse a publication ban upon the request of a complainant or prosecutor where the accused is charged with one of the listed offences. How a court must deal with contempts arising in certain circumstances is now prescribed in some detail (see, e.g., ss. 127(1), 708(1), 605(2), 484, 486(1) and (5)). Interestingly, in order to preserve the court's jurisdiction over contempt in s. 9, the *Code* specifically excludes that offence from the general withdrawal of jurisdiction over the common law offences. The drafters clearly recognized the competence of Parliament to remove an aspect of inherent jurisdiction, and consequently the need to segregate contempt from the general provision eradicating those offences if the courts were to retain this power.

80 All of this is simply to restate the general principle that courts must conform to the rule of law. They can exercise more power in the control of their process, in different ways, than is expressly provided by statute, but must generally abide by the dictates of the legislature. It follows that Parliament and the legislatures can legislate to limit the superior courts' powers, including their powers over contempt, provided that the legislation is not otherwise unconstitutional. If this is so, then it is wrong to posit a core of inherent superior court powers to regulate the process of the courts which the legislators cannot touch. Parliament's transfer of an aspect of the contempt power from the superior courts to the youth courts may be seen as an example of a legislative limitation on the inherent power of the superior court, in the sense that absent the transfer, the superior court would possess that power. That however, does not render the transfer of power invalid. Nor does it rule out the power of a superior court to deal with exceptional situations threatening its status by the exercise of its inherent power which exists to complement the statutory assignment of specific powers: to use Jacob's phrase, "one set of powers supplements and reinforces the other" (Jacob, *supra*, at p. 50). I conclude that Parliament may enact that all *ex facie* juvenile contempt charges should be heard in youth court, provided that the conditions of the *Residential Tenancies* test are met. The need to preserve the inherent powers of superior courts requires no further test.

81 I have concluded that one cannot say, as a matter of principle, that Parliament can never legislate with respect to a matter that might be dealt with under the inherent jurisdiction of the court. But another argument was pressed in support of an untouchable core of s. 96 jurisdiction immune from legislative limitation. It is not an argument of principle but of policy. It is the argument that without an untouchable core of inherent jurisdiction, the constitutional position of s. 96 courts will, as a practical matter, be eroded. The functional approach of the *Residential Tenancies* test is inadequate to protect the s. 96 courts. We must, it is asserted, go further and build an impregnable wall around core court powers if the position of the superior courts is to be preserved.

82 It may initially be observed that the *Residential Tenancies* approach to the transfer of s. 96 powers has been the law in Canada since the *Tomko* case in 1977. It is not suggested that the role of s. 96 courts has been diminished in the 18 intervening years, despite the creation of a host of administrative tribunals exercising a variety of substantive and procedural powers traditionally exercised by s. 96 courts.

83 Indeed, it might be argued that the primal position of the superior courts during this period has been enhanced by the fact that they have jealously guarded their rights of review of the decisions of inferior tribunals. Where an aspect of their historical power has been transferred to the inferior tribunal, the courts have reserved the right to review the decision for conformity to the law and the rules of natural justice. Attempts by Parliament or the legislatures to insulate tribunal decisions from supervision by superior courts through the use of clauses purporting to oust judicial review, while offering protection against review of decisions on fact and exercise of discretion, have not deterred the courts from insisting that the decisions of tribunals meet the basic requirements of legality and fairness: see *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220. Viewed thus, transfers of s. 96 jurisdiction to inferior tribunals have not ousted the power of the superior courts, but merely elevated it one remove. Administrative tribunals deal with the factual minutiae of

multitudinous disputes; the superior courts ensure that the law is followed and fair process maintained.

84 Viewing the matter from the perspective of the power here in question, the conclusion is the same. The facts of this case simply do not support the contention that powers essential to the proper functioning of s. 96 courts are in danger of being eroded. The Court of Appeal accepted without much discussion the proposition that the power to try youths for contempt not in the face of the court is essential to maintaining the authority of the superior courts. Yet, with respect, this is far from self-evident. What is essential to maintaining the authority of a court is that consequences attach to the disobedience of its order. It would seem immaterial whether the consequences derive from the same court as issued the initial order, or from a different court. It is the attachment of criminal consequences which gives the order its force, not the source of those consequences. I accept the submissions of the Attorney General of Canada that the youth court is just as able to protect the validity and efficacy of a superior court order as is the superior court. No evidence was put forward by the Attorney General of British Columbia or cited by the Court of Appeal to suggest otherwise. And if the youth court errs, or fails to proceed where it should, it is subject to the corrective power of the superior court on judicial review or of the Court of Appeal on appeal.

85 It was argued that contempt charges might not be pursued in youth court, leaving the superior court order unenforced. The superior court must have the power, it was submitted, to pursue and try charges for contempt out of the face of the court in such circumstances.

86 There are a number of answers to this submission. First, counsel for the young offender conceded that s. 47(2) does not deprive the superior court of the power to initiate proceedings by referring a charge of contempt out of the face of the court to the youth court.

87 Second, contempt not in the face of the court is generally prosecuted like any other crime by the Attorney General, who gathers the evidence and presents the case to the court. This follows from the fact that the contempt is not committed in the presence of the court. Unlike

contempt *in facie*, which Parliament has left within the purview of the court where it was committed, the court whose order has been allegedly traversed will usually have no evidence itself of *ex facie* contempt, and cannot pursue it without the intervention of the Attorney General. For example, in the case at bar, the superior court judge had no personal knowledge of who had demonstrated, let alone when or where the injunction was supposedly violated. As in the case of any other crime, trial of the contempt was dependent on a case presented by the prosecution. This removes much of the force of the argument that the superior court must retain power to pursue charges for contempt out of the face of the court because the Attorney General may fail to bring such charges before the youth court. Whatever the court, the decision as to whether the charge proceeds will almost always be the Attorney General's.

88 The final guarantee that the process of the superior courts will not be undermined by a transfer of juvenile contempt of court *ex facie* to the youth courts, lies in the residual inherent jurisdiction of the superior courts to take such measures as may be required to preserve their process. Should the administration of justice require that a particular case be tried in superior court, that court possesses the inherent power to hold such a trial. As discussed earlier, all rules of court must be read as subject to the inherent power of the superior court to do what is required to preserve their process. Where the use of a legislative provision or rule of court would itself amount to an abuse of the court's process, the court may invoke its inherent jurisdiction to ensure that justice is done. [Section 47\(2\)](#) of the *Young Offenders Act* is no exception.

89 In conclusion, I note that the argument on policy would have more force if Parliament had removed from the superior courts all power to try the offence of contempt. In fact, only contempt not in the face of the court committed by youths has been removed from the superior courts. To borrow the language of *McEvoy, supra*, at p. 722, this is a "mere alteration or diminution of criminal jurisdiction", cardinally different from a complete exclusion of Parliament.

90 Parliament appears to have carefully considered and weighed what is necessary to permit the superior courts to preserve their authority. Parliament left to the superior courts power to try youths for contempt in the face of the court, a power arguably necessary to enable a court to maintain order in its proceedings. At the same time, it transferred to youth court contempt not in the face of the court committed by youths. The latter, unlike the former, is concerned with the enforcement of orders rather than preservation of order in proceedings. This carefully calibrated scheme poses no threat to the authority of the superior courts, whose authority stands firm.

91 Before leaving the policy argument, it may be useful to ask whether, when all is considered, it can be said that the *Residential Tenancies* test might fail to maintain the protection of s. 96 courts which the Constitution requires. I would not suggest that the *Residential Tenancies* test is forever cast in stone, nor that situations may not arise affecting the stature and integrity of the superior court, which could require the court to invoke its inherent power to safeguard its own process in a manner which was not contemplated by the *Residential Tenancies* test. This said, the current test for transfer, developed in response to Canadian needs over a period of several decades, strikes a reasonable balance between the need to permit Parliament and the legislatures to annex effective administrative tribunals to their legislative schemes, and the need to maintain the constitutional position of the s. 96 courts. The test permits only incidental derogations of powers from s. 96 courts, and then only to the extent that their judicial nature is transformed by the administrative context in which they are exercised. The greater the powers sought to transferred, the greater the curtailment of the inherent powers of the s. 96 courts, the more likely the powers are to be seen as judicial rather than administrative, barring their transfer from s. 96 courts to inferior tribunals.

92 On the other hand, the revised "core" test proposed would impose significant new restrictions on the power of Parliament and the legislatures to endow specialized tribunals with sufficient powers to meet particular problems and deprive many tribunals of powers which they have long exercised. The alternative of dual powers exercised by the tribunals and the courts would encourage forum shopping and contribute to expense and delay in the

resolution of problems within these specialized areas. At the same time, the addition of a concept of a category of core of inherent powers which can never be transferred would add a new element of uncertainty to the law. As the Chief Justice admits, inherent jurisdiction "may be difficult to define" (para. 30). He declines, quite understandably, "to enumerate the precise powers which compose inherent jurisdiction" (para. 38). What is clear is that this concept of inherent jurisdiction includes some of what administrative tribunals now do. What is not clear is how far beyond this the penumbra of inherent powers may extend.

93 For these reasons, I remain unpersuaded that the *Residential Tenancies* test for transfer s.
96 judicial powers to inferior tribunals should be supplemented by the concept of immutable core powers which can never constitutionally be transferred from s. 96 courts, no matter how incidental their role in the overall administrative scheme. I would maintain the *Residential Tenancies* test.

(d) Application of the *Residential Tenancies* Test in This Case

94 As the Chief Justice concedes, application of the *Residential Tenancies* test in this case leads to the result that the transfer of contempt not in the face of the court committed by juveniles from s. 96 courts to the youth courts is valid and constitutional. The power was historically possessed by s. 96 courts, it is judicial, and it is merely ancillary to the larger role of the youth courts in relation to the special problems and needs of young offenders.

95 A number of assaults were made on the proposition that conferral of this power is ancillary only. None, in my view, succeed.

96 The Attorney General of British Columbia seeks to bring itself within the *Residential Tenancies* test by characterizing the power at issue simply as "the inherent jurisdiction of a superior court of record to maintain and enforce its authority by contempt proceedings for . . . contempt *ex facie*". This power, it argues, has nothing to do with the goals of the *Young Offenders Act* and hence fails to satisfy the third enquiry under the test. But this is a

mischaracterization of the power at issue. Parliament has not transferred power over all contempt out of the face of the court to the youth courts, only such contempt committed by young offenders. Only by reading the reference to young offenders out of s. 47(2) can the Attorney General argue that the power is not related to the goal of the *Young Offenders Act*. If the power transferred is properly characterized, there is no basis for parting from the analysis under *Reference re Young Offenders Act* and *Residential Tenancies*.

97 The Attorney General of British Columbia also argues that s. 47(2) is not necessarily incidental to the policy goals of the *Young Offenders Act*, because contempt not in the face of the court is different from other crimes, being a common law crime and the only crime whose *actus reus* is disobedience of a court order. These features, in my view, do not suffice to remove juvenile contempt not in the face of the court from the concerns of the *Young Offenders Act*. Like other crimes, it is generally prosecuted by the Attorney General, who gathers and presents evidence to the court, which must sit impartially and conclude on innocence or guilt based on the record before it. Like other crimes, it involves *actus reus*, *mens rea*, and consequences of imprisonment upon conviction. Like other crimes, conviction creates a criminal record. All these considerations suggest that it should be treated like any other crime. The special aims of the *Young Offenders Act* apply to it as much as to any other crime. Parents should be advised of pending charges. Rehabilitation should be the predominant consideration. Incarceration in facilities tailored to young people's special needs should be the norm. The argument that the transfer of criminal contempt not in the face of the court committed by youths is not ancillary to the powers exercised by the youth courts cannot succeed.

2. Conclusion

98 I conclude that Parliament's transfer of contempt not in the face of the court by juveniles from the s. 96 superior courts to the youth courts is valid. The test for transfer laid down in *Residential Tenancies* and approved in *Reference re Young Offenders Act* is met. The case for

a modified test proposing an inviolable core of matters immune from transfer which includes juvenile contempt not in the face of the court has not, in my respectful view, been established.

99 J.P. is charged with criminal contempt not in the face of the court, for violating a court order. [Section 47\(2\)](#) of the *Young Offenders Act* requires that he be tried in youth court. The constitutionality of s. 47(2) has not, for the reasons I have outlined, been successfully challenged. It follows that J.P. should have been tried in youth court. I would allow the appeal and set aside his conviction in superior court and remit the charges to youth court for trial in the forum Parliament has chosen.

100 Accordingly, I would answer the constitutional question stated by the Chief Justice as follows:

Is it within the jurisdiction of Parliament to grant exclusive jurisdiction to youth courts, through the operation of [s. 47\(2\)](#) of the *Young Offenders Act*, R.S.C., 1985, c. Y-1, over contempt of court committed by a young person against a superior court otherwise than in the face of that court?

Answer: Yes.

*Appeal dismissed, L'HEUREUX-DUBÉ, MCLACHLIN, IACOBucci and MAJOR JJ.
dissenting.*

Solicitors for the appellant: Ritchie & Company, Vancouver.

Solicitor for the respondent the Attorney General of British Columbia: The Ministry of the Attorney General, Victoria.

Solicitor for the intervener: The Department of Justice, Vancouver.

Tab 88

Crevier v. A.G. (Québec) et al., 1981 CanLII 30 (SCC), [1981] 2 SCR 220

Source:	Supreme Court of Canada
Date:	1981-10-20
Other citations:	127 DLR (3d) 1 — 38 NR 541 — 11 ACWS (2d) 165 — [1981] CarswellQue 109 — [1981] SCJ No 80 (QL) — [1981] ACS no 80
Citation:	Crevier v. A.G. (Québec) et al., 1981 CanLII 30 (SCC), [1981] 2 SCR 220, < https://canlii.ca/t/1mjlq >, retrieved on 2026-03-23
Most recent unfavourable mention	J.C. c. Canada (Procureur général) , 2012 QCCA 366 (CanLII) [...] Hence, the constitutional principles of the rule of law and of the division of powers invoked by the Supreme Court in Crevier are not applicable in the appellant's case. [...]

SUPREME COURT OF CANADA

Crevier v. A.G. (Québec) et al., [1981] 2 S.C.R. 220

Date: 1981-10-20

Pierre Crevier *Appellant*; and

The Attorney General of the Province of Quebec and Harmel Aubry *Respondents*;

and

Pierre Crevier *Appellant*; and

The Attorney General of the Province of Quebec and Robert Cofsky *Respondents*;

and

The Attorney General for the Province of Alberta *Intervener*.

1981: February 10, 11; 1981: October 20.

Present: Laskin C.J. and Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Professions Tribunal — Writs of evocation — Privative clauses — Express general exclusion of the supervisory authority of the Superior Court in respect of jurisdiction and law — Power to determine limits of jurisdiction without appeal or review — Whether a s. 96 court created — British North America Act, art. 96 — Professional Code, R.S.Q. 1977, c. C-26, arts. 162, 163, 164, 169, 175, 193, 194, 195 — Code of Civil Procedure, arts. 33, 846.

The appellant obtained two writs of evocation from a judge of the Superior Court of Quebec from two decisions of the Professions Tribunal quashing a decision of a Discipline Committee of a professional corporation on the ground that that body had acted beyond its authority. The Superior Court held that the wide powers conferred upon the Professions Tribunal—powers encompassing review of law or fact and jurisdiction—offended s. 96 of the *B.N.A. Act* because the question whether a body has exceeded its jurisdiction fell within the superintending and reforming power belonging solely to a superior court whose members are appointed by the Governor General in Council. That decision was reversed by a majority of the Quebec Court of Appeal. Hence the appeal to this Court.

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Held: The appeal should be allowed.

The Professions Tribunal is given no function other than that of a general tribunal of appeal in respect of all professions covered by the *Professional Code* and it was, therefore, impossible to see its final appellate jurisdiction as part of an institutional arrangement by way of a regulatory scheme for governance of the various professions.

Where a provincial legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions, and where that insulation encompassing jurisdiction, the legislation must be struck down as unconstitutional because it constitutes, in effect, a s. 96 court. It is unquestioned that privative clauses, when properly framed, may effectively oust judicial review on questions of law and on other issues not touching jurisdiction. However, given that s. 96 is in the *British North America Act* and that it would make a mockery of it to treat it in non-functional formal terms as a mere appointing power, there is nothing that is more the hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review. Consequently, a provincially-constituted statutory tribunal could not constitutionally be immunized from review of decisions on questions of jurisdiction.

The present case was no different in principle from the *Farrah* case, [1978 CanLII 195 \(SCC\)](#), [1978] 2 S.C.R. 638, when regard is had to ss. 175, 194 and 195 of the *Professional Code*. In both cases there was a purported exclusion of the reviewing authority of any court, whether by appeal or by evocation.

Attorney General of Quebec v. Farrah, [1978 CanLII 195 \(SCC\)](#), [1978] 2 S.C.R. 638, followed; *Tomko v. Labour Relations Board (N.S.)*, [1975 CanLII 183 \(SCC\)](#), [1977] 1 S.C.R. 112, distinguished; *Re Residential Tenancies Act*, 1979, [1981 CanLII 24 \(SCC\)](#), [1981] 1 S.C.R. 714; *Farrell v. Workmen's Compensation Board*, [1961 CanLII 46 \(SCC\)](#), [1962] S.C.R. 48; *Toronto Newspaper Guild, Local 187 v. Globe Printing Company*, [1953 CanLII 10 \(SCC\)](#), [1953] 2 S.C.R. 18; *L'Alliance des Professeurs Catholiques de Montréal*

v. Labour Relations Board of Quebec, 1953 CanLII 45 (SCC), [1953] 2 S.C.R. 140; *Executors of the Woodward Estate v. Minister of Finance*, 1972 CanLII 139 (SCC), [1973] S.C.R. 120, referred to.

APPEAL from a decision of the Court of Appeal of Quebec^[1], reversing a judgment of the

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Superior Court^[2], authorizing writs of evocation to be issued. Appeal allowed.

Robert Lesage, Q.C., and Daniel Lavoie, for the appellant.

Henri Brun, Louis Crête and Jean-François Jobin, for the respondent the Attorney General of the Province of Quebec.

Pierre Saint-Martin, for the respondents Aubry and Cofsky.

B. A. Crane, Q.C., for the intervener.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—The issue in this appeal is whether the Professions Tribunal, established under s. 162 of the *Professional Code*, R.S.Q. 1977, c. C-26, may competently exercise the powers conferred upon it under s. 175 and under ancillary provisions such as s. 169 or whether, by reason of such powers and having regard also to the privative terms of s. 194, there would be a violation of s. 96 of the *British North America Act* in their exercise. The issue so stated requires a close examination of the recent judgment of this Court in *Attorney General of Quebec v. Farrah*^[3], to determine whether there is a sufficient distinction between the challenged legislation here and that involved in the *Farrah* case to warrant a different answer, one of validity rather than invalidity as in *Farrah*.

I need make but a brief allusion to the facts. The *Professional Code* governs some 38 professional corporations listed in an annex to the Code. Each of these corporations is required to establish a Discipline Committee in conformity with the Code to deal with allegations of professional misconduct. The Discipline Committees have authority under s. 156 to impose a range of sanctions upon a finding of guilty, such as a reprimand or a temporary or permanent striking off the rolls of the particular corporation or a fine of at least \$200 for each offence. The Discipline Committee has no authority to admit members to the particular

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profession and hence is not invested with any power to set standards for membership. This is done by Bureaux constituted under the Code for the respective professions.

In this case two members of a professional corporation were charged with three offences. They were convicted of one and acquitted of the others^[4]. They appealed to the Professions Tribunal under ss. 162 and 164 of the *Professional Code* and the Tribunal found (I shall delineate its powers shortly) that the Discipline Committee had gone beyond the governing regulations in concluding that an offence had been committed and hence had acted beyond its authority. Accordingly, the two members were found not guilty. The complainant thereupon brought two writs of evocation which were granted by Poitras J.^[5]

who held that the wide powers conferred upon the Professions Tribunal, powers to confirm, alter or quash any decision by a Discipline Committee, powers encompassing review of law or fact and jurisdiction, were such as to offend s. 96 of the *British North America Act*. His judgments were reversed by a majority of the Quebec Court of Appeal^[6] (Paré J. A. and Jacques J., *ad hoc*), Montgomery J.A. dissenting. Leave to appeal to this Court was subsequently granted to consider the constitutional question posed at the beginning of these reasons.

The relevant provisions of the *Professional Code* governing the establishment and powers of the Discipline Committees are as follows:

116. A committee on discipline is constituted within each corporation.

The committee shall be seized of every complaint made against a professional for an offence against this Code, the act constituting the corporation of which he is a member or the regulations made under this Code or that act.

117. The Committee shall consist of at least three members, including a chairman who shall be appointed by the Gouvernement, after consultation with the Barreau du Québec, from among the advocates who have at least ten years' practice. At least two other members

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shall be designated by the Bureau of the corporation from among the members of the corporation.

In choosing the chairman, the Gouvernement may consider to be years of practice the years during which a person acquired pertinent legal experience after obtaining a permit to practise the profession of advocate, a diploma of admission to the Barreau du Québec or a certificate of competence to practise the profession of advocate.

120. Whenever possible, the person appointed by the Gouvernement as chairman of the committee on discipline of a corporation shall also be appointed chairman of the committee on discipline of other corporations.

138. There shall be three members, including the chairman, at the sittings of the committee.

If the number of members of the committee so permits, the committee may sit in divisions consisting of three members, one of whom shall be the chairman or a person chosen by him from a list of advocates prepared by the Gouvernement, after consultation with the Barreau du Québec.

142. Every hearing shall be held *in camera*, unless the committee, at the request of the respondent, considers that it is in the public interest that it not be held in this manner.

143. The committee on discipline may have recourse to all legal means to ascertain the facts alleged in the complaint; with the consent of all the parties, the committee may also, in its discretion, receive evidence taken outside the trial.

146. The committee shall summon such witnesses and require the production of such documents as it or either party considers useful by ordinary summons over the

signature of the secretary.

147. The committee shall have all the powers of the Superior Court to compel witnesses to appear and answer, and to punish them in case of refusal; for such purpose the respondent shall be considered as a witness.

149. A witness or professional testifying before the committee shall be bound to answer all questions. His evidence is privileged and cannot be used against him before any court of justice.

Except where the hearing is public under section 142, every person conversant with such evidence shall be

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personally bound to secrecy saving the right of the president of the corporation of which the professional is a member and of the members of the tribunal hearing an appeal under section 162 to be informed thereof in the performance of their duties.

151. The Committee shall have the power to condemn the complainant or the respondent to pay the costs, including the cost of recording, or to apportion the costs between them.

152. The committee shall decide to the exclusion of any court, in first instance, whether the respondent is guilty of an offence against this Code, the act constituting the corporation of which he is a member or the regulations made under this Code or the said act.

154. The decision of the committee on discipline shall be recorded in writing and signed by the members of the committee. It shall contain, in addition to the conclusions, the reasons for the decision.

156. The committee on discipline shall impose on a professional convicted of an offence against this Code, the act constituting the corporation of which he is a member or the regulations made under this Code or the said act, one or more of the following penalties:

- (a) reprimand;
- (b) temporary or permanent striking off the roll;
- (c) a fine of at least two hundred dollars for each offence;
- (d) the obligation to remit to any person entitled to it a sum of money the professional is holding for him;
- (e) revocation of his permit;
- (f) revocation of his specialist's certificate.

For the purposes of subparagraph c of the first paragraph, when an offence is continuous, its continuity shall constitute a separate offence, day by day.

A decision of the committee on discipline condemning the complainant or the respondent to costs or imposing a fine on the respondent may, in default of voluntary payment, be homologated by the Superior Court or the Provincial Court

according to their respective jurisdictions, having regard to the amount involved, and such decision shall become executory as a judgment of that Court.

The Professions Tribunal although consisting of six Provincial Court Judges, as prescribed by s. 162, sits with three, pursuant to s. 163 and hence

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may have a varying membership for the hearing of appeals from decisions of a Discipline Committee. Sections 162 and 163 read:

162. A Professions Tribunal is established, composed of six judges of the Provincial Court designated by the chief judge of such Court who shall designate a chairman among them.

An appeal shall lie to such tribunal from any decision of a committee on discipline, by the plaintiff or the respondent.

163. Sittings of the tribunal shall be composed of three judges.

At least two of such judges must form part of the six judges forming the court. The third may be a judge forming part of a list of five judges of the Provincial Court established for such purpose by the chief judge of that Court.

However, motions preliminary or incidental to the hearing of the appeal, except those presented under the first paragraph of section 164 and sections 166 to 169, 171, 172 and 173 and those excepted by the rules of practice, shall be heard and judged by a judge of the tribunal who may, however, refer them to the tribunal.

Other provisions of the *Professional Code* relevant to the operation of the Professions Tribunal are ss. 164, 165, 167, 169, 173, 174, 175 and 176. They are as follows:

164. Every appeal under section 162 shall be made by a petition served upon the parties and upon the secretary of the committee on discipline. This petition must be filed at the office of the Provincial Court at the chief place of the judicial district where the respondent in first instance principally practises his profession, within twenty days of the service of the decision of the committee on discipline dismissing the complaint or imposing the penalty, as the case may be, or within ten days of the service of the decision of such committee if such decision has to do with a request for provisional striking off the roll.

Within ten days of receipt of the notice of appeal, the secretary of the committee shall send the original and three copies of the record relating to the decision appealed from to the clerk of the Provincial Court.

The record shall comprise the complaint, the subsequent proceedings, the exhibits produced, the transcription of the depositions if they have been recorded, the minutes of the trial, the decision of the committee and the petition.

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A judge of the tribunal may:

(a) upon a motion of the secretary of the committee, extend the delay provided in the second paragraph;

(b) upon a motion of one of the parties, allow that certain contents of the record be not reproduced in the three copies which must be sent in accordance with the second paragraph.

165. The tribunal to which the appeal is referred and each of its members shall have the powers and immunities of commissioners appointed under the Act respecting public inquiry commissions ([chapter C-37](#)).

The tribunal or a member thereof may, on the basis, *mutatis mutandis*, of the Code of Civil Procedure, prescribe such orders of procedure as the exercise of its functions may require.

The clerk and the officers and employees of the Provincial Court of the district in which the tribunal sits must provide it with the services they usually provide to the Provincial Court itself.

167. Within fifteen days of the filing of the petition, the appellant must file at the office of the Provincial Court five copies of a factum setting out his pretensions, and give two copies to each of the other parties. Within the following fifteen days, the other parties must file at the office of the court and give to the appellant the same number of copies of their own factums.

If the appellant does not file his factum within the delay fixed, the appeal may be dismissed; if the other parties are in default, the tribunal may refuse to hear them.

169. The tribunal may also, by reason of exceptional circumstances and where the ends of justice so require, authorize the presentation of additional written or verbal evidence.

The application for authorization shall be made by a written and sworn motion; it shall be presented to the tribunal for adjudication after notice to the opposite party.

If the motion is heard, each party may examine and cross-examine the witnesses summoned and present his arguments.

173. Every hearing shall be held *in camera*, unless the tribunal decides, at the request of the respondent in first instance, that it is in the public interest that it not be held in this manner.

174. The rules provided in section 149 shall apply to the hearing before the tribunal.

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175. The tribunal may confirm, alter or quash any decision submitted to it and render the decision which it considers should have been rendered in first instance.

The tribunal has power to order any of the parties to pay the costs or to apportion such costs among them.

The tribunal's decision shall be final.

176. The decision of the tribunal shall be recorded in writing and signed by the judges who rendered it. If *[sic]* shall contain, in addition to the conclusions, the reasons on which it is based.

Two other sections of the *Professional Code* are relevant, s. 193 providing for certain immunity for acts done in good faith in the performance by, *inter alia*, a discipline committee or an appeal tribunal of their duties; and s. 194, a privative provision, excluding recourse to the supervisory authority of the Superior Court under certain articles of the *Code of Civil Procedure*. These sections read:

193. The syndics, assistant syndics, corresponding syndics, the investigators and experts of a professional inspection committee, the members of the Office, of a Bureau, of a committee on discipline, of a professional inspection committee or of a committee of inquiry established by a Bureau, and the members of a tribunal hearing an appeal from a decision by a committee on discipline, shall not be prosecuted for acts done in good faith in the performance of their duties.

194. No extraordinary recourse contemplated in articles 834 to 850 of the Code of Civil Procedure shall be exercised and no injunction granted against the persons mentioned in section 193 acting in their official capacities.

Section 194 is reinforced by s. 196 which is as follows:

196. Two judges of the Court of Appeal may, upon motion, summarily annul any writ, order or injunction issued or granted contrary to sections 193 and 194.

Section 195 should also be mentioned, reading as follows:

195. Article 33 of the Code of Civil Procedure does not apply to the persons mentioned in section 193 acting in their official capacities.

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It is sufficient in the present case, in adverting to the reference in s. 194, *supra*, to arts. 834 to 850 of the *Code of Civil Procedure*, to reproduce only art. 846 which is in these terms:

846. The Superior Court *may*, at the demand of one of the parties, evoke before judgment a case pending before a court subject to its superintending and reforming power, or revise a judgment already rendered by such court, in the following cases:

1. when there is want or excess of jurisdiction;
2. when the enactment upon which the proceedings have been based or the judgment rendered is null or of no effect;
3. when the proceedings are affected by some gross irregularity, and there is reason to believe that justice has not been, or will not be done;
4. when there has been a violation of the law or an abuse of authority amounting to fraud and of such a nature as to cause a flagrant injustice.

However, in the cases provided in paragraphs 2, 3 and 4 above, the remedy lies only if, in the particular case, the judgments of the court seized with the proceeding are not susceptible of appeal.

Article 33 of the *Code of Civil Procedure*, excluded by s. 195, *supra*, is as follows:

33. Excepting the Court of Appeal, the courts within the jurisdiction of the Legislature of Quebec, and bodies politic and corporate within the Province are subject to the

superintending and reforming power of the Superior Court in such manner and form as by law provided, save in matters declared by law to be of the exclusive competency of such courts or of any one of the latter, and save in cases where the jurisdiction resulting from this article is excluded by some provision of a general or special law.

The Court of Appeal majority viewed the preclusive words of s. 194 as not touching the power and right of the Superior Court to issue a writ of evocation where there has been a want or excess of jurisdiction. Section 194 itself, however, does not recognize this supervisory authority of the Superior Court. If it did, it would be arguable that so long as the Professions Tribunal was subject to the superintendence of the Superior Court on questions of jurisdiction, it would not be tainted as exercising a power belonging to a s. 96 court by an initial but reviewable conclusion that a Discipline

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Committee had exceeded its jurisdiction. That is not this case, having regard to the embrative terms of s. 194 of the *Professional Code*. Even if it were otherwise and the supervisory authority of the Superior Court on questions of jurisdiction was expressly preserved, it would still not be a complete answer to a contention that the Professions Tribunal is exercising powers more conformable to those belonging to a s. 96 court than those properly exercisable by a provincial administrative or quasi-judicial tribunal or even a provincial judicial tribunal.

In the present case, Poitras J. summarized in the following words his view that the Professions Tribunal had been endowed with powers which it could not constitutionally exercise [at p. 334]:

[TRANSLATION] We are of the opinion that the question whether a body has exceeded its jurisdiction, either by refusing to acknowledge the scope of a regulation of the Order, or by deciding in the absence of a regulation, or by following non written rules, or by construing a given regulation in an unreasonable way, falls within the superintending and reforming power which belongs solely to a superior court whose members are appointed by the Governor General in Council.

Therefore, in so far as jurisdiction is vested in the Professions Tribunal by the *Professional Code*, to the exclusion of any other Court, to dispose of any issue of law with respect to the alleged refusal by the Committee on discipline to acknowledge the scope of a regulation, or to the right of the Committee on discipline to construe it as it sees fit, this jurisdiction *rationae materiae* is unconstitutional.

The majority of the Court of Appeal viewed the matter differently. Paré J.A. proceeded from an historical view that at Confederation an appeal of a disciplinary decision against a member of a profession was not within the exclusive domain of the Superior Court. Hence, on an historical criterion alone, it could not be said that to invest the Professions Tribunal with the appeal jurisdiction conferred upon it by the *Professional Code* was to endow it with powers analogous to those of courts within s. 96 of the *British North America Act*. Moreover, in the opinion of Paré J.A., the fact that

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the Professions Tribunal was given, by way of appeal to it, authority over the merits of decisions of Discipline Committees did not involve the exercise of jurisdiction previously exercised exclusively by the Superior Court. That authority did not result in transferring to the Professions Tribunal the superintending control vested in the Superior Court.

Paré J.A. purported to distinguish the *Farrah* case on the ground that the legislation challenged there under s. 96 of the *British North America Act*, namely, s. 58(a) of the *Transport Act*, in association with ss. 24 and 72 thereof, had the effect of excluding the supervisory jurisdiction of the Superior Court. In his view, the same considerations did not apply to the present case; it was proper to look at ss. 162 and 175 (formerly ss. 158 and 170) of the *Professional Code* separately from ss. 194 and 195 (formerly ss. 188 and 189); and, hence, the restrictive provisions of ss. 194 and 195 should not be taken to limit the powers of the Superior Court in matters of competence and jurisdiction to control the proceedings of the Professions Tribunal. Again, there was the contrasting fact in the *Farrah* case that the effect of s. 58(a) of the *Transport Act* was to displace the appellate authority vested in the Court of Appeal on questions of jurisdiction or law in favour of the Transport Tribunal. There being no invasion of s. 96, in this case, it was not open to the Superior Court to substitute its opinion for that of the Professions Tribunal when the latter was exercising its wide powers under s. 175 of the *Professional Code*.

Jacques J. (*ad hoc*) agreed with Paré J.A. but added that although the decisions of the Professions Tribunal were not subject to appeal and were protected by privative provisions, yet notwithstanding such provisions it remained subject to the control and supervision of the Superior Court in respect of any want or excess of jurisdiction. Further, according to Jacques J., the *Professional Code* established a regime for control of the professions, a matter within provincial competence,

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and the Professions Tribunal was an integral part of the regime. There is an indication here of the "institutional" approach taken in *Tomko v. Labour Relations Board (N.S.)*^[7], but it was not elaborated.

Montgomery J.A., in dissent, pointed out that the Discipline Committees were, in effect, domestic tribunals with penal jurisdiction (and not administrative bodies) and that, correspondingly, the Professions Tribunal was given no power except to hear appeals from decisions of Discipline Committees. It was, therefore, an appeal court with limited jurisdiction in penal matters and not an administrative tribunal of appeal such as was mentioned in reasons given in the *Farrah* case, at p. 642. Montgomery J.A. did not regard it as material that there was previously no right of appeal to the Court of Appeal from decisions of domestic tribunals such as Discipline Committees (a feature of the *Farrah* case) nor did he think it material that the Professions Tribunal was not expressly authorized to decide questions of law. In his view, the terms of ss. 162 and 175 were wide enough to make it clear that it was given that power; and he added that "the nature of the decisions to be rendered by committees on discipline are such that the decisions submitted to the Professions Tribunal would normally be mixed questions of law and fact".

In concluding his reasons, Montgomery J.A. said this [at p. 341]:

It has been suggested that the *Professional Code* should be interpreted so as not to deprive the Superior Court of its superintending and reforming power in the event that a committee on discipline should exceed its jurisdiction. *This point was considered in great detail in the Farrah case by Mr. Justice Pigeon [at pp. 657-611, who nevertheless agreed with the reasons given by Mr. Justice Pratte for holding section 58(a) unconstitutional.*

It is evident that a material, if not the material difference between the reasons of the majority and

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those of Montgomery J.A. lies in their respective views of the effect of the privative terms of ss. 194 and 195. Notwithstanding the embracing words of s. 194, excluding supervisory control of the Superior Court in respect of jurisdiction and law, the majority would read this down to preserve the Superior Court's authority in respect of want or excess of jurisdiction and, in consequence, save the appellate authority of the Professions Tribunal from the invalidating effect of s. 96. The dissenting Justice obviously felt that the express general exclusion of the supervisory authority of the Superior Court, coupled with the wide power given to the Professions Tribunal to entertain appeals on law and fact from decisions of a Discipline Committee and with finality, stamped the Professions Tribunal as a court with powers conformable to those exercised by a s. 96 court and, indeed, of a superior court under s. 96.

Three issues arise from the reasons in the Court of Appeal. The first, which I think may be quickly disposed of, concerns the intimation by Jacques J. of a *Tomko* situation. The Professions Tribunal is given no function other than that of a general tribunal of appeal in respect of all professions covered by the *Professional Code* and it is, therefore, impossible to see its final appellate jurisdiction as part of an institutional arrangement by way of a regulatory scheme for the governance of the various professions. The Professions Tribunal is not so much integrated into any scheme as it is sitting on top of the various schemes and with an authority detached from them, although, of course, exercising that authority in relation to each scheme as the occasion requires. There is no valid comparison with the cease and desist orders which the Labour Relations Board in the *Tomko* case was authorized to issue in its administration of a collective bargaining statute.

I draw support for distinguishing *Tomko* in this assessment of the Professions Tribunal by relying on the recent judgment of this Court in *Re Residential Tenancies Act, 1979*, delivered on May 28,

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1981 and as yet unreported^[8]. There, Dickson J., speaking for a unanimous Court, said this in considering *Tomko* in the course of his reasons [at p. 735]:

It is no longer sufficient simply to examine the particular power or function of a tribunal and ask whether this power or function was once exercised by s. 96 courts. This would be examining the power or function in a 'detached' manner, contrary to the reasoning in *Tomko*. What must be considered is the 'context' in which this power is exercised. *Tomko* leads to the following result: it is possible for administrative tribunals to exercise powers and jurisdiction which once were exercised by the s. 96 courts. It will all depend on the context of the exercise of the power. It may be that the impugned 'judicial powers' are merely subsidiary or ancillary to general administrative functions assigned to the tribunal (*John East; Tomko*) or the powers may be necessarily incidental to the achievement of a broader policy goal of the legislature (*Mississauga*). In such a situation, the grant of judicial power to provincial appointees is valid. The scheme is only invalid when the adjudicative function is a sole or central function of the tribunal (*Farrah*) so that the tribunal can be said to be operating 'like a s. 96 court'.

I emphasize the concluding sentence of this passage.

The second issue arising from the reasons of the Quebec Court of Appeal concerns the effect upon s. 96 of a privative clause of a statute which purports to insulate a provincial adjudicative tribunal from any review of its decisions. Is it enough to deflect s. 96 if the

privative clause is construed to preserve superior court supervision over questions of jurisdiction, and if (as in this case) such a construction is not open because of the wording of the privative clause, is the clause constitutionally valid? In my opinion, where a provincial Legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions, the insulation encompassing jurisdiction, such provincial legislation must be struck down as unconstitutional by reason of having the effect of constituting the tribunal a s. 96 court. As Judson J. noted in *Farrell v. Workmen's Compensation Board*^[9],

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at p. 52, "the restrictions on the legislative power of the province to confer jurisdiction on boards must be derived by implication from the provisions of s. 96 of the *British North America Act*". In the *Farrell* case, there was a preclusive provision against judicial review of Board decisions on questions of law but not on questions of jurisdiction, as distinguished from questions of law, and there was no doubt in that case that the Board had jurisdiction. The conclusion in the *Farrell* case, supported as well in the *Farrah* case, was that there was no constitutional impediment to such a limitation by a province on judicial review. In an earlier case, *Toronto Newspaper Guild, Local 187 v. Globe Printing Company*^[10], at p. 40, Fauteux J. (as he then was) remarked that "if the controlling power of superior courts over inferior tribunals or administrative bodies performing judicial functions is to be operative in the cases where, in principle, it is conceded to exist, the superior courts must somehow or other be enabled to see that jurisdiction has not been exceeded or has not been declined".

A stronger statement on this point was made by Rinfret C.J. in *L'Alliance des Professeurs Catholiques de Montréal v. Labour Relations Board of Quebec*^[11], at p. 155:

[TRANSLATION] We repeat, a court cannot attribute to itself a jurisdiction that it does not have. It seems that this proposition is so evident that it has no need of demonstration. In addition, any restriction on the powers of control and of surveillance of a superior court is necessarily inoperative when it is a question of its preventing the execution of a decision, of an order or of a sentence rendered in the absence of jurisdiction.

In *Executors of the Woodward Estate v. Minister of Finance*^[12], this Court was concerned, *inter alia*,

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with a provincial statutory provision which purported to make certain determinations by the Minister final and conclusive and not open to appeal or review in any court. Martland J., speaking for this Court, dealt with this provision as follows (at p. 127):

The effect which has been given to a provision of this kind is that, while it precludes a superior court from reviewing, by way of *certiorari*, a decision of an inferior tribunal on the basis of error of law, on the face of the record, if such error occurs in the proper exercise of its jurisdiction, it does not preclude such review if the inferior tribunal has acted outside its defined jurisdiction. The basis of such decisions is that if such a tribunal has acted beyond its jurisdiction in making a decision, it is not a decision at all within the meaning of the statute which defines its powers because Parliament could not have intended to clothe such tribunal with the power to expand its statutory jurisdiction by an erroneous decision as to the scope of its own powers.

Although this was not a direct pronouncement on constitutional power (jurisdiction as such was not expressly involved as it is in the case at bar), it was a clear indication that the constitutional issue was in the background. It is necessary to bring it forward, however, when it is raised as squarely as it has been under the *Professional Code*.

It is true that this is the first time that this Court has declared unequivocally that a provincially-constituted statutory tribunal cannot constitutionally be immunized from review of decisions on questions of jurisdiction. In my opinion, this limitation, arising by virtue of s. 96, stands on the same footing as the well-accepted limitation on the power of provincial statutory tribunals to make unreviewable determinations of constitutionality. There may be differences of opinion as to what are questions of jurisdiction but, in my lexicon, they rise above and are different from errors of law, whether involving statutory construction or evidentiary matters or other matters. It is now unquestioned that privative clauses may, when properly framed, effectively oust judicial review on questions of law and, indeed, on other issues not touching

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jurisdiction. However, given that s. 96 is in the *British North America Act* and that it would make a mockery of it to treat it in non-functional formal terms as a mere appointing power, I can think of nothing that is more the hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review.

There has been academic concern with the permitted scope of privative clauses referable to determinations of provincial adjudicative agencies. Opinion has varied from a position that even errors of law cannot validly be immunized from review (see J. N. Lyon, "Comment" (1971), 49 Can. Bar Rev. 365), to a position that at least jurisdictional review is constitutionally guaranteed (see W. R. Lederman, "The Independence of the Judiciary" (1956), 34 Can. Bar Rev. 1139, at p. 1174) to a position that jurisdictional determinations may, constitutionally, also be denied judicial review (see P. W. Hogg, "Is Judicial Review of Administrative Action Guaranteed by the British North America Act?" (1976), 54 Can. Bar Rev. 716, and see also Dussault, *Le contrôle judiciaire de l'administration au Québec* (1969), esp. at pp. 110-13).

This Court has hitherto been content to look at privative clauses in terms of proper construction and, no doubt, with a disposition to read them narrowly against the long history of judicial review on questions of law and questions of jurisdiction. Where, however, questions of law have been specifically covered in a privative enactment, this Court, as in *Farrah*, has not hesitated to recognize this limitation on judicial review as serving the interests of an express legislative policy to protect decisions of adjudicative agencies from external correction. Thus, it has, in my opinion, balanced the competing interests of a provincial Legislature in its enactment of substantively valid legislation and of the courts as ultimate interpreters of the *British North America Act* and s. 96 thereof. The same considerations do not, however, apply to

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issues of jurisdiction which are not far removed from issues of constitutionality. It cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review.

The third issue that emerges from the reasons of the Court of Appeal relates to the impact of the *Farrah* case. There, as here, the provincial Legislature established a statutory tribunal of appeal. The relevant statute, the [Quebec Transport Act](#), confided to the

Transport Tribunal, under s. 58(a) of the *Transport Act*, "jurisdiction, to the exclusion of any other court, to hear and dispose of in appeal, on any question of law, any decision of the [Quebec Transport] Commission which terminates a matter". This authority was reinforced by the privative provisions of ss. 24 and 72 which, respectively, precluded recourse under arts. 834 to 850 of the *Code of Civil Procedure* as against the Commission and as against the Transport Tribunal. The effect of the foregoing provisions, taken together, was to transfer the supervisory jurisdiction of the Quebec Superior Court, as it existed at Confederation and afterwards, to the Transport Tribunal, and this was beyond provincial competence. It was a supporting consideration that s. 58(a) put the Transport Tribunal in place of the, Quebec Court of Appeal to which there was previously a right of appeal on questions of law and of jurisdiction.

In short, what the *Farrah* case decided was that to give a provincially-constituted statutory tribunal a jurisdiction in appeal on questions of law without limitation, and to reinforce this appellate authority by excluding any supervisory recourse to the Quebec Superior Court, was to create a s. 96 court. The present case is no different in principle, even though in ss. 162 and 175 of the *Professional Code*, dealing with the appellate authority of the Professions Tribunal, there is no mention of the word "law" or the word "jurisdiction". When regard is had to the privative terms of ss. 194 and 195, added to the fact that by s. 175 the Professions

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Tribunal's decisions are final, I see no significant distinction between the present case and the *Farrah* case in the fact that in the latter the authority granted to the appeal tribunal was "to the exclusion of any other court". In both cases there was a purported exclusion of the reviewing authority of any other court, whether by appeal or by evocation.

In the result, I would allow the appeal, set aside the judgments of the Quebec Court of Appeal and restore the judgments of Poitras J. The appellant is entitled to costs throughout.

Appeal allowed.

Solicitors for the appellant: Amyot, Lesage, Bernard, Drolet & Associés, Quebec.

Solicitors for the respondent the Attorney General of the Province of Quebec: Boissonneault, Roy & Poulin, Montreal; Henri Brun, Quebec.

Solicitors for the respondents Aubry & Cofsky: Smith, Léger, Lussier & Saint-Martin, Montreal.

Solicitor for the intervener: The Attorney General for the Province of Alberta, Edmonton.

[1] [1979] C.A. 333.

[2] [1977] C.S. 324.

[3] 1978 CanLII 195 (SCC), [1978] 2 S.C.R. 638.

[4] [1975] D.D.C.P. 233 and 235.

[5] [1977] C.S. 324.

[6] [1979] C.A. 333.

[7] 1975 CanLII 183 (SCC), [1977] 1 S.C.R. 112.

[8] Now published at 1981 CanLII 24 (SCC), [1981] 1 S.C.R. 714.

[9] 1961 CanLII 46 (SCC), [1962] S.C.R. 48.

[10] 1953 CanLII 10 (SCC), [1953] 2 S.C.R. 18.

[11] 1953 CanLII 45 (SCC), [1953] 2 S.C.R. 140.

[12] 1972 CanLII 139 (SCC), [1973] S.C.R. 120.

Tab 89

Doré v. Barreau du Québec, 2012 SCC 12 (CanLII), [2012] 1 SCR 395

Source:	Supreme Court of Canada
Date:	2012-03-22
File number:	33594
Other citations:	343 DLR (4th) 193 — 428 NR 146 — 211 ACWS (3d) 852 — AZ-50841558 — [2012] EXP 1231 — 255 CRR (2d) 289 — 34 Admin LR (5th) 1 — EYB 2012-203967 — JE 2012-672 — [2012] SCJ No 12 (QL) — [2012] ACS no 12
Citation:	Doré v. Barreau du Québec, 2012 SCC 12 (CanLII), [2012] 1 SCR 395, < https://canlii.ca/t/fqn88 >, retrieved on 2026-03-23
Most recent unfavourable mention	S.C. c. Société de l'assurance automobile du Québec (SAAQ) , 2022 QCCA 1615 (CanLII) [...] [45] L'appelant plaide que l'arrêt Doré doit être écarté parce que le TAQ n'était pas limité ici à une application des valeurs consacrées dans la Charte canadienne à l'occasion d'une décision discrétionnaire. [...]



SUPREME COURT OF CANADA

CITATION: Doré v. Barreau du Québec, 2012 SCC 12, [2012] 1 S.C. R. 395 **DATE:** 20120322
DOCKET: 33594

BETWEEN:

Gilles Doré
Appellant
and

**Pierre Bernard, in his capacity as Assistant Syndic of the Barreau du Québec,
Tribunal des professions and Attorney General of Quebec**
Respondents
- and -
**Federation of Law Societies of Canada, Canadian Civil Liberties Association
and Young Bar Association of Montreal**
Intervenors

CORAM: McLachlin C.J. and Binnie, LeBel, Fish, Abella, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: Abella J. (McLachlin C.J. and Binnie, LeBel, Fish, Rothstein and Cromwell JJ. concurring)
(paras. 1 to 72)

Doré v. Barreau du Québec, 2012 SCC 12, [2012] 1 S.C.R. 395

Gilles Doré

Appellant

v.

**Pierre Bernard, in his capacity as Assistant Syndic of
the Barreau du Québec, Tribunal des professions and
Attorney General of Quebec**

Respondents

and

**Federation of Law Societies of Canada,
Canadian Civil Liberties Association and
Young Bar Association of Montreal**

Intervenors

Indexed as: Doré v. Barreau du Québec

2012 SCC 12

2011: January 26; 2012: March 22.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Administrative law — Judicial review — Standard of review — Disciplinary council — Lawyer challenging constitutionality of council's decision — Proper approach to judicial review of discretionary administrative decisions engaging Charter protections — Whether framework developed in R. v. Oakes appropriate to determine if discretionary administrative decisions comply with [Canadian Charter of Rights and Freedoms](#).

Law of professions — Discipline — Barristers and solicitors — Lawyer writing private letter to judge and criticizing him — Disciplinary council finding lawyer in breach of duty to behave with objectivity, moderation and dignity and reprimanding him — Whether council properly balanced relevant [Charter](#) values with statutory objectives — Whether decision reasonable — [Code of ethics of advocates, R.R.Q. 1981, c. B-1, r. 1, art. 2.03](#).

D appeared before a judge of the Superior Court of Quebec on behalf of a client. In the course of D's argument, the judge criticized D. In his written reasons rejecting D's application, the judge levied further criticism, accusing D of using bombastic rhetoric and hyperbole, of engaging in idle quibbling, of being impudent and of doing nothing to help his client discharge his burden. D then wrote a private letter to the judge calling him loathsome, arrogant and fundamentally unjust, and accusing him of hiding behind his status like a coward, of having a chronic inability to master any social skills, of being pedantic, aggressive and petty, and of having a propensity to use his court to launch ugly, vulgar and mean personal attacks.

The Assistant Syndic of the Barreau du Québec filed a complaint against D based on that letter alleging that D had violated [art. 2.03](#) of the *Code of ethics of advocates*, which states that the conduct of advocates “must bear the stamp of objectivity, moderation and dignity”. The Disciplinary Council of the Barreau du Québec found that the letter was likely to offend, rude and insulting, that the statements had little expressive value, and that the judge’s conduct, which resulted in a reprimand from the Canadian Judicial Council, could not be relied on as justification for it. The Council rejected D’s argument that art. 2.03 violated [s. 2\(b\)](#) of the *Canadian Charter of Rights and Freedoms*, finding that the limitation on freedom of expression was reasonable. Based on the seriousness of D’s conduct, the Council reprimanded D and suspended his ability to practice law for 21 days. On appeal to the Tribunal des professions, D abandoned his constitutional challenge to the specific provision, arguing instead that the sanction itself violated his freedom of expression. The Tribunal found that D had exceeded the objectivity, moderation and dignity expected of him and that the decision to sanction D was a minimal restriction on his freedom of expression. On judicial review, the Superior Court of Quebec upheld the decision of the Tribunal.

Before the Quebec Court of Appeal, D no longer appealed the actual sanction of 21 days, challenging only the decision to reprimand him as a violation of the *Charter*. The Court of Appeal applied a full *Oakes* analysis under [s. 1](#) of the *Charter* and upheld the reprimand. It found that D’s letter had limited importance compared to the values underlying freedom of expression, that the Council’s decision had a rational connection to the important objective of protecting the public and that the effects of the decision were proportionate to its objectives.

Held: The appeal from the result should be dismissed.

To determine whether administrative decision-makers have exercised their statutory discretion in accordance with *Charter* protections, the review should be in accordance with an administrative law approach, not a s. 1 *Oakes* analysis. The standard of review is reasonableness.

In assessing whether a law violates the *Charter*, we are balancing the government’s pressing and substantial objectives against the extent to which they interfere with the *Charter* right

at issue. If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. But in assessing whether an adjudicated decision violates the *Charter*, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right. In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited.

There is nothing in the administrative law approach which is inherently inconsistent with the strong protection of the *Charter*'s guarantees and values. An administrative law approach recognizes that administrative decision-makers are both bound by fundamental values and empowered to adjudicate them, and that administrative discretion is exercised in light of constitutional guarantees and the values they reflect. An administrative decision-maker exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values and will generally be in the best position to consider the impact of the relevant *Charter* guarantee on the specific facts of the case. Under a robust conception of administrative law, discretion is exercised in light of constitutional guarantees and the values they reflect.

When applying *Charter* values in the exercise of statutory discretion, an administrative decision-maker must balance *Charter* values with the statutory objectives by asking how the *Charter* value at issue will best be protected in light of those objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives.

On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* rights and values at play. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both

contemplate giving a “margin of appreciation”, or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives. In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one. But both decision-makers and reviewing courts must remain conscious of the fundamental importance of *Charter* values in the analysis.

Here, the decision to suspend D for 21 days was not before the Court. The only issue was whether the Council’s decision to reprimand D reflected a proportionate balancing of the lawyer’s expressive rights with its statutory mandate to ensure that lawyers behave with “objectivity, moderation and dignity” in accordance with art. 2.03 of the *Code of ethics*. In dealing with the appropriate boundaries of civility for a lawyer, the severity of the conduct must be interpreted in light of the expressive rights guaranteed by the *Charter*, and, in particular, the public benefit in ensuring the right of lawyers to express themselves about the justice system in general and judges in particular. We are, in other words, balancing the fundamental importance of open, and even forceful, criticism of our public institutions with the need to ensure civility in the profession. Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer’s right to expression and the public’s interest in open discussion. As with all disciplinary decisions, this balancing is a fact-dependent and discretionary exercise.

Proper respect for these expressive rights may involve disciplinary bodies tolerating a degree of discordant criticism. The fact that a lawyer is criticizing a judge, a tenured and independent participant in the justice system, may raise, not lower, the threshold for limiting a lawyer’s expressive rights under the *Charter*. This does not, however, argue for an unlimited right on the part of lawyers to breach the legitimate public expectation that they will behave with civility. Lawyers potentially face criticisms and pressures on a daily basis. They are expected by the public, on whose behalf they serve, to endure them with civility and dignity. This is not always

easy where the lawyer feels he or she has been unfairly provoked, as in this case. But it is precisely when a lawyer's equilibrium is unduly tested that he or she is particularly called upon to behave with transcendent civility. On the other hand, lawyers should not be expected to behave like verbal eunuchs. They not only have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint.

A reprimand for a lawyer does not automatically flow from criticizing a judge or the judicial system. Such criticism, even when it is expressed vigorously, can be constructive. However in the context of disciplinary hearings, such criticism will be measured against the public's reasonable expectations of a lawyer's professionalism. As the Disciplinary Council found, D's letter was outside those expectations. His displeasure with the judge was justifiable, but the extent of the response was not.

In light of the excessive degree of vituperation in the letter's context and tone, the Council's decision that D's letter warranted a reprimand represented a proportional balancing of D's expressive rights with the statutory objective of ensuring that lawyers behave with "objectivity, moderation and dignity". The decision is, as a result, a reasonable one.

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S.C.R. 483; *Dagenais v. Canadian Broadcasting Corp.*, [1994 CanLII 39 \(SCC\)](#), [1994] 3 S.C.R. 835; *Ross v. New Brunswick School District No. 15*, [1996 CanLII 237 \(SCC\)](#), [1996] 1 S.C.R. 825; *Eldridge v. British Columbia (Attorney General)*, [1997 CanLII 327 \(SCC\)](#), [1997] 3 S.C.R. 624; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000 SCC 69](#), [2000] 2 S.C.R. 1120; *United States v. Burns*, [2001 SCC 7](#), [2001] 1 S.C.R. 283; *R. v. Mentuck*, [2001 SCC 76](#), [2001] 3 S.C.R. 442; *Trinity Western University v. British Columbia College of Teachers*, [2001 SCC 31](#), [2001] 1 S.C.R. 772; *Ahani v. Canada (Minister of Citizenship and Immigration)*, [2002 SCC 2](#), [2002] 1 S.C.R. 72; *Lake v. Canada (Minister of Justice)*, [2008 SCC 23](#), [2008] 1 S.C.R. 761; *Canada (Prime Minister) v. Khadr*, [2010 SCC 3](#), [2010] 1 S.C.R. 44; *Németh v. Canada (Justice)*, [2010 SCC 56](#), [2010] 3 S.C.R. 281; **referred to:** *Catalyst Paper Corp. v. North Cowichan (District)*, [2012 SCC 2](#), [2012] 1 S.C.R. 5; *R. v. Lanthier*, [2001 CanLII 9351](#); *Alberta v. Hutterian Brethren of Wilson Colony*, [2009 SCC 37](#), [2009] 2 S.C.R. 567; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002 SCC 1](#), [2002] 1 S.C.R. 3; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, [2009 SCC 31](#), [2009] 2 S.C.R. 295; *R. v. Daviault*, [1994 CanLII 61 \(SCC\)](#), [1994] 3 S.C.R. 63; *R. v. Swain*, [1991 CanLII 104 \(SCC\)](#), [1991] 1 S.C.R. 933; *Hill v. Church of Scientology of Toronto*, [1995 CanLII 59 \(SCC\)](#), [1995] 2 S.C.R. 1130; *Grant v. Torstar Corp.*, [2009 SCC 61](#), [2009] 3 S.C.R. 640; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002 SCC 8](#), [2002] 1 S.C.R. 156; *Law Society of New Brunswick v. Ryan*, [2003 SCC 20](#), [2003] 1 S.C.R. 247; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990 CanLII 63 \(SCC\)](#), [1990] 3 S.C.R. 570; *Mooring v. Canada (National Parole Board)*, [1996 CanLII 254 \(SCC\)](#), [1996] 1 S.C.R. 75; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995 CanLII 64 \(SCC\)](#), [1995] 3 S.C.R. 199; *R. v. Felderhof* (2003), [2003 CanLII 37346 \(ON CA\)](#), 68 O.R. (3d) 481; *R. v. Kopyto* (1987), [1987 CanLII 176 \(ON CA\)](#), 62 O.R. (2d) 449; *Attorney-General v. Times Newspapers Ltd.*, [1974] A.C. 273; *Histed v. Law Society of Manitoba*, [2007 MBCA 150](#), 225 Man. R. (2d) 74.

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APPEAL from a judgment of the Quebec Court of Appeal (Rochon, Dufresne and Léger JJ.A.), 2010 QCCA 24, [2010] R.J.Q. 77, 326 D.L.R. (4th) 749, [2010] Q.J. No. 88 (QL), 2010 CarswellQue 13368, affirming a decision of Déziel J., 2008 QCCS 2450 (CanLII), [2008] J.Q. n° 5222 (QL), 2008 CarswellQue 5285, dismissing an application for judicial review of a decision of the Tribunal des professions, 2007 QCTP 152 (CanLII), [2007] D.T.P.Q. n° 152 (QL). Appeal dismissed.

Sophie Dormeau and Sophie Préfontaine, for the appellant.

Claude G. Leduc and Luce Bastien, for the respondent Pierre Bernard, in his capacity as Assistant Syndic of the Barreau du Québec.

Dominique A. Jobin and Noémi Potvin, for the respondents Tribunal des professions and the Attorney General of Quebec.

Babak Barin and Frédéric Côté, for the intervener the Federation of Law Societies of Canada.

David Grossman, Sylvain Lussier, Julien Morissette and Annie Gallant, for the intervener the Canadian Civil Liberties Association.

Mathieu Bouchard and Audrey Boctor, for the intervener the Young Bar Association of Montreal.

The judgment of the Court was delivered by

[1] ABELLA J. — The focus of this appeal is on the decision of a disciplinary body to reprimand a lawyer for the content of a letter he wrote to a judge after a court proceeding.

[2] The lawyer does not challenge the constitutionality of the provision in the *Code of ethics* under which he was reprimanded. Nor, before us, does he challenge the length of the suspension he received. What he *does* challenge, is the constitutionality of the decision itself, claiming that it violates his freedom of expression under the *Canadian Charter of Rights and Freedoms*.

[3] This raises squarely the issue of how to protect *Charter* guarantees and the values they reflect in the context of adjudicated administrative decisions. Normally, if a discretionary

administrative decision is made by an adjudicator within his or her mandate, that decision is judicially reviewed for its reasonableness. The question is whether the presence of a *Charter* issue calls for the replacement of this administrative law framework with the *Oakes* test, the test traditionally used to determine whether the state has justified a law's violation of the *Charter* as a "reasonable limit" under s. 1.

[4] It seems to me to be possible to reconcile the two regimes in a way that protects the integrity of each. The way to do that is to recognize that an adjudicated administrative decision is not like a law which can, theoretically, be objectively justified by the state, making the traditional s. 1 analysis an awkward fit. On whom does the onus lie, for example, to formulate and assert the pressing and substantial objective of an adjudicated decision, let alone justify it as rationally connected to, minimally impairing of, and proportional to that objective? On the other hand, the protection of *Charter* guarantees is a fundamental and pervasive obligation, no matter which adjudicative forum is applying it. How then do we ensure this rigorous *Charter* protection while at the same time recognizing that the assessment must necessarily be adjusted to fit the contours of what is being assessed and by whom?

[5] We do it by recognizing that while a formulaic application of the *Oakes* test may not be workable in the context of an adjudicated decision, distilling its essence works the same justificatory muscles: balance and proportionality. I see nothing in the administrative law approach which is inherently inconsistent with the strong *Charter* protection — meaning its guarantees and values — we expect from an *Oakes* analysis. The notion of deference in administrative law should no more be a barrier to effective *Charter* protection than the margin of appreciation is when we apply a full s. 1 analysis.

[6] In assessing whether a law violates the *Charter*, we are balancing the government's pressing and substantial objectives against the extent to which they interfere with the *Charter* right at issue. If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. In assessing whether an adjudicated decision violates the *Charter*, however, we are engaged in

balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right. In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited.

[7] As this Court has noted, most recently in *Catalyst Paper Corp. v. North Cowichan (District)*, [2012 SCC 2](#), [2012] 1 S.C.R. 5, the nature of the reasonableness analysis is always contingent on its context. In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one.

[8] In this case, the discipline committee's decision to reprimand the lawyer reflected a proportionate balancing of its public mandate to ensure that lawyers behave with "objectivity, moderation and dignity" with the lawyer's expressive rights. It is, as a result, a reasonable one.

Background

[9] Gilles Doré was counsel for Daniel Lanthier in criminal proceedings. On June 18 and 19, 2001, Mr. Doré appeared before Boilard J. in the Superior Court of Quebec seeking a stay of proceedings or, in the alternative, the release of his client on bail. In the course of Mr. Doré's argument, Justice Boilard said about him that [TRANSLATION] "an insolent lawyer is rarely of use to his client". In his written reasons rejecting Mr. Doré's application on June 21, 2001, Boilard J. levied further criticism (*R. v. Lanthier*, [2001 CanLII 9351](#)). He accused Mr. Doré of [TRANSLATION] "bombastic rhetoric and hyperbole" and said that the court must "put aside" Mr. Doré's "impudence". Justice Boilard characterized Mr. Doré's request for a stay as "totally ridiculous" and one of his arguments as "idle quibbling". Finally, he said that "fixated on or obsessed with his narrow vision of reality, which is not consistent with the facts, Mr. Doré has done nothing to help his client discharge his burden".

[TRANSLATION]

WITHOUT PREJUDICE OR ADMISSION

Sir,

I have just left the Court. Just a few minutes ago, as you hid behind your status like a coward, you made comments about me that were both unjust and unjustified, scattering them here and there in a decision the good faith of which will most likely be argued before our Court of Appeal.

Because you ducked out quickly and refused to hear me, I have chosen to write a letter as an entirely personal response to the equally personal remarks you permitted yourself to make about me. This letter, therefore, is from man to man and is outside the ambit of my profession and your functions.

If no one has ever told you the following, then it is high time someone did. Your chronic inability to master any social skills (to use an expression in English, that language you love so much), which has caused you to become pedantic, aggressive and petty in your daily life, makes no difference to me; after all, it seems to suit you well.

Your deliberate expression of these character traits while exercising your judicial functions, however, and your having made them your trademark concern me a great deal, and I feel that it is appropriate to tell you.

Your legal knowledge, which appears to have earned the approval of a certain number of your colleagues, is far from sufficient to make you the person you could or should be professionally. Your determination to obliterate any humanity from your judicial position, your essentially non-existent listening skills, and your propensity to use your court — where you lack the courage to hear opinions contrary to your own — to launch ugly, vulgar, and mean personal attacks not only confirms that you are as loathsome as suspected, but also casts shame on you as a judge, that most extraordinarily important function that was entrusted to you.

I would have very much liked to say this to your face, but I highly doubt that, given your arrogance, you are able to face your detractors without hiding behind your judicial position.

Worst of all, you possess the most appalling of all defects for a man in your position: You are fundamentally unjust. I doubt that that will ever change.

Sincerely,

Gilles Doré

P.S. As this letter is purely personal, I see no need to distribute it.

(C.A. judgment, [2010 QCCA 24](#), 326 D.L.R. (4th) 749, at para. 5)

[11] The next day, June 22, 2001, Mr. Doré wrote to Chief Justice Lyse Lemieux, with a copy to Justice Boilard. He made it clear that he was not filing a complaint with her against Justice Boilard. Instead, Mr. Doré respectfully requested that he not be required to appear before Justice Boilard in the future since he was concerned that he could not properly represent his clients before him.

[12] On July 10, 2001, Mr. Doré complained to the Canadian Judicial Council about Justice Boilard's conduct. On July 13, 2001, Chief Justice Lemieux sent a copy of the letter Mr. Doré had sent to Justice Boilard to the Syndic du Barreau, the body that disciplines lawyers in Quebec.

[13] In March 2002, the Assistant Syndic filed a complaint against Mr. Doré based on his letter to Justice Boilard. The complaint alleged that Mr. Doré had violated both [art. 2.03](#) of the *Code of ethics of advocates*, R.R.Q. 1981, c. B-1, r. 1, and Mr. Doré's oath of office. Article 2.03 stated: "The conduct of an advocate must bear the stamp of objectivity, moderation and dignity."

[14] In the interval between the filing of the Assistant Syndic's complaint against Mr. Doré and the actual proceedings against him, a committee of judges appointed by the Judicial Council to look into Mr. Doré's complaint communicated its conclusions to Mr. Doré and Justice Boilard in letters sent on July 15, 2002. The committee found that Justice Boilard had made [TRANSLATION] "unjustified derogatory remarks to Mr. Doré" stating, in part:

[TRANSLATION] . . . to use the words "bombastic rhetoric and hyperbole" and "impudence" in referring to counsel arguing a case before you, quite clearly in good faith, is unnecessarily insulting. To reply to counsel who submits that you have not allowed him to argue his case "that an insolent lawyer is rarely of use to his client" not only is unjustified in the circumstances, but could tarnish counsel's professional reputation in the eyes of his client, his peers and the public. To say to counsel arguing a case before you that "I have the impression this is going to be tiresome" is to gratuitously degrade him. To describe a procedure before the court as "totally ridiculous" is unnecessarily humiliating. It is the panel's opinion that such comments would seem to show contempt for counsel not only as an individual but also as a professional.

The evidence reveals a flagrant lack of respect for an officer of the court, namely Mr. Doré, who was nevertheless at all times respectful to the court. The evidence also shows signs of impatience on your part that are surprising in light of every judge's duty

to listen calmly to the parties and to counsel. It is the panel's opinion that in so abusing your power as a judge, you not only tarnished your image as a dispenser of justice, but also undermined the judiciary, the image of which has unfortunately been diminished. The panel reminds you that your independence and your authority as a judge do not exempt you from respecting the dignity of every individual who argues a case before you. Dispensing justice while gratuitously insulting counsel is befitting neither for the judge nor for the judiciary.

Having also read the judgments of the Quebec Court of Appeal in *R. v. Proulx*, *R. v. Bisson* and *R. v. Callochia*, the panel observed that you tend to use your platform to unjustly denigrate counsel appearing before you. The transcript of the hearing of April 9, 2002 in *Sa Majesté la Reine v. Sébastien Beauchamp*, which contains evidence of personal attacks on another lawyer, also confirmed that the case raised in Mr. Doré's complaint is neither unique nor isolated, but shows that extreme conduct and comments seem to form part of a more generalized attitude. In the panel's view, the fact that such an attitude could persist despite warnings from the Court of Appeal is troubling.

The panel finds that the impatience you showed and the immoderate comments you made to an officer of the court, Mr. Doré, are unacceptable and merit an expression of the panel's disapproval under subsection 55(2) of the Canadian Judicial Council By-Laws.

The panel notes that you have deferred to its decision and assumes that the fact that Mr. Doré has made a complaint will lead you to reflect on this and will remind you of your duty as a judge to show respect and courtesy to all counsel who appear before you.

[15] On July 22, 2002, after receiving this reprimand, Justice Boilard recused himself from a complex criminal trial involving the Hell's Angels, a trial related to the trial of Daniel Lanthier in which Mr. Doré had acted. As a result of this recusal, the Attorney General of Quebec requested the Canadian Judicial Council to conduct an inquiry. The Judicial Council concluded that Justice Boilard's recusal had not constituted misconduct.

[16] As for Mr. Doré, the proceedings before the Disciplinary Council of the Barreau du Québec took place between April 2003 and January 2006. In its January 18, 2006 decision, the Disciplinary Council found that Mr. Doré's letter was [TRANSLATION] "likely to offend and is rude and insulting" (2006 CanLII 53416, at para. 58). It concluded that his statements had little expressive value, as they were "merely opinions, perceptions and insults" (para. 62). The Disciplinary Council rejected Mr. Doré's submission that his letter was private, since it was written by him as a lawyer. It also concluded that Justice Boilard's conduct could not be relied on as justification for the letter.

[17] The Disciplinary Council rejected Mr. Doré’s argument that art. 2.03 violated [s. 2\(b\)](#) of the *Charter*. While acknowledging that the provision infringed on freedom of expression, the Disciplinary Council found that

[TRANSLATION] [t]his is a limitation on freedom of expression that is entirely reasonable, even necessary, in the Canadian legal system, where lawyers and judges must work together in the interest of justice. [para. 88]

Moreover, it concluded that Mr. Doré had willingly joined a profession that was subject to rules of discipline that he knew would limit his freedom of expression. While the rules may [TRANSLATION] “be seen as restrictions imposed on the members of the Barreau in comparison to the freedom that may be enjoyed by other Canadian citizens”, they are made in exchange for “the privileges conferred on lawyers as members of an ‘exclusive profession’” (paras. 109-10). On July 24, 2006, based on what it found to be the seriousness of Mr. Doré’s conduct and on his failure to show remorse, the same panel suspended Mr. Doré’s ability to practise law for 21 days (2006 CanLII 53436).

[18] Mr. Doré appealed the Disciplinary Council’s decisions to the Tribunal des professions on several grounds ([2007 QCTP 152 \(CanLII\)](#)). This time, he did not challenge the constitutionality of art. 2.03. Instead, he argued that the manner in which the relevant legislation was applied by the Disciplinary Council was unconstitutional because his comments were protected by [s. 2\(b\)](#) of the *Charter*.

[19] The Tribunal reviewed the constitutionality of the Disciplinary Council’s decision on a standard of correctness, but said that a full *Oakes* analysis under [s. 1](#) of the *Charter* was inappropriate where a decision only applied to one person. Instead, it held that “[t]he issue becomes one of proportionality or, more specifically, minimal limitation of the guaranteed right” (para. 69, citing *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006 SCC 6](#), [2006] 1 S.C.R. 256, at para. [155](#)). In the circumstances, the Disciplinary Council’s decision to sanction Mr. Doré was found to be a [TRANSLATION] “minimal restriction on freedom of expression” (para. 76). It rejected Mr. Doré’s argument that Justice Boilard’s disparaging remarks justified his letter. It

also rejected his argument that the letter was private, since Mr. Doré remained “an officer of the court and a lawyer” (para. 77) and had exceeded the objectivity, moderation and dignity expected of him. Though it noted that the sanction imposed by the Disciplinary Council “seems harsh” (para. 135), the Tribunal held that it was not unreasonable, given the gravity of Mr. Doré’s conduct and his lack of remorse.

[20] On judicial review, the Superior Court of Quebec upheld the decision of the Tribunal, including its view that the letter did not constitute a private act, and found the Tribunal’s reasoning to be [TRANSLATION] “unassailable” (2008 QCCS 2450 (CanLII), at paras. 105, 109, 139 and 147). It concluded that by finding the decision to be a minimal restriction on Mr. Doré’s freedom of expression, the Tribunal had “implicitly” held that the restriction was “justified in a free and democratic society” (para. 104).

[21] The Quebec Court of Appeal held that given the status and role of the parties, Mr. Doré could not reasonably have expected his letter to remain confidential or private. It acknowledged that the Disciplinary Council’s decision was a breach of s. 2(b), but, applying a full s. 1 analysis, it found that Mr. Doré’s letter had [TRANSLATION] “limited importance . . . compared to the values underlying freedom of expression, which are the pursuit of truth, participation in the community, individual self-fulfillment, and human flourishing” (para. 36). The court held that protecting the public was an important objective, and that the Disciplinary Council’s decision had a rational connection with that objective, especially given the importance of a judge’s position in the judicial system. On minimal impairment, assessing both the decision and the sanction, the Court of Appeal held that while the sanction was significant, it was targeted at the manner in which Mr. Doré criticized Justice Boilard, and did not prohibit the expression itself:

[TRANSLATION] The impugned decision appears to be measured and, in the present case, is a correct application of section 2.03 of the *Code of ethics*. The sanction is significant (suspension of the right to practice for twenty-one days). It also involves the stigma attached to disciplinary guilt. It is not, however, unreasonable. In my view, it is a measured sanction of a lawyer who has been found guilty of a serious ethical offence. [para. 47]

It concluded by finding that the effects of the decision were proportionate to its objectives.

Analysis

[22] Mr. Doré's argument rests on his assertion that the finding of a breach of the *Code of ethics* violates the expressive rights protected by s. 2(b) of the *Charter*. Because the 21-day suspension had already been served when he was before the Court of Appeal, he did not appeal the penalty. The reasonableness of its length, therefore, is not before us.

[23] It is clear from the decisions of the Tribunal and the reviewing courts in this case that there is some confusion about the appropriate framework to be applied in reviewing administrative decisions for compliance with *Charter* values. Some courts have used the same s. 1 *Oakes* analysis used for determining whether a law complies with the *Charter*; others have used a classic judicial review approach.

[24] It goes without saying that administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values (see *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710, at para. 71; *Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 S.C.R. 528, at paras. 19-23; and *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, at paras. 62-75). The question then is what framework should be used to scrutinize how those values were applied?

[25] In *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038, Lamer J., in his concurring reasons, said that the *Charter* applied to a labour adjudicator's decision and used the s. 1 framework developed in *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, to determine if the decision complied with the *Charter*. Writing for the majority, Dickson C.J. agreed with Lamer J. that the *Charter* applied to administrative decision-making. But while he applied the *Oakes* framework, he notably and presciently observed that "[t]he precise relationship between the traditional standard of administrative law review of patent unreasonableness

and the new constitutional standard of review will be worked out in future cases” (p. 1049 (emphasis added)).

[26] Yet the approach taken in *Slaight* can only be properly understood in its context. Importantly, when Lamer J. held that discretionary administrative decisions implicating *Charter* values should be reviewed under the *Oakes* analysis, he did so in the context of the perceived inability of administrative law to deal with *Charter* infringements in the exercise of discretion. This concern permeates the reasons in *Slaight*. As Prof. Geneviève Cartier has noted:

. . . while Lamer J thought the administrative law standard was ill-suited to *Charter* challenges because of its inability to inquire into the substance of discretionary decisions, Dickson CJ thought it was ill-suited because of its inability to properly unravel the value inquiries involved in any *Charter* litigation.

(“The *Baker* Effect: A New Interface Between the *Canadian Charter of Rights and Freedoms* and Administrative Law — The Case of Discretion”, in David Dyzenhaus, ed., *The Unity of Public Law* (2004), 61, at p. 68)

[27] The approach taken in *Slaight* attracted academic concern from administrative law scholars. Prof. John Evans argued that if courts were too quick to bypass administrative law in favour of the *Charter*, “a rich source of thought and experience about law and government will be overlooked or lost altogether” (“The Principles of Fundamental Justice: The Constitution and the Common Law” (1991), 29 *Osgoode Hall L.J.* 51, at p. 73). Similarly, Prof. Cartier suggested that the *Slaight* approach reduced the role of administrative law to the “formal determination of jurisdiction on the basis of statutory interpretation”, which prevented the control of discretion with reference to “values” and presented “an impoverished picture of administrative law” (pp. 68-69).

[28] The scope of the review of discretionary administrative decisions that provided the backdrop for the decision in *Slaight* was altered by this Court’s decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at para. 65. In that case, L’Heureux-Dubé J. concluded that administrative decision-makers were required to take into account fundamental Canadian values, including those in the *Charter*, when exercising their discretion (*Baker*, at paras. 53-56).

[29] Building on the decision in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227 (“C.U.P.E.”), *Baker* represented a further shift away from Diceyan principles. By recognizing that administrative decision-makers are both bound by fundamental values and empowered to adjudicate them, *Baker* ceded interpretive authority on those issues to those decision-makers (David Dyzenhaus and Evan Fox-Decent, “Rethinking the Process/Substance Distinction: *Baker v. Canada*” (2001), 51 *U.T.L.J.* 193, at p. 240). This allows the *Charter* to “nurture” administrative law, by emphasizing that *Charter* values infuse the inquiry (Cartier, at pp. 75 and 86; see also Mary Liston, “Governments in Miniature: The Rule of Law in the Administrative State”, in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (2008), 77, at p. 100; Susan L. Gratton and Lorne Sossin, “In Search of Coherence: The *Charter* and Administrative Law under the McLachlin Court”, in David A. Wright and Adam M. Dodek, eds., *Public Law at the McLachlin Court: The First Decade* (2011), 145, at pp. 157-58).

[30] When this is weighed together with this Court’s subsequent decisions, we see a completely revised relationship between the *Charter*, the courts, and administrative law than the one first encountered in *Slaight*. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Court held that judicial review should be guided by a policy of deference, justified on the basis of legislative intent, respect for the specialized expertise of administrative decision-makers, and recognition that courts do not have a monopoly on adjudication in the administrative state (para. 49). And in *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at paras. 78-82, building on the development of the jurisprudence, the Court found that administrative tribunals with the power to decide questions of law have the authority to apply the *Charter* and grant *Charter* remedies that are linked to matters properly before them.

[31] But, as predicted by Chief Justice Dickson, this Court has explored different ways to review the constitutionality of administrative decisions, vacillating between the values-based approach in *Baker* and the more formalistic template in *Slaight*. The s. 1 *Oakes* approach suggested by Lamer J., was followed in *Stoffman v. Vancouver General Hospital*, 1990 CanLII 62 (SCC), [1990] 3 S.C.R. 483; *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC),

[1994] 3 S.C.R. 835; *Ross v. New Brunswick School District No. 15*, 1996 CanLII 237 (SCC), [1996] 1 S.C.R. 825; *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442.

[32] Other cases, and particularly recently, have instead applied an administrative law/judicial review analysis in assessing whether the decision-maker took sufficient account of *Charter* values. This approach is seen in *Baker; Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772; *Chamberlain; Ahani v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 2, [2002] 1 S.C.R. 72; *Pinet; Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *Criminal Lawyers' Association*; and *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281.

[33] The last decision of this Court to use the full s. 1 *Oakes* approach to determine whether the exercise of statutory discretion complied with the *Charter* was *Multani*. The academic commentary that followed was consistently critical. In brief, it generally argued that the use of a strict s. 1 analysis reduced administrative law to having a formal role in controlling the exercise of discretion (see Gratton and Sossin, at p. 157; David Mullan, “Administrative Tribunals and Judicial Review of *Charter* Issues after *Multani*” (2006), 21 *N.J.C.L.* 127; Stéphane Bernatchez, “Les rapports entre le droit administratif et les droits et libertés: la révision judiciaire ou le contrôle constitutionnel?” (2010), 55 *McGill L.J.* 641).

[34] Since then, and largely as a result of the revised administrative law template found in *Dunsmuir*, this Court appears to have moved away from *Multani*, leading to the suggestion that it may have “decided to start from ground zero in building coherence in public law” (Gratton and Sossin, at p. 161). Today, the Court has two options for reviewing discretionary administrative decisions that implicate *Charter* values. The first is to adopt the *Oakes* framework, developed for reviewing laws for compliance with the Constitution. This undoubtedly protects *Charter* rights,

but it does so at the risk of undermining a more robust conception of administrative law. In the words of Prof. Evans, if administrative law is bypassed for the *Charter*, “a rich source of thought and experience about law and government will be overlooked” (p. 73).

[35] The alternative is for the Court to embrace a richer conception of administrative law, under which discretion is exercised “in light of constitutional guarantees and the values they reflect” (*Multani*, at para. 152, *per* LeBel J.). Under this approach, it is unnecessary to retreat to a s. 1 *Oakes* analysis in order to protect *Charter* values. Rather, administrative decisions are *always* required to consider fundamental values. The *Charter* simply acts as “a reminder that some values are clearly fundamental and . . . cannot be violated lightly” (*Cartier*, at p. 86). The administrative law approach also recognizes the legitimacy that this Court has given to administrative decision-making in cases such as *Dunsmuir* and *Conway*. These cases emphasize that administrative bodies are empowered, and indeed required, to consider *Charter* values within their scope of expertise. Integrating *Charter* values into the administrative approach, and recognizing the expertise of these decision-makers, opens “an institutional dialogue about the appropriate use and control of discretion, rather than the older command-and-control relationship” (*Liston*, at p. 100).

[36] As explained by Chief Justice McLachlin in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, the approach used when reviewing the constitutionality of a law should be distinguished from the approach used for reviewing an administrative decision that is said to violate the rights of a particular individual (see also *Bernatchez*). When *Charter* values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts. *Dunsmuir* tells us this should attract deference (para. 53; see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 39). When a particular “law” is being assessed for *Charter* compliance, on the other hand, we are dealing with principles of general application.

[37] The more flexible administrative approach to balancing *Charter* values is also more consistent with the nature of discretionary decision-making. Some of the aspects of the *Oakes* test are, in any event, poorly suited to the review of discretionary decisions, whether of judges or

administrative decision-makers. For instance, the requirement under s. 1 that a limit be “prescribed by law” has been held by this Court to apply to norms where “their adoption is authorized by statute, they are binding rules of general application, and they are sufficiently accessible and precise to those to whom they apply” (*Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 53).

[38] Moreover, when exercising discretion under a provision or statutory scheme whose constitutionality is not impugned, it is conceptually difficult to see what the “pressing and substantial” objective of a decision is, or who would have the burden of defining and defending it.

[39] This Court has already recognized the difficulty of applying the *Oakes* framework beyond the context of reviewing a law or other rule of general application. This has been the case in applying *Charter* values to the common law, “where there is no specific enactment that can be examined in terms of objective, rational connection, least drastic means and proportionate effect” (Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at section 38.15). In *R. v. Daviault*, 1994 CanLII 61 (SCC), [1994] 3 S.C.R. 63, for example, in assessing the common law rule relating to establishing intent under extreme intoxication, the Court held that no *Oakes* analysis was required when reviewing a common law rule for compliance with *Charter* values:

If a new common law rule could be enunciated which would not interfere with an accused person’s right to have control over the conduct of his or her defence, I can see no conceptual problem with the Court’s simply enunciating such a rule to take the place of the old rule, without considering whether the old rule could nonetheless be upheld under s. 1 of the *Charter*. Given that the common law rule was fashioned by judges and not by Parliament or a legislature, judicial deference to elected bodies is not an issue. If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken. [pp. 93-94, citing *R. v. Swain*, 1991 CanLII 104 (SCC), [1991] 1 S.C.R. 933, at p. 978.]

[40] In *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130, this Court explicitly rejected the use of the s. 1 *Oakes* framework in developing the common law of defamation for two reasons. First, when interpreting a common law rule, there is no violation of a *Charter* right, but a conflict between principles, so “the balancing must be more

flexible than the traditional s. 1 analysis”, with *Charter* values providing the guidelines for any modification to the common law (para. 97). Second, the Court noted that “the division of onus which normally operates in a *Charter* challenge” was not appropriate for private litigation under the common law, as the party seeking to change the common law should not be allowed to benefit from a reverse onus (para. 98). As a result, the Court went on to “consider the common law of defamation in light of the values underlying the *Charter*” (para. 99). And in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, the Court relied on *Charter* values in introducing the new defence of responsible communication on matters of public interest to the law of defamation, without engaging in an *Oakes* analysis.

[41] A further example is found in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156, where the Court dealt with the common law of secondary picketing. After concluding that freedom of expression was engaged, the Court did not embark on an *Oakes* analysis. Instead, it found that the appropriate question was “which approach [to regulating secondary picketing] best balances the interests at stake in a way that conforms to the fundamental values reflected in the *Charter*?” (para. 65).

[42] Though each of these cases engaged *Charter* values, the Court did not see the *Oakes* test as the vehicle for balancing whether those values were taken into sufficient account. The same is true, it seems to me, in the administrative law context, where decision-makers are called upon to exercise their statutory discretion in accordance with *Charter* protections.

[43] What is the impact of this approach on the standard of review that applies when assessing the compliance of an administrative decision with *Charter* values? There is no doubt that when a tribunal is determining the constitutionality of a law, the standard of review is correctness (*Dunsmuir*, at para. 58). It is not at all clear to me, however, based on this Court’s jurisprudence, that correctness should be used to determine whether an administrative decision-maker has taken sufficient account of *Charter* values in making a discretionary decision.

[44] This Court elaborated on the applicable standard of review to legal disciplinary panels in the pre-*Dunsmuir* decision of *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, where Iacobucci J. adopted a reasonableness standard in reviewing a sanction imposed for professional misconduct:

Although there is a statutory appeal from decisions of the Discipline Committee, the expertise of the Committee, the purpose of its enabling statute, and the nature of the question in dispute all suggest a more deferential standard of review than correctness. These factors suggest that the legislator intended that the Discipline Committee of the self-regulating Law Society should be a specialized body with the primary responsibility to promote the objectives of the Act by overseeing professional discipline and, where necessary, selecting appropriate sanctions. In looking at all the factors as discussed in the foregoing analysis, I conclude that the appropriate standard is reasonableness *simpliciter*. Thus, on the question of the appropriate sanction for professional misconduct, the Court of Appeal should not substitute its own view of the “correct” answer but may intervene only if the decision is shown to be unreasonable. [Emphasis added; para. 42.]

[45] It seems to me that applying the *Dunsmuir* principles results in reasonableness remaining the applicable review standard for disciplinary panels. The issue then is whether this standard should be different when what is assessed is the disciplinary body’s application of *Charter* protections in the exercise of its discretion. In my view, the fact that *Charter* interests are implicated does not argue for a different standard.

[46] The starting point is the expertise of the tribunals in connection with their home statutes. Citing Prof. David Mullan, *Dunsmuir* confirmed the importance of recognizing that

those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime

(para. 49, citing “Establishing the Standard of Review: The Struggle for Complexity?” (2004), 17 *C.J.A.L.P.* 59, at p. 93.)

And, as Prof. Evans has noted, the “reasons for judicial restraint in reviewing agencies’ decisions on matters in which their expertise is relevant do not lose their cogency simply because the

question in issue also has a constitutional dimension” (p. 81).

[47] An administrative decision-maker exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values. As the Court explained in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, 1990 CanLII 63 (SCC), [1990] 3 S.C.R. 570, adopting the observations of Prof. Danielle Pinard:

[TRANSLATION] . . . administrative tribunals have the skills, expertise and knowledge in a particular area which can with advantage be used to ensure the primacy of the Constitution. Their privileged situation as regards the appreciation of the relevant facts enables them to develop a functional approach to rights and freedoms as well as to general constitutional precepts.

(p. 605, citing “Le pouvoir des tribunaux administratifs québécois de refuser de donner effet à des textes qu’ils jugent inconstitutionnels” (1987-88), *McGill L.J.* 170, at pp. 173-74.)

[48] This case, among others, reflected the increasing recognition by this Court of the distinct advantage that administrative bodies have in applying the *Charter* to a specific set of facts and in the context of their enabling legislation (see *Conway*, at paras. 79-80). As Major J. noted in dissent in *Mooring v. Canada (National Parole Board)*, 1996 CanLII 254 (SCC), [1996] 1 S.C.R. 75, tailoring the *Charter* to a specific situation “is more suited to a tribunal’s special role in determining rights on a case by case basis in the tribunal’s area of expertise” (para. 64; see also *C.U.P.E.*, at pp. 235-36).

[49] These principles led the Court to apply a reasonableness standard in *Chamberlain*, where McLachlin C.J. found that a school board had acted unreasonably in refusing to approve the use of books depicting same-sex parented families. She held that the board had failed to respect the “values of accommodation, tolerance and respect for diversity” which were incorporated into its enabling legislation and “reflected in our Constitution’s commitment to equality and minority rights” (para. 21). Similarly, in *Pinet*, Binnie J. used a reasonableness standard to review, for compliance with s. 7 of the *Charter*, a decision of the Ontario Review Board to return the appellant to a maximum security hospital, observing that a reasonableness review best reflected “the

expertise of the members appointed to Review Boards” (para. 22). The purpose of the exercise was to determine whether the decision was “the least onerous and least restrictive” of the liberty interests of the appellant while considering “public safety, the mental condition and other needs of the individual concerned, and his or her potential reintegration into society” (paras. 19 and 23). In *Pinet*, the test was laid out in the statute, but Binnie J. made it clear that the emphasis on the least infringing decision was a constitutional requirement.

[50] In *Lake*, where the Court was reviewing the Minister’s decision to surrender a Canadian citizen for extradition, implicating ss. 6(1) and 7 of the *Charter*, the Court again applied a reasonableness standard. LeBel J. held that deference is owed to the Minister’s decision, as the Minister is closer to the relevant facts required to balance competing considerations and benefits from expertise:

This Court has repeatedly affirmed that deference is owed to the Minister’s decision whether to order surrender once a fugitive has been committed for extradition. The issue in the case at bar concerns the standard to be applied in reviewing the Minister’s assessment of a fugitive’s *Charter* rights. Reasonableness is the appropriate standard of review for the Minister’s decision, regardless of whether the fugitive argues that extradition would infringe his or her rights under the *Charter*. As is evident from this Court’s jurisprudence, to ensure compliance with the *Charter* in the extradition context, the Minister must balance competing considerations, and where many such considerations are concerned, the Minister has superior expertise. The assertion that interference with the Minister’s decision will be limited to exceptional cases of “real substance” reflects the breadth of the Minister’s discretion; the decision should not be interfered with unless it is unreasonable (*Schmidt [Canada v. Schmidt]*, 1987 CanLII 48 (SCC), [1987] 1 S.C.R. 500) (for comments on the standards of correctness and reasonableness, see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9). [Emphasis added; para. 34.]

[51] The alternative — adopting a correctness review in every case that implicates *Charter* values — will, as Prof. Mullan noted, essentially lead to courts “retrying” a range of administrative decisions that would otherwise be subjected to a reasonableness standard:

If correctness review becomes the order of the day in all *Charter* contexts, including the determination of factual issues and the application of the law to those facts, then what in effect can occur is that the courts will perforce assume the role of a *de novo* appellate body from all tribunals the task of which is to make decisions that of necessity have an impact on *Charter* rights and freedoms: Review Boards, Parole Boards, prison disciplinary tribunals, child welfare authorities, and the like. Whether

that kind of judicial micro-managing of aspects of the administrative process should take place is a highly problematic question. [Emphasis added; p. 145.]

[52] So our choice is between saying that every time a party argues that *Charter* values are implicated on judicial review, a reasonableness review is transformed into a correctness one, or saying that while both tribunals and courts can interpret the *Charter*, the administrative decision-maker has the necessary specialized expertise and discretionary power in the area where the *Charter* values are being balanced.

[53] The decisions of legal disciplinary bodies offer a good example of the problem of applying a correctness review whenever *Charter* values are implicated. Most breaches of art. 2.03 of the *Code of ethics* calling for “objectivity, moderation and dignity”, necessarily engage the expressive rights of lawyers. That would mean that most exercises of disciplinary discretion under this provision would be transformed from the usual reasonableness review to one for correctness.

[54] Nevertheless, as McLachlin C.J. noted in *Catalyst*, “reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is an essentially contextual inquiry” (para. 18). Deference is still justified on the basis of the decision-maker’s expertise and its proximity to the facts of the case. Even where *Charter* values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant *Charter* values on the specific facts of the case. But both decision-makers and reviewing courts must remain conscious of the fundamental importance of *Charter* values in the analysis.

[55] How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. In *Lake*, for instance, the importance of Canada’s international obligations, its relationships with foreign governments, and the investigation, prosecution and suppression of international crime justified the *prima facie* infringement of mobility rights under s. 6(1) (para. 27). In *Pinet*, the twin goals of

public safety and fair treatment grounded the assessment of whether an infringement of an individual's liberty interest was justified (para. 19).

[56] Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the *Oakes* context. As this Court recognized in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199, at para. 160, “courts must accord some leeway to the legislator” in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure “falls within a range of reasonable alternatives”. The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, “falls within a range of possible, acceptable outcomes” (para. 47).

[57] On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. As LeBel J. noted in *Multani*, when a court is faced with reviewing an administrative decision that implicates *Charter* rights, “[t]he issue becomes one of proportionality” (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a “margin of appreciation”, or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives.

[58] If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.

Application

[59] The *Charter* value at issue in this appeal is expression, and, specifically, how it should be applied in the context of a lawyer's professional duties.

[60] At the relevant time, art. 2.03 of the *Code of ethics* (now modified as art. 2.00.01, O.C. 351-2004, (2004) 136 G.O. II, 1272) stated that "[t]he conduct of an advocate must bear the stamp of objectivity, moderation and dignity". This provision, whose constitutionality is not impugned before us, sets out a series of broad standards that are open to a wide range of interpretations. The determination of whether the actions of a lawyer violate art. 2.03 in a given case is left entirely to the Disciplinary Council's discretion.

[61] No party in this dispute challenges the importance of professional discipline to prevent incivility in the legal profession, namely "potent displays of disrespect for the participants in the justice system, beyond mere rudeness or discourtesy" (Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007), 11 *Can. Crim. L.R.* 97, at p. 101; see also Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (5th ed. 2009), at p. 8-1). The duty to encourage civility, "both inside and outside the courtroom", rests with the courts and with lawyers (*R. v. Felderhof* (2003), 2003 [CanLII 37346 \(ON CA\)](#), 68 O.R. (3d) 481 (C.A.), at para. 83).

[62] As a result, rules similar to art. 2.03 are found in codes of ethics that govern the legal profession throughout Canada. The Canadian Bar Association's *Code of Professional Conduct* (2009), for example, states that a "lawyer should at all times be courteous, civil, and act in good faith to the court or tribunal and to all persons with whom the lawyer has dealings in the course of an action or proceeding" (c. IX, at para. 16; see also Law Society of Upper Canada, *Rules of Professional Conduct* (updated 2011), r. 6.03(5)).

[63] But in dealing with the appropriate boundaries of civility, the severity of the conduct must be interpreted in light of the expressive rights guaranteed by the *Charter*, and, in particular, the public benefit in ensuring the right of lawyers to express themselves about the justice system in general and judges in particular (MacKenzie, at p. 26-1; *R. v. Kopyto* (1987), 1987 [CanLII 176 \(ON](#)

CA), 62 O.R. (2d) 449 (C.A.); and *Attorney-General v. Times Newspapers Ltd.*, [1974] A.C. 273 (H.L.)).

[64] In *Histed v. Law Society of Manitoba*, 2007 MBCA 150, 225 Man. R. (2d) 74, where Steel J.A. upheld a disciplinary decision resulting from a lawyer's criticism of a judge, the critical role played by lawyers in assuring the accountability of the judiciary was acknowledged:

Not only should the judiciary be accountable and open to criticism, but lawyers play a very unique role in ensuring that accountability. As professionals with special expertise and officers of the court, lawyers are under a special responsibility to exercise fearlessness in front of the courts. They must advance their cases courageously, and this may result in criticism of proceedings before or decisions by the judiciary. The lawyer, as an intimate part of the legal system, plays a pivotal role in ensuring the accountability and transparency of the judiciary. To play that role effectively, he/she must feel free to act and speak without inhibition and with courage when the circumstances demand it. [Emphasis added; para. 71.]

[65] Proper respect for these expressive rights may involve disciplinary bodies tolerating a degree of discordant criticism. As the Ontario Court of Appeal observed in a different context in *Kopyto*, the fact that a lawyer is criticizing a judge, a tenured and independent participant in the justice system, may raise, not lower, the threshold for limiting a lawyer's expressive rights under the *Charter*. This does not by any means argue for an unlimited right on the part of lawyers to breach the legitimate public expectation that they will behave with civility.

[66] We are, in other words, balancing the fundamental importance of open, and even forceful, criticism of our public institutions with the need to ensure civility in the profession. Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion. As with all disciplinary decisions, this balancing is a fact-dependent and discretionary exercise.

[67] In this case, the 21-day suspension imposed on Mr. Doré is not before this Court, since Mr. Doré did not appeal it either to the Court of Appeal or to this Court. All we have been asked to determine is whether the Disciplinary Council's conclusion that a reprimand was

warranted under art. 2.03 of the *Code of ethics* was a reasonable one. To make that assessment, we must consider whether this result reflects a proportionate application of the statutory mandate with Mr. Doré's expressive rights.

[68] Lawyers potentially face criticisms and pressures on a daily basis. They are expected by the public, on whose behalf they serve, to endure them with civility and dignity. This is not always easy where the lawyer feels he or she has been unfairly provoked, as in this case. But it is precisely when a lawyer's equilibrium is unduly tested that he or she is particularly called upon to behave with transcendent civility. On the other hand, lawyers should not be expected to behave like verbal eunuchs. They not only have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint.

[69] A reprimand for a lawyer does not automatically flow from criticizing a judge or the judicial system. As discussed, such criticism, even when it is expressed robustly, can be constructive. However in the context of disciplinary hearings, such criticism will be measured against the public's reasonable expectations of a lawyer's professionalism. As the Disciplinary Council found, Mr. Doré's letter was outside those expectations. His displeasure with Justice Boilard was justifiable, but the extent of the response was not.

[70] The Disciplinary Council recognized that a lawyer must have [TRANSLATION] "total liberty and independence in the defence of a client's rights", and "has the right to respond to criticism or remarks addressed to him by a judge", a right which the Council recognized "can suffer no restrictions when it is a question of defending clients' rights before the courts" (paras. 68-70). It was also "conscious" of the fact that art. 2.03 may constitute a restriction on a lawyer's expressive rights (para. 79). But where, as here, the judge was called [TRANSLATION] "loathsome", arrogant and "fundamentally unjust" and was accused by Mr. Doré of "hid[ing] behind [his] status like a coward"; having a "chronic inability to master any social skills"; being "pedantic, aggressive and petty in [his] daily life"; having "obliterate[d] any humanity from [his] judicial position"; having "non-existent listening skills"; having a "propensity to use [his] court — where [he] lack[s] the courage to hear opinions contrary to [his] own — to launch ugly, vulgar, and mean personal

attacks”, which “not only confirms that [he is] as loathsome as suspected, but also casts shame on [him] as a judge”; and being “[un]able to face [his] detractors without hiding behind [his] judicial position”, the Council concluded that the [TRANSLATION] “generally accepted norms of moderation and dignity” were “overstepped” (para. 86).

[71] In the circumstances, the Disciplinary Council found that Mr. Doré’s letter warranted a reprimand. In light of the excessive degree of vituperation in the letter’s context and tone, this conclusion cannot be said to represent an unreasonable balance of Mr. Doré’s expressive rights with the statutory objectives.

[72] I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: Sophie Dormeau, Outremont.

Solicitors for the respondent Pierre Bernard, in his capacity as Assistant Syndic of the Barreau du Québec: Mercier Leduc, Montréal.

Solicitor for the respondents Tribunal des professions and the Attorney General of Quebec: Attorney General of Quebec, Sainte-Foy.

Solicitors for the intervener the Federation of Law Societies of Canada: BCF, Montréal.

Solicitors for the intervener the Canadian Civil Liberties Association: Osler, Hoskin & Harcourt, Montréal.

Solicitors for the intervener the Young Bar Association of Montreal: Irving Mitchell Kalichman, Westmount.

Tab 90

Trial Lawyers Association of British Columbia v. British Columbia (Attorney General), 2014 SCC 59 (CanLII), [2014] 3 SCR 31

Source: Supreme Court of Canada

Date: 2014-10-02

File number: 35315

Other citations: 375 DLR (4th) 599 — 463 NR 336 — [2014] 11 WWR 213 — 619 WAC 1 — 51 RFL (7th) 1 — 361 BCAC 1 — 59 CPC (7th) 1 — [2014] SCJ No 59 (QL) — [2014] ACS no 59

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SUPREME COURT OF CANADA

CITATION: Trial Lawyers Association of British Columbia v. British Columbia (Attorney General), 2014 SCC 59, [2014] 3 S.C.R. 31 **DATE:** 20141002
DOCKET: 35315

BETWEEN:

**Trial Lawyers Association of British Columbia and
 Canadian Bar Association — British Columbia Branch**
 Appellants/Respondents on cross-appeal
 and

Attorney General of British Columbia
 Respondent/Appellant on cross-appeal
 - and -

**Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec,
 Attorney General of Alberta, Advocates' Society, West Coast Women's Legal Education and
 Action Fund and David Asper Centre for Constitutional Rights**

Interveners

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

REASONS FOR JUDGMENT: McLachlin C.J. (LeBel, Abella, Moldaver and Karakatsanis JJ. concurring)
(paras. 1 to 69)

REASONS CONCURRING IN RESULT: Cromwell J.
(paras. 70 to 79)

DISSENTING REASONS: Rothstein J.
(paras. 80 to 117)

TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA v. BRITISH COLUMBIA (ATTORNEY GENERAL),
2014 SCC 59, [2014] 3 S.C.R. 31

**Trial Lawyers Association of British
Columbia and Canadian Bar Association
— British Columbia Branch** *Appellants/Respondents on cross-appeal*

v.

Attorney General of British Columbia *Respondent/Appellant on cross-appeal*

and

**Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of Alberta,
Advocates' Society,
West Coast Women's Legal Education and Action Fund
and David Asper Centre for Constitutional Rights** *Interveners*

2014 SCC 59

File No.: 35315.

2014: April 14; 2014: October 2.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Courts — Access to justice — Court hearing fees — Province enacting regulations establishing graduated court hearing fees — Regulations containing exemption provision from fees for persons who are “indigent” or “impoverished” — Whether province can establish hearing fee scheme under its administration of justice power pursuant to s. 92(14) of Constitution Act, 1867 — Whether regulations imposing hearing fees denying some people access to courts infringing core jurisdiction of s. 96 superior courts — Whether provincial hearing fee scheme constitutionally valid — Constitution Act, 1867, ss. 92(14), 96 — Court Rules Act, R.S.B.C. 1996, c. 80 — Supreme Court Rules, B.C. Reg. 221/90, as amended by B.C. Reg. 10/96 and B.C. Reg. 75/98 — Supreme Court Civil Rules, B.C. Reg. 168/2009, r. 20-5(1).

This case began as a family action. V and D were involved in a custody dispute. V went to court to have these issues resolved. In order to get a trial date, she had to undertake in advance to pay a court hearing fee. At the outset of the trial, V asked the judge to relieve her from paying the hearing fee. The judge reserved his decision on this request until the end of the trial. The parties were not represented by lawyers, and the hearing took 10 days. The hearing fee amounted to some \$3,600 — almost the net monthly income of the family. After legal fees had depleted her savings, V could not afford the hearing fee.

Aware that there was some authority for the proposition that hearing fees are unconstitutional, the judge invited submissions and interventions on the subject from outside parties and stayed V's obligation to pay the hearing fee. Ultimately, the B.C. branch of the Canadian Bar Association ("CBA"), the Trial Lawyers Association of British Columbia ("Trial Lawyers") and the Attorney General of British Columbia (the "Province") intervened.

The *Supreme Court Rules*, which were in place at the time this case began, were replaced in 2010 by the *Supreme Court Civil Rules*. The constitutionality of the hearing fees set out in both rules of court is challenged. The current hearing fees escalate from no fee for the first three days of trial, to \$500 for days four to ten, to \$800 for each day over ten. Rule 20-5(1) of the *Supreme Court Civil Rules* provides for an exemption from hearing fees if the court finds that a person is "impoverished". The exemption in place at the time of the trial provided that a judge could waive all fees for a person who is "indigent".

The trial judge in this case ruled that the hearing fee provision was unconstitutional. The Court of Appeal agreed that the scheme could not stand as it is, but held that if the exemption provision were expanded by reading in the words "or in need", it would pass constitutional muster. The Trial Lawyers and CBA appeal the remedy to this Court. The Province cross-appeals on the issue of the constitutionality of the hearing fees.

Held (Rothstein J. dissenting): The appeal should be allowed and the cross-appeal dismissed.

Per McLachlin C.J. and LeBel, Abella, Moldaver and Karakatsanis JJ.: Levying hearing fees is a permissible exercise of the Province's jurisdiction under s. 92(14) of the *Constitution Act, 1867*; however, that power is not unlimited. It must be exercised in a manner that is consistent with s. 96 of the *Constitution Act, 1867* and the requirements that flow by necessary implication from s. 96. Section 96 restricts the legislative competence of provincial legislatures and Parliament; neither level of government can enact legislation that removes part of the core or inherent jurisdiction of the superior courts. The historic task of the superior courts is to resolve

disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. Therefore, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts and impermissibly impinge on s. 96 of the *Constitution Act, 1867*.

The connection between access to justice and s. 96 is further supported by considerations relating to the rule of law. The s. 96 function and the rule of law are inextricably intertwined. As access to justice is fundamental to the rule of law, it is natural that s. 96 provide some degree of constitutional protection for access to justice. Concerns about the rule of law in this case are not abstract or theoretical. If people cannot bring legitimate issues to court, laws will not be given effect, and the balance between the state's power to make and enforce laws and the courts' responsibility to rule on citizen challenges to them may be skewed.

Section 92(14), read in the context of the Constitution as a whole, does not give the provinces the power to administer justice in a way that denies the right of Canadians to access courts of superior jurisdiction. Any attempt to do so will run afoul of the constitutional protection for the superior courts found in s. 96 of the *Constitution Act, 1867*.

Hearing fees are unconstitutional when they deprive litigants of access to the superior courts. That point is reached when the hearing fees in question cause undue hardship to the litigant who seeks the adjudication of the superior court. A hearing fee scheme that does not exempt impoverished people clearly oversteps the constitutional minimum. But providing exemptions only to the truly impoverished may set the access bar too high. A fee that is so high that it requires litigants who are not impoverished to sacrifice reasonable expenses in order to bring a claim may, absent adequate exemptions, be unconstitutional because it subjects litigants to undue hardship, thereby effectively preventing access to the courts. It is the role of the provincial legislatures to devise a constitutionally compliant hearing fee scheme. But as a general rule, hearing fees must be coupled with an exemption that allows judges to waive the fees for people who cannot, by reason of their financial situation, bring non-frivolous or non-vexatious litigation to court. A hearing fee scheme can include an exemption for the truly impoverished, but the hearing fees must be set at an

amount such that anyone who is not impoverished can afford them. Higher fees must be coupled with enough judicial discretion to waive hearing fees in any case where they would effectively prevent access to the courts because they require litigants to forgo reasonable expenses in order to bring claims.

The hearing fee scheme at issue in this case places an undue hardship on litigants and impedes the right of British Columbians to bring legitimate cases to court and is unconstitutional. The current exemptions do not provide sufficient discretion to the trial judge to exempt litigants from having to pay hearing fees in appropriate circumstances.

V is excused from paying the hearing fee. The hearing fee scheme prevents access to the courts in a manner inconsistent with s. 96 of the *Constitution Act, 1867* and the underlying principle of the rule of law. It therefore falls outside the Province's jurisdiction under s. 92(14) to administer justice.

The proper remedy is to declare the hearing fee scheme as it stands unconstitutional and leave it to the Legislature or the Lieutenant Governor-in-Council to enact new provisions, should they choose to do so. "Reading in" is a remedy sparingly used, and available only where it is clear the legislature, faced with a ruling of unconstitutionality, would have made the change proposed. This condition is not met here. Further, modifying the exemption as suggested might still not cover all litigants who cannot afford the hearing fee and other provisions might be required in order to avoid the onerous or undignified process of proving that one falls within the exception.

Per Cromwell J.: This case can be resolved on administrative law grounds and it is unnecessary to address the broader constitutional issues. There is a common law right of reasonable access to civil justice. This right of reasonable access may only be abrogated by clear statutory language. This common law right is preserved by the *Court Rules Act*. The common law right of access to civil justice allows court fees, but only if there is an exemption to ensure that no person is prevented from making an arguable claim or defence because he or she lacks the resources to carry on the proceeding. This is a flexible standard: whether a person has the ability to

pay the fees depends not only on wealth and income, but also on the amount of their reasonable, necessary expenses and the magnitude of the fees. If the hearing fee exemptions cannot be interpreted to ensure that the common law right of access is not defeated, then the fees are *ultra vires* the *Court Rules Act*.

Here, the trial judge found as a fact that the hearing fees are unaffordable and therefore limit access for litigants who do not fall within the exemptions for the indigent and the impoverished. The plain meaning of the exemption, referring to persons who are “impoverished” and “indigent” cannot be interpreted to cover people of modest means who are prevented from having a trial because of the hearing fees. The hearing fees do not meet the common law standard preserved by the *Court Rules Act*. The exemptions under the *Court Rules Act* cannot be interpreted in a way that is consistent with the common law right of access to civil justice which is preserved by the *Court Rules Act*. Thus, the fees are *ultra vires* the regulation-making authority conferred by the *Court Rules Act*.

Per Rothstein J. (dissenting): The British Columbia hearing fee scheme does not offend any constitutional right. There is no express constitutional right to access the civil courts without hearing fees. Section 92(14) of the *Constitution Act, 1867* entrusts the administration of justice in the provinces to provincial legislatures. It is well established that provinces have the power under s. 92(14) to enact laws that prescribe conditions on access to the courts. Legislatures must balance a number of important values, including providing access to courts and ensuring that those same courts are adequately funded. They are accountable to voters for the choices they make. Absent a violation of the *Charter* and within the bounds of their constitutional jurisdiction, provincial legislatures have leeway to make policy decisions regarding the allocation of funding and the recovery of costs.

The hearing fee scheme in this case cannot be struck down on the basis of a novel reading of s. 96 of the *Constitution Act, 1867*. Section 96 protects the core jurisdiction of superior courts that is integral to their operations; however, it does not follow that legislation that places conditions on access to superior courts removes or infringes upon an aspect of their core

jurisdiction. This Court has previously established a three-part test for determining whether legislation impermissibly removes an aspect of the core jurisdiction of superior courts. The majority does not apply this test because no aspect of the core jurisdiction of superior courts is removed by legislation that merely places limits on access to superior courts. In the absence of any demonstrated destruction of the core powers of the superior courts, there is no such removal sufficient to find a violation of s. 96. Instead, the majority significantly expands what is meant by the “core jurisdiction” of the superior courts beyond what is contemplated in the text or this Court’s jurisprudence on the scope of s. 96. The hearing fees are a financing mechanism and do not go to the very existence of the court as a judicial body or limit the types of powers it may exercise.

The unwritten principle of the rule of law does not support the striking down of legislation otherwise properly within provincial jurisdiction. The majority uses the rule of law to support reading a general constitutional right to access the superior courts into s. 96. Section 96 requires that the existence and core jurisdiction of superior courts be preserved, but this does not, necessarily imply the general right of access to superior courts described by the majority. So long as the courts maintain their character as judicial bodies and exercise the core functions of courts, the demands of the Constitution are satisfied. In using an unwritten principle to support expanding the ambit of s. 96 to such an extent, the majority subverts the structure of the Constitution and jeopardizes the primacy of the written text. This purported constitutional right to access the courts circumvents the careful checks and balances built into the structure of the *Charter*. Unlike *Charter* rights, rights read into s. 96 are not subject to s. 1 justification or the s. 33 notwithstanding clause.

This Court has clearly and persuasively cautioned against using the rule of law to strike down legislation. To circumvent this caution, the majority characterizes the rule of law as a limitation on the jurisdiction of provinces under s. 92(14). Dressing the rule of law in division-of-powers clothing does not disguise the fact that the rule of law, an unwritten principle, cannot be used to support striking down the hearing fee scheme. Reading the unwritten principle of the rule of law too broadly would also render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers. Provisions such as ss. 11(d) and 24(1) of the *Charter* would be unnecessary if the Constitution

already contained a more general right to access superior courts. The rule of law is a vague and fundamentally disputed concept. To rely on this nebulous principle to invalidate legislation based on its content introduces uncertainty into constitutional law and undermines our system of positive law.

Even if there were a constitutional basis upon which to challenge the British Columbia hearing fee scheme, it would not be unconstitutional. The majority's approach to determining whether hearing fees prevent litigants from accessing the courts overlooks some important contextual considerations. In particular, the majority does not account for measures that offset the burden of hearing fees or eliminate them altogether. When these measures are taken into consideration, there is no indication that the hearing fees at issue would prevent litigants from bringing meritorious legal claims.

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By McLachlin C.J.

Distinguished: *British Columbia (Attorney General) v. Christie*, [2007 SCC 21](#), [2007] 1 S.C.R. 873, rev'g [2005 BCCA 631](#), 262 D.L.R. (4th) 51; **applied:** *MacMillan Bloedel Ltd. v. Simpson*, [1995 CanLII 57 \(SCC\)](#), [1995] 4 S.C.R. 725; *Re Residential Tenancies Act, 1979*, [1981 CanLII 24 \(SCC\)](#), [1981] 1 S.C.R. 714; *Crevier v. Attorney General of Quebec*, [1981 CanLII 30 \(SCC\)](#), [1981] 2 S.C.R. 220; **referred to:** *Pleau v. Nova Scotia (Prothonotary)* (1998), [1998 CanLII 12462 \(NS SC\)](#), 186 N.S.R. (2d) 1; *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005 SCC 49](#), [2005] 2 S.C.R. 473; *Reference re Senate Reform*, [2014 SCC 32](#), [2014] 1 S.C.R. 704; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997 CanLII 317 \(SCC\)](#), [1997] 3 S.C.R. 3; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988 CanLII 3 \(SCC\)](#), [1988] 2 S.C.R. 214, aff'g (1985), [1985 CanLII 143 \(BC CA\)](#), 20 D.L.R. (4th) 399; *Hryniak v. Mauldin*, [2014 SCC 7](#), [2014] 1 S.C.R. 87; *Schachter v. Canada*, [1992 CanLII 74 \(SCC\)](#), [1992] 2 S.C.R. 679.

By Cromwell J.

Referred to: *Polewsky v. Home Hardware Stores Ltd.* (2003), [2003 CanLII 48473 \(ON SCDC\)](#), 66 O.R. (3d) 600; *Fabrikant v. Canada*, [2014 FCA 89](#), 459 N.R. 163; *Toronto-Dominion Bank v. Beaton*, [2012 ABQB 125](#), 534 A.R. 132; *R. v. Lord Chancellor, Ex parte Witham*, [1998] Q.B. 575; *R. v. Secretary of State for the Home Department, ex p. Saleem*, [2000] 4 All E.R. 814; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, [2013 SCC 64](#), [2013] 3 S.C.R. 810.

By Rothstein J. (dissenting)

OPSEU v. Ontario (Attorney General), [1987 CanLII 71 \(SCC\)](#), [1987] 2 S.C.R. 2; *British Columbia (Attorney General) v. Christie*, [2007 SCC 21](#), [2007] 1 S.C.R. 873; *Ontario v. Criminal Lawyers' Association of Ontario*, [2013 SCC 43](#), [2013] 3 S.C.R. 3; *MacMillan Bloedel Ltd. v. Simpson*, [1995 CanLII 57 \(SCC\)](#), [1995] 4 S.C.R. 725; *Re Residential Tenancies Act, 1979*, [1981 CanLII 24 \(SCC\)](#), [1981] 1 S.C.R. 714; *Crevier v. Attorney General of Quebec*, [1981 CanLII 30 \(SCC\)](#), [1981] 2 S.C.R. 220; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997 CanLII 317 \(SCC\)](#), [1997] 3 S.C.R. 3; *Reference re Secession of Quebec*, [1998 CanLII 793 \(SCC\)](#), [1998] 2 S.C.R. 217; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988 CanLII 3 \(SCC\)](#), [1988] 2 S.C.R. 214; *Reference re Manitoba Language Rights*, [1985 CanLII 33 \(SCC\)](#), [1985] 1 S.C.R. 721; *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005 SCC 49](#), [2005] 2 S.C.R. 473; *Singh v. Canada (Attorney General)*, [2000 CanLII 17100 \(FCA\)](#), [2000] 3 F.C. 185; *De Fehr v. De Fehr*, [2001 BCCA 485](#), 156 B.C.A.C. 240; *Hryniak v. Mauldin*, [2014 SCC 7](#), [2014] 1 S.C.R. 87; *Combined Air Mechanical Services Inc. v. Flesch*, [2011 ONCA 764](#), 108 O.R. (3d) 1.

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Supreme Court Family Rules, B.C. Reg. 169/2009, App. C, Sch. 1.

Supreme Court Rules, B.C. Reg. 221/90 [rep. 168/2009], App. C, Sch. 1 [rep. & sub. 10/96; *idem* 75/98].

APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (Donald, Chiasson and Garson JJ.A.), [2013 BCCA 65](#), 43 B.C.L.R. (5th) 217, 334 B.C.A.C. 71, 572 W.A.C. 71, 359 D.L.R. (4th) 524, [2013] 7 W.W.R. 478, 286 C.R.R. (2d) 26, [2013] B.C.J. No. 243 (QL), 2013 CarswellBC 354, setting aside a decision of McEwan J., [2012 BCSC 748](#), 260 C.R.R. (2d) 1, [2012] B.C.J. No. 1016 (QL), 2012 CarswellBC 1485. Appeal allowed and cross-appeal dismissed, Rothstein J. dissenting.

Darrell W. Roberts, Q.C., and *Chantelle M. Rajotte*, for the appellant/respondent on cross-appeal the Trial Lawyers Association of British Columbia.

Sharon D. Matthews, Q.C., *Melina Buckley* and *Michael Sobkin*, for the appellant/respondent on cross-appeal the Canadian Bar Association — British Columbia Branch.

Bryant A. Mackey and *J. Gareth Morley*, for the respondent/appellant on cross-appeal.

Alain Préfontaine, for the intervener the Attorney General of Canada.

Rochelle Fox and *Padraic Ryan*, for the intervener the Attorney General of Ontario.

Alain Gingras and *Dana Pescarus*, for the intervener the Attorney General of Quebec.

Donald Padget, for the intervener the Attorney General of Alberta.

Joseph J. Arvay, Q.C., Kelly D. Jordan and Tim A. Dickson, for the intervener the Advocates' Society.

Francesca V. Marzari and Kasari Govender, for the intervener the West Coast Women's Legal Education and Action Fund.

Paul Schabas and Cheryl Milne, for the intervener the David Asper Centre for Constitutional Rights.

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

THE CHIEF JUSTICE —

I. Overview

[1] The issue in this case is whether court hearing fees imposed by the Province of British Columbia that deny some people access to the courts are constitutional. The trial judge, upheld on appeal, held that the legislation imposing the fees was unconstitutional. I agree.

[2] In my view, the fees at issue here violate s. 96 of the *Constitution Act, 1867*. Although the province can establish hearing fees under its power to administer justice under s. 92(14) of the *Constitution Act, 1867*, the exercise of that power must also comply with s. 96 of the *Constitution Act, 1867*, which constitutionally protects the core jurisdiction of the superior courts. For the reasons discussed below, the fees impermissibly infringe on that jurisdiction by, in effect, denying some people access to the courts.

II. Facts

[3] This case began as a family action ([2009 BCSC 434 \(CanLII\)](#)). Ms. Vilardell and Mr. Dunham began a relationship in England and came to British Columbia, Canada, with their daughter. The relationship foundered, and the question arose — who should have custody of the child? Ms. Vilardell wanted to return with the child to Spain, her country of origin. Mr. Dunham wanted to keep the child in British Columbia. Ms. Vilardell also claimed an interest in Mr. Dunham's house.

[4] Ms. Vilardell went to court to have these issues resolved. In order to get a trial date, she had to undertake in advance to pay a court hearing fee. At the outset of the trial, Ms. Vilardell asked the judge to relieve her from paying the hearing fee. The judge reserved his decision on this request until the end of the trial, so he could address the question of ability to pay after hearing evidence respecting the parties' means, circumstances, and entitlement to property.

[5] The parties were not represented by lawyers, and the hearing took 10 days. The hearing fee amounted to some \$3,600 — almost the net monthly income of the family ([2012 BCSC 748](#), 260 C.R.R. (2d) 1, at para. 396). Ms. Vilardell is not an “impoverished” person in the ordinary sense of the word. She is qualified as a veterinary surgeon in Europe. She was unemployed in the year leading up to the trial; the “family” income appears to have come mainly from her partner. She had some assets, including about \$10,000 in savings in a Canadian bank account, \$10,000 in a Barclays Investment Savings Account in the United Kingdom, and \$4,500 in a registered retirement account in Spain. However, after legal fees had depleted her savings, she could not afford the hearing fee.

[6] Aware that there was some authority for the proposition that hearing fees are unconstitutional (*Pleau v. Nova Scotia (Prothonotary)* (1998), [1998 CanLII 12462 \(NS SC\)](#), 186 N.S.R. (2d) 1 (S.C.)), the judge held that the Attorney General should be given an opportunity to intervene on Ms. Vilardell's application. He also invited submissions from the Law Society of British Columbia and the B.C. branch of the Canadian Bar Association. The judge stayed Ms. Vilardell's obligation to pay the hearing fee pending further order.

[7] Ultimately, the B.C. branch of the Canadian Bar Association and the Trial Lawyers Association of British Columbia intervened and challenged the hearing fee scheme as unconstitutional. They argued that people like Ms. Vilardell — possessing some means but not able to pay the hearing fee — have the right to have a court adjudicate their legal disputes, and that the hearing fee regime in British Columbia essentially denies them that right.

[8] The trial judge ruled that the hearing fee provision was unconstitutional. The Court of Appeal agreed that the scheme could not stand as it is, but held that if the exemption provision were expanded by reading in the words “or in need”, it would pass constitutional muster (2013 BCCA 65, 43 B.C.L.R. (5th) 217). The Trial Lawyers Association of British Columbia and the Canadian Bar Association — British Columbia Branch appeal the remedy to this Court. The Province cross-appeals on the issue of the constitutionality of the hearing fees.

III. The Legislative Regime

[9] The *Supreme Court Rules*, B.C. Reg. 221/90, as amended by B.C. Reg. 10/96 and B.C. Reg. 75/98, in place at the time this case began, were enacted as subordinate legislation under the *Court Rules Act*, R.S.B.C. 1996, c. 80. In 2010, the *Supreme Court Rules* were replaced by the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. The appellants challenge the constitutionality of the hearing fees set out in both rules of court.

[10] The current hearing fees are set out in Schedule 1 of Appendix C of the *Supreme Court Civil Rules* and the *Supreme Court Family Rules*, B.C. Reg. 169/2009. The fees escalate from no fee for the first three days of trial, to \$500 for days four to ten, to \$800 for each day over ten.

[11] Rule 20-5(1) of the *Supreme Court Civil Rules* provides for an exemption from hearing fees:

If the court, on application made in accordance with subrule (3) before or after the start of a proceeding, finds that a person receives benefits under the *Employment and*

Assistance Act or the *Employment and Assistance for Persons with Disabilities Act* or is otherwise impoverished, the court may order that no fee is payable by the person to the government under Schedule 1 of Appendix C in relation to the proceeding unless the court considers that the claim or defence

- (a) discloses no reasonable claim or defence, as the case may be,
- (b) is scandalous, frivolous or vexatious, or
- (c) is otherwise an abuse of the process of the court.

[12] In B.C., the party that sets a case down for trial (usually the plaintiff) is required to undertake to pay the hearing fee — regardless of whether the trial length is based on that party's estimate or the estimate of the other party or the court.

[13] Applications for the impoverishment exemption are usually spoken to in court, often on an *ex parte* basis. The registry provides the applicant with an application form, a blank affidavit, and a draft order (r. 20-5(3)).

IV. Issues

[14] This appeal raises the following issues:

1. Is B.C.'s hearing fee scheme constitutionally valid?
2. If not, what is the appropriate remedy?

[15] The appellants challenge the Province's hearing fees on a number of grounds, including the rule of law and access to an independent judiciary.

[16] The Province argues that the hearing fee scheme is a valid exercise of the provincial power over the administration of justice under s. 92(14) of the *Constitution Act, 1867*.

[17] The question arises: What, if any, are the limits of the scope of provincial authority over the administration of justice under s. 92(14)? The authority is a wide one, but it must be exercised harmoniously with the core jurisdiction of provincial superior courts protected by s. 96. The issue in this case comes down to whether s. 96 is infringed by legislation that imposes hearing fees that deny some people access to the courts.

V. Analysis

A. The Province Has the Power to Impose Hearing Fees

[18] The Province has the power to legislate with respect to the administration of justice under s. 92(14) of the *Constitution Act, 1867*. This includes the power to charge fees for court services.

[19] Section 92(14) of the *Constitution Act, 1867* provides:

92. In each Province the Legislature may exclusively make Laws in relation to
...

...

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of the Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil matters in those Courts.

[20] In *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873, this Court said:

The legislature has the power to pass laws in relation to the administration of justice in the province under s. 92(14) of the *Constitution Act, 1867*. This implies the power of the province to impose at least some conditions on how and when people have a right to access the courts. Therefore *B.C.G.E.U.* cannot stand for the proposition that every limit on access to the courts is automatically unconstitutional. [Emphasis added; para. 17.]

[21] Hearing fees fall squarely within the “administration of justice” and may be used to defray some of the cost of administering the justice system, to encourage the efficient use of court resources, and to discourage frivolous or inappropriate use of the courts.

[22] It was argued that *all* hearing fees are unconstitutional; as courts are a “first charge on government”, charging fees for time in court is as offensive to democracy as charging fees for voting. However, this argument is flawed because it focuses on the type of the fee, rather than the real problem — using fees to deny certain people access to the courts. Moreover, the argument raises policy issues relating to how governments should generate revenue and allocate their funds. Hearing fees paid by litigants who *can* afford them may be a justifiable way of making resources available for the justice system and increasing access to justice overall.

[23] I conclude that levying hearing fees is a permissible exercise of the Province’s jurisdiction under s. 92(14) of the *Constitution Act, 1867*.

B. *The Provinces’ Power to Impose Hearing Fees Is Not Unlimited*

[24] On its face, s. 92(14) does not limit the powers of the provinces to impose hearing fees. However, that does not mean that the province can impose hearing fees in any fashion it chooses. Its power to impose hearing fees must be consistent with s. 96 of the *Constitution Act, 1867* and the requirements that flow by necessary implication from s. 96. This follows from two related tenets of constitutional interpretation.

[25] First, particular constitutional grants of power must be read together with other grants of power so that the Constitution operates as an internally consistent harmonious whole. Thus s. 92(14) does not operate in isolation. Its ambit must be determined, not only by reference to its bare wording, but with respect to other powers conferred by the Constitution. In this case, this requires us to consider s. 96 of the *Constitution Act, 1867*.

[26] Second, the interpretation of s. 92(14) must be consistent not only with other express terms of the Constitution, but with requirements that “flow by necessary implication from those terms”: *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 66, per Major J. As this Court has recently stated, “the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text”: *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 26 (emphasis added).

[27] It follows that in determining the power conferred on the province over the administration of justice, including the imposition of hearing fees, by s. 92(14), the Court must consider not only the written words of that provision, but how a particular interpretation fits with other constitutional powers and the assumptions that underlie the text.

[28] In this case, the other constitutional grant of power that must be considered is s. 96 of the *Constitution Act, 1867*, which has been held to guarantee the core jurisdiction of provincial superior courts throughout the country.

[29] While s. 92(14) gives the provinces the responsibility for the administration of justice, s. 96 gives the federal government the power to appoint judges to the superior, district and county courts in each province. Taken together, these sections have been held to provide a constitutional basis for a unified judicial presence throughout the country: *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725, at paras. 11 and 52. Although the bare words of s. 96 refer to the appointment of judges, its broader import is to guarantee the core jurisdiction of provincial superior courts: Parliament and legislatures can create inferior courts and administrative tribunals, but “[t]he jurisdiction which forms this core cannot be removed from the superior courts by either level of government, without amending the Constitution” (*MacMillan Bloedel*, at para. 15). In this way, the Canadian Constitution “confers a special and inalienable status on what have come to be called the ‘section 96 courts’” (*MacMillan Bloedel*, at para. 52).

[30] Section 96 therefore restricts the legislative competence of provincial legislatures and Parliament — neither level of government can enact legislation that abolishes the superior courts or removes part of their core or inherent jurisdiction: *MacMillan Bloedel*, at para. 37; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3 (“*Provincial Judges Reference*”), at para. 88.

[31] It is not suggested that legislating hearing fees that prevent people from accessing the courts would abolish or destroy the existence of the courts. The question is rather whether legislating hearing fees that prevent people from accessing the courts infringes on the core jurisdiction of the superior courts.

[32] The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. As a result, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts.

[33] The jurisprudence under s. 96 supports this conclusion. The cases decided under s. 96 have been concerned either with legislation that purports to transfer an aspect of the core jurisdiction of the superior court to another decision-making body or with privative clauses that would bar judicial review: *Re Residential Tenancies Act, 1979*, 1981 CanLII 24 (SCC), [1981] 1 S.C.R. 714; *MacMillan Bloedel*; *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220. The thread throughout these cases is that laws may impinge on the core jurisdiction of the superior courts by denying access to the powers traditionally exercised by those courts.

[34] In *Residential Tenancies*, the law at issue unconstitutionally denied access to the superior courts by requiring that a certain class of cases be decided by an administrative tribunal. In *Crevier*, the law at issue unconstitutionally denied access to the superior courts by imposing a privative clause excluding the supervisory jurisdiction of the superior courts. In *MacMillan Bloedel*, the legislation at issue unconstitutionally barred access to the superior courts for a segment of society — young persons — by conferring an exclusive power on youth courts to try youths for contempt in the face of superior courts. This Court, *per* Lamer C.J., relied on *Crevier*, concluding that “[it] establishes . . . that powers which are ‘hallmarks of superior courts’ cannot be removed from those courts” (*MacMillan Bloedel*, at para. 35).

[35] Here, the legislation at issue bars access to the superior courts in yet another way — by imposing hearing fees that prevent some individuals from having their private and public law disputes resolved by the courts of superior jurisdiction — the hallmark of what superior courts exist to do. As in *MacMillan Bloedel*, a segment of society is effectively denied the ability to bring their matter before the superior court.

[36] It follows that the province’s power to impose hearing fees cannot deny people the right to have their disputes resolved in the superior courts. To do so would be to impermissibly impinge on s. 96 of the *Constitution Act, 1867*. Rather, the province’s powers under s. 92(14) must be exercised in a manner that is consistent with the right of individuals to bring their cases to the superior courts and have them resolved there.

[37] This is consistent with the approach adopted by Major J. in *Imperial Tobacco*. The legislation here at issue — the imposition of hearing fees — must conform not only to the express terms of the Constitution, but to the “requirements . . . that flow by necessary implication from those terms” (para. 66). The right of Canadians to access the superior courts flows by necessary implication from the express terms of s. 96 of the *Constitution Act, 1867* as we have seen. It follows that the province does not have the power under s. 92(14) to enact legislation that prevents people from accessing the courts.

[38] While this suffices to resolve the fundamental issue of principle in this appeal, the connection between s. 96 and access to justice is further supported by considerations relating to the rule of law. This Court affirmed that access to the courts is essential to the rule of law in *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988 CanLII 3 \(SCC\)](#), [1988] 2 S.C.R. 214. As Dickson C.J. put it, “[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice” (p. 230). The Court adopted, at p. 230, the B.C. Court of Appeal’s statement of the law ((1985), [1985 CanLII 143 \(BC CA\)](#), 20 D.L.R. (4th) 399, at p. 406):

. . . access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens. . . . Any action that interferes with such access by any person or groups of persons will rally the court’s powers to ensure the citizen of his or her day in court. Here, the action causing interference happens to be picketing. As we have already indicated, interference from whatever source falls into the same category. [Emphasis added.]

As stated more recently in *Hryniak v. Mauldin*, [2014 SCC 7](#), [2014] 1 S.C.R. 87, *per* Karakatsanis J., “without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined” (para. 26).

[39] The s. 96 judicial function and the rule of law are inextricably intertwined. As Lamer C.J. stated in *MacMillan Bloedel*, “[i]n the constitutional arrangements passed on to us by the British and recognized by the preamble to the [Constitution Act, 1867](#), the provincial superior courts are the foundation of the rule of law itself” (para. 37). The very rationale for the provision is said to be “the maintenance of the rule of law through the protection of the judicial role”: *Provincial Judges Reference*, at para. 88. As access to justice is fundamental to the rule of law, and the rule of law is fostered by the continued existence of the s. 96 courts, it is only natural that s. 96 provide some degree of constitutional protection for access to justice.

[40] In the context of legislation which effectively denies people the right to take their cases to court, concerns about the maintenance of the rule of law are not abstract or theoretical. If people cannot challenge government actions in court, individuals cannot hold the state to account

— the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. And the balance between the state’s power to make and enforce laws and the courts’ responsibility to rule on citizen challenges to them may be skewed: *Christie v. British Columbia (Attorney General)*, 2005 BCCA 631, 262 D.L.R. (4th) 51, at paras. 68-9, *per* Newbury J.A.

[41] This Court’s decision in *Christie* does not undermine the proposition that access to the courts is fundamental to our constitutional arrangements. The Court in *Christie* — a case concerning a 7 percent surcharge on legal services — proceeded on the premise of a fundamental right to access the courts, but held that not “every limit on access to the courts is automatically unconstitutional” (para. 17). In the present case, the hearing fee requirement has the potential to bar litigants with legitimate claims from the courts. The tax at issue in *Christie*, on the evidence and arguments adduced, was not shown to have a similar impact.

[42] Nor does the argument that legislatures generally have the right to determine the cost of government services undermine the proposition that laws cannot prevent citizens from accessing the superior courts. (Indeed, the Attorney General does not assert such a proposition.) The right of the province to impose hearing fees is limited by constitutional constraints. In defining those constraints, the Court does not impermissibly venture into territory that is the exclusive turf of the legislature. Rather, the Court is ensuring that the Constitution is respected.

[43] I conclude that s. 92(14), read in the context of the Constitution as a whole, does not give the provinces the power to administer justice in a way that denies the right of Canadians to access courts of superior jurisdiction. Any attempt to do so will run afoul of the constitutional protection for the superior courts found in s. 96.

C. *When Do Hearing Fees Become Unconstitutional?*

[44] The remaining question is how to determine when hearing fees deny access to superior courts.

[45] Litigants with ample resources will not be denied access to the superior courts by hearing fees. Even litigants with modest resources are often capable of arranging their finances so that, with reasonable sacrifices, they may access the courts. However, when hearing fees deprive litigants of access to the superior courts, they infringe the basic right of citizens to bring their cases to court. That point is reached when the hearing fees in question cause undue hardship to the litigant who seeks the adjudication of the superior court.

[46] A hearing fee scheme that does not exempt impoverished people clearly oversteps the constitutional minimum — as tacitly recognized by the exemption in the B.C. scheme at issue here. But providing exemptions only to the truly impoverished may set the access bar too high. A fee that is so high that it requires litigants who are not impoverished to sacrifice reasonable expenses in order to bring a claim may, absent adequate exemptions, be unconstitutional because it subjects litigants to undue hardship, thereby effectively preventing access to the courts.

[47] Of course, hearing fees that prevent litigants from bringing frivolous or vexatious claims do not offend the Constitution. There is no constitutional right to bring frivolous or vexatious cases, and measures that deter such cases may actually increase efficiency and overall access to justice.

[48] It is the role of the provincial legislatures to devise a constitutionally compliant hearing fee scheme. But as a general rule, hearing fees must be coupled with an exemption that allows judges to waive the fees for people who cannot, by reason of their financial situation, bring non-frivolous or non-vexatious litigation to court. A hearing fee scheme can include an exemption for the truly impoverished, but the hearing fees must be set at an amount such that anyone who is not impoverished can afford them. Higher fees must be coupled with enough judicial discretion to waive hearing fees in any case where they would effectively prevent access to the courts because they require litigants to forgo reasonable expenses in order to bring claims. This is in keeping with a long tradition in the common law of providing exemptions for classes of people who might be prevented from accessing the courts — a tradition that goes back to the *Statute of Henry VII*, 11 Hen. 7, c. 12, of 1495, which provided relief for people who could not afford court fees.

D. *Application to Hearing Fee at Issue*

[49] To recap, provinces may impose hearing fees as part of the administration of justice. However, this power does not extend to hearing fees that effectively prevent litigants from accessing the courts because they cannot afford the fees.

[50] On the findings of the trial judge, the hearing fee scheme at issue in this case places an undue hardship on litigants and impedes the right of British Columbians to bring legitimate cases to court.

[51] The trial judge held that the primary purpose of the hearing fee scheme is to provide an incentive for efficient use of court time and a disincentive for lengthy and inefficient trials (para. 309). The secondary purpose of the scheme is to provide sufficient revenue to offset the costs of providing civil justice in Provincial Court Small Claims matters, Supreme Court civil claims, and Supreme Court family claims (paras. 302-7). To put it in other words, the Province's aim is to establish a revenue-neutral trial service.

[52] The trial judge, affirmed by the Court of Appeal, found that B.C.'s hearing fees go beyond these purposes and limit access to courts for litigants who are not indigent or impoverished (and therefore who do not fall under the exemption provision), but for whom the hearing fees are nonetheless unaffordable. This is supported by the evidence. At trial, the appellants filed a report by economist Robert Carson, who used a "Market Basket Measure" ("MBM") developed in 2003 by Human Resources Development Canada to measure poverty. Assuming that the test for the indigency exemption was based on an MBM measure of poverty, he concluded that a significant percentage of the population would not be exempted from hearing fees (because their income is above MBM), but would nonetheless have great difficulty affording the hearing fees for a 10-day trial, like the one in this case, because the fees would equal or exceed any income in excess of MBM. In other words, the effect of the fees is unconstitutional, because for many litigants, bringing a claim would require sacrificing reasonable expenses.

In 2005 the median after tax income of couples households in B.C., without children, was \$53,468. About 8.7% of couples without children had incomes below MBM which is, in my opinion, a conservative (that is, a relatively low) estimate of the line between poverty and income sufficient to meet people's basic needs. Adding \$15,000 to MBM results in an estimate of 82,500 couples whose incomes were above MBM and therefore, too high to qualify for exemption from hearing fees, using an MBM based test, but still well below the median level. In this group, comprising one couple in five, incomes ranged from \$21,745, the amount required simply to cover basic needs to \$36,745, an amount sufficient to increase average daily expenditures per household member by about \$20 above MBM. At the upper end of the income range in this group, fees for a ten day trial would equal the daily spendable income, in excess of MBM, for almost three months.

Among couples households with children median income was \$68,357 in 2005. MBM for B.C. couples with children was about \$34,750 in that year. About 15% of couples with children had incomes below MBM. Adding \$15,000 to MBM resulted in an estimate of 67,000 couples with relatively low incomes who would not meet an MBM based test for indigence. The addition of \$15,000 to MBM income increased spendable income by about \$11 per day per household member, in couples families with children. The number of couples with incomes exceeding MBM either marginally, or by as much as \$15,000 per year, is about equal to the number of couples with incomes below MBM who could qualify for exemption. In other words, there are at least as many people who would not be exempt from fees, but who would be hard pressed to meet the cost of hearing fees, as there are who could claim exemption.

Among female loan [sic] parent families in private households, median income in 2005 was \$33,151. About four in ten such households would meet an MBM based test for indigence. Adding \$15,000 to MBM results in an estimate of 31,600 families with incomes between MBM and \$43,700. About one loan [sic] parent female headed family in four would not meet an MBM based test for indigence but would, at the outside, be able to spend \$12 per day per family member more than MBM. Similar calculations, for loan [sic] parent families headed by males, adds about 7,000 families to those I would consider to be living on modest incomes, with similarly limited ability to bear the costs of hearing fees.

Among single men median pre-tax income in 2005 was \$28,175 and among single women, it was \$22,833. About 28% of all singles had incomes below MBM and about one in five had incomes between MBM and the medians. Medians exceeded MBM by \$12,645 (men) and \$7,300 (women). It is my opinion that among single people in B.C. at least half either would either have to seek indigent status, or would find hearing fees to be a significant barrier to their access to a court.

On the basis of fairly limited information with respect to income distribution and the extent and quality of participation in paid work among First Nations people, recent immigrants and the disabled it is my opinion that people in these groups are certain to be over-represented among those likely to qualify for indigent status, and among those with incomes that are too high to qualify for indigence, but low enough that hearing fees would represent a significant barrier to recourse to a court. [Emphasis added.]

[54] Mr. Carson’s evidence was based on the Province’s previous hearing fee scheme, in place at the time this case began. However, in my view, it is equally relevant to the current hearing fee regime. Under the current *Supreme Court Civil Rules*, the fee for a 10-day trial is \$3,500 — almost the same as under the previous *Supreme Court Rules*.

[55] Indeed, the effect of B.C.’s hearing fee scheme is illustrated in this case. Ms. Vilardell is not “impoverished”, and is therefore not caught by the exemption provision. However, the fee for Ms. Vilardell’s 10-day trial amounted to her family’s net monthly income. This was on top of \$23,000 already spent on lawyer fees. She could not afford the fee. That the fee arbitrarily was imposed only on Ms. Vilardell and escalated with the length of the trial — even though she did not control the length of the trial — worsened her situation.

[56] The Province argues that the exemption provision for impoverished litigants should be interpreted broadly to allow a judge to waive the hearing fees in appropriate cases, thereby avoiding the potentially unconstitutional impact of the scheme. I cannot accept this submission.

[57] The current exemption, cited above, provides an exemption for people receiving benefits under the *Employment and Assistance Act*, S.B.C. 2002, c. 40, and the *Employment and Assistance for Persons with Disabilities Act*, S.B.C. 2002, c. 41, or for persons who are “otherwise impoverished”. The exemption in place at the time of the trial provided that a judge could waive all fees for a person who is “indigent”. I conclude that these exemptions do not provide sufficient discretion to the trial judge to exempt litigants from having to pay hearing fees in appropriate circumstances.

[58] I agree with the view of the trial judge that the plain meaning of the words “impoverished” and “indigent” does not cover people of modest means who are nonetheless prevented from having a trial because of the hearing fees:

The AGBC . . . reconciles the principle that the courts are meant to be accessible by pointing to the indigency exemption. It is clear, however, that if indigency is not redefined to include those who would otherwise be described as middle class, many will be forced to forego the assertion of their rights and interests in a courtroom for

lack of money. I again note that in this particular case the cost of hearing fees for 10 days approached the net income of the family for a month.

...

. . . The AGBC's answer dares the courts to redefine indigency — while maintaining the label — in a manner that would bring the whole exercise into disrepute. The courts simply do not engage in calling things what they are not, and could not be enlisted into an executive function by administering a more general form of means test to those who come before them, without compromising the appearance of independence, and the fact of equality before the law, as the TLABC has noted: see para. 180 herein. The “indigency” remedy does not cure this obvious impediment to access to justice. [paras. 396 and 398]

[59] Like the trial judge, I am of the view that the courts must read “impoverished” in its ordinary sense. A judge may waive fees for the very poor, and no one else. As the trial judge noted, while a person who cannot afford a fee of \$100 or \$200 may properly be described as “indigent” or “impoverished”, it is awkward to use these terms to describe a middle class family's inability to pay a fee that amounts to a month's net salary. As the trial judge found, there “may be something at odds between the indigency test and the level of the fees” (para. 26).

[60] Other objections to the exemption provision can be raised. Litigants are required to come before the court, explain why they are indigent and beg the court to publicly acknowledge this status and excuse the payment of fees. This is arguably an affront to dignity and imposes a significant burden on the potential litigant of adducing proof of impoverishment — a burden she may be unable or unwilling to assume. This burden may further hamper access to the court. In clear cases of impoverishment, the task may be relatively straightforward. However, if “impoverished” were extended to the large group of additional people that the evidence indicates is prevented from going to court because of the current hearing fees, the task might be much more complex. In such circumstances, there is a practical concern the exemption application itself may contribute to hardship.

[61] The contention that this hearing fee regime promotes proportionality and efficiency by weeding out unmeritorious cases and encouraging shorter trials, thereby actually increasing access to the courts, does not answer the findings of the trial judge that it unconstitutionally

prevents access to the courts. Moreover, the trial judge held that it is “dubious” that the hearing fees at issue here increase efficacy and fairness (para. 310). They penalize long trials simply because they are long, and do so by incremental leaps. But long trials are not necessarily inefficient. Prolonged trials may be caused by the nature of the case or the evidence. Litigants in long but efficient trials ought not to be penalized by hearing fees — particularly fees that escalate with the length of the trial.

[62] Moreover, the plaintiff who is required to pay the hearing fee may not control the length or efficiency of the trial — the defendant may be responsible for prolonging the matter. The ability of the trial judge to make orders for costs against such a defendant does not address the real problem — before being able to set a matter down for trial the plaintiff must undertake to pay hearing fees that may escalate through no fault of her own. If she cannot afford the prospective fees, she may reasonably conclude that she cannot bring her dispute to the court.

[63] Most fundamentally, unlike cost awards, the imposition of the hearing fees at issue are not dependent on efficiency or the merit of one’s claim. The hearing fees imposed by this scheme escalate to \$800 per day after 10 days of trial — the highest price tag in the country — without any relationship to the efficiency of the proceeding. These hearing fees do not promote efficient use of court time; at best they promote *less* use of court time.

[64] I conclude that the hearing fee scheme prevents access to the courts in a manner inconsistent with s. 96 of the *Constitution Act, 1867* and the underlying principle of the rule of law. It therefore falls outside the Province’s jurisdiction under s. 92(14) to administer justice.

VI. What Is the Appropriate Remedy?

[65] This leaves the question of the appropriate remedy. The trial judge struck down the scheme as unconstitutional. The Court of Appeal preferred the remedy of “reading in” the words “or in need” into the exemption provision.

[66] “Reading in” is a remedy sparingly used, and available only where it is clear that the legislature, faced with a ruling of unconstitutionality, would have made the change proposed: *Schachter v. Canada*, 1992 CanLII 74 (SCC), [1992] 2 S.C.R. 679. I am not satisfied that this condition is met here. The legislature or Lieutenant Governor in Council has a number of options, from abandoning or modifying the hearing fee to changing the exemption provision. Moreover, any expansion of the exemption provision will be at odds with the legislative objective of deterring use of the courts. “Reading in” to cure the constitutional defect of the hearing fee scheme would defeat the purpose of the legislation.

[67] I would also note that modifying the exemption as suggested by the Court of Appeal might still not cure the problem; it is not clear that the term “or in need” will cover all litigants who cannot afford the hearing fee and other provisions might be required in order to avoid the onerous or undignified process of proving that one falls within the exception.

[68] The proper remedy is to declare the hearing fee scheme as it stands unconstitutional and leave it to the legislature or the Lieutenant Governor in Council to enact new provisions, should they choose to do so.

VII. Conclusion

[69] The appeal is allowed and the cross-appeal is dismissed, both without costs. I would affirm the declaration of unconstitutionality of the trial judge and set aside the order of the Court of Appeal expanding the exemption provision. Ms. Vilardell is excused from paying the hearing fee.

The following are the reasons delivered by

[70] CROMWELL J. — I prefer to resolve this case on administrative law grounds and find that it is unnecessary to address the broader constitutional issues raised by the appellants. The submissions made by the Attorney General of British Columbia in my view make it desirable to follow this narrower route to the resolution of the appeal.

[71] First, the Attorney General concedes that there is a common law right of reasonable access to civil justice: R.F., at para. 10. I agree. Courts in Canada and the United Kingdom have recognized the existence of this right: *Polewsky v. Home Hardware Stores Ltd.* (2003), 2003 CanLII 48473 (ON SCDC), 66 O.R. (3d) 600 (S.C.J.), at para. 60; *Fabrikant v. Canada*, 2014 FCA 89, 459 N.R. 163, at para. 7; *Toronto-Dominion Bank v. Beaton*, 2012 ABQB 125, 534 A.R. 132, at paras. 17-20; in the United Kingdom, see *R. v. Lord Chancellor, Ex parte Witham*, [1998] Q.B. 575, at p. 585; *R. v. Secretary of State for the Home Department, ex p. Saleem*, [2000] 4 All E.R. 814 (C.A.), at p. 820.

[72] It is widely accepted, and the Attorney General agrees, that this right of reasonable access may only be abrogated by clear statutory language: *Polewsky*, at para. 60; *Witham*, at p. 585; *Saleem*, at p. 821. The Attorney General does not suggest that there is any such clear language in the *Court Rules Act*, R.S.B.C. 1996, c. 80. On the contrary, the Attorney General's position is that this common law right is *preserved* by the Act: R.F., at para. 10.

[73] The Attorney General also rightly points out that since the hearing fees in dispute here are found in subordinate legislation made under the authority of the *Court Rules Act*, they should be reviewed for consistency with the Act. As I have said, the Attorney General's position, which I accept, is that the right is preserved, not abrogated by the Act: R.F., at paras. 10 and 12. It follows, as the Attorney General submits, that subordinate legislation purportedly adopted pursuant to the *Court Rules Act* which is inconsistent with the common law right of access to civil justice is *ultra vires*: *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at para. 24.

[74] The Attorney General submits, and I agree, that the common law right of access to civil justice allows court fees, but only if there is an exemption to ensure that no person is prevented from making an arguable claim or defence because he or she lacks the resources to carry on the proceeding: R.F., at para. 71. This is a flexible standard: whether a person has the ability to pay the fees depends not only on wealth and income, but also on the amount of their reasonable, necessary expenses and the magnitude of the fees: *ibid.*, at para. 72.

[75] Finally, the Attorney General submits, again in my view correctly, that if the hearing fee exemptions cannot be interpreted to ensure that the common law right of access is not defeated, then the fees are *ultra vires* the [Court Rules Act](#): R.F., at para. 47.

[76] The trial judge found as a fact that the hearing fees are unaffordable and therefore limit access for litigants who do not fall within the exemptions for the indigent and the impoverished. This finding and the evidentiary basis for it are reviewed in the Chief Justice's reasons, at paras. 52-55. Like the Chief Justice, I accept this key factual conclusion of the trial judge. It follows that the issue then becomes whether the exemptions under the [Court Rules Act](#) can be interpreted so that they are consistent with the common law right of access to civil justice, which is preserved, as the Attorney General submits, by the *Court Rules Act*.

[77] On that question, I agree with the Chief Justice and the trial judge: the plain meaning of the exemption, referring to persons who are "impoverished" and "indigent" cannot be interpreted to cover people of modest means who are prevented from having a trial because of the hearing fees: trial judge's reasons, [2012 BCSC 748](#), 260 C.R.R. (2d) 1, at paras. [396-98](#); reasons of the Chief Justice, at para. 61.

[78] In summary, the hearing fees do not meet the common law standard which the Attorney General correctly accepts is preserved by the [Court Rules Act](#). The exemption cannot be interpreted in a way that would do so. It follows, in accordance with the Attorney General's submissions, that the fees are *ultra vires* the regulation-making authority conferred by the *Court Rules Act*.

[79] I would therefore allow the appeal, dismiss the cross-appeal, set aside the order of the Court of Appeal and in its place declare that the hearing fees are *ultra vires* the [Court Rules Act](#). Ms. Vilardell does not have to pay the hearing fee. It is not necessary for me to answer the constitutional question. I would make no order as to costs.

The following are the reasons delivered by

[80] ROTHSTEIN J. (dissenting) — Courts do not have free range to micromanage the policy choices of governments acting within the sphere of their constitutional powers. This appeal concerns the constitutionality of a hearing fee scheme contained in the [British Columbia Supreme Court Civil Rules](#), B.C. Reg. 168/2009, to encourage the efficient use of courtroom time in civil courts and to recoup some of the costs for the provision of such time. The appellants submit that the imposition of hearing fees is unconstitutional. The majority finds that the hearing fees *do* fall within the powers of a province to make laws in relation to the administration of justice in the province but that they are nevertheless unconstitutional when they cause undue hardship to some litigants and effectively prevent their access to courts. In the majority's view, [s. 96](#) of the [Constitution Act, 1867](#), supported by the rule of law, provides a general right to access the courts. They find that this right is undermined by hearing fees that Canadians cannot afford.

[81] In my respectful view, the British Columbia hearing fee scheme does not offend any constitutional right. The majority must base its finding on an overly broad reading of s. 96, with support from the unwritten constitutional principle of the rule of law, because there is no express constitutional right to access the civil courts without hearing fees.

[82] In engaging, on professed constitutional grounds, the question of the affordability of government services to Canadians, the majority enters territory that is quintessentially that of the legislature. The majority looks at the question solely from the point of view of the party to litigation required to undertake to pay the hearing fee. It does not consider, and has no basis or evidence upon which to consider, the questions of the financing of court services or the impact of reduced revenues from reducing, abolishing, or expanding the exemption from paying hearing fees. Courts must respect the role and policy choices of democratically elected legislators. In the absence of a violation of a clear constitutional provision, the judiciary should defer to the policy choices of the government and legislature. How will the government deal with reduced revenues from hearing fees? Should it reduce the provision of court services? Should it reduce the provision of other government services? Should it raise taxes? Should it incur debt? These are all questions that are relevant but that the Court is not equipped to answer. I respectfully dissent.

[83] Section 92(14) of the *Constitution Act, 1867* entrusts the administration of justice in the provinces to provincial legislatures. Legislatures must balance a number of important values, including providing access to courts and ensuring that those same courts are adequately funded. They are accountable to voters for the choices they make. In a constitutional democracy such as ours, courts must be wary of subverting democracy and its accountability mechanisms beneath an overly expansive vision of constitutionalism.

[84] In *OPSEU v. Ontario (Attorney General)*, 1987 CanLII 71 (SCC), [1987] 2 S.C.R. 2, Beetz J. stated that unlike in a *Canadian Charter of Rights and Freedoms* case,

in a distribution of powers case, once it is demonstrated that the enacting legislature is competent, the balancing of conflicting values depends on the political judgment of such legislature and cannot be reviewed by the courts without their passing upon the wisdom of the legislation. [p. 56]

Accordingly, absent a violation of the *Charter* and within the bounds of their constitutional jurisdiction, provincial legislatures have leeway to make policy decisions regarding the allocation of funding and the recovery of costs.

[85] In this appeal, the majority does not dispute that the provinces are competent to prescribe hearing fees under s. 92(14) of the *Constitution Act, 1867*. Yet they nevertheless proceed to assess whether the hearing fees infringe a general right to access the courts, a right derived from an overly expansive understanding of both s. 96 of the *Constitution Act, 1867*, and the unwritten principle of the rule of law. In my view, this inquiry unduly enlarges the role of courts and hampers the ability of legislatures to respond to complex legislative challenges.

[86] I therefore take exception to the majority striking down the British Columbia hearing fee scheme on a novel reading of s. 96 and the rule of law. On the contrary, it is well established that provinces have the power under s. 92(14) to enact laws that prescribe conditions on access to the courts. In *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873, this Court expressly held:

The legislature has the power to pass laws in relation to the administration of justice in the province under s. 92(14) of the *Constitution Act, 1867*. This implies the power of the province to impose at least some conditions on how and when people have a right to access the courts. [Emphasis added; para. 17.]

[87] This is not to deny that universal, free (or at least affordable) access to courts is a laudable goal; it is merely to say that s. 96 and the unwritten principle of the rule of law cannot be used to force provincial governments to expend funds or forego cost recovery to bring this goal to fruition. As this Court recently found, “the allocation of resources between competing priorities remains a policy and economic question; it is a political decision and the legislature and the executive are accountable to the people for it” (*Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 43, per Karakatsanis J.).

II. Section 96 of the *Constitution Act, 1867*

[88] The majority states that s. 96 of the *Constitution Act, 1867* limits the power of the provinces to administer justice under s. 92(14). It is true that s. 96 protects the core jurisdiction of superior courts that is integral to their operations. In *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725, this Court stated:

Destroying part of the core jurisdiction would be tantamount to abolishing the superior courts of general jurisdiction, which is impermissible without constitutional amendment. [para. 37, per Lamer C.J.]

[89] However, it does not follow that legislation that places conditions on access to superior courts removes or infringes upon an aspect of their core jurisdiction. In *Re Residential Tenancies Act, 1979*, 1981 CanLII 24 (SCC), [1981] 1 S.C.R. 714, Dickson J. (as he then was) established a three-part test for determining whether legislation impermissibly removes an aspect of the core jurisdiction of superior courts. This Court later affirmed and summarized the test as follows:

The first branch of the test is an historical inquiry into “whether the power or jurisdiction conforms to the power or jurisdiction exercised by superior, district or

county courts at the time of Confederation” (p. 734). . . . The second step asks whether the function in question is “judicial” in its institutional setting, and [Dickson J.] contrasts “judicial” functions with policy making functions. The final branch of the test involves an assessment of the “tribunal’s function as a whole in order to appraise the impugned function in its entire institutional context” (p. 735).

(*MacMillan Bloedel*, at para. 12, citing *Residential Tenancies*.)

[90] But the majority on this appeal does not apply this test because no aspect of the core jurisdiction of superior courts is removed by legislation that merely places limits on access to superior courts. In the absence of any demonstrated destruction of the core powers of the superior courts, there is no such removal sufficient to find a violation of s. 96. Instead, the majority approach significantly expands what is meant by the “core jurisdiction” of the superior courts beyond what is contemplated in the text or this Court’s jurisprudence on the scope of s. 96. The cases cited by the majority speak of the inability of governments to remove “core or inherent jurisdiction”, as doing so “emasculates the court, making it something other than a superior court” (*MacMillan Bloedel*, at paras. 29-30; see also *Residential Tenancies*; *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220). The British Columbia government’s measures cannot be said to have “emasculated” B.C. courts or to have made them something “other than a superior court”. The hearing fees are a financing mechanism and do not go to the very existence of the court as a judicial body or limit the types of powers it may exercise. The concept of core jurisdiction in s. 96 cannot justify striking down the regulations at issue in this appeal.

III. The Rule of Law

[91] The majority reads the unwritten principle of the rule of law as supporting the striking down of legislation otherwise properly within provincial jurisdiction. It is true that this Court has, on occasion, turned to unwritten principles to fill in “gaps in the express terms of the constitutional text” (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3, at para. 104). But there are no such gaps in the text of s. 92(14). With respect, gaps do not exist simply because the courts believe that the text should say something that it does not. This Court, in *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, reiterated its earlier insistence on the primacy of the written

constitutional text, stating that unwritten principles “could not be taken as an invitation to dispense with the written text of the Constitution” (para. 53, affirming *Re: Remuneration of Judges*, at paras. 93 and 104). The written constitutional provisions guide government action and provide the touchstone for judicial review, anchoring the authority of courts to invalidate non-compliant laws enacted by democratically elected governments.

[92] There is no express right of general access to superior courts for civil disputes in the text of the Constitution. Rather, the Constitution specifies the particular instances in which access to courts is guaranteed. [Section 24\(1\)](#) of the [Charter](#) provides that persons whose *Charter* rights have been infringed or denied may apply to the courts for a remedy. It is in this sense that this Court, in *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988 CanLII 3 \(SCC\)](#), [1988] 2 S.C.R. 214, held that access to courts for the purpose of vindicating *Charter* rights is protected (pp. 228-29). [Section 11\(d\)](#) of the *Charter* guarantees persons charged with an offence the right “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”.

[93] But the majority uses the rule of law to support reading a general constitutional right to access the superior courts into s. 96. This provision of the [Constitution Act, 1867](#) requires that the existence and core jurisdiction of superior courts be preserved, but this does not, for the reasons herein, *necessarily* imply the general right of access to superior courts described by the majority. So long as the courts maintain their character as judicial bodies and exercise the core functions of courts, the demands of the Constitution are satisfied. In using an unwritten principle to support expanding the ambit of s. 96 to such an extent, the majority subverts the structure of the Constitution and jeopardizes the primacy of the written text.

[94] This purported constitutional right to access the courts circumvents the careful checks and balances built into the structure of the [Charter](#). Unlike *Charter* rights, rights read into s. 96 are absolute. They are not subject to s. 1 justification or the s. 33 notwithstanding clause. These provisions reflect a recognition that, in certain circumstances, governments will be permitted to enact legislation or take action that places limits on *Charter* rights. Indeed, s. 33 contemplates and

permits the legislative override of, among other things, the fundamental freedoms described in s. 2, the right to life, liberty and security of the person embodied by s. 7, and numerous rights applicable in the criminal context. The question my colleagues avoid answering is why access to superior courts for civil disputes warrants even stronger protection than those rights expressly enumerated in the *Charter*.

[95] I now turn to the specific unwritten constitutional principle invoked by the majority.

[96] The majority proposes to invalidate those provincial laws relating to the administration of justice that, in their view, are contrary to the rule of law. The unwritten principle of the rule of law, as defined by this Court, consists of three elements:

- (1) “[T]he law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power” (*Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721, at p. 748);
- (2) The rule of law “requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order” (*ibid.*, at p. 749); and
- (3) “[T]he exercise of all public power must find its ultimate source in a legal rule” (*Reference re Secession of Quebec*, at para. 71, quoting *Re: Remuneration of Judges*, at para. 10).

As this Court found in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, “none of the principles that the rule of law embraces speak directly to the terms of legislation” (para. 59).

[97] This Court has clearly and persuasively cautioned against using the rule of law to strike down legislation:

So understood, it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content. . . .

This does not mean that the rule of law as described by this Court has no normative force. As McLachlin C.J. stated in *Babcock*, at para. 54, “unwritten constitutional principles”, including the rule of law, “are capable of limiting government actions”. See also *Reference re Secession of Quebec*, at para. 54. But the government action constrained by the rule of law as understood in *Reference re Manitoba Language Rights* and *Reference re Secession of Quebec* is, by definition, usually that of the executive and judicial branches. Actions of the legislative branch are constrained too, but only in the sense that they must comply with legislated requirements as to manner and form (i.e., the procedures by which legislation is to be enacted, amended and repealed). [Emphasis added.]

(*Imperial Tobacco*, at paras. 59-60)

[98] To circumvent this caution against using the rule of law as a basis for striking down legislation, the majority characterizes the rule of law as a limitation on the jurisdiction of provinces under s. 92(14) of the *Constitution Act, 1867*. The majority acknowledges that imposing hearing fees is a permissible exercise of the province’s jurisdiction according to the *written* constitutional text — that is, s. 92(14) (para. 23). But they ultimately conclude that the hearing fees fall outside the province’s jurisdiction in part because the fees are inconsistent with the *unwritten* principle of the rule of law (paras. 38-40). Dressing the rule of law in division-of-powers clothing does not disguise the fact that the rule of law, an unwritten principle, cannot be used to support striking down the hearing fee scheme.

[99] In using the rule of law to support the striking down of legislation that is indisputably within the scope of s. 92(14) of the *Constitution Act, 1867*, without attention to this Court’s entrenched understanding of the rule of law, the majority ignores this Court’s caution in *Imperial Tobacco*:

The rule of law is not an invitation to trivialize or supplant the Constitution’s written terms. Nor is it a tool by which to avoid legislative initiatives of which one is not in favour. On the contrary, it requires that courts give effect to the Constitution’s text, and apply, by whatever its terms, legislation that conforms to that text. [Emphasis added; para. 67.]

With respect, the rule of law does not demand that this Court invalidate the hearing fee scheme — if anything, it demands that we uphold it.

[100] The unwritten principles of our Constitution often work at cross purposes. Even if we were to accept that the rule of law favours striking down the hearing fees, the unwritten principle of democracy favours upholding legislation passed by democratically elected representatives which conforms to the express terms of the Constitution. As the Court stated in *Imperial Tobacco*, “in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box” (para. 66).

[101] *Imperial Tobacco* offers yet another caution against reading the unwritten principle of the rule of law too broadly: it would “render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers” (para. 65). As noted above, s. 11(d) of the *Charter* specifically includes a right of access to the courts for a person charged with an offence and s. 24(1) gives this right to those vindicating their *Charter* rights. These provisions would be unnecessary if the Constitution already contained a more general right to access superior courts.

[102] In any event, the rule of law is a vague and fundamentally disputed concept. In *Imperial Tobacco*, this Court endorsed the observation of Strayer J.A. that “[a]dvocates tend to read into the principle of the rule of law anything which supports their particular view of what the law should be” (para. 62, citing *Singh v. Canada (Attorney General)*, 2000 CanLII 17100 (FCA), [2000] 3 F.C. 185 (C.A.), at para. 33). To rely on this nebulous principle to invalidate legislation based on its content introduces uncertainty into constitutional law and undermines our system of positive law.

IV. The Hearing Fees Are Not Unconstitutional

[103] Even if there were a constitutional basis upon which to challenge the British Columbia hearing fee scheme, I would not find the scheme to be unconstitutional.

[104] The majority holds that the hearing fee scheme is unconstitutional because it “places an undue hardship on litigants and impedes the right of British Columbians to bring legitimate cases to court” (para. 50). The primary source of the violation appears to be the inadequacy of the impoverishment exemption (see paras. 55-59).

[105] But the majority’s approach to determining whether hearing fees prevent litigants from accessing the courts overlooks some important contextual considerations. In particular, the majority does not account for measures that offset the burden of hearing fees or eliminate them altogether. When these measures are taken into consideration, there is no indication that the hearing fees at issue would prevent litigants from bringing meritorious legal claims.

[106] First, the so-called “indigency” exemption (applicable at trial) was replaced in 2010. Rule 20-5(1) now reads:

Court may determine impoverished status

- (1) If the court, on application made in accordance with subrule (3) before or after the start of a proceeding, finds that a person receives benefits under the *Employment and Assistance Act* or the *Employment and Assistance for Persons with Disabilities Act* or is otherwise impoverished, the court may order that no fee is payable by the person to the government under Schedule 1 of Appendix C in relation to the proceeding unless the court considers that the claim or defence
 - (a) discloses no reasonable claim or defence, as the case may be,
 - (b) is scandalous, frivolous or vexatious, or
 - (c) is otherwise an abuse of the process of the court.

[107] In my view, the updated impoverishment exemption provides a measure of discretion to trial judges in determining its application. The term “may” establishes a foundational discretion. But the addition of the phrase “otherwise impoverished” indicates that a trial judge may exercise this discretion where the hearing fees themselves would be a source of impoverishment. This is the

approach adopted by the British Columbia Court of Appeal (interpreting the indigency exemption in the British Columbia *Court of Appeal Rules*) in *De Fehr v. De Fehr*, 2001 BCCA 485, 156 B.C.A.C. 240:

Although the applicant in this case has regular employment income, I am persuaded that after he meets the support obligations imposed in the trial court, along with his own expenses, he would effectively be denied access to the courts by reason of impecuniosity if he were required to pay the fees to the Crown. [para. 16]

[108] However, while courts have discretion in applying the impoverishment exemption, it is not unlimited: it should be exercised only where a litigant is impoverished or, if not impoverished, would be rendered so if required to pay the hearing fees. In this regard, I agree with the trial judge's observation that the "courts simply do not engage in calling things what they are not, and could not be enlisted into an executive function by administering a more general form of means test to those who come before them" (2012 BCSC 748, 260 C.R.R. (2d) 1, at para. 398).

[109] Second, the financial burden of hearing fees, a disbursement, may be reapportioned through both interim and final costs awards (Rule 14-1 of the *British Columbia Supreme Court Civil Rules*). Judges may consider factors such as the success of a party, the reasonableness of the positions taken, the importance of the case, and whether one party was responsible for an excessively lengthy hearing.

[110] Third, and most importantly, judges have a key role to play in limiting hearing fees. Active judicial case management is critical to ensuring reasonable timelines in civil proceedings and efficient use of court resources, especially in the case of self-represented litigants. I agree with the trial judge that courts must be careful, in situations involving self-represented litigants, not to appear to refuse relevant evidence (para. 19). But judges must enforce the requirement for relevance so that evidence that does not bear directly on the issues will not prolong a trial. In this context, judges are entrusted with the obligation to manage the resources of the court in the interests of justice and, with respect to hearing fees, to have regard for the interests of the litigants. As this Court has recently noted in the context of summary judgment proceedings, "it is the motion

judge, not counsel, who maintains control over the extent of the evidence to be led and the issues to which the evidence is to be directed” (*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 61, quoting *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, 108 O.R. (3d) 1, at para. 60). There is no reason to think that this case-management principle of *Hryniak* should not extend to all court proceedings, especially those involving self-represented parties.

[111] Finally, my colleagues rely on the evidence of economist Robert Carson for their assessment of the affordability of hearing fees. Like Mr. Carson, they use the amount of hearing fees for a 10-day trial as the benchmark. The hearing fees, in their view, are unfair because the party “who is required to pay the hearing fee may not control the length or efficiency of the trial” (para. 62).

[112] Yet characterizing 10-day trials as the norm skews the analysis. There is no reason to believe that a 10-day trial is standard. Under the British Columbia hearing fee scheme, the first three days are free, which incentivizes short, efficient trials (see Schedule 1 of Appendix C of the *Supreme Court Civil Rules*). And, as discussed above, judges have an obligation to ensure that trials do not consume unnecessarily lengthy periods.

[113] I make two final observations regarding the “[o]ther objections” to the hearing fees raised by the majority at paras. 60-63.

[114] First, my colleagues at once indicate that judges must have sufficient discretion in applying exemptions to fees (para. 48), and yet critique the very existence of the exemption provision on the basis that it requires litigants to apply to the court (para. 60). These two positions are irreconcilable: it is not possible in the same breath to provide for increased judicial discretion and eliminate the requirement that litigants apply to have such discretion exercised.

[115] In any event, I question whether the application to be exempted from hearing fees is any more an “affront to dignity” than other applications made in court (majority reasons, at para. 60). As the majority acknowledges, such applications are usually made on an *ex parte* basis. And,

in the family law context, the assets and liabilities of the parties are regularly exposed to courts charged with determining levels of spousal support.

[116] Second, I do not agree that the “hearing fees do not promote efficient use of court time” (majority reasons, at para. 63). The comment of the trial judge that the efficacy of the hearing fees is “dubious” (para. 310) is not a finding of fact. It is true that hearing fees incentivize parties to use less court time where possible. But this, in turn, encourages efficiency by promoting prioritization and dissuading excessive use of court time. Incentivizing efficient use of court time addresses the problem that excessive use of court time by one party may delay or deny access to other litigants.

V. Conclusion

[117] For the reasons above:

(a) I would answer the constitutional question stated in this appeal as follows:

Are the hearing fees set out in paragraph 14 of Appendix C, Schedule 1 (B.C. Reg. 10/96, as amended) and the hearing fees set out in paragraphs 9 and 10 of Appendix C, Schedule 1 ([B.C. Reg. 168/2009](#), as amended), unconstitutional on the basis that they infringe a right of access to justice and thereby offend the rule of law?

No.

(b) I would dismiss the appeal from the Court of Appeal’s order setting aside the trial judge’s order striking down the hearing fees without costs;

(c) I would allow the appeal from the Court of Appeal’s decision to read in “or in need” to the exemption provision without costs ([2013 BCCA 65](#), 43 B.C.L.R. (5th) 217, at para. 41);

(d) I would allow the cross-appeal without costs;

(e) I would allow the appeal from the Court of Appeal's order relieving Ms. Vilardell from paying the hearing fees and remit this question to the trial judge for determination.

Appeal allowed and cross-appeal dismissed, ROTHSTEIN J. dissenting.

Solicitors for the appellant/respondent on cross-appeal the Trial Lawyers Association of British Columbia: Miller Thomson, Vancouver.

Solicitors for the appellant/respondent on cross-appeal the Canadian Bar Association — British Columbia Branch: Camp Fiorante Matthews Mogerman, Vancouver; Michael Sobkin, Ottawa.

Solicitor for the respondent/appellant on cross-appeal: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

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

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the Advocates' Society: Farris, Vaughan, Wills & Murphy, Vancouver; Jordan Battista, Toronto.

Solicitors for the intervener the West Coast Women's Legal Education and Action Fund: Young, Anderson, Vancouver.

Solicitors for the intervener the David Asper Centre for Constitutional Rights: Blake, Cassels & Graydon, Toronto; University of Toronto, Toronto.

Tab 91

Ontario (Attorney General) v. \$25,610 in Canadian Currency, 2017 ONCA 251 (CanLII)

Source: Court of Appeal for Ontario
Date: 2017-03-22
Citation: Ontario (Attorney General) v. \$25,610 in Canadian Currency, 2017 ONCA 251 (CanLII), <<https://canlii.ca/t/h4c2l>>, retrieved on 2026-03-23

COURT OF APPEAL FOR ONTARIO

CITATION: Ontario (Attorney General) v. \$25,610 in Canadian Currency,
2017 ONCA 251
DATE: 20170322

Brown J.A. (In Chambers)

BETWEEN

Attorney General of Ontario

and

\$25,610 in Canadian Currency and \$80.00 in US Currency (In Rem)

Heard: In Writing

On a fee waiver request made by Godwin Diogu in respect of the filing of a Notice of Appeal from the judgment of Justice Michael A. Penny of the Superior Court of

Justice, dated January 31, 2017, with reasons reported at [2017 ONSC 708](#).

Brown J.A.:

OVERVIEW

[1] Ensuring that litigants enjoy access to public courts to resolve their civil legal disputes is fundamental to our country's constitutional arrangements: *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014 SCC 59](#), [2014] 3 S.C.R. 31, at paras. [32](#) and [41](#).

[2] At the same time, courts require money to operate. In Ontario, filing fees provide some of the court's operating revenue. In the case of most civil appeals brought to the Court of Appeal for Ontario, an appellant must pay \$220 on the filing of a notice of appeal and \$405 to perfect the appeal: *Superior Court of Justice and Court of Appeal – Fees*, O. Reg. 293/92, ss. 1(3) and [\(5\)](#).

[3] Those fees are quite modest in amount, given the services received by the litigant in return. However, for some, even such modest amounts are beyond their financial means. To address this concern, the *Administration of Justice Act*, R.S.O. 1990, c. A.6 (the “AJA”), creates a mechanism by which civil filing fees can be waived “so that individuals who might otherwise be denied access to justice because of their financial circumstances can be excused from paying fees”: s. 4.1.

[4] Under the fee waiver regime, two different routes are available to a person to request a fee waiver for an appeal in this court: (i) a request to the court registrar; and (ii) a request to a judge: *AJA*, ss. 4.3 and [4.4](#).

[5] In the present case, Godwin Diogu has followed the second route, requesting a fee waiver from a judge in respect of his notice of appeal from the order of Penny J., dated January 31, 2017. For the reasons that follow I find that Mr. Diogu is not entitled to a fee waiver.

THE FEE WAIVER REGIME

[6] A new fee waiver regime came into force in November 2016. Below, I describe the procedural requirements for each of the two fee waiver request routes.

(1) The first route: a request to the court registrar

[7] First, the person can make a written request for a fee waiver to the court's registrar using a form provided by the Ministry of the Attorney General: [AJA](#), s. 4.3(1). The request must be accompanied by proof of the person's income and, in some cases, proof of the spouse's income: *Fee Waiver*, O. Reg. 2/05, s. 2.1. The registrar must then review the request, together with the accompanying proof of income, to determine whether the person meets the prescribed financial conditions that entitle him or her to a fee waiver.

[8] A person meets the prescribed financial conditions if he or she falls into one of three categories:

- (i) the primary source of the person's gross annual household income is one of several identified government benefit programs – e.g. Ontario Works, Old Age Security, Canada Pension Plan, and some others;
- (ii) Legal Aid Ontario has approved the person's application to receive legal aid services in respect of the proceeding; or,
- (iii) The person meets the financial criteria stipulated by the regulation: [O. Reg. 2/05, s. 2\(1\)](#).

[9] The stipulated financial criteria require a person to demonstrate that his or her gross annual household income, the value of the household's liquid assets, and the household's net worth all fall below certain dollar amounts set out in the regulation: [O. Reg. 2/05, s. 2\(2\)](#).

[10] If the registrar determines the person meets the prescribed financial conditions, the registrar shall give the person a fee waiver certificate: [AJA](#), s. 4.3(4).

(2) The second route: a request to a judge

[11] The second way a person can request a fee waiver is by making a written request, using a prescribed form, to a judge of the court: [AJA](#), s. 4.4. Before the request is put before a judge, the registrar must review it. If the registrar determines the person has met the prescribed financial conditions, the registrar shall issue a fee waiver certificate: [AJA](#), s. 4.4(4).

[12] If the registrar determines the person does not meet the prescribed financial conditions, the registrar then forwards the request to a judge. In reviewing the request, a judge must determine whether the person has met two conditions:

- (i) The person lacks the financial means to pay fees relating to the proceeding; and
- (ii) Commencing or continuing the proceeding is not frivolous, vexatious or otherwise an abuse of the process of the court: [AJA](#), ss. 4.4(5) and [\(7\)](#).

[13] If the judge is of the opinion the person meets those two conditions, then the judge shall make an order directing the registrar to give the person a fee waiver certificate: [AJA](#), s. 4.4(5).

[14] Two practical questions arise about fee waiver requests made to a judge.

[15] First, what criteria does a judge use to determine whether the person “lacks the financial means to pay fees relating to the proceeding”? Although a judge will consider all the circumstances concerning a person’s financial means, as part of that review a judge certainly will look at the financial criteria used on fee waiver applications to the registrar – i.e. whether: (i) the primary source of the person’s gross annual household income is one of several identified government benefit

programs; (ii) the person has applied for and received approval for Legal Aid; or (iii) the person's income, liquid assets and net worth fall below the dollar amounts specified in the regulation.

[16] Second, what information must a fee waiver applicant include with a request to a judge? A fee waiver request to a judge first passes through the hands of the registrar. Since the registrar must determine whether the request meets the financial conditions prescribed by the regulation, it follows that an application to a judge for a fee waiver must, at a minimum, include the same information as would a fee waiver request to the registrar – i.e. information showing that the three financial criteria to satisfy a fee waiver are met: (i) the primary source of the person's gross annual household income is one of several identified government benefit programs; (ii) the person has applied for and received approval for Legal Aid; or (iii) the person's income, liquid assets and net worth fall below the dollar amounts specified in the regulation. The Ministry form for a request to a judge assists an applicant in organizing such information.

[17] A fee waiver request to a judge may contain additional information about the applicant's "financial means," and the Ministry form contains a page for "additional financial information."

[18] An applicant for a fee waiver must appreciate that as a result of the changes which came into force in November 2016, he or she can no longer simply file an affidavit stating the applicant lacks the financial means to pay the court filing fees. Financial information must be filed. It is important that any person who applies to a judge for a fee waiver take the time and care to assemble and place before the judge relevant financial documentation about his or her financial means. I say this because the decision of the judge on a fee waiver request is final: [AJA](#), s. 4.4(9). The rules of court do not apply to a fee waiver request made to a judge, so the

decision made by the single judge will not be reviewable by a full panel of the court: [AJA](#), s. 4.8.

THE FEE WAIVER REQUEST IN THE PRESENT CASE

[19] In the present case, Godwin Diogu requests a fee waiver in respect of his notice of appeal from the order of Penny J. In that proceeding by the Attorney General of Ontario under the [Civil Remedies Act, 2001](#), S.O. 2001, c. 28, the application judge granted an application for the forfeiture of CDN \$25,610 and US \$80 on the basis the funds were either the proceeds of unlawful activity or an instrument of illegal activity. Mr. Diogu took the position that the funds were owned either by himself or Mr. Chidi Chinagroom. The motion judge did not accept his evidence.

[20] Mr. Diogu wishes to appeal that judgment on several grounds: (i) the seized funds were not the proceeds of crime; (ii) the judgment was based on the improper application of the facts and law and, therefore, was wrong; and (iii) “further reasons to be provided”.

[21] The registrar has referred Mr. Diogu’s fee waiver request to me for consideration.

[22] Mr. Diogu has provided some information about his financial means in his affidavit. He states that he is “presently unemployed because [his] work authorization application is pending.” He lives with his wife and lists their net annual household income from employment at \$11,000, but he attached 2016 T4s for his wife that show only about \$175 in employment income. He lists their household assets as zero; he did not file any documentation about bank accounts or any other asset.

[23] I must assess the statements in Mr. Diogu’s fee waiver affidavit in light of other information about his financial means contained in the application judge’s

reasons. According to those reasons, Mr. Diogu filed evidence on the application that he was an inspection engineer and in 2013 earned annual income net of tax of \$40,000. He also had a Canadian dollar bank account and a credit card. He received transfers of US dollars, and he bought used cars for export to Nigeria.

[24] The evidence Mr. Diogu placed before the application judge paints a much different picture of his financial means than shown by his fee request affidavit. Mr. Diogu has not provided me with any explanation that reconciles the statements he makes on this fee waiver request about his current financial means with the evidence he placed before the application judge about his prior employment in Canada, annual income, and use of bank accounts. As a result, I am not persuaded that Mr. Diogu lacks the financial means to pay fees relating to his appeal.

DISPOSITION

[25] Mr. Diogu is not entitled to a fee waiver certificate.

Released: March 22, 2017 ("DB")

"David Brown J.A."

Ontario Criminal Code Review Board v. Hale, 1999 CanLII 3805 (ON CA)

Source:	Court of Appeal for Ontario
Date:	1999-11-01
File number:	C28685
Other citations:	47 OR (3d) 201 — 180 DLR (4th) 657 — 126 OAC 92 — 140 CCC (3d) 400 — [1999] OJ No 4072 (QL)
Citation:	Ontario Criminal Code Review Board v. Hale, 1999 CanLII 3805 (ON CA), < https://canlii.ca/t/1f9tp >, retrieved on 2026-03-24

**Ontario Criminal Code Review Board v. Hale, Inquiry
Officer et al.**
[Indexed as: Ontario (Criminal Code Review Board) v. Doe]

**47 O.R. (3d) 201
[1999] O.J. No. 4072
Docket No. C28685**

**Court of Appeal for Ontario
Catzman, Doherty and O'Connor JJ.A.
November 1, 1999**

Administrative law -- Freedom of information -- Backup audio tapes prepared by court reporter at disposition hearings before Ontario Criminal Code Review Board are "under the control" of Board and not of independent court reporter for purposes of [s. 10](#) of [Freedom of Information and Protection of Privacy Act](#) -- Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, s. 10.

The respondents made requests under [s. 10\(1\)](#) of the [Freedom of Information and Protection of Privacy Act](#) for access to backup audio tapes prepared by the court reporter at their disposition hearings before the Ontario Criminal Code Review Board. The Board refused their requests, taking the position that the backup tapes were not under its control for the purposes of [s. 10](#) of the Act, but rather were under the control of the court reporter, who was an independent contractor hired by the Board. The respondents appealed to an Inquiry Officer. The Inquiry Officer held that the

backup tapes were under the control of the Board and ordered that the Board obtain copies of them from the court reporter. The Divisional Court dismissed the Board's application for judicial review of that decision. The court reporter, supported by the Board, appealed.

Held, the appeal should be dismissed.

Under s. 672.52(1) of the [Criminal Code, R.S.C. 1985, c. C-46](#), the Board is required to keep a record of its proceedings. Obviously, whatever constitutes the record must be under the control of the Board. The "record" is not restricted to the reporter's stenographic tapes. Accepting that s. 672.52(1) requires that the record of proceedings that must be kept is an accurate record, it makes sense that there should be included in that record those documents or materials that, when taken together, provide the accurate record. The court reporter chose to use a backup audiotape to assist her in making an accurate record. The record of the Board includes all of those documents or materials that were created for the purpose of making an accurate record.

Even if the backup tapes do not constitute part of the Board's record, the Board nevertheless has control over them within the meaning of [s. 10\(1\)](#) of the [Act](#). The sole purpose for creating the backup tapes was to fulfil the Board's statutory mandate to keep an accurate record. It is within the Board's power to limit the use to which the backup tapes may be put. The Board has the broad discretion to exclude the public from hearings or portions of them and to limit the disclosure of disposition information to the public or to an accused. Orders of this nature require the Board to exercise control over all the records of a proceeding, including backup tapes. The Board must have access to all of the records prepared by the court reporter in the event that an issue arises about the accuracy of either the record or a transcript. In either event, the Board would require access to all of the records, including backup tapes if any existed, that could be of assistance in order to satisfy itself that the record or transcript is accurate. For that reason, the Board must have access to the backup tapes regardless of who has physical custody of them.

APPEAL from a judgment of the Divisional Court dismissing an application for judicial review of a decision of the Inquiry Officer under the [Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31](#).

Walmsley v. Ontario (Attorney General) (1997), [1997 CanLII 3017 \(ON CA\)](#), 34 O.R. (3d) 611 (C.A.), distd Canada Post Corp. v. Canada (Minister of Public Works), [1995 CanLII 3574 \(FCA\)](#), [1995] 2 F.C. 110, 30 Admin. L.R. (2d) 242, 179 N.R. 350, 60 C.P.R. (3d) 441, 91 F.T.R. 320n (C.A.); Neilson v. British Columbia (Information and Privacy Commissioner), [1998] B.C.J. No. 1640 (S.C.), consd Statutes referred to [Criminal Code, R.S.C. 1985, c. C-46, ss. 672.38, 672.5\(6\), 672.51\(3\), \(5\), 672.52\(1\), 672.73\(1\), 672.74\(4\)](#) [Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, ss. 2, 10, 50](#) Rules and regulations referred to General Regulation, [R.R.O. 1990, Reg. 460](#) (Freedom of Information and Protection of Privacy Act), s. 1(1)

Peter J. Harte, for appellant.

Robert H. Ratcliffe, for respondent, Ontario Criminal Code Review Board.

William S. Challis and John R. Higgins, for respondent, Donald Hale, Inquiry Officer.

Marshall A. Swadron, for respondent, John Doe III.

The judgment of the court was delivered by

[1] O'CONNOR J.A.: -- This appeal raises the issue whether a record is "under the control" of a provincial government institution giving rise to a right of access under [s. 10](#) of the [Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31](#) ("the Act"). Each of the respondents, John Doe I, II and III, sought access to backup audio tapes prepared by the court reporter at their disposition hearings before the Ontario Criminal Code Review Board. The Board

refused these requests. It took the position that the backup tapes were not under its control but rather were under the control of the court reporter who was an independent contractor hired by the Board. The John Does appealed to an Inquiry Officer. The Inquiry Officer held that the backup tapes were under the control of the Board and ordered that the Board obtain copies of them from the court reporter.

[2] The Board applied for judicial review. The Divisional Court dismissed the application. This appeal, brought by the court reporter, supported by the Board, is from that decision. For the reasons below, I would dismiss the appeal.

Facts

[3] The Board is an administrative tribunal which was established in 1992. It was created and receives its authority from [s. 672.38](#) of the [Criminal Code, R.S.C. 1985, c. C-46](#). [See Note 1 at end of document] The Board's mandate is to review dispositions of persons who have been found unfit to stand trial or not criminally responsible by reason of mental disorder. The proceedings of the Board are called "disposition hearings".

[4] Section 672.52(1) requires the Board to keep a record of its proceedings. It reads as follows:

672.52(1) The court or Review Board shall cause a record of the proceedings of its disposition hearings to be kept, and include in the record any assessment report submitted.

[5] The record of the Board's disposition hearings includes the verbatim record of the oral evidence given at a hearing. This record may take different forms depending on the method of recording used by the court reporter responsible for a particular hearing. Some court reporters take shorthand notes, others make stenographic notes using a stenographic machine, and others employ a tape recorder using steno mask technology. Some use a backup system, others do not.

[6] Appeals from disposition hearings of the Board lie to the Court of Appeal and are based on transcripts of the proceedings. An appellant is usually required to provide the Court of Appeal and the respondent with a transcript of the evidence taken before the Board certified to be accurate by the stenographer (court reporter). [See Note 2 at end of document]

[7] The Board employs independent fee-for-service court reporters to create records of its proceedings and to prepare transcripts of those proceedings when required. These reporters are paid a per diem fee for attending at a hearing and creating the record that the Board is required to keep under [s. 672.52\(1\)](#). The practice is that the court reporter maintains the physical custody of the record on behalf of the Board. In addition, the court reporters are entitled to charge a per page fee for preparing transcripts.

[8] In July 1994, the Board held separate disposition hearings for each of the three respondent John Does. The Board hired the appellant, Simcoe Court Reporting (Barrie) Inc., to provide court reporting services for each of these hearings. The individual court reporter employed by the appellant was Carol Forde, a Chartered Shorthand Reporter. Ms. Forde used a stenographic machine to make stenographic notes of each hearing. In addition, she also used a single track tape recorder and an open microphone to create tape recordings of all or portions of the proceedings. Ms. Forde described these tapes as "backup audio tapes" which were created as aids to assist her in preparing an accurate record. It is these backup tapes that are in issue in this appeal. The appellant is Ms. Forde's personal corporation. Nothing turns on this and for simplicity, I will refer to Ms. Forde as the court reporter.

[9] The three John Does each made a request under [s. 10\(1\)](#) of the [Act](#) for access to the backup tapes of their respective hearings. Section 10(1) provides as follows:

10(1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

(a) the record or the part of the record falls within one of the exemptions under sections 12 to 22, or

(b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[10] The Board refused these requests, taking the position that the backup tapes were in the custody of the court reporter and not the Board. The Board indicated that the requesters could contact the court reporter directly and obtain a copy of the record (a transcript) at a cost determined by the court reporter.

[11] The John Does appealed under [s. 50](#) of the [Act](#). Pursuant to [s. 56\(1\)](#), an appeal under this section is determined by the Commissioner of Information and Privacy or by a person designated by him.

[12] A notice of inquiry was provided to the John Does and to the Board. In addition, the court reporter and the Chartered Shorthand Reporters Association of Ontario (CCSRAO) were asked to make representations. The Board, the court reporter, the CCSRAO and also the Society of Ontario Adjudicators and Regulators made representations opposing the request for access to the backup tapes.

[13] In its written submission to the Inquiry Officer, the Board took the position that the stenographic notes constituted the official record of the Board's proceedings. The Board accepted that the stenographic notes were under its control within the meaning of [s. 10\(1\)](#) of the [Act](#) even though they were kept by the court reporter for safekeeping. [See Note 3 at end of document] The Board argued, however, that the backup tapes belonged to the court reporter and were not in the custody or under the control of the Board. The backup tapes were simply an aide memoire for the reporter. She could listen to them to clarify a word or phrase that might be unclear in the stenographic notes. Except for the requests by the John Does that the backup tapes be produced, the Board would not have inquired about their existence nor the circumstances under which they were created. The use the court reporter may make of the backup tapes was of no concern to the Board. Unlike the stenographic notes, the Board did not request that they be made, was not concerned about their existence, and was not concerned about whether they continued to exist or were destroyed.

[14] The Board also submitted that it did not have a right to possession of the backup tapes, nor did it exercise control over their use by the court reporter. The Board said that it was impossible for it to compel the court reporter to surrender the backup tapes. The tapes were created by the court reporter solely for her own benefit.

[15] The court reporter took essentially the same position. She said that the backup tapes were aids to her and that they may or may not be complete as she turned the tape machine on and off at various times during the proceedings. The tapes were for her own personal use. In close to 20 years' experience as a court reporter, she had never released backup tape recordings. She said the Board did not have possession of them, that they had not been voluntarily produced by her, nor had they been provided pursuant to any mandatory statutory or employment requirement. She also said "the record [the backup tapes] is being held by me for the purpose of my duties as a maker of the official record." She drew the same distinction as the Board between the stenographic notes and the backup tapes. She accepted that the Board has "... authority to the use of my stenographic notes." She concluded that she was at liberty to dispose of the backup tapes at any time.

[16] The precise contractual terms between the Board and the court reporter are not in the record. There is no indication of an agreement setting out their respective rights of property, custody or control over the stenographic notes or the backup tapes nor specifying what records the reporter must keep.

[17] The appeal was decided by an Inquiry Officer designated by the Commissioner. The Inquiry Officer allowed the John Does' appeals. He found that the backup tapes, like the stenographic notes, were created by the court reporter as a result of an engagement by the Board and he considered that both of these records, taken together, constituted the Board's record of proceedings. He rejected the argument that the backup tapes were created for the court reporter's personal purposes. He found that the court reporter was the trustee or repository of the backup tapes and that the right of control remained with the Board. The Inquiry Officer directed the Board to obtain copies of the backup tapes from the court reporter. It is important to note that this order does not necessarily mean that the John Does will be provided access to the backup tapes. The Board has not yet determined whether it will rely upon any of the exemptions set out in the Act and, on that basis, refuse access.

[18] The Board brought an application for judicial review. The Divisional Court dismissed the Board's application. The court reporter, with the support of the Board, appeals that decision.

Analysis

[19] The single issue before the Inquiry Officer was whether the backup tapes were records to which there was a right of access within the meaning of [s. 10\(1\)](#) of the [Act](#). That section limits the jurisdiction of the Board. Records in the custody or under the control of an institution are subject to the access provisions in the Act. Records that are not fall outside the scope of the Act. This court has held that a decision by the Commissioner or his designate under [s. 10\(1\)](#) of the Act is to be reviewed on a standard of correctness, not reasonableness:

Walmsley v. Ontario (Attorney General) (1997), [1997 CanLII 3017 \(ON CA\)](#), 34 O.R. (3d) 611 (C.A.). The reasoning behind this decision was threefold: [s. 10\(1\)](#) is jurisdiction limiting; the interpretation of the "custody or control" test does not require specialized expertise; and there is no privative clause.

[20] With this standard in mind, I turn to the question of the application of [s. 10\(1\)](#) to the backup tapes. For convenience, I repeat [s. 10\(1\)](#):

10(1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

(a) the record or the part of the record falls within one of the exemptions under sections 12 to 22, or

(b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[21] It is accepted that the backup tapes are records within the meaning of the [Act](#) ([s. 2](#)). It is also accepted that the Board has been designated as an institution in the regulations made under the Act. [See Note 4 at end of document]

[22] The only issue is whether the backup tapes are under the control of the Board. I start with the proposition that the records of the Board's disposition hearings are under its control. Under [s. 672.52\(1\)](#) of the [Criminal Code](#), the Board is required to keep a record of its proceedings. It seems obvious that whatever constitutes that record must be under the control of the Board. If the record is not physically in the Board's custody, then it must be kept under an arrangement by which the

Board has access to it. Were it otherwise, the Board would be in breach of its statutory mandate "to keep a record of its proceedings."

[23] The question then is -- what constitutes the Board's record of proceedings? The court reporter now argues that even the stenographic tapes do not constitute the record. It contends that only a transcript, if prepared, is the record of proceedings referred to in s. 672.52(1). I disagree. In many cases, there will be no transcript prepared; the Board nevertheless has a duty to keep a record. That record must include the non-transcribed record prepared by the court reporter responsible for making a record of the proceedings.

[24] Unlike the court reporter, the Board accepts that it has control over the stenographic notes because those notes constitute the record of its proceedings. The Board, however, argues that the stenographic notes constitute the entirety of that record. As set out above, it takes the position that the backup tapes are prepared by the court reporter for her own purposes and are, therefore, not part of the record. That argument, it seems to me, takes an unduly narrow view of the reason that the backup tapes were created.

[25] Accepting that s. 672.52(1) requires that the record of proceedings that must be kept is an accurate record, and it is inconceivable that it could be otherwise, it makes sense that there should be included in that record those documents or materials that, when taken together, provide the accurate record. The court reporter was hired for the purpose of making an accurate record. She chose to use a backup audiotape process to assist her in doing so. It may be that the backup tape in some instances will add nothing to the accuracy of her stenographic notes. However, it seems reasonable to conclude that in some cases the backup tape must be of assistance, otherwise there would be no purpose in making one.

[26] I am of the view that the record of the Board includes all of those documents or materials that were created for the purpose of making an accurate record. As Sharpe J. said in the reasons of the Divisional Court:

I fail to see how when two methods are used to record proceedings, one being the primary method and the other being a backup or check, one constitutes the "record" while the other does not. Both are created for the same purpose

[27] It is not an answer to say that some court reporters do not employ a backup system to assist with the accuracy of a record. The record includes whatever documents are created by the court reporter in carrying out the mandate to prepare an accurate record for the Board.

[28] I am also of the view that even if the backup tapes do not constitute part of the Board's record, the Board nonetheless has control over them within the meaning of [s. 10\(1\)](#) of the [Act](#). There are three aspects to the relationship between the Board and the court reporter that are important to this conclusion.

[29] First, the sole purpose for creating the backup tapes was to fulfill the Board's statutory mandate to keep an accurate record.

[30] Next, it is within the Board's power to limit the use to which the backup tapes may be put. The Board has the broad discretion to exclude the public from hearings or portions of them, [See Note 5 at end of document] and to limit the disclosure of disposition information to the public or to an accused. [See Note 6 at end of document] It follows that orders of this nature require the Board to exercise control over all the records of a proceeding, including backup tapes. That level of control is implicit in the powers conferred upon the Board by the [Criminal Code](#).

[31] It is reasonable to expect that the Board would ensure, by contract if necessary, that any records of proceedings, backup records included, be used solely for the purposes of the Board. The

Board can and should exercise control over the use of all records made by court reporters of its proceedings.

[32] Third, the Board must have access to all of the records prepared by the court reporter in the event that an issue arises about the accuracy of either the record or a transcript. In either event the Board would require access to all of the records, including backup tapes if any existed, that could be of assistance in order to satisfy itself that the record or transcript is accurate. For this purpose, the Board must have access to the backup tapes regardless of who has physical custody of them.

[33] The Federal Court of Appeal has decided that, in the context of the federal legislation, a broad, liberal and purposive approach should be given to the interpretation of access to information legislation: *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), [1995 CanLII 3574 \(FCA\)](#), 30 Admin. L.R. (2d) 242, [1995] 2 F.C. 110. Letourneau J.A., writing for the court, held as follows, at p. 245:

The notion of control referred to in [the [Act](#)] is left undefined and unlimited. Parliament did not see fit to distinguish between ultimate and immediate, full and partial, transient and lasting, or "de jure" and "de facto" control. Had Parliament intended to qualify and restrict the notion of control to the power to dispose of the information, as suggested by the appellant, it could certainly have done so by limiting the citizen's right of access only to those documents that the government can dispose of or which are under the lasting or ultimate control of the government.

[34] This reasoning applies equally well to the Ontario legislation and supports the conclusion that the Board should be found to have control over the backup tapes. The Federal Court's decision was cited with approval by Dorgan J. in *Neilson v. British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. No. 1640, a case involving an application under the B.C. Act for the production of notes made by a school counselor during counseling sessions with the children of the applicant parent. Dorgan J. held that the statute, which also provides for access to "any record in the custody or under the control" of a public body, was broad enough to encompass these documents. The counselor in that case argued, as did the stenographer in this case, that the notes were simply an aide memoire which she was not required to make, over which she had custody and control, and which she stored at her home. The court, however, found that the notes were under the control of the School Board because the counselor, as an employee, was required to write reports on the children she counseled and that requirement implicitly involves the keeping of notes. Although the facts of the instant case are not identical, similar reasoning applies.

[35] The Board has argued throughout this proceeding that if it is ordered to make access to the backup tapes available to the John Does, it will be unable to comply because it is not able to compel the court reporter to deliver the backup tapes to it. I must say I find this a rather surprising proposition. We were told that at some time in the past the Board had used employees to do what independent court reporters now do. If the Board had continued to use employees there would be no issue; the backup tapes would be in the Board's custody and under its control. However, the Board chose to enter into arrangements with independent court reporters to meet its court reporting requirements. Assuming the court reporter now refuses to deliver the backup tapes to the Board, the Board's failure to enter into a contractual arrangement with the reporter that would enable it to fulfil its statutory duty to provide access to documents under its control cannot be a reason for finding that the duty does not exist. Put another way, the Board cannot avoid the access provisions of the [Act](#) by entering into arrangements under which third parties hold custody of the Board's records that would otherwise be subject to the provisions of the Act.

[36] In argument, the Board placed a great deal of reliance on this court's decision in *Walmsley*. In my view, *Walmsley* is distinguishable. In that case, the request was made to the Ministry of the Attorney General to provide documents in the personal possession of individual members of the

Judicial Appointments Committee. In holding that the documents were not under the control of the Ministry, this court pointed out that the Advisory Committee was set up to provide recommendations for judicial appointments that were to be arrived at independently and at arms length from the Ministry. Further, in *Walmsley*, there was no statutory or contractual basis upon which the Ministry could assert the right to possess or dispose of the documents. The situation in this appeal is very different. The court reporter is specifically hired to fulfil the statutory duty of the Board to keep a record and to make transcripts available, if requested. Although the court reporter is an independent contractor, she plays an integral part in fulfilling the mandate of the Board under the [Criminal Code](#). Unlike the situation in *Walmsley*, the court reporter's function is part of the Board's function. The court reporter has no independent role. She does not operate "independently or at arms length" from the Board.

[37] I am satisfied that regardless of whether the backup tapes are part of the Board's "record of proceeding", the Board has control over them within the meaning of [s. 10\(1\)](#) of the [Act](#).

[38] As an alternative argument, the court reporter submitted that if [s. 10\(1\)](#) of the [Act](#) is interpreted to provide access to records of proceedings of disposition hearings there could be a conflict between an order made under the Act and those provisions of the [Criminal Code](#) that permit the Board to restrict access to its proceedings. It is argued that the doctrine of paramountcy would result in the provisions of the Criminal Code taking precedence. That issue does not arise on the facts of this case. There were no orders restricting access to the disposition hearings involved in this appeal. If access is permitted to the backup tapes, there would be no conflict with any order of the Board.

[39] We were not told, in argument, why the respondents insisted on access to the backup tapes rather than the production of a transcript. There appeared to be an understandable concern on the part of the court reporter, and probably the Board, that if access is permitted to the backup tapes someone may be able to prepare a transcript of a disposition hearing without paying for it, i.e., that it will not be difficult to have a typed version of a backup tape prepared. Leaving aside the fact that a backup tape may not cover an entire hearing, a typed version will be of limited use. It could not be used for purposes of an appeal from a decision of the Board nor for any other legal proceedings in which a transcript must be filed. It would not be a certified transcript. Only a transcript certified by the court reporter who was present at a hearing is sufficient for an appeal or other legal proceedings.

[40] For the above reasons, I would dismiss the appeal. The order of the inquiry officer requires the Board to obtain copies of the backup tapes from the court reporter. The next step is for the Board to determine if it takes the position that any of the exemptions set out in the [Act](#) apply to the backup tapes and to advise the parties accordingly.

[41] The inquiry officer, who appeared as a respondent on this appeal, does not request an order for costs. John Doe III filed a factum and appeared by counsel on the argument of this appeal. John Doe I and II did not. I would direct that the appellant and the Board are liable for John Doe III's costs of the appeal forthwith after assessment.

Appeal dismissed.

Notes

Note 1: 672.38(1) A Review Board shall be established or designated for each province to make or review dispositions concerning any accused in respect of whom a verdict of not criminally responsible by reason of mental disorder or unfit to stand trial is rendered, and shall consist of not fewer than five members appointed by the lieutenant governor in council of the province.

(2) A Review Board shall be treated as having been established under the laws of the province.

(3) No member of a Review Board is personally liable for any act done in good faith in the exercise of the member's powers or the performance of the member's duties and functions or for any default or neglect in good faith in the exercise of those powers or the performance of those duties and functions.

Note 2: [Sections 672.73\(1\) and 672.74\(4\)](#) of the [Criminal Code](#).

Note 3: In its submission, the Board justified this position in part by referring to its policy that court reporters do not prepare transcripts of the proceedings for anyone requesting a transcript unless the Board first gives its written consent. There is some doubt about whether this is still the policy of the Board. For the reasons that I set below, I do not think that it matters to the result of this appeal whether or not there is such a policy.

Note 4: [R.R.O. 1990, Reg. 460, s. 1\(1\)](#).

Note 5: Section 672.5(6).

Note 6: Section 672.51(5) and (3).

Tab 92

Uhrik v Terrigno, 2024 ABCA 383 (CanLII)

Source: Court of Appeal of Alberta
Date: 2024-11-26
File number: 2301-0117AC
Citation: Uhrik v Terrigno, 2024 ABCA 383 (CanLII),
<<https://canlii.ca/t/k82jr>>, retrieved on 2026-03-23

In the Court of Appeal of Alberta

Citation: Uhrik v Terrigno, 2024 ABCA 383

Date: 20241126
Docket: 2301-0117AC
Registry: Calgary

Between:

Tibor Uhrik and Lieselotte Litzius

Applicants

- and -

Mike Terrigno and Michele De Cesare

Respondents

The Court:

**The Honourable Justice Jo'Anne Strekaf
The Honourable Justice Jolaine Antonio
The Honourable Justice Anne Kirker**

Memorandum of Judgment

Application for Consent Judgment

Memorandum of Judgment

The Court:

[1] The applicants appealed an order declaring them vexatious litigants and subjecting them to court access restrictions. It appears the applicants and respondents have reached a settlement agreement which contemplates the parties jointly submitting a consent order that would vacate the order imposed below. The parties were directed by the Case Management Officer to bring an application before a panel for approval of the consent order. We deny their application.

Background

[2] The applicants and respondents have been embroiled in litigation at the Court of King's Bench. Eventually the applicants and respondents each filed applications to have the other declared vexatious litigants and to have court access restrictions imposed. The respondents' application was granted but the applicants' was denied. In the result, the applicants were declared vexatious but the respondents were not.

[3] The applicants filed a notice of appeal alleging numerous errors in the chambers judge's decision and asking that it be set aside in its entirety. With the respondents' consent, the applicants have now filed a discontinuance of the portion of their appeal arising from the chambers judge's decision not to declare the respondents vexatious litigants. The extant appeal therefore only concerns the portion of the decision below declaring the applicants vexatious and imposing restrictions on them.

[4] According to the applicant Mr. Uhrík, in an affidavit filed in support of this application, the parties reached a settlement agreement on June 8 of this year. He deposes that it is a condition of that agreement that it shall be kept confidential except insofar as disclosure is required by law.

[5] The redacted version of the agreement that was exhibited to Mr. Uhrík's affidavit indicates that the parties "wish to fully and completely resolve any and all outstanding matters between them". It further provides:

2. The Parties shall jointly file with the Court of Appeal a Consent Order directing that Justice Bourque's finding and declaration that UHRIK and LITZIUS are deemed vexatious litigants in *Uhrík v. Terrigno* 2023 ABKB 223 (the "**Bourque Decision**") be overturned/reversed without costs to any of the parties.

3. If the Consent Order contemplated in *paragraph B (2)* is not granted at first instance and instead the Court of Appeal directs that the parties make further

submissions in person or writing, the Parties agree to facilitate and comply with the additional direction from the Court.

a. **It is expressly understood and accepted by UHRIK and LITZIUS that the final decision to overturn the Bourque Decision and their respective designation as vexatious litigants is exclusively the jurisdiction of the Court of Appeal.** [emphasis in original]

b. Neither MIKE TERRIGNO, MICHELE DE CESARE, or ANTOINETTA TERRIGNO make any representation or guarantees as to UHRIK or LITZIUS's success in the relief they now seek from the Court of Appeal.

4. The Release of the Settlement Amount is not dependent on UHRIK and LITZIUS's ultimate success in having their designation as vexatious litigants reversed; however, the release of the Settlement Funds to TERRIGNO and DE CESARE will not be permitted until the steps contemplated by paragraphs B2 and B3 have been voluntarily completed, along with any other conditions set out in the Settlement Agreement

[6] As discussed below, the applicants submit the chambers judge made reviewable errors. They submit the consent order should be granted because, *inter alia*: without it, the costs they have expended to date will have been wasted; they have no remaining assets; they do not foresee any reason they would need to engage in litigation in future, but should the need arise they would like to do so without restriction; and “[t]he dispute between the parties in this Honourable Court and in the Court below has been entirely in the nature of private litigation with no impact on third parties.”

[7] The respondents filed no materials on this application, but they confirmed in oral argument that they are complying with their obligations under the agreement by supporting the application for consent judgment.

I. Analysis

[8] We accept that both parties wish to have the extant vexatious litigant order vacated. We accept that the litigation between the parties was private in nature. However, the vexatious litigant order is not purely, or primarily, private in nature. Therefore it is not appropriate to vacate it merely on the basis of giving effect to the wishes of private parties.

[9] Vexatious litigant orders may be imposed where the subject party has demonstrated a persistent pattern of inappropriate behaviour: *Judicature Act*, RSA 2000, J-2, s 23(2), *Jonsson v Lymer*, 2020 ABCA 167 at para 20 [*Jonsson*]. Such patterns of behaviour will virtually inevitably result in misuse of court resources. When determining a vexatious litigant application, the court’s goal is to “find the proper balance between maintaining reasonable access to the court, while preserving court resources and shielding other litigants from abusive behavior”: *Jonsson* at para 16.

[10] As this Court has said, universal access to the courts is an important component of the rule of law: *Jonsson* at para 10. As the Supreme Court of Canada has said in *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at paras 32 and 40:

Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in

the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. . .

In the context of legislation which effectively denies people the right to take their cases to court, concerns about the maintenance of the rule of law are not abstract or theoretical. If people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. . .

[11] Where persistent abusive conduct has been shown, it is the court’s responsibility to step in and prevent the misuse, to ensure that the rights of other litigants to access the court is not impaired.

[12] Given the nature and purpose of vexatious litigant orders, it is evident that they are intended to protect interests beyond those of the parties to the litigation in which they arise. It follows that it is not appropriate to set aside a vexatious litigant order merely because it is the resolution desired by the parties.

[13] It should go without saying that courts “should never rubber stamp any judgment without being satisfied that it is proper”: *Wensel v Wensel*, 1976 AltaSCAD 179 at para 15.

[14] Before us, the applicants submitted the decision below is flawed because the chambers judge did not give them an opportunity to respond orally to allegations concerning their conduct in an unrelated matter. They say they had understood the vexatious litigant application, and any remedy imposed, would address only the litigation between them and the respondents; in other words, they did not anticipate that they could be restricted from filing any action, against any respondent, without the court’s permission.

[15] We are not satisfied from our review of the materials filed on the application and the parties’ submissions that vacating the order in its entirety would be proper. We decline to say more about the merits of the matter since the appeal remains outstanding and may be argued on its merits with a full record before another panel.

II. Result

[16] The application is denied. Each of the parties shall bear their own costs.

[17] Rule 9.4(2)(c) is invoked, and the Court will prepare the resulting order.

Appeal heard on November 21, 2024

Memorandum filed at Calgary, Alberta
this 26th day of November, 2024

Strekaf J.A.

Authorized to sign for:

Antonio J.A.

Kirker J.A.

Appearances:

Applicants, T. Uhrík and L. Litzius

J.B. Denis, KC
for the Respondents, M. Terrigno and M. De Cesare

Timm v. Canada, 2019 FC 238 (CanLII)

Source: Federal Court
Date: 2019-02-27
File number: T-1445-13
Citation: Timm v. Canada, 2019 FC 238 (CanLII),
<<https://canlii.ca/t/j0880>>, retrieved on 2026-03-23

Date: 20190227

Docket: T-1445-13

Citation: 2019 FC 238

[CERTIFIED ENGLISH TRANSLATION REVISED BY THE AUTHOR]

Ottawa, Ontario, February 27, 2019

PRESENT: Mr. Justice Grammond

BETWEEN:

RICHARD TIMM

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

JUDGMENT AND REASONS

[1] Mr. Timm, an inmate in a federal institution, is seeking damages from the federal Crown. He alleges that two Crown employees caused him various forms of injury by criticizing him for pursuing certain remedies and by discouraging another inmate from associating with him for that reason. I dismiss Mr. Timm's action. Indeed, with one exception, I find that the Crown employees' conduct did not constitute a fault. Moreover, I find that Mr. Timm failed to prove the alleged injury and the causal link between that injury and the faults that may have been committed. Lastly, Mr. Timm failed to demonstrate interference with his fundamental rights. Therefore, he cannot claim punitive damages.

[2] In making these findings, I am not denying that it is important for every person, including incarcerated persons, to be able to pursue the various types of statutory remedies without retaliation or interference by Crown officials. I find that there is evidence of such a conduct on one specific occasion. However, Mr. Timm has not shown that the improper conduct caused him any injury.

I. Factual background

[3] The plaintiff, Richard Timm, is an inmate serving a life sentence. In 1995, he was convicted of first degree murder and other offences. Since that time, he has maintained that he did not commit the crime for which he was convicted. The Minister of Justice dismissed his application for mercy. That decision was upheld by this Court and by the Federal Court of Appeal (*Timm v Canada (Attorney General)*, [2012 FC 505](#); [2012 FCA 282](#)).

[4] Over a number of years, Mr. Timm has filed numerous complaints and grievances regarding various aspects of his conditions of detention. He has also commenced a number of proceedings in the Federal Court.

[5] In 2012, when the incidents giving rise to this action took place, Mr. Timm was incarcerated in La Macaza Institution, a medium-security facility. On September 14, 2012, his parole officer [PO], Valery Beaulieu-Guilbault, told him that she found it difficult to establish a relationship of trust

with him, given the numerous complaints he was filing against the institution's staff members. On January 11, 2013, Ms. Beaulieu-Guilbault had a meeting with Dave Roy, another inmate under her supervision, and noticed that his temporary absence request had clearly been prepared by another inmate, most likely Mr. Timm. Ms. Beaulieu-Guilbault told Mr. Roy that his request had been prepared by another inmate whom she described as [TRANSLATION] "very litigious". She advised him to be careful about the company he kept, because that inmate [TRANSLATION] "[would] only hinder him". Shortly after, Yves Maillé, Mr. Roy's Aboriginal liaison officer, advised Mr. Roy not to associate with Mr. Timm.

[6] In response to these events, Mr. Timm filed a grievance disputing the way in which he had been treated by Ms. Beaulieu-Guilbault and Mr. Maillé. In the grievance, he requested that the Correctional Service of Canada [CSC] acknowledge that Ms. Beaulieu-Guilbault and Mr. Maillé had breached a number of provisions in Commissioner's Directives [CDs] 060 and 081. At the time, the grievance process under CD 081 consisted of three levels. At the first level, the acting warden of La Macaza Institution, Yves Guimont, denied the grievance. At the second level, CSC's regional deputy commissioner for Quebec, Réjean Tremblay, also rejected the grievance. At the third level, however, CSC's senior deputy commissioner, Anne Kelly, allowed Mr. Timm's grievance. The specific rationale for allowing the grievance will be examined in detail below.

[7] Shortly after receiving the third-level decision, Mr. Timm brought this action based on extracontractual liability against the federal Crown. He maintains that the actions of Ms. Beaulieu-Guilbault and Mr. Maillé have caused him injury. In his statement, he also complains about the actions of Mr. Guimont, Mr. Tremblay and Ms. Kelly. At the hearing, however, counsel for Mr. Timm stated that Mr. Timm was not basing his claim on the faults that these three individuals allegedly committed. Therefore, these reasons will relate to the actions of Ms. Beaulieu-Guilbault and Mr. Maillé. Mr. Timm is claiming \$400,000 in compensatory damages for [TRANSLATION] "moral damages and damage to reputation", and \$800,000 in punitive damages. He is also seeking declarations by the Court that various statutory or regulatory provisions have been breached.

II. Legal framework

[8] Mr. Timm bases his action on the provisions of the *Crown Liability and Proceedings Act*, RSC, 1985, c C-50 [the CLPA]. Under section 3 of the CLPA, the Crown is civilly liable for faults committed by “servant[s] of the Crown”, that is, its employees. This means that, with respect to extracontractual liability, the Crown is subject to the private law of the province in which the events occurred. Since the events in this case occurred entirely in Quebec, the basic principles are set out in [article 1457](#) of the *Civil Code of Québec*, SQ 1991, c 64:

1457. Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature.

He is also bound, in certain cases, to make reparation for injury caused to another by the act, omission or fault of another person or by the act of things in his custody.

1457. Toute personne a le devoir de respecter les règles de conduite qui, suivant les circonstances, les usages ou la loi, s’imposent à elle, de manière à ne pas causer de préjudice à autrui.

Elle est, lorsqu’elle est douée de raison et qu’elle manque à ce devoir, responsable du préjudice qu’elle cause par cette faute à autrui et tenue de réparer ce préjudice, qu’il soit corporel, moral ou matériel.

Elle est aussi tenue, en certains cas, de réparer le préjudice causé à autrui par le fait ou la faute d’une autre personne ou par le fait des biens qu’elle a sous sa garde.

[9] It should be emphasized that, under the *CLPA*, the federal Crown cannot be held directly liable for its own actions; it is liable only in respect of the fault of its employees (*Merchant Law Group v Canada Revenue Agency*, [2010 FCA 184](#) at paragraphs [36–38](#); *Hinse v Canada (Attorney General)*, [2015 SCC 35](#) at paragraph [92](#), [2015] 2 SCR 621 [*Hinse*]). One cannot merely allege that a fault was committed by the “government” as an institution unless the fault was also that of a specific employee.

[10] In Quebec, the reference to private law in [section 3](#) of the [CLPA](#) includes not only the [Civil Code](#) but also certain provisions of the [Charter of human rights and freedoms](#), CQLR, c C-12 [the Quebec Charter] (*Hinse* at paragraphs [156–163](#)). Consequently, when events giving rise to liability also constitute interference with a right guaranteed by the Quebec Charter, it is possible to claim punitive damages (sometimes called exemplary damages) under [section 49, paragraph 2](#), of the Quebec Charter. According to *de Montigny v Brossard (Succession)*, [2010 SCC 51](#), [2010] 3 SCR 64 [*de Montigny*], the purpose of punitive damages is not to compensate for the injury, but rather to punish a person who interferes with a right, to deter similar interference and to publicly denounce the impugned conduct. The amount of such damages must be determined taking into account the factors listed in [article 1621](#) of the Civil Code, namely the gravity of the fault, the debtor’s patrimonial situation, the amount of compensatory damages and whether the debtor is insured.

[11] Procedurally, it is important to note that the scope of the debate before me is framed by the allegations contained in the pleadings—the statement of claim or statement of defence—filed by the parties. There is a reason for the requirement, found in [rule 174](#) of the [Federal Courts Rules](#), SOR/98-106, that pleadings contain “a concise statement of the material facts on which the party relies”. This enables the opposing party to conduct its own verification of the facts and to bring evidence and make legal submissions to refute the other party’s allegations. This prevents surprises and ensures that the trial is conducted fairly and properly. Pleadings are used to determine the scope of pre-trial proceedings, such as examinations for discovery, as well as what can be proven at trial. Of course, pleadings must be interpreted generously, but not in such a way as to allow an endless investigation into the dealings between the parties.

[12] In his pleadings, Mr. Timm identified precise and time-specific events that, he alleges, constitute a fault against him. This judgment deals with those allegations. At trial, Mr. Timm referred to various other sources of dissatisfaction with his conditions of detention. However, these events are not alleged in the pleadings. This proceeding is therefore not the appropriate time to consider every detail of Mr. Timm’s time at La Macaza Institution.

III. Fault

[13] The concept of fault is the cornerstone of extracontractual liability in civil law. Article 1457 of the Code defines fault as a failure to abide by “the rules of conduct incumbent on [every person], according to the circumstances, usage or law”. Thus, the first step in the analysis is to define the appropriate standard of conduct. Second, the evidence must be analyzed to determine whether that standard has been violated.

[14] The standard of conduct may be based on circumstances or usage. In some types of situations that are frequently brought before the courts, such as damage to reputation, case law helps to define the appropriate standard of conduct. In other cases, it is up to the judge to determine *a posteriori* what a reasonable person would have done in the circumstances.

[15] The standard of conduct may also be based on legislation or regulations made under a statute. As will be seen below, however, not all statutes or regulations give rise to civil liability when they are breached.

A. Standard of conduct

[16] In his pleadings, Mr. Timm alleges various types of fault. Many of his criticisms of CSC employees stem from the alleged violation of certain internal CSC rules. I must therefore identify the conditions under which the violation of a statutory norm gives rise to civil liability. Moreover, Mr. Timm bases his claims on the decision at the third level of the review of his grievance. I must therefore clarify the authority of such a decision with respect to this case. Once I have examined these preliminary issues, I will be able to describe the various standards of conduct at issue in this case.

(1) Relationship between violation of legislation and civil fault

[17] Despite the reference to “law” in the first paragraph of [article 1457](#) of the [Civil Code](#), there is general agreement that not every breach of a statute or regulation constitutes civil fault. For

example, in *Morin v Blais*, [1975 CanLII 3 \(SCC\)](#), [1977] 1 SCR 570, the Supreme Court stated that the violation of a regulatory standard could constitute a fault if that standard also expressed an elementary standard of care. More recently, the Supreme Court stated in *St. Lawrence Cement Inc. v Barrette*, [2008 SCC 64](#) at paragraphs [34 and 36](#), [2008] 3 SCR 392:

In Quebec civil law, the violation of a legislative standard does not in itself constitute civil fault For that, an offence provided for in legislation must also constitute a violation of the standard of conduct of a reasonable person under the general rules of civil liability set out in art. 1457 C.C.Q. . . .

. . .

As a result, the content of a legislative standard may influence the assessment of the duty of prudence and diligence that applies in a given context. In a civil liability action, it will be up to the judge to determine the applicable standard of conduct—the content of which may be reflected in the relevant legislative standards—having regard to the law, usage and circumstances.

(2) Relevance of grievance decisions

[18] The events giving rise to an extracontractual liability action may have been considered in other decision-making processes. If so, it is necessary to determine the authority of decisions rendered in such processes over a civil trial.

[19] The decisions rendered in such processes are not binding on a judge who rules on an extracontractual liability action. This is because the conditions for the recognition of *res judicata*, provided for in [article 2848](#) of the [Civil Code](#), are not fulfilled (*La Foncière, compagnie d'assurance de France v Perras*, [1943 CanLII 42 \(SCC\)](#), [1943] SCR 165). For a matter to be considered to be *res judicata*, the parties, cause and object must be identical. For example, in a professional discipline decision, the cause is a breach of a code of discipline and the object is a regulatory penalty, which is very different from an extracontractual liability action arising from civil fault and seeking reparation for injury.

[20] Nevertheless, it is recognized that a criminal or disciplinary decision may have de facto authority over a civil trial (*Ali c Compagnie d'assurance Guardian du Canada*, [1999 CanLII](#)

[13177 \(QC CA\)](#), [1999] RRA 427 (CA); *Audet c Transamerica Life Canada*, [2012 QCCA 1746](#) at paragraphs [44–46](#)). This means that a criminal or disciplinary decision is a relevant fact that may be put into evidence in a civil trial. The decision may be a convincing indication that the facts that it finds did in fact occur, even if the legal conclusions it draws may not be applicable to the issue of whether there was civil fault.

[21] In this case, the grievance process under the *Corrections and Conditional Release Act*, SC 1992, c 20 [the CCRA], does not aim at awarding damages for injury. It is not based on the concept of civil fault. In fact, it appears that the main purpose of this process is to enforce the internal rules of the penitentiary system (see *May v Ferndale Institution*, [2005 SCC 82](#) at paragraph [63](#), [2005] 3 SCR 809). Grievance decisions therefore do not have the force of *res judicata* in this case; they have only de facto authority.

[22] Having made these clarifications, I can now turn to the main standards of conduct that may be relevant. I will divide them into two main categories, namely standards governing the conduct of a public body with respect to the exercise of legal or other remedies, and standards prohibiting harassment and discrimination.

(3) Prohibition against interfering with the pursuit of a legal remedy and prohibition against retaliation

[23] The right to an effective remedy is an essential component of the rule of law. It is pointless to recognize the rights of individuals if they cannot exercise those rights. There is a growing awareness of the practical difficulties that Canadians face when seeking to have their legal disputes determined by the courts and of the significant resources they must devote to this end (see, for example, *Hryniak v Mauldin*, [2014 SCC 7](#) at paragraphs [23–33](#), [2014] 1 SCR 87). Nevertheless, the issue here is more specific, namely imposing hurdles or constraints on the pursuit of a remedy, in particular through retaliation.

[24] One of the best-known decisions on this issue is *Golder v the United Kingdom*, a decision made by the European Court of Human Rights on February 21, 1975. Mr. Golder, an inmate,

sought to bring a civil suit against a prison guard who had allegedly made a false statement about him. However, the British prison authorities denied Mr. Golder permission to contact a lawyer. On the basis of Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, the Court held that everyone has a right of access to the courts and that the British prison authorities had violated this right by denying Mr. Golder the right to consult a lawyer, thereby significantly interfering with his pursuit of a remedy.

[25] The Supreme Court of Canada applied the same principle in *BCGEU v British Columbia (Attorney General)*, [1988 CanLII 3 \(SCC\)](#), [1988] 2 SCR 214. The Court confirmed an injunction to prevent picketing outside British Columbia's courthouses. Citing *Golder*, Chief Justice Dickson linked the prohibition against interfering with the pursuit of legal remedies to the principle of the rule of law, stating the following at page 230:

There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice.

[26] The Supreme Court reiterated these principles in a more recent decision, *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, [2014 SCC 59](#) at paragraphs [32 and 38–40](#), [2014] 3 SCR 31.

[27] A concrete example of interference with the pursuit of a legal remedy that has been found to be contrary to the rule of law is provided by *Compagnie de construction et de développement cristée v Société de développement de la Baie James*, [2001 CanLII 20643 \(QC CA\)](#), [2001] RJQ 1726 (CA). In that case, a municipality had included in the terms and conditions of its calls for tenders a clause that excluded from the bidding process any company that had filed a lawsuit against the municipality. The Court of Appeal found that such a clause was contrary to public order and the rule of law, since it imposed a disadvantage on persons who had exercised their right to pursue a legal remedy.

[28] To ensure the right to effectively pursue a remedy, it is also necessary to prohibit retaliation. Although this is undoubtedly a general principle, there are several statutory provisions that specifically prohibit retaliation against persons exercising certain rights or remedies (see, for example, [section 14.1](#) of the *Canadian Human Rights Act*, RSC 1985, c H-6; [section 147](#) of the *Canada Labour Code*, RSC 1985, c L-2; [section 19](#) of the *Public Servants Disclosure Protection Act*, SC 2005, c 46; [section 425.1](#) of the *Criminal Code*, RSC 1985, c C-46; and [section 10](#) of the *Canadian Victims Bill of Rights*, SC 2015, c 13). In this case, the relevant provision is [section 91](#) of the *CCRA*, which reads as follows:

91. Every offender shall have complete access to the offender grievance procedure without negative consequences.	91. Tout délinquant doit, sans crainte de représailles, avoir libre accès à la procédure de règlement des griefs.

[29] How this process works is described in detail in CD 081—Offender Complaints and Grievances. (This directive has since been amended; I am quoting the provisions in force when the events took place.) Section 10(a) of this directive reiterates that retaliation (“negative consequences”) is prohibited.

[30] In addition, section 54 of CD 081 states that the grievance process is confidential and that:

An offender’s use of the complaint and grievance process may not be mentioned in records outside the complaint and grievance process without the authorization of the Institutional Head.	Le fait qu’un délinquant a eu recours au processus de règlement des plaintes et griefs ne peut être mentionné dans d’autres dossiers que ceux qui concernent ce processus sans l’autorisation du directeur de l’établissement.

[31] Although most of the cases cited above dealt with applications to overturn government decisions, interfering with the pursuit of a remedy may also, depending on the circumstances, constitute a civil fault for which reparation may be sought if the fault has caused injury. Indeed, in the case of retaliation, several of the statutes above specifically provide for reparation to the victim.

(4) Prohibition against harassment and discrimination

[32] In his pleadings, Mr. Timm strongly emphasizes breaches of certain provisions of CSC's internal rules. More specifically, he refers to the prohibition against discrimination and harassment in the Commissioner's Directive No. 60 [CD 060]—Code of Discipline. For example, section 12 of the Code states that an employee has committed an infraction if he or she "maltreats, humiliates, harasses, discriminates and/or is abusive, by word or action, to an offender". Mr. Timm also refers to the following definitions in the appendix to the Code:

Discrimination: when the grievor believes that CSC staff actions, language or decisions were made in a discriminatory manner based on gender, race and ethnicity, language, sexual orientation, religion, age, marital status, or a physical or mental disability. The category includes staff behaviour that constitutes a violation of the offender's human rights or the [*Canadian Charter of Rights and Freedoms*](#).

Harassment: any improper conduct by one or more employees, offenders, visitors or volunteers, that is directed at and offensive to another person, and that the individual knew or ought reasonably to have known to cause offence or harm. It comprises any objectionable act, comment or display that demeans, belittles, or causes personal humiliation or embarrassment, and any act of intimidation or threat. It includes harassment within the meaning of the [*Canadian Human Rights Act*](#).

Discrimination : des actes, des paroles ou des décisions du personnel du SCC qui incitent le délinquant à s'estimer victime de discrimination fondée sur le sexe, la race, l'ethnie, la langue, l'orientation sexuelle, la religion, l'âge, l'état civil ou une déficience mentale ou physique. Sont inclus les comportements du personnel qui enfreignent les droits de la personne ou de la [*Charte canadienne des droits et libertés*](#).

Harcèlement : tout comportement inapproprié de la part d'un ou de plusieurs employés, délinquants, visiteurs ou bénévoles à l'égard d'une autre personne, et dont l'auteur ou les auteurs savaient ou auraient raisonnablement dû savoir qu'il serait offensant ou préjudiciable. Le harcèlement comprend tout acte, propos ou exhibition répréhensible qui diminue, rabaisse, humilie ou embarrasse une personne, ou tout acte d'intimidation ou de menace. Il comprend également le harcèlement au sens de la [*Loi canadienne sur les droits de la personne*](#).

[33] Harassment and discrimination may also constitute a civil fault giving rise to an obligation to make reparation for the injury caused (regarding harassment, see *Syndicat des employées et*

employés de métiers d'Hydro-Québec, section locale 1500 (SCFP-FTQ) c Fontaine, 2006 QCCA 1642, [2007] RJQ 5; regarding discrimination, see *de Montigny* at paragraph 44). In this case, however, I must rely on the definitions of these concepts that have been adopted by the civil courts and not on the definitions in the internal CSC rules.

[34] With regard to harassment, I refer to the following definition proposed by Judge Christian Brunelle of the Court of Québec in *Bélanger c Hydro-Québec*, 2016 QCCQ 15565, at paragraphs 64 and 65:

[TRANSLATION]

In general, harassment occurs when there are unwanted, vexatious acts whose effects are ongoing, either because the acts are being repeated or because there are serious harmful effects on the person being harassed.

To describe a situation as harassment, one must assess [TRANSLATION] “all the circumstances of the case before the Court”. Indeed, there are differences—of nature and degree—between harassing acts and acts that are simply [TRANSLATION] “annoying” or [TRANSLATION] “bothersome”. [References omitted.]

[35] With regard to discrimination, the conduct complained of must involve a distinction related to one of the grounds set out in section 10 of the *Quebec Charter*, for example colour, age or sex. In the absence of such a distinction, there can be no discrimination (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at paragraph 52, [2015] 2 SCR 789).

B. Evidence of fault

[36] In his statement, Mr. Timm complains about two separate events, namely the discussion between him and Ms. Beaulieu-Guilbault on September 14, 2012, in which she criticized him for filing complaints against the staff, and the discussions on January 11, 2013, in which Ms. Beaulieu-Guilbault and Mr. Maillé advised Mr. Roy to stop associating with Mr. Timm. The circumstances of the first event are not subject to significant debate; however, the parties disagree

on the second event. I must therefore analyze the evidence in detail to determine what in fact took place.

[37] Having established the facts, I will then be able to characterize them legally and determine whether a fault has been committed. I will state my findings at the outset: Ms. Beaulieu-Guilbault and Mr. Maillé committed a fault with respect to the second event only, by trying to discourage Mr. Roy from pursuing certain remedies; however, Ms. Beaulieu-Guilbault's conduct in the first event was not a fault, and there was no harassment and no discrimination.

(1) Facts

[38] It is not disputed that, on September 14, 2012, Ms. Beaulieu-Guilbault had a meeting with Mr. Timm and made the comments recorded in the Offender Management System [OMS]:

[TRANSLATION]

. . . we spoke at length about his resistant attitude towards authority and CSC. We talked about the complaints he has been filing and the consequences of that for him. . . . I told him that I am finding it difficult to reach him and that it is hard to trust him because of the many complaints he has been making against the staff.

[39] However, the accounts of the events on January 11, 2013, are divergent. It is therefore necessary to examine the evidence in detail on this matter.

(a) *Mr. Roy's affidavit*

[40] Mr. Timm did not personally witness the actions he alleges. These acts were revealed to him by another inmate, Mr. Roy, who agreed to sign an affidavit relating these facts.

[41] This affidavit was initially prepared in support of Mr. Timm's grievance. However, the defendant objects to its admission into evidence in these proceedings, because Mr. Roy did not testify at trial.

[42] Under rule 285 of the *Federal Courts Rules*, I may order that a specific fact be proven by affidavit. I am of the opinion that this discretionary power should be exercised and I order that Mr. Roy's affidavit be admitted into evidence. This affidavit was brought to the attention of the defendant in 2013, as part of the grievance process. There is no indication that the defendant has challenged the content of this affidavit or attempted to prove otherwise. Decisions at all three levels of the grievance process were based, at least implicitly, on the premise that the events described by Mr. Roy had actually taken place. In addition, because Mr. Roy has since been released, Mr. Timm has not been able to locate him.

[43] In the affidavit, Mr. Roy states that he asked Mr. Timm for help in preparing a request for an escorted temporary absence [ETA]. He submitted this written request to his PO, Ms. Beaulieu-Guilbault. The following is his account of what then happened:

[TRANSLATION]

The following week, PO Valery Beaulieu Guilbault called me to her office to tell me that she had read my ETA request and was convinced that it had been written not by me but rather by Richard Timm, because she recognized his writing style.

...

PO Valery Beaulieu Guilbault then said not to associate with Richard Timm, because he was bad company, since he was a litigious person who had filed complaints against employees and since associating with him would only hinder my progress.

On the same afternoon, Aboriginal liaison officer [ALO] Yves Maillé had a meeting with me to tell me that, further to a call from PO Valery Beaulieu Guilbault, he had to tell me to stop associating with Richard Timm, because he was bad company and was not well liked by the staff, since he had filed complaints against certain employees, and because it could hinder my reintegration in society.

[44] At first glance, these statements constitute evidence that, when Ms. Beaulieu-Guilbault discovered that Mr. Timm had helped Mr. Roy with a request, she and Mr. Maillé immediately intervened to discourage Mr. Roy from associating with Mr. Timm and asking for more help.

(b) *Ms. Beaulieu-Guilbault's testimony*

[45] Ms. Beaulieu-Guilbault testified at trial. I found her to be generally honest and professional. However, she occasionally sought to interpret the facts to her advantage.

[46] Ms. Beaulieu-Guilbault confirmed the accuracy of the note she entered in Mr. Roy's record in the OMS on January 11, 2013:

[TRANSLATION]

In addition, I noticed that the request was written not by him but by another very litigious inmate. I immediately told him that he should be careful about the company he kept and that this inmate would only hinder him. He said that he was able to form his own opinion about the other inmates and that he would not let another inmate hinder his progress. However, I urged him to be careful.

[47] She stated that, during this discussion with Mr. Roy, she did not mention Mr. Timm's name. However, she admitted that, at that time, she was certain it was Mr. Timm who had written Mr. Roy's ETA request, because only Mr. Timm had access to a computer and only Mr. Timm submitted typed documents. Even if I give her the benefit of the doubt in this regard, for her warning to make sense, she had to make it clear to Mr. Roy that she was referring to Mr. Timm, even if she did not say his name. Moreover, she wrote that associating with "this inmate" would hinder him. It is difficult to understand how this message could be conveyed without it being clear to Mr. Roy that she was talking about Mr. Timm. In fact, according to Mr. Roy's affidavit, that is how he understood the conversation. In this regard, it does not matter that Ms. Beaulieu-Guilbault testified that there were other litigious inmates at La Macaza.

[48] I must also say that I was not convinced by her attempt to downplay the derogatory nature of the word [TRANSLATION] "litigious." Even though, as she points out, the dictionary defines a litigious person as one who always uses the law to assert their point of view, it is obvious that she does not see this in a positive light, especially since she uses the adverb [TRANSLATION] "very" before the adjective [TRANSLATION] "litigious" and concludes that the litigious person in question is bad company.

[49] Ms. Beaulieu-Guilbault also acknowledged that she definitely told Mr. Maillé about this incident, probably at a meeting of Mr. Roy's case management team [CMT], although she could not say exactly when. She further stated that the workers did not keep secrets and that it was normal for one worker to talk to another about an inmate's interactions. She did not recall taking the initiative to contact Mr. Maillé on January 11, 2013, but she did not deny it.

[50] Finally, Ms. Beaulieu-Guilbault stated that the entire staff of La Macaza Institution knew that Mr. Timm made frequent use of the complaints and grievance process.

(c) Mr. Maillé's testimony

[51] At trial, Mr. Maillé said that he remembered Mr. Roy, because Mr. Roy was involved in the activities for Indigenous inmates that he organized or facilitated. In those days, he could be interacting with Mr. Roy between 15 and 30 minutes a day.

[52] When asked about the matter, Mr. Maillé said he did not remember receiving a call from Ms. Beaulieu-Guilbault regarding the relationship between Mr. Roy and Mr. Timm. He also does not remember advising Mr. Roy not to associate with Mr. Timm. This memory lapse seems implausible to me. One must not forget that these events were the subject of a grievance in the weeks that followed and of this action a few months later. It is unlikely that Mr. Maillé did not discuss this matter with the institution's management and then with the Crown attorneys. In other words, Mr. Maillé surely had several opportunities to refresh his memory shortly after the events took place.

(d) The grievance decision

[53] Mr. Timm filed a grievance regarding the facts underlying this action. This grievance was decided at all three levels. A review of these decisions shows that the facts alleged by Mr. Timm, including the discussions between Ms. Beaulieu-Guilbault, Mr. Maillé and Mr. Roy, are not in question. To that extent, I am prepared to give some de facto authority to these decisions.

[54] The decision at the first level, signed by the warden of the institution, contains the following paragraph:

[TRANSLATION]

We are of the opinion that the two employees [Ms. Beaulieu-Guilbault and Mr. Maillé], more particularly the PO (because the grievance focuses more on her), did not harass you, based on the definition in CD 081 mentioned above. However, the casework records attached to the grievance may raise some questions. Nevertheless, we conclude that Ms. Beaulieu-Guilbault acted openly with the intention of helping you, and the other inmate involved, in your respective paths.

[55] If the warden concludes that Ms. Beaulieu-Guilbault acted to assist Mr. Timm and Mr. Roy, it is because he necessarily admits that she made comments to discourage Mr. Roy from associating with Mr. Timm and obtaining his help in writing requests.

[56] The decision at the second level, signed by CSC's regional deputy commissioner, contains the following paragraphs:

[TRANSLATION]

On 2013-02-13, the inmate you mentioned completed an affidavit, sworn in by a commissioner for oaths. It states that the ALO [Mr. Maillé] intervened and suggested that he no longer associate with you since this would only hinder his personal progress under paragraph 6a of CD 710-1.

The ALO has to communicate with the PO and the CMT to provide input on the intervention strategy in relation to your correctional plan, in accordance with paragraphs 6c and 6e of CD 710-1.

[57] In these passages, however, the regional deputy commissioner assumes that there were in fact conversations between Ms. Beaulieu-Guilbault and Mr. Maillé. He seeks to justify their actions rather than deny that they took place. Far from contradicting the content of Mr. Roy's affidavit, this decision makes sense only if one concludes that Mr. Roy was telling the truth.

[58] The decision at the third level does not contain any additional information on this matter.

(e) *Conclusion on facts*

[59] From all of this evidence, I conclude that the events did indeed unfold as Mr. Roy describes in his affidavit.

[60] At the hearing, the Crown attorney tried to argue that Mr. Timm's testimony regarding Mr. Roy's visit on January 11, 2013, was implausible, because the time at which Ms. Beaulieu-Guilbault entered her note on the conversation in the OMS is the time that Mr. Maillé would have finished his shift. Mr. Roy would therefore not have had time to visit Mr. Timm between the meetings with Ms. Beaulieu-Guilbault and Mr. Maillé. This argument assumes that the OMS entry was made at the exact time of the conversation and that Mr. Maillé remembers exactly what time he left work that day. I believe that this is speculation and that it does not support the inference that the Crown attorney urges me to draw, namely that the events described by Mr. Roy in his affidavit did not take place.

(2) Legal characterization of facts

(a) *Retaliation and interference with pursuit of remedy*

[61] The first event must be placed in context: it is a regular meeting between an inmate and his parole officer. It is normal in such a meeting to have a frank conversation on the various elements of the correctional plan and the factors that are hindering the inmate's progress. Ms. Beaulieu-Guilbault was entitled to point out the lack of a relationship of trust between Mr. Timm and his CMT and to identify Mr. Timm's [TRANSLATION] "many complaints" as one of the barriers to establishing such a relationship, along with Mr. Timm's [TRANSLATION] "resistant attitude". In doing so, Ms. Beaulieu-Guilbault was not retaliating: she was not attempting to impose negative consequences on Mr. Timm for pursuing a remedy. She was also not attempting to hinder the pursuit of remedies in the future.

[62] I would add that the fact that Ms. Beaulieu-Guilbault referred to Mr. Timm's complaints in the OMS does not, in my opinion, constitute a civil fault. Although this entry violates CD 081,

violating a regulatory standard does not necessarily constitute a civil fault. In this case, this violation was neither a form of retaliation nor an attempt to interfere with the pursuit of a remedy.

[63] However, in acting as they did in the second event, Ms. Beaulieu-Guilbault and Mr. Maillé committed a fault. They wanted to isolate Mr. Timm for having helped Mr. Roy write a request. This is retaliation for collaborating with another inmate in the pursuit of a remedy and, more generally, for having pursued multiple remedies in the past. In addition, the obvious goal was to discourage Mr. Roy and possibly other inmates from making more requests in the future with the help of Mr. Timm. In this sense, Ms. Beaulieu-Guilbault and Mr. Maillé sought to interfere with the exercise of the rights or remedies of these other inmates. The fact that their actions failed does not excuse their conduct, but remains relevant to the existence of injury, as discussed below.

(b) Harassment and discrimination

[64] To begin with, the evidence does not reveal any act of discrimination by Ms. Beaulieu-Guilbault or Mr. Maillé. Indeed, they did not act on any prohibited ground of discrimination set out in [section 10](#) of the [Quebec Charter](#). Pursuing a remedy or filing a grievance, even repeatedly, is unrelated to these prohibited grounds of discrimination.

[65] For that reason alone, I am also of the opinion that the acts that Mr. Timm describes as harassment do not constitute a civil fault. Even if their purpose was to discourage the pursuit of remedies, the actions taken by Ms. Beaulieu-Guilbault and Mr. Maillé, according to the admissible evidence, did not constitute repeated or especially serious vexatious acts.

[66] As I mentioned above, the first event must be considered in the context of the relationship between officers and inmates in a penitentiary. Ms. Beaulieu-Guilbault was simply trying to paint a realistic picture of Mr. Timm's situation to allow him to make progress towards achieving the objectives of his correctional plan. To make an analogy with workplaces, it is well established that the exercise of an employer's management rights, however unpleasant, does not constitute

harassment (Bernard Cliche et al., *Le harcèlement et les lésions psychologiques*, 2nd ed., Cowansville, Que., Yvon Blais, 2012 at pages 197–198).

[67] Moreover, regarding the second event, the evidence shows that Ms. Beaulieu-Guilbault and Mr. Maillé were not so much seeking to offend or humiliate Mr. Timm, whom they did not see that day, as to discourage other inmates from seeking Mr. Timm’s assistance in preparing a request or pursuing a remedy. Judge Brunelle’s remarks in *Bélanger*, at paragraph 68, may apply to Mr. Timm’s situation: [TRANSLATION] “However ‘irritating’ or ‘annoying’ it may be, this practice does not seem serious enough to constitute harassment amounting to civil fault.”

[68] Mr. Timm also refers to the third-level decision on his grievance. He submits that it upholds his grievance in its entirety and that the deputy commissioner has therefore acknowledged that he was a victim of harassment.

[69] In this regard, it is useful to recall that the grievance decision can only have de facto authority. The concept of harassment in CD 060 is not necessarily defined in the same way as harassment that constitutes civil fault. As well, the grievance process is not intended to compensate the grievor. The decision therefore does not have the authority of *res judicata*.

[70] Moreover, from a factual standpoint, this decision does not conclude that harassment occurred. To fully understand this, one particular feature of the grievance process must be emphasized, namely the two-step process for handling harassment complaints. In the first step, the first-level authority must determine whether the facts alleged by the complainant, if they are assumed to be true, constitute harassment. Only if this initial question can be answered affirmatively should the decision-maker move to the second step and proceed to an inquiry to establish the facts.

[71] In this case, however, the warden concluded that the acts alleged by Mr. Timm, although they had occurred, did not constitute harassment. He therefore felt no need to proceed to the second step

of the harassment process. At the second level, the regional deputy commissioner took the same approach:

[TRANSLATION]

Upon reading your allegations, I am able to conclude that the situations mentioned do not meet the definition of harassment

[72] At the third level, the senior deputy commissioner took a different approach. She states the following:

[TRANSLATION]

Despite the results of the first-level investigation, the conduct of your PO and ALO, were it proven [emphasis added], would meet the definition of harassment. However, the warden's investigation determined that the PO and ALO had not engaged in any conduct that was harmful to you. Indeed, at a meeting with the PO, it was determined that she had acted with the intention of helping you.

[Emphasis in the original]

[73] Consequently, she deemed it necessary to proceed to the second step of the process. However, she noted that an examination of the facts that actually occurred did not support a finding of harassment. In other words, the senior deputy commissioner took a different path to reach the same result, the denial of the grievance with respect to harassment. Therefore, the grievance was allowed not because of harassment, but for another reason.

[74] In my opinion, the grievance was upheld at the third level only because the senior deputy commissioner found that the first-level process had not allowed Mr. Timm to present his arguments with respect to the entries in the OMS regarding complaints he had filed against staff members. The warden had noted that these entries might raise [TRANSLATION] "some questions", but had asked Mr. Timm to present a new grievance on the issue. At the third level, the deputy commissioner found that the grievance had [TRANSLATION] "not been dealt with in accordance with the provisions of CD 081 and GL 081-1".

[75] My understanding is that the only reason the grievance was upheld at the third level is that, at the two previous levels, Mr. Timm's allegations regarding the references to his complaints in the OMS had not been taken into consideration. This also explains why the only corrective measures imposed by the senior deputy commissioner are a reminder to staff members that they may not refer to the use of the complaint and grievance process in an inmate's record and the amendment of Mr. Timm's record to remove the references in question.

[76] I agree that the decision at the third level is not written in a way that makes it easy to understand. Nevertheless, the Supreme Court encourages us to read administrative decisions from a broad perspective and not to focus on flaws or deficiencies in drafting: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708. Mr. Timm claims that, since his grievance was not upheld [TRANSLATION] "in part", it was necessarily upheld [TRANSLATION] "in full". I disagree. A reading of the decision as a whole clearly shows that the allegations of harassment were not upheld and that the senior deputy commissioner agreed with Mr. Timm only on the issue of the casework record entries. There is therefore nothing in this decision to support an allegation of civil fault.

IV. Injury and causal link

[77] A finding of fault is not sufficient to establish extracontractual liability. The fault must also have caused injury. In his pleadings and at trial, Mr. Timm referred to various types of injury. I will assess whether Mr. Timm has proven this injury and whether he has shown that it was caused by the fault of Ms. Beaulieu-Guilbault and Mr. Maillé.

A. Interference with pursuit of remedy

[78] I should begin by noting that, although the fault I found may be described as discouraging the use of grievance procedures or other remedies, there is no evidence that this fault has had any consequence whatsoever.

[79] Indeed, Mr. Roy told Ms. Beaulieu-Guilbault that he would form his own opinion about his relationship with Mr. Timm. There is no evidence that Ms. Beaulieu-Guilbault's intervention discouraged Mr. Roy or anyone else from pursuing a remedy, with or without Mr. Timm's assistance. In any event, such injury would have been suffered by Mr. Roy (or another inmate), and Mr. Timm would not have the required standing to claim damages to compensate for that injury.

[80] During his testimony, Mr. Timm did not in any way claim to have been prevented from pursuing any remedy whatsoever. In fact, the evidence shows that he subsequently commenced a variety of recourses.

B. Damage to reputation

[81] In *Bou Malhab v Diffusion Métromédia CMR inc*, [2011 SCC 9](#), [2011] 1 SCR 214, Justice Marie Deschamps of the Supreme Court of Canada describes, at paragraphs 27 and 28, what constitutes damage to reputation in the context of an extracontractual liability action:

A person is defamed where the image reflected back to the person by one or more other people is inferior not only to the person's self-image but above all to the image the person projected to "others" in the normal course of social interaction. . . .

Therefore, the fact that a person alleging defamation feels humiliated, sad or frustrated is not a sufficient basis for an action in defamation. In such an action, injury is examined at a second level focussed not on the actual victim but on the perceptions of other people. Injury exists where "an ordinary person . . . believe[s] that the remarks made, when viewed as a whole, brought discredit on the reputation" of the victim.

[82] Mr. Timm argues that, in a prison context, the remarks made by Ms. Beaulieu-Guilbault and Mr. Maillé were extremely damaging, since, out of fear of authority, other prisoners would be strongly encouraged to avoid him and could even resort to physical violence towards him.

[83] These assertions are not supported by the evidence. Mr. Roy, the main recipient of the impugned remarks, did not stop associating with Mr. Timm. On the contrary, he even helped to prepare Mr. Timm's grievance by filing an affidavit.

[84] During his testimony, Mr. Timm alleged that, as a result of the events, some inmates avoided him. He did not say who the inmates were and did not give any further details. He also alleged that some staff members made comments, but did not provide further details. A finding of injury cannot be made on the basis of such vague statements.

[85] Mr. Timm states that at least three other inmates were present when Mr. Maillé told Mr. Roy to stop associating with him. The three inmates allegedly heard Mr. Maillé's remarks and went to see Mr. Timm to tell him what had happened. It was only at trial that Mr. Timm gave the names of these three inmates. He stated that he did not want to do so at discovery, for fear of hindering the progress of these inmates or, worse, for fear of retaliation. In any event, Mr. Timm's testimony in this regard is hearsay that is inadmissible in evidence. The other three inmates did not testify or provide an affidavit. In his affidavit, Mr. Roy does not mention the presence of the other three inmates. In any event, Mr. Timm did not claim that the three inmates stopped associating with him.

[86] Finally, there is no evidence that a fellow inmate used violence against Mr. Timm as a result of the events or for any other reason.

[87] Mr. Timm also testified about his reputation at La Macaza Institution. He claims that his nickname was [TRANSLATION] "the Citizen" and that he was known for not being associated with organized crime or contraband within the institution. Nothing in the evidence suggests that that perception has changed as a result of the interventions of Ms. Beaulieu-Guilbault and Mr. Maillé.

C. Negative effect on certain decisions

[88] At trial, Mr. Timm reported a number of events that occurred after the discussions on September 14, 2012, and January 11, 2013, that are central to his action. Although these subsequent events were not alleged in his statement, he asserted that they were consequences of the faults committed by Ms. Beaulieu-Guilbault and Mr. Maillé. This approach does not allow for a fair debate on these issues. Indeed, it deprives the Crown of the opportunity to investigate and bring evidence to refute Mr. Timm's allegations. In addition, the situations referred to by Mr. Timm

would constitute separate faults and not injury caused by the conduct alleged in the statement of claim. This makes the attempt to broaden the debate to include facts that were not alleged in the pleadings even more problematic. Nevertheless, I shall say a few words about the main situations referred to by Mr. Timm.

[89] First, Mr. Timm states that the faults committed against him resulted in the denial of his ETA request and his request for a security classification decrease. More generally, Mr. Timm claims that he is still in prison because of the [TRANSLATION] “poor management of his case”.

[90] Although, at the meeting on September 14, 2012, Ms. Beaulieu-Guilbault told Mr. Timm that she would not support an ETA request, he nevertheless submitted one, and it was denied a few weeks later. The denial predates the events of January 11, 2013, which are the only events I consider to be faults. These events cannot be the cause of the ETA denial.

[91] It also appears that, in fall 2012, Mr. Timm requested that his security classification be decreased. His March 2013 correctional plan shows that the request was denied on November 14, 2012. Again, this decision predates the events of January 11, 2013.

[92] The correctional plan and the assessment for the ETA decision include detailed reasons. Mr. Timm’s lack of commitment, lack of progress and resistant attitude are the main reasons given in support of the denials. There is no evidence to suggest that these grounds are unreasonable or flawed or that prison authorities acted on the basis of irrelevant factors. In any event, were that the case, these decisions would constitute separate faults, which are not alleged in the declaration, rather than injury.

D. Move to a different wing

[93] In January 2014, Mr. Timm was moved from Wing C of the La Macaza Institution, where he had been living for 11 years, to Wing A of the same institution. At discovery and at trial, he stated

that he had been told at the time by staff members of the institution that this decision was a consequence of his having brought this action in September 2013.

[94] Such allegations are troubling. As mentioned above, it is unacceptable to retaliate against a prisoner who pursues remedies available under the law.

[95] However, I can grant a remedy only if Mr. Timm can prove the reasons for the move to a different wing. He has not done so. His statement constitutes hearsay. He has not called the people who were involved in this decision to testify. On cross-examination, he also acknowledged that, in August 2013, he had requested to be physically separated from Ms. Beaulieu-Guilbault, since he believed that the third-level decision recognized that she had been harassing him. In addition, Exhibit 17 in the record contains a grievance apparently filed by Mr. Timm following the move to a different wing. The evidence does not show what action was taken on the grievance. In short, the situation may not be as clear-cut as Mr. Timm suggests. I am unable to draw a presumption of fact, as his counsel is asking me to do, since it is not serious, precise and concordant, as required by [article 2849](#) of the [Civil Code](#). Only fulsome evidence would allow me to make a finding.

E. Unwarranted searches and sleep deprivation

[96] During his testimony at trial, Mr. Timm also alleged that, after his move to Wing A, guards conducted unwarranted searches of his cell and deprived him of sleep. As for the latter, he stated that a guard would knock on his door to wake him up each hour during the night. Since his cell door was locked at night, he did not know the identity of the guards who had carried out these acts.

[97] Again, such allegations are troubling. However, there are a number of reasons preventing me from granting any reparation in this regard.

[98] First, Mr. Timm admitted on cross-examination that these events took place mainly over two months in 2016, shortly before he moved from La Macaza Institution to another institution. Moreover, while I acknowledge that it is inherently difficult to obtain evidence on this issue, I have

no information about the motives of the guards who allegedly deprived Mr. Timm of sleep. It is therefore difficult for me to conclude that the sleep deprivation resulted from the events in January 2013 or, at the very least, from the commencement of this action in September 2013.

[99] Secondly, these events are not mentioned in Mr. Timm's statement of claim, since it was written in 2013. Mr. Timm never amended his statement of claim to mention these events.

Procedurally, one cannot simply raise entirely new injuries at trial. As mentioned above, doing so deprives the opposing party of any realistic opportunity to investigate and bring counterevidence.

[100] Third, Mr. Timm admitted on cross-examination that he had filed a grievance in relation to these events and that the grievance had been denied. Therefore, it is possible that not all the relevant facts have been put in evidence before me.

V. Punitive damages

[101] In *Hinse*, the Supreme Court of Canada affirmed that the [Quebec Charter](#) is part of the *jus commune* (“*droit commun*”, or general law) of extracontractual liability in Quebec, which applies to the federal Crown through [section 3](#) of the [CLPA](#). It would therefore be possible to claim punitive damages, under [section 49, paragraph 2](#), of the Quebec Charter, in cases of intentional interference with a right that it guarantees. Since the Supreme Court considered that Mr. Hinse's claim was unfounded, it did not consider it necessary to specify the conditions under which the federal Crown could be ordered to pay punitive damages.

[102] Mr. Timm maintains that the conduct of Ms. Beaulieu-Guilbault and Mr. Maillé interfered with his right to dignity, honour and reputation (s. 4), his right to equality (s. 10), his right to protection from harassment (s. 10.1) and his right to liberty (s. 24).

[103] It is true that, in *de Montigny*, the Supreme Court stated that punitive damages could be awarded even in the absence of compensatory damages. However, there must still have been interference with a guaranteed right.

[104] Given the findings I have already reached, I must conclude that Mr. Timm has not proven any interference with a right guaranteed by the [Quebec Charter](#). I have ruled that Mr. Timm has not proven any damage to his reputation, which disposes of section 4. Mr. Timm has also failed to demonstrate that he was a victim of discrimination under section 10. As for harassment, section 10.1 prohibits only harassment arising from a ground set out in section 10, for example sex. Therefore, it is not possible for Mr. Timm to demonstrate that section 10.1 was breached. In any case, I have found that he was not harassed. Lastly, section 24 provides that “no one may be deprived of his liberty . . . except on grounds provided by law”. Mr. Timm is incarcerated because he has been convicted of an offence under the [Criminal Code](#). He has not asked me, either in his statement or at trial, to question the legality of his conviction. Therefore, section 24 was not breached. Mr. Timm has not raised any rights other than the ones I have just discussed.

[105] In the absence of interference with a guaranteed right, I cannot award punitive damages.

VI. Declarations

[106] Although he did not emphasize this issue at trial, in his statement, Mr. Timm also requests that a series of declarations be issued finding violations of various standards by Ms. Beaulieu-Guilbault, Mr. Maillé and the persons who ruled on his grievance.

[107] Declaratory relief may be provided where the parties have an interest in the determination of a genuine issue (*Canada (Prime Minister) v Khadr*, [2010 SCC 3](#) at paragraph 46, [2010] 1 SCR 44 [*Khadr*]). As the Supreme Court stated in *Daniels v Canada (Indian Affairs and Northern Development)*, [2016 SCC 12](#) at paragraph 11, [2016] 1 SCR 99, “[a] declaration can only be granted if it will have practical utility, that is, if it will settle a ‘live controversy’ between the parties”.

[108] In Mr. Timm’s case, there is no longer any “live controversy”

[109] between the parties over the facts of this case. The case is a thing of the past. Unlike in *Khadr*, it cannot be said that the facts before the Court, namely the events of September 14, 2012, and January 11, 2013, continue to have legal or practical implications.

[110] In other words, this decision constitutes a complete solution to the matter before the Court. A declaration would add nothing.

VII. Costs

[111] Although the usual practice is to award costs in favour of the successful party, [rule 400](#) of the *Federal Courts Rules* provides that the Court retains full discretion in this regard. Exercising this discretion, I am of the opinion that Mr. Timm should not be ordered to pay the costs.

[112] I find that Ms. Beaulieu-Guilbault and Mr. Maillé did commit a fault. This fault is not sufficient to give rise to liability on the part of the federal Crown, since it did not cause any injury to Mr. Timm. However, it explains why Mr. Timm brought this action. In addition, the wording of the third-level decision on Mr. Timm's grievance was rather confusing. Given all the circumstances, I consider it unfair to make Mr. Timm bear the financial consequences of the failure of his action.

JUDGMENT in T-1445-13

THIS COURT ORDERS that the action is dismissed without costs.

"Sébastien Grammond"

Judge

FEDERAL COURT **SOLICITORS OF RECORD**

DOCKET:

T-1445-13

STYLE OF CAUSE:

RICHARD TIMM v HER MAJESTY THE QUEEN

PLACE OF HEARING: Montréal, Quebec
DATE OF HEARING: January 21, 28 and 29, 2019
JUDGMENT AND REASONS: GRAMMOND J.
DATED: February 27, 2019

APPEARANCES:

Pierre Tabah
Andrée-Anne Dion-Côté
Véronique Forest

FOR THE PLAINTIFF

FOR THE DEFENDANT

SOLICITORS OF RECORD:

Labelle, Côté, Tabah et associés
Avocats
Saint-Jérôme, Quebec

FOR THE PLAINTIFF

Attorney General of Canada
Ottawa, Ontario

FOR THE DEFENDANT

Tab 94

Larouche v Court of Queen's Bench of Alberta, 2015 ABQB 25 (CanLII)

Source: Court of King's Bench of Alberta
Date: 2015-01-12
File number: 0603 04866
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Court of Queen's Bench of Alberta

Citation: Larouche v Court of Queen's Bench of Alberta, 2015 ABQB 25

Date: 20150112
Docket: 0603 04866
Registry: Edmonton

Between:

Eric Larouche

Applicant

- and -

**The Honourable (Former) Chief Justice of the Court of Queen's Bench,
A.H. Wachowich, Her Majesty the Queen, and
the Clerk of the Court of Queen's Bench of Alberta (Criminal)**

Respondents

Corrected judgment: A corrigendum was issued on January 12, 2015; the corrections have been made to the text and the corrigendum is appended to this judgment.

**Reasons for Judgment on Motion to Dismiss for Mootness
of the Honourable Mr. Justice J. Watson**

I Introduction

[1] The Rule of Law is an organization of principles which are not only foundational to our Constitutional order but crucial to our democracy, to our security, to our rights and freedoms, and to our equal status as members of humanity. The Rule of Law is also an expression of our collective and inherited wisdom and socialization. It is our cloak and our shelter from oppression on the one hand and from disorder on the other. As the Governor General of Canada wisely observed on Remembrance Day, November 11, 2014, freedom without peace is agony, and peace without freedom is slavery. Without the Rule of Law, we can have neither freedom nor peace.

[2] A crucial element of the Rule of Law is that no exercise of power emanating from the structure of our social order of governance can be considered above or beyond the reach of law. The integrity and validity of the exercise of legal authority are necessarily linked to its own legality. Power and its exercise must be legitimate. That includes what judges and Chief judges do in the exercise of their powers. This motion to declare a proceeding before the Court of Queen's Bench moot, and the proceeding itself, raise the Rule of Law.

[3] That is because the applicant in the proceeding itself seeks a declaration that a putative exercise of the authority of the former Chief Justice of the Court of Queen's Bench to make a direction, translated into a form of policy or regulation and carried out by Court administrative staff, was unlawful when, on March 22, 2006, it impeded the applicant's ability to make an application to the Court at Edmonton under the *Criminal Code* respecting review of an order of judicial interim release. For simplicity here I call this the "direction" of the former Chief Justice.

[4] The direction was not a Rule or even a Practice Note as commonly recognized in this jurisdiction. Essentially he made a business management decision with a policy element, so instructed the court administration staff and, of course, the court staff carried it out. Invoking various provisions of the *Canadian Charter of Rights and Freedoms* and other legal principles, the applicant seeks to quash the direction by certiorari and seeks a declaration that the direction was contrary to law, was *ultra vires*, and, notably, was contrary to those *Charter* provisions. In other words, the core question challenges the exercise of legal authority by the Chief Justice to individually regulate the business of his Court in the administration of criminal justice in a manner other than by the more formalized and elaborate enactment and promulgation of a Rule or Practice

Note. No other remedy is sought in the underlying proceeding but *certiorari* and a declaration of various things.

[5] In sum, the impugned direction set a pre-condition for scheduling such release review motions. Its operative effect here was to delay the applicant's motion being placed on a hearing list and being heard by a judge of the Court until the pre-condition was overcome. Although the elements of the pre-condition were not completely free of ambiguity, the essence of it was that no applicant's motion would go onto the hearing list until the applicant had arranged with Crown counsel to have any related or unrelated outstanding warrants for the applicant's apprehension or detention organized to be dealt with in advance or at the same time as the hearing before the Court.

[6] The direction did not target the applicant as such. It just affected him. It is not entirely clear from the record before me how much practical impact the direction actually had on the applicant. He was not in custody at the time. He was simply seeking a variation of release terms which variation was later consented to by the Crown. The outstanding warrant he evidently faced was for a traffic offence fine from Calgary in the amount of \$150 which was soon thereafter paid. His counsel did contend that this direction caused a significant interference with his *Charter* rights. The extent of breach, if breach, is not in agreement between the parties.

[7] It is also in evidence that either the direction or an *ad hoc* administrative arrangement to a similar effect (along with other elements) was put in place in 2004. When it was first approved by the Chief Justice is not entirely clear. In any event, the record before me provides no basis to draw any firm conclusions about the practical effect of the direction on anyone other than the applicant (whether in custody or not) either before or after 2006. More is said about this below.

[8] It is common ground that the direction was only formally rescinded in February, 2014. In that respect, some form of this arrangement was arguably in place for a decade and the direction itself, if dated from the explanatory letter of the Chief Justice dated March 23, 2006, was in place for at least eight years. It is the removal in 2014 of the direction by the Court which principally underlies the Crown's motion to have the applicant's motion for *certiorari* and for declaratory relief declared moot in all its aspects as against all respondents, and dismissed.

[9] The applicant's initial challenge to the direction was made in the Court of Queen's Bench directly out of the original criminal proceedings against the applicant. But a judge of that Court on April 7, 2006, stayed the applicant's initial application as procedurally misplaced, with leave to the applicant to convert the proceeding into one by way of originating notice for a declaration and for *certiorari*. No appeal was taken from that decision. The applicant's replacement originating notice was filed on April 18, 2006.

[10] For reasons not specified to me, the proceeding then seems to have gently eased into a form of stasis for some years. Meanwhile, the *Rules of Court* were changed in 2010 and overtook the application. By operation of Rule 15.2, the 'originating notice' proceeding was transmogrified into an 'originating application' proceeding governed by Division 2 of Part 3 of the *Alberta Rules of Court*. No one raised either delay or procedural defect about *the form* of the present application by the applicant before me, so I was not asked to use the modern adaptation Rule 15.6 to rectify anything.

[11] The significance of this format of proceeding is that, in the Crown's submission, the originating application can now be dismissed summarily by operation of modern Rule 7.3(1)(b) of the *Rules*. Rule 7.3(1)(b) provides that a civil proceeding, which is what this now is, can be dismissed if the Court is satisfied that there is "no merit to a claim or part of it". On this aspect, the Crown contends that nothing about the application survives the crucible of mootness and that the Court should not exercise its discretion to entertain any of it. During the hearing of the motion, however, counsel were advised that I would, in taking the matter in reserve, have to consider whether "part" of it would indeed survive either as not moot or as moot but a proper subject for a hearing on discretionary grounds.

[12] That said, the governing test for summary judgment in Alberta finds expression in *Windsor v CPR*, 2014 ABCA 108 at para 13, 572 AR 317; *Sherwood Steel Ltd v Odyssey Construction Inc.*, 2014 ABCA 320, at paras 7 to 8, 59 CPC 7th 22; *Maxwell v Wal-Mart*, 2014 ABCA 383 at para 12 and cases mentioned therein, *inter alia*. From the process perspective, summary judgment can be given if a disposition that is fair and just to both parties can be made on the existing record: *Hryniak v Mauldin*, 2014 SCC 8, [2014] 1 SCR 87.

[13] From the substantive perspective, summary judgment can be granted if, in light of what that fair and just process reveals, there is no merit to the claim. No ‘merit’ in my view means that, even assuming the accuracy of the position of the non-moving party as to any material and potentially decisive matters -- matters which would require ordinary forensic testing through a full trial procedure and which cannot be resolved through the fair and just alternative -- the non-moving party’s position viewed in the round has no merit.

[14] Stated another way, in order for the non-moving party’s case to have merit, there must be a genuine issue of a potentially decisive material fact in the case which cannot be summarily found against the non-moving party on the record revealed by the ‘fair and just process’. The mere assertion of a position by the non-moving party, or the mere hope of the non-moving party that something will turn up at a trial, does not suffice. The key is whether the circumstances require a full regular trial on that issue in order to properly resolve the case: see *Canada v Lameman*, 2008 SCC 14 at paras 10 to 11, [2008] 1 SCR 372. The concept of “merit” in this respect is to be distinguished from the test for striking out pleadings under Rule 3.68 which involves deciding “whether there is any reasonable prospect that the claim will succeed, erring on the side of generosity in permitting novel claims to proceed.”: compare *Ernst v Alberta (Energy Resources Conservation Board)*, 2014 ABCA 285 at paras 13 to 15, 85 CELR 3rd 39, under motion [2014] SCCA No 497 (QL).

[15] The Crown as the moving party on the current motion submits that the evidential record placed before me by the effective agreement of the parties demonstrates that mootness is a complete answer to adjudicating on the merits of this originating application. The Crown also submits that I should not exercise my discretion to allow the matter or any part of it to proceed. As the non-moving party at this stage, the applicant has to, accordingly, put his best foot forward to show ‘merit’ in the sense of non-mootness, or ‘merit’ in the sense of a reason for me to exercise discretion to proceed with any aspect of the underlying application.

[16] My involvement in this matter, since I am a member of the Court of Appeal of Alberta, should be explained. On the initiative of counsel for the applicant by letter dated February 28, 2014, to the Registrar of the Court of Appeal, and apparently with the consensus of counsel for the respondents (as well with the support of a judge of the Court of Queen’s Bench who was initially assigned to the within Crown motion and who also felt it was correct to ask a member of the Court of Appeal to deal with the matter), the Chief Justice of Alberta was asked to designate a member of the Court of Appeal to hear the Crown’s motion. That is why I am dealing with it.

[17] Nonetheless, in doing so, I am still acting as an *ex officio* member of the Court of Queen’s Bench of Alberta, which is part of the judicial architecture in Alberta. Accordingly, any ruling that I make would seem, to me at least, to be subject to appeal under the *Judicature Act* to the Court of Appeal.

II Broader Context of the Proceedings

[18] There is no need to discuss *initiative* jurisdiction of the Court of Queen’s Bench in the present context. It is not necessary to be elaborate about the ability of courts under s 96 of the *Constitution Act, 1867* to adopt policies or practices, including those manifested in specific directions affecting the management of court business, whether in the administration or justice generally, or affecting some aspect of public law or private law. Although the applicant’s ‘originating notice’ asserts the illegality of “*ultra vires*” against the direction, there is no such problem in this case. Within the territorial jurisdiction of the Court, the Court of Queen’s Bench as

a superior court under s 96 of the *Constitution Act, 1867*, possesses “constant, concurrent and complete” jurisdiction to perform both its inherent and its statutory functions, and all necessarily incidental authority pertaining thereto is also possessed. The Court in exercise of this jurisdiction may err in law, and consequently act unlawfully, but where the jurisdiction is apparent from the outset, there is no question of *ultra vires*. For similar (indeed allied) reasons, there is no question of *certiorari* being available against this direction of the Chief Justice: this is discussed more below.

[19] Nonetheless, the applicant is not out of bounds to argue that, under the Rule of Law, the legality of even a business management direction by a Chief Justice of a superior trial court under s 96 – to the extent that it directly affects the legal right of any person to have access to the Court -- would be justiciable by means of a motion for a declaration in the same Court. As McLachlin J (as she then was albeit dissenting) succinctly put it: “The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it.” See *Martin v Nova Scotia (WCB)*, 2003 SCC 54, per Gonthier J at para 29, [2003] 2 SCR 504, approving that aspect of her dissent in *Cooper v Canada (HRC)*, 1996 CanLII 152 (SCC), [1996] 3 SCR 854 at para 70.

[20] Bringing a motion for a declaration is an available method despite the fact that the only court to which the motion for a declaration *could* be presented is the same court that promulgated the rule in the first place: see *BCGEU v BC*, 1988 CanLII 3 (SCC), [1988] 2 SCR 214, 44 CCC 3rd 289 where the initial challenge to the direction of then Chief Justice MacEachern of the British Columbia Supreme Court was taken to him. Only a s 96 Court has the authority to make general declarations of legality: see *Alberta Union of Provincial Employees v Alberta*, 2014 ABCA 43, 566 AR 380, reconsideration refused 2014 ABCA 197, 575 AR 338, under motion [2014] SCCA 387 (QL); see also *R v Lloyd*, 2014 BCCA 224, 12 CR 7th 190 under motion [2014] SCCA 304 (QL); see also *Martin*, para 31, re-affirmed (albeit on the corollary point about tribunal legal jurisdiction) in *Okwuobi v Québec*, 2005 SCC 16 at paras 28 to 37, [2005] 1 SCR 257.

[21] In this respect, an analogy to the ‘rule of necessity’ comes into play when a challenge is made to a court about the legality of something the Court itself did: see *Reference re Remuneration of Judges of the Provincial Court*, 1998 CanLII 833 (SCC), [1998] 1 SCR 3, at para 5, reaching back to a case decided in 1430 “in which it was held that the judges of the Common Pleas were not disqualified from judging an action against all of them, because there was no other court in which the case could be brought: *Year Book*, 8 Hen 6, 19b; 2 *Rolle’s Abridgment* (1668), at p 93.” The Supreme Court in that *Judge’s Reference* noted authority in England, Australia, Canada and the United States affirming that rule.

[22] Strictly speaking, however, this rule does not need to be applied here. That is because it was entirely open to any member of the Court of Queen’s Bench to entertain the applicant’s application for a declaration. The fact that the application sought to challenge this direction by the same Court’s Chief Justice (or former Chief Justice) would not be disqualifying of a judge of the same Court to consider the application. I need say nothing about an application for a declaration against a formally promulgated Rule of the Court which raises other considerations. Nor is this present situation one that raises concepts of *res judicata* or abuse of process. For what it is worth, though, I do not discern any basis of disqualification of a judge of the Court because, after all, someone has to decide and the judges can be expected to abide their responsibilities.

[23] One case that has some comparable characteristics to the present one is the case of *Société Radio-Canada v Québec*, 2011 SCC 2 at paras 58 to 63, [2011] 1 SCR 19 where rules of practice as to media and public conduct within court buildings were altered to further restrict what was happening there and “to provide an ordered environment so as to ensure the serenity of judicial proceedings”. The rules of practice were evidently created in a process involving representatives of both the judiciary and executive as well as other input (although it is not entirely obvious how much consultation was involved).

[24] That case proceeded through the Quebec courts before it got to the Supreme Court. No one suggested it should not proceed in that manner. In the end, the Supreme Court found that the rule

content was “prescribed by law” for the purposes of s 1 of the *Charter*, such as to limit media and expressive freedom under s 2(b) of the *Charter*. In the end, the Supreme Court there concluded:

98 Freedom of the press and the fair administration of justice are essential to the proper functioning of a democratic society and must be harmonized with one another. Each one is just as vital as the other. Freedom of the press cannot foster self-fulfilment, democratic discourse and truth finding if it has a negative impact on the fair administration of justice. In the instant case, the government has taken action to reconcile those two values. Since no right is absolute, this reconciliation must be accepted.

[25] As mentioned above, it is contended by the applicant that the direction impugned in the present case adversely, and unlawfully, affected both access to justice under the *Criminal Code* and the liberty of the applicant as reflected in several provisions of the *Charter*. This is an important issue. The applicant’s position is not banal. Access to justice has been recently explained (if not re-positioned) at an untouchable Constitutional level in *Trial Lawyers Association of British Columbia v Attorney General of British Columbia*, 2014 SCC 59 at paras 24 to 43, (2014) 375 DLR (4th) 599.

[26] It is argued by the applicant that the direction improperly impeded in a legally cognizable manner the exercise of liberty-related legal rights by the applicant. It is surmised by the applicant that the same direction probably adversely affected the similar liberty-based legal rights of untold other individuals during the operational period of this direction, which appears to be a period of almost a decade, until the direction was rescinded earlier in 2014 as mentioned.

[27] Before addressing the Crown’s motion for dismissal on the grounds of mootness squarely, it is necessary to more clearly situate the applicant’s motion as it presently exists and in light of the procedural history. This follows.

III Specific Context of the Mootness Motion

[28] Counsel for the applicant, counsel for the Attorney General of Alberta, standing in for the former Chief Justice and for the Clerk of that Court, and counsel for Her Majesty the Queen in right of Alberta efficiently addressed this motion and the relevant contextual circumstances seem to be largely in agreement.

[29] The relevant circumstances appear to have commenced with a letter dated May 28, 2004, signed by the then Chief Crown Prosecutor for Edmonton and addressed to the then Supervisor of the Criminal and Jury Section of the office of the Clerk of the Court setting out an understanding that “Bail applications will not be scheduled in the Court of Queen’s Bench for persons with outstanding warrants.” The letter refers to other alleged understandings but only the paragraph including the foregoing words was approved by a handwritten endorsement by the then Chief Justice which appears to have been ascribed to the letter on March 23, 2006 as “Approved”.

[30] The supervisor’s affidavit refers to a follow up document entitled “Bail Review Application Procedures – Effective June 1, 2004” which instructed the desk clerks that defence counsel could set dates for hearings by “call in or apply at the counter”. The scheduling forms must, however, be completed with the information required. The Procedures include the requirement that the matter not be set down for hearing if there are “outstanding warrants in Alberta”. There were other elements not in issue here. Checking for warrants was to be done by the desk clerks via the Information System the Court used called “JOIN”.

[31] The specific arrangement under consideration here appears to have been a step in an evolution of the “bail review” process which had been described in an announcement called a “Notice to All Members of the Bar” made by the former Chief Justice dated February 5, 2004. While that February 5, 2004 announcement did not specifically mention the impugned management direction here, the announcement shows that the Court was seeking to establish an efficient system conducive to access, particularly by reduction of the “collapse” rate of motions set

for hearing. Forms for bail review applications were proposed. The need of the Court to set a manageable list for each judge, to avoid wasting of time and resources of counsel and the Court, and to address priorities in processing of the case load goes without saying.

[32] As with the way of all flesh, those forms came to be revised. Another such Notice dated November 9, 2004 was issued by the Chief Justice. The affidavit of the supervisor also indicates that the Chief Crown Prosecutor told her on June 23, 2004, that the Chief Justice had agreed that “bail reviews were not to be set for people with outstanding arrest warrants”.

[33] On February 3, 2006, the applicant was granted judicial interim release by a Justice of the Court of Queen’s Bench in Edmonton. On March 21, 2006, counsel for the applicant filed an application for review of that order at Edmonton. After checking the JOIN system, the desk clerk took the application off of the hearing list because she determined that there was a warrant for a fine of \$150 from a traffic matter in Calgary. As noted above, that fine was paid and the warrant discharged on March 30, 2006.

[34] In the meantime, then counsel for the applicant had written to the Chief Justice asking why the application was taken off the list. The Chief Justice wrote back as follows by letter dated March 23, 2006:

This is to confirm that I approved a directive that if counsel came to the Clerk’s Office to make an application for bail review or to vary the terms of release and if there was at that time an outstanding warrant on the record, that counsel was to first deal with the Crown and make arrangements to deal with the outstanding warrant at the same time that the application was scheduled to come before our Court.

This was an administrative decision and it prevents the situation of the person being immediately re-arrested upon the application being heard by the Court if the outstanding warrant was not to be addressed at the same time.

If there are no outstanding warrants, the clerk might be approached for a hearing date in the usual manner. If there are outstanding warrants, counsel are to first make arrangements with the Crown and then come before the clerk for a hearing date.

I believe these are the instructions given to you when you approached the clerk in this matter.

[35] This letter sets out the rationale and scope of the pre-condition for getting onto the ‘bail review’ hearing list than, for example, what the Chief Crown Prosecutor of the day may have said to the court office supervisor. What the Chief Crown Prosecutor may have thought, of course, is neither here nor there. Certainly there is no reason not to take the letter of the former Chief Justice as other than accurately expressing the intent and scope of his direction: compare ***R v O’Brien***, [2011 SCC 29](#) at para 18, [2011] 2 SCR 485.

[36] On April 5, 2006, the conditions of the judicial interim release order of the applicant were adjusted by consent order of a judge of the Court. On or around April 6, 2006, an effort was commenced in the Court of Queen’s Bench to attack the direction, but, as noted above, the judge who then addressed the matter found procedural defect and stayed that first foray with leave to the applicant to file his originating notice of motion.

[37] In support of his new application, the applicant’s counsel also filed an affidavit of a legal assistant indicating that a bail review motion was faxed on June 27, 2007 and returned with a notation that a warrant was outstanding. The affidavit went on to say that the legal assistant was told by a desk clerk that the matter would *remain* on the hearing list and Crown counsel would

decide then whether to proceed with the matter anyway despite that fact. The desk clerk was reported to have told the legal assistant that “the only time that the Clerk takes it off the list is when the client is not in custody”.

[38] Crown Counsel advises that on January 23, 2014, in unrelated proceedings, the issue as to the propriety of the direction was brought to the attention of the current Associate Chief Justice by a different defence counsel. Having looked into the matter, the Associate Chief Justice communicated with representatives of the Federal and Provincial Crown, and the Criminal Trial Lawyers’ Association, asking whether there was good reason to maintain the policy. On February 13, 2014, the Associate Chief Justice wrote to the heads of prosecution offices and to the President of the Criminal Trial Lawyers Association to advise that in response to a meeting conducted on February 12, 2014:

As a result of that discussion and a review of the matter, please be advised that henceforth the fact that an accused person in custody may have outstanding warrants other than for which s/he is being detained, will not be a basis for a refusal to schedule a bail review application under s. 520 of the [Criminal Code](#). While the fact that there are outstanding warrants may be relevant to the determination on such a hearing, it will not be a bar to setting the hearing. The consequences that flow from or after the decision on any such bail review will be what they are. [Emphasis in letter]

[39] It is noteworthy that the letter of February 13, 2014, only refers to applications by people in custody. It therefore did not, at least expressly, address the situation such as that which the applicant found himself in, nor did it expressly address the interpretation said to have been suggested by a desk clerk in late June, 2007. In so saying, I hasten to add that I am not suggesting that the Associate Chief Justice intended to leave that aspect of the direction as to non-custodial cases in place. On the face of that letter alone, it is not possible to say. However, the Associate Chief Justice has written again since: see below.

[40] As it happens, following February, 2014, request of counsel to the Registrar of the Court of Appeal for the selection of a Justice of the Court of Appeal to deal with the Crown’s motion, the Associate Chief Justice wrote an additional letter to counsel for the applicant dated March 25, 2014, that read as follows:

I write because, as I will explain below, I believe this issue has become moot for two reasons: (1) the bail review of the subject accused, Mr. Larouche (and two others mentioned since) was (were) dealt with at the time on the merits, notwithstanding the application to him (them) of the directive discussed below; and (2) more importantly, independent of (and without me recalling) this litigation, the directive was reversed by me effective February 13, 2014.

In the intervening 15 months from December 2012 to March 11, 2014, I had, as noted, forgot about the matter and it had not been brought to my attention. Coincidentally, the same issue was raised with me by Mr. Fix, on behalf of an accused, on January 23, 2014. In response to the issue, I wrote to the Provincial and Federal Crowns, and the President of the Criminal Trial Lawyers Association on February 10, 2014 (copy attached). Subsequently there was a meeting with those representatives and others on February 10, 2014, and I wrote to all on February 13, 2014 (copy attached), confirming that the directive had been discontinued by me effective February 13, 2014. During this time, as I said, I had not recalled this litigation, nor did anyone mention it to me, nor did I raise it with Ms. Lowe, and thus in the result, the decision to suspend the directive was made independent of consideration of the litigation.

I leave it for you and Mr. Hurlburt to discuss and to proceed as you may be instructed. From the point of view of our Court, no further action is required and the action could be discontinued.

[41] Before me, the Crown counsel adds and counsel for the applicant does not dispute that following the letters of the Associate Chief Justice, the court criminal section office does not apply the direction to any applicant for bail review, whether in or out of custody.

[42] The language of the March, 2014, letter of the Associate Chief Justice also sheds light on the rationale for asking a member of the Court of Appeal to at least address the question of mootness. No member of the Court of Queen's Bench would be bound by the opinion of the Associate Chief Justice on the topic of mootness. All of them could be expected to act appropriately. None of them would have had to recuse on this basis. Nevertheless, counsel evidently felt the appearance of justice would be better served by having a judge of the Court of Appeal step in and at least the first judge on the recent mootness motion was inclined to agree. By comparison, the transcript of the appearance before the judge on April 7, 2006, shows that, albeit in *obiter*, he was of a mind that at least some of the matter was *not* moot. In the face of this history, I can understand why a call was made to the bullpen.

[43] This brings me back to the originating notice of motion. It set out the following requests for remedy:

An Order for judicial review in the nature of certiorari, quashing the directive of the Respondent Chief Justice of the Court of Queen's Bench that accused persons are not permitted to make applications for review of judicial interim release orders if they have outstanding warrants;

A declaration that the said directive and refusal of the Clerk to set such applications down for hearing is ultra vires and in breach of s. 520 of the [Criminal Code](#) of Canada and ss. 7, 9, 15 and 11(e) of the [Charter of Rights and Freedoms](#), and that, in this case, a declaration pursuant to s. 24(1) that the Applicant's rights were so violated.

[44] During the hearing of the argument on mootness, I asked if any counsel would object to my subdividing the topics raised in the notice of motion for the purposes of assessment of whether the mootness answer should terminate the whole or any part of the application. Counsel did not express any objection. Following that course, I now turn to the subject of mootness and to the related topic of discretion.

IV Mootness and Discretion

Is the Application Moot?

[45] The answer is yes. The issues of "ultra vires" and the remedy of "certiorari" are certainly moot because there is nothing left to quash or to declare void. The reality is that neither of those contentions had any merit in the first place for reasons adverted to above. There is no need to be ornate about this. The subject of "ultra vires" is narrowly interpreted even for tribunals where it still exists as a topic of legality: see eg *Imperial Oil Ltd v Calgary (City)*, [2014 ABCA 231](#) at para 28, 374 DLR (4th) 489. But for s 96 courts, *certiorari* and the rightly hallowed 'great writ' of *habeas corpus* simply do not lie against any exercise of judicial power (including necessarily incidental administrative judicial power) by a s 96 judge or court. Those prerogative writs (and their modern judicial review classification) are immanent *powers* of s 96 courts and have been for the ancestors of s 96 courts for centuries.

[46] As for the declaration remedy aspects, the Crown essentially offered several overlapping reasons to have the application of the applicant found to be moot and not a proper subject of discretion to entertain it: (1) the legality of the direction does not require assessment, because no such direction exists any longer; (2) there are no other forms of practical remedy that were or are sought by the applicant and none were or are available to the applicant individually; (3) a declaration of legality has no utility as a matter of social policy as it is not likely to recur at all let alone in a form to which the declaration could be usefully applied in future and (4) the impact of

the direction upon the applicant, even if the topic generally raises significant *Charter* interests, is not significant enough to justify entertaining the matter.

[47] The substratum of principles shared by the doctrine of mootness and the doctrine of standing include the “natural reluctance on the part of the courts to exercise jurisdiction otherwise than at the instance of a person who has an interest in the subject matter of the litigation in conformity with the philosophy that it is for the courts to decide actual controversies between parties, not academic or hypothetical questions.”: see *Robinson v Western Australian Museum*, (1977) 138 CLR 283 at 327; [1977] HCA 46; see also *Kuczborski v Queensland*, [2014] HCA 46; *Director- General Department of Home Affairs v Mukhamadiva*, [2013] ZACC 47; *United States v Windsor*, 570 US (2013). In other words, there is a judicial wisdom involved in choosing not to adjudicate where, in effect, the party seeking the opinion of the Court has nothing directly at stake in the answer, even as to future behaviour by that person.

[48] For Canadian law, a helpful summary of mootness appears in the text of Prof. Hogg, *Constitutional Law of Canada*, [Toronto: Carswell, 2009] at pp 59-17 to 59-18 where the learned author writes:

A case is “moot” when there is no longer any dispute between the parties. Mootness is like an absence of standing in that the court is being invited to rule on an issue that has no direct impact on the parties to the proceedings A case becomes moot when the repeal of a statute, the expiry of a lease, the death of a party, the settlement of the dispute, or some other new circumstance, resolves the dispute or makes it irrelevant.

Normally, of course, the parties to litigation will not wish to proceed after their case has become moot. If they do, it will usually be because they perceive that some principle is at stake, although the mundane question of who is to be responsible for costs is for some parties a sufficient incentive. If the parties do wish to proceed with the litigation, should they be permitted to do so? The general rule is no: a court should not decide a case that has become moot.

[49] A party’s purely subjective belief that what happened to him in the past provides a compelling “principle at stake” to go forward with the case cannot be decisive for mootness any more than it can be for standing: compare *Downtown Eastside Sex Workers v Canada*, 2012 SCC 45 at paras 1 to 2, 22, [2012] 2 SCR 524.

[50] In this respect, one can also conceive of situations where a non-moot matter is “marginal or redundant” to use language mentioned in *Downtown Eastside*. Despite the triviality, a party may wish to press that matter forward with a view to actually pursuing extensions or lines of legality inquiry that are moot or abstract. This is not to impugn the motives of the applicant here as purely strategic, namely using the alleged *Charter* breach as a ‘hook’ to attack the ability of the Chief Justice of the Court of Queen’s Bench to make case flow management or other administrative decisions without consultation. Even if that were so, it is not for me to say the motive is unholy.

[51] But where the remedy sought is declaratory, it often has the essential nature of being abstract to begin with. The sort of judicial self-discipline referred to in the mootness authorities is also reflected in the existence of discretion not to make a declaration about the legality of a past event which is clearly unlikely to recur, or which is a matter of such low significance that even if it does occur that investment in judicial resources to develop an answer to the issue would be inconsistent with the practical as well as foundational role of the courts to declare what the law is in a way that is useful and not spurious.

[52] In other words, the basis for a remedy of a declaration may be “moot” even if a private law remedy, howsoever modest and based on the same circumstances, would not be. That is because, while a private law claimant may be entitled to press forward with a minor claim before a

competent court, a claimant who is venturing into the field of public law declarations before a s 96 court should be able to show that the public law aspects of the matter are not academic and are important enough to necessitate a judicial declaratory answer.

[53] That sort of non-moot point is not escalated to significance merely by the colouration of the debate. There needs to be features of the potential debate which give the point some gravity. The lack of such features may be because the question is premature or because it is finished with. Consequently, even if a non-moot point can be linked in logical terms to legal issues of moment, but those legal issues of moment are themselves unmoored from the case, mootness doctrine can apply to the entire composite.

[54] Put another way, it is not the role of courts to provide advisory opinions about prospective but purely inchoate legal development possibilities. Nor is it the role of the courts to provide a form of adjudicative solace to assuage a sense of grievance, howsoever burning, of litigants over trivial inconveniences in their interactions with legal institutions. As Lamer CJC observed in a different context in *Delgamuukw v British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 SCR 1010 at para 186: “Let us face it, we are all here to stay.” It is the ordinary lot of mankind to be bumped in the jostling of life. So the fact that the applicant may have personally suffered some form of a set-back in his attempt to process a motion to adjust the terms of the judicial interim release order does not itself, according to the respondents, provide any reasonable basis for not declaring his applications moot.

[55] For his part, counsel for the applicant asserts firmly that his proceeding is not moot, and that his claim of injury to his legal rights remains unchanged. In his submission, the rescinding decision by the Associate Chief Justice does not revise history, particularly the applicant’s personal history, any more than a claim against the state vanishes because the legal situation has changed or its legal foundation has, in a sense, disappeared. He says that there remains a significant public interest in addressing the legality of the direction because the rescission of the direction cannot bind the future. In other words, he says that the decision to rescind is evidence of how evasive of review the question of legality could be in such cases.

[56] In this respect, one might compare, albeit acknowledging important differences in the comparator, the situation in *Hislop v Canada*, 2007 SCC 10 at para 76, [2007] 1 SCR 429, a case where an estate sought to continue a s 15 of the *Charter* claim by the deceased claimant, even though, in law, a deceased person had no equality or dignity rights at stake in any decision:

“Although s 15(1) rights are personal, the constitutional issues raised here are issues of public importance. Given the public interest in ensuring that questions of law related to such rights be correctly decided, an appeal from a judgment raising such issues must be allowed to survive the party's death pending the appeal.”

[57] But in *Hislop* there was a real and substantial question of law and it affected others. The applicant says that the fact that he is not seeking, as part of his position, any claim for an individual remedy such as damages under public or private law, does not mean he has no valid basis to seek a declaration. He says that his rights were violated and that the courts should say so. He does not accept that the impact upon him is of such a minor effect not merely for him personally but for the public interest generally that it renders his application a Quixotic private reference into an abstract question or questions.

[58] The fact that the case raises interesting legal points cannot itself justify the Court looking into and making declarations about the broad questions of legality, including Constitutional legality, that are asserted by the applicant. The reality is that none of the circumstances here provide a compelling practical *nexus* either to current reality or to real prospects of future effects such as to make them anything but moot for those purposes. It is not just that the matter is premature, as adverted to in cases such as *Phillips v Nova Scotia*, [1995] 1995 CanLII 86 (SCC), 2 SCR 97 at paras 118 to 123. It is also that the instructive nature of such a declaration would be speculative for the future. It is not possible to readily predict a situation, let alone a regularly

occurring situation arising that is evasive of review, for which a present declaration of legality would help to ensure the Chief Justice does not go astray. This case is not as clear as *G(J) v New Brunswick*, 1999 CanLII 653 (SCC), [1999] 3 SCR 46 at paras 41 to 49 where the absence of a tangible case of present right did not mean there was not a pressing and substantial legal concern that needed to be addressed. Nor is it like *Trial Lawyers (BC)*, 2014 SCC 59.

[59] In this case, on this record, the sole utility of a declaration would be in characterizing the legality of past events and how they touched legal rights of the applicant then. The question whether the Court should exercise its discretion to so legally characterize past events despite mootness becomes the crucial point, and, as indicated above, will be assessed topic by topic below.

[60] In doing so, I acknowledge that declaratory relief to characterize past events is a legitimate, if discretionary, remedy in its own right even if it has no present cash value to the litigant. That is so provided a statement of legality characterizing what happened to the party is of a matter of genuine and significant public interest and not just something individual to the party. The exercise of discretion to consider such a declaratory remedy clearly exists: see *Haig v The Queen*, 1993 CanLII 58 (SCC), [1993] 2 SCR 995 at para 130; *Ravndahl v Saskatchewan*, 2009 SCC 7, [2009] 1 SCR 181; *Manitoba Metis Federation Inc v Canada*, 2013 SCC 14, [2013] 1 SCR 623.

[61] But it should not be forgotten by the Court that there are hazards associated with giving opinions unmoored from any record to which future cases could be compared. The incremental evolution of the common law is very much done by comparing prior cases with present ones. It is ordinarily the province of legislators to state law by category definitions, or, in other words, stating law in a generalized structural manner with no need to build it on a pattern of decisions from the past. That is why one of the principles both of mootness and of standing is recognition of the limits of the law making function of the Court.

[62] This reference brings the reasoning back the Rule of Law. The law making function of the Court is most controversial when it is seen to be intrusive into the proper law making function of the legislative branch of government. But insofar as what the courts themselves do, and particularly s 96 courts, the courts themselves have a unique legitimacy in declaring whether what they did conformed to the law. There is considerable force in the applicant's position that where the Court itself, or in this case where the Chief Justice of the Court, is said to have acted unlawfully, it is important for the Court not to be seen to shirk its duty to conform to legality, or to use mootness as a means to evade finding fault with itself.

[63] As compared with situations where judicial restraint would be understood by the enlightened citizenry when it relates to judicial irradiation of laws otherwise duly enacted by Parliament, or relates to actions of Ministers of the Crown, the same enlightened citizenry might react with skepticism about the Court if there were a flagrant illegality in the past in something the Court did, and the Court failed to own up to it and used mootness as the bar. This point of judicial responsibility is a factor in the exercise of discretion, in my view, and therefore I consider it as to each of the topics mentioned in the applicant's originating notice, quoted above.

Should I Exercise Discretion to Hear Any of the Application?

[64] Inasmuch as I have covered the topics of *certiorari* and *ultra vires* above, I will not repeat myself. Suffice it to say that those topics are moot, and are not such as to warrant a hearing. I must mention in passing, so the reader does not think it has been overlooked, s 32(1) of the *Charter*. In light of *R v Mian*, 2014 SCC 54, 13 CR 7th 1, it does not appear to be open to me to express any opinion as to whether that provision would be relevant to consideration of the legality of judicial action, particularly this impugned direction, upon any of the rights actually identified by the applicant. In light of the important function of s 32 as part of the remedial framework I should refrain from any further commentary.

[65] Further, it is important to bear in mind that I have not heard any submissions from any counsel as to the substance of any of the alleged *Charter* breaches. The basis for consideration of them here is solely focused on whether the framework of the application is such as to answer the motion to declare the application moot and induce discretionary hearing. As pointed out in *Mian*, a party is to be expected to advance jurisdictional arguments without prompting. And in reply to a motion for summary judgment, a non-moving party must make the best of what the record offers, or must supplement the record. Here, the applicant appears to have made the best of what he can about the circumstances. No fault finding there. So I turn to each point.

[66] The applicant's motion for a declaration raises s 9 of the *Charter* dealing with arbitrary detention. The applicant was not detained in the sense defined by case law as to s 9 of the *Charter*. Moreover, there is nothing in this record that speaks to arbitrariness as that topic is involving in the modern law. As noted in *R v Vuozzo*, 2013 ABCA 130, at para 544 AR 271, leave denied [2013] SCCA No 314 (QL):

29 The terms "arbitrary" and "detention" each involve legal concepts. As to what is "arbitrary", McLachlin CJC observed in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at para 132, [2011] 3 SCR 134 that the concept of arbitrariness - albeit in the context of principles of fundamental justice under s. 7 of the *Charter* - was not settled. One line of reasoning linked arbitrariness to state agent action "unnecessary" to the law. Another line of reasoning had it that arbitrariness arose when "[a] deprivation of a right ... bears no relation to, or is inconsistent with, the state interest that lies behind the legislation": see *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at para 232, [2005] 1 SCR 791. (The latter approach seems favoured in *Canada (Attorney General) v. Bedford*, 2012 ONCA 186 at paras 145-147, 109 OR (3d) 1, leave to appeal to SCC granted, [2012] SCCA No 159 (QL)).

30 In our view, it is helpful here to view arbitrariness in terms of what "bears no relation to, or is inconsistent with" the law which founds the state action, whether that be statute or common law. That brings up for consideration the law's objectives, which looks at the scope of police authority to interact with the individual in the first place: see e.g. *PHS Community* at para 129.

[67] While *Vuozzo* was talking about 'state action', and the action here is by a Chief Justice, it may be appropriate to consider the legality of the direction from the perspective whether what he did "bears no relation to, or is inconsistent with" the law on which it is based. I am not in a position to decide whether the direction was arbitrary by that standard. On the other hand, it is hard to envision what evidence would shed light on it. It is true that, for the test of arbitrariness, the applicant impugns the process by which the direction came into being. The applicant notes that the impetus for the direction appears to have come from the Chief Crown Prosecutor in a 'pre-consultative' manner. Whether or not that was the main prompt, the fact remains that the reasons of the former Chief Justice state the rationale for his direction. There is simply not a suitable framework for an adjudication on whether the direction infringed the rights of the applicant under s 9. Accordingly, I am not persuaded that I should exercise discretion to hear argument on this topic.

[68] The applicant also refers to s 15 of the *Charter*. There was little said about this in the hearing or written material. This is unsurprising. I am not persuaded that there is a record upon which a useful discussion can be had on whether the applicant fell into an enumerated or analogous ground under s 15 of the *Charter*, or whether there was any stereotyping or other ill motives or effects involved in the direction. The record is a void on this. Accordingly, I am not persuaded that I should exercise discretion to hear argument on this topic.

[69] The applicant also refers to s 11(e) of the *Charter*. As to the latter, it is an interesting question, not to mention a profoundly important one, whether the right to "reasonable bail" under s 11(e) of the *Charter* embraces not merely the alternative between detention on the one hand and "bail" on the other, but also includes the types of conditions which vary the level of liberty that the

individual may have even if not actually in custody. This goes to questions about what may be properly annexed to a “bail” order: compare *R v Shoker*, 2006 SCC 44, [2006] 2 SCR 399. This case also arguably goes to what sort of processes should exist for the achievement of hearings as to “bail” and the carrying out of “bail” orders when made. Obviously Court resources are not infinite and a Chief Justice has to organize affairs somehow. That said, a veritable garden of interesting, if entirely potential, questions can be seen here. The difficulty is that none of them have any real root in the soil of the case. As much as I might personally like to embrace the horticultural challenge involved, I am not persuaded that I should exercise discretion to hear argument on this topic.

[70] Finally there is s 7 of the *Charter*. The applicant seems to me to be on solid ground to submit that his right to liberty is at least arguably engaged when one is dealing with his right to access judicial remedy of limitations on his liberty. But as earlier set out in these reasons, the foothold is not even the entire question of what rights a person not in actual custody may have to promptly access a court (without infinite resources) to rectify some element of his release terms. It is even more narrowly focused than that since it goes to timing primarily. An applicant could well miss a cut off time, or the list may be full, or there may be a shortage of judges or court rooms, or any number of factors may be involved in contributing to the development of a priority like the one evidently chosen by the former Chief Justice. Moreover, the *Charter* debate largely turns on whether any breach of s 7 conforms with the principles of fundamental justice.

[71] On this topic of principles of fundamental justice, the position of the applicant is not outside the range of reasonable inquiry. The manner in which this direction was promulgated, how it was publicized, and the ambiguities of its meaning and application are the types of questions that a “principles of fundamental justice” discussion might engage. I hasten to emphasize that, by saying this, I am not asserting a position, nor for that matter seeking to limit the scope of what might be talked about.

[72] Plainly, the course of the Court of Queen’s Bench in developing case management and processes for the administration of criminal justice is a challenging one. The Court must ensure the processes actually work fairly as well as conform with the law. For instance, giving priority to cases of people in custody over cases of condition variances does not seem irrational. The tradition of the Court appears to be to consult as best as the Court can (which is difficult with an amorphous and changing cadre of Crown counsel and defence counsel as well as other potential ‘stakeholders’). The situation in *Société Radio-Canada*, 2011 SCC 2 is an example of one way to address a major development. Not every tweak of the administration of justice, however, requires the same level of scrutiny or consultation. It may in some cases be both sufficient and fair to effect the change and wait for reaction.

[73] That said, the record of circumstances here simply do not provide a sufficient framework to make any orderly and useful assessment of such extremely important topics. *A fortiori* is that so after so many years. In the end, after anxious consideration of the utility of an inquiry into this, I am not persuaded that I should exercise discretion to hear argument on this topic.

V Conclusion

[74] The application of the applicant is moot in all its particulars. I am not persuaded that the Court should embark onto an inquiry and assessment of any of them as a matter of discretion. The originating application of the applicant is dismissed.

Heard on the 12th day of November, 2014.

Dated at the City of Edmonton, Alberta this 12th day of January, 2015.

Appearances:

T. Engel
for the Applicant

T. Hurlburt, Q.C. / R. J. Normey
for the Respondents

**Corrigendum of the Reasons for Judgment on Motion to Dismiss for Mootness
of
The Honourable Mr. Justice J. Watson**

On the first page of the judgment, the citation has been corrected to read *Larouche v Court of Queen's Bench of Alberta*, 2015 ABQB 25.

Tab 95

Larouche v Court of Queen's Bench of Alberta, 2015 ABQB 25 (CanLII)

Source: Court of King's Bench of Alberta
Date: 2015-01-12
File number: 0603 04866
Other citations: 14 Alta LR (6th) 124 — [2015] CarswellAlta 33
Citation: Larouche v Court of Queen's Bench of Alberta, 2015 ABQB 25 (CanLII), <<https://canlii.ca/t/gfwpw>>, retrieved on 2026-03-23

Court of Queen's Bench of Alberta

Citation: Larouche v Court of Queen's Bench of Alberta, 2015 ABQB 25

Date: 20150112
Docket: 0603 04866
Registry: Edmonton

Between:

Eric Larouche

Applicant

- and -

**The Honourable (Former) Chief Justice of the Court of Queen's Bench,
A.H. Wachowich, Her Majesty the Queen, and
the Clerk of the Court of Queen's Bench of Alberta (Criminal)**

Respondents

Corrected judgment: A corrigendum was issued on January 12, 2015; the corrections have been made to the text and the corrigendum is appended to this judgment.

**Reasons for Judgment on Motion to Dismiss for Mootness
of the Honourable Mr. Justice J. Watson**

I Introduction

[1] The Rule of Law is an organization of principles which are not only foundational to our Constitutional order but crucial to our democracy, to our security, to our rights and freedoms, and to our equal status as members of humanity. The Rule of Law is also an expression of our collective and inherited wisdom and socialization. It is our cloak and our shelter from oppression on the one hand and from disorder on the other. As the Governor General of Canada wisely observed on Remembrance Day, November 11, 2014, freedom without peace is agony, and peace without freedom is slavery. Without the Rule of Law, we can have neither freedom nor peace.

[2] A crucial element of the Rule of Law is that no exercise of power emanating from the structure of our social order of governance can be considered above or beyond the reach of law. The integrity and validity of the exercise of legal authority are necessarily linked to its own legality. Power and its exercise must be legitimate. That includes what judges and Chief judges do in the exercise of their powers. This motion to declare a proceeding before the Court of Queen's Bench moot, and the proceeding itself, raise the Rule of Law.

[3] That is because the applicant in the proceeding itself seeks a declaration that a putative exercise of the authority of the former Chief Justice of the Court of Queen's Bench to make a direction, translated into a form of policy or regulation and carried out by Court administrative staff, was unlawful when, on March 22, 2006, it impeded the applicant's ability to make an application to the Court at Edmonton under the *Criminal Code* respecting review of an order of judicial interim release. For simplicity here I call this the "direction" of the former Chief Justice.

[4] The direction was not a Rule or even a Practice Note as commonly recognized in this jurisdiction. Essentially he made a business management decision with a policy element, so instructed the court administration staff and, of course, the court staff carried it out. Invoking various provisions of the *Canadian Charter of Rights and Freedoms* and other legal principles, the applicant seeks to quash the direction by certiorari and seeks a declaration that the direction was contrary to law, was *ultra vires*, and, notably, was contrary to those *Charter* provisions. In other words, the core question challenges the exercise of legal authority by the Chief Justice to individually regulate the business of his Court in the administration of criminal justice in a manner other than by the more formalized and elaborate enactment and promulgation of a Rule or Practice

Note. No other remedy is sought in the underlying proceeding but *certiorari* and a declaration of various things.

[5] In sum, the impugned direction set a pre-condition for scheduling such release review motions. Its operative effect here was to delay the applicant's motion being placed on a hearing list and being heard by a judge of the Court until the pre-condition was overcome. Although the elements of the pre-condition were not completely free of ambiguity, the essence of it was that no applicant's motion would go onto the hearing list until the applicant had arranged with Crown counsel to have any related or unrelated outstanding warrants for the applicant's apprehension or detention organized to be dealt with in advance or at the same time as the hearing before the Court.

[6] The direction did not target the applicant as such. It just affected him. It is not entirely clear from the record before me how much practical impact the direction actually had on the applicant. He was not in custody at the time. He was simply seeking a variation of release terms which variation was later consented to by the Crown. The outstanding warrant he evidently faced was for a traffic offence fine from Calgary in the amount of \$150 which was soon thereafter paid. His counsel did contend that this direction caused a significant interference with his *Charter* rights. The extent of breach, if breach, is not in agreement between the parties.

[7] It is also in evidence that either the direction or an *ad hoc* administrative arrangement to a similar effect (along with other elements) was put in place in 2004. When it was first approved by the Chief Justice is not entirely clear. In any event, the record before me provides no basis to draw any firm conclusions about the practical effect of the direction on anyone other than the applicant (whether in custody or not) either before or after 2006. More is said about this below.

[8] It is common ground that the direction was only formally rescinded in February, 2014. In that respect, some form of this arrangement was arguably in place for a decade and the direction itself, if dated from the explanatory letter of the Chief Justice dated March 23, 2006, was in place for at least eight years. It is the removal in 2014 of the direction by the Court which principally underlies the Crown's motion to have the applicant's motion for *certiorari* and for declaratory relief declared moot in all its aspects as against all respondents, and dismissed.

[9] The applicant's initial challenge to the direction was made in the Court of Queen's Bench directly out of the original criminal proceedings against the applicant. But a judge of that Court on April 7, 2006, stayed the applicant's initial application as procedurally misplaced, with leave to the applicant to convert the proceeding into one by way of originating notice for a declaration and for *certiorari*. No appeal was taken from that decision. The applicant's replacement originating notice was filed on April 18, 2006.

[10] For reasons not specified to me, the proceeding then seems to have gently eased into a form of stasis for some years. Meanwhile, the *Rules of Court* were changed in 2010 and overtook the application. By operation of Rule 15.2, the 'originating notice' proceeding was transmogrified into an 'originating application' proceeding governed by Division 2 of Part 3 of the *Alberta Rules of Court*. No one raised either delay or procedural defect about *the form* of the present application by the applicant before me, so I was not asked to use the modern adaptation Rule 15.6 to rectify anything.

[11] The significance of this format of proceeding is that, in the Crown's submission, the originating application can now be dismissed summarily by operation of modern Rule 7.3(1)(b) of the *Rules*. Rule 7.3(1)(b) provides that a civil proceeding, which is what this now is, can be dismissed if the Court is satisfied that there is "no merit to a claim or part of it". On this aspect, the Crown contends that nothing about the application survives the crucible of mootness and that the Court should not exercise its discretion to entertain any of it. During the hearing of the motion, however, counsel were advised that I would, in taking the matter in reserve, have to consider whether "part" of it would indeed survive either as not moot or as moot but a proper subject for a hearing on discretionary grounds.

[12] That said, the governing test for summary judgment in Alberta finds expression in *Windsor v CPR*, 2014 ABCA 108 at para 13, 572 AR 317; *Sherwood Steel Ltd v Odyssey Construction Inc.*, 2014 ABCA 320, at paras 7 to 8, 59 CPC 7th 22; *Maxwell v Wal-Mart*, 2014 ABCA 383 at para 12 and cases mentioned therein, *inter alia*. From the process perspective, summary judgment can be given if a disposition that is fair and just to both parties can be made on the existing record: *Hryniak v Mauldin*, 2014 SCC 8, [2014] 1 SCR 87.

[13] From the substantive perspective, summary judgment can be granted if, in light of what that fair and just process reveals, there is no merit to the claim. No ‘merit’ in my view means that, even assuming the accuracy of the position of the non-moving party as to any material and potentially decisive matters -- matters which would require ordinary forensic testing through a full trial procedure and which cannot be resolved through the fair and just alternative -- the non-moving party’s position viewed in the round has no merit.

[14] Stated another way, in order for the non-moving party’s case to have merit, there must be a genuine issue of a potentially decisive material fact in the case which cannot be summarily found against the non-moving party on the record revealed by the ‘fair and just process’. The mere assertion of a position by the non-moving party, or the mere hope of the non-moving party that something will turn up at a trial, does not suffice. The key is whether the circumstances require a full regular trial on that issue in order to properly resolve the case: see *Canada v Lameman*, 2008 SCC 14 at paras 10 to 11, [2008] 1 SCR 372. The concept of “merit” in this respect is to be distinguished from the test for striking out pleadings under Rule 3.68 which involves deciding “whether there is any reasonable prospect that the claim will succeed, erring on the side of generosity in permitting novel claims to proceed.”: compare *Ernst v Alberta (Energy Resources Conservation Board)*, 2014 ABCA 285 at paras 13 to 15, 85 CELR 3rd 39, under motion [2014] SCCA No 497 (QL).

[15] The Crown as the moving party on the current motion submits that the evidential record placed before me by the effective agreement of the parties demonstrates that mootness is a complete answer to adjudicating on the merits of this originating application. The Crown also submits that I should not exercise my discretion to allow the matter or any part of it to proceed. As the non-moving party at this stage, the applicant has to, accordingly, put his best foot forward to show ‘merit’ in the sense of non-mootness, or ‘merit’ in the sense of a reason for me to exercise discretion to proceed with any aspect of the underlying application.

[16] My involvement in this matter, since I am a member of the Court of Appeal of Alberta, should be explained. On the initiative of counsel for the applicant by letter dated February 28, 2014, to the Registrar of the Court of Appeal, and apparently with the consensus of counsel for the respondents (as well with the support of a judge of the Court of Queen’s Bench who was initially assigned to the within Crown motion and who also felt it was correct to ask a member of the Court of Appeal to deal with the matter), the Chief Justice of Alberta was asked to designate a member of the Court of Appeal to hear the Crown’s motion. That is why I am dealing with it.

[17] Nonetheless, in doing so, I am still acting as an *ex officio* member of the Court of Queen’s Bench of Alberta, which is part of the judicial architecture in Alberta. Accordingly, any ruling that I make would seem, to me at least, to be subject to appeal under the *Judicature Act* to the Court of Appeal.

II Broader Context of the Proceedings

[18] There is no need to discuss *initiative* jurisdiction of the Court of Queen’s Bench in the present context. It is not necessary to be elaborate about the ability of courts under s 96 of the *Constitution Act, 1867* to adopt policies or practices, including those manifested in specific directions affecting the management of court business, whether in the administration or justice generally, or affecting some aspect of public law or private law. Although the applicant’s ‘originating notice’ asserts the illegality of “*ultra vires*” against the direction, there is no such problem in this case. Within the territorial jurisdiction of the Court, the Court of Queen’s Bench as

a superior court under s 96 of the *Constitution Act, 1867*, possesses “constant, concurrent and complete” jurisdiction to perform both its inherent and its statutory functions, and all necessarily incidental authority pertaining thereto is also possessed. The Court in exercise of this jurisdiction may err in law, and consequently act unlawfully, but where the jurisdiction is apparent from the outset, there is no question of *ultra vires*. For similar (indeed allied) reasons, there is no question of *certiorari* being available against this direction of the Chief Justice: this is discussed more below.

[19] Nonetheless, the applicant is not out of bounds to argue that, under the Rule of Law, the legality of even a business management direction by a Chief Justice of a superior trial court under s 96 – to the extent that it directly affects the legal right of any person to have access to the Court -- would be justiciable by means of a motion for a declaration in the same Court. As McLachlin J (as she then was albeit dissenting) succinctly put it: “The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it.” See *Martin v Nova Scotia (WCB)*, 2003 SCC 54, per Gonthier J at para 29, [2003] 2 SCR 504, approving that aspect of her dissent in *Cooper v Canada (HRC)*, 1996 CanLII 152 (SCC), [1996] 3 SCR 854 at para 70.

[20] Bringing a motion for a declaration is an available method despite the fact that the only court to which the motion for a declaration *could* be presented is the same court that promulgated the rule in the first place: see *BCGEU v BC*, 1988 CanLII 3 (SCC), [1988] 2 SCR 214, 44 CCC 3rd 289 where the initial challenge to the direction of then Chief Justice MacEachern of the British Columbia Supreme Court was taken to him. Only a s 96 Court has the authority to make general declarations of legality: see *Alberta Union of Provincial Employees v Alberta*, 2014 ABCA 43, 566 AR 380, reconsideration refused 2014 ABCA 197, 575 AR 338, under motion [2014] SCCA 387 (QL); see also *R v Lloyd*, 2014 BCCA 224, 12 CR 7th 190 under motion [2014] SCCA 304 (QL); see also *Martin*, para 31, re-affirmed (albeit on the corollary point about tribunal legal jurisdiction) in *Okwuobi v Québec*, 2005 SCC 16 at paras 28 to 37, [2005] 1 SCR 257.

[21] In this respect, an analogy to the ‘rule of necessity’ comes into play when a challenge is made to a court about the legality of something the Court itself did: see *Reference re Remuneration of Judges of the Provincial Court*, 1998 CanLII 833 (SCC), [1998] 1 SCR 3, at para 5, reaching back to a case decided in 1430 “in which it was held that the judges of the Common Pleas were not disqualified from judging an action against all of them, because there was no other court in which the case could be brought: *Year Book*, 8 Hen 6, 19b; 2 *Rolle’s Abridgment* (1668), at p 93.” The Supreme Court in that *Judge’s Reference* noted authority in England, Australia, Canada and the United States affirming that rule.

[22] Strictly speaking, however, this rule does not need to be applied here. That is because it was entirely open to any member of the Court of Queen’s Bench to entertain the applicant’s application for a declaration. The fact that the application sought to challenge this direction by the same Court’s Chief Justice (or former Chief Justice) would not be disqualifying of a judge of the same Court to consider the application. I need say nothing about an application for a declaration against a formally promulgated Rule of the Court which raises other considerations. Nor is this present situation one that raises concepts of *res judicata* or abuse of process. For what it is worth, though, I do not discern any basis of disqualification of a judge of the Court because, after all, someone has to decide and the judges can be expected to abide their responsibilities.

[23] One case that has some comparable characteristics to the present one is the case of *Société Radio-Canada v Québec*, 2011 SCC 2 at paras 58 to 63, [2011] 1 SCR 19 where rules of practice as to media and public conduct within court buildings were altered to further restrict what was happening there and “to provide an ordered environment so as to ensure the serenity of judicial proceedings”. The rules of practice were evidently created in a process involving representatives of both the judiciary and executive as well as other input (although it is not entirely obvious how much consultation was involved).

[24] That case proceeded through the Quebec courts before it got to the Supreme Court. No one suggested it should not proceed in that manner. In the end, the Supreme Court found that the rule

content was “prescribed by law” for the purposes of s 1 of the *Charter*, such as to limit media and expressive freedom under s 2(b) of the *Charter*. In the end, the Supreme Court there concluded:

98 Freedom of the press and the fair administration of justice are essential to the proper functioning of a democratic society and must be harmonized with one another. Each one is just as vital as the other. Freedom of the press cannot foster self-fulfilment, democratic discourse and truth finding if it has a negative impact on the fair administration of justice. In the instant case, the government has taken action to reconcile those two values. Since no right is absolute, this reconciliation must be accepted.

[25] As mentioned above, it is contended by the applicant that the direction impugned in the present case adversely, and unlawfully, affected both access to justice under the *Criminal Code* and the liberty of the applicant as reflected in several provisions of the *Charter*. This is an important issue. The applicant’s position is not banal. Access to justice has been recently explained (if not re-positioned) at an untouchable Constitutional level in *Trial Lawyers Association of British Columbia v Attorney General of British Columbia*, 2014 SCC 59 at paras 24 to 43, (2014) 375 DLR (4th) 599.

[26] It is argued by the applicant that the direction improperly impeded in a legally cognizable manner the exercise of liberty-related legal rights by the applicant. It is surmised by the applicant that the same direction probably adversely affected the similar liberty-based legal rights of untold other individuals during the operational period of this direction, which appears to be a period of almost a decade, until the direction was rescinded earlier in 2014 as mentioned.

[27] Before addressing the Crown’s motion for dismissal on the grounds of mootness squarely, it is necessary to more clearly situate the applicant’s motion as it presently exists and in light of the procedural history. This follows.

III Specific Context of the Mootness Motion

[28] Counsel for the applicant, counsel for the Attorney General of Alberta, standing in for the former Chief Justice and for the Clerk of that Court, and counsel for Her Majesty the Queen in right of Alberta efficiently addressed this motion and the relevant contextual circumstances seem to be largely in agreement.

[29] The relevant circumstances appear to have commenced with a letter dated May 28, 2004, signed by the then Chief Crown Prosecutor for Edmonton and addressed to the then Supervisor of the Criminal and Jury Section of the office of the Clerk of the Court setting out an understanding that “Bail applications will not be scheduled in the Court of Queen’s Bench for persons with outstanding warrants.” The letter refers to other alleged understandings but only the paragraph including the foregoing words was approved by a handwritten endorsement by the then Chief Justice which appears to have been ascribed to the letter on March 23, 2006 as “Approved”.

[30] The supervisor’s affidavit refers to a follow up document entitled “Bail Review Application Procedures – Effective June 1, 2004” which instructed the desk clerks that defence counsel could set dates for hearings by “call in or apply at the counter”. The scheduling forms must, however, be completed with the information required. The Procedures include the requirement that the matter not be set down for hearing if there are “outstanding warrants in Alberta”. There were other elements not in issue here. Checking for warrants was to be done by the desk clerks via the Information System the Court used called “JOIN”.

[31] The specific arrangement under consideration here appears to have been a step in an evolution of the “bail review” process which had been described in an announcement called a “Notice to All Members of the Bar” made by the former Chief Justice dated February 5, 2004. While that February 5, 2004 announcement did not specifically mention the impugned management direction here, the announcement shows that the Court was seeking to establish an efficient system conducive to access, particularly by reduction of the “collapse” rate of motions set

for hearing. Forms for bail review applications were proposed. The need of the Court to set a manageable list for each judge, to avoid wasting of time and resources of counsel and the Court, and to address priorities in processing of the case load goes without saying.

[32] As with the way of all flesh, those forms came to be revised. Another such Notice dated November 9, 2004 was issued by the Chief Justice. The affidavit of the supervisor also indicates that the Chief Crown Prosecutor told her on June 23, 2004, that the Chief Justice had agreed that “bail reviews were not to be set for people with outstanding arrest warrants”.

[33] On February 3, 2006, the applicant was granted judicial interim release by a Justice of the Court of Queen’s Bench in Edmonton. On March 21, 2006, counsel for the applicant filed an application for review of that order at Edmonton. After checking the JOIN system, the desk clerk took the application off of the hearing list because she determined that there was a warrant for a fine of \$150 from a traffic matter in Calgary. As noted above, that fine was paid and the warrant discharged on March 30, 2006.

[34] In the meantime, then counsel for the applicant had written to the Chief Justice asking why the application was taken off the list. The Chief Justice wrote back as follows by letter dated March 23, 2006:

This is to confirm that I approved a directive that if counsel came to the Clerk’s Office to make an application for bail review or to vary the terms of release and if there was at that time an outstanding warrant on the record, that counsel was to first deal with the Crown and make arrangements to deal with the outstanding warrant at the same time that the application was scheduled to come before our Court.

This was an administrative decision and it prevents the situation of the person being immediately re-arrested upon the application being heard by the Court if the outstanding warrant was not to be addressed at the same time.

If there are no outstanding warrants, the clerk might be approached for a hearing date in the usual manner. If there are outstanding warrants, counsel are to first make arrangements with the Crown and then come before the clerk for a hearing date.

I believe these are the instructions given to you when you approached the clerk in this matter.

[35] This letter sets out the rationale and scope of the pre-condition for getting onto the ‘bail review’ hearing list than, for example, what the Chief Crown Prosecutor of the day may have said to the court office supervisor. What the Chief Crown Prosecutor may have thought, of course, is neither here nor there. Certainly there is no reason not to take the letter of the former Chief Justice as other than accurately expressing the intent and scope of his direction: compare ***R v O’Brien***, [2011 SCC 29](#) at para 18, [2011] 2 SCR 485.

[36] On April 5, 2006, the conditions of the judicial interim release order of the applicant were adjusted by consent order of a judge of the Court. On or around April 6, 2006, an effort was commenced in the Court of Queen’s Bench to attack the direction, but, as noted above, the judge who then addressed the matter found procedural defect and stayed that first foray with leave to the applicant to file his originating notice of motion.

[37] In support of his new application, the applicant’s counsel also filed an affidavit of a legal assistant indicating that a bail review motion was faxed on June 27, 2007 and returned with a notation that a warrant was outstanding. The affidavit went on to say that the legal assistant was told by a desk clerk that the matter would *remain* on the hearing list and Crown counsel would

decide then whether to proceed with the matter anyway despite that fact. The desk clerk was reported to have told the legal assistant that “the only time that the Clerk takes it off the list is when the client is not in custody”.

[38] Crown Counsel advises that on January 23, 2014, in unrelated proceedings, the issue as to the propriety of the direction was brought to the attention of the current Associate Chief Justice by a different defence counsel. Having looked into the matter, the Associate Chief Justice communicated with representatives of the Federal and Provincial Crown, and the Criminal Trial Lawyers’ Association, asking whether there was good reason to maintain the policy. On February 13, 2014, the Associate Chief Justice wrote to the heads of prosecution offices and to the President of the Criminal Trial Lawyers Association to advise that in response to a meeting conducted on February 12, 2014:

As a result of that discussion and a review of the matter, please be advised that henceforth the fact that an accused person in custody may have outstanding warrants other than for which s/he is being detained, will not be a basis for a refusal to schedule a bail review application under s. 520 of the [Criminal Code](#). While the fact that there are outstanding warrants may be relevant to the determination on such a hearing, it will not be a bar to setting the hearing. The consequences that flow from or after the decision on any such bail review will be what they are. [Emphasis in letter]

[39] It is noteworthy that the letter of February 13, 2014, only refers to applications by people in custody. It therefore did not, at least expressly, address the situation such as that which the applicant found himself in, nor did it expressly address the interpretation said to have been suggested by a desk clerk in late June, 2007. In so saying, I hasten to add that I am not suggesting that the Associate Chief Justice intended to leave that aspect of the direction as to non-custodial cases in place. On the face of that letter alone, it is not possible to say. However, the Associate Chief Justice has written again since: see below.

[40] As it happens, following February, 2014, request of counsel to the Registrar of the Court of Appeal for the selection of a Justice of the Court of Appeal to deal with the Crown’s motion, the Associate Chief Justice wrote an additional letter to counsel for the applicant dated March 25, 2014, that read as follows:

I write because, as I will explain below, I believe this issue has become moot for two reasons: (1) the bail review of the subject accused, Mr. Larouche (and two others mentioned since) was (were) dealt with at the time on the merits, notwithstanding the application to him (them) of the directive discussed below; and (2) more importantly, independent of (and without me recalling) this litigation, the directive was reversed by me effective February 13, 2014.

In the intervening 15 months from December 2012 to March 11, 2014, I had, as noted, forgot about the matter and it had not been brought to my attention. Coincidentally, the same issue was raised with me by Mr. Fix, on behalf of an accused, on January 23, 2014. In response to the issue, I wrote to the Provincial and Federal Crowns, and the President of the Criminal Trial Lawyers Association on February 10, 2014 (copy attached). Subsequently there was a meeting with those representatives and others on February 10, 2014, and I wrote to all on February 13, 2014 (copy attached), confirming that the directive had been discontinued by me effective February 13, 2014. During this time, as I said, I had not recalled this litigation, nor did anyone mention it to me, nor did I raise it with Ms. Lowe, and thus in the result, the decision to suspend the directive was made independent of consideration of the litigation.

I leave it for you and Mr. Hurlburt to discuss and to proceed as you may be instructed. From the point of view of our Court, no further action is required and the action could be discontinued.

[41] Before me, the Crown counsel adds and counsel for the applicant does not dispute that following the letters of the Associate Chief Justice, the court criminal section office does not apply the direction to any applicant for bail review, whether in or out of custody.

[42] The language of the March, 2014, letter of the Associate Chief Justice also sheds light on the rationale for asking a member of the Court of Appeal to at least address the question of mootness. No member of the Court of Queen's Bench would be bound by the opinion of the Associate Chief Justice on the topic of mootness. All of them could be expected to act appropriately. None of them would have had to recuse on this basis. Nevertheless, counsel evidently felt the appearance of justice would be better served by having a judge of the Court of Appeal step in and at least the first judge on the recent mootness motion was inclined to agree. By comparison, the transcript of the appearance before the judge on April 7, 2006, shows that, albeit in *obiter*, he was of a mind that at least some of the matter was *not* moot. In the face of this history, I can understand why a call was made to the bullpen.

[43] This brings me back to the originating notice of motion. It set out the following requests for remedy:

An Order for judicial review in the nature of certiorari, quashing the directive of the Respondent Chief Justice of the Court of Queen's Bench that accused persons are not permitted to make applications for review of judicial interim release orders if they have outstanding warrants;

A declaration that the said directive and refusal of the Clerk to set such applications down for hearing is ultra vires and in breach of s. 520 of the [Criminal Code](#) of Canada and ss. 7, 9, 15 and 11(e) of the [Charter of Rights and Freedoms](#), and that, in this case, a declaration pursuant to s. 24(1) that the Applicant's rights were so violated.

[44] During the hearing of the argument on mootness, I asked if any counsel would object to my subdividing the topics raised in the notice of motion for the purposes of assessment of whether the mootness answer should terminate the whole or any part of the application. Counsel did not express any objection. Following that course, I now turn to the subject of mootness and to the related topic of discretion.

IV Mootness and Discretion

Is the Application Moot?

[45] The answer is yes. The issues of "ultra vires" and the remedy of "certiorari" are certainly moot because there is nothing left to quash or to declare void. The reality is that neither of those contentions had any merit in the first place for reasons adverted to above. There is no need to be ornate about this. The subject of "ultra vires" is narrowly interpreted even for tribunals where it still exists as a topic of legality: see eg *Imperial Oil Ltd v Calgary (City)*, [2014 ABCA 231](#) at para 28, 374 DLR (4th) 489. But for s 96 courts, *certiorari* and the rightly hallowed 'great writ' of *habeas corpus* simply do not lie against any exercise of judicial power (including necessarily incidental administrative judicial power) by a s 96 judge or court. Those prerogative writs (and their modern judicial review classification) are immanent *powers* of s 96 courts and have been for the ancestors of s 96 courts for centuries.

[46] As for the declaration remedy aspects, the Crown essentially offered several overlapping reasons to have the application of the applicant found to be moot and not a proper subject of discretion to entertain it: (1) the legality of the direction does not require assessment, because no such direction exists any longer; (2) there are no other forms of practical remedy that were or are sought by the applicant and none were or are available to the applicant individually; (3) a declaration of legality has no utility as a matter of social policy as it is not likely to recur at all let alone in a form to which the declaration could be usefully applied in future and (4) the impact of

the direction upon the applicant, even if the topic generally raises significant *Charter* interests, is not significant enough to justify entertaining the matter.

[47] The substratum of principles shared by the doctrine of mootness and the doctrine of standing include the “natural reluctance on the part of the courts to exercise jurisdiction otherwise than at the instance of a person who has an interest in the subject matter of the litigation in conformity with the philosophy that it is for the courts to decide actual controversies between parties, not academic or hypothetical questions.”: see *Robinson v Western Australian Museum*, (1977) 138 CLR 283 at 327; [1977] HCA 46; see also *Kuczborski v Queensland*, [2014] HCA 46; *Director- General Department of Home Affairs v Mukhamadiva*, [2013] ZACC 47; *United States v Windsor*, 570 US (2013). In other words, there is a judicial wisdom involved in choosing not to adjudicate where, in effect, the party seeking the opinion of the Court has nothing directly at stake in the answer, even as to future behaviour by that person.

[48] For Canadian law, a helpful summary of mootness appears in the text of Prof. Hogg, *Constitutional Law of Canada*, [Toronto: Carswell, 2009] at pp 59-17 to 59-18 where the learned author writes:

A case is “moot” when there is no longer any dispute between the parties. Mootness is like an absence of standing in that the court is being invited to rule on an issue that has no direct impact on the parties to the proceedings A case becomes moot when the repeal of a statute, the expiry of a lease, the death of a party, the settlement of the dispute, or some other new circumstance, resolves the dispute or makes it irrelevant.

Normally, of course, the parties to litigation will not wish to proceed after their case has become moot. If they do, it will usually be because they perceive that some principle is at stake, although the mundane question of who is to be responsible for costs is for some parties a sufficient incentive. If the parties do wish to proceed with the litigation, should they be permitted to do so? The general rule is no: a court should not decide a case that has become moot.

[49] A party’s purely subjective belief that what happened to him in the past provides a compelling “principle at stake” to go forward with the case cannot be decisive for mootness any more than it can be for standing: compare *Downtown Eastside Sex Workers v Canada*, 2012 SCC 45 at paras 1 to 2, 22, [2012] 2 SCR 524.

[50] In this respect, one can also conceive of situations where a non-moot matter is “marginal or redundant” to use language mentioned in *Downtown Eastside*. Despite the triviality, a party may wish to press that matter forward with a view to actually pursuing extensions or lines of legality inquiry that are moot or abstract. This is not to impugn the motives of the applicant here as purely strategic, namely using the alleged *Charter* breach as a ‘hook’ to attack the ability of the Chief Justice of the Court of Queen’s Bench to make case flow management or other administrative decisions without consultation. Even if that were so, it is not for me to say the motive is unholy.

[51] But where the remedy sought is declaratory, it often has the essential nature of being abstract to begin with. The sort of judicial self-discipline referred to in the mootness authorities is also reflected in the existence of discretion not to make a declaration about the legality of a past event which is clearly unlikely to recur, or which is a matter of such low significance that even if it does occur that investment in judicial resources to develop an answer to the issue would be inconsistent with the practical as well as foundational role of the courts to declare what the law is in a way that is useful and not spurious.

[52] In other words, the basis for a remedy of a declaration may be “moot” even if a private law remedy, howsoever modest and based on the same circumstances, would not be. That is because, while a private law claimant may be entitled to press forward with a minor claim before a

competent court, a claimant who is venturing into the field of public law declarations before a s 96 court should be able to show that the public law aspects of the matter are not academic and are important enough to necessitate a judicial declaratory answer.

[53] That sort of non-moot point is not escalated to significance merely by the colouration of the debate. There needs to be features of the potential debate which give the point some gravity. The lack of such features may be because the question is premature or because it is finished with. Consequently, even if a non-moot point can be linked in logical terms to legal issues of moment, but those legal issues of moment are themselves unmoored from the case, mootness doctrine can apply to the entire composite.

[54] Put another way, it is not the role of courts to provide advisory opinions about prospective but purely inchoate legal development possibilities. Nor is it the role of the courts to provide a form of adjudicative solace to assuage a sense of grievance, howsoever burning, of litigants over trivial inconveniences in their interactions with legal institutions. As Lamer CJC observed in a different context in *Delgamuukw v British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 SCR 1010 at para 186: “Let us face it, we are all here to stay.” It is the ordinary lot of mankind to be bumped in the jostling of life. So the fact that the applicant may have personally suffered some form of a set-back in his attempt to process a motion to adjust the terms of the judicial interim release order does not itself, according to the respondents, provide any reasonable basis for not declaring his applications moot.

[55] For his part, counsel for the applicant asserts firmly that his proceeding is not moot, and that his claim of injury to his legal rights remains unchanged. In his submission, the rescinding decision by the Associate Chief Justice does not revise history, particularly the applicant’s personal history, any more than a claim against the state vanishes because the legal situation has changed or its legal foundation has, in a sense, disappeared. He says that there remains a significant public interest in addressing the legality of the direction because the rescission of the direction cannot bind the future. In other words, he says that the decision to rescind is evidence of how evasive of review the question of legality could be in such cases.

[56] In this respect, one might compare, albeit acknowledging important differences in the comparator, the situation in *Hislop v Canada*, 2007 SCC 10 at para 76, [2007] 1 SCR 429, a case where an estate sought to continue a s 15 of the *Charter* claim by the deceased claimant, even though, in law, a deceased person had no equality or dignity rights at stake in any decision:

“Although s 15(1) rights are personal, the constitutional issues raised here are issues of public importance. Given the public interest in ensuring that questions of law related to such rights be correctly decided, an appeal from a judgment raising such issues must be allowed to survive the party's death pending the appeal.”

[57] But in *Hislop* there was a real and substantial question of law and it affected others. The applicant says that the fact that he is not seeking, as part of his position, any claim for an individual remedy such as damages under public or private law, does not mean he has no valid basis to seek a declaration. He says that his rights were violated and that the courts should say so. He does not accept that the impact upon him is of such a minor effect not merely for him personally but for the public interest generally that it renders his application a Quixotic private reference into an abstract question or questions.

[58] The fact that the case raises interesting legal points cannot itself justify the Court looking into and making declarations about the broad questions of legality, including Constitutional legality, that are asserted by the applicant. The reality is that none of the circumstances here provide a compelling practical *nexus* either to current reality or to real prospects of future effects such as to make them anything but moot for those purposes. It is not just that the matter is premature, as adverted to in cases such as *Phillips v Nova Scotia*, [1995] 1995 CanLII 86 (SCC), 2 SCR 97 at paras 118 to 123. It is also that the instructive nature of such a declaration would be speculative for the future. It is not possible to readily predict a situation, let alone a regularly

occurring situation arising that is evasive of review, for which a present declaration of legality would help to ensure the Chief Justice does not go astray. This case is not as clear as *G(J) v New Brunswick*, 1999 CanLII 653 (SCC), [1999] 3 SCR 46 at paras 41 to 49 where the absence of a tangible case of present right did not mean there was not a pressing and substantial legal concern that needed to be addressed. Nor is it like *Trial Lawyers (BC)*, 2014 SCC 59.

[59] In this case, on this record, the sole utility of a declaration would be in characterizing the legality of past events and how they touched legal rights of the applicant then. The question whether the Court should exercise its discretion to so legally characterize past events despite mootness becomes the crucial point, and, as indicated above, will be assessed topic by topic below.

[60] In doing so, I acknowledge that declaratory relief to characterize past events is a legitimate, if discretionary, remedy in its own right even if it has no present cash value to the litigant. That is so provided a statement of legality characterizing what happened to the party is of a matter of genuine and significant public interest and not just something individual to the party. The exercise of discretion to consider such a declaratory remedy clearly exists: see *Haig v The Queen*, 1993 CanLII 58 (SCC), [1993] 2 SCR 995 at para 130; *Ravndahl v Saskatchewan*, 2009 SCC 7, [2009] 1 SCR 181; *Manitoba Metis Federation Inc v Canada*, 2013 SCC 14, [2013] 1 SCR 623.

[61] But it should not be forgotten by the Court that there are hazards associated with giving opinions unmoored from any record to which future cases could be compared. The incremental evolution of the common law is very much done by comparing prior cases with present ones. It is ordinarily the province of legislators to state law by category definitions, or, in other words, stating law in a generalized structural manner with no need to build it on a pattern of decisions from the past. That is why one of the principles both of mootness and of standing is recognition of the limits of the law making function of the Court.

[62] This reference brings the reasoning back the Rule of Law. The law making function of the Court is most controversial when it is seen to be intrusive into the proper law making function of the legislative branch of government. But insofar as what the courts themselves do, and particularly s 96 courts, the courts themselves have a unique legitimacy in declaring whether what they did conformed to the law. There is considerable force in the applicant's position that where the Court itself, or in this case where the Chief Justice of the Court, is said to have acted unlawfully, it is important for the Court not to be seen to shirk its duty to conform to legality, or to use mootness as a means to evade finding fault with itself.

[63] As compared with situations where judicial restraint would be understood by the enlightened citizenry when it relates to judicial irradiation of laws otherwise duly enacted by Parliament, or relates to actions of Ministers of the Crown, the same enlightened citizenry might react with skepticism about the Court if there were a flagrant illegality in the past in something the Court did, and the Court failed to own up to it and used mootness as the bar. This point of judicial responsibility is a factor in the exercise of discretion, in my view, and therefore I consider it as to each of the topics mentioned in the applicant's originating notice, quoted above.

Should I Exercise Discretion to Hear Any of the Application?

[64] Inasmuch as I have covered the topics of *certiorari* and *ultra vires* above, I will not repeat myself. Suffice it to say that those topics are moot, and are not such as to warrant a hearing. I must mention in passing, so the reader does not think it has been overlooked, s 32(1) of the *Charter*. In light of *R v Mian*, 2014 SCC 54, 13 CR 7th 1, it does not appear to be open to me to express any opinion as to whether that provision would be relevant to consideration of the legality of judicial action, particularly this impugned direction, upon any of the rights actually identified by the applicant. In light of the important function of s 32 as part of the remedial framework I should refrain from any further commentary.

[65] Further, it is important to bear in mind that I have not heard any submissions from any counsel as to the substance of any of the alleged *Charter* breaches. The basis for consideration of them here is solely focused on whether the framework of the application is such as to answer the motion to declare the application moot and induce discretionary hearing. As pointed out in *Mian*, a party is to be expected to advance jurisdictional arguments without prompting. And in reply to a motion for summary judgment, a non-moving party must make the best of what the record offers, or must supplement the record. Here, the applicant appears to have made the best of what he can about the circumstances. No fault finding there. So I turn to each point.

[66] The applicant's motion for a declaration raises s 9 of the *Charter* dealing with arbitrary detention. The applicant was not detained in the sense defined by case law as to s 9 of the *Charter*. Moreover, there is nothing in this record that speaks to arbitrariness as that topic is involving in the modern law. As noted in *R v Vuozzo*, 2013 ABCA 130, at para 544 AR 271, leave denied [2013] SCCA No 314 (QL):

29 The terms "arbitrary" and "detention" each involve legal concepts. As to what is "arbitrary", McLachlin CJC observed in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at para 132, [2011] 3 SCR 134 that the concept of arbitrariness - albeit in the context of principles of fundamental justice under s. 7 of the *Charter* - was not settled. One line of reasoning linked arbitrariness to state agent action "unnecessary" to the law. Another line of reasoning had it that arbitrariness arose when "[a] deprivation of a right ... bears no relation to, or is inconsistent with, the state interest that lies behind the legislation": see *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at para 232, [2005] 1 SCR 791. (The latter approach seems favoured in *Canada (Attorney General) v. Bedford*, 2012 ONCA 186 at paras 145-147, 109 OR (3d) 1, leave to appeal to SCC granted, [2012] SCCA No 159 (QL)).

30 In our view, it is helpful here to view arbitrariness in terms of what "bears no relation to, or is inconsistent with" the law which founds the state action, whether that be statute or common law. That brings up for consideration the law's objectives, which looks at the scope of police authority to interact with the individual in the first place: see e.g. *PHS Community* at para 129.

[67] While *Vuozzo* was talking about 'state action', and the action here is by a Chief Justice, it may be appropriate to consider the legality of the direction from the perspective whether what he did "bears no relation to, or is inconsistent with" the law on which it is based. I am not in a position to decide whether the direction was arbitrary by that standard. On the other hand, it is hard to envision what evidence would shed light on it. It is true that, for the test of arbitrariness, the applicant impugns the process by which the direction came into being. The applicant notes that the impetus for the direction appears to have come from the Chief Crown Prosecutor in a 'pre-consultative' manner. Whether or not that was the main prompt, the fact remains that the reasons of the former Chief Justice state the rationale for his direction. There is simply not a suitable framework for an adjudication on whether the direction infringed the rights of the applicant under s 9. Accordingly, I am not persuaded that I should exercise discretion to hear argument on this topic.

[68] The applicant also refers to s 15 of the *Charter*. There was little said about this in the hearing or written material. This is unsurprising. I am not persuaded that there is a record upon which a useful discussion can be had on whether the applicant fell into an enumerated or analogous ground under s 15 of the *Charter*, or whether there was any stereotyping or other ill motives or effects involved in the direction. The record is a void on this. Accordingly, I am not persuaded that I should exercise discretion to hear argument on this topic.

[69] The applicant also refers to s 11(e) of the *Charter*. As to the latter, it is an interesting question, not to mention a profoundly important one, whether the right to "reasonable bail" under s 11(e) of the *Charter* embraces not merely the alternative between detention on the one hand and "bail" on the other, but also includes the types of conditions which vary the level of liberty that the

individual may have even if not actually in custody. This goes to questions about what may be properly annexed to a “bail” order: compare *R v Shoker*, 2006 SCC 44, [2006] 2 SCR 399. This case also arguably goes to what sort of processes should exist for the achievement of hearings as to “bail” and the carrying out of “bail” orders when made. Obviously Court resources are not infinite and a Chief Justice has to organize affairs somehow. That said, a veritable garden of interesting, if entirely potential, questions can be seen here. The difficulty is that none of them have any real root in the soil of the case. As much as I might personally like to embrace the horticultural challenge involved, I am not persuaded that I should exercise discretion to hear argument on this topic.

[70] Finally there is s 7 of the *Charter*. The applicant seems to me to be on solid ground to submit that his right to liberty is at least arguably engaged when one is dealing with his right to access judicial remedy of limitations on his liberty. But as earlier set out in these reasons, the foothold is not even the entire question of what rights a person not in actual custody may have to promptly access a court (without infinite resources) to rectify some element of his release terms. It is even more narrowly focused than that since it goes to timing primarily. An applicant could well miss a cut off time, or the list may be full, or there may be a shortage of judges or court rooms, or any number of factors may be involved in contributing to the development of a priority like the one evidently chosen by the former Chief Justice. Moreover, the *Charter* debate largely turns on whether any breach of s 7 conforms with the principles of fundamental justice.

[71] On this topic of principles of fundamental justice, the position of the applicant is not outside the range of reasonable inquiry. The manner in which this direction was promulgated, how it was publicized, and the ambiguities of its meaning and application are the types of questions that a “principles of fundamental justice” discussion might engage. I hasten to emphasize that, by saying this, I am not asserting a position, nor for that matter seeking to limit the scope of what might be talked about.

[72] Plainly, the course of the Court of Queen’s Bench in developing case management and processes for the administration of criminal justice is a challenging one. The Court must ensure the processes actually work fairly as well as conform with the law. For instance, giving priority to cases of people in custody over cases of condition variances does not seem irrational. The tradition of the Court appears to be to consult as best as the Court can (which is difficult with an amorphous and changing cadre of Crown counsel and defence counsel as well as other potential ‘stakeholders’). The situation in *Société Radio-Canada*, 2011 SCC 2 is an example of one way to address a major development. Not every tweak of the administration of justice, however, requires the same level of scrutiny or consultation. It may in some cases be both sufficient and fair to effect the change and wait for reaction.

[73] That said, the record of circumstances here simply do not provide a sufficient framework to make any orderly and useful assessment of such extremely important topics. *A fortiori* is that so after so many years. In the end, after anxious consideration of the utility of an inquiry into this, I am not persuaded that I should exercise discretion to hear argument on this topic.

V Conclusion

[74] The application of the applicant is moot in all its particulars. I am not persuaded that the Court should embark onto an inquiry and assessment of any of them as a matter of discretion. The originating application of the applicant is dismissed.

Heard on the 12th day of November, 2014.

Dated at the City of Edmonton, Alberta this 12th day of January, 2015.

Appearances:

T. Engel
for the Applicant

T. Hurlburt, Q.C. / R. J. Normey
for the Respondents

**Corrigendum of the Reasons for Judgment on Motion to Dismiss for Mootness
of
The Honourable Mr. Justice J. Watson**

On the first page of the judgment, the citation has been corrected to read *Larouche v Court of Queen's Bench of Alberta*, 2015 ABQB 25.

Tab 96

Chisan v Fielding, 2017 ABQB 233 (CanLII)

Source:	Court of King's Bench of Alberta
Date:	2017-03-31
File number:	1601 06249
Other citation:	98 CPC (7th) 257
Citation:	Chisan v Fielding, 2017 ABQB 233 (CanLII), < https://canlii.ca/t/h311r >, retrieved on 2026-03-23
Most recent unfavourable mention	Chisan v Akers , 2020 ABQB 746 (CanLII) [...] [17] As I explained in Chisan v Akers #1 at para 21-24 , the Clerks filed Mr. Chisan's October 9, 2020 Statement of Claim despite the Chisan v Fielding court access restrictions because the Clerks do not have the authority to evaluate the substantive content of a court document. [...]

Court of Queen's Bench of Alberta

Citation: Chisan v Fielding, 2017 ABQB 233

Date: 20170331
Docket: 1601 06249
Registry: Calgary

Between:

James Brian Chisan

Plaintiff

- and -

**Jeff Fielding, Persons A to E, Wayne Brown, Scott Miller,
Person F, Douglas Merchant, C. Wallis**

Defendants

**Memorandum of Decision
of the
Honourable Mr. Justice J.T. Eamon**

I. Introduction

[1] The Defendants apply to declare the Plaintiff a vexatious litigant pursuant to [section 23.1 *Judicature Act*](#), RSA 2000, c J-2, and to bar him from commencing any further proceedings in his own name or in the name of any other person without leave of the Court.

[2] The application is based on the Plaintiff's historical conduct in litigation involving the City of Calgary ("**City**") or its representatives, employees or agents. The Defendants claim Mr. Chisan's law suits against the City, or its employees, representatives or agents include collateral attacks on previously decided issues concerning the legality of the use of a building in the City known as 2214/2216 - 42nd Street, SE ("**2214/2216**") and frivolous or vexatious claims. They also point to numerous appeals over the years, most of which were unsuccessful or abandoned. They say Mr. Chisan's conduct in legal proceedings demonstrate that he cannot be trusted to use court resources properly and causes those sued by him to incur needless expense and effort in responding to his frivolous claims.

[3] The proceedings relied on by the Defendants include:

- (a) A prosecution against Mr. Chisan for committing an offence under the *Planning Act* in relation to the use of 2214/2216, leading to trial and conviction on September 16, 1992 (the "**1992 Trial**"), Mr. Chisan's unsuccessful application to this Court to stay the decision pending appeal to this Court, his unsuccessful appeal of the 1992 Trial decision to this Court (QB no. 9201-0408-S2), and his unsuccessful attempt to further appeal to the Alberta Court of Appeal (no. 14417AC/14462);
- (b) Mr. Chisan's unsuccessful certiorari application attempting to remove the above mentioned prosecution to Queen's Bench (QB no. 9201-1386-CO) ("**Certiorari Application**") and his unsuccessful appeal therefrom to the Alberta Court of Appeal (no. 9201-13620-A1-01);

- (c) Mr. Chisan's civil suit in this Court (action no. 9701-09641 filed July 3, 1997), which was discontinued ("**First 1997 Action**");
- (d) Mr. Chisan's civil suit in this Court (action no. 9701-16441 filed November 19, 1997), which was dismissed for want of prosecution against several defendants, and has been stayed as against City defendants since 2002 ("**Second 1997 Action**");
- (e) A contempt of Court proceeding against Mr. Chisan in this Court (action no. 9301-02696), which led to Mr. Chisan's imprisonment and other relief (the "**Contempt Proceeding**"), and Mr. Chisan's unsuccessful appeal to the Alberta Court of Appeal which was dismissed for failure to prosecute (no. 0201-0106AC);
- (f) An application against Mr. Chisan in this Court (action no. 9910-18117), for an order permitting the City to inspect 2214/2216 ("**Inspection Application**"), leading to Mr. Chisan's unsuccessful appeal to the Alberta Court of Appeal (no. 00-18723) and unsuccessful applications by Mr. Chisan in the appeal;
- (g) Mr. Chisan's civil suit in this Court (action no. 0201-17504 filed October 16, 2002), which has been stayed since 2002 ("**2002 Action**");
- (h) An injunction application by the City against Susannah Chisan in this Court (action no 0701-13288 filed December 28, 2007) ("**2007 Injunction Application**"), in which Mr. Chisan participated;
- (i) Mr. Chisan's civil suit in this Court (action no. 1301-15170 filed December 24, 2013) ("**2013 Action**"). Parts of this action were summarily struck out, and the remainder dismissed by summary judgment;
- (j) Mr. Chisan's civil suit in this Court (action no. 1601-06249 filed May 10, 2016) ("**2016 Action**"). This action was summarily struck out by a Master of this Court, leading to Mr. Chisan's appeal in this Court which was struck out, and Mr. Chisan's appeal from that decision to the Alberta Court of Appeal (no. 1601-02555AC) which was struck for failure to prosecute.

II. The background, procedural objections, and evidence considered

a. Background

[4] The present application arises in the 2016 Action. Mr. Chisan sued various named and unnamed parties, alleging loss from various allegedly unlawful actions. The underlying complaint in the action is described in para 1 of the Statement of Claim:

“The cause of this Action is that the Defendants failed to effect disclosure respecting their actions and omissions, trespassed, and impaired the Plaintiff’s constitutional rights not in accordance with the principles of fundamental justice.”

[5] Generally speaking, the allegations relate to seizure of various properties, without “disclosure”. The Plaintiff says he was the owner of a property in the City referred to in these reasons as “**Lots 19 to 24**”, before the lots were seized by “Defendants A to E”. Another property (2214/2216) was allegedly seized by a City investigator and a City bylaw officer. “Defendant F” was another bylaw officer allegedly engaged to seize personal property and renovation materials at the same address. Neither allegation specifies the type of seizure. It is further alleged in para 5 of the Statement of Claim that a City manager has the obligation to effect disclosure and “facilitate actions of The City Actors that demonstrate compliance with the Plaintiff’s right to be secure against unreasonable seizure”. The Plaintiff also complains about a notice issued by a City corporate security officer prohibiting him from being on lands owned or occupied by the City. Finally, Mr. Chisan sued a City lawyer for allegedly committing fraud by failing to disclose that he did not have a solicitor and client relationship with the individual defendants in the 2013 Action.

[6] The Plaintiff seeks various damages and “an order for disclosure”.

[7] The named Defendants and un-named Defendant F are alleged to be various representatives of the City -- two investigators, a manager, a corporate security officer, and a lawyer.

[8] The Statement of Claim does not explicitly allege a nexus between the seizure of Lots 19 to 24 and activities of the City (or identify the persons who effected seizure of Lots 19 to 24 as the City or its personnel), but in fact that nexus exists.

[9] Lots 19 to 24 were under enforcement proceedings commenced by a writ of enforcement issued by the City, who as instructing creditor instructed that they be sold in the enforcement proceedings. The City is a corporation (*Municipal Government Act*, RSA 2000, c. M-26, s. 4), and therefore a person. With that context and the allegations of para 5 of the Statement of Claim, it is obvious that the un-named Defendants are the instructing creditor (the City) and perhaps individual representatives or agents of the City.

[10] The 2016 Action was struck by a Master in Chambers on June 10, 2016. The Plaintiff appealed that order. His appeal was returnable in morning Chambers on August 19, 2016.

[11] This caused the Defendants to file the present vexatious litigant application on August 9, 2016 in the 2016 Action, also returnable on August 19, 2016.

[12] At the return of the applications on August 19, 2016 Campbell J adjourned the vexatious litigant application to a full day special chambers application.

[13] Notice of the present application was provided to the Minister of Justice and Solicitor General, as required by [section 23.1](#) of the *Judicature Act*. By letter dated August 10, 2016 Alberta Justice and Solicitor General acknowledged notice to the Attorney General of Alberta (who is also the Minister of Justice and Solicitor General) and advised the Attorney General of Alberta would not be taking a position or appearing.

[14] The Court raised during the special chambers application whether it might be an irregularity to make a motion in a struck action. However, Rule 6.3(1) permits such an application. Even if it did not, Campbell J's order obviously was meant to continue the application so that it could be heard on its merits. A section 23.1 application would be an appropriate response in the 2016 Action to ongoing efforts by the Plaintiff to try to keep the action alive. In any case, it would now be too late to complain about such an irregularity, if it was irregular: Rule 1.5(3).

b. Mr. Chisan's procedural objections

[15] At the outset of the application before me, Mr. Chisan raised various procedural objections.

[16] First, he noted Ms. Sinclair (a lawyer with the City of Calgary Law Department, who appeared on behalf of counsel for the Defendants at the application) is a "corporate lawyer" for the City of Calgary. He requested a clear statement of who she represents and how that comes to be. Second, he said the Defendants needed leave to allegedly limit Mr. Chisan's freedom of expression rights under the Canadian constitution. Third, he submitted the City cannot initiate proceedings under the *Judicature Act*.

[17] The Court dismissed the first objection, relating to Ms. Sinclair's role as counsel, during the hearing.

[18] Pursuant to Rule 2.24(1) of the Alberta Rules of Court, a lawyer becomes a lawyer of record by filing a record in an action. Ms. Sinclair or the City of Calgary Law Department became the lawyer of record for the Defendants in the 2016 Action by filing the motion to strike the action, and continued to be described in that capacity in the present vexatious litigant application.

[19] This Court has jurisdiction to embark on the inquiry requested by Mr. Chisan. Courts of inherent jurisdiction have supervisory power over lawyers as officers of the court and may exercise this power to ensure the proper administration of justice: *Canadian National Railway Co v. McKercher LLP*, 2013 SCC 39 at paras 13 - 16.

[20] Generally speaking, the Court should be reluctant to inquire into the retainer of counsel who becomes a lawyer of record. Lawyers are officers of the Court who have ethical obligations, including of competence and candour, which makes reliance on their representations of authority appropriate in most cases. The terms of their retainers with their clients are privileged from disclosure.

[21] Mr. Chisan did not articulate an intelligible basis to inquire into Ms. Sinclair's authority.

[22] Mr. Chisan's second objection was that the application will limit his constitutional right to freedom of expression so the Defendants would require leave of the Court. Later in his submissions, he acknowledged that he was not challenging the validity of the applicable provisions of the *Judicature Act*. Rather, he was submitting that his constitutional rights are to be considered in the balance in deciding whether to make an order.

[23] There is no requirement on the Defendants, who are parties to the action, to get leave to apply under [section 23.1](#) of the *Judicature Act*.

[24] It may be that Mr. Chisan is referring to the requirement in sub-section 23.1(2) that a person, other than a party, a clerk of the Court or the Minister of Justice and Solicitor General, obtain permission to apply. The City is not explicitly named as a Defendant, so Mr. Chisan might perceive that permission is required where counsel making the application was a member of the City law department.

[25] As explained above, the application has been made by the Defendants. The City is obviously one of the Defendants. No permission is required.

[26] There is no merit to the second objection.

[27] The third objection is that the City cannot initiate proceedings under the *Judicature Act* or bring a proceeding to limit one's freedom of expression.

[28] A municipality has the powers of a natural person except to the extent they are limited by an enactment: *Municipal Government Act*, s. 6. No limitation was cited to me that the City cannot protect itself from vexatious litigation arising from enforcement or litigation proceedings that arise in the course of its governmental operations. I conclude that there are no such gaps in its powers. In any case, other Defendants also made the application.

[29] The third objection is without merit.

c. The evidence tendered by the Defendants

[30] The motion proceeded on the basis of books tendered by the Defendants containing copies of numerous pleadings, orders and other records in previous court proceedings and the 2016 Action. These were served on Mr. Chisan on August 17, 2016 with a letter informing him that they would be relied on in support of the application. Additional records were appended to the Defendants' written brief later served on Mr. Chisan. There was no clerk's certificate authenticating the records as true copies of records on the Court's file. Counsel, who is an officer of the Court, represented that these records are true copies of the original court proceedings by tendering them to the Court.

[31] Mr. Chisan did not object before me to the manner in which the Defendants provided these materials for use in the application. He did not suggest any individual records were not authentic or complete copies.

[32] It would have been preferable that the Defendants obtain and provide copies of records obviously bearing an original certification or authentication under Rule 13.29(2) or the *Evidence Act* RSA 2000, C.A-18, section 33, 44 or by following the procedure in *R v Tatomir* (1990), 1989 ABCA 233 (CanLII), 69 Alta. L.R. (2d) 305 (CA), leave refused [1989] S.C.C.A. No. 448.

[33] For each transcript, it would be preferable to provide transcripts certified by the reporter, including digitally certified versions. Those are admissible in evidence, without proof of the

signature of the reporter: [Recording of Evidence Act](#), RSA 2000, c. R-7.5 and the [Recording of Evidence Regulation](#), A.R. 169/2009 and predecessor regulations; Rule 13.47.

[34] Notwithstanding the preferable procedures, it is not unusual for counsel to rely on photocopies of court records because any objection will typically result in a brief adjournment to obtain a certified or authenticated record. The present matter was booked for hearing on the special list for many months. Mr. Chisan knew the City would rely on the records. Mr. Chisan did not file any written brief prior to the application as required by Queen's Bench Practice Note 2, and did not otherwise object to the admissibility or authenticity of the copies. Mr. Chisan has frequently represented himself in the Alberta Courts since at least 1992, including in Chambers and Special Chambers applications and should know the rules by now.

[35] In this case, not all records were authenticated in the ordinary ways. However, there is really no doubt that the records submitted by the Defendants are authentic for the reasons outlined below. Asking for the formality of additional certifications would be useless and would cause further delay. The Court therefore accepts the records tendered by the City as true copies of the original proceedings as represented by counsel and given the absence of objection by Mr. Chisan.

[36] The following explains why there is no real doubt over the authenticity of the records.

[37] All of the records provided by the Defendants, other than transcripts of proceedings, reasons for decision, a letter from the Registrar of the Alberta Court of Appeal dated April 4, 2003, and a Struck Certificate - Late Appeal Record dated January 31, 2017 issued by the Registrar of the Alberta Court of Appeal, appear to be photocopies of stamped office copies of court filed documents or, in some cases, photocopies of court certified copies.

[38] All of the transcripts, save two, were proceedings in the Court of Queen's Bench. The two exceptions were:

- (a) A transcript of the 1992 Trial in the Provincial Court. A certified copy of that transcript was filed in this Court in relation to various proceedings in this Court following Mr. Chisan's conviction.
- (b) An extract from a transcript of a provincial offence proceeding on September 23, 2008 against Mr. Chisan's spouse in the Provincial Court. That document appears to be a photocopy of a certified copy.

[39] Transcripts provided by the Defendants for pre-2015 proceedings in Queen's Bench were photocopies of certified transcripts, other than the oral reasons for judgment of Phillips J on April 19, 2002 and an extract of reasons delivered October 23, 2002 where no certificates were provided.

[40] Transcripts provided by the Defendants for 2015 and 2016 proceedings in Queen's Bench were digitally certified.

[41] Most of the reasons for decision reproduced by the Defendants in their books are published versions of previous reasons for decision of the Alberta courts in matters concerning Mr. Chisan or are copies from the Court:

- (a) ***R v Chisan***, [1992] A.J. No. 1108, the decision of the Alberta Court of Appeal in appeal no. 13266 dismissing Mr. Chisan's appeal from a decision by Power J wherein Mr. Chisan argued that the court lost jurisdiction in a provincial offence proceeding;
- (b) ***R v Chisan***, [1992 CanLII 6234 \(AB KB\)](#), [1992] A.J. No 1267, 7 Alta. L.R. (3d) 254, the decision of Montgomery J refusing Mr. Chisan's application to stay the decision of Stevenson PCJ in the 1992 Trial pending appeal;
- (c) ***R v Chisan***, [1993 CanLII 16395 \(AB KB\)](#), [1993] A.J. No. 509, 142 A.R. 201, 15 M.P.L.R. (2d) 275, the decision of Dixon J dismissing Mr. Chisan's appeal from conviction in the 1992 Trial (The original reasons for this reported decision are on

the Queen's Bench appeal file, and are the same as the reported version other than the paragraph numbers added);

- (d) **R v Chisan**, [1994 ABCA 14 \(CanLII\)](#), [1994] A.J. No. 63, 149 A.R. 394, 16 Alta. L.R. (3d) 371 (CA), leave to appeal dismissed [1994] S.C.C.A. No. 109, the dismissal of Mr. Chisan's appeal from the decision of Waite J in the Certiorari Application;
- (e) **R v Chisan**, [1994 ABCA 209 \(CanLII\)](#), [1994] A.J. No. 515, [1994] 9 W.W.R. 147, 21 Alta. L.R. (3d) 95, 155 A.R. 264, the decision of the Alberta Court of Appeal finding that court did not have jurisdiction to entertain Mr. Chisan's appeal from the decision of a single judge refusing leave to appeal from the decision of Dixon J;
- (f) **478370 Alberta Inc v. Chisan**, [1998 ABCA 169](#), 219 A.R. 6, leave to appeal dismissed [1998] SCCA No 485, the decision of the Alberta Court of Appeal dismissing Mr. Chisan's appeal from a Queen's Bench chambers decision granting an application for judgment against Mr. Chisan. This decision reviews the "difficult history" of that litigation, including the contempt finding against Mr. Chisan for refusing to answer questions on cross-examination, Mr. Chisan's abandonment of an appeal of a contempt order, and Mr. Chisan's failing to call oral evidence at the final application after obtaining an order for viva voce evidence in the application. Mr. Chisan was represented by counsel in the application and on the appeal;
- (g) **Calgary v Chisan**, [2000 ABCA 313](#), 271 A.R. 384, 4 C.P.C. (5th) 222, 16 M.P.L.R. (3d) 178, the decision of the Alberta Court of Appeal in appeal no. 99-18427 allowing the City's appeal from the decision of Lutz J striking out the Contempt Proceeding for want of prosecution, and restoring the Contempt Proceeding;
- (h) **Calgary v Chisan**, [2001 ABCA 14](#), 286 A.R. 85, 21 M.P.L.R. (3d) 194, the decision of the Alberta Court of Appeal on Mr. Chisan's appeal from the Order of Wilkins J in the Inspection Application;
- (i) **Calgary v Chisan**, [2002] A.J. No. 1713, 32 M.P.L.R. (3d) 256, the decision of Phillips, J. issued March 1, 2002 in the Contempt Proceeding finding Mr. Chisan in contempt of court;
- (j) **R v Chisan**, [2003 ABCA 19](#), [2003] A.J. No. 49, the decision of O'Leary JA granting Mr. Chisan judicial interim release from imprisonment ordered by Phillips J;
- (k) **R v Chisan**, [2003 ABCA 68](#), [2003] A.J. No. 241, the January 31, 2003 decision of the panel imposing conditions on Mr. Chisan's appeal from the decision of Phillips J finding Mr. Chisan in contempt of court and sanctioning him;
- (l) **Calgary v Susannah Chisan**, [2008 ABQB 320](#), [2008] A.J. No. 807, the decision of Erb J in the 2007 Injunction Application against Susannah Chisan.

[42] The Court may take notice of court records in appropriate cases: **Wong v Giannacopoulos**, [2011 ABCA 277](#) at para 6; **Calgary (City) v. Alberta (Energy and Utilities Board)**, [2010 ABCA 132](#), at para 193; **Kin Franchising v. Donco** (1993), [1993 ABCA 7 \(CanLII\)](#), 7 Alta. L.R. (3d) 313 (C.A.) at para 7 (C.A.). This principle applies to published reasons for decision and records on the Court's proceedings file. It also applies to records of lower courts removed to this Court by certiorari: Stevenson and Côté, *Civil Procedure Encyclopedia* (Edmonton: Juriliber, 2003), p 45-55. Similarly, the principle obviously applies to records of proceedings of a lower court deposited in this Court in connection with an appeal to this Court, or to records of a higher court placed on the files of this Court in the course of an appeal from this Court. Examples are transcripts filed in connection with a summary conviction appeal to this Court, or a notice of appeal from an order in this Court to the Alberta Court of Appeal.

[43] The Court may take notice of proceedings in the Court and did so. The Court reviewed Queen's Bench files in action no. 9201-0408-S2, 9201-1386-CO, 9301-02696, 9701-09641, 9701-16441, 9901-18117, 0201-17504, 0701-13288, 1301-15170, and 1601-06249 to ensure that the copies of records tendered by the Defendants which were on those files were authentic.

[44] In reviewing the Queen's Bench files, the Court did not take note of other records in the files except: (1) a warrant of committal issued October 23, 2002 reflecting the decision of Phillips J contained in the extract of the transcript of proceedings of the same date submitted by the Defendants; and (2) an Order of Master Laycock made May 26, 2005 dismissing the Second 2007 Action against Her Majesty, as noted in a procedure record print of that action from the Clerk of the Court and submitted by the Defendants.

[45] The Court concluded there was no real doubt over authenticity because:

- (a) the pleadings, affidavits, motions, discontinuance of the First 1997 Action, formal orders filed in Queen's Bench, transcript of the 1992 Trial, reasons for decision of Dixon J dated June 21, 1993, Mr. Chisan's Notice of Appeal filed July 22, 1993 from the decision of Dixon J, Mr. Chisan's Notice of Appeal filed March 10, 2000 from the decision of Wilkins J in the Inspection Application (appeal no. 00-18723), Order of Hunt JA made October 31, 2000 in appeal no. 99-18427 and 00-18724, Mr. Chisan's Notice of Appeal filed March 27, 2002 from decisions of Phillips J in the Contempt Proceeding, and Mr. Chisan's Notice of Appeal from the decision of Campbell J in Action no. 1601 - 06249, were confirmed to be authentic by comparing them to the Court copies on the Queen's Bench files;
- (b) the transcripts of all proceedings taking place in 2015 and 2016 attached to the special Defendants' chambers brief are digitally certified and admissible under the *Recording of Evidence Act*;
- (c) the rest of the transcripts (other than two extracts from transcript being reasons of Phillips J on October 19, 2002 and October 23, 2002 re further sanction of 6 months imprisonment, the latter attached to the Defendants' special chambers brief) purport to bear a signed certification and no objection was taken to their admission or use in the present application;
- (d) the contempt findings and sanction decisions of Phillips J described in the transcripts referenced in sub-para 45(c) are accurately reflected in her formal Order of April 19, 2002, and a subsequent a warrant of committal that she signed dated October 23, 2002. No objection was taken by Mr. Chisan to the use or admission of those transcripts;
- (e) the Court can take and has taken judicial notice of the published reasons for decision listed in para 41;
- (f) the remainder of the records tendered by the Defendants is a small group of photocopies of records not found filed on the Queen's Bench files: (1) Mr. Chisan's filed Notice of Appeal in the Alberta Court of Appeal, 1992, in appeal no 13266 (appeal dismissed - see para 41(a) above); (2) Mr. Chisan's filed Notice of Motion in appeal no. 14417 seeking leave to appeal (leave refused - see para 41(e) above); (3) Mr. Chisan's filed motions, July 25, 2000 and October 26, 2000, Mr. Chisan's filed affidavit, October 26, 2000, and the Orders of Hunt JA filed August 3, 2000, in appeal no. 99-18427 and 00-18723; (4) Order of Paperny JA dated March 13, 2003 and letter from the Registrar of the Alberta Court of Appeal dated April 4, 2003 in appeal no. 02-0106AC; (5) Struck Certificate – Late Appeal Record, January 31, 2017, in appeal no. 1601-0255AC. No objection was taken by Mr. Chisan to their use or admission into evidence.

[46] Moving from authenticity to use of the records, the Court was mindful of limitations on the evidence:

- (a) Mr. Chisan suggested that the Court should not refer to Madam Justice Erb's reasons for decision in the 2007 Injunction Application. Mr. Chisan said he was not a party to that proceeding. The records provided by the Defendants do not provide sufficient information to make a finding that he was a privy to that proceeding. Therefore, the Court has not considered the findings in Madam Justice Erb's reasons for judgment in its deliberations;
- (b) A similar issue arises with respect to an Order of Romaine J in the 2007 Injunction Application disqualifying Mr. Chisan from representing Mrs. Chisan in those proceedings. It is not apparent from the face of the Order that Mr. Chisan participated in the submissions concerning disqualification or was privy to it. The Court has not considered that part of the Order in its deliberations;
- (c) A similar issue arises with respect to the September 23, 2008 transcript in the City's materials recording a provincial court judge's disqualification of Mr. Chisan from representing Susannah Chisan in a prosecution in Provincial Court. Again, it is not apparent from the materials tendered by the City whether Mr. Chisan participated in that disqualification application. So the Court has disregarded it;
- (d) Where transcripts were reviewed, they were taken as proof of what was said or found by the court, but not otherwise as proof of the truth of the contents. For this distinction, see for example, *R. v. WBC*, 2000 CanLII 5659 (ON CA), [2000] O. J. No 397 (CA) at paras 30 - 34.

[47] Mr. Chisan provided an affidavit sworn April 15, 2008 supporting Susannah Chisan in the 2007 Injunction Application. The Court has considered all of Mr. Chisan's affidavits provided in the Defendant's supporting materials in considering whether he is a vexatious litigant.

III. Applicable Law

a. General principles

[48] [Section 23.1](#) of the *Judicature Act* authorizes a judge of this Court to restrict the right of a person start or continue litigation in Alberta courts where that person has initiated or engaged in vexatious proceedings:

23.1(1) Where on application or on its own motion, with notice to the Minister of Justice and Solicitor General, a Court is satisfied that a person is instituting vexatious proceedings in the Court or is conducting a proceeding in a vexatious manner, the Court may order that

- (a) the person shall not institute a further proceeding or institute proceedings on behalf of any other person, or
- (b) a proceeding instituted by the person may not be continued, without the permission of the Court.

(2) An application under subsection (1) may be made by a party against whom vexatious proceedings are being instituted or conducted, a clerk of the Court or the Minister of Justice and Solicitor General or, with the permission of the Court, any other person.

...

(7) A person against whom an order has been made under subsection (1) or (4) may apply to a Court for permission to institute or continue a proceeding in that Court and the Court may, subject to any terms or conditions it may impose, grant permission if it is satisfied that the proceeding is not an abuse of process and that there are reasonable grounds for the proceeding.

[49] [Section 23\(2\)](#) of the *Judicature Act* provides a non-exclusive definition of instituting vexatious proceedings or conducting a proceeding in a vexatious manner:

For the purposes of this Part, instituting vexatious proceedings or conducting a proceeding in a vexatious manner includes, without limitation, any one or more of the following:

- (a) persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction;
- (b) persistently bringing proceedings that cannot succeed or that have no reasonable expectation of providing relief;
- (c) persistently bringing proceedings for improper purposes;
- (d) persistently using previously raised grounds and issues in subsequent proceedings inappropriately;
- (e) persistently failing to pay the costs of unsuccessful proceedings on the part of the person who commenced those proceedings;
- (f) persistently taking unsuccessful appeals from judicial decisions;
- (g) persistently engaging in inappropriate courtroom behaviour.

[50] Any one or more of those indicia is a basis to find a person has engaged in vexatious misconduct: *Chutskoff v. Bonora*, [2014 ABQB 389](#) at para [131](#), leave to appeal refused, [2014 ABCA 444](#).

[51] In *Chutskoff* at para [92](#), Justice Michalyshyn provided a catalogue of potential features of vexatious litigation or abusive proceedings, which provides a useful guide to assessing a litigant's conduct. The Court was mindful of this catalogue in assessing Mr. Chiasan's litigation history.

[52] In determining whether to make an order the Court was also mindful of the difference between vexatious proceedings and vexatious litigants. Section 23.1 contemplates persistent conduct: *O. (R.) v F. (D.)*, [2016 ABCA 170](#) at para [38](#).

[53] The entire history of the matter must be reviewed, to determine if there is a principled basis to make an order. That basis is demonstrated where the litigation history demonstrates a need to have litigation activities restricted to prevent future abuses of court processes: *644036 Alberta Ltd v Morbank Financial Inc*, [2014 ABQB 681](#), at paras [51 - 97](#).

[54] In *Hok v Alberta*, [2016 ABQB 651](#), leave to appeal refused [2017 ABCA 63](#), Verville J describes the issues that should be considered relating to the impact or scope of a vexatious litigant order:

36 I conclude that when a court considers limits to future court access by a person with a history of litigation misconduct the key questions for a court are:

- 1. Can the court determine the identity or type of persons who are likely to be the target of future abusive litigation?
- 2. What litigation subject or subjects are likely involved in that abuse of court processes?
- 3. In what forums will that abuse occur?

[55] The Order should be a proportional response to the conduct proved on the application. Where the vexatious litigant focussed their litigation efforts on an identified group, it may not be justifiable to regulate that litigant's access to Courts to pursue claims against others: *O.(R.)* at para 39 - 40.

b. Mr. Chisan's constitutional objections

[56] As stated above, Mr. Chisan suggests the Court take into account his freedom of speech interests in deciding whether to make an order.

[57] No authority was cited to the Court that the act of filing a statement of claim is a form of speech that is protected under the Charter. Whether or not filing a statement of claim is protected speech, there is no doubt access to a Canadian superior court is protected: *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, at para 18 to 43.

[58] However, the Court is satisfied that whatever the source of the right to file or bring legal proceedings, the right does not extend to vexatious or abusive litigation.

[59] In *Trial Lawyers Association of British Columbia*, McLachlin CJC speaking for the majority stated:

47 Of course, hearing fees that prevent litigants from bringing frivolous or vexatious claims do not offend the Constitution. There is no constitutional right to bring frivolous or vexatious cases, and measures that deter such cases may actually increase efficiency and overall access to justice.

[60] A vexatious litigant order is a reasonable screening procedure:

8 The applicant argues that the vexatious litigant order denies her the basic right of a Canadian citizen to commence a legal action. That is not the true effect of the order. The applicant can still commence any legitimate action; she is only subject to a screening procedure to make sure that any action she proposes is properly founded in fact and law, and will be diligently prosecuted. The vexatious litigant order does not substantially prejudice the applicant.

Wong, at para 8.

[61] Given the Court's focus, in deciding whether to make a vexatious litigant order, on the nature of the litigant and the need to protect from anticipated abuse of court process, the control of frivolous, vexatious, and abusive litigation is a valid exercise of legislative and court authority: *Hok*, at para 37 of 2016 ABQB 651.

c. Form of order

[62] In *KE v CSM*, 2016 ABQB 342 at para 36 the Court provided recommendations for court orders to assist persons who are typically self-represented litigants to make informative and focussed applications for permission to commence an action, for example:

1. The legislation that authorizes the restriction to access court processes.
2. A description of what activity has been restricted, for example, whether the vexatious litigant has been restricted from filing any application, or instead certain kinds of applications.
3. What preliminary requirements or preconditions may be necessary prior to a leave application.
4. The documents and information that are required for a proper leave application to obtain permission to file and application.
5. To what judge or judges the application should be directed.
6. In what forum the application will be heard, typically in open court and on the record or thorough paper appreciation.
7. That notice of the leave application to other parties is required, and to any other persons as the court directs.

[63] The reported cases show differing approaches to whether an unsuccessful applicant for permission to sue may apply more than once. Some orders provide that an application for permission shall not be made again before another judge unless the applicant discloses in writing to the second judge that the application has previously been dismissed (for example, *Wong v.*

Giannacopoulos, 2011 ABCA 206 at para 11; *Chutskoff* at para 135). Others provide that an application for permission which is dismissed shall not be made again (*Re Boisjoli*, 2015 ABQB 629 at para 110; *Hok*, at para 51 of 2016 ABQB 651).

[64] A permission application engages the same values of finality and prudent use of court resources as any other application. An applicant should be obliged to diligently assemble his or her evidence and arguments on the first application, and should not be permitted or encouraged to make multiple applications if new evidence or theories of the claim are later developed. However, sometimes legitimate claims must be commenced out of concern for an expiring limitation period or other good reason where not all the evidence is yet discovered and could not be discovered using due diligence.

[65] The Court is reluctant to permanently prohibit what may be a meritorious action only because the applicant may have applied prematurely and been refused leave for that reason. A vexatious litigant order should provide some ground rules about what the applicant must establish if there has been a previous dismissal, to balance a litigant's interest where not all evidence may be available at the outset of litigation and the public interest in ensuring that if a subsequent application is brought it is only because there is material, fresh information that could not have previously been discovered by a claimant who investigated his or her claim in a diligent fashion.

IV. Mr. Chisan's litigation history

[66] As noted, it is necessary to review the entire history of the matter to ascertain whether there is a principled basis on which to make a Section 23.1 order. The facts determined by the Court are set out below.

a. The background - the prosecution alleging an offence under the *Planning Act*

[67] In 1991, Mr. Chisan and Susannah Chisan were charged that:

“On or about the 6th day of November A.D. 1991, aforesaid, did unlawfully contravene [amended during trial on September 16, 1992 to “did commit an offence under”] Section 154 (a.1) of the *Planning Act R.S.A. 1980 C., P-9*, by contravening Section 16(1)(b) of the City of Calgary Land Use Bylaw, Number 2P80, as amended, in that the aforesaid did make use of land in a manner contrary to the provisions of this bylaw, to wit: to have more than the allowable number of dwelling units in the building at 2214/2216 42 St. S.E., Calgary.”

[Information on Behalf of her Majesty the Queen, sworn November 22, 1991, Provincial Court docket no. 11593753P1]

[68] The basis of the prosecution was that the building configuration was an illegal fourplex under zoning or land use provisions that permitted a maximum of 2 dwelling units in a semi-detached building. The City law department had conduct of the prosecution.

b. Certiorari Application

[69] Mr. Chisan made a certiorari application in respect of the prosecution described in para 67 by motion filed by Mr. Chisan (and Susannah Chisan, against whom the charge was later withdrawn) on August 27, 1992, returnable November 30, 1992.

[70] This application included an autrefois acquit plea, alleging that a previous dismissal of another prosecution was a bar to any subsequent proceedings in the same cause. The previous dismissal relied on was an order of Egbert J on November 25, 1991 dismissing a charge of contravening a development officer's order in relation to the same property.

[71] The application further stated that if there was not sufficient evidence in respect of the same cause to demonstrate the autrefois acquit argument, then the Provincial Court declined jurisdiction to permit the applicants to call evidence or there was a breach section 7 of the Charter

because the Provincial Court allegedly declined the applicants the right to call evidence before trial about the dismissal, the date of the unlawful development and exemptions under the *Planning Act*.

[72] The motion also claimed:

“If the Provincial Court is not willing to respect the presumption of innocence, the Applicants seek the opportunity to prove exemption to the law, if the law is applicable.”

[73] The motion was addressed to the Crown and 8 judges of the Provincial Court.

[74] The Crown (as noted, the City law department had carriage of the proceeding) applied to this Court, by motion filed September 8, 1992 in the Certiorari Application, to quash that proceeding so that the trial could proceed in Provincial Court as scheduled for September 16, 1992. This motion was returnable September 14, 1992.

[75] Mr. Chisan filed a motion in the Certiorari Proceeding on September 14, 1992 returnable September 14, 1992 for a remedy under section 24(1) of the Charter. The precise remedy sought is not specified. This motion quotes directly from the Crown’s motion and re-asserts the *autrefois* acquit plea. It advances various objections including that the “Respondent” (clearly a reference to counsel from the City law department) knew the special plea was disposed of without evidence and that this lawyer “failed in his duty to be fair and as an officer of the Court” in failing to advise another judge that the plea of *autrefois* acquit does not require there to have been a trial on the merits. The motion also accuses that counsel of knowingly making a false statement in a submission in response to Mr. Chisan’s position that the Provincial Court had lost jurisdiction, and of “deliberately and wilfully choosing to ignore the law”. It says that the Crown’s application was “purely vexatious and malicious”. This motion concludes with the following ground:

The Respondent knows that, notwithstanding his personal motives or views, the decision of the Court of Appeal is binding until and unless varied by the S.C.C.”

[76] Waite J heard the Crown’s motion on September 14 1992, and heard submissions from Mr. Chisan. Waite J ordered that the scheduled trial of the matter in Provincial Court proceed, and vacated the Certiorari Application and struck it from the November 30, 1992 Chambers list.

[77] Mr. Chisan’s appeal from the decision of Waite J was dismissed by the Alberta Court of Appeal on January 14, 1994. The court found that the previous charge of contravening the development officer’s order was factually and legally distinct from the charge of making use of the land contrary to the land use bylaw.

[78] A motion by Mr. Chisan for leave to appeal from that decision was dismissed by the Supreme Court of Canada on June 9, 1994.

c. 1992 Trial and appeal therefrom

[79] Mr. Chisan did not appear on September 16, 1992 for the trial of the charge described in para 60. The Trial Judge, Stevenson PCJ, was informed that Mr. Chisan had appealed Waite J’s decision to the Alberta Court of Appeal. Stevenson PCJ decided to proceed *ex parte* in the absence of the accused, following the Crown’s submission that the accused was well aware of his trial date. The charge was withdrawn against Susannah Chisan on the same appearance.

[80] Mr. Chisan was convicted of the offence on September 16, 1992. He was fined \$2500. The Court ordered him to make the property comply with the land use bylaw by December 31, 1992 by converting it into a single family dwelling or a duplex.

[81] Mr. Chisan appealed the summary conviction on October 16, 1992 to this Court. This appeal included his theory that the property was built before Bylaw 2P80 came into force and the existing use was grandfathered. Various Charter and other breaches were claimed arising from what Mr. Chisan characterized as an “*ex parte* trial”, and Mr. Chisan asserted that the court lost jurisdiction, proceedings were barred by statutory time limitations, Mr. Chisan was denied the right

to be informed of the specific offence, and, the offence was unknown to law. The notice of appeal concludes with the following ground:

11. The ex parte sentence of the maximum penalty (\$2500) permitted under the planning act is contrary to s2 of the said statute and sanitizes the wanton conduct of the City of Calgary: The injunctive like order disposes [sic] the Appellant of his property”.

[82] Mr. Chisan applied to this Court to stay the fine and the compliance order pending determination of his appeal. That application was dismissed by Montgomery J on December 18, 1992. The requested stay of the fine was dismissed because “Mr. Chisan has delayed these proceedings without cause over a lengthy period of time in the earlier part of this year and continues to delay” The request for a stay of the compliance order was dismissed because the Court had no jurisdiction to stay it.

[83] Mr. Chisan’s appeal from the conviction and sentence was dismissed on June 21, 1993 by Dixon J. His Lordship ordered compliance with Judge Stevenson’s compliance order by August 31, 1993.

[84] Dixon J observed:

“Mr. Chisan elected to adopt what I describe as a “cute” or “fancy” posture as regards this proceeding in general, including his refusal to plead to the charge or to accommodate the setting of trial dates ...”

[85] Mr. Chisan attempted to appeal Dixon J’s decision to the Alberta Court of Appeal on July 22, 1993. This notice again propounded the theory that the property was effectively grandfathered from Bylaw 2P80. Various Charter grounds were raised, and the grounds of the notice of appeal concluded with a request:

... I ask the Court of Appeal to answer one simple question:

What have I done that is prohibited by law?”

[bold face in original]

[86] A single judge of the Alberta Court of Appeal refused leave to appeal from the decision of Dixon J, concluding the judgment did not involve a question of law of sufficient importance to justify a further appeal. Mr. Chisan appealed the refusal of leave to appeal. A three judge panel held on June 28, 1994 that the Court did not have jurisdiction to entertain an appeal from the refusal of leave to appeal.

d. First 1997 Action

[87] On July 3, 1997, Mr. Chisan and 4 other individuals sued, in this Court, the City of Calgary and an individual alleged to be a coordinator in the City finance department. This action claimed damages, and various injunctions and disclosure orders. The complaint concerned the alleged insufficiency of a local improvement petition and negligence in relation thereto. The suit also advanced claims based on alleged City refusals to provide information, and includes the following particular of negligence:

“11. by asserting by conduct that he determines matters and that both the [Municipal Government Act](#) and the [Canadian Charter of Rights and Freedoms](#) are intrusive nuisances administratively, and that the taxpayer is irrelevant, except to the paying of taxes.”

[88] The Plaintiffs were represented by counsel in that action.

[89] That action was discontinued (without costs, on the City’s consent) on August 1, 1997. The Defendants’ materials include a release purporting to be executed by the Plaintiffs and reciting that the City paid \$2000 to the Plaintiffs in return for a release of this claim.

e. Second 1997 Action

[90] On November 19, 1997 Mr. Chisan and various tenants in properties alleged to be owned or managed by Chisan (some of whom were not named other than as Tenant A and Tenant B) launched another suit in this Court against the Province, the City, a natural gas utility, the VP Operations of the gas utility, several safety codes officers and employees of the City, the Calgary Police Commission, the Chief of Police, and a police officer. The claim alleges inter alia

- (a) Unlawful entry by safety codes officers into a property in Calgary that I will refer to as “2006/2008”;
- (b) Certain safety code officers who entered 2006/2008 wilfully and deceptively misrepresented their powers, or in the alternative if they honestly believed their representations, they were “constitutionally illiterate, resulting in unconstitutional actions”;
- (c) The gas utility terminated gas service to 2006/2008. The Statement of Claim does not allege facts for concluding the service termination was unlawful. The claim includes an incomprehensible plea about the VP Operations of the gas utility to the effect that the company executed the wishes of the safety codes officer and “The defendant Stevens confirms this action on the basis of a close relationship with Safety Codes Officers.”
- (d) The police officer unlawfully arrested a tenant of 2006/2008;
- (e) Safety codes officers unlawfully entered 2216;
- (f) The City and employees seized property at 16 Varsity Estates Court under an unlawful clean up order;
- (g) Safety codes officers unlawfully entered 2214, and city employees improperly made a clean-up order either by wilfully refusing to consider the [Municipal Government Act](#) or being unable to comprehend the words of the Municipal Government Act, resulting in unconstitutional actions.
- (h) The Police Commission and the Chief of Police were both vicariously liable for the actions of all police officers in the city;
- (i) The City, supported by the Province, effected a “personally motivated snitch program” whereby officers engage resources of the state to address a civil dispute for the benefit of a complainant or to satisfy the vindictive desire of one citizen to the detriment of another citizen, all of which conflicts with peace, order and good government.

[91] The Plaintiffs were represented by the same counsel as in the First 1997 Action.

[92] Master Laycock of this Court summarily dismissed the Second 1997 Action against Her Majesty on May 26, 2005 for want of prosecution.

[93] On March 27, 2006, Master Waller of this Court summarily dismissed the Second 1997 Action against the Police Commission, Chief of Police, and the gas utility and its VP Operations, for want of prosecution.

[94] On October 23, 2002, in the Contempt Proceeding, Phillips J prohibited Mr. Chisan from taking any steps in the Second 1997 Action against the City and its employees without leave of the Court until certain conditions occurred. There is nothing to indicate Mr. Chisan ever complied with the conditions or attempted to obtain leave. A procedure record print from the Court Clerk’s office provided by the Defendants (the Court obtained a copy from the Clerk’s office to verify its authenticity) indicates that motions were brought for summary dismissal, leading to the Orders of May 26, 2005 and March 27, 2006, but otherwise there has been no activity in the Court on this action since 1999.

f. Contempt Proceeding

[95] By motion filed February 17, 1993 the City applied for an order declaring Mr. Chisan in contempt of court for failing to comply with the compliance order of Stevenson PCJ.

[96] On June 3, 1999 Rooke J (now ACJ) ordered that Chisan appear and show cause why he should not be held in contempt. This generated a dispute whether the Contempt Proceeding was in good standing or should be dismissed under the 5 year drop dead rule. The Defendants' materials indicate Mr. Chisan intended to appeal Rooke J's Order, then later applied to set the Order aside. Lutz J struck the proceeding out on June 22, 1999, but the Court of Appeal allowed the City's appeal and restored the contempt application. The Contempt Proceeding went into case management in 2000.

[97] The Contempt Proceeding came to trial before Phillips J. The trial lasted 5 days, and she gave judgment on March 1, 2002.

[98] Phillips J found Mr. Chisan guilty of contempt for breach of the order of Stevenson PCJ. Phillips J stated it is revealing and worthy of note that in the application before Wilkins J on March 6, 2000 (in the Inspection Application) Mr. Chisan through counsel advised that he did not admit the fourplex at 2214/2216 was "illegal under whatever the law happens to be", and continued:

"Essentially, Mr. Chisan is still to this day attacking the underpinnings or correctness of Judge Stevenson's conclusive and binding order, which he has failed to challenge successfully."

[99] Mr. Chisan also alleged breach of his [Charter](#) rights in the Contempt Proceeding, including that his security of the person was violated by oppressive actions by the City. Phillips J dismissed these complaints, and noted that there was "no evidence" the City acted in a manner oppressive toward him and any problems he faced were caused by his own actions.

[100] Mr. Chisan appealed the contempt finding to the Alberta Court of Appeal on March 27, 2002.

[101] On April 19, 2002 Phillips J ordered Mr. Chisan to remove the basement suites in 2214/2216, stayed the Second 1997 Action as against the City and its employees pending compliance with Stevenson PCJ's order, and fined Mr. Chisan \$25,000 and in default of payment sentenced him to imprisonment for 90 days. Her Order detailed the work to be completed by Mr. Chisan and ordered completion by September 30, 2002. A further hearing was set in the Order for October 23, 2002 to determine whether the work was completed and the fine paid.

[102] In assessing the fine Phillips J accepted that Mr. Chisan perverted the court process, made a game out of the proceedings, and prolonged his contempt of the order through his abuse of the proceedings. She found that Mr. Chisan's contempt was part of an ongoing pattern of conduct over 10 years; and rather than purge his contempt, provided the court with novel, cute and fancy arguments, none of which the Court accepted. He displayed "defiance in the extreme". Phillips J noted there were unpaid costs awards dating back to 1993.

[103] Following a further hearing on October 23, 2002, Phillips J found that Mr. Chisan had not purged his contempt, showed no remorse for his contempt, did not complete the work he was required to do under the April 19, 2002 order, and never intended to purge his contempt. Phillips J authorized the City to enter and do the work, at Mr. Chisan's expense, and imprisoned him for 6 months.

[104] Mr. Chisan appealed the contempt finding and sanction of Phillips J. He obtained judicial interim release from jail on December 19, 2002 from O'Leary JA.

[105] On January 31, 2003 a panel of the Alberta Court of Appeal established various deadlines for the appeal. Some of these were extended, on Mr. Chisan's application, by Paperny JA on March 13, 2003. Her Order provided that if Mr. Chisan did not file the appeal book within 7 days, the

appeal is dismissed. Mr. Chisan did not comply with the deadlines so the appeal stood dismissed and a warrant of committal was issued.

g. Inspection Application

[106] On November 17, 1999 the City commenced an originating notice proceeding for orders permitting the City to inspect 2214/2216, as Mr. Chisan allegedly refused city inspectors the entry to which they are entitled under the *Municipal Government Act*.

[107] Mr. Chisan opposed the motion, asserting inter alia the “refusal of the City of Calgary to produce any authority for its requested action or authorizing its alleged designated officer, notwithstanding that such authority has been requested several times”.

[108] On March 6, 2000 Wilkins J ordered Mr. Chisan to permit City representatives to enter and inspect 2214/2216.

[109] Mr. Chisan appealed Wilkins J’s order to the Alberta Court of Appeal on March 10, 2000.

[110] Mr. Chisan applied in his appeal (as well as in the City’s appeal no. 99-18247 from the decision of Lutz J) by motion and memorandum filed July 25, 2000 for an order that the City’s lawyer provide him with the “resolution wherein the R-2 designation was affixed” to 2214/2216 and “the law of that date, common or statutory, which forbade the use of 4 suites”.

[111] Hunt JA dismissed Mr. Chisan’s application for production of those records on July 27, 2000.

[112] Mr. Chisan applied in his appeal (as well as in the City’s appeal no. 99-18247 from the decision of Lutz J) by motion and memorandum filed October 26, 2000 for a stay or adjournment of the appeals “until a lawyer purportedly acting for The City of Calgary demonstrates standing to be heard”. The grounds included that the City refused to provide resolutions of City Council authorizing the actions appealed from. This was addressed to counsel representing the City on the appeal, described by Mr. Chisan as “Purported Counsel for the City of Calgary”. An affidavit in support from Mr. Chisan said the resolution sought may have shown grounds why his property was selected among 300,000 other properties and for what purpose. His affidavit indicates that the appeals were scheduled to be heard on November 10, 2000.

[113] That application was dismissed by Hunt JA on October 31, 2000. Mr. Chisan was ordered to pay costs in any event of the cause.

[114] On November 10, 2000 the Court of Appeal dismissed Mr. Chisan’s appeal, stating the grounds of appeal were without merit. Following discussion, the Court directed the matter go back to the Chambers Judge for further directions regarding particulars of the inspection.

[115] Following the appeal the City issued a motion to vary the Order of Wilkins J as it relates to time and manner of entry to Mr. Chisan’s property. The motion is dated 17 November 2000. The filing and service date(s) are unknown.

[116] Mr. Chisan cross-applied by motion filed November 24, 2000 to Wilkins J to vary the Order, stating he may rely on the *Charter* and the Alberta Bill of Rights, and on the transcript of the original proceedings before Wilkins J “wherein reliance on the Charter respecting government conduct was denied” by Wilkins J.

[117] The records provided by the Defendants do not contain any further proceedings in the Inspection Application. It is reasonable to infer, as the appeal was dismissed, that further directions were made to implement the inspection.

h. 2002 Action

[118] On October 16, 2002 Mr. Chisan again sued the City over 2214/2216. This action again asserts the theory that Bylaw 2P80 did not apply to 2214/2216. Mr. Chisan sought a declaration that the buildings were essentially legal non-conforming properties.

[119] Mr. Chisan stated in an affidavit filed October 22, 2002 opposing the City's motion to strike the claim, "Foremost in my Statement of Claim is the non-conforming status of the subject building, and the right of non-compliance." And further:

"Fourteen years of litigation, including the contempt action, is the direct result of the City's refusal to apply the test to determine the right of non-compliance and its refusal to disclose".

[120] This action was another attempt by Mr. Chisan to re-litigate the decisions of Stevenson PCJ that 2214/2216 was regulated by the land use bylaw and that by November 6, 1991 the fourplex configuration was illegal. Nothing was pled in the 2002 Action as a new occurrence over the ensuing 10 years that changed that result.

[121] There are other indications of abusive litigation conduct in Mr. Chisan's affidavit filed October 22, 2002:

(a) He deposed that at the outset of the contempt trial in the Contempt Proceeding he was prohibited from calling subpoenaed witnesses relative to the jurisdiction of Stevenson PCJ. As stated earlier in these reasons, Dixon J dismissed Mr. Chisan's appeal from that decision and the Alberta Court of Appeal refused leave to appeal. The issue of the validity of Stevenson PCJ's Order was authoritatively determined in 1994, but Mr. Chisan refused to accept it.

(b) He provided a second example of making groundless allegations about judges, saying:

"I have very serious concerns in that this matter should not be decided by Justice Phillips. People like to believe they are right even at the cost of defeating the pursuit of innocence".

As mentioned above, his Certiorari Application expressed concerns that the Provincial Court would not respect the presumption of innocence.

[122] Phillips J ordered on October 23, 2002 that the proceedings in the 2002 Action were stayed until the later of Mr. Chisan having completed his sentence of incarceration and the City having completed the work authorized by the October 23, 2002 order. The Order provided that before taking further steps in the action, Mr. Chisan must attend before a judge to confirm the stay has been lifted.

[123] There is nothing in the records provided by the Defendants to indicate the stay was lifted. According to a procedure record obtained by the Court from the Court Clerk's Office, there have not been any steps in the 2002 Action for over 10 years.

i. 2007 Injunction Application

[124] At some time prior to late 2007, Mr. Chisan conveyed his interest in 2214/2216 to Susannah Chisan. On December 28, 2007 the City applied in this Court against for an injunction to force her to comply with the land use bylaw concerning 2214/2216.

[125] Mr. Chisan provided an affidavit sworn April 15, 2008 in the injunction proceeding.

[126] In his affidavit Mr. Chisan said he had previously been a part owner of 2214/2216. He re-argued his position that the building use is not precluded by land use bylaws, even quoting some of the prosecutor's submissions verbatim from the transcript of the 1992 Trial before Stevenson PCJ and seeking to refute them; complained about alleged lack of disclosure by the prosecution in respect of the 1992 charge; asserted the courts have not ever addressed the non-conforming status of the property; alleged the City chose to ignore prior decisions of the Court of Appeal about land use; accused a City trainer of fraud; accused the City of making false claims on its website about the jurisdiction of the Subdivision Appeal Board; expressed beliefs as to whether certain conduct

of the City was intentional and motivated in certain ways; and accused counsel for the City of making a “carefully fabricated fiction” by asserting the facilities had been rebuilt.

[127] He said he swore the affidavit “in support of any fair process that seeks to discover the truth as to whether or not the subject property is a statutory non-confirming building, so that the evidence may be transferred to the [Subdivision Appeal Board], the only tribunal that has jurisdiction, as determined by Justice Chrumka and as confirmed by the Supreme Court of Canada in the R v. Al Klippert case”.

[128] As stated in Part II, the Court has not considered the reasons of Erb J on the injunction application because Mr. Chisan has not been shown to be a party or privy to the application.

[129] The Court therefore has nothing before it to indicate whether the facilities had been rebuilt as challenged by Mr. Chisan in his affidavit. The statement in his affidavit about fabrication of that matter by counsel acting for the City is nevertheless concerning from the perspective of assessing his conduct in litigation. The affidavit did not provide any detail or admissions as to the physical facilities in the building, nor any facts that would show the City’s assertion is incorrect:

- (a) It is an obvious example of an evasive argument that seeks to avoid providing any admissions that might be used against the respondent in the injunction application.
- (b) It is a bare assertion unsupported by any recitation of the actual facts, calculated not only to challenge the underlying facts but also to attempt to impugn the personal conduct of lawyers acting for the City.

j. 2013 Action

[130] On December 24, 2013 Mr. Chisan sued various Councillors and employees of the City in this Court.

[131] The Plaintiff was named as follows:

JAMES B. CHISAN: AKA “SMALLIFY” LOCAL GOVERNMENT, AND JOHN DOE II

[132] The Statement of Claim:

- (a) alleged Mr. Chisan is a property owner and taxpayer in the City. The Plaintiff “John Doe II” represents “other taxpayers who were overtaxed”;
- (b) alleged Calgary property owners were over taxed by \$52 million or more. The Plaintiff sought an order that “requires pay back” of the alleged \$52 million of over-taxation in 2013 with the cost to be borne by the Councillors who voted in favor of Bylaw 11M2013.
- (c) complained about various enforcement proceedings by the City, including a complaint about invoices for the cost to remove items from various properties including 2214/2216.
- (d) advanced a damages claim for the City’s alleged trespass onto 2214/2216 and boarding it up. That plea again raised the land use issue:
“This is the same property wherein members of the law department had falsely claimed R-2 designation”.
(This allegation demonstrates Mr. Chisan’s propensity to assert irrelevant impropriety against counsel representing the City.)
- (e) asserted various claims for wrongdoing of many types against several un-named individuals associated with the City.
- (f) included claims against un-named lawyers in the City law department who provided advice to the corporate security department or gave instructions to a third party security company.

(g) demanded:

- i. payback of 2013 property tax of \$52 million;
- ii. with respect to a notice issued by the City to Mr. Chisan, various disclosures by the City, including various information and resolutions, and damages from the City.

[133] On January 23 2014 Hunt-MacDonald J struck the claim of John Doe II, various allegations in the 2013 Action seeking disclosure on various issues, and many of the allegations against the City law department. She also struck the action against several defendants.

[134] The rest of the 2013 Action was summarily dismissed by Jeffrey J on January 27, 2015 on the application of the remaining defendants for summary judgment.

[135] In the proceedings before Jeffrey J, Mr. Chisan challenged the authority of a member of the City law department to represent the remaining defendants. Jeffrey J rejected that challenge, stating the “ostensible authority alone from a member of the bar is sufficient for my purposes.”

[136] The transcript of proceedings before Jeffrey J records that Mr. Chisan is aware of the protections of [section 535](#) of the [Municipal Government Act](#) that councillors and municipal officers and employees are not liable for loss or damage caused by acts or omissions done or omitted to be done in good faith in the performance or intended performance of their duties. In the January 2015 application, Mr. Chisan saw the onus on the City to prove good faith of its representatives in a claim against them. Jeffrey J stated, in dismissing the remainder of the 2013 Action:

“... There is no onus shift to them, and, in any event, the law, the [Municipal Government Act](#), works on the basis that employees of a municipality are entitled to liability protection and the Court of Appeal has said there needs to be some pleading and more than just a ... bare allegation of bad faith...”

k. 2016 Action

[137] Notwithstanding the ruling by Jeffrey J, Mr. Chisan’s 2016 Action (described at paras 4 - 12 above) again asserted allegations against City personnel without the necessary pleas of bad faith supported by particulars.

[138] The 2016 Action also includes a claim against the City lawyer who successfully represented the defendants in the 2013 Action for allegedly falsely representing that he was instructed by all the defendants in that action.

[139] Master Farrington of this Court struck the 2016 Action on June 10, 2016.

[140] Mr. Chisan appealed that decision. His appeal came on before Campbell J in ordinary chambers on August 19, 2016.

[141] Campbell J accepted the Defendants’ position that Mr. Chisan’s appeal must be adjourned to the special chambers list. The Defendants’ counsel indicated the earliest dates were in September 2017. Mr. Chisan refused to provide dates in 2017, noting he just received the materials. Mr. Chisan asked that his application be set over for 2 weeks. Campbell J disagreed. Mr. Chisan again refused to provide dates in 2017 so his appeal was struck.

[142] During this hearing, a representative of a civil enforcement agency instructed by the City was present. He stated he had with him a bank draft in the approximate amount of \$446,000 together with an accounting of the proceeds from the sale of Mr. Chisan’s property that had been sold in execution proceedings instructed by the City. He said he wanted to give the money and the accounting to Mr. Chisan. The Court asked Mr. Chisan whether he wanted to take the money or have it paid into court. The following exchange occurred:

THE COURT: ...So, Mr. Chisan, they want to give you \$445,000. So, you can either take it from them now – it’s a cheque payable to you – if you don’t want to take it from them for whatever reason then I’m going to order that the money be

paid into court and then you can apply to the clerk of the court to get the money if you don't want to accept the cheque from him directly. It's your choice. So, would you like to take the money from him directly or would you like me to order the money paid into court to your credit and then you can take steps to get that money from the clerk of the court should you wish? It's your money.

MR. CHISAN: My Lady, you didn't want to hear from me a few minutes ago, so why should I speak now?

THE COURT: Well, you don't have to.

MR. CHISAN: Whatever you decide. You decide whatever you feel like. It doesn't matter what I say."

[143] Campbell J directed payment of the civil enforcement funds into court and declared them to be Mr. Chisan's property.

[144] Mr. Chisan appealed Campbell J's Order to the Alberta Court of Appeal by notice of appeal filed September 30, 2016. The grounds of appeal are:

1. Arrest and detention not in accordance with the principles of fundamental justice.
2. No jurisdiction to ignore [s. 8, Constitution Act, 1982](#).
3. No jurisdiction to decide on a record of no evidence.
4. No jurisdiction to ignore application for adjournment.
5. Who does Colleen Sinclair represent?

[145] Colleen Sinclair was the lawyer from the City of Calgary law department who appeared for the Defendants on August 19, 2016.

[146] The relief sought in the appeal is:

"An Order that requires non-partisan disclosure by City Manager, Jeff Fielding respecting the seizure of my land."

[147] The appeal to the Alberta Court of Appeal was struck because no appeal record was filed on time.

[148] In the present application, Mr. Chisan again challenged the authority of a City of Calgary law department lawyer (again, Colleen Sinclair) to act. He also said he did not want to speak about the merits of the application lest his statements be used against him. He also said if he was seriously going to oppose, he should make a written submission on the matter of 2214/2216 and raise the old zoning and disclosure issues. The Court was not prepared to adjourn, as Mr. Chisan was required to file his written submission well in advance of the application.

V. Assessment of Mr. Chisan's litigation history

[149] Mr. Chisan has persistently instituted vexatious proceedings and has persistently engaged in vexatious behaviours in litigation. He probably will continue to commence groundless and hopeless proceedings against the City or its representatives, or third parties that are somehow drawn into Mr. Chisan's disputes with the City or its representatives. He probably will behave in vexatious ways in those proceedings, including making groundless appeals, failing to prosecute matters, and making groundless allegations about the authority or conduct of lawyers acting for parties he sues. The considerations leading me to these conclusions are set forth below.

[150] In assessing Mr. Chisan's litigation history, it is useful to be mindful of the basic substantive and procedural rules concerning the liability of statutory authorities, their representatives, and corporate officers.

[151] Litigation against a statutory authority or its representatives engages underlying legal principles that are vastly different than litigation with a private person. These types of defendants have defences where they purported to act under statutory authority. The *Municipal Government Act* confers wide powers on a municipality or its officers to conduct inspections and remedy contraventions: *Municipal Government Act*, sections 542, 544, 545, 546, 549, 550, 551, and 555. Appeals are provided from some types of municipal orders: *Municipal Government Act*, sections 547, 548. The municipality is liable only in limited circumstances: sections 527.2, 529. Section 535 protects City Councillors, officers and employees who act in good faith in the course of their duties: *Municipal Government Act*, section 535.

[152] Similar considerations apply in the case of the execution of duties by officers of commercial corporations. For example, an officer of a corporation is not guilty of inducing breach of a contract by that corporation or conspiring with that corporation without specific allegations sufficient to establish actions that are themselves tortious or exhibit a separate identity or interest from that of the corporation so as to make the act or conduct complained of their own. See, for example, *Bower v Evans*, 2016 ABQB 717; *Kent v Postmedia Network Inc.*, 2015 ABQB 461 at para 60 - 65; *Hogarth v Rocky Mountain Slate Inc*, 2013 ABCA 57; *Blacklaws v Morrow*, 2000 ABCA 175 at para 41; *Criak v Aetna Life Insurance Company of Canada*, [1995] OJ No 3286 (Gen Div), aff'd [1996] OJ No 2377 (CA). Sufficient facts must be pled for such a claim to survive an application to strike: *Micro-watt Control Devices Ltd. v. Krohne Inc.*, 2012 ABQB 53 at para 54 - 56.

[153] The Plaintiff has the burden to properly plead a case that, if the allegations were proved, would result in liability: Rule 13.6(2). The Plaintiff must allege facts capable of sustaining a determination that a duty was owed, that an act or omission occurred breaching that duty, and (where damages are a necessary element of the claim) that damages resulted. It is not sufficient to allege a legal conclusion alone. *Tottrup v. Alberta (Minister of Environmental Protection)*, 2000 ABCA 121, 81 Alta.L.R. (3d) 27, 255 A.R. 204, at para. 11.

[154] Where it is necessary to establish bad faith, a bare allegation of bad faith without particulars is insufficient. Factual particulars must be provided where bad faith is alleged: Rule 13.6(3): *Walton International Group Inc. v. Rocky View Municipal District*, 2007 ABCA 21, at para 12; *Grenon v Canada Revenue Agency*, 2016 ABQB 260 at para 23 - 28, 32; *Irwin v Buote*, 2016 ABQB 530 at para 41 - 47.

[155] Mr. Chisan's litigation history demonstrates a disregard for those basic concepts in litigation, as well as these concepts: finality of judicial decisions and the rules against collateral attacks and re-litigating settled issues; and, the rules against bringing groundless litigation.

[156] Many manifestations of Mr. Chisan's vexatious litigation and vexatious or abusive tactics in litigation since the early 1990's have been proved by the Defendants in the application. These propensities manifest themselves in pleadings, motions and appeals:

- (a) attempting to re-litigate previously decided issues: his refusal to accept the decision of the Courts that the land use of the fourplex at 2214/2216 is unlawful:
 - a. his attempt in the Contempt Proceeding to call witnesses to attack the jurisdiction of the trial judge in the 1992 Trial, years after his appeal from that trial decision was dismissed,
 - b. his position in the 1993 Contempt Proceeding refusing to accept the fourplex was unlawful and the basement suites must be removed, and his refusal to abide by court orders made by Stevenson PCJ, Dixon J and Phillips J to remove them,
 - c. the Second 1997 Action,
 - d. the 2002 Action;
 - e. his attempt to seek disclosure of the basis for the City's land use bylaws in the appeal from Wilson J's Order in the Inspection Application,

(b) pleading bare allegations or legal conclusions in Statements of Claim without sufficient underlying facts:

- a. his claim against the gas utility and its VP Operations in the Second 1997 Action,
- b. his claims against City representatives in the Second 1997 Action,
- c. his claims against City representatives in the 2013 Action, and
- d. his claims against the City and City representatives in the 2016 Action;

(c) making bare allegations of dishonesty against lawyers with the City law department or allegations that City lawyers must prove their authority in specific proceedings:

- a. his motion filed September 14, 1992 in the Certiorari Application (allegations of dishonest or dishonourable conduct by City lawyer conducting prosecution),
- b. his appeal from the Order of Wilson J in the Inspection Application (applied to stay appeal until provided proof of authority of counsel to appear for City),
- c. his affidavit in the 2007 Injunction Application (alleged fabrication by City lawyer),
- d. the 2013 Action (required proof of authority of counsel to appear for defendants), and
- e. the 2016 Action (required proof of authority of counsel to appear for Defendants at the application before Campbell J, repeated same in the Notice of Appeal therefrom and in the present application);

(d) casting groundless aspersions on judges:

- a. his suggestion in the Certiorari Proceeding that judges of the Provincial Court would not respect the presumption of innocence, and
- b. his expression of concerns over the impartiality of Phillips J in his October 22, 2002 affidavit;

(e) taking frequent and unsuccessful appeals:

1. his unsuccessful appeal from the decision of Power J in 1992 (dismissed after hearing),
2. his unsuccessful appeal from the decision of Stevenson PCJ in the 1992 Trial to Queen's Bench (dismissed after hearing),
3. his unsuccessful appeal from the decision of Waite J striking his certiorari application (dismissed after hearing),
4. his unsuccessful application for leave to appeal to the Supreme Court of Canada from the decision of the Alberta Court of Appeal dismissing the appeal from Waite J (dismissed),
5. his unsuccessful attempt to appeal from the decision of Dixon J to the Alberta Court of Appeal (leave refused),
6. his unsuccessful attempt to appeal to the Alberta Court of Appeal from the aforementioned decision refusing leave to appeal (refused for lack of jurisdiction),
7. his unsuccessful appeal from the decision of the Court of Queen's Bench to the Alberta Court of Appeal in his litigation with 478370 Alberta Inc. (dismissed after hearing),

8. his unsuccessful application for leave to appeal to the Supreme Court of Canada in his litigation with 478370 Alberta Inc. (dismissed),
9. his unsuccessful appeal from Wilson J in the Inspection Application (dismissed after argument),
10. his unsuccessful appeal from Phillips J in the Contempt Proceeding (dismissed for failure to meet court ordered deadlines),
11. his unsuccessful appeal from Master Farrington's decision to strike the 2016 Action (struck because he refused to provide his availability for the appeal), and
12. his unsuccessful appeal from Campbell J's decision to the Alberta Court of Appeal (struck for late filing of appeal book);

(f) failing to prosecute litigation:

- a. the Second 1997 Action, which was struck against some defendants and remains stayed against others,
- b. the 2002 Action, which remains stayed,
- c. the struck appeals mentioned above;

(g) launching groundless busybody litigation purporting to benefit others:

- a. his claim by "JOHN DOE II" in the 2013 Action for damages of \$25 million against Councillors who voted for a taxing bylaw. (The First 1997 Action may have been such a suit, but as the City appears to have paid a settlement to resolve the issue and no explanation of that was provided in the present application by the Defendants, the Court has disregarded it).

[157] The 2013 Action and the 2016 Action are recent examples of this persistent misconduct that show Mr. Chisan probably will continue his pattern of bringing vexatious litigation and using vexatious litigation tactics.

[158] The claims in these actions disregard the basic substantive law and procedural rules described above. Both actions were summarily struck out.

[159] In addition, the 2013 Action made baseless allegations of dishonesty in relation to the land use designation of 2214/2216. No one, having been through Mr. Chisan's litigation experience in the Contempt Proceeding and the Inspection Application could reasonably think that there was anything to argue over the land use of that property. Mr. Chisan was bound by the findings in the 1992 Trial, Contempt Proceeding and Inspection Application, all of which found that the fourplex was an illegal land use.

[160] Mr. Chisan's conduct in raising this again in the form of bare allegations of irrelevant falsehood against the City law department in the 2013 Action was egregious.

[161] His conduct in the 2016 Action again demonstrated persistent misuse of legal proceedings. He made the same types of allegations having the same fatal defects that the Court held could not be maintained in the 2013 Action. Worse, he advanced bare allegations of fraud against the City law department lawyer involved in the 2013 Action. He has continued to challenge the authority of lawyers appearing on the record in proceedings without articulating any basis for doing so. His pattern of persistent groundless appeals has also resurfaced in the 2016 Action.

[162] The Court is satisfied that based on his litigation history that it is likely that he will continue to bring frivolous or vexatious litigation against the City or its representatives.

[163] The Court finds on the basis of the foregoing that Mr. Chisan is a vexatious litigant.

[164] Mr. Chisan asks the Court to consider his [section 2\(b\) Charter](#) rights in the balance. The exercise of discretion may engage consideration of Charter rights like any other fundamental legal

or civil right. Mr. Chisan has freedom of expression and the right to access courts like any other Canadian.

[165] As discussed in Part III (b), whatever rights of access or expression Mr. Chisan has do not extend to vexatious or abusive lawsuits. Mr. Chisan has many other avenues to express himself, and the requirement that he seek permission to sue does not preclude him from pursuing legitimate actions in the Courts.

[166] The Court has considered that the vast majority of the abusive behaviour by Mr. Chisan in litigation relates to claims against the City or its representatives. This behaviour has extended to others drawn into his disputes with the City, such as the gas utility and its VP Operations, and police. The Court must therefore be concerned not only for actions against the City and its representatives or agents, but also actions against others where there is a reasonable prospect that claims-over against the City and its representatives and agents will arise.

[167] There is evidence, in the decision of the Alberta Court of Appeal concerning Mr. Chisan's litigation with 478370 Alberta Inc., of a similar litigation pattern with other parties. However, there are no other proved instances of vexatious litigation with persons not related to the City since 1998. The Court is not satisfied that Mr. Chisan should be regulated at this time in any disputes he may have with unrelated litigants. Any order the Court makes can be varied to add others or increase its scope, should that later prove justified.

[168] In all the circumstances it is appropriate to make an order relating to claims against the City or its present or former representatives, or against anyone else relating to or arising in whole or in part from alleged acts or omissions on the part of the City or those representatives. There will be a provision permitting the restriction to be expanded if subsequent actions show that to be necessary.

VI. Order

[169] James Brian Chisan is declared to be a vexatious litigant, on the following conditions.

(a) James Brian Chisan is prohibited, under the *Judicature Act*, section 23.1, from commencing, or attempting to commence, or continuing any appeal, action, application or proceeding in the Alberta Court of Appeal, the Court of Queen's Bench of Alberta or the Provincial Court of Alberta, on his own behalf or on behalf of any other person or entity:

- a. against the City of Calgary,
- b. against any current or former councillor, officer, employee, representative or agent of the City of Calgary, or
- c. against any person or entity not referred to in sub-para a. or b. above, in respect of any matter or allegation that relates to or arises from, in whole or in part, any alleged act, omission, or representation on the part of any person mentioned in sub-para a. or b. above,

without an order of a judge of the court in which the proceeding is conducted.

(b) An application for permission to commence a proceeding described in sub-para (a) must be in writing, and notice must be given

- a. to the City of Calgary to the attention of the City of Calgary law department by serving the same, together with a true copy of all supporting affidavits or other materials, in accordance with the requirements of the Alberta Rules of Court for serving a commencement document,
- b. to any other person directed by a justice or judge at any time (on application or on his or her own motion) by serving the same, together with a true copy of all supporting affidavits or other materials, in accordance with the requirements of

the Alberta Rules of Court for serving a commencement document or such other manner prescribed by such judge,

- c. the time for service shall be the time required for service of an originating application under the Alberta Rules of Court, subject to any expansion or abridgment granted by a judge or justice of the Court in which permission is sought.
- (c) James Brian Chisan must describe himself in the application and any pleadings by his full name (“James Brian Chisan”), and not by using initials, a pseudonym, an alternative name structure, or any other name which he might have used or uses.
- (d) An application to commence any appeal, action, application or proceeding must be accompanied by an affidavit:
 - a. attaching a copy of the order declaring Mr. Chisan to be a vexatious litigant,
 - b. attaching a copy of the appeal, pleading, application or process Mr. Chisan proposes to issue or file,
 - c. deposing fully and completely to the facts and circumstances surrounding the proposed claim or proceeding, so as to demonstrate that the proceeding is not an abuse of process, and that there are reasonable grounds for it,
 - d. indicating whether Mr. Chisan has ever sued some or all of the defendants or respondents previously in any jurisdiction or court, and if so providing full particulars,
 - e. indicating whether Mr. Chisan has previously applied for permission under this Order in respect of the same claim or matter, and if so the affidavit must include:
 - i. a certified copy of any order refusing permission or otherwise disposing of or adjourning the application,
 - ii. a certified copy of the transcript of the hearing and disposition of any prior request for permission,
 - iii. a true copy of the materials relied on for the previous application,
 - iv. a statement of new evidence or facts on which the applicant relies for the application, the source of such information, the reasons why the information was not previously known, and the facts if any demonstrating that the applicant investigated his claim diligently and did not previously discover such information,
 - f. undertaking that, if leave is granted, the authorized appeal, pleading, application or process, the order granting leave to proceed, and the affidavit in support of the order will promptly be served on the defendants or respondents, and
 - g. undertaking to the Court to diligently prosecute the proceeding.
- (e) The application shall be made in open court before a regularly assigned duty or chambers judge or justice (not in private chambers), and shall be recorded.
- (f) Where an application for permission is dismissed, an application shall not be made again in relation to the same claim or matter unless (a) the fact an application was previously made is disclosed to the judge or justice hearing the application, and (b) the applicant provides relevant, credible and substantial information that could reasonably be expected to have affected the result, which was not before the judge or justice

hearing the previous application and could not have been through due diligence provided in the previous application.

- (g) Leave to commence proceedings may be given on conditions, including the posting of security for costs.
- (h) This Order does not affect Mr. Chisan's right to apply to the Clerk of the Court pursuant to para 6 of the Order of Madam Justice Campbell made August 19, 2016 in action no. 1601-06249 in this Court, to obtain payment out of funds standing to his credit in that action.
- (i) Nothing in this Order limits the authority of a Court to stay or dismiss a proceeding as an abuse of process or on any other ground.
- (j) An application to vary this Order (including extending the scope of this order) or to set aside this Order must be made on notice to the Attorney General of Alberta, the City of Calgary, and any other person as directed by a justice of this Court.

[170] The Defendants' counsel are to prepare the formal order for my review. Subject to any request by the Defendants for an extension, they are to submit the draft to the Court for consideration within 14 days of the date of these reasons, and to mail a copy of their draft to Mr. Chisan by ordinary mail to any address for service that has been provided by him in the 2016 Action within the same period. Rule 9.4(2)(c) is invoked and approval of the draft by Mr. Chisan is not required.

[171] The parties are reminded that the above order is effective from pronouncement of these reasons, and notwithstanding any delay in entering the formal order.

Heard on the 24th day of February, 2017.

Dated at the City of Calgary, Alberta this 31st day of March, 2017.

J.T. Eamon
J.C.Q.B.A.

Appearances:

James Chisan (Self Represented)
Plaintiff

Colleen Sinclair
for the Respondents

Tab 97

R. v. Li, 2008 CanLII 92006 (ON SC)

Source:	Superior Court of Justice
Date:	2008-01-11
File number:	M0368/06
Other citations:	231 CCC (3d) 563 — 78 WCB (2d) 227 — [2008] OJ No 1077 (QL)
Citation:	R. v. Li, 2008 CanLII 92006 (ON SC), < https://canlii.ca/t/g9zf1 >, retrieved on 2026-03-23

Ontario High Court of Justice, Divisional Court

Citation: R. v. Li
Date: 2008-01-11
Court File No. M0368/06

Croll J.

Counsel:

J. Pinkovsky, for accused, applicant.

J. Lofft, for the Crown, respondent.

P. Stem, for The Queen in Right of Ontario and the Ontario Court of Justice, Co-respondent Record Keepers.

[1]CROLL J.: —On October 4, 2004, Mr. Li was charged with assault, assault with a weapon, attempt murder and two counts of forgery. His wife Fiona Sun is the complainant in the assault and attempt murder charges, and the forgery relates to an alleged false credit application presented to the TD Canada Trust.

[2]Mr. Li (the Applicant) has brought an 11(b) application in which he claims that the charges against him should be stayed on account of delay. As part of the 11(b) application, the Applicant seeks an order directing the Ontario Court of Justice at 111 Yonge Street, Toronto (College Park) to *praecipere* the contents of his file in its possession or control to the Trial Coordinator of the Superior Court in Toronto.

[3]In this case, two judicial pre-trials were held at College Park, one on August 5, 2005 and one on September 9, 2005. The file that has been provided by College Park contains the Information; Notice of Assignment Court; Trial Confirmation forms dated April 4, 2006 and April 7, 2006; Verification of Special Date(s) provided by the Trial Co-ordinator's Office; Recognizance of Bail; the Judicial Interim Release Order; Designation and Acknowledgment of Counsel of Record; Appendix A (Name, Address and Charges); and Statement-Section 536.3 of the *Criminal Code*. No pre-trial reports, forms or information

about the pre-trials are in the court file. While the application is broadly framed, it is the notes of the judges who presided at the pre-trials that are the subject of the application. To this end, the Applicant served notice of the application on the Senior Administrative Judge at College Park, the Chief Justice of the Ontario Court of Justice and the Attorney General for Ontario.

[4]The position of the Ontario Court of Justice is that the notes of the pre-trial judges are privileged and in the ordinary course should not be provided to the Superior Court. The Crown Attorney charged with the prosecution of this matter has advised that she is also acting as counsel for the Attorney General (Ontario) for all purposes on this application. In this regard, the Crown Attorney as counsel for the Attorney General (Ontario) adopts the position taken by the Ontario Court of Justice. During submissions on the *praecipe* application, the Applicant brought a further application for removal of the Crown Attorney from acting as counsel to the Attorney General (Ontario) in his capacity as the administrative superintendent of the Ontario Court of Justice, on the basis of institutional and personal conflict of interest. However, for reasons delivered at that time, the conflict application was dismissed.

[5]Having heard all the submissions on the *praecipe* application, I have determined that the application will not be granted. These are my reasons for that ruling.

[6]The Applicant submits that the records from the two judicial pre-trials held at College Park will shed some light on what occurred in the Ontario Court of Justice and, in particular, why a second judicial pre-trial was needed. The Applicant suggests that one of the issues canvassed was in the nature of an offer to withdraw the attempt murder charge, and that this may have necessitated the need for a second judicial pre-trial. The Applicant's position is that the notes of the pre-trial judges should be conveyed to the Trial Coordinator of this court, given that attribution of fault and an examination of the conduct of the parties are important in an 11(b) application. The Applicant relies on the decision in *R. v. McNeilly*, [2005] O.J. No. 1297 (QL), 64 W.C.B. (2d) 635, in which Hill J. stated at para. 24: "The experience with s. 11(b)/24(1) Charter applications in Brampton has consistently demonstrated that there are documents in the Ontario Court of Justice court file of particular relevance to these applications."

[7]Similarly, in *R. v. Cowell*, [2004] O.J. No. 71 (QL), 60 W.C.B. (2d) 168, Durno R.S.J. of the Superior Court in Brampton stated at para. 45 that "[j]ust as the trial co-ordinator's 'Verification of Trial Dates Offered' form is admissible to establish the dates offered and counsel's position on them, the judge's pre-trial notes in regards to 'case management' issues such as time estimates, witnesses to be called, and Charter issues, are essential when examining s. 11(b) issues. The forms should contain only the case management issues, and no reference to discussions regarding resolutions, offers to resolve from either party, or the pre-trial Judge's opinion on sentence."

[8]I accept that there may be some relevance to the pre-trial information. and that the relevance should not depend on the region in which a person is charged. However, in both *McNeilly* and *Cowell*, the reference to the pre-trial information provided to the Superior Court from the Ontario Court of Justice is a specific reference to pre-trial forms (See *McNeilly*, *supra* at para. 25; *Cowell*, *supra* at paras. 45, 46). This is in accordance with [Rule 27.04\(1\)](#) of the [Rules of the Ontario Court of Justice in Criminal Proceedings](#), SI/97-133, which provides as follows:

- (1) The pre-hearing conference judge, upon the completion of the hearing *may* complete a Pre-Hearing Conference Report in Form 14, a copy of which *shall* be provided to the prosecutor and counsel of record for the accused, or to the accused if the accused is not represented by counsel of record, and may be provided to the

judge, presiding over the proceedings, together with any materials filed by counsel of record on the pre-hearing conference relating to matters to be raised at proceedings, [emphasis added]

[9] It is clear that although the pre-trial judge is not required to complete the Pre-Hearing Conference Report, if it is completed, it must be provided. It is the position of the Applicant that although the pre-trial form was not completed by either pre-trial judge, her or his notes of the pre-trial conference should nonetheless be provided. The Applicant submits that as a pre-trial is not an adjudicative process, the notes are merely a record of the position of the parties, and whether they are completed on the prescribed form, or in some other fashion, is of no significance. The Applicant submits that without the pre-trial information from the College Park judges, the Applicant will not have all the facts or data about the pre-trials and, in particular, will not have disclosure as to why there was a need for a second pre-trial. The Applicant submits that this, in turn, will mean that he cannot present a complete factual and legal argument on the reasons for delay, which is a violation of his constitutional right to fundamental justice (See *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 (CanLII), [2007] 1 S.C.R. 350 (right to answer the case as an aspect of fundamental justice)).

[10] In my view, the factual context of this application is very different from those in cases like *Dersch v. Canada (Attorney General)*, 1990 CanLII 3820 (SCC), [1990] 2 S.C.R. 1505, 60 C.C.C. (3d) 132, and *Charkaoui*, upon which the Applicant relies. In *Dersch*, the applicant sought access to a sealed wiretap packet under section 178.14 of the *Criminal Code*, R.S.C. 1970, c. C-34, and the court held it was not necessary for him to show *prima facie* misconduct on the part of the applicant for the wiretap authorization in order to gain access. Rather, the court found that an assertion that the admission of the evidence obtained through the interception is challenged, and that access is required to make full answer and defense, was sufficient to grant access. *Charkaoui* dealt with the constitutionality of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, which allowed the government to issue a certificate of inadmissibility to Canada on the grounds of security that would lead to the detention of the named person. While the certificate and detention were subject to review by a Federal Court judge, some or all of the information on which the certificate was based could not be disclosed to the named person or his or her representative in the review process. The court held that the principles of fundamental justice require that before a person is deprived of his or her liberty, he or she must be afforded a hearing before an independent and impartial judge; a decision by the judge on the facts and the law; and the right to know and to answer the case he or she is facing (*Charkaoui*, *supra* at para. 29).

[11] This is not a case where the Applicant is challenging a judicial order, such as a wiretap authorization or an arrest warrant. This is a case where the Applicant seeks a judge's notes. The Applicant claims that as the notes are simply the records of administrative proceedings, they do not attract any judicial privilege, and that they must be produced to ensure transparency in the criminal justice system,

[12] With respect, I do not accept the Applicant's position. Pre-trials are vital to effective case management and to ensuring that trials are efficient and focused (see *Rules of the Ontario Court of Justice in Criminal Proceedings*, r. 27.03(2)). Pre-trials often lead to agreement on a particular issue or to resolution, both of which save trial time, and resolution, as well, may impact sentence. A pre-trial judge has the discretion to require that an accused who has counsel be available for consultation with counsel, or that an investigating officer be available for consultation with the prosecution (see *Rules of the Ontario Court of Justice in Criminal Proceedings*, r. 27.02(2)). Although a pre-trial judge does not make any adjudicative decisions on a pre-trial, she or he clearly is performing a

judicial function when she or he conducts a pre-trial (see *Edwards v. Canada (Attorney General)* (1999), 1999 CanLII 15109 (ON SC), 46 O.R. (3d) 447 (S.C.J.)). A pre-trial judge is not, as the Applicant suggests, a kind of judicial stenographer of positions taken. Rather, pre-trials are held to facilitate and resolve matters before the court and, as such, a judge at a pre-trial is engaged in an integral part of the judicial function (*Edwards, supra* at para. 29).

[13] The determination that a judge conducting a pre-trial is fulfilling a judicial function, and thereby afforded judicial immunity, does not beg the question as suggested by the Applicant, nor is it the type of inference drawing criticized by Ducharme J. in *R. v. Munoz*, 2006 CanLII 3269 (ON SC), [2006] O.J. No. 446 (QL), 205 C.C.C. (3d) 70 (S.C.J.). This is because judicial immunity is an established legal principle. Ducharme J.'s criticism of deductive reasoning in *Munoz* related to the drawing of impermissible factual inferences from evidence, not the drawing of legal conclusions through the application of legal principles. In this case, what needs to be established on the evidence is whether the actions of the judges conducting the judicial pre-trials satisfy the requirements of judicial immunity. This entails an examination of whether they were carrying out a judicial function. Where it is established on the evidence that the actions of the judges do satisfy the preconditions to judicial immunity, the end result follows. This is not an impermissible inference, but rather the application of a legal principle.

[14] Given that a pre-trial judge is acting *qua* judge at a pre-trial, her or his judicial acts, including her or his note-taking, enjoy complete immunity. This principle is succinctly set out by Lax J. in *Edwards* at para. 18, where she referred to the decision of the Supreme Court of Canada in *MacKeigan v. Hickman*, 1989 CanLII 40 (SCC), [1989] 2 S.C.R. 796, 50 C.C.C. (3d) 449, as "authority for the proposition that the thought processes of a judge may not be penetrated, nor may her administrative acts later be questioned."

[15] The Applicant also submits that the notes taken by the pre-trial judge are connected with the administration of the courts and thereby superintended by the Attorney General (Ontario) (see *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 72, as am. by *Access to Justice Act*, 2006, S.O. 2006, c. 21, s. 14) While section 72 of the *Courts of Justice Act* provides that the Attorney-General shall superintend all matters connected with the administration of the courts, paragraph 1 of the section specifically exempts matters that are assigned by law to the judiciary. Given that I am satisfied that there is no issue that judicial pre-trials are assigned by law to the judiciary, I also reject the Applicant's submission that the notes belong to the court as a record of the proceedings and that they do not belong to the pre-trial judge (See *Criminal Code*, R.S.C. 1985, c. C-46, s. 625.1).

[16] Similarly, paragraph 3 of section 72 of the *Court of Justice Act* exempts matters assigned by a memorandum of understanding under section 77 of the *Act* from being superintended by the Attorney General. The Applicant reviewed the current memorandum in some detail in support of his position that the judiciary is not independent of the Attorney General as superintendent of the courts with respect to the records of the pre-trial judges. The Applicant seems to suggest that because the memorandum is silent in respect of judge's notes at a pre-trial, they are not exempt from the superintendence of the Attorney General and therefore producible. However, in my view, this submission ignores the fact that judicial pre-trials are assigned by law to the judiciary and are thus exempt from the superintendence of the Attorney General under paragraph 1.

[17] The Applicant further relies on the memorandum to establish a more general lack of independence of the judiciary in the administration of The Ontario Court of Justice. He points to the administrative support services performed by the Ministry of the Attorney

General on behalf of the Office of the Chief Justice, and to the acknowledgement in the memorandum that "...some of these additional support services may more appropriately be the responsibility of the Office of the Chief Justice, but that it is not possible to make this determination at this time" (*Memorandum of Understanding between the Attorney General of Ontario and the Chief Justice of the Ontario Court of Justice*, December 16, 2004 at 5). The Applicant alleges that numerous aspects of the memorandum, dealing with matters from financing to staffing, undermine the Ontario Court's judicial independence. In support of this contention the Applicant refers to a line of cases dealing with judicial independence: *R. v. Valente*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673, 23 C.C.C. (3d) 193; *R. v. Lippé*, 1990 CanLII 18 (SCC), [1991] 2 S.C.R. 114, 64 C.C.C. (3d) 513; *Ref re Remuneration of Judges of the Prov. Court of P.E.I.*; *Ref re Independence and Impartiality of the Prov. Court of P.E.I.*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3, 118 C.C.C. (3d) 193; *Newfoundland Assn. of Provincial Court Judges v Newfoundland*, 1998 CanLII 14092 (NL SC), [1998] N.J. No. 120 (QL), 160 D.L.R. (4th) 337; *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*, 2002 SCC 13 (CanLII), [2002] 1 S.C.R. 405; *Re Application under s. 83.28 of the Criminal Code*, 2004 SCC 42 (CanLII), [2004] 2 S.C.R. 248, 184 C.C.C. (3d) 449 *sub nom. R. v Bagri*.

[18] While these cases are instructive on the evolution of the principle of judicial independence, in my view they do not assist the Applicant in this application. The Applicant has not established a nexus between the requisite level of administrative independence and judges' notes taken in a judicial context.

[19] The Applicant also points to the *Court Services Division Policies and Procedures on Public Access to Court Files, Documents and Exhibits*. The Applicant submits that while the policies and procedures set out in this document recognize that access to court files and documents is subject to "judicial direction", no such "direction" existed in this case, and accordingly, the records should be subject to production. Firstly, in my view, the notes kept by the pre-trial judges in this case are not within the scope of the files and documents encompassed by the Court Services Division policy manual. The policy manual deals with public access to official court records, access to exhibits, the effects of publication bans, and associated matters. It does not contemplate a judge's notes. Moreover, "judicial direction", in the context of the policy manual, should not be limited to a formal written direction or practice guideline. Rather, when one reads the phrase in context, it can be seen to refer to the fact that the court itself "... has a supervisory and protecting power over its records, and as a result determines rules for public access". (*CSD Policy Manual August 17, 2007 s. 1.1*) The direction may be in the form of a formal direction or practice guideline applying broadly, or may be the direction of an individual judge in an individual case.

[20] In my view, in many of the submissions and material provided to the court, The Applicant is conflating judicial independence with judicial immunity or privilege. Among other things, the Applicant provided the court with discussion papers on judicial independence, including *The Governance of Britain: A Consultation on the Role of the Attorney General* and the *Canadian Judicial Council's report Administering Justice for the Public*. While these papers include interesting discussion on possible court reform, it provides this court with little material that is relevant to the *praecipe* issue at hand.

[21] The practice at College Park differs from the practice at Peel, where it appears that the pre-trial judges complete Form 14, which, in turn, must be provided to the parties. At College Park, pre-trial information is kept in a judge's own notes, and, as I have indicated, these notes are presumptively private and protected by judicial immunity. While the Applicant asserts that it is facile to suggest that pre-trial information from College Park should not be disclosed simply because it is not recorded on a prescribed form, in my view, that is precisely what the legislation allows. There is no ambiguity in the word "may" in Rule

27.04(1) and, accordingly, no ability to read into the rule words to the effect that the judge may complete a Pre-Hearing Conference Report in Form 14 *or make any other record deemed appropriate*, as suggested by the Applicant. This is not a case where the wording of the rule can be subject to more than one interpretation, such that it would be proper to embark on any exercise of statutory interpretation guided by Charter values (See the discussion of *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 (CanLII), [2002] 2 S.C.R. 559, in Ruth Sullivan, *Statutory Interpretation*, 2nd ed. (Toronto: Irwin Law, 2007) at 240).

[22] In urging this court to accept a broad construction of Rule 27.04(1), the Applicant refers to, among other things, the decision of the Supreme Court of Canada in *R. v. Potvin*, 1989 CanLII 130 (SCC), [1989] 1 S.C.R. 525, 47 C.C.C. (3d) 289, in which the court addressed the proper interpretation of the word "may" in the former section 643(1) of the *Criminal Code*. Section 643(1) dealt with the admission of evidence previously taken. The court held that the word "may" in section 643(1) was not directed at the parties, but rather at the trial judge, and gave him or her a discretion to not admit the previous testimony where it would be unfair to do so, even when the other requirements of the section had been met. The court considered the plain, literal meaning of the word "may" and noted that "... 'may' is commonly used to denote a discretion, while the word is used to denote an obligation" (*Potvin*, *supra* at para. 32). In my view, a complete reading of *Potvin* supports the position taken by the Ontario Court of Justice, namely that the judges have the discretion as to whether or not to complete the Pre-trial Report, and it is only when they do so that the Report shall be produced. As stated by Ruth Sullivan, "[w]hen a statutory power is conferred using the word 'may', the implication is that the power is discretionary and that its recipient can lawfully decide whether or not to exercise it. After all, if the legislature wished to impose an obligation, it could easily have used instead of 'may'" (Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Vancouver: Butterworths, 2002) at 57). While recognizing that the use of "may" is not conclusive, I am not satisfied that there is anything in the *Rules of the Ontario Court of Justice in Criminal Proceedings* that expressly or impliedly requires a pre-trial judge to complete Form 14. Given the purpose and context of pre-trials, this is not, in my view, a case where the failure to exercise the discretion to complete the form will undermine the purpose of the pre-trial rules (See Sullivan, *Statutory Interpretation*, *supra* at 74).

[23] I also note that prior to October 2006, the *Superior Court of Justice Criminal Proceedings Rules*, SI/92-99, of the Ontario Superior Court did not require a report to the trial judge, and it was not until the rules were changed that the pre-trial judge was required to complete a report that now becomes part of the Superior Court file (See Ontario, *Criminal Proceedings Rules*, r. 28.04(16), which replaces the former *Ontario Supreme Court Rules Respecting Pre-Hearing Conferences in Criminal Matters*, r. 6(a) [S1/86-145, C. Gaz. 1986 II. 3397]). There has been no comparable change to the *Rules of the Ontario Court of Justice in Criminal Proceedings*. While it is arguable that the same transparency which is now part of the Superior Court process should be part of the process of the Ontario Court of Justice, this is not what the rules prescribe.

[24] I return to the Supreme Court decision in *MacKeigan v. Hickman*. In that case, as indicated, while the majority of the court held that the administrative function of a judge also carried absolute immunity, Cory J., together with Lamer C.J.C. and Wilson J., were of the opinion that administrative functions are only protected by a qualified judicial immunity. In this regard, the comments of Cory J. are apposite: The qualified privilege of judges on administrative matters will clearly apply in most situations; however, there are exceptional cases in which the qualified privilege of immunity from testifying must give way; this will occur when it is necessary to reaffirm public confidence in the administration of justice.

[25] In this case, the Applicant seeks the pre-trial notes in an 11(b) application on the basis that they may elucidate a 5 week period of delay in an overall period of 114 weeks. I note that the Crown, on the record, indicated that it was prepared to assume the 5 weeks of delay for purposes of the 11(b) application. As such, it cannot be said that the information sought goes to the ability of the Applicant to make full answer and defence. This can be contrasted to *R. v. Mills*, [1999 CanLII 637 \(SCC\)](#), [1999] 3 S.C.R. 668, 139 C.C.C. (3d) 321, a case of record production where the court noted that where records are part of the case to meet, the concern about production is "particularly acute as such a situation very directly implicates the accused's ability to raise a doubt concerning his or her innocence" (*Mills*, *supra* at para. 71). This is also not a case where there is no other extrinsic evidence to establish the pre-trial information (see *Dersch*, *supra* at para. 15). In this case, there was a representative of the Applicant at each of the two pre-trials, and the potential significance of any pre-trial notes must be assessed in light of the fact that the Applicant was always represented (*R. v. Scott*, [2002 CanLII 44950 \(ON CA\)](#), [2002] O.J. No. 2180 (QL) (C.A.)). Accordingly, even if I am incorrect in my finding that the privilege attaching to the judges' pre-trial notes is absolute, I am not satisfied that this is an exceptional case where privilege must give way to ensure public- confidence in the administration of justice.

[26] For these reasons, the *praecipe* application is dismissed.

Application dismissed.

Tab 98

Long v. Red Branch Investments Limited, 2018 BCCA 115 (CanLII)

Source: Court of Appeal for British Columbia
 Date: 2018-03-28
 File number: CA43358
 Citation: Long v. Red Branch Investments Limited, 2018 BCCA 115 (CanLII), <<https://canlii.ca/t/hr7cx>>, retrieved on 2026-03-23

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Long v. Red Branch Investments Limited*,
 2018 BCCA 115

Date: 20180328
 Docket: CA43358

Between:

David P. Long

Respondent
 (Plaintiff)

And

Red Branch Investments Limited and Gerald Wright

Appellants
 (Defendants)

Before: The Honourable Mr. Justice Harris
 The Honourable Mr. Justice Willcock
 The Honourable Madam Justice Fenlon

Supplementary Reasons to *Long v. Red Branch Investments Limited*,
[2017 BCCA 256](#), Vancouver Registry S122642.

Counsel for the Appellants:	O. Ahmed and A. Way
Counsel for the Respondent:	C.M. Tribe and A.J. Piercy
Place and Date of Hearing:	Vancouver, British Columbia May 24, 2017
Place and Date of Judgment:	Vancouver, British Columbia July 12, 2017
Written Submissions of Appellants filed:	Vancouver, British Columbia November 1, 2017 and January 24, 2018
Written Submissions of Respondent filed:	Vancouver, British Columbia December 19, 2017
Place and Date of Supplementary Reasons:	Vancouver, British Columbia March 28, 2018

Supplementary Reasons of the Court

Summary:

The appellants apply to adduce fresh evidence and have this Court re-open and allow their previously dismissed appeal. They allege that they discovered new evidence after the dismissal of their appeal that demonstrates the respondent and a key witness perjured themselves during the original trial. Held: Application dismissed. While this Court does retain inherent jurisdiction to set aside a fraudulently obtained judgment, it would not be appropriate to do so in this case. Where a party seeks to set aside a prior judgment on the basis that it was obtained by fraud, the traditional approach in British Columbia is to bring a new action in the trial court. That is the most appropriate forum here, where the respondent denies all of the alleged fraud.

Supplementary Reasons for Judgment of the Court:

[1] On July 12, 2017, we dismissed an appeal brought by Red Branch Investments Limited ("Red Branch") and Gerald Wright from the order of Wong J. granting judgment in favour of David P. Long. Reasons for judgment at trial are indexed as [2015 BCSC 2192](#). Our reasons are found at [2017 BCCA 256](#). In the course of proceedings to recover the costs of the appeal, subsequent to our judgment, the respondent disclosed information from the solicitors' file that has given rise to new controversy.

[2] The appellants seek to adduce this information as fresh evidence and ask this Court to re-open and allow the appeal.

Background

[3] The litigation arises from a dispute over ownership of a royalty interest in a potash mine in Thailand. Its resolution hinged upon an assessment of the parties' credibility and the credibility and reliability of certain witnesses.

[4] In February 1999, Mr. Wright registered his share of the royalty interest in Mr. Long's name. Mr. Long paid for the royalty interest by a promissory note. He later repaid the promissory note using funds provided to him by Mr. Wright for that purpose.

[5] In June 2010, Mr. Wright asked Mr. Long to transfer the royalty interest to Red Branch, Mr. Wright's company. He provided Mr. Long with a document dated September 1, 2009, transferring the royalty interest to Red Branch for \$1. Mr. Long executed it.

[6] In late June 2011, the parties had a falling out and Mr. Long asked Red Branch to confirm it held half the royalty in trust for him. Red Branch refused to do so and these proceedings were commenced.

[7] In our reasons for judgment, we summarized the trial judgment as follows:

[10] The trial judge accepted Long's evidence that when Wright's share in the royalty was transferred to Long in 1999, Wright told Long they would each have a 50% beneficial interest in it. He accepted Long's evidence that Wright made the following representations to Long when the 2010 Agreement was signed:

- a) Wright was the beneficial owner of Red Branch and he controlled the company;
- b) Wright wanted to transfer the royalty to Red Branch because there were tax advantages of having the royalty held by a Hong Kong company; and
- c) Red Branch would continue to hold the royalty in trust for both Long and Wright as before, with each of them receiving an equal beneficial interest and, to that end, Wright would make Long a 50% shareholder and director of Red Branch.

[11] While the 2010 Agreement made no reference to the fact Red Branch held the royalty in trust for Long and Wright, the trial judge accepted that Long relied upon these representations and assurances when he signed the agreement.

[8] The judge found that 50% of Mr. Wright's share in the royalty was, in fact, given to Mr. Long in consideration for holding the royalty, which was, at all times, intended to be shared between the two men.

[9] We considered the following finding of the trial judge to be critical to the outcome:

[47] Mr. John Darch, who was a long-time business associate of Mr. Wright and a fellow Royalty holder testified that he knew that Mr. Wright was appointing Mr. Long as his nominee for the royalty and that he clearly told Mr. Darch that he was sharing this royalty with Mr. Long. Mr. Darch also said that Mr. Wright told him that he would rather receive half of the royalty than one quarter, the reason being that he would lose half to Canada Revenue Agency and he would have to share the other half with his wife Gail whom he was planning to leave for his Thai mistress. Mr. Darch said that Mr. Wright told him this on more than one occasion.

[10] Mr. Wright's appeal was founded upon the argument that the trial judge committed a palpable and overriding error by ignoring, forgetting, or misconceiving relevant evidence that went to the core of the case, including, specifically, the evidence of Mr. Wright's accountant, Paul Royce.

[11] At paras. 30-43 of our reasons for judgment, we discussed the trial judge's consideration of the evidence of the parties' intentions. We expressed the view that while it would have been preferable for the trial judge to have expressly addressed the evidence of Mr. Royce, we noted, at para. 31, that the trial judge had effectively done so by preferring the evidence of Mr. Darch, who he considered to be more impartial. The trial judge had concluded, at para. 50:

Mr. Darch is a neutral witness, having no bias in favour of either of the parties. He has no financial interest in the outcome of this litigation.

[12] We found the trial judge had given reasons that, while less than ideal in their consideration of the conflicts in the evidence, were reasonably intelligible to the parties and sufficient to provide a basis for meaningful appellate review.

The Fresh Evidence

[13] On August 11, 2017, the respondent filed an application to settle the costs below to which was attached an affidavit with the solicitors' accounts. On receipt of those accounts, the appellants made enquiries which resulted in the disclosure of portions of the respondent's counsel's file. The documents obtained must be considered in light of the chronology: the notice of civil claim was filed on April 16, 2012, and the response on May 15, 2012; discoveries took place in February 2013; and the trial was originally scheduled for July 2013. The documents included:

- a) Records of funds paid by Western Investments "on behalf of David Long" to his solicitors to pay their accounts in 2012 and 2013, as well as correspondence indicating that John Darch directed Western Investments to forward some of those funds to Mr. Long's counsel;
- b) January 2012 correspondence from Mr. Long to his counsel advising them that Mr. Darch, described as a "trusted friend and colleague", had "volunteered to act as a witness (against Mr. Wright) in the action and assist in any way he can";
- c) June 2012 correspondence from Mr. Darch to Mr. Long (after the close of pleadings) with advice on how to question Mr. Wright on examination for discovery and offering advice on the pleadings and conduct of the litigation, including the following advice:

At some stage, as it unfolds that Gail [Mr. Wright's wife] is an officer (director or shareholder?) of Red Branch it may be worthwhile to add her name as a defendant as she was conspiring with GW [Mr. Wright] to defraud you of your Royalty.

...

Don't provide what you should not have [sic] until the right time, which to me is after GW has stated things under oath at his Discovery.

The goal is to prove GW is a liar, discredit him, expose his scheme to evade tax, and in 1998 to leave Gail.

...

I have to be the last witness and the one who ties a bow on the case. You have to win with the documents and other witnesses leaving me to confirm. GW's lawyer will do everything to destroy my credibility and use the argument that I am supporting you through malice because of the lawsuit between GW and me. Or that I have been promised a part of the royalty or some compensation.

...

Probably much more to come up after the case gets underway and some brain storming.

[Emphasis added.]

- d) June 2012 correspondence from Mr. Long to his counsel, referring to Mr. Darch as "[m]y business partner, friend and confidant", advising them that Mr. Darch would be arriving in Vancouver from Bangkok and would be "carrying some documents for you", and inviting counsel to meet with him;
- e) June 2012 correspondence from Mr. Darch to Mr. Long and his counsel describing a meeting with counsel for the estate of another holder of a royalty interest to "appraise them about the dispute" and offering further advice about proving the claim;
- f) Later correspondence in the same month from Mr. Darch to Mr. Long and his counsel summarizing his review of files in the offices of Fasken Martineau LLP. and enclosing copies of documents he had obtained from them;
- g) February 2013 correspondence from Mr. Darch to Mr. Long (at about the time discoveries were taking place) in which he states: "I feel that your lawyer MUST present to the judge that you were deceived by GW on the whole issue of tax and that he abused your trust in him and he conned you into signing the transfer[] to Red Branch and ask the judge to rule that your 50% be reinstated in your name";
- h) February 2013 correspondence from Mr. Long's counsel to Mr. Long referring to Mr. Darch's correspondence and advice;

- i) March 2015 correspondence from Mr. Long to his counsel in which he writes: "I note that John (Darch) has responded. Seems to be trying to run the show again? He hasn't made another mention of the missing files which I definitely left in his office immediately after the Discovery." (emphasis added).

[14] This material is said to be significant given the testimony of Messrs. Long and Darch at trial. Mr. Darch testified at the conclusion of his examination-in-chief:

- Q All right. And so what is the reason you're here today, sir?
- A I'm here because I had a subpoena to attend this case, and I'm pretty sure that either Mr. Wright or Mr. Long is going to be unhappy with what I have said, but I have no friendship interest, I have no financial interest, I have no business interest in either of the parties. So really to me it makes no difference who wins or who loses. What I have told you are the facts as much as I know them.

[Emphasis added.]

[15] And, in cross-examination:

- Q And, sir, have you ever discussed this legal proceeding with Mr. Long?
- A I did.
- Q And when did you discuss it with him?
- A In the early part of 2012.
- Q And so you discussed this with him before he -- he initiated these proceedings?
- A Yes.
- Q You encouraged him to do so?
- A No.
- Q Sir, have you ever directly or indirectly contributed to his legal fees related to this proceeding?
- A No. Never.
- Q Have you provided him or his lawyers with documents relevant to this proceeding?
- A I had a meeting with his lawyers, and we reviewed some documents.
- Q And when was that?
- A 2012.
- Q Before the proceedings started?
- A Yes.
- Q And you provided them with documents?
- A No, there may have been some emails that I had at the time.
- Q Did you also provide those emails to Mr. Long?
- A I think I might have given them to Mr. Long for his lawyer.

[Emphasis added.]

[16] When it was suggested to Mr. Darch that he had made efforts to preserve certain solicitor's records so as to assist Mr. Long, he testified as follows: "It's not entirely clear whose records those were ... it's complicated":

- Q Sir, why would you -- why would you volunteer that information? You would have volunteered that information to Mr. Long because you had been assisting him in this litigation?
- A I have not been assisting Mr. Long in the litigation. I gave him this information at the time, that if he was being denied something which he claimed was justly his, then it would be inappropriate of me not to tell him where he might find the proof that he needs.
- Q Sir, I suggest to you that you hired Mr. Long for a position he wasn't qualified for so that he would have sufficient income to pursue this lawsuit?

MS. TRIBE: Sir, I'm going to object. The question has been asked if he provided any financial assistance. He said no. That has been asked and answered, My Lord.

THE COURT: I will permit the question to be put just to settle the matter.

...

Because he has particularized it in another fashion.

THE WITNESS: Then my response will be to this, My Lord, absolutely I did not hire Mr. Long for any purpose of pursuing any claim against Mr. Wright. That is absolutely not my interest. I have no interest who wins, friendship-wise, business-wise, any other reason. So whatever you may be trying to suggest over and over again is simply not true.

[Emphasis added.]

[17] And at the conclusion of his cross-examination:

Q Just to be clear, Doi Chang is a company in which you have an interest?

A I have 50 percent. And if I may just say this, so it's absolutely clear, Long never received anything from me personally, nothing from Western Investments, nothing from Doi Chang. No money was given directly or indirectly in respect of this lawsuit. I am not in favour of the lawsuit. I wish I had no part of it.

[Emphasis added.]

[18] Mr. Long, in turn, testified as follows in cross-examination:

Q Sir, has Mr. Darch provided you with any assistance in this litigation?

A No, My Lord.

Q No financial assistance?

A No, My Lord.

Q But he has provided your lawyers with documents relevant to the litigation?

A I can't answer for my lawyers, My Lord.

Q Are you aware as to whether or not he has provided documents to your lawyers in this litigation?

A I can't say for sure, My Lord.

Q Has he provided you with documents that are relevant to this litigation?

A No, My Lord.

Q Have you ever met with him to discuss the issues in -- that relate to this litigation?

A We've not discussed the litigation, My Lord.

Q Sir, I suggest to you that that is, in fact, not true, that you have spoken to Mr. Darch about, in particular, this litigation.

A My Lord, my recollection is that there has been no discussion of the litigation.

Q That, in fact, sir, you had a discussion with Mr. Darch shortly before these proceedings were initiated, and he told you that if what you were saying was true, that you should start proceedings because you might have a claim?

A No, My Lord, that was not his advice.

Q So just so that I'm perfectly clear, you've never had a discussion with Mr. Darch about this proceeding?

A No, My Lord.

[Emphasis added.]

The Application

[19] The appellants seek orders re-opening the appeal, admitting fresh evidence, allowing the appeal, setting aside the judgment at trial, and ordering a new trial.

[20] They say the fresh evidence establishes that the testimony of Messrs. Long and Darch at trial was false and misleading and intended to create the false impression that Mr. Darch was uninterested and impartial. Mr. Darch's impartiality was material as the trial judge expressly considered it to be an important factor in the assessment of the evidence, and the outcome hinged upon the parties' credibility.

[21] In particular, the evidence of Messrs. Long and Darch at trial is said to be directly contradicted by the recently produced records which show that Mr. Darch:

- a) indirectly contributed to the financing of the litigation;
- b) was a friend, business partner, and confidant of Mr. Long;
- c) was in favour of, and encouraged, the lawsuit;
- d) was actively assisting Mr. Long and his counsel in the litigation, after the pleadings in April–May 2012, and through examinations for discovery in February 2013;
- e) provided documents to Mr. Long and his lawyers; and
- f) had conversations with Mr. Long about the litigation after the commencement of the proceedings.

Applicable Law

[22] The appellants seek to re-open the appeal with a view toward setting aside the judgment at trial on the ground it was founded upon misrepresentation amounting to perjury. This Court has inherent jurisdiction, founded upon control of its own process, to re-open an appeal after the appeal has been heard and judgment entered: *R. v. Hummel*, 2003 YKCA 4. The scope of that power in civil cases is described in, among other cases, *Menzies v. Harlos* (1989), 1989 CanLII

2760 (BC CA), 37 B.C.L.R. (2d) 249 (C.A.), and *Mayer v. Mayer Estate* (1993), 1993 CanLII 6861 (BC CA), 106 D.L.R. (4th) 353 (B.C.C.A.).

[23] In *Temple Consulting Group Ltd. v. Abakhan & Associates Inc.*, 2013 BCCA 119, Chiasson J.A., for the Court, addressed the circumstances in which the Court should re-consider an appeal as follows:

[17] In my view, reconsidering a decision of this Court involves a two-step process: first, should the appeal be re-opened in order to consider a position advanced by a party; second, if so, should the decision be reconsidered, that is, changed. This is the approach taken by the court in *R. v. Hummel*, 2003 YKCA 4, 175 C.C.C. (3d) 1, leave to appeal dismissed, [2002] S.C.C.A. No. 434, and applied by this Court in *Hadcock v. Georgia Pacific Securities Corp.*, 2007 BCCA 127, 64 B.C.L.R. (4th) 316. I recognize that often, from a practical perspective, the two steps are conflated, but in a case like the present, this Court must consider whether to re-open the appeal to determine whether to admit the tendered fresh evidence. If we were to do so, only then would we decide whether to reconsider our decision based on the fresh evidence.

[18] Reconsideration is guided by the words of this Court in *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp.*, 2005 BCCA 111, 209 B.C.A.C. 197 at para. 6:

The circumstances in which a reconsideration will be undertaken are limited and do not include simple re-argument of the appeal. Something in the nature of overlooked or misapprehended evidence, or failing that, a clear and compelling case in law on the point and the prospect of a very serious injustice absent reconsideration, is required: *Mayer v. Mayer*. That is to say, an application for reconsideration is of an extraordinary nature.

[24] The respondent would have us set a particularly high bar, both in relation to the admission of fresh evidence and in relation to the substantive relief sought by the appellant: setting aside the judgment at trial. In relation to the admission of fresh evidence, the respondent refers us not only to the test in *Palmer v. The Queen*, 1979 CanLII 8 (SCC), [1980] 1 S.C.R. 759, but also to *Ascent Developments Corp. v. Stonehenge Projects Inc.*, 2016 BCCA 287. In the latter case, Goepel J.A., for the Court, followed *Jens v. Jens*, 2008 BCCA 392, in holding, at para. 64, that the case was “one of the rare situations where fresh evidence should be admitted” because “[t]o not admit the evidence could well lead to an injustice” (emphasis added).

[25] In our view, *Ascent* is not a departure from precedent. Goepel J.A. clearly follows *Albu v. The University of British Columbia*, 2015 BCCA 41, and *Golder Associates Ltd. v. North Coast Wind Energy Corp.*, 2010 BCCA 263, and applies the test set out in *Palmer*.

[26] On the question of the substantive relief, the appellants say they can establish, on a balance of probability, on the affidavit evidence before us: Messrs. Long and Darch gave false testimony at trial; their perjured evidence is material; the fraud was not known to the appellants at the time of trial and could not have been known to them; and they are bringing the application in a timely fashion. In short, they say they can meet the test described in *Wentworth v. Rogers (No. 5)* (1986), 6 N.S.W.L.R. 534 (C.A.) at 538:

...it must be shown, by the party asserting that a judgment was procured by fraud, that there has been a new discovery of something material, in the sense that fresh facts have been found which, by themselves or in combination with previously known facts, would provide a reason for setting aside the judgment.

[27] The respondent says the conflict between the testimony of Messrs. Long and Darch at trial, on one hand, and the recently produced documentary record, on the other, may be explained. The conflict he says, does not clearly demonstrate perjury. Further, certain conflicts in the evidence were apparent at trial and with due diligence the conflicts upon which the application is founded might have been brought to light.

[28] In our view, before addressing these arguments it is necessary to determine whether we can and should resolve the allegation of perjury on the material in hand, when the affiants have not been cross-examined on their affidavits or testified in relation to the alleged perjury.

[29] Many of the cases referred to by counsel in their submissions have come on for hearing before appellate courts after examination of the alleged perjury issue by a judge of first instance. There is some authority for the proposition that an allegation that a judgment has been obtained by misrepresentation should not be determined in the first instance in this Court.

[30] In *Landreville v. Town of Boucherville*, 1978 CanLII 202 (SCC), [1978] 2 S.C.R. 801 at 814, Beetz J., for the Court, noted:

Fraud, dishonesty, bad faith, extortion and bribery form a special category of causes of nullity, which transcends all others.

Fraud unravels everything. The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever...

Lord Denning in *Lazarus Estates Ltd. v. Beasley*, at p. 712.

[31] In doing so, he emphasized two important principles: first, that fraud can vitiate a judgment, and second, that fraud must be distinctly pleaded and proved.

[32] The early cases deal with the grounds upon which an action can be brought to set aside an entered judgment. The dissent of Duff J. in the leading early case, *MacDonald v. Pier* (1922), 1922 CanLII 29 (SCC), [1923] S.C.R. 107, has frequently been cited as an authoritative description of the general principles. He wrote at 120-22:

Now Lord Selborne [in *Boswell v. Coaks*] explicitly says that he has no doubt that a judgment may be set aside on the ground of fraud and it is to be noted that the observations of Lord Justice James [in *Flower v. Lloyd*] are not confined in their application to cases where the fraud charged consists of perjury; false answers to interrogatories, misleading production of documents, subornation of perjury are all pointed out in the passage quoted above, and I think that notwithstanding Lord Selborne's expressed approval of the spirit of those observations and notwithstanding the weight and force of the observations themselves one is constrained to the conclusion upon an examination of the authorities that there is jurisdiction in the court to entertain an action to set aside a judgment on the ground that it has been obtained through perjury. The principle I conceive to be this; such jurisdiction exists but in the exercise of it the court will not permit its process to be made use of and will exert the utmost care and caution to prevent its process being used for the purpose of obtaining a re-trial of an issue already determined, of an issue which *transivit in rem judicatam* under the guise of impugning a judgment as procured by fraud. ... The principle upon which both these cases proceeded is that, to quote the judgment in the *Duchess of Kingston's case*:

Although it is not permitted to show that the court was mistaken it may be shown that it was misled.

Where the court is misled by the fraud of the parties that is something which vitiates the most solemn proceedings of courts of justice and as Lord Coke says, it avoids all judicial acts ecclesiastical or temporal. In the very nature of things as Lord Coleridge C.J. said in *Abouloff v. Oppenheimer* at p. 302, the question whether the court was misled in pronouncing judgment never could have been submitted to them, never could have been in issue before them and therefore never could have been decided by them. Brett L.J. at p. 307 discusses the judgment of James L.J. in *Flower v. Lloyd* and he expressly dissents from the proposition that there can be any doubt that the fraud of the party to the action committed before the court for the purpose of deceiving the court is a ground for setting aside the judgment.

[33] The question of appropriate procedure is clearly addressed in Ontario. The *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 59.06 (formerly R. 529 of the *Rules of Court*) provide:

(2) A party who seeks to,

(a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;

...

may make a motion in the proceeding for the relief claimed.

[34] In *100 Main Street East Ltd. v. Sakas* (1974), 1974 CanLII 637 (ON SC), 3 O.R. (2d) 361 (H. Ct. J.), the trial judge set aside a judgment in a real estate dispute, after trial, on the basis that material evidence had been concealed. Justice Holland held, at 368:

I think it comes down to this: that fraud has been clearly established on the part of the defendant which, if known to the trial Judge, may reasonably have affected the result. I cannot say that of necessity it would have affected the result. I am of the view, however, that where fraud has been clearly established the test of the effect of the fraud on the result should not be placed too high.

[35] On appeal, in *100 Main Street East Ltd. v. Sakas* (1975), 1975 CanLII 381 (ON CA), 8 O.R. (2d) 385 (C.A.), Estey J.A. described the procedure that had brought the case before the Ontario Court of Appeal, utilization of Rule 529 of the Ontario *Rules of Court*:

The test applicable in these circumstances has not changed over the years although the procedure in obtaining the desired relief has. Formerly (and it is still the case in England), the party alleging that the judgment has been obtained by fraud was required to bring an action to set aside such judgment. In Ontario, such a person is required, by Rule 529 of the Rules of Court, to apply by motion in the original proceedings for such order as could formerly have been obtained by the bringing of a new action. This new procedure is of course not a form of appeal, nor are the principles to be applied in resolving such application those which would apply in the case of newly discovered evidence not revealing fraud, except that the fraud must not have been known to the complaining party at the time of the trial.

[Emphasis added.]

[36] *International Corona Resources Ltd. v. LAC Minerals Ltd.* (1988), 1988 CanLII 4534 (ON SC), 66 O.R. (2d) 610 (H. Ct. J.), to which both parties have referred as an authoritative statement of the applicable test on an application

v. *Granitile Inc.* (2008), 2008 CanLII 63568 (ON SC),

302 D.L.R. (4th) 40 (Ont. Sup. Ct.), where the motion was converted into a trial in order to review the evidence of fraud.

[37] *Hill v. Hill*, 2016 ABCA 49, came on before the Court of Appeal of Alberta by a circuitous route.

Ultimately, the appeal arose from a second action in the trial court seeking to set aside an earlier judgment on the basis of newly discovered evidence.

[38] There is, however, in Alberta a statutory provision applicable in some situations that is similar to the rule relied upon in Ontario. In *Re Smolak and Necula* (1973), 1973 CanLII 1085 (AB CA), 39 D.L.R. (3d) 730 (Alta. C.A.), Clement J.A. cited the provisions of the *Maintenance and Recovery Act*, R.S.A. 1970, c. 223:

30. Where an order has been made or an application for an order has been dismissed, a judge may, on the discovery of new evidence or of fraud, grant leave to reopen and may reopen and consider a previous decision.

[39] *Smolak* was an appeal from the refusal of a trial judge to re-open his previous decision.

[40] *Wentworth*, the leading Australian case, to which counsel referred, came on before the Court of Appeal as an appeal from the summary dismissal of an action to set aside a prior judgment. Interestingly, the case had previously come before the Court of Appeal but was remitted to the trial division, for reasons summarized by President Kirby, at 538, as follows:

The appellant has appealed from the judgment entered by Maxwell, J pursuant to the jury's verdict. Her appeal was to have been heard in May 1986. She then commenced proceedings, supplementary to the appeal, to have the judgment set aside on the ground that it was obtained by fraud. Such proceedings are well-established in our law. They are independent of the appeal and equitable in origin and nature. That is the principal reason why this Court declined to consolidate the attack on the judgment for fraud with the appeal and required it to be tried separately in the Equity Division of the Court. When Young J. received the matter by remission from this Court, he directed that a statement of claim be filed. This was subsequently done and the appellant verified it. It was later amended with the leave of the Court. It was the amended statement of claim, as verified, which was the subject of the motion by the respondent that gave rise to his Honour's peremptory orders now under challenge.

[Emphasis added.]

[41] There are certainly instances where appellate courts have admitted fresh evidence, found a judgment to be vitiated by fraud, and set a trial judgment aside without a new trial. That appears to have been the result in the leading English case, *Meek v. Fleming*, [1961] 3 All E.R. 148 (C.A.). In that case, the English Court of Appeal described its ability to address misrepresentation or nondisclosure at trial. Holroyd Pearce L.J. held, at 154:

Where a party deliberately misleads the court in a material matter, and that deception has probably tipped the scale in his favour (or even, as I think, where it may reasonably have done so) it would be wrong to allow him to retain the judgment thus unfairly procured. *Finis* litium is a desirable object, but it must not be sought by so great a sacrifice of justice which is and must remain the supreme object. Moreover, to allow the victor to keep the spoils so unworthily obtained would be an encouragement to such behaviour, and do even greater harm than the multiplication of trials. In every case it must be a question of degree, weighing one principle against the other.

[42] Lord Pearson held, at 156:

In the present case the fresh evidence only affects the credit of the defendant, and does not relate directly to any issue in the case. Accordingly it would not be right to order a new trial unless there is some feature of paramount importance outweighing the grave disadvantage of protracting the litigation. In my opinion, however, there is such a feature in the present case.

And, at 157:

There was in the result at the trial of this action the deception of the court, and the defendant in cross-examination was giving uncandid (and at one point false) evidence in order to preserve the concealment of the truth.

The fresh evidence has materiality.

[43] Similarly, in *Vagi v. Peters*, 1989 CanLII 5121 (SK CA), [1990] 2 W.W.R. 170 (Sask. C.A.), the Saskatchewan Court of Appeal set aside a judgment at trial and ordered a new trial on the basis that the respondent's testimony at trial involved "concealment of relevant information which pertained either to the quantum of damages or had a bearing upon his credibility" (at 171). The *Palmer* test was found to have been met. Wakeling J.A., for the majority, held, at 172:

This court has consistently indicated its concerns for the maintenance of respect for the administration of justice. To that end, I do not consider it appropriate to permit a judgment which is to at least some degree based upon evidence which is untruthful or conceals

relevant information to be upheld. This is so even though every aspect of that evidence cannot be said to clearly bear on the judgment rendered. It is enough if the evidence is of some consequence and therefore might have some bearing upon the result of the trial: see *Meek v. Fleming*

[44] There is no discussion in *Vagi* of the Court's jurisdiction or the English practice of requiring the party alleging that the judgment has been obtained by fraud to bring an action to set aside the judgment. Nor does there appear to have been any doubt in *Vagi* that the respondent was untruthful or concealed relevant information at trial.

[45] In British Columbia, we have no equivalent to the Ontario provision referred to above, except rules that provide for the setting aside of orders made without notice or in default. In *Coughlin v. Kuntz* (1997), 1997 CanLII 2995 (BC SC),

43 B.C.L.R. (3d) 360 (S.C.), Cohen J. addressed the English practice referred to by Estey J.A. in *100 Main Street East*. After discussing *Gusola* (1991), 50 C.P.C. (2d) 154 (B.C.S.C.), and this Court's judgment in *D.K. Investments Ltd. v. S.W.S. Investments Ltd.* (1990), 1990 CanLII 586 (BC CA), 44 B.C.L.R. (2d) 1 (C.A.), he held:

[35] Some of the cases cited above were brought as separate actions, and others brought as motions. The general rule in British Columbia has traditionally been that after a judgment or order has been entered, a new action must be brought to set aside that judgment. This was made clear by the Supreme Court of Canada in *Royal Trust Co. v. Jones*, [1962] S.C.R. 133, where at pp. 145-146 Cartwright J. said:

An examination of the authorities leads me to the conclusion that it has long been settled in England that the proper method of impeaching a judgment of the High Court on the ground of fraud or of seeking to set it aside on the ground of subsequently discovered evidence is by action, whether or not the judgment which is attacked has been affirmed or otherwise dealt with by the Court of Appeal or other appellate tribunal.... There appears to be nothing in the statutes constituting and continuing the courts in British Columbia or in the Rules of Court of that Province to suggest that there is any difference between the law and practice on this point in British Columbia and in England; in my opinion they are the same.

[36] In *D.K. Investments Ltd.*, *supra*, the Court of Appeal confirmed that *Royal Trust Co. v. Jones*, *supra*, is still the law in British Columbia.

....

[38] The cases which involve a motion to set aside a judgment, as opposed to an action, are Ontario cases. Ontario provides for the setting aside or varying of a judgment by way of motion in its *Rules of Civil Procedure*

[39] There is no equivalent rule in the British Columbia *Rules of Court* to allow for the setting aside of a judgment on the basis of fraud by motion. The Rules do allow for applications to set aside judgments in circumstances where judgment was granted upon the default of one of the parties. ...

[40] It appears therefore, that, as a general principle, the jurisdiction of the trial judge ends with the entry of judgment and that when a party seeks to set aside a judgment which has been entered, a new action must be commenced. However, there is some authority to suggest that the court has an inherent jurisdiction to set aside its own entered order and may do so without the party having to commence a new action.

...

[48] ... [I]n *C. (C.A.) v. H. (J.R.)* (1992), 1992 CanLII 1419 (BC CA), 67 B.C.L.R. (2d) 268, (C.A.), an application was brought to set aside a child maintenance order made by the Provincial Court. The application was dismissed in the Supreme Court, and the applicant appealed. In the course of her judgment dismissing the appeal, Southin J.A. stated at p. 271:

An order of a court of competent jurisdiction can be set aside in a number of ways. First, under the Rules of the court that made it if those Rules contain provisions for the setting aside of, for instance, a default judgment; secondly, by judicial review if the court is an inferior court, properly brought under the *Judicial Review Procedure Act*, R.S.B.C. 1979, c. 209; thirdly, by way of appeal - none of those proceedings have been taken; and fourthly, by what one might call by way of short-hand an action in the nature of *Royal Trust Co. v. Jones*, 1961 CanLII 50 (SCC), [1962] S.C.R. 132, 37 W.W.R. 1, 31 D.L.R. (2d) 292, a form of action which was discussed by this Court in *D.K. Investments Ltd. v. S.W.S. Investments Ltd.* (1990), 1990 CanLII 586 (BC CA), 44 B.C.L.R. (2d) 1. It is not necessary in this case to expand on those authorities.

[49] This passage is most significant because, first, it enumerates the ways in which an entered order might be upset in British Columbia, and second, because it does not contain any reference to setting aside an entered judgment or order by way of a motion in the action pursuant to the inherent jurisdiction of the court. In my view, this case, which was decided after *Racz v. District of Mission* (1988), 1988 CanLII 2937 (BC CA), 22 B.C.L.R. (2d) 70 (C.A.), brings into question the jurisdiction of this court, on a motion, to re-open, or to set aside, vary, or amend the original judgment in the instant case.

...

[51] In my opinion, the court does not have jurisdiction in the case at bar to re-open the trial or vary the entered judgment on a motion in the action. I think that the procedure approved in *Racz*, *supra*, is limited to setting aside a consent order. In my view, the result in that case does not operate to overrule the well-established law that once a judgment is entered the court is functus officio and its judgment can be set aside or varied only in a fresh action brought for that purpose. This, I find, is particularly so where, as in the instant case,

the relief sought by the applicant raises complex issues which must be decided on controversial evidence.

[Emphasis added.]

[46] In *Lemmon*, Josephson J. presided over trial in an action to set aside a prior judgment on the basis it was obtained by fraudulent testimony. Applying the test described in *100 Main Street East, Meek, and Hip Foong Hong v. H. Neotia & Co.*, [1918] A.C. 888 (P.C.), he allowed the action and set aside the prior judgment.

[47] *Bains v. Bhandar*, 1999 BCCA 32, came on before this Court as an appeal from a trial judge's order refusing to order a new trial of the original action in response to allegations of fraud. The trial judge was alleged to have erred in his findings regarding due diligence and in describing the evidentiary onus on the applicant. The application was not brought, in the first instance, in the Court of Appeal.

[48] Similarly, *D.K. Investments* was an appeal from the summary dismissal of an action to set aside a prior judgment. The trial judge found that the misrepresentation alleged was immaterial and the party seeking to set aside the judgment had not exercised due diligence.

[49] The judgment of this Court referred extensively to the decision in *Royal Trust Company v. E.M. Jones* (1961), 1961 CanLII 50 (SCC), [1962] S.C.R. 132, where, Cartwright J. said, at 145-46:

An examination of the authorities leads me to the conclusion that it has long been settled in England that the proper method of impeaching a judgment of the High Court on the ground of fraud or of seeking to set it aside on the ground of subsequently discovered evidence is by action, whether or not the judgment which is attacked has been affirmed or otherwise dealt with by the Court of Appeal or other appellate tribunal. Section 9 of the *Supreme Court Act*, R.S.B.C. 1936, c. 56, which was in force at the time when Manson J. [the trial judge] dealt with the matter (and which is now section 9 of the R.S.B.C. 1960, c. 374) reads as follows:

9. The Court is and shall continue to be a Court of original jurisdiction, and shall have complete cognizance of all pleas whatsoever, and shall have jurisdiction in all cases, civil as well as criminal, arising within the Province.

There appears to be nothing in the statutes constituting and continuing the courts in British Columbia or in the Rules of Court of that Province to suggest that there is any difference between the law and the practice on this point in British Columbia and in England; in my opinion they are the same.

[Emphasis added.]

[50] Madam Justice Southin, for this Court, found that the action to set aside the judgment should not have been summarily dismissed and remitted some of the issues to be determined after a trial. She wrote, at 21:

In my opinion, this was a case, at least on the issue of due diligence, where the court, whatever the parties wanted, should have declined to grant judgment. The learned judge spoke of evidence not adduced but in a case of so rare a nature in which there is no established practice -- no understood standard of evidence -- and where, as here, the issue is one of a man's honour, it behooves the court to give an opportunity for a full hearing.

[51] In our opinion, the judgment in *D.K. Investments* speaks strongly in favour of permitting the trial court to determine the issue the parties seek to put before us. The trial court continues to have the inherent jurisdiction to consider the question, notwithstanding our dismissal of the appeal, and it is the forum in which the parties may have a full hearing.

Application of the Law

[52] In response to the application to re-open the appeal, C. Michelle Tribe, counsel for the respondent at trial, has sworn an affidavit in which she attests to her unfamiliarity with the contents of the file said to establish the falsity of the evidence of Messrs. Darch and Long. She does not dispute that her firm was offered assistance by Mr. Darch, received documents from him, and was aware of discussions between Messrs. Long and Darch that took place after the commencement of the litigation.

[53] Mr. Darch has filed an affidavit in which he says, among other things: "It is not true, as alleged in these proceedings, that I offered and provided assistance over the period from June 2012 to February 2013. In fact, to the best of my recollection, I was involved in this matter on four separate occasions: June 2012; December 2012; February 2013; and shortly prior to trial." He deposes that he sent money to Mr. Long's lawyers at his request but those funds were "paid from Mr. Long's remuneration on his written instructions".

[54] Mr. Long has also filed an affidavit in which he deposes to the fact that he paid little attention to Mr. Darch's advice and at trial had forgotten the extent of his communication with Mr. Darch. He also swears that he did not regard Mr. Darch's correspondence or advice as assistance with the litigation.

[55] He says the evidence now before us could have been elicited at trial if the appellants had exercised due diligence and, in any event, the evidence does not bear on a decisive or potentially decisive issue.

[56] In their submissions, Mr. Long's counsel say there was no perjury or fraud. They say the allegation of perjury is in relation to a nebulous concept: whether Mr. Darch provided "assistance" or was "biased". In relation to Mr. Long's evidence, the respondent's counsel says: "the trial judge was aware, from the cross-examination, of the contradiction between Mr. Long's evidence and Mr. Darch's evidence ... and to the extent that that affected Mr. Long's credibility, it must have been included in the trial judge's assessment of the case."

[57] In addition, the respondent says there is "no evidence at all to suggest anything other than that Long's memory was faded".

[58] On all of the relevant issues – falsity of the evidence at trial, knowledge of falsity, intention to mislead, materiality and, to the extent it is relevant, due diligence – the respondent joins issue with the appellants. While this Court has jurisdiction to re-open an appeal, hear fresh evidence in support of an allegation that a judgment was improperly obtained, and set aside a judgment on those grounds, we would be loath to do so in a case where the falsity of the impugned evidence is in issue. We say that because there is no doubt that the trial court retains jurisdiction to hear and determine a challenge to an entered judgment founded upon an allegation of fraud or perjury, and because courts of first instance are in a privileged position with respect to the determination of such factual disputes.

Disposition

[59] For those reasons, we would dismiss the applications to re-open the appeal and admit fresh evidence because our judgment does not pose an impediment to a future action in the British Columbia Supreme Court to set aside the judgment below as vitiated by fraud.

“The Honourable Mr. Justice Harris”

“The Honourable Mr. Justice Willcock”

“The Honourable Madam Justice Fenlon”

Tab 99

Smith v. Canada (Attorney General), 2020 FC 629 (CanLII), [2020] 4 FCR 3

Source: Federal Court

Date: 2020-05-21

File number: T-1713-18

Citation: Smith v. Canada (Attorney General), 2020 FC 629 (CanLII), [2020] 4 FCR 3, <<https://canlii.ca/t/j7v4k>>, retrieved on 2026-03-23

Acknowledgements: The official copies of the [Federal Courts Reports' decisions](#) are available on the website of the [Office of the Commissioner for Federal Judicial Affairs Canada](#).

1713-18

T-

T-2055-18

2020 FC 629

The Honourable Justice Patrick Smith (*Applicant*)

v.

The Attorney General of Canada (*Respondent*)

and

The Canadian Judicial Council, the Canadian Superior Court Judges Association and the Ontario Superior Court Judges' Association (*Interveners*)

INDEXED AS: SMITH V. CANADA (ATTORNEY GENERAL)

Federal Court, Zinn J.—Toronto, January 21; Ottawa, May 21, 2020.

Judges and Courts — Judicial review of Canadian Judicial Council's (CJC) decision to constitute Judicial Conduct Review Panel (Review Panel), Review Panel's conclusion that applicant contravening Judges Act, s. 55 — Applicant, Ontario Superior Court of Justice judge, accepting appointment to position of Interim Dean of law school — Chief Justice granting applicant special leave pursuant to Judges Act, s. 54(1)(a) after obtaining approval from Minister of Justice — Executive Director of CJC of view that in light of Judges Act, ss. 54, 55, general duties, ethical obligations of Judges, acceptance

*by applicant of Interim Dean role may warrant consideration by Council — Referring matter to Judicial Conduct Committee Vice-Chairperson — Matter referred to Review Panel — Review Panel concluding that leave of absence granted under Judges Act, s. 54 not removing prohibition under s. 55 — Finding applicant breaching ethical obligations, impermissibly using prestige of judicial office — Vice-Chairperson endorsing Review Panel's decision — Whether Review Panel decision reasonable, CJC proceedings procedurally unfair or abuse of process — Review Panel's interpretation of Judges Act, s. 55 unreasonable — "Prohibition" identified by Review Panel not "on judges carrying on extra-judicial activities" but rather on judges engaging "in any occupation or business other than his or her judicial duties" — Review Committee's broad interpretation exhibiting neither justification nor intelligibility — Applicant not breaching s. 55 when accepting appointment — S. 55 not complete ban on judges taking on non-judicial roles — S. 54 allowing for leave from judicial duties for reasons not inconsistent with those duties — Review Panel's decision as to ethical breach by applicant unreasonable — Review Panel failing to examine applicant's conduct on basis of informed public exercising mature judgment — CJC process involving applicant unfair, contrary to interests of justice — Constituting abuse of process — Nothing in record explaining how, on what basis Executive Director concluding that referral to Judicial Conduct Committee in public interest, due administration of justice — Applicant also denied procedural fairness by Executive Director — Not receiving fundamental procedural right to know case to be met — Initial referral to Judicial Conduct Committee failing to accord with CJC procedures — Executive Director raising matter on his own in absence of public complaint — In such circumstances, Executive Director ought to weight conduct against test set out in *Baker v. Canada (Minister of Citizenship and Immigration)* for conduct worthy of removal from bench, be convinced that conduct could result in such a finding — Here, removal of applicant by Minister of Justice inconceivable — Applications allowed.*

These were applications for judicial review of the Canadian Judicial Council's (CJC) decision to constitute a Judicial Conduct Review Panel (Review Panel) and of the Review Panel's conclusion that the applicant contravened [section 55](#) of the *Judges Act*.

The applicant, an Ontario Superior Court of Justice judge, accepted an appointment as Interim Dean of the Bora Laskin Faculty of Law at Lakehead University (the Law School). After obtaining the approval of the Minister of Justice, the Chief Justice granted the applicant special leave pursuant to [paragraph 54\(1\)\(a\)](#) of the *Judges Act* to accept the assignment, subject to certain parameters, including that his role be confined to "academic leadership". The Executive Director of the CJC subsequently wrote to the applicant informing him that "in light of [sections 54](#) and [55](#) of the *Judges Act*, and given the general duties and ethical obligations of judges," acceptance of the Interim Dean role "brings me to the view that the situation may warrant consideration by Council." The Chief Justice informed the Executive Director of the CJC that the appointment would attract no remuneration, that the applicant's duties would be restricted to providing only academic leadership, and that he would be insulated from concerns about future litigation. The Executive Director nevertheless referred the matter to the Vice-Chairperson of the Judicial Conduct Committee (Vice-Chairperson). The applicant responded that he did not view section 55 of the *Judges Act* as a bar to his acceptance of the position at the Law School. The applicant later signed a written agreement setting out the limitations of his appointment with Lakehead University. In August 2018, the Executive Director advised the applicant that the Vice-Chairperson had decided to constitute a review panel in respect of the appointment. The CJC later issued a press release stating that the applicant's decision to become Interim Dean raised some questions about whether such duties were compatible with judicial office. The Vice-Chairperson's reasons for referral rested on his view that the applicant accepted the role without considering the reaction from First Nations chiefs or the potential effect on the prestige of judicial office. Following notice that the matter had been referred to the Review Panel, the applicant advised the Executive Director that he had resigned from his position at the Law School in September 2018 and would return to his judicial duties with the Superior Court of Justice. The Review Panel concluded that section 55 of the *Judges Act* "requires judges ... to confine themselves to their judicial role" and that a leave of absence granted under section 54 does not remove this prohibition. It further found that the applicant had breached an ethical obligation to avoid becoming involved in public controversy, and he had impermissibly used the prestige of judicial office to bolster the Law School, but his conduct was not serious enough to warrant removal from the bench and it therefore decided not to constitute an inquiry committee. The Vice-Chairperson endorsed the decision of the Review Panel and concluded that in light of the applicant's resignation from the position, no further measures were needed. The applicant sought a declaration that he did not contravene section 55 of the *Judges Act*.

The main issues were whether the decision of the Review Panel was reasonable, and whether the CJC proceedings were procedurally unfair or an abuse of process.

Held, the applications should be allowed.

The interpretation given by the Review Panel to [section 55](#) of the *Judges Act* was unreasonable. The “prohibition” identified by the Review Panel is set out in clear and explicit terms in the English version. However, the prohibition is not “on judges carrying on extra-judicial activities”. Rather, it is on judges engaging “in any occupation or business other than his or her judicial duties”. The Review Committee interpreted the phrase “occupation or business” in isolation from its context. Properly read, the phrase says that judicial duties are an occupation or business. By failing to include and examine this critical qualifier in its initial summary of the section, the Review Panel may have engaged in “reverse engineering” to achieve a desired outcome rather than discerning the meaning and legislative intent of the section. In ignoring the context, the Review Panel’s reasoning failed to properly apply the modern principle of statutory construction. The Review Panel’s conclusion that the phrase “occupation or business” is to be broadly interpreted exhibited neither justification nor intelligibility. It was problematic in several respects, including the failure to consider the entire phrase. When considering the legislative history of section 55, the Review Panel did not address or consider the original wording of the provision. In neither official language do the words of section 55 support the conclusion of the Review Panel that the intent of Parliament was to restrict judges from performing non-remunerative engagements. To the contrary, they are focused on remunerative commercial engagements. When a judge is appointed by Parliament or a Legislature to head a commission or act as an arbitrator, his or her judicial compensation under the *Judges Act* continues and pursuant to [section 57](#), there is no additional remuneration. However, that does not mean that these exceptional duties are done on a non-remunerative basis. Rather, they are done for the judge’s regular remuneration. The Review Panel’s reasoning was flawed and led to an unreasonable conclusion on interpretation. The applicant did not breach section 55 of the *Judges Act* when he accepted the appointment of Interim Dean. There is nothing in the language of [section 54](#) of the *Judges Act*, suggesting that leaves of absence may not be granted to enable judges to take on responsibilities outside of their judicial duties. This leave provision was not enacted to be used exclusively for absences “such as an illness, a period of recovery from accident or parental leave” as the Review Panel suggested. Leaves under section 54 are not restricted to maternity or parental leaves. Section 55 is not a complete ban on judges taking on non-judicial roles. Parliament’s intention was that judges are able to assume non-judicial roles in certain circumstances and section 54 of the [Act](#) allows for a leave from judicial duties for a variety of reasons that are not inconsistent with those duties. The decision of the Review Panel as to the ethical breach of the applicant in accepting the appointment was unreasonable and could not stand. The Review Panel failed to examine whether the applicant’s conduct unnecessarily exposed him to criticism or attack on the basis of an informed public exercising mature judgment.

The CJC process involving the applicant was unfair to the point that it was contrary to the interests of justice. It was an abuse of process. The CJC disciplinary procedure was misused from the beginning, i.e. when the Executive Director determined that the applicant accepting the appointment to the Law School was a matter that “warrants consideration.” There was nothing in the record explaining how and on what basis the Executive Director concluded that his referral to the Judicial Conduct Committee was in the public interest and the due administration of justice. The Executive Director placed no weight on the Minister’s approval of the applicant’s appointment. The Minister’s approval could not reasonably be said to be “unofficial” simply because she did not expressly use the word “approved.” In addition to the improper decision of the Executive Director that the matter “warrants consideration” there was evidence in the record that the applicant was also denied procedural fairness by the Executive Director. Specifically, the applicant was not informed of the Executive Director’s concerns about the call for him to resign, nor was he provided with any of the “public comments” made in response to statements made by First Nations chiefs, nor those statements. The Executive Director failed to give to the applicant the fundamental procedural right to know the case to be met. If the real concern of the Executive Director was the adverse reaction of some First Nations chiefs to his appointment, then the applicant was entitled to know that and respond to it. Accordingly, the initial referral to the Judicial Conduct Committee by the Executive Director failed to accord with the procedures established by the CJC. It was not a matter that warranted consideration, and the referral was done in a procedurally unfair manner. In raising matters on his own in the absence of any complaint from the public, the Executive Director would be well advised seriously to consider whether to do so. The Executive Director ought to weigh conduct against the test set by the Supreme Court in *Baker v. Canada (Minister of Citizenship and Immigration)* for conduct worthy of removal from the

bench. Although that ultimate decision is not his to make, he ought to be convinced that it could result in such a finding. Here, in light of the approval of the Minister of Justice, removal action by the Minister of Justice was inconceivable.

The declarations sought by the applicant were appropriate. The Court declared that the applicant, in accepting the appointment of Interim Dean, did not breach [section 55](#) of the *Judges Act*, nor did he breach his judicial ethics.

STATUTES AND REGULATIONS CITED

An Act to amend the [Act](#) respecting the Judges of Provincial Courts, S.C. 1905, 4-5 Edward VII, c. 31, s. 7.

Canadian Judicial Council Inquiries and Investigations By-laws, 2015, SOR/2015-203, s. 2(1).

Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5], s. 99.

Federal Courts Rules, SOR/98-106, rr. 109, 303(2).

Judges Act, R.S.C. 1906, c. 138, s. 33.

Judges Act, R.S.C., 1985, c. J-1, ss. 54 to [56.1](#), 54, [55](#), [56](#), [56.1](#), [57](#).

Judges Act, 1946 (The), S.C. 1946, c. 56, s. 34.

CASES CITED

APPLIED:

Canada (Minister of Citizenship and Immigration) v. Vavilov, [2019 SCC 65](#), 441 D.L.R. (4th) 1; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999 CanLII 699](#); *Blencoe v. British Columbia (Human Rights Commission)*, [2000 SCC 44](#), [2000] 2 S.C.R. 307; *Therrien (Re)*, [2001 SCC 35](#), [2001] 2 S.C.R. 3.

CONSIDERED:

Canada Post Corp. v. Canadian Union of Postal Workers, [2019 SCC 67](#), 441 D.L.R. (4th) 269; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002 SCC 11](#), [2002] 1 S.C.R. 249; *Ruffo v. Conseil de la magistrature*, [1995 CanLII 49 \(SCC\)](#), [1995] 4 S.C.R. 267, (1995), 130 D.L.R. (4th) 1; *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, [2015 SCC 25](#), [2015] 2 S.C.R. 282; *Cosgrove v. Canadian Judicial Council*, [2007 FCA 103](#), [2007] 4 F.C.R. 714.

REFERRED TO:

Girouard v. Canada (Attorney General), [2018 FC 865](#), [2019] 1 F.C.R. 404, affd [2019 FCA 148](#), [2019] 3 F.C.R. 503, leave to appeal to the S.C.C. refused December 12, 2019; *Ontario (Energy Board) v. Ontario Power Generation Inc.*, [2015 SCC 44](#), [2015] 3 S.C.R. 147; *Girouard v. Canada (Attorney General)*, [2019 FC 434](#); *Girouard v. Canada (Attorney General)*, [2019 FC 1282](#); *Canadian Judicial Council v. Girouard*, 2019 FCA 148, [2019] 3 F.C.R. 503; *Mission Institution v. Khela*, [2014 SCC 24](#), [2014] 1 S.C.R. 502; *Canada (Citizenship and Immigration) v. Khosa*, [2009 SCC 12](#), [2009] 1 S.C.R. 339; *Garces Caceres v. Canada (Public Safety and Emergency Preparedness)*, [2020 FC 4](#); *Ebrahimshani v. Canada (Citizenship and Immigration)*, [2020 FC 89](#); *Ennis v. Canada (Attorney General)*, [2020 FC 43](#); *Canadian Pacific Railway Company v. Canada (Attorney General)*, [2018 FCA 69](#), [2019] 1 F.C.R. 121; *R. v. Daoust*, [2004 SCC 6](#), [2004] 1 S.C.R. 217; *Sandoz Canada Inc. v. Canada (Attorney General)*, [2014 FC 501](#), 122 C.P.R. (4th) 195.

AUTHORS CITED

Canada. Parliament. Senate. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 35th Parl., 2nd Sess., Issue No. 29 (October 3, 1996).

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Canadian Judicial Council. *Report of the Review Panel constituted by the Canadian Judicial Council regarding the Honourable Patrick Smith*, November 5, 2018.

Canadian Judicial Council. *Reasons for the referral of a complaint to a Judicial Conduct Review Panel in the matter of the Honourable Patrick Smith of the Ontario Superior Court of Justice*, October 3, 2018.

“Justice Patrick Smith named interim dean of Lakehead law school”, *CBC News* (May 3, 2018).

McQuigge, Michelle. “Judge fights against disciplinary body’s ruling that said he engaged in misconduct”, *Toronto Star* (27 September 2018).

Schmitz, Cristin. “Canadian judges rally around judge facing discipline for accepting interim law dean post at Lakehead University”, *The Lawyer’s Daily* (4 October 2018).

APPLICATIONS for judicial review of the Canadian Judicial Council’s decision to constitute a Judicial Conduct Review Panel and of the Review Panel’s conclusion that the applicant contravened [section 55](#) of the [Judges Act](#). Applications allowed.

APPEARANCES

Brian Gover and Pam Hrick for applicant.

Michael H. Morris, Joseph Cheng and Elizabeth Koudys for respondent.

Christopher D. Bredt, Ewa Krajewska and Teagan Markin for intervener Canadian Judicial Council.

Richard P. Stephenson and Michael Fenrick for intervener Canadian Superior Courts Judges Association.

Tom Curry, Scott Rollwagen and Margaret Robbins for intervener Ontario Superior Court Judges’ Association.

SOLICITORS OF RECORD

Stockwoods LLP, Toronto, for applicant.

Deputy Attorney General of Canada for respondent.

Borden Ladner Gervais LLP, Toronto, for intervener Canadian Judicial Council.

Paliare Roland Rosenburg Rothstein LLP, Toronto, for intervener Canadian Superior Courts Judges Association.

Lenczner Slaght Royce Smith Griffin LLP, Toronto, for intervener Ontario Superior Court Judges’ Association.

The following are the reasons for judgment and judgment rendered in English by

Zinn J.:

“The fact that Judge Patrick Smith is in danger of removal is a sobering illustration of the ‘no good deed goes unpunished’ saying.”

Christie Blatchford

I. INTRODUCTION

[1] The Honourable Justice Patrick Smith (Justice Smith) is a judge of the Superior Court of Justice of Ontario.

[2] He challenges two decisions of the Canadian Judicial Council (CJC). The first is the August 28, 2018, decision of Québec Superior Court Associate Chief Justice Robert Pidgeon, in his capacity as Vice-Chairperson of the Judicial Conduct Committee (Pidgeon A.C.J.), to constitute a Judicial Conduct Review Panel (Review Panel) (Court File T-1713-18). Second, Justice Smith challenges the November 5, 2018, decision of the Review Panel [*Report of the Review Panel constituted by the Canadian Judicial Council regarding the Honourable Patrick Smith*] (Court File T-2055-18).

[3] The Review Panel concluded that Justice Smith, in accepting the appointment of Interim Dean (Academic) at Bora Laskin Faculty of Law at Lakehead University (the Law School), contravened [section 55](#) of the *Judges Act*, R.S.C., 1985, c. J-1 [the Act]. It further found that Justice Smith failed in his “ethical obligations as a judge to avoid involvement in public debate that may unnecessarily expose him to political attack or be inconsistent with the dignity of judicial office.” It recommended that an Inquiry Committee not be constituted, and remitted the matter back to Pidgeon A.C.J. for a decision on the most appropriate way to resolve the matter.

[4] Pidgeon A.C.J., in a letter to Justice Smith dated November 6, 2018 (Letter of Concern), writes that he “fully support[s] the Panel’s reasons and conclusions” and describes the decision to accept the role of Interim Dean as “ill-advised.” As Justice Smith had resigned as Interim Dean (Academic) of the Law School prior to the decision of the Review Panel and had resumed his judicial duties, it was concluded that no further measures were necessary.

[5] In their memoranda and oral submissions, Justice Smith and the CJC focused on the decision of the Review Panel and the subsequent Letter of Concern as they overtook the decision to refer the conduct of Justice Smith to the Review Panel. Likewise, I shall focus on the decision of the Review Panel and the Letter of Concern, except when relevant to the submission of Justice Smith that the CJC proceedings were procedurally unfair and an abuse of process.

[6] The Review Panel decision and this application bring into issue the interpretation of several sections of the *Judges Act*, which are reproduced in Appendix A.

[7] For the reasons that follow, I conclude that these applications must be allowed. The decision of the Review Panel is not reasonable, and the CJC procedure was applied unfairly to Justice Smith and was an abuse of process. Justice Smith is entitled to a meaningful remedy.

II. BACKGROUND

A. Procedural History

[8] Both applications for judicial review were under case management. By her July 4, 2019 order, the Case Management Judge consolidated these applications. Pursuant to [rule 109](#) of the [Federal Courts Rules](#), SOR/98-106 [Rules], leave to intervene was granted to the Canadian Superior Courts Judges Association and the Ontario Superior Court Judges' Association.

[9] The Attorney General of Canada was named as the respondent pursuant to subsection 303(2) [of the [Rules](#)]. The Attorney General agrees with Justice Smith that the decision of the Review Panel is unreasonable, and that its interpretation of [sections 54 to 56.1](#) of the [Judges Act](#), as adopted by Pidgeon A.C.J. in the Letter of Concern, is unreasonable.

[10] The Case Management Judge granted the CJC leave to intervene in these applications, restricted to the issue of its jurisdiction. That issue was resolved by the decisions in *Girouard v. Canada (Attorney General)*, [2018 FC 865](#), [\[2019\] 1 F.C.R. 404](#), appeal dismissed *Canadian Judicial Council v. Girouard*, [2019 FCA 148](#), [\[2019\] 3 F.C.R. 503](#), leave to appeal to the S.C.C. refused December 12, 2019.

[11] In her October 17, 2019 order, the Case Management Judge expanded the scope of the CJC's intervention permitting it to defend its decision on the merits, within the parameters set out by the Supreme Court of Canada in *Ontario (Energy Board) v. Ontario Power Generation Inc.*, [2015 SCC 44](#), [\[2015\] 3 S.C.R. 147](#).

B. Facts

[12] On April 16, 2018, the Interim President and Vice Chancellor, Lakehead University, wrote to Justice Smith asking him to accept an appointment to the position of Interim Dean of the Law School. The Law School has existed only since 2013. Its mandate is "Aboriginal and Indigenous Law, Natural Resources and Environmental Law, and small firm and Sole Practice." The second permanent dean of the Law School, Angelique EagleWoman, resigned earlier in 2018, alleging institutional racism. In her letter to Justice Smith, the Interim President notes the importance that it "maintain the confidence and support of the Law Society of Ontario, the Federation of Law Societies of Canada, and of our local bar and extended communities." The Interim President explains why he is being asked to take on this interim position:

We make this urgent request based on your knowledge, skills, and experience as a Judge of the Superior Court of Ontario. In addition, your long standing connections and the respect

you garner in the local, provincial and national legal communities, combined with your significant work with Indigenous communities and your important publications focused on Aboriginal Law in Canada, are critical to the ongoing evolution and success of the Faculty of Law.

[13] Justice Smith sits in the Northwest Region and before becoming a judge in 2001, practised law in Thunder Bay for 25 years. He has significant expertise in Aboriginal and Indigenous law. In October 2009, he was appointed to the Specific Claims Tribunal. Justice Smith worked with former judge and current Senator Murray Sinclair, Chair of the Truth and Reconciliation Commission, on various judicial education initiatives, including developing and co-chairing a three-day intensive course, sponsored by the National Judicial Institute on Aboriginal Law for judges from across Canada, and creating and updating a Judicial Bench Book on Aboriginal Law. He is often invited by legal organizations to speak on Aboriginal and Indigenous law, and is called upon regularly by judges across Canada to assist with the mediation of land claims and other litigation between First Nations and various levels of government.

[14] Justice Smith informed the Honourable Heather J. Forster Smith, Chief Justice of the Superior Court of Justice (the Chief Justice) of the request from the Law School. In his letter, Justice Smith says, “the affairs at the school are in a crisis.” This characterization of the situation at the Law School is not questioned. He asked for the approval of his Chief Justice and the Minister of Justice to accept this short-term appointment.

[15] The Chief Justice wrote to Minister of Justice, Jody Wilson-Raybould, expressing her support for Justice Smith to accept this role. She notes that this request “would take him outside of his judicial duties in a role that is unprecedented for a judge of our Court.” She also notes that Justice Smith is a supernumerary judge “so the impact may be less than it would in other circumstances, particularly until the fall.” As a supernumerary judge, Justice Smith performs judicial duties for only six months each year. She indicates that this is an exceptional situation and “an opportunity for our Court to respond positively to a number of Truth and Reconciliation Commission recommendations.”

[16] The Chief Justice proposes to grant Justice Smith a leave of up to six months, from June 1, 2018, into November 2018, under the authority given to her in [paragraph 54\(1\)\(a\) of the *Judges Act*](#). She notes that anything beyond that would require an Order in Council.

[17] The Chief Justice writes that Justice Smith appreciates that he can only accept the role “within certain clear parameters” including that his role be confined to “academic leadership.” He would delegate administrative authority over recruitment, financial decisions, and academic appeals to others within the school. Lastly, she observes, “given the restrictions of [s. 55 of the *Judges Act*](#) (which prohibits extra-judicial employment, occupation or business) he could not accept any remuneration from the university.”

[18] On April 27, 2018, the Minister replies:

As Chief Justice, you have authority to grant Justice Smith a “special leave” under the *Judges Act*, for a period up to six months....

I have no concerns about your granting Justice Smith a “special leave” from June 2018 to November 2018, as outlined in your letter. In the event that more than six months is required, I will consider any requests for additional leave at the appropriate time. [Emphasis added.]

[19] On April 30, 2018, the Chief Justice granted Justice Smith special leave pursuant to *paragraph 54(1)(a)* of the *Judges Act* from June 1, 2018, to accept the assignment of Interim Dean at the Law School, subject to the parameters set out in her letter to the Minister of Justice.

[20] On May 9, 2018, the Executive Director of the CJC, Norman Sabourin, wrote to Justice Smith, with a copy to his Chief Justice. He observed that pursuant to section 4.2 of the *Canadian Judicial Council Procedures for the Review of Complaints or Allegations About Federally Appointed Judges* (the Review Procedures), in addition to receiving and reviewing complaints, he may “review any other matter involving the conduct of a superior court judge that comes to the attention of the Executive Director and appears to warrant consideration.” He further noted that under section 4.3 of the Review Procedures, if he determines that the matter warrants consideration, he “must” refer it to the Judicial Conduct Committee.

[21] With that background, Mr. Sabourin writes in his letter to Justice Smith that media reports indicate that he has accepted to serve as “Dean of Lakehead University (on an interim basis)” and he attaches a CBC web report posted May 3, 2018, entitled “Justice Patrick Smith named interim dean of Lakehead law school.” It reports on the departure of former Dean Angelique EagleWoman who on stepping down said, “Systemic issues within the university and challenges to implementing the Bora Laskin Faculty of Law’s Aboriginal and Indigenous law mandate have made my continued involvement in the law school untenable.” The news report concludes with the reaction of some Indigenous leaders to the situation at the Law School:

Since then Indigenous leaders representing dozens of First Nations communities across northwestern Ontario called for “immediate change” at Lakehead University. They made several recommendations, including that Lakehead commit to appointing an Indigenous person as EagleWoman’s successor, that an independent review examine “all issues and allegations” raised by her and that appropriate measures are subsequently taken.

[22] Mr. Sabourin says, “in light of *sections 54 and 55* of the *Judges Act*, and given the general duties and ethical obligations of judges,” acceptance of the Interim Dean role “brings me to the view that the situation may warrant consideration by Council.” Prior to reaching any decision, Mr. Sabourin invites Justice Smith’s views.

[23] The Chief Justice quickly responds by letter of May 11, 2018, noting that Justice Smith is unable to respond as he is out of the country. She assures Mr. Sabourin that she considered the request “very carefully taking into account the CJC’s ethical principles and the *Judges Act*.” She informs him that she obtained assurances that the appointment would attract no remuneration, that Justice Smith’s duties would be restricted to providing

only academic leadership, and that he would be insulated from concerns about future litigation. Further, she informs Mr. Sabourin that she had sought and obtained approval from the Minister of Justice. She closes her letter with the following:

I trust that the above clarifies how the matter unfolded and that it was thoroughly considered and approved both by me and the Minister of Justice. As such, I trust that you will agree that any further review of this matter is unwarranted.

I anticipate that this explanation will satisfy all concerns you may have, but if not, please advise me and we may be able to suggest possible solutions.

[24] This response apparently did not satisfy Mr. Sabourin. He did not accept the invitation of the Chief Justice to contact her; he referred the matter to Pidgeon A.C.J.. On his behalf, Mr. Sabourin requests “more information about the precise scope and nature of the duties”. Justice Smith will undertake at the Law School and asks for his comments on the following:

- * who first contacted you in respect of the proposed appointment as Dean;
- * whether you have been granted leave from your judicial duties and, if so, by whom and on what basis;
- * whether, in your view, [section 55](#) of the [Judges Act](#) is a bar to a judge engaging in professional activities other than judicial duties, whether remunerated or not;
- * whether you intend to engage in any judicial activities while acting as Dean;
- * whether there is any possibility of litigation in relation to Lakehead University;
- * whether the public confidence in the judiciary might be undermined by your engaging in the activities you propose at Lakehead University.

[25] Justice Smith responds directly to Pidgeon A.C.J. on May 24, 2018. He points out that the position he was invited to fulfill is not Dean of the Law School, as Mr. Sabourin's letter states, but Interim Dean. He reiterates that he has been granted a leave of absence from his judicial duties by his Chief Justice who has consulted with the Minister of Justice who has “no concerns” with that.

[26] Justice Smith responds that he does not view [section 55](#) of the [Judges Act](#) as a bar to his acceptance of the position at the Law School:

While I do not believe that this provision creates a blanket ban on engaging in any “professional activities other than judicial duties”, I am hesitant to opine in the abstract on the circumstances in which section 55 prohibits such activities. I am pleased, however, to have the opportunity to provide submissions on whether this provision prohibits my proposed activities as Interim Dean.

The role of “Interim Dean”, as defined above, does not in my respectful view qualify as an “occupation or business” in which the Legislature intended to prohibit judges from engaging. The Legislature intended to prohibit judges from moonlighting in other roles – particularly

remunerative ones – that could undermine their ability to devote themselves fully to their judicial duties.

Moreover, the role that I intend to play at the Bora Laskin Faculty of Law is not unlike a study leave granted to a judge to reflect, research, or teach at a Canadian Law School, as authorized by the Canadian Judicial Council and the Minister of Justice.

Further, section 55 must be read in conjunction with section 54, which expressly contemplates that a judge may “be granted a leave of absence from his or her judicial duties.” It is necessarily inferred that during a period of leave granted pursuant to section 54, a judge is relieved of the obligation in section 55 to “devote himself or herself exclusively to those judicial duties.”

Viewed in this context, as well as in the circumstances in which I would be fulfilling the temporary role of Interim Dean (i.e., during a period of leave pursuant to section 54), I respectfully submit that section 55 does not prohibit taking on this role, as defined above.

Nevertheless, if this remains a concern for you, I would be open to suggestions on how this role might be more tightly tailored or differently stylized (e.g., “Interim Academic Dean”, “Interim Dean/Judge-in-Residence”, “Academic Lead” or “Special Academic Advisor”) to ensure I do not run afoul of section 55.

[27] Justice Smith says that the restrictions placed on him to providing academic leadership “are intended, in part, to insulate me from concerns about future litigation.” Upon his return to judicial duties, he will recuse himself from any matter in which Lakehead University is a party.

[28] Additionally, he expresses his view that public confidence in the judiciary would be enhanced and not undermined by him engaging in the proposed activities at the Law School:

I share Chief Justice Smith’s concerns about the current risk to Lakehead University’s Faculty of Law, which includes a real possibility that the Faculty may collapse. I have only accepted to take on the role of Interim Dean in order to try to help the Faculty navigate a period of real crisis. I do not believe the public confidence in the judiciary could be undermined by me providing assistance to the Faculty as proposed. To the contrary; I believe the public confidence in the judiciary would be enhanced by knowing that a judge of the Superior Court is willing and enthusiastic to answer a call to service made by Lakehead University to assist its Faculty of Law through an existential crisis, while also ensuring full compliance with his obligations as a judge. That confidence would only be further enhanced by knowing that the Chief Justice of the Ontario Superior Court of Justice, the federal Minister of Justice, and the Canadian Judicial Council are united in their support of this effort to ensure that a Law Faculty with such important mandates continues to survive and thrive, and to address one of the Truth and Reconciliation Commission’s Calls to Action in furthering the project of reconciliation. This will contribute to the public perception of the judiciary and the Canadian Judicial Council as relevant and responsive to a crisis in the community. [Emphasis in original.]

[29] The Chief Justice also wrote to Pidgeon A.C.J. on May 28, 2018, repeating her support of Justice Smith accepting the position. Further, she provided a legal opinion from former Ontario Deputy Attorney General Murray Segal who, after outlining the legislative history of and parliamentary intention regarding [sections 54 and 55](#) of the *Judges Act* concludes that the appointment did not contravene section 55 of the *Judges Act*:

In sum, our view is that ss. 54 and 55 of the *Judges Act* did not prevent Chief Justice H. Smith from granting special leave to Justice P. Smith to act as Acting Dean in a limited capacity, nor do they prevent Justice P. Smith from taking such leave.

Granting special leave was within Chief Justice H. Smith's power and did not contravene s. 55 of the *Judges Act*. When leave is granted under s. 54, it must be for a purpose that is consistent with the office of the judge and judicial ethics, and it must be particularly sensitive to the judge's eventual return to the bench. These considerations were apparent in Chief Justice H. Smith's decision to grant leave on carefully designed conditions. Given the plain meaning and history of ss. 54 and 55, the history of judges pursuing roles in academia, and the principles of judicial ethics, granting special leave for Justice P. Smith to take on a closely circumscribed role as Acting Dean did not contravene s. 55. Emphasis added.

[30] In his opinion, Mr. Segal notes, as had Justice Smith, that academic leaves of absence established by the CJC were not viewed as offending the *Judges Act* or a judge's ethical principles. Further, he points out that there are precedents for a Superior Court justice acting as Dean of a law school. Former Chief Justice Gerald Fauteux was a justice of the Superior Court of Québec while serving as Dean of McGill Law School (1949–1950) and a justice of the Supreme Court of Canada while serving as Dean of Ottawa Law School (1953–1962). Mr. Segal also points out that while a Superior Court judge, Justice Bora Laskin joined the Board of Governors of York University (1967–1970) and was Chair of the Ontario Institute for Studies in Education.

[31] Mr. Segal recommends some additional conditions on Justice Smith's role at the Law School, including that a written agreement be entered into setting out the limitations of his appointment. Justice Smith and Lakehead University signed such a written agreement on May 31, 2018, and it was sent to Pidgeon A.C.J.. His position title was modified to Interim Dean (Academic) to reflect the limitations on his role.

[32] On July 12, 2018, Pidgeon A.C.J. sought further information from Justice Smith on the additional limitations on his role (as recommended in Mr. Segal's opinion), his duties, the written agreement, and the status of the search for a permanent dean. Justice Smith replied on July 17, 2018, stating that the agreement embodied the additional recommended limitations, except the condition that he approach his Chief Justice if there was a change in circumstances or the appearance of controversy. In its place, he confirmed that he had "undertaken to Chief Justice Smith to approach her or her office immediately should circumstances change, or any issues arise which may raise new ethical implications, possibly lead to public controversy, or generally on which I require direction."

[33] Mr. Sabourin notified Justice Smith by telephone on August 20, 2018, that Pigeon A.C.J. decided to constitute a Review Panel in respect of the appointment, and that a press release would be issued by the CJC.

[34] Justice Smith replied on August 23, 2018, providing an update on his duties and the results he had achieved, and asking the CJC not to issue a press release because of the negative effect this would have on the morale and reputation of the Law School. The CJC later issued a Press Release on October 3, 2018 ["Canadian Judicial Council review of a matter involving the Honourable Patrick Smith"], stating, "Specifically, the decision of

the Honourable Patrick Smith to become the Interim Dean of the Bora Laskin Law School at Lakehead University raises some questions about whether such duties are compatible with judicial office.”

[35] Justice Smith received a letter from the CJC dated August 28, 2018, attaching the reasons for the decision to appoint a Review Panel “in respect of your appointment as Dean [sic] of the Faculty of Law at Lakehead University.” Justice Smith was invited “to provide any written comments you may wish to make to the Panel, including on whether or not an Inquiry Committee should be constituted.”

[36] The reasons provided by Pidgeon A.C.J. for the referral include his interpretation of the relevant provisions of the *Judges Act*. However, and contrary to the explanation in the press release, his decision to refer rests on his view that Justice Smith accepted the role “without considering the possible public controversy associated with the reaction from First Nations chiefs and without considering the political environment or the potential effect on the prestige of judicial office.”

[37] The reasons for referral [*Reasons for the referral of a complaint to a Judicial Conduct Review Panel in the matter of the Honourable Patrick Smith of the Ontario Superior Court of Justice*, October 3, 2018], in relevant part, are as follows [at pages 3, 5, 6, 7, 10, 11]:

.... I begin my review by noting that this matter raises a question of interpretation with regard to sections 54, 55 and 56 of the *Judges Act*. Indeed, Justice Smith and his Chief Justice obtained a legal opinion in this respect (attached), prepared by Mr. Murray Segal, former Deputy Attorney General of Ontario. Mr. Segal provides a broad interpretation of sections 55 and 56 of the *Judges Act*:

The history of s. 55 and its predecessors does not suggest that it was targeted at preventing judges from engaging in unpaid academic pursuits. The history of s. 55 suggests it was aimed at preventing judges from: (1) engaging in paid employment while acting as judges, and thereby neglecting their judicial duties; (2) being involved in commercial enterprises; and (3) being involved in matter of public controversy. [Emphasis added by Pidgeon ACJ.]

...

In my view, a somewhat different interpretation must be given to the provision in question. In my respectful opinion, the question for Council in this matter is whether Justice Patrick Smith’s conduct in accepting an appointment as Interim Dean of the Law Faculty potentially contravenes the *Judges Act* or his ethical obligations as a member of the judiciary.

...

Section 55 of the *Judges Act* requires judges to devote themselves exclusively to their judicial duties, and to abstain from businesses and occupations falling outside the judicial sphere. This is confirmed by the legislative history of sections 55, 56 and 56.1 of the *Judges Act*. Being granted a leave of absence under section 54 of the *Judges Act* does not permit a judge to take on a business or occupation outside of the judicial sphere (except for acting as a commissioner, arbitrator, adjudicator, referee conciliator or mediator on any commission or on any inquiry, provided certain statutory conditions under section 56 of the *Judges Act* are met). The meaning of “occupation” should be broadly interpreted to capture all non-judicial

activities that interfere with the judicial role, whether due to their onerous or time-consuming nature or given their incompatibility with judicial office.

In addition, it is worth noting that in a decision rendered on 22 June 2015 (attached), regarding a complaint made against an Ontario Court of Appeal judge who had accepted a position as chancellor at Brescia University College, the Chairperson of the Judicial Conduct Committee, the Honourable Michael MacDonald, concluded:

Chief Justice MacDonald came to the opinion that Justice Gillese's appointment to the Chancellor's post did not place her in a position that is incompatible with her judicial functions. Chief Justice MacDonald took into consideration the strict limitations that were agreed upon by officials from Brescia and by Justice Gillese, as well as her pro-active course of action which included discussions with her Chief Justice to avoid any potential conflict and limit any associated risks. In these specific circumstances, Chief Justice MacDonald agrees with Chief Justice Strathy that Justice Gillese's acceptance of this ceremonial post is not contrary to judicial ethics and may, in fact, be of benefit to the judiciary. [Emphasis added by Pidgeon A.C.J.]

Note that in that case, the Chief Justice of the Ontario Court of Appeal, the Honourable George Strathy, in response to a request from Chief Justice MacDonald regarding the interpretation of [sections 55](#) and [56](#) of the [Judges Act](#), suggested the following:

The words "occupation and business" cannot be interpreted to apply to any activity. Otherwise they would prohibit such things as hobbies or personal activities. The words "occupation or business" certainly prohibit judges from engaging in any remunerative employment or business, but they cannot be interpreted to prohibit any unremunerated activity. [Emphasis added.]

...

After considering the interpretation of the relevant legislative provisions, only one question remains: did Justice Smith err by incorrectly assessing the situation, that is, by erroneously weighing the inherent risks of the situation? [Emphasis added.]

My answer is that he did....

...

In summary, I am of the view that Justice Patrick Smith engaged in misconduct by accepting a position as Interim Dean without considering the possible public controversy associated with the reaction from chiefs of First Nations and without considering the political environment or the potential effect on the prestige of judicial office.

I had to answer this question bearing in mind that (1) an interim or permanent dean is the public face of a faculty and (2) Justice Smith accepted the appointment while the media attention was underway. In addition, and with respect, it is my opinion that the situation is exacerbated by his erroneous assessment of the risks that will continue to exist at an institution where litigation would surely come before the Court of which he is a member.

I therefore conclude that the matter might be serious enough to warrant the removal of Justice Patrick Smith from office. I accordingly refer the matter to a Review Panel, in keeping with [subsection 2\(1\)](#) of the [Canadian Judicial Council Inquiries and Investigations By-Laws, 2015](#), to decide whether an Inquiry Committee should be constituted in accordance with [subsection 63\(3\)](#) of the [Judges Act](#).

[38] [Subsection 2\(1\)](#) of the [Canadian Judicial Council Inquiries and Investigations By-laws, 2015](#), SOR/2015-203 (the By-laws) provides:

Establishment of Judicial Conduct Review Panel

2 (1) The Chairperson or Vice-Chairperson of the Judicial Conduct Committee, established by the Council in order to consider complaints or allegations made in respect of a judge of a superior court may, if they determine that a complaint or allegation on its face might be serious enough to warrant the removal of the judge, establish a Judicial Conduct Review Panel to decide whether an Inquiry Committee should be constituted in accordance with [subsection 63\(3\)](#) of the [Act](#).

[39] In concluding that the conduct of Justice Smith was contrary to judicial ethics, Pidgeon A.C.J. relies on passages from the CJC's *Ethical Principles for Judges* (the Ethical Principles), and particularly the following statement under the heading "Impartiality:" "Judges are free to participate in civic, charitable and religious activities subject to the following consideration: ... (c) Judges should avoid involvement in causes or organizations that are likely to be engaged in litigation." He also notes section C.9 of the Commentary:

C.9 Several Canadian judges have served as chancellors of universities or dioceses. Others have served on the boards of schools, hospitals or charitable foundations. Such participation may now present risks that did not appear evident in the past. These risks must be carefully weighed. Universities, churches and charitable and service organizations are now involved in litigation and matters of public controversy in ways that were virtually unheard of even in the very recent past. A judge serving as a chancellor of a university or a diocese or as a board member may be placed in an awkward position if the organization should become involved in litigation or matters of public controversy.

[40] The Court notes that Pidgeon A.C.J. does not reference the statement in the Ethical Principles that it is provided for guidance and "does not preclude reasonable disagreements about their application or imply that departures from them warrant disapproval."

[41] I also note that in the referral decision Pidgeon A.C.J. writes [at page 8] that the conditions imposed on Justice Smith in the role of Interim Dean (Academic) "for all intents and purposes would limit his role to a ceremonial one." This suggests that his role was no different from that of Justice Gillese as chancellor of a university.

[42] Justice Smith outlines the duties he performed in this role in a letter to Mr. Sabourin. He says that he delivered an address to graduating students of the Law School; he recommended the installation of a video conference facility to connect academics, elders, jurists, and others with the student body; through his efforts Senator Murray Sinclair delivered a keynote address during a special lecture at the Law School; and his efforts resulted in the engagement with the Aboriginal Advisory Committee regarding the content of Indigenous courses, and the provision of support for and connection with Indigenous students. While these arguably take his role outside a purely ceremonial one, as is noted by Pidgeon A.C.J. elsewhere in his reasons, the content of his role is not examined by the Review Panel in its decision. In my view, his duties as reflected in the record are consistent with the description given by his Chief Justice as one of academic leadership.

[43] Following notice that the matter had been referred to the Review Panel, Justice Smith's counsel wrote to Mr. Sabourin on September 4, 2018, stating that he had resigned his position at the Law School effective September 14, 2018, and would return to his judicial duties with the Superior Court of Justice on the following business day.

[44] On September 14, 2018, counsel for Justice Smith wrote to the CJC requesting that Pidgeon A.C.J. reconsider his decision to refer the matter to the Review Panel. Mr. Sabourin replied on September 19, 2018, that Pidgeon A.C.J. believes he is unable to reconsider his decision and that his function in the matter has concluded, unless and until the Review Panel returns it to him after a conclusion that no Inquiry Committee should be constituted.

[45] Justice Smith provides written submissions to the Review Panel on September 27, 2018, and his Chief Justice provided her comments on October 10, 2018.

[46] On September 24, 2018, Justice Smith commenced his application for judicial review challenging the decision to refer the matter to the Review Panel and refusing to reconsider that decision. He also brought a motion seeking an order staying the Review Panel's consideration of the matter referred to it.

[47] Counsel for Justice Smith together with counsel for the Attorney General on October 1, 2018, wrote to the CJC, asking the Review Panel not to proceed with the review until the stay motion had been decided. The CJC replied that the request had been put before the Chair of the Review Panel. The Panel never responded. The stay motion was adjourned at the request of counsel for Justice Smith and the Attorney General of Canada, and subsequently rescheduled by the Court to a special sitting on November 20, 2018. The CJC was informed of this revised hearing date. Prior to the scheduled motion date, the Review Panel issued its decision, rendering the motion moot.

[48] The Review Panel issued its decision on November 5, 2018. It concluded [at paragraph 47] that [section 55](#) of the *Judges Act* "requires judges, subject to a limited number of narrow exceptions, to confine themselves to their judicial role" and that a leave of absence granted under section 54 does not remove this prohibition. It further found that, regardless of the interpretation of these sections, Justice Smith breached an ethical obligation to avoid becoming involved in public controversy, and he impermissibly used the prestige of judicial office to bolster the Law School. The Review Panel found that as Justice Smith had no bad behaviour or improper motives, his conduct was not serious enough to warrant removal from the bench and it therefore decided not to constitute an Inquiry Committee.

[49] The matter then returned to Pidgeon A.C.J. [at paragraph 80] to make "a decision on the most appropriate way to resolve this matter." He endorsed the decision of the Review Panel and noted that Justice Smith had resigned from the position and returned to his judicial duties. He concluded that no further measures were needed.

[50] On November 6, 2018, the CJC told two reporters that the Review Panel had reached its decision and that it would be released that day without having so informed Justice Smith or his counsel. The CJC published a press release on its Web site the same day, with a link to the Panel Decision.

III. ISSUES

- [51] These applications focus on three issues:
- i. whether the decision of the Review Panel decision is reasonable;
 - ii. whether the CJC proceedings were procedurally unfair or an abuse of process; and
 - iii. if the applications succeed, what is the appropriate remedy?

IV. ANALYSIS

A. Is the Review Panel Decision Reasonable?

[52] The Review Panel [at paragraph 76] reached two conclusions concerning the conduct of Justice Smith. First, that Justice Smith breached [section 55](#) of the *Judges Act*. Second, that Justice Smith breached his ethical obligation “to avoid involvement in public debate that may unnecessarily expose him to political attack or be inconsistent with the dignity of judicial office” and he and the Superior Court of Justice, in lending their support to the Law School, put their reputations at risk.

[53] All parties agree, as does the Court, that the standard of review of the Review Panel decision is reasonableness, regardless of whether one is reviewing its interpretation of [section 55](#) of the *Judges Act* or its finding that Justice Smith breached his ethical obligations.

[54] The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#), 441 D.L.R. (4th) 1 (*Vavilov*), at paragraph 16, teaches that there is “a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions.” Moreover, it makes it clear at paragraph 115 that “Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard.”

[55] As the Supreme Court explains at paragraph 87 of *Vavilov*, “a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome.”

[56] In *Canada Post Corp. v. Canadian Union of Postal Workers*, [2019 SCC 67](#), 441 D.L.R. (4th) 269, which was issued with *Vavilov*, the majority at paragraph 31, explains that when conducting a reasonableness review, a court should start with the reasons, looking to see if there is a coherent and rational chain of analysis based on the facts and law:

A reasonable decision is “one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker” (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review “[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with ‘respectful attention’ and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion” (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand “the basis on which a decision was made” (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).

[57] Other helpful guidance from *Vavilov*, when conducting a reasonableness review, includes the observation at paragraph 105 that a decision “must be justified in relation to the constellation of law and facts that are relevant to the decision.” We are told at paragraph 106 that these considerations are many and varied:

It is unnecessary to catalogue all of the legal or factual considerations that could constrain an administrative decision maker in a particular case. However, in the sections that follow, we discuss a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.

[58] In *Vavilov*, like the present matter, the decision under review involved the decision maker’s interpretation of a statutory provision. The Supreme Court at paragraphs 115 to 124 provides extensive guidance to a reviewing court when reviewing such decisions. The main principles therein on which I rely in reviewing the Review Panel’s interpretation of section 55 of the *Judges Act*, are the following:

1. The proper approach to interpreting a statutory provision, whether done by a court or an administrative decision maker, is the “modern principle” of statutory interpretation, that is, that the words of a statute must be read “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the Act, and the intention of Parliament” (paragraphs 117–118);
2. “[T]he merits of an administrative decision maker’s interpretation of a statutory provision must be consistent with the text, context and purpose of the provision.” “[T]he usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are ‘precise and unequivocal’, their ordinary meaning will usually play a more significant role in the interpretive exercise” (paragraph 120); and
3. “[E]ven though the task of a court conducting a reasonableness review is *not* to perform a *de novo* analysis or to determine the ‘correct’ interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single

reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue” [italics in original] (paragraph 124).

[59] The CJC, at paragraph 67 of its memorandum of argument, and referencing *Girouard v. Canada (Attorney General)*, 2019 FC 434, at paragraph 26; *Girouard v. Canada (Attorney General)*, 2019 FC 1282, at paragraph 71; and *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249 (*Moreau-Bérubé*), at paragraphs 44 and 49; submits, “The composition and constitutional role of the Council demands deference to its assessment of judicial conduct.”

[60] Justice Smith takes issue with the claim of the CJC that it has any such constitutional role. He correctly notes that the Federal Court of Appeal has concluded that the investigative power of the CJC is a statutory power and that the only procedure provided for in the constitution for removal of a superior court judge is that set out in subsection 99(1) of the *Constitution Act, 1867*: See *Canadian Judicial Council v. Girouard*, 2019 FCA 148, [2019] 3 F.C.R. 503, paragraphs 38–46.

[61] He further notes that the CJC at paragraphs 10, 67, and 87 of its memorandum, contends that it has a constitutional role in judicial discipline delegated to it under the *Judges Act*, that it is a special body with a special purpose performing the essential constitutional task of determining the boundaries of ethical judicial conduct and judicial independence, and that the composition and constitutional role of the Council demands deference to its assessment of judicial conduct. He submits that in making those submissions, the CJC has clothed itself with a role that does not belong to it. He says that the only constitutional actor in this process is the Minister of Justice, who is responsible for making any address to Parliament under section 99 of the *Constitution Act, 1867*.

[62] I agree with the submissions of Justice Smith that only the Minister of Justice plays a constitutional role in the matter of judicial conduct.

[63] I also agree with the submissions of the Attorney General of Canada regarding deference. Although the concept of deference in judicial review continues to have a role, *Vavilov*, at paragraphs 30 and 31, makes it clear that the previous rationale for the proposition that deference is owed by a reviewing court to the decision maker’s relative expertise, no longer holds true:

While specialized expertise and these other rationales may all be reasons for a legislature to delegate decision-making authority, a reviewing court need not evaluate which of these rationales apply in the case of a particular decision maker in order to determine the standard of review. Instead, in our view, it is the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review.

...

We wish to emphasize that because these reasons adopt a presumption of reasonableness as the starting point, expertise is no longer relevant to a determination of the standard of review as it was in the contextual analysis. [Italics in original.]

[64] In summary, as the Supreme Court states at paragraph 58 of *Vavilov*, “the consideration of expertise is folded into the new starting point adopted in these reasons, namely the presumption of reasonableness review.”

[65] The CJC also cites paragraph 49 of *Moreau-Bérubé* wherein the Supreme Court of Canada writes, “There is no basis upon which one could claim that a single judge sitting in judicial review of a decision of the Council would enjoy a legal or judicial advantage.” With respect, I may not enjoy a legal or judicial advantage to the Review Panel, but neither do I suffer any disadvantage. Indeed, one might ask what advantage the Review Panel has in this matter in light of the Attorney General and two judges’ associations, one of which represents superior court judges across Canada, expressing the view that the Review Panel’s decision is unreasonable. The point surely is that judicial review is not a quantitative analysis, but a qualitative one; one judge is as well placed as several when performing that task.

[66] In any event, *Moreau-Bérubé* was decided before *Vavilov* and the Supreme Court of Canada’s “revised framework” for judicial review of administrative decisions. Thus, it must be read with some caution. The comment the CJC relies on is directed at the suggested expertise of the decision maker and that is no longer the separate consideration it once was.

[67] The standard of review applicable to Justice Smith’s claim that the CJC process and resulting decision was procedurally unfair and an abuse of process is not reasonableness. In my view, *Vavilov* has not changed the law pertaining to procedural fairness; the standard of review remains correctness: *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, at paragraph 79; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at paragraph 43; and see *Garces Caceres v. Canada (Public Safety and Emergency Preparedness)*, 2020 FC 4, at paragraph 23; *Ebrahimshani v. Canada (Citizenship and Immigration)*, 2020 FC 89, at paragraph 12; *Ennis v. Canada (Attorney General)*, 2020 FC 43, at paragraph 18. Whether a particular process was procedurally fair remains “‘eminently variable’, inherently flexible and context-specific”: *Vavilov*, at paragraph 77. This Court will consider whether the process employed was *fair* in the specific context of the decision, having regard to the *Baker*[1] factors: *Vavilov*, at paragraph 23; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121, at paragraphs 40, 54–56.

(1) Section 55 of the Judges Act

[68] I turn first to consider whether the Review Panel’s interpretation of section 55 of the *Judges Act* is reasonable. Did it read the words of that section “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament?”

[69] In conducting this exercise it is important to recall that federal statutes are bilingual, in French and in English, and both are equally authoritative. The shared meaning principle stipulates that in cases of discrepancies between the English and French versions of a statute, the meaning common to both versions must be accepted, unless evidence of legislative intent indicates otherwise: *R. v. Daoust*, 2004 SCC 6,

[2004] 1 S.C.R. 217. If the meaning of one version is broader than the other, the narrower version should be adopted: *Sandoz Canada Inc. v. Canada (Attorney General)*, 2014 FC 501 122 C.P.R. (4th) 195.

[70] Section 55 was first enacted in 1905 as [section 7](#) of *An Act to amend the Act respecting the Judges of Provincial Courts*, S.C. 1905, 4-5 Edward VII, c. 31. The marginal note to section 7 is “Judges restricted to judicial duties / *Les juges ne s’occuperont que de leurs fonctions judiciaires*” and it reads as follows:

Judges restricted to judicial duties

7. No judge mentioned in this [Act](#) shall, either directly or indirectly as director or manager of any corporation, company, or firm, or in any other manner whatever, for himself or for others, engage in any occupation or business other than his judicial duties; but every such judge shall devote himself exclusively to such judicial duties.

[71] This provision is section 33 of the *Judges Act*, R.S.C. 1906, c. 138, headed “JUDGES NOT TO ENGAGE IN BUSINESS / *LES JUGES NE PEUVENT SE LIVRER AUX AFFAIRES*” and with a marginal note that reads “No judge to engage in business other than his judicial duties / *Les juges doivent se consacrer exclusivement à leurs fonctions judiciaires*”. It reads as follows:

No judge to engage in business other than his judicial duties

33. No judge of the Supreme Court of Canada or of the Exchequer Court of Canada or of any superior or county court in Canada shall, either directly, or indirectly as director or manager of any corporation, company, or firm, or in any other manner whatever, for himself or others, engage in any occupation or business other than his judicial duties; but every such judge shall devote himself exclusively to such judicial duties.

[72] The heading of sections 55 to 56.1, as they currently read, is “EXTRA-JUDICIAL EMPLOYMENT / *FONCTIONS EXTRAJUDICIAIRES*” and the marginal note for section 55 is “Judicial duties exclusively/*Incompatibilités*”. Section 55 reads:

Judicial duties exclusively

55 No judge shall, either directly or indirectly, for himself or herself or others, engage in any occupation or business other than his or her judicial duties, but every judge shall devote himself or herself exclusively to those judicial duties.

[73] The Review Panel at paragraphs 38 and 39 of its decision says of section 55:

.... Although its wording has been changed periodically, the section has always been comprised of two foundational components:

- (a) A prohibition on judges carrying on extra-judicial activities; and
- (b) A requirement that judges devote themselves exclusively to their judicial duties.

The prohibition, and the requirement are set forth in clear and explicit terms in the current version of section 55. [Emphasis added.]

[74] The noted prohibition component on “carrying out extra-judicial activities” is found in the first phrase of the English language version of the section—“No judge shall ... engage in any occupation or business other than his or her judicial duties.” However, the French language version reads differently. A more literal translation of the French version is that “Judges shall devote themselves to their judicial functions to the exclusion of any other activity.” This does not appear to have the two components noted by the Review Panel. Rather, it is directed only to the second foundational component identified by the Review Panel - a requirement that judges devote themselves exclusively to their judicial duties.

[75] I agree with the Review Panel that the “prohibition” it identifies is set out in clear and explicit terms in the English version. However, the Review Panel does not accurately capture that prohibition in its passage quoted above. The prohibition is not, as it writes [at paragraph 38], “on judges carrying on extra-judicial activities” [emphasis added.] Rather, as the section explicitly states, it is on judges engaging “in any occupation or business other than his or her judicial duties” [emphasis added.]

[76] Although subsequently the Review Panel interprets the phrase “occupation or business” it does so in isolation from its context. The full phrase—“any occupation or business other than his or her judicial duties”—provides an important interpretative context. Properly read, it says that judicial duties are an occupation or business. They are therefore reliable examples of what is meant by the phrase “occupation or business” guiding the reader in how the phrase is to be interpreted. The same holds true if one looks to the French language phrase “*à leurs fonctions judiciaires à l’exclusion de toute autre activité*”.

[77] The failure to include and examine this critical qualifier in its initial summary of the section leads me to wonder whether the Review Panel is engaging in “reverse engineering” to achieve a desired outcome rather than discerning the meaning and legislative intent of the section. The Supreme Court of Canada at paragraph 121 of *Vavilov* expressly warned against that manner of proceeding. In any event, in ignoring the context, the Review Panel’s reasoning fails to apply properly the modern principle of statutory construction.

[78] When the Review Panel does turn its attention to the phrase “occupation or business” albeit standing alone, it concludes that it is to be broadly interpreted. It reaches that conclusion by looking at the French language equivalent—“*activité*”—and dictionary definitions of the English language word occupation [at paragraphs 40–41]:

The prohibition in the English version is expressed in terms of an “occupation or business”, whereas the French version uses the broader term “*activité*”. The English version, by referring to “occupation or business” may imply that the prohibition is limited to some form of remunerative livelihood, but the French version, by using the broader term, is more explicit in prohibiting any activity other than judicial functions.

The broader interpretation of the word “occupation” to include non-remunerative pursuits and activities is consistent with various dictionary definitions of the word and with the French version of section 55. [Emphasis added.]

[79] This reasoning exhibits neither justification nor intelligibility. It is problematic in several respects, including the failure to consider the entire phrase as previously

discussed.

[80] First, the Review Panel states [at paragraph 41] that the “broader interpretation of the word ‘occupation’ to include non-remunerative pursuits and activities is consistent with various dictionary definitions of the word” but it does not point to any dictionary definition it relies on. The record contains none, leading me to question whether any were before the Review Panel.

[81] Second, while one use of the English word “occupation” might be said to include non-remunerative activity—such as in the statement “On Saturdays my occupation is chauffeur because every Saturday I drive my son to his football match”—others (and I suggest most) clearly reflect remunerated activities. In response to the question: “What is your occupation?” I daresay the response of four members of the Review Panel would be “Judge”—a paid occupation.

[82] Third, the Review Panel only examines the word “occupation” and ignores the word “business” in section 55. In my view, the plain and clear import when it is said that one is engaging in business is that they are being remunerated.

[83] The view of the Review Panel that section 55 is to be interpreted as prohibiting any activity (remunerated or not) other than judicial functions is not one shared by all. Indeed, as Pidgeon A.C.J. himself noted in his letter referring the matter to the Review Panel, in 2015, the Chief Justice of the Ontario Court of Appeal, the Honourable George Strathy, in response to a request from the Judicial Conduct Committee regarding the interpretation of [sections 55 and 56](#) of the *Judges Act*, said [reasons for referral, at page 7]:

The words “occupation and business” cannot be interpreted to apply to any activity. Otherwise they would prohibit such things as hobbies or personal activities. The words “occupation or business” certainly prohibit judges from engaging in any remunerative employment or business, but they cannot be interpreted to prohibit any unremunerated activity. [Emphasis added.]

[84] The Review Panel considers the legislative history of section 55 and, in reference to the opinion of Murray Segal, notes, “some of the remarks during the initial debates in the House of Commons in 1905, including those of Prime Minister Laurier, reflected a concern to restrict the commercial activities of judges.” In those debates, the Prime Minister, responding to a question of whether the provision would prevent judges from acting as arbitrators in a reference involving Canada and the Provinces, responded:

But what parliament intends and what we are all agreed to is that judges should not be allowed to participate in any kind of business which is of a commercial character; they should not be directors of insurance companies or banks or such. But as regards anything of a judicial character, I do not think any one has the intention of preventing the judges from acting. [Emphasis added.]

[85] A statement made by the Prime Minister at the time as to the intent of Parliament and its members ought to be accorded significant weight, if not considered conclusive on the issue of parliamentary intent. However, in response to the Prime Minister’s statement, the Review Panel writes [at paragraph 42]:

.... other members took a broader view. The Minister of Justice, Charles Fitzpatrick (later Chief Justice of Canada) commented that “The less a judge has to do with matters which are not clearly within the scope of his duties, the better for himself and the dignity of the bench.”

[86] I agree with the submission of the Attorney General of Canada, that the Review Panel ignores the context in which that statement was made. In extracting a single sentence from its context, the Review Panel gives it a meaning it does not have.

[87] The Minister of Justice had been asked by Mr. Foster whether the provision being debated would prevent judges from “going on commissions.” The context discloses that the Minister of Justice was not, as the Review Panel says, stating his preference that judges do nothing outside their judicial duties, rather his comment focuses on judges sitting on minor commissions, as the full report shows:

Mr. FOSTER. Will that [clause] prevent judges from going on commissions? We know that a good deal of discussion has arisen of late about judges being appointed to commissions at various times. Sometimes these are high matters of interest in which it might be desirable to appoint judges; but in other cases they are minor matters, and the judges are left open to a great deal of criticism and cross currents of opinion, which do not seem to add very much to the dignity of the bench or to the respect in which judges should be held throughout the country. In fact, when you take a judge from the bench and make him commissioner in a matter involving other than legal points, you rather take his robe of dignity from him. He becomes then more like an ordinary individual and becomes subject to criticism to which a judge ought not to be subject. He comes down, so to speak, into the general arena, and stands to get a good deal of dust upon his clothes. I would like to know how far this goes towards preventing judges taking up commissions of the smaller kind and which are outside their judicial functions, or international affairs. I quite agree that on an international commission it may be quite necessary to have judges; but the Minister of Justice will understand what I allude when I say that there are commissions and employments which, when participated in by judges, detract from the general respect to which the bench ought to be held.

Mr. FITZPATRICK. This amendment to the [Act](#) respecting judges will operate as a clear notice that judges are not to be employed in connection with commissions, except where it is important in the public interest that they should be so employed. I think the less a judge has to do with matters which are not clearly within the scope of his judicial duties, the better for himself and the dignity of the bench. Of that I am absolutely convinced. I would even go so far as to say that I entertain grave doubts as to the constitutionality of such appointments. That question arose in Parliament when it was decided by the British Parliament to refer matters arising out of contested elections to the courts. When the courts were first charged with the duties investigating such matters, Chief Justice Cockburn wrote a strong letter of protest from the constitutional standpoint. That protest was of no avail, but nevertheless it showed that there was considerable doubt as to the right of the judges to sit in such matters. There are cases, however, where it is in the public interest that we should utilize the service of the judges outside the bench, but only in matters of urgent public necessity.

[88] The Attorney General of Canada also references Bill 13 in 1906, which proposed further amendments to the section. It was introduced, but failed to receive Royal Assent. Importantly, and not referenced by the Review Panel, there was further discussion “providing additional insight into the intention of Parliament.” Specifically, there was reference to the ability of a judge to teach in a law school, notwithstanding the restrictions set out in the [Judges Act](#). The same Minister of Justice, Mr. Fitzpatrick, was asked

whether “the law of last year excludes also the teaching in universities.” The Minister responded that it did not prohibit teaching:

No. I would be disposed, myself, to think, and I was acting upon that supposition, that those who are engaged in the teaching of the law in connection with our universities would not come within the law of last session. I think that must fairly be considered as in line with the performance of their professional work and I expressed that opinion, I think, last session when the [Act](#) was passed. [Emphasis added.]

I will add that it is my experience that judges are not remunerated when asked to teach in law schools.

[89] When considering the legislative history of section 55, the Review Panel does not address or consider the original wording of the provision. The English language version reads, “No judge ... shall, either directly or indirectly as director or manager of any corporation, company, or firm, or in any other manner whatever ... engage in any occupation or business other than his judicial duties”. The French language version reads, “*Aucun juge ... ne peut se livrer ni directement ni indirectement, en qualité de directeur ou gérant de corporation, de compagnie ou de maison d'affaires, non plus qu'en aucune autre manière ... à une occupation ou affaire autre que ses fonctions judiciaires.*”

[90] In neither language do these words support the conclusion of the Review Panel that the intent of Parliament was to restrict judges from performing non-remunerative engagements. To the contrary, they are focused on remunerative commercial engagements.

[91] At paragraph 43 of its decision, the Review Panel asserts that the legislated exceptions to the general prohibition in section 55 reinforces the broader interpretation it has given to section 55:

Furthermore, the broader interpretation of the word “occupation” to include non-remunerative pursuits and activities is reinforced by the narrow and specific exceptions to the general prohibition in section 55.

[92] It states that the narrow and specific exceptions are those set out in [sections 56 and 56.1](#) of the [Judges Act](#); namely, (1) a judge acting in a specific dispute resolution capacity when expressly authorized by an Act of Parliament or a Provincial Legislature, or the Governor in Council or lieutenant governor in council of a province, (2) a judge acting as an arbitrator or assessor of compensation or damages under a public Act of Canada or a province, and (3) Madam Justice Arbour serving as Prosecutor of the United Nations International Tribunal.

[93] The Review Panel [at paragraph 41] provides no reason or explanation why these exceptions provide support for its “broader interpretation of the word ‘occupation’ to

include ‘non-remunerative’ pursuits and activities”. Indeed, it is not obvious or evident how these exceptions support the view of the Review Panel. Its reasoning is unintelligible.

[94] It is to be noted that none of these exceptions is stated to be on a non-remunerated basis. When a judge is appointed by Parliament or a Legislature to head a commission or act as an arbitrator, his or her judicial compensation under the *Judges Act* continues and pursuant to section 57, there is no additional remuneration. However, in my view, that does not mean that these exceptional duties are done on a non-remunerative basis. Rather, they are done for the judge’s regular remuneration. The remuneration received when performing these exceptional duties cannot be said to be remuneration for judicial duties, as the judge is not performing his judicial duties when acting as a commissioner or arbitrator. Even if it were otherwise, the exception regarding Justice Louise Arbour in section 56.1 expressly provides that she may elect to receive a leave of absence to accept the position offered by the United Nations without receiving her judge’s pay if she receives remuneration from the United Nations. In fact, the record shows that the United Nations insisted that she not be remunerated as a judge but that it pay her. In her circumstance, one of the exceptions the Review Panel relies on to support its interpretation, it is without doubt that the exception to judicial duties is remunerated. Accordingly, it cannot be said to support the interpretation given by the Review Panel.

[95] For these reasons, I find that the analysis of the Review Panel, the manner in which it reaches its interpretation of section 55, is not in keeping with the modern principle of interpretation. The Review Panel, in its analysis, fails to read the words of the section “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the Act, and the intention of Parliament.” Specifically, it ignores some words; it fails to properly consider the legislative history of the provision; it fails to properly consider the context in which the provision is found; and it fails to properly consider all of the evidence of Parliamentary intention. As such, the reasoning is flawed and leads to an unreasonable conclusion on interpretation.

[96] The Review Panel concludes its interpretation of section 55 at paragraphs 46 to 48 of its decision, as follows:

In summary, section 55 of the *Judges Act* contains a prohibition on judges carrying on extra-judicial activities and a requirement that judges devote themselves exclusively to their judicial functions. In circumstances in which Parliament is of the view that there is a sufficiently important public goal to justify judges engaging in other activities, it has legislated specific, narrowly defined exceptions.

Accordingly, the Review Panel has concluded that:

(a) Section 55 requires judges, subject to a limited number of narrow exceptions, to confine themselves to their judicial role, and

(b) Subject to those exceptions, judges are prohibited from engaging in any other occupation, whether paid or unpaid.

The above-noted conclusions are consistent with the objectives of maintaining judicial independence and the preservation of the dignity and respect associated with the judicial office. *Section 55* of the *Judges Act* is also intended to promote the efficient administration of

justice and to uphold the dignity and integrity of the judiciary by restricting judges, except in very limited circumstances, to performing judicial functions. [Emphasis added.]

[97] The Review Panel [at paragraph 47] does not explain what it means by “any other occupation, whether paid or unpaid” but at paragraph 43 it describes its “broader” interpretation of the word “occupation” to include “non-remunerative pursuits and activities” (emphasis added).

[98] Counsel for the CJC, in its memorandum, says that the interpretation the Review Panel gives to section 55 is that it is “to prohibit judges from devoting their ‘productive time’ to vocations other than judging, such that they will work as judges” (emphasis added). In my view, counsel’s characterization does not reflect the interpretation given the section by the Review Panel. Nowhere in its decision does the Review Panel use the phrase “productive time” or the word “vocation.”

[99] It is unclear what legal counsel means by “productive time.” Other than time when sleeping, it is arguable that all of one’s time is productive time. As I pointed out at the hearing, my experience is that judging is not a 9 am to 5 pm, five days a week job. Judges, like lawyers and many others, work days, nights, and weekends.

[100] The Review Panel’s interpretation [at paragraph 41] of “occupation” as including “non-remunerative pursuits and activities” [emphasis added] gives it a much broader definition than the word “vocation.” “[P]ursuits and activities” includes most of what one does in daily life, including taking children and grandchildren to soccer and ballet classes, attending choir practice, going to the gym, quilting and knitting, etc. Again, as was pointed out to counsel at the hearing, the phrase “pursuits and activities” includes writing a mystery novel. Even if written at night and on weekends, as our former Chief Justice did, is that a non-judicial activity done in a judge’s productive time? If so, did the former Chief Justice of Canada breach [section 55](#) of the *Judges Act* in doing this prior to her retirement? Her activity certainly conflicts with the interpretation of section 55 given by the Review Panel.

[101] This question and these examples illustrate the unreasonableness of the outcome of the Review Panel’s interpretation. Its interpretation restricts judges from all non-judicial activities or pursuits, other than the narrow exceptions in [sections 56](#) and [56.1](#) of the *Act*.

[102] For these reasons, I find the interpretation given by the Review Panel to [section 55](#) of the *Judges Act* to be unreasonable.

(2) *The Impact of a Section 54 Leave of Absence on Section 55*

[103] After interpreting section 55, the Review Panel turns to [section 54](#) of the *Judges Act* and the impact a leave of absence granted thereunder may have on a judge’s obligations under section 55.

[104] The Review Panel sees a leave of absence granted under section 54 as relieving a judge from the obligation in section 55 to “devote himself or herself exclusively to those judicial duties” but finds that it does not affect the prohibition in that section on carrying out extra-judicial duties. It finds that section 54 does not permit a judge, while on a leave of absence, taking up extra-judicial activities. In support of that interpretation, the Review Panel relies on (1) its interpretation of section 55 (which I have found to be unreasonable), and (2) the language of section 54. It writes at paragraph 51 of its decision:

There is nothing in the language of [section 54](#) of the *Judges Act*, to suggest that leaves of absence properly granted and with proper notices issued, may be granted to enable judges to take on responsibilities outside of the judicial sphere.

[105] I begin by noting that there is nothing in the language of [section 54](#) of the *Judges Act*, suggesting that such leaves of absence may not be granted to enable judges to take on responsibilities outside of their judicial duties. Indeed, as noted by Justice Smith, that has previously happened and with the approval of the CJC:

In Canada, the Council's Study Leave Program has permitted judges to take academic leaves longer than six months to engage in teaching, talks with faculty, curriculum development, organizing conferences, guest lectures, and both formal; and informal discussions with students.

[106] The Review Panel provides no review of the legislative history of section 54, nor does any analysis of parliamentary intent. The Attorney General of Canada provides a very informative history of section 54 that supports an interpretation different from that provided by the Review Panel of both sections 54 and 55.

[107] The leave of absence provisions in section 54 were introduced in 1946, in a slightly different wording than at present. Section 34 of *The Judges Act, 1946*, [S.C. 1946] 10 George VI, c. 56 provides that no judge is to be granted a leave of absence from judicial duties for a period in excess of 30 days without the approval of the Governor in Council. If a judge were absent for a period in excess of 30 days without that approval, the judge and the Chief Justice are to inform the Minister of Justice.

[108] A reading of the Parliamentary debates confirms the submission of the Attorney General of Canada at paragraphs 42 and 43 of his memorandum, reproduced below, that this leave provision was not enacted to be used exclusively for absences “such as an illness, a period of recovery from accident or parental leave” as the Review Panel suggests at paragraph 49 of its decision:

In enacting this provision, a concern was raised during the debates that some judges had been absent from the bench for several months without having obtained any sort of permission for a leave of absence. The Minister of Justice stated, “I think the clause does

indicate, if it is passed by parliament, that parliament wants the Minister of Justice to see to it that gentlemen who are absent without leave are not paid.”

There is no indication here that this provision was enacted to be used exclusively for circumstances of disability or parental leave. Rather, the rationale for the provision was to ensure that judges were not being paid when they were absent from the bench, for any reason.

[109] In 1996, the section was amended to create the current system. Leaves of six months or less can be granted by a chief justice but a longer leave requires approval from the Governor in Council. The debates indicate that the revision was recommended:

... by the 1992 Triennial Commission on Judges' Salaries and Benefits and endorsed by the Canadian Judicial Council. It allows a judge to request maternity or parental leave without having to seek cabinet approval.

[110] I agree with the Attorney General of Canada that leaves under section 54 are not restricted to maternity or parental leaves. The reference above to those purposes was to illustrate and support the expansion of the leave period from 30 days to 6 months. Evidence of that is the statement then Justice Minister Rock gave to the Standing Senate Committee on Legal and Constitutional Affairs when it was considering the amendment to the *Judges Act* relating to Justice Louise Arbour [*Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 35th Parl., 2nd Sess., Issue No. 29 (October 3, 1996)]. He stated, “It might be noted that the Judges Act already provides for judges to be granted leaves of absence in order to perform non-judicial duties, such as serving as commissioners of inquiry ... or to assist foreign countries developing codes of human rights” (emphasis added). While the first exception is provided for in section 56, the second exception is not. Later, the Minister of Justice describes the parameters of leaves other than for personal reasons:

[Mr. Rock:] Second, while [judges] are there they should only be doing the work of judges and not working on the side for businesses or in some other fashion. While that is an important principle, the Judges Act itself already contemplates exceptions. As I mentioned in my opening remarks, a judge might be appointed to chair a commission of inquiry or to arbitrate a dispute. That goes on all the time. It is a necessary adjunct to a judge's life.

Senator Beaudoin: We agree entirely.

Mr. Rock: What I am suggesting, senator, is that it is consistent with section 56. It grows out of the same notion that we would permit a sitting judge to leave her duties for a stated period to go on an international organization and fulfil a worthy endeavour. That is not inconsistent with her judicial role. [Emphasis added.]

[111] The Attorney General concludes with his submission as to the proper interpretation of section 55:

This legislative history demonstrates that Parliament did not intend for [section 55](#) of the [Act](#) to act as a complete ban on judges taking on non-judicial roles. Section 55 instead functions to prohibit judges from taking on employment in a commercial, private, or political capacity that could call into question their judicial independence or otherwise threaten public confidence in their integrity or impartiality. The record consistently reiterates that judges should remain able to assume non-judicial roles in certain circumstances, particularly when that role serves an important public purpose. Additionally, the legislative record demonstrates that [section 54](#) of

the Act is to be read together with sections 55-57 and allows for a leave from judicial duties for a variety of reasons, including to assume a non-judicial role, as long as that role would not otherwise conflict with his or her eventual return to the bench.

[112] I agree (1) that [section 55](#) of the [Act](#) is not a complete ban on judges taking on non-judicial roles; (2) that Parliament's intention was that judges are able to assume non-judicial roles in certain circumstances; and (3) that [section 54](#) of the Act allows for a leave from judicial duties for a variety of reasons that are not inconsistent with the judge's judicial duties.

[113] I further agree that section 55, interpreted using the modern principle of interpretation, provides that a judge cannot assume employment in a commercial, private, or political capacity as that could call into question their judicial independence or threaten public confidence in the integrity and impartiality of the judge and the judiciary. These are inconsistent with his or her judicial duties. It is a matter for the chief justice or Minister of Justice to determine whether a leave request under section 54 warrants being granted. It is expected that they will consider whether the purpose of the leave serves an important public purpose and whether it could call into question their judicial independence or otherwise threaten public confidence in their integrity or impartiality. However, these requirements cannot be read into section 55.

[114] Collectively, the three findings set out above at paragraph 112 result in the conclusion that Justice Smith did not breach [section 55](#) of the [Judges Act](#) when, on a leave of absence granted by his Chief Justice and approved by the Minister of Justice, he accepted the appointment of Interim Dean (Academic) of the Law School.

(3) *Ethical Obligations*

[115] I turn next to the Review Panel finding that Justice Smith breached his ethical duties. It writes [at paragraph 76]:

(d) Regardless of the interpretation ascribed to [sections 54 to 56.1](#) of the [Judges Act](#), Justice Smith has an ethical obligation as a judge to avoid involvement in public debate that may unnecessarily expose him to political attack or be inconsistent with the dignity of judicial office. There were also reputational risks to Justice Smith and to the Ontario Court of Justice associated with lending their support to the Faculty of Law at Lakehead during a time of crisis.

(e) In the circumstances facing Justice Smith in 2018, notwithstanding his genuine desire to help the Faculty of Law at Lakehead, his decision to accept an appointment as Interim Dean (Academic) at the Faculty of Law was ill-advised.

[116] In so concluding, the Review Panel considered the Ethical Principles and the past circumstances of Justice Fauteux serving as Dean of two separate law schools, and Justice Gillese occupying the position of university Chancellor.

[117] With respect to Justice Fauteux, the Review Panel [at paragraph 61] says only “that societal norms are shifting, and that it is much more likely in the present day that individuals assuming leadership roles within universities will be required to deal with controversial and highly public topical issues, than was formerly the case.” Even if the Review Panel had any evidence that universities in the 1960s dealt with fewer controversial and highly public topical issues than today (and none is in the record), the Review Panel fails to note that unlike Justice Fauteux, Justice Smith’s deanship was limited to academic matters—an area that can hardly be said to be a wellspring of “controversial and highly public topical issues”.

[118] With respect to Justice Gillese, the Review Panel notes [at paragraph 62] that the CJC agreed to her appointment as Chancellor because “of the strict limitations” agreed to by the university and the judge, and because “of the ceremonial nature of the post.” This fails to reference the view of Pidgeon A.C.J. that the limitations agreed to by Justice Smith and the Law School limited his role to a ceremonial one. As to the conditions, it writes [at paragraph 74], “the use of such conditions may be an imperfect attempt to address unknowable contingencies arising in a dynamic environment”. Nonetheless, significant conditions were agreed upon that removed Justice Smith from the administration of the Law School and the university. Most importantly, he had undertaken to inform and seek guidance from his Chief Justice if circumstances changed or “any issues arise which may raise new ethical implications, or [possibly] lead to public controversy” [at paragraph 72]. A condition not mentioned by the Review Panel.

[119] Moreover, and critically, his acceptance of the Interim Dean (Academic) role with these conditions was approved by his Chief Justice. If his decision was ill-advised, what does that say of the decisions of his Chief Justice and the Minister of Justice?

[120] The role of his Chief Justice both in terms of consenting to the appointment and her subsequent role should any public controversy arise was worthy of consideration and weight. In *Ruffo v. Conseil de la magistrature*, 1995 CanLII 49 (SCC), [1995] 4 S.C.R. 267, at paragraph 59, Justice Gonthier for the majority, notes the important role a chief justice plays in ethical decisions:

We must recognize that the chief judge, as *primus inter pares* in the court, the efficient operation of which he or she oversees in all other respects, is in a preferred position to ensure compliance with judicial ethics. First, because of the chief judge’s role as co-ordinator, events that may raise ethical issues are more readily brought to his or her attention. As well, because of the chief judge’s status, he or she is often the best situated to deal with such delicate matters, thereby relieving the other judges of the court of the difficult task of laying a complaint against one of their colleagues where necessary. In short, the power to lay a complaint is an intrinsic part of the chief judge’s responsibility in this area and it would not be fitting for the chief judge to act through someone else, whether a judge or a person outside the judiciary, to fulfil his or her obligations in this regard.

[121] The underpinning for the conclusion the Review Panel reaches on its consideration of the judicial ethics question is: (1) media reports that the former Dean had threatened litigation; (2) the possibility of litigation should the Law Society of Ontario remove the Law School’s accreditation; (3) “extensive” media reports “which included allegations of a failure on the part of Lakehead to fulfill the Faculty of Law’s Indigenous mandate and

some criticism of Justice Smith's appointment from Indigenous leaders" [at paragraph 27]; and (4) that prior to accepting the appointment, the CJC Executive Director informed Justice Smith that it could be a matter for the CJC's consideration.

[122] As to the first two of these, although any litigation by the former Dean would come before the Superior Court, Justice Smith had already and appropriately indicated that he would recuse himself from any litigation in his Court relating to the University. This removes all possibility that he would be in a conflict of interest, or even appear to be in one, should litigation arise. This is equally true if a decision on accreditation were challenged before the Divisional Court. Justice Abella in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282 (*Yukon*), at paragraph 59 noted the absence of restrictions on judges' associations when there is little likelihood of potential conflict:

While I fully acknowledge the importance of judges avoiding affiliations with certain organizations, such as advocacy or political groups, judges should not be required to immunize themselves from participation in community service where there is little likelihood of potential conflicts of interest.

[123] Should the former Dean sue the Law School, it is extremely unlikely that she or any reasonably informed person would think her suit could be influenced by Justice Smith's involvement with the Law School. She is a lawyer and knows otherwise. Moreover, her taking legal action was not a certainty when the Review Panel report issued.

[124] The Review Panel's consideration of litigation regarding the accreditation of the Law School is entirely speculative and unworthy of its consideration. Again, both the Law School and the Law Society of Ontario being well informed of judicial matters would be extremely unlikely to have any concern if Justice Smith accepted the appointment and recused himself from such litigation.

[125] At paragraph 60 of *Yukon*, Justice Abella considers the Ethical Principles and observes that they "advise that while judges should clearly exercise common sense about joining organizations, they are not prohibited from continuing to serve their communities outside their judicial role" (emphasis added). Moreover, she wisely observes at paragraph 61, "We expect a degree of mature judgment on the part of an informed public which recognizes that not everything a judge does or joins predetermines how he or she will judge a case." The decision of the Review Panel, in my assessment, in examining whether Justice Smith's conduct unnecessarily exposed him to criticism or attack, fails to do so on the basis of an informed public exercising mature judgment.

[126] The Review Panel [at paragraph 27] exaggerates when it writes of the "extensive" media coverage generated by Justice Smith's appointment. There was some coverage; however, most of the media coverage was directed to the University and the resignation of the Dean. There was very little directed to Justice Smith's interim appointment and even the Review Panel describes it as "arguably unfounded" [at paragraph 64]. Moreover, as is noted by Pidgeon A.C.J. in his referral decision, following a meeting between a First

Nations advisory committee and the university on May 10, 2018, “no public comments were made subsequently.”

[127] I agree entirely with the submission of the Canadian Superior Courts Judges Association at paragraph 49 of its memorandum of argument that “CJC’s response to Justice Smith’s acceptance of the appointment resulted in a torrent of public criticism, not of Justice Smith or his conduct, but of the CJC itself.” This criticism from judges, lawyers, and the public directed to the CJC’s conduct far outweighs and is more damning than the sparse coverage directed to Justice Smith.

[128] As to the Review Panel relying on Justice Smith having received the letter from the Executive Director of the CJC as a fact underpinning its decision, I concur with the submission of The Canadian Superior Courts Judges Association that the letter “raised particularized concerns” and must be considered against the backdrop of the consent of the Chief Justice and the Minister of Justice. As it submits “the CJC’s Executive Director has no status or authority to advise judges on ethical matters and it would raise significant constitutional issues if he did.”

[129] The CJC submits, “Judicial ethics prohibit the prestige of judicial office from being used to bolster the reputation, status or public confidence in extra-judicial organizations.” The Ethical Principles do not make that broad statement. Section C.1 under Statement 6 dealing with impartiality provides that while judges are free to participate in “civic, charitable and religious activities” they “should not solicit funds ... or lend the prestige of judicial office to such solicitations.” The commentary to that section repeats the same in C.6. C.10 speaks of using the prestige of judicial office to advance a person’s private interests.

[130] The association of a judge with any extra-judicial organization will, to some degree, bolster its reputation, status and public confidence. It is for precisely that reason that law schools seek to have judges teach. I daresay it was also for such reason that McGill and Ottawa Law School sought out Justice Fauteux as their Dean, and Brescia University College sought out Justice Gillese as its Chancellor. If that were the test, then no judge could ever join or participate in any extra-judicial civic, religious, or charitable organization.

[131] For these reasons, I find the decision of the Review Panel as to the ethical breach of Justice Smith in accepting this appointment to be unreasonable and it cannot stand.

B. Were the Proceedings Procedurally Unfair Amounting to an Abuse of Process?

[132] Counsel for Justice Smith submits that the CJC’s “treatment of Justice Smith’s case from its inception has been unfair and oppressive, such that it is an abuse of the Council’s process.”

[133] The Supreme Court of Canada in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at paragraph 120, held that it is an

abuse of process where an administrative proceeding has been conducted so unfairly that it is contrary to the interests of justice:

In order to find an abuse of process, the court must be satisfied that, “the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted” (Brown and Evans, *supra*, at p. 9-68). According to L’Heureux-Dubé J. in *Power*, *supra*, at p. 616, “abuse of process” has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L’Heureux-Dubé J., be “unfair to the point that they are contrary to the interests of justice” (p. 616). “Cases of this nature will be extremely rare” (*Power*, *supra*, at p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive.

[134] The judicial conduct review process established by the CJC is ultimately directed to the possible removal of a judge because of conduct. In *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3, at paragraph 147, the Supreme Court describes the severity of conduct that warrants removal:

.... before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office. [Emphasis added.]

[135] When analyzing whether the process of the CJC regarding the conduct of Justice Smith was so unfair as to constitute an abuse of process, this high standard should be kept in mind because, as is discussed below, the referral to the Review Panel can only be done if it is determined that the conduct may be serious enough to warrant removal from office.

[136] The submission of Justice Smith is that on the facts of this matter, the CJC misused its disciplinary procedure in a manner that is excessive and unreasonable, putting Justice Smith’s livelihood and reputation at risk, causing him prejudice, and eroding public confidence in the judiciary and the fairness of the CJC’s process. This is a serious allegation; however, on the record before me, I find that the CJC did misuse its disciplinary procedure in a manner that is excessive and unreasonable.

[137] I find that the CJC disciplinary procedure was misused from the beginning —when the Executive Director determined that Justice Smith accepting the appointment to the Law School was a matter that “warrants consideration.”

[138] Subject to my comments below at paragraphs 171 to 175, I take no issue with the Executive Director, on May 9, 2018, writing to Justice Smith, informing him that this appointment has come to his attention and that under section 4.2 of the Review

Procedures, it appears to him to be a matter that may warrant consideration. Although he references “Media reports”, he attaches only one, a CBC web post that reports that Justice Smith has accepted the appointment.

[139] The Court notes that there is nothing in that attached report that criticises Justice Smith’s conduct in accepting the position, nor is anything reported that is critical of the Law School appointing him on an interim basis. One part of the report sets out the position of some indigenous leaders about the conduct of the Law School, but this report does not show any objection by it to this appointment or to Justice Smith:

Since then indigenous leaders representing dozens of First Nations communities across northwestern Ontario called for “immediate change” at Lakehead University. They made several recommendations, including that Lakehead commit to appointing an Indigenous person as EagleWoman’s successor, that an independent review examine “all issues and allegations” raised by her and that appropriate measures are subsequently taken.

[140] In his letter to Justice Smith, the Executive Director writes, “In light of [sections 54 and 55](#) of the [Judges Act](#), and given the general duties and ethical obligations of judges, the information provided in these news reports brings me to the view that the situation may warrant consideration by Council.” Based on the single report attached to the letter, one can only conclude that the “situation” that concerned the Executive Director was that Justice Smith accepted this appointment.

[141] Indeed, that appears to be exactly how the Chief Justice, who was copied on the letter read it. She responds by letter of May 11, 2018, providing the background facts leading to the appointment. She provides the Executive Director with the letter from the Law School requesting Justice Smith to accept the appointment, the letter of the Chief Justice to the Minister of Justice concerning it, and the Minister’s response.

[142] Based on the record, these letters set out the facts on which the Executive Director made his decision that the matter warranted consideration by the CJC and, under section 4.3 of the Review Procedures, referred it to the Judicial Conduct Committee on May 16, 2018.

[143] Prior to making this determination, the Executive Director had to screen the matter as required under the Review Procedures. Indeed, in his affidavit, the Executive Director states that he refers every complaint or matter not falling within the exceptions described in section 5 of the Review Procedures, to the Chairperson of the Judicial Conduct Committee. Section 5 reads as follows:

5. Early Screening Criteria

For the purposes of these Procedures, the following matters do not warrant consideration:

(a) complaints that are trivial, vexatious, made for an improper purpose, are manifestly without substance or constitute an abuse of the complaint process;

(b) complaints that do not involve conduct; and

(c) any other complaints that are not in the public interest and the due administration of justice to consider.

[144] How did the Executive Director fail to conclude that it is “not in the public interest and the due administration of justice” to consider the matter of Justice Smith’s appointment?

[145] That question is asked because the information the Executive Director had leads me to only one conclusion; namely, that the referral to the Judicial Conduct Committee of the matter raised by the Executive Director himself was “not in the public interest and the due administration of justice to consider.” I arrive at that conclusion based on the following facts:

1. The Law School approached Justice Smith to consider the appointment, in part because of his “significant work with Indigenous communities” and his publications focused on Aboriginal Law in Canada;
2. Justice Smith immediately informed his Chief Justice that he had been contacted “out of the blue” with this request and that he would “accept a short term appointment with your approval and that of the Minister of Justice”;
3. The Chief Justice writes to the Minister of Justice setting out the facts, including the role being limited to academic leadership, describing this as a “very exceptional situation” and one which provides “an opportunity for our Court to respond positively to a number of Truth and Reconciliation Commission recommendations” and advising, “With your approval, I am anxious to authorize this special leave” (emphasis in original);
4. The Minister of Justice responds, “I have no concerns about your granting Justice Smith a ‘special leave’ ... as outlined in your letter [and] in the event that more than six months is required, I will consider any requests for additional leave”;
5. Justice Smith’s judicial colleagues in the Northwest Region support him being granted a leave to take this appointment; and
6. No complaint was made to the CJC by anyone at any time regarding the conduct of Justice Smith in accepting this appointment.

[146] There is nothing in the record explaining how and on what basis the Executive Director concluded that his referral to the Judicial Conduct Committee was in the public interest and the due administration of justice. The information disclosed to Justice Smith prior to the referral did not indicate any public debate or concern about the appointment, and the approval of his Chief Justice and Minister of Justice belie any suggestion that it affected the due administration of justice.

[147] Again, without evidence from the Executive Director we do not know what weight he placed on the Minister’s approval; however, based on his affidavit, I find that he gave it none. Regarding the Minister’s letter, he swears:

On 11 May 2018, the Applicant sent me an email attaching a letter from Chief Justice Heather Smith which he referred to as Leave of Absence Approval from Chief Justice Smith. On the same date, the Applicant sent another email attaching a letter from the Honourable Judy Wilson-Raybould, Minister of Justice and Attorney General of Canada (as she then was) which he referred to as a Letter of Approval of the Minister of Justice for Secondment as (Interim) Dean. The Minister's letter did not indicate that the Minister has made any decision in respect of the matter, but that the Minister recognized that the authority to grant leave for less than six months rested with Chief Justice Smith. The Minister concluded her letter thus: "I would encourage the university to move quickly in appointing a permanent Dean, both to ensure long-term leadership for the Faculty of Law, and to minimize Justice Smith's time away from his regular duties as a supernumerary judge." [Emphasis added.]

[148] The following underlined passages of the Minister's letter are not referred to by Mr. Sabourin, and in my view, clearly show that the Minister made a decision, namely, that she has no concerns about the appointment and will consider an extension if asked:

As Chief Justice, you have the authority to grant Justice Smith a "special leave" under the Judges Act, for a period up to six months. I also understand that Justice Smith's judicial colleagues in the Northwest Region are supportive of his taking a "special leave" in order to accept this position.

I have no concerns about your granting Justice Smith a "special leave" from June 2018 to November 2018, as outlined in your letter. In the event that more than six months is required, I will consider any requests for additional leave at the appropriate time. I would encourage the university to move quickly in appointing a permanent Dean, both to ensure long-term leadership for the Faculty of Law, and to minimize Justice Smith's time away from his regular duties as a supernumerary judge. [Emphasis added.]

[149] The CJC and the Attorney General, echoing Mr. Sabourin, both submit that the response by the Minister was not an "approval" of the leave being granted. I disagree. The Chief Justice explicitly asked for the Minister's "approval" of her granting the leave. The Minister responded that she had no concerns with the leave being granted. The leave was granted by the Chief Justice who obviously considered the Minister's response to indicate approval. Further, Justice Smith indicated that he would accept the assignment with the approval of his Chief Justice and the Minister of Justice, and so he too viewed this as ministerial approval as he accepted the appointment.

[150] The position that there was no ministerial approval on these facts is absurd. If the Minister was not approving, then it was simple enough for her to say so. She did not. Moreover, she expressed a willingness to consider an extension which is not what one would expect from someone opposed to the initial leave. Apprised of all the facts, the Minister had no concerns.

[151] I find that the Minister's letter indicated her approval.

[152] Consider an analogy. A teenager who has a 10 p.m. curfew approaches father seeking a later curfew as the child and friends are going to a movie that runs longer than usual. Father says he is inclined to approve, but that they need to speak to mother. They

go to mother to discuss the request and she responds that father can grant the request and she has no concerns. She adds that if the child is going to be later than an hour to seek her approval for an extension. On this basis, the child goes to the movie and arrives home 30 minutes past her 10 p.m. curfew. Is there anyone who would think it fair if the mother were to ground the child for having been 30 minutes late because she did not grant her approval? Can anyone seriously suggest that the mother had not made a decision on the request and had not approved it?

[153] The Court is equally troubled by the treatment Pidgeon A.C.J. gives to the approval of the Minister. In his decision to refer the matter to the Review Panel, he writes of the Minister's letter that she had "unofficially" approved the leave to allow Justice Smith to serve as Interim Dean. He writes [at page 5 of the reasons for referral]:

.... In my view, Chief Justice Heather Smith's consent and support for Justice P. Smith's leave of absence, and the Minister of Justice's apparent lack of concern, are simply factors to be weighed in assessing the nature and gravity of Justice Patrick Smith's conduct, and whether this conduct is appropriate. [Emphasis added.]

[154] My view, as earlier stated, is that the Minister's approval cannot be reasonably said to be "unofficial" simply because she did not expressly use the word "approved." Second, it is not an honest description of the Minister's actions to describe them as an "apparent lack of concern" when she expressly writes, "I have no concerns." She is to be taken at her word.

[155] It is unclear to me what Pidgeon A.C.J. means when he writes that these approvals are factors to be weighed in assessing whether Justice Smith's "conduct is appropriate." Pidgeon A.C.J. referred the matter to the Review Panel. Under section 8.2(d) of the Review Procedures, he could do that only if he "determines that the matter may be serious enough to warrant the removal of the judge."

[156] Counsel for Justice Smith submits that the CJC "pursued Justice Smith knowing that the Minister of Justice had already approved of his actions." She says that "it is inconceivable that the Minister of Justice would make an address to both Houses of Parliament asking ... for Justice Smith's removal on the basis of actions that he took with her express approval."

[157] I agree.

[158] Under section 8.2(d) of the Review Procedures, the Chairman of the Judicial Conduct Committee may "refer the matter to a Panel, in accordance with subsection 2(1) of the By-laws, if the Chairperson determines that the matter may be serious enough to warrant the removal of the judge." How, one must ask, could Pidgeon A.C.J. determine that the matter may be serious enough to warrant the removal of Justice Smith when removal will never occur?

[159] As in the case of the Executive Director, he could only have made this decision based on his improper characterization of the Minister's approval.

[160] In addition to the improper decision of the Executive Director that the matter "warrants consideration" there is evidence in the record that Justice Smith was also denied procedural fairness by the Executive Director.

[161] As noted above, the only information Justice Smith had as to the substance of the matter was the initial letter of the Executive Director attaching one web page reporting that he had accepted the appointment, and his reference to [sections 54 and 55 of the Judges Act](#) and "the general duties and obligations of judges." However, Pidgeon A.C.J., in his reasons for referring the matter to the Review Panel, indicates that other material was before the Executive Director which guided his actions and decisions. He writes [at page 2]:

Following Justice Smith's appointment as Interim Dean, First Nations leaders were upset and criticized the lack of prior consultation and failure to follow the recommendations of the national advisory committee on aboriginal issues. They called on the university to rescind the appointment.

On 9 May 2018, given the public comments made in response to the statements made by First Nations chiefs, the Executive Director of the Canadian Judicial Council wrote to Justice Patrick Smith and his Chief Justice to obtain more information. [Emphasis added.]

[162] None of this information was provided to Justice Smith. Specifically, he was not informed of the Executive Director's concerns about the call for him to resign, nor was he provided with any of the "public comments" made in response to statements made by First Nations chiefs, nor those statements.

[163] Procedural fairness dictates that one is entitled to know the case to be met. This is a fundamental procedural right that the Executive Director failed to give to Justice Smith.

[164] A finding of judicial misconduct may result in the removal of the judge from office. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999 CanLII 699](#), the Supreme Court observed that the duty of procedural fairness is flexible and variable and depends on an appreciation of many matters. These were said to include: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the agency itself.

[165] Specifically, at paragraph 25, it was observed, "The importance of a decision to the individuals affected ... constitutes a significant factor affecting the content of the duty of procedural fairness." That factor alone, in the context of a complaint regarding judicial

conduct, points to the CJC being required to accord a judge significant procedural fairness.

[166] If the real concern of the Executive Director was the adverse reaction of some First Nations chiefs to his appointment, then Justice Smith was entitled to know that and respond to it. In an affidavit filed in this application, Justice Smith describes the response he would have provided if this were the concern.

[167] Justice Smith submits that the decision(s) to refer his acceptance of the appointment in the face of the approvals received and the lack of public complaint was done for an improper purpose. He points to statements made by the CJC in three publications:

1. The CJC Press Release ["Canadian Judicial Council review of a matter involving the Honourable Patrick Smith"] of October 3, 2018, announcing that the matter had been referred to the Review Panel, which says:

Council believes that all judges, and the public alike, will benefit from greater clarity regarding the permissible scope of activities for judges outside their normal judicial duties.

2. The report ["Judge fights against disciplinary body's ruling that said he engaged in misconduct" by Michelle McQuigge] in *The Star* [*Toronto Star*] of September 27, 2018, in which the Executive Director is quoted as saying: "We believe that all judges would benefit from clarity in this regard;" and
3. An article in *The Lawyer's Daily* of October 4, 2018 ["Canadian judges rally around judge facing discipline for accepting interim law dean post at Lakehead University" by Cristin Schmitz], in which the Executive Director is quoted as saying with respect to the referral to the Review Panel, "This will greatly assist [the judicial] council, and its Independence Committee, in its ongoing work of revising *Ethical Principles for Judges*, a project that is expected to be completed in the fall of 2019."

[168] Counsel for Justice Smith makes the following submission, with which I entirely agree:

The purpose of judicial conduct proceedings is not to provide "clarity" to judges and the public. By improperly wielding its authority over Justice Smith in this way, including unreasonably and unnecessarily finding that he contravened [s. 55](#) of the *Judges Act*, the Council abused its process. To the extent the Council wanted to provide such guidance, it should have done so through means other than launching frivolous and unfounded misconduct proceedings against Justice Smith.

[169] Accordingly, I conclude that the initial referral to the Judicial Conduct Committee by the Executive Director failed to accord with the procedures established by the CJC. It was not a matter that warranted consideration, and the referral was done in a procedurally unfair manner as Justice Smith was not informed of the Executive Director's real

concerns. I further find that the referral to the Review Panel failed to accord with the procedures established by the CJC in finding, based on an improper characterization of the Minister's consent, that "the matter may be serious enough to warrant removal of the judge." I further find that the review of Justice Smith's acceptance of the appointment was made, at least in part, for an improper purpose.

[170] I find that the CJC process involving Justice Smith was unfair to the point that it is contrary to the interests of justice. It was an abuse of process.

[171] Before concluding, I wish to address the submission made by The Canadian Superior Courts Judges Association that it was not proper for the Executive Director "to initiate a complaint." It points out that as the Executive Director has responsibility to conduct an initial screening that cannot occur in any meaningful fashion if he is also the person initiating the complaint. It submits that this circumstance results in the judge being denied "this essential procedural safeguard and, as in this case, be called to account for conduct that could not reasonably have led to removal."

[172] In *Cosgrove v. Canadian Judicial Council*, [2007 FCA 103](#), [\[2007\] 4 F.C.R. 714](#), the Federal Court of Appeal, at paragraph 77 commented on the advantages of the screening procedure:

In practical terms, the screening procedure followed for an ordinary complaint under [subsection 63\(2\)](#) of the *Judges Act* is advantageous from the point of view of the judge for three reasons. First, it permits the resolution of a complaint without publicity. Second, it permits the summary dismissal of an unmeritorious complaint. Third, it permits the early resolution of a complaint by remedial measures, without the establishment of an Inquiry Committee.

[173] Provided the Executive Director assiduously applies the same review procedure to a matter he raises on his own as he does to complaints made by others, this concern does not seem to arise.

[174] Nonetheless, the Court finds that in raising matters on his own in the absence of any complaint from the public, the Executive Director would be well advised seriously to consider whether to do so.

[175] It is not as if the public never complains about judicial conduct. Evidence in the record shows that prior to 2005–2006 more than 150 complaints were filed annually. This suggests that if the Executive Director is raising a matter that is not the subject of a complaint, it ought to be of sufficient gravity to warrant that action. In that regard the Executive Director ought to weigh the conduct against the test set by the Supreme Court of Canada for conduct worthy of removal from the bench. Although that ultimate decision is not his to make, he ought to be convinced that it could result in such a finding. Here, in light of the approval of the Minister of Justice, removal action by the Minister of Justice was inconceivable.

C. What is the Appropriate Remedy?

[176] Justice Smith seeks the following by way of remedy:

- (a) A declaration that Justice Smith did not contravene [section 55](#) of the *Judges Act*;
- (b) An order quashing the Letter of Concern; and
- (c) An order that the entry about the Council's actions in this matter on its website be changed to conform to this Court's decision and order.

[177] Typically, on a successful judicial review application, the decision under review is quashed and the matter referred back for a new decision. The remedy sought cannot be granted unless the Court finds that there is only one reasonable interpretation of the *Judges Act* and Justice Smith's actions do not breach it.

[178] The Supreme Court of Canada at paragraph 124 of *Vavilov*, recognized that a court might make a finding of statutory interpretation in a judicial review application, such as that here:

Finally, even though the task of a court conducting a reasonableness review is *not* to perform a *de novo* analysis or to determine the "correct" interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue: *Dunsmuir*, at paras. 72-76. One case in which this conclusion was reached was *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, [2019 FCA 52](#), in which Laskin J.A., after analyzing the reasoning of the administrative decision maker (at paras. 26-61 (CanLII)), held that the decision maker's interpretation had been unreasonable, and, furthermore, that the factors he had considered in his analysis weighed so overwhelmingly in favour of the opposite interpretation that that was the only reasonable interpretation of the provision: para. 61. As discussed below, it would serve no useful purpose in such a case to remit the interpretative question to the original decision maker. Even so, a court should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker. [Emphasis in original.]

[179] In this case, taking into account all of the factors in reviewing the reasonableness of the interpretation the Review Panel gave to [section 55](#) of the *Judges Act*, I see this to be one of those situations where the analysis weighs overwhelmingly in favour of a different interpretation. Moreover, using the modern principle of interpretation, it is the only reasonable interpretation of section 55 of the *Judges Act*.

[180] It was never the intention of Parliament in enacting section 55, to prohibit judges from all non-judicial activities, and a reasonable interpretation must accord with that intention. Moreover, it has always been the intention of Parliament that section 55 prohibits judges from taking on employment in a commercial, private or political capacity, i.e. in businesses or occupations, and that is so whether the judge is sitting or on leave. A sitting judge is permitted to engage in non-commercial activities that do not impair his or

her ability to perform judicial duties. Where the non-commercial activities duties cannot be performed without impairing the judge's ability to sit, the judge must obtain a leave of absence from his chief justice or Minister of Justice under section 54.

[181] In my view, that is the only reasonable interpretation of sections 54 and 55, based on the text of those sections, their statutory context, and their legislative history. That does not mean that a judge can be authorized to engage in any non-judicial activity that falls outside the scope of section 55 with impunity. There may be circumstances where an otherwise permissible activity the judge wishes to do may raise ethical concerns. As an example, a judge accepting a teaching assignment or writing a legal text may run afoul of his or her ethical obligations if he or she expresses a legal opinion on matters or issues that may later come before the judge. For this reason, judges wishing to engage in such acceptable activities ought to have a full and frank discussion of the role with their chief justice, and be prepared to step out of the role should any conflict with ethical duties present themselves.

[182] In light of this interpretation, the declarations Justice Smith seeks are appropriate, as nothing will be gained by sending this matter back to the CJC for consideration.

[183] All parties agreed that there should be no order made as to costs.

[184] Before concluding, I wish to thank all counsel for their precise and thoughtful written and oral submissions. They have greatly assisted me in my deliberations. This has been a challenging application; it has occupied a very significant portion of my time. The conclusions reached and findings made are the only ones available to me based on the evidence and the law.

JUDGMENT IN T-1713-18 (T-2055-18)

THIS COURT ORDERS that:

1. These applications for judicial review are allowed;
2. The decision of the Judicial Conduct Review Panel dated November 5, 2018, is quashed;
3. The letter dated November 6, 2018, from Associate Chief Justice Pidgeon in his capacity as Vice-Chairperson of the Judicial Conduct Committee of the Canadian Judicial Council which relies on the decision of the Judicial Conduct Review Panel, is quashed;
4. Justice Patrick Smith was denied procedural fairness in the Canadian Judicial Council process considering his conduct in accepting the appointment as Interim Dean (Academic) at Bora Laskin Faculty of Law at Lakehead University, and it was an abuse of process;
5. The Court declares that Justice Patrick Smith in accepting the appointment of Interim Dean (Academic) at Bora Laskin Faculty of Law at Lakehead University did not breach [section 55](#) of the [Judges Act](#), R.S.C., 1985, c. J-1, nor did he breach his judicial ethics;

6. The Canadian Judicial Council, within 10 days of this decision, shall post a copy of this judgment and reasons on its website, and shall provide a reference to it on all of its descriptions, references, reports, and decisions relating to its review of the conduct of Justice Patrick Smith; and
7. There is no order as to costs.

APPENDIX A

Judges Act, R.S.C., 1985, c. J-1

Leave of absence

54 (1) No judge of a superior court shall be granted leave of absence from his or her judicial duties for a period

(a) of six months or less, except with the approval of the chief justice of the superior court; or

(b) of more than six months, except with the approval of the Governor in Council.

...

EXTRA-JUDICIAL EMPLOYMENT

Judicial duties exclusively

55 No judge shall, either directly or indirectly, for himself or herself or others, engage in any occupation or business other than his or her judicial duties, but every judge shall devote himself or herself exclusively to those judicial duties.

Acting as commissioner, etc.

56 (1) No judge shall act as commissioner, arbitrator, adjudicator, referee, conciliator or mediator on any commission or on any inquiry or other proceeding unless

(a) in the case of any matter within the legislative authority of Parliament, the judge is by an Act of Parliament expressly authorized so to act or the judge is thereunto appointed or so authorized by the Governor in Council; or

(b) in the case of any matter within the legislative authority of the legislature of a province, the judge is by an Act of the legislature of the province expressly authorized so to act or the judge is thereunto appointed or so authorized by the lieutenant governor in council of the province.

...

Authorization

56.1 (1) Notwithstanding section 55, Madam Justice Louise Arbour of the Ontario Court of Appeal is authorized to take a leave from her judicial duties to serve as Prosecutor of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia and of the International Tribunal for Rwanda.

...

PART II

Canadian Judicial Council

...

Objects of Council

60 (1) The objects of the Council are to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts.

Powers of Council

(2) In furtherance of its objects, the Council may

...

(c) make the inquiries and the investigation of complaints or allegations described in section 63; and

...

Inquiries concerning Judges

Inquiries

63 (1) The Council shall, at the request of the Minister or the attorney general of a province, commence an inquiry as to whether a judge of a superior court should be removed from office for any of the reasons set out in paragraphs 65 (2)(a) to (d).

Investigations

(2) The Council may investigate any complaint or allegation made in respect of a judge of a superior court.

[1] *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817.

Tab 100

Faber v. R., 2015 QCCS 12 (CanLII)

Source: Superior Court
Date: 2015-01-06
File number: 200-36-002068-146; 200-36-002088-144;
200-36-002087-146; 200-36-002080-141;
200-36-002092-146; 200-36-002078-145
Quote: Faber v. R., 2015 QCCS 12 (CanLII), <
<https://canlii.ca/t/gfv8p> >, retrieved on 2026-03-23

Faber c. R.

2015 QCCS 12

JP1124

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF QUEBEC

No.: 200-36-002068-146
200-36-002088-144
200-36-002087-146
200-36-002080-141
200-36-002092-146
200-36-002078-145

DATE : January 6, 2015

**UNDER THE PRESIDENCY THE HONORABLE RAYMOND W. PRONOVOST, JCS
OF:**

JEAN FABER

hereinafter referred to as "Faber"

And

PIERRE-OLIVIER GILBERT-LANGLOIS

hereinafter referred to as "Gilbert-Langlois"

And

ERIC DENIS

hereinafter referred to as "Denis"

And

ÉRIC CHOUINARD

hereinafter referred to as "Chouinard"

And

PAUL GERMAIN

hereinafter referred to as "Germain"

And

FRANÇOIS KIROUACK

hereinafter referred to as "Kirouack"

Appellants

c.

HER MAJESTY THE QUEEN

Respondent

JUDGEMENT

[1] This is an appeal in six cases, all of which concern the same legal issues. In each case, the charges are as follows:

[2] Faber:

(a) On or about April 10, 2010, in Fossambault-sur-le-Lac, District of Quebec, drove a motor vehicle while impaired by alcohol or a drug, thereby committing an offence punishable on summary conviction under [sections 253\(1\) \(a\) and 255\(1\)](#) of the [Criminal Code](#).

(b) On or about April 10, 2010, in Fossambault-sur-le-Lac, District of Quebec, drove a motor vehicle while having consumed an amount of alcohol such that his blood alcohol level exceeded 80 milligrams of alcohol per 100 millilitres of blood, thereby committing the offence punishable on summary conviction under [sections 253\(1\) \(b\) and 255\(1\)](#) of the [Criminal Code](#).

[3] Gilbert-Langlois:

(a) On or about June 10, 2009, in Quebec City, District of Quebec, drove a motor vehicle while impaired by alcohol or a drug, thereby committing an offence punishable on summary conviction under [sections 253\(1\) \(a\) and 255\(1\)](#) of the [Criminal Code](#).

b) Le ou vers le 10 juin 2009, à Québec, district de Québec, a conduit un véhicule moteur, alors qu'il avait consommé une quantité d'alcool telle que son alcoolémie dépassait 80 milligrammes d'alcool par 100 millilitres de sang, commettant ainsi l'infraction punissable sur déclaration sommaire de culpabilité prévue aux [articles 253\(1\)b\) et 255\(1\)](#) du [Code criminel](#).

[4] Denis:

a) Le ou vers le 13 septembre 2008, à Québec, district de Québec, a conduit un véhicule moteur, alors que sa capacité de conduire ce véhicule était affaiblie par l'effet de l'alcool ou d'une drogue, commettant ainsi l'infraction punissable sur

déclaration sommaire de culpabilité prévue aux [articles 253\(1\)a](#)) et [255\(1\)](#) du [Code criminel](#).

b) Le ou vers le 13 septembre 2008, à Québec, district de Québec, a conduit un véhicule moteur, alors qu'il avait consommé une quantité d'alcool telle que son alcoolémie dépassait 80 milligrammes d'alcool par 100 millilitres de sang, commettant ainsi l'infraction punissable sur déclaration sommaire de culpabilité prévue aux [articles 253\(1\)b](#)) et [255\(1\)](#) du [Code criminel](#).

[5] Chouinard:

a) Le ou vers le 31 août 2008, à Saint-Apollinaire, district de Québec, a conduit un véhicule moteur, alors que sa capacité de conduire ce véhicule était affaiblie par l'effet de l'alcool ou d'une drogue, commettant ainsi l'infraction punissable sur déclaration sommaire de culpabilité prévue aux [articles 253\(1\)a](#)) et [255\(1\)](#) du [Code criminel](#).

b) Le ou vers le 31 août 2008, à Saint-Apollinaire, district de Québec, a conduit un véhicule moteur, alors qu'il avait consommé une quantité d'alcool telle que son alcoolémie dépassait 80 milligrammes d'alcool par 100 millilitres de sang, commettant ainsi l'infraction punissable sur déclaration sommaire de culpabilité prévue aux [articles 253\(1\)b](#)) et [255\(1\)](#) du [Code criminel](#).

[6] Germain:

a) Le ou vers le 21 août 2008, à Québec, district de Québec, a conduit un véhicule moteur, alors que sa capacité de conduire ce véhicule était affaiblie par l'effet de l'alcool ou d'une drogue, commettant ainsi l'infraction punissable sur déclaration sommaire de culpabilité prévue aux [articles 253\(1\)a](#)) et [255\(1\)](#) du [Code criminel](#).

b) Le ou vers le 21 août 2008, à Québec, district de Québec, a conduit un véhicule moteur, alors qu'il avait consommé une quantité d'alcool telle que son alcoolémie dépassait 80 milligrammes d'alcool par 100 millilitres de sang, commettant ainsi l'infraction punissable sur déclaration sommaire de culpabilité prévue aux [articles 253\(1\)b](#)) et [255\(1\)](#) du [Code criminel](#).

[7] Kirouack:

a) Le ou vers le 14 mars 2010, à Lévis, district de Québec, a conduit un véhicule moteur, alors que sa capacité de conduire ce véhicule était affaiblie par l'effet de l'alcool et d'une drogue, commettant ainsi l'infraction punissable sur déclaration sommaire de culpabilité prévue aux [articles 253\(1\)a](#)) et [255\(1\)](#) du [Code criminel](#).

b) Le ou vers le 14 mars 2010, à Lévis, district de Québec, a conduit un véhicule moteur, alors qu'il avait consommé une quantité d'alcool telle que son alcoolémie dépassait 80 milligrammes d'alcool par 100 millilitres de sang, commettant ainsi l'infraction punissable sur déclaration sommaire de culpabilité prévue aux [articles 253\(1\)b](#)) et [255\(1\)](#) du [Code criminel](#).

[8] Toutes les infractions ont été commises après l'entrée en vigueur des modifications à l'[article 258](#) du [Code criminel](#) le 2 juillet 2008.

[9] Dans tous les dossiers, un avis d'intention de soulever l'inconstitutionnalité des alinéas 258(1)c), 258(1)(d.01) et 258(1)(d.1) du *Code criminel canadien* a été présenté.

[10] Dans le dossier Faber, l'audition de la cause a eu lieu le 31 mai 2011. Au procès-verbal, il est indiqué : « preuve close généralement ». À cette date, le juge Lemay a acquitté Faber sur le 1^{er} chef. Sur le 2^e chef, il a reporté l'audience de la cause sur la requête en vertu de l'article 95 C.p.c.

[11] Dans le dossier Gilbert-Langlois, l'audition de la cause a eu lieu le 7 octobre 2010. Au procès-verbal, il est indiqué : « preuve de la défense close ». La cause est prise en délibéré et remise à une autre date. Le 27 octobre 2010, le juge Rousseau acquitte

Gilbert-Langlois sur le 1^{er} chef. Au procès-verbal il est indiqué que la requête en vertu de l'article 95 C.p.c est reportée.

[12] Dans le dossier Denis, l'audition de la cause a eu lieu le 18 juin 2010. Au procès-verbal, il est indiqué : « la preuve de la défense est close » et « la preuve est close généralement ». Le 7 octobre 2010, le juge Rousseau acquitte Denis sur le 1^{er} chef.

[13] Dans le dossier Germain, l'audition de la cause a eu lieu le 7 avril 2011. Il est indiqué au procès-verbal : « preuve close en défense et preuve close généralement ». Le dossier est pris en délibéré. Le 25 mai 2011, le juge Rousseau acquitte Germain sur le 1^{er} chef.

[14] Dans le dossier Chouinard, l'audition a eu lieu le 24 mars 2010. On peut lire au procès-verbal : « preuve de la défense continuera avec la requête article 95 et 95.1 C.p.c. » et le tout fut ajourné. Le 4 mars 2014, la juge Bouillon acquitte Chouinard du 1^{er} chef et le trouva coupable sur le 2^e chef.

[15] Dans le dossier Kirouack, l'audition de la cause a eu lieu le 10 janvier 2012. Au procès-verbal, on indique : « fin du témoignage » et le 12 février 2014, la juge Bouillon acquitte Kirouack sur le 1^{er} chef et le trouva coupable sur le 2^e chef.

[16] Après la décision de la Cour suprême du 2 novembre 2012 dans la cause *St-Onge Lamoureux*^[1], dans les dossiers Faber, Gilbert-Langlois, Denis et Germain, des requêtes pour mise hors du délibéré ont été présentées. Ces requêtes ont été accordées. Dans tous les dossiers, des requêtes en divulgation de la preuve ou arrêt des procédures ont été déposées. Dans plusieurs de ces dossiers, des requêtes ont été amendées et même réamendées.

[17] À la suite de ces requêtes en divulgation de la preuve des appelants, l'intimée présenta dans tous les dossiers une requête en irrecevabilité et les juges Lemay (Faber), Rousseau (Gilbert-Langlois, Denis et Germain) et Bouillon (Chouinard) accueillirent la requête en irrecevabilité, rejetèrent les requêtes en divulgation de la preuve et trouvèrent les appelants coupables du 2^e chef, soit le chef d'ivressomètre.

Jugements de première instance

[18] Le juge Pierre Rousseau a rendu un seul jugement pour trois dossiers, soit les dossiers de Gilbert-Langlois, Denis et Germain. Quant à la juge Bouillon, elle a rendu jugement dans chacun des dossiers de Chouinard et de Kirouack et le juge Lemay a rendu le jugement dans le dossier de Faber.

[19] Le déroulement de tous ces dossiers se faisait sensiblement de la même manière. Dans un premier temps, le juge de première instance entendait toute la preuve. Dans quatre dossiers (Faber, Gilbert-Langlois, Denis et Germain) les juges Rousseau et Lemay ont acquitté l'appelant sur le premier chef et ont reporté l'audition de la requête en vertu de l'article 95 quant au deuxième chef. Dans deux dossiers (Chouinard, Kirouack), la juge Bouillon s'est prononcée en même temps sur les deux chefs.

Le Juge Rousseau (Germain, Denis et Gilbert-Langlois)

[20] Le juge de première instance souligne que cette nouvelle disposition qui est entrée en vigueur le 2 juillet 2008 a comme conséquence que l'accusé doit soulever un doute raisonnable sur le bon fonctionnement ou l'utilisation correcte de l'alcootest dans le but de contrer la présomption d'exactitude. Cette disposition concrétise la fiabilité des alcootests.

[21] Après avoir cité une partie du jugement de l'arrêt *St-Onge Lamoureux*, il dit^[2] :

« Pour contrer la présomption d'exactitude des résultats d'analyse de l'alcootest, il faut maintenant démontrer uniquement un mauvais fonctionnement de l'appareil ou son utilisation incorrecte.

Il n'est plus nécessaire d'établir, en plus que le fonctionnement ou l'utilisation de l'appareil a causé une lecture d'alcoolémie supérieure à .08 et que l'alcoolémie de l'accusé au moment de l'infraction ne dépassait pas 90 milligrammes d'alcool par 100 millilitres de sang.

La défense de type Carter, c'est-à-dire, présentation d'une preuve relative à la consommation d'alcool de l'accusé n'est pas admissible pour démontrer le mauvais fonctionnement de l'appareil d'alcootest. »

[22] Il mentionne qu'avec l'ancienne législation, il était possible de présenter une preuve contraire basée sur le mauvais fonctionnement de l'appareil ou son utilisation incorrecte. Il déclare également que la loi dès son adoption est valide à moins qu'elle ne soit déclarée invalide par un tribunal compétent.

[23] À l'appel des dossiers, les procureurs des appelants se sont tous déclarés prêts à procéder. Aucun n'a demandé une divulgation additionnelle de la preuve ni d'ajournement. Les deux parties étaient d'accord que le tribunal ne tranche pas la question constitutionnelle et qu'il réserve ses verdicts sur le 2^e chef d'accusation après la décision de la Cour suprême dans *St-Onge Lamoureux*.

[24] Dans ces dossiers, il y a eu un choix stratégique des procureurs de présenter uniquement une défense de type Carter. Tous ont déclaré leur preuve close. La défense misait sur l'inconstitutionnalité des amendements.

[25] Le juge de première instance reconnaît que ceux-ci ont été pris par surprise du fait que la Cour suprême ait invalidé la défense de type Carter et maintenant ils veulent présenter un nouveau moyen de défense alors que ce moyen de défense existait au moment de l'audition.

[26] Pour celui-ci, il est inconciliable que l'on veuille soulever un nouveau moyen alors que tous les certificats d'analyse des techniciens qualifiés ont été déposés sans objection et même sans réserve, sans même avoir demandé la présence d'un analyste aux fins de contre-interrogatoire, conformément à l'article 258 (6) *C. cr.*

[27] Par la suite, il souligne les principes du droit à la divulgation de la preuve prévus conformément à l'article 7 de la *Charte canadienne des droits et libertés*. Il soumet l'arrêt *Stinchcombe*^[3] soit que l'obligation de la divulgation de la preuve de la Couronne perdure tout au long du procès, mais que l'avocat de la défense a également l'obligation d'être proactif.

[28] S'appuyant sur l'arrêt *Dixon*^[4] de la Cour suprême, il mentionne que l'avocat de la défense doit faire preuve d'une diligence raisonnable en réclamant activement la divulgation auprès de la poursuite.

[29] Par la suite, il parle des délais dans les différents dossiers avant que la demande de divulgation ait été faite et il déclare que ces longs délais ne permettent pas de conclure que les appelants ont été pro actifs dans leur demande. En s'appuyant sur l'arrêt *Bérubé*^[5], la Cour d'appel a statué qu'une réouverture d'enquête ne peut servir à une nouvelle orientation stratégique.

[30] Il parle également que les procureurs disaient se sentir liés par la décision de la juge Chantale Pelletier^[6]. Il souligne qu'aucun des avocats dans ces dossiers n'était partie à ce dossier, que les infractions se situaient avant la mise en vigueur du nouvel [article 258 C.cr.](#), mais que la juge Pelletier avait mentionné en obiter qu'elle en serait venue à la même conclusion si les faits étaient survenus après le 2 juillet 2008.

[31] Il souligne que la juge Pelletier avait réservé à chacun des accusés, la possibilité de présenter une demande particularisée au cours du procès et que la règle du stare decisis ne s'applique pas entre les jugements de la même instance.

[32] Par la suite, il explique pourquoi il ne suit pas le jugement rendu dans *Carl Desjardins*^[7] par le juge Jean-Claude Beaulieu, car la règle du stare decisis s'applique au ratio decidendi, c'est-à-dire au motif du jugement et non à toute la décision et que la décision dans *Desjardins* a été faite à l'intérieur d'une conférence de gestion.

[33] Quant à l'arrêt *Boutin*^[8], c'est un jugement qui fait suite à une conférence de facilitation et qu'on ne retrouve pas le ratio decidendi de la Cour, mais uniquement des passages d'une lettre de l'avocat de la défense.

[34] En obiter en se référant à la décision du juge Decoste^[9], il réfère les appelants aux commentaires de l'expert Robitaille entendu dans ce dossier. Il conclut qu'il n'y a pas matière à rouvrir la preuve ou l'enquête, et ce, dans tous les dossiers.

Le Juge Lemay (Faber)

[35] Le juge de première instance fait une chronologie des événements, le 31 mai 2011, les parties déclarent leur preuve close. Il acquitte l'appelant sur le 1^{er} chef.

[36] Il fait mention des différentes remises dans le dossier dans l'attente du jugement de la Cour suprême et c'est le 30 novembre 2012 que la défense fait signifier sa requête en divulgation de la preuve, laquelle requête a été amendée et réamendée.

[37] Le 13 septembre 2013, il accorde la requête pour être mis hors du délibéré et réouverture d'enquête et il s'entend avec les parties qu'il se prononcerait dans un premier temps sur la requête en irrecevabilité.

[38] Ensuite, il parle d'événements collatéraux, soit l'amendement du 2 juillet 2008 du *Code criminel* et du jugement de la juge Pelletier^[10] qui est une cause type dans le district de Québec.

[39] Par la suite, il dit que le 31 mai 2011, les parties ont accepté de procéder à l'audition de la cause malgré le dépôt de l'article 95 C.p.c. Il a été convenu de procéder pour préserver les faits et que s'il en arrivait à la conclusion qu'il devait se rendre jusqu'aux arguments de l'article 95 C.p.c., le dossier serait remis à une date ultérieure.

[40] Il souligne également qu'à deux reprises, le procureur de l'accusé a prétendu qu'il avait été obligé de procéder de cette façon à la suite d'une directive de la juge coordonnatrice de l'époque. Il soumet que la coordonnatrice de la chambre criminelle n'a pas ce pouvoir eu égard à l'indépendance judiciaire et que même si l'accusé avait refusé de procéder de cette façon, il l'aurait probablement obligé à le faire, mais qu'il n'a jamais obligé l'accusé à déclarer sa preuve close et il dit^[11] :

« Par contre, une fois les faits sauvegardés, la preuve testimoniale entendue, jamais je ne l'aurais obligé à déclarer sa preuve close si une demande justifiée, comme réserver ses droits en attente de la décision de la Cour suprême par exemple, m'avait été faite. Ce n'est pas le cas ici, la preuve a été déclarée généralement close par les parties. »

[41] Par la suite, il lit les transcriptions des notes sténographiques du 13 septembre 2013 où il est fait mention que le report de l'audition est pour statuer sur l'article 95 C.p.c. en citant la page 132 des notes sténographiques du procès, où il est écrit :

« Nous convenons tous de remettre le dossier pour l'audition sur l'article 95 et pour aucun autre motif. »

[42] À la suite de ces remarques, il se pose la question quant à la tardiveté de la demande et tout comme le juge Rousseau, il réfère les parties aux arrêts Stinchcombe, Dixon et O'Connor^[12].

[43] La requête en divulgation du 30 novembre 2012 a été présentée 2 ans et 5 mois après la comparution et un an et demi après le procès.

[44] Tout comme le juge Rousseau, il souligne que depuis le 2 juillet 2008, les accusés avaient une obligation supplémentaire de démontrer le mauvais fonctionnement ou la mauvaise utilisation de l'appareil et que rien ne les empêchait de présenter une requête en divulgation avant le procès ou au moment du procès.

[45] Par la suite, il réfute l'argument de l'appelant concernant la décision de la juge Pelletier, car celle-ci a pris la peine à son paragraphe 118 de parler de la possibilité de présenter une nouvelle demande particularisée au cours du procès. Donc, rien n'empêchait l'accusé de présenter des témoins pour faire sa preuve sur le mauvais fonctionnement de l'appareil ou de sa mauvaise utilisation.

[46] Il est vrai que l'accusé a une défense pleine et entière, mais l'accusé n'a pas droit à une deuxième chance.

[47] Il affirme que la façon de procéder comme le suggère la défense dénaturerait la procédure criminelle et serait contraire à une saine administration de la justice. Il n'est pas d'accord avec les prétentions de la défense voulant que la décision dans l'arrêt *St-Onge Lamoureux* modifie la divulgation de la preuve. Ce n'est pas ce que la juge Deschamps de la Cour suprême a écrit.

[48] Pour le juge de première instance, il est clair que la remise des dossiers était en attente de la décision de la Cour suprême. Il n'y a pas eu d'argumentation sur la divulgation de la preuve. Pour conclure, il cite l'arrêt Harrer de la Cour suprême et il conclut ainsi^[13] :

« L'économie du droit, la stabilité des jugements, les règles de procédure et la hiérarchie des tribunaux convergent toutes vers le même dénominateur commun. S'il doit y avoir tenue d'un nouveau procès, parce que c'est ce qu'on me demande ici, c'est un tribunal supérieur qui va me l'imposer et personne d'autre, ce qui m'inclut dans ce « personne d'autre ».

[49] Et il accueille la requête en irrecevabilité et rejette la requête en divulgation.

La juge Bouillon (Chouinard et Kirouack)

[50] La juge fait la chronologie des événements. Dans le dossier de Chouinard, le procès a eu lieu le 24 mars 2010 et dans Kirouack le 10 janvier 2012. Ces deux dossiers sont remis à différentes occasions dans l'attente du jugement de la Cour suprême.

[51] Dans le dossier Chouinard, la requête en divulgation de la preuve a été déposée le 4 décembre 2012, dans le dossier Kirouack, le 18 janvier 2013. Ces requêtes ont été amendées.

[52] Les requêtes en irrecevabilité sont entendues dans les deux dossiers le 6 décembre 2013. Par la suite, la juge souligne les dates importantes, dates d'infraction, dates des amendements et souligne également le jugement Dufour rendu par la juge Chantale Pelletier le 4 septembre 2009.

[53] Elle soumet qu'à la suite du jugement de la Cour suprême, l'obligation est de démontrer le mauvais fonctionnement, la mauvaise utilisation de l'appareil et qu'il n'est plus nécessaire en plus, d'établir le taux d'alcoolémie de l'accusé au moment de l'infraction, mais que cette preuve demeure pertinente pour contrer la présomption d'identité prévue au [paragraphe 258 d\)\(1\) C.cr.](#).

[54] Tout comme les juges Rousseau et Lemay, elle parle des principes de justice fondamentaux ainsi que des arrêts Stinchcombe, Dixon et O'Connor.

[55] Elle souligne que l'audition a été reportée pour le seul motif de la contestation constitutionnelle.

[56] Tout comme dans les autres dossiers, elle mentionne que dans le dossier Chouinard, la requête en divulgation de la preuve a été déposée quatre ans après sa comparution et deux ans et demi après la tenue du procès alors que dans le dossier Kirouack, elle a été déposée deux ans et demi après la comparution et un an après la tenue du procès.

[57] Elle mentionne que depuis le 2 juillet 2008, les appelants ont l'obligation de démontrer le mauvais fonctionnement ou la mauvaise utilisation de l'appareil et que rien n'empêchait les appelants de présenter une requête en divulgation de la preuve avant la tenue du procès malgré la contestation constitutionnelle.

[58] Elle soumet que dans le dossier Chouinard, l'appelant avait fait parvenir une lettre demandant la divulgation de la preuve le 21 octobre 2009 et qu'il n'a jamais donné suite à cette première demande, qu'il n'a jamais présenté de preuve et qu'un tribunal n'a jamais été mis au courant de cette demande si ce n'est que le 6 décembre 2013, lors de l'audition de la requête.

[59] Elle parle aussi de la décision de la juge Pelletier et elle ne retient pas l'argument des appelants voulant que cette décision empêchait les avocats de présenter une demande. Elle souligne elle aussi le paragraphe 118 de la décision de la juge Pelletier.

[60] Pour la juge de première instance, les appelants ont fait un choix et que lors des procès, ni l'un ni l'autre des procureurs des appelants n'a contre-interrogé les témoins de la poursuite ce qui aurait permis de soutenir la prétention de la mauvaise utilisation et du mauvais fonctionnement de l'appareil.

[61] Elle maintient que dans le dossier Chouinard, le technicien qualifié n'a pas été entendu, mais la défense avait un expert biochimiste, monsieur Jean Létourneau. Dans le dossier Kirouack, le technicien a témoigné, mais après consultation avec son expert, le procureur de la défense n'a posé aucune question à ce témoin.

[62] Elle n'est pas d'accord avec les prétentions du procureur voulant que l'arrêt *St-Onge Lamoureux* a changé la manière de divulguer la preuve, car la juge Deschamps n'a pas traité de la divulgation de la preuve dans sa décision.

[63] Elle réitère que la remise des dossiers était dans l'attente de la décision de la Cour suprême et pas autre chose. Elle maintient que bien que la preuve n'ait pas été déclarée close dans les deux dossiers, le report était uniquement pour la requête sur la constitutionnalité de l'[article 258 C.cr.](#)

[64] Tout comme les juges Rousseau et Lemay, elle adopte la même position en ce qui concerne stare decisis et elle parle des mêmes jugements que ceux-ci. Finalement, elle accueille la requête en irrecevabilité de l'intimée.

Prétentions des appelants

[65] Les juges de première instance ont commis une erreur en droit en accueillant la requête en irrecevabilité et par le fait même refusant de se prononcer sur la requête en divulgation de la preuve. De plus, comme les juges reprochent aux appelants d'avoir manqué de diligence et d'avoir fait un choix stratégique, on se retrouve devant une question mixte de droit et de fait.

[66] Il s'agit d'une situation unique dans le district de Québec. Dans les autres districts, la situation n'était pas la même. Il ne s'agissait pas d'un choix stratégique des procureurs

des appelants, mais d'une directive établie par la Cour du Québec et ceux-ci devaient s'y conformer, ils n'avaient aucun choix, il n'y avait aucune autre possibilité de procéder.

[67] Il s'agissait d'une décision de la juge coordonnatrice adjointe à la chambre criminelle et pénale de la Cour du Québec. Le seul choix que les procureurs avaient était de refuser de procéder. Pour le bien de leurs clients, ils ne pouvaient faire ce choix.

[68] Les juges de première instance refusaient les demandes de remise, même si on était en attente de la décision de la Cour suprême. Les dossiers devaient procéder sur les deux chefs, par la suite le tout a été reporté dans l'attente de ladite décision.

[69] Il était inutile de présenter des requêtes en divulgation de preuve puisque celles-ci étaient systématiquement rejetées à la suite de la décision de la juge Chantale Pelletier^[14]. Il n'était pas d'une saine administration de la justice pour les avocats d'engager des sommes importantes pour présenter des requêtes en divulgation sachant pertinemment que ces requêtes seraient rejetées.

[70] Comment les juges de première instance dans les présents dossiers peuvent-ils prétendre dans leurs décisions que l'avis d'inconstitutionnalité en vertu de l'article 95 C.p.c. est un choix stratégique alors que les avocats se sont limités à donner leur avis à écrire ce que contenait ledit article 95 C.p.c.?

[71] Si les appelants avaient plaidé l'inconstitutionnalité lors des procès devant les juges de première instance, ils auraient pu, après la décision sur l'inconstitutionnalité, présenter leurs requêtes en divulgation de la preuve.

[72] Mais, comme ils n'ont pu plaider l'inconstitutionnalité et qu'ils devaient attendre le jugement de la Cour suprême, ils ont été ainsi privés de cette possibilité. Les appelants étaient limités puisqu'ils ne pouvaient présumer des conclusions de la Cour suprême. S'il y a eu une erreur, c'était une erreur de bonne foi et non pas un manque de diligence.

[73] Les appelants ont accepté de procéder de cette manière pour faire avancer les dossiers. Il fallait vérifier la crédibilité accordée aux différents appelants. Les procureurs ont fait ce choix, mais uniquement dans le but de ne pas nuire aux clients et à la bonne administration de la justice.

[74] Les conclusions de la Cour suprême déclarant inconstitutionnelles certaines parties de l'article 258 C.cr. n'étaient pas prévisibles.

[75] D'ailleurs, le juge Érick Vanchestein^[15] mentionne bien que l'arrêt *St-Onge Lamoureux* a restreint la défense que les appelants pouvaient avoir à une « démonstration du mauvais fonctionnement ou d'une utilisation incorrecte de l'appareil d'alcootest ». Pour celui-ci, il s'agit d'un nouveau contexte qui n'existait pas auparavant et il a accordé beaucoup d'items demandés aux prévenus pour qu'ils puissent préparer leurs défenses.

[76] Ce que les appelants demandaient dans leurs requêtes, ce sont les mêmes documents que la juge Pelletier a refusés, et ce, malgré que les appelants se retrouvaient dans un nouveau contexte juridique à la suite de la décision de la Cour suprême. Bien que dans son jugement celle-ci réservait à chacun des accusés la possibilité de présenter une nouvelle demande particularisée au cours du procès.

[77] Les juges de première instance soulignent le manque de diligence, de promptitude des appelants à agir pour présenter leurs requêtes en divulgation de la preuve. Mais tous les procureurs savaient que la requête en divulgation de la preuve serait rejetée tenant compte du jugement de la juge Pelletier.

[78] Les procureurs se sont peut-être trompés au niveau de la stratégie, mais ils ont été diligents. C'était une situation juridique compliquée, ils ont agi au meilleur de leurs connaissances et dans l'intérêt supérieur de leurs clients. Aujourd'hui sachant ce qu'ils

savent, les procureurs n'auraient jamais procédé, ils auraient tout simplement attendu la décision de la Cour suprême.

[79] Les appelants ont été diligents, dès qu'ils ont eu connaissance du manque de documents fournis par la poursuite en divulgation de la preuve, ils ont présenté des requêtes, ils ont été proactifs.

[80] Le 17 février 2012, Me Pierre Lapointe, procureur-chef aux poursuites criminelles et pénales, soumettait un avis concernant la « divulgation des registres d'entretien des appareils utilisés » (I-4). De plus, le procureur aux poursuites criminelles et pénales, Me Sacha Blais, le 16 janvier 2013 (I-4) énuméra les différents documents à être divulgués.

[81] Ce n'est que par la suite que le Directeur des poursuites criminelles et pénales a modifié sa position. D'ailleurs, le bon fonctionnement du registre et son entretien étaient une préoccupation de la Cour suprême puisque le juge LeBel, lors de l'audition du 16 octobre 2011, a posé de nombreuses questions sur l'entretien et les pièces de l'appareil.

[82] Il existe actuellement à la Cour du Québec deux courants jurisprudentiels quant à la divulgation de la preuve en ce qui concerne les ivressomètres. Dans le dossier Kirouack, il y a eu divulgation de la preuve, la poursuite ne s'est pas opposée. Dans ce dossier, en septembre 2013, une nouvelle requête amendée pour la divulgation de la preuve a été refusée.

[83] Avant ladite décision de la Cour suprême, on n'avait pas à vérifier le bon fonctionnement de l'appareil, l'attention était surtout portée sur l'alcool type.

[84] L'arrêt *St-Onge Lamoureux* a allégé le fardeau de la défense qui n'a maintenant qu'à soulever un doute sur le bon fonctionnement de l'appareil. Sur ce point, le juge Pierre Rousseau écrit dans sa décision :

« Je souligne que suivant même l'ancienne disposition législative, il était toujours possible pour la défense de présenter une preuve contraire basée sur un mauvais fonctionnement de l'appareil ou une utilisation incorrecte dudit appareil. »

[85] Il s'agit d'un énoncé qui est erroné, car cette possibilité n'est là que depuis l'arrêt *St-Onge Lamoureux*.

[86] Les juges de première instance reprochent aux appelants de ne pas avoir été devins et prévoir le jugement de la Cour suprême.

[87] Concernant la tardiveté, il y a eu une évaluation erronée de la tardiveté. De plus, lorsqu'on présente des requêtes en réouverture d'enquête, on doit tenir compte du préjudice subi par chacune des parties. Ici, quel est le préjudice subi par la poursuite dans le cas des demandes de réouverture d'enquête?

[88] Les juges de première instance n'ont pas tenu compte de ce critère au niveau du préjudice lors de leurs décisions sur les requêtes en réouverture d'enquête. L'application d'une norme juridique à une question de fait est une question de droit.

[89] Comme il s'agit d'une erreur de droit, l'erreur n'a pas à être déraisonnable, mais il s'agit de la norme de la décision correcte.

Prétentions de l'intimée

[90] Depuis que l'arrêt *Dufour*^[16] a été rendu, les avocats en défense savaient qu'ils pouvaient attaquer le bon fonctionnement de l'appareil. Cette décision n'a pas été portée en appel, les éléments demandés dans l'arrêt *Dufour* étaient les mêmes que ceux demandés dans les présents dossiers.

[91] Dans l'avis d'inconstitutionnalité des appelants, il n'est aucunement question de la divulgation de la preuve. L'avis doit être traité largement et libéralement.

[92] Lors des procès, les procureurs des appelants n'ont posé aucune question au technicien qualifié sur la manipulation de l'appareil, c'était le choix des avocats de la défense. Dans l'arrêt *Dufour*, la défense reposait sur le bon fonctionnement de l'appareil et les procureurs savaient ou auraient dû savoir qu'il fallait qu'ils fassent cette vérification, ils ne l'ont pas fait.

[93] Les avocats de la défense soulignent que la décision de la juge Pelletier les muselait. Le juge Lemay^[17] (décision Faber) indique bien :

« Qu'il en conteste la constitutionnalité, j'en suis. Par contre, rien n'empêchait l'accusé de présenter une telle requête au ou avant le procès. L'argument que la décision de l'honorable Chantal Pelletier rendue le quatre (4) septembre deux mille neuf (2009) sur la divulgation de la preuve les muselait ne tient pas la route. D'ailleurs, à son paragraphe 118, elle précise dans ses conclusions qu'elle réserve aux avocats la possibilité de présenter une nouvelle demande particularisée au cours du procès. »

[94] Et le juge Lemay écrit également à la page 16 :

« Je souligne qu'en plus, l'accusé n'a pas posé une seule question aux témoins de la poursuite sur le fonctionnement de l'appareil ou son utilisation. »

[95] La question en litige est le délai. Dans le dossier Kirouack, la requête en divulgation de la preuve a été présentée 1 an et 8 jours après l'audition de la cause. Le droit est cristallisé au moment de l'infraction. Le moyen de défense existe depuis juillet 2008, soit depuis l'adoption des amendements au [Code criminel](#).

[96] Les parties étaient d'accord à procéder sur les chefs et d'attendre la décision de la Cour suprême en ce qui concerne la constitutionnalité dudit article. C'est d'ailleurs ce que le juge Lemay^[18] écrit :

« Le trente et un (31) mai deux mille onze (2011), les parties ont accepté de procéder à l'audition de la cause malgré le dépôt de l'article 95. Il a été convenu de procéder ainsi pour préserver les faits et que si, suivant la preuve entendue, j'arrivais à la conclusion que je devais entendre les arguments relativement à l'article 95 pour régler le litige, le dossier serait remis à une prochaine date. »

[97] Les appelants ont décidé de faire uniquement une défense de type Carter et de ne pas s'attaquer au fonctionnement et à l'utilisation de l'appareil. Depuis le 2 juillet 2008, la loi ne permettait plus cette défense, mais la Couronne a accepté, même si c'était illégal dans l'attente de la décision sur la constitutionnalité dudit article.

[98] La stratégie des appelants était d'attaquer la fiabilité des résultats avec une preuve illégale contraire au [Code criminel](#). L'article du code est en vigueur tant et aussi longtemps qu'il n'a pas été déclaré inconstitutionnel. Au moment de l'audition, l'[article 258 C.cr.](#) tel qu'amendé était en vigueur.

[99] Dans tous les dossiers, sauf le dossier de Kirouack, la preuve était close. Il était toujours possible au défendeur avant l'arrêt *St-Onge Lamoureux* de faire cette preuve au niveau de l'appareil.

[100] Lors du jugement de la Cour suprême, les dossiers étaient terminés, il ne restait que la requête en constitutionnalité qui n'avait plus d'objet et les juges ont statué sur le 2^e chef comme ils le devaient.

[101] Ce n'est pas normal que les appelants aient présenté un moyen préliminaire après que la preuve ait été complétée. Il ne s'agissait pas d'une preuve nouvelle, il ne s'agissait pas d'un nouveau moyen de défense qui leur aurait permis d'obtenir une réouverture d'enquête.

[102] L'arrêt *Dufour*^[19] démontre bien que la défense que veulent maintenant présenter les appelants était disponible, et ce, depuis le mois de juillet 2008. Les demandeurs dans leurs requêtes en divulgation de la preuve n'ont établi aucun lien entre leurs demandes et leurs moyens de défense. C'est d'ailleurs ce que le juge Lemay^[20] mentionne :

« Ça nous ramène donc à la finalité de la demande. Si j'accordais la demande en divulgation, je comprends qu'on ramènerait les témoins de la poursuite, peut-être même le technicien qualifié qui, d'ailleurs, n'a pas même pas été entendu lors du procès. On ne s'appliquerait pas seulement à faire la preuve... à parfaire la preuve en défense, mais plutôt à présenter toute une nouvelle facette si tant est qu'un des nouveaux soixante (60) quelques éléments demandés ne révèle quelque chose. »

[103] Il y a eu entente entre les appelants et l'intimée sur le processus, il n'y a pas lieu de revenir sur ce processus.

[104] Or, les juges de première instance n'ont pas commis d'erreur lorsqu'ils ont dit non à la requête en divulgation de la preuve. Les appelants ont décidé de présenter une preuve illégale (défense de type Carter), le procès est terminé. Ils n'ont pas présenté de moyen préliminaire avant que la preuve soit close, il est trop tard.

[105] Dans ces requêtes, il n'est aucunement fait mention d'une nouvelle preuve, mais uniquement d'une requête en divulgation de la preuve. C'est à raison que les juges de première instance ont rejeté la demande des appelants. Ceux-ci n'ont fourni aucune explication quant à la tardiveté de leurs requêtes.

Décision

[106] Les points suivants ont été soulevés par les appelants;

- Il y avait une directive d'établie par la juge coordonnatrice adjointe et les appelants n'avaient pas le choix de procéder ainsi.
- Les juges refusaient les demandes de remise.
- Les requêtes en divulgation étaient rejetées systématiquement.
- Les conclusions de la Cour suprême déclarant inconstitutionnelles certaines parties de l'article 258 C.cr. n'étaient pas prévisibles.
- Si les appelants avaient plaidé l'inconstitutionnalité lors du procès, ils auraient pu après la décision du juge sur l'inconstitutionnalité, présenter leurs requêtes en divulgation de la preuve. Cette manière de procéder les a privés de cette possibilité.
- Il s'agit d'une situation juridique compliquée, les procureurs ont agi au meilleur de leur connaissance et dans l'intérêt de leurs clients.
- Les appelants ont été diligents. Dès qu'ils ont eu connaissance du manque de documents, ils ont produit des requêtes en divulgation de la preuve.
- L'arrêt St-Onge, Lamoureux a allégé le fardeau de la défense.
- Lors des réouvertures d'enquête, on doit tenir compte du préjudice subi par chacune des parties.

La directive

[107] Lors de l'audition, le tribunal l'a souligné aux procureurs des appelants que lorsqu'ils affirmaient des points, ils devaient en faire la preuve. Entre autres, les appelants ont souligné que la coordonnatrice adjointe avait émis une directive sur la manière de procéder.

[108] Le tribunal a donné un délai jusqu'au 5 décembre 2014 aux procureurs pour déposer soit la directive écrite, soit des notes sténographiques dans un dossier où la coordonnatrice adjointe aurait émis cette directive.

[109] Aucun document n'a été produit à l'appui des prétentions des procureurs des appelants.

[110] L'article 96 de la *Loi sur les tribunaux judiciaires*^[21] mentionne :

« 96. Le juge en chef est chargé de la direction de la Cour.

Fonctions.

Il a notamment pour fonctions:

1° de voir au respect, en matière judiciaire, des politiques générales de la Cour;

2° de coordonner, de répartir et de surveiller le travail des juges et de voir à leur formation complémentaire; ceux-ci doivent se soumettre à ses ordres et directives;

3° de veiller au respect de la déontologie judiciaire.

Fonctions.

En collaboration avec les juges coordonnateurs, il a également pour fonctions :

1° de voir à la distribution des causes et à la fixation des séances de la Cour;

2° de déterminer les assignations d'un juge appelé à exercer sa compétence dans une matière qui n'est pas du ressort de la chambre à laquelle il est affecté. »

[111] En se prononçant sur cet article, le juge Dufour^[22] écrivait :

« Remarquons la différence de la phraséologie employée aux paragraphes 1, 3 et celle au [paragraphe 2](#) de l'article 96.

Au paragraphe 2, et c'est le seul endroit où il en est ainsi, le législateur édicte que les juges doivent se soumettre aux ordres et directives du juge en chef pour la matière concernée.

De cela, je déduis que les juges ne sont pas soumis légalement à toute autre directive émise par le juge en chef de leur Cour.

Le législateur en a voulu ainsi sans doute pour protéger l'indépendance judiciaire.

Le juge en chef est "primus inter pares"^[23]. C'est seulement par son ascendant moral sur les juges de sa Cour qu'il s'imposera à ces derniers quant aux directives auxquelles ils ne sont pas soumis légalement. »

[112] Donc le seul pouvoir du juge en chef se limite aux assignations et à la fixation des séances de la Cour. Tant les juges en chef que les coordonnateurs ne peuvent intervenir dans le travail du juge. Les coordonnateurs et coordonnateurs adjoints n'ont qu'un pouvoir d'assignation qui leur est délégué par le juge en chef car tous les juges sont égaux.

[113] En aucun moment, comme l'écrivait le juge Lemay, tant le juge en chef que le juge coordonnateur ne peuvent intervenir dans le travail du juge. Les coordonnateurs adjoints n'ont qu'un pouvoir d'assignation qui leur est délégué par le juge en chef.

[114] Comme le juge Dufour l'a souligné, le juge en chef a un ascendant moral sur les juges. Mais cette autorité morale ne peut être déléguée. Le seul pouvoir que les juges en chef peuvent déléguer est celui d'un pouvoir administratif d'assignation. Sans cela, on ne pourrait prétendre à l'indépendance judiciaire, principe essentiel dans notre système.

[115] Sur ce point, le juge Lemay^[24] écrivait :

« (...) Première parenthèse ici. À deux (2) reprises, dans le cadre de l'audition de ce dossier, le procureur de l'accusé a prétendu qu'il avait été obligé de procéder de cette façon suite à une directive de la juge coordonnatrice adjointe de l'époque.

Je dois souligner que c'est accorder beaucoup de pouvoir au juge coordonnateur adjoint qu'il n'a pas dans les faits. La seule chose qu'on pouvait m'obliger à faire,

le trente et un (31) mai deux mille onze (2011), c'était d'entendre la cause de l'accusé, rien d'autre.

L'indépendance judiciaire ne m'autoriserait jamais, pas plus que je me l'autoriserais moi-même à être le porte-parole du juge coordonnateur adjoint. »

[116] Le juge qui préside l'audition est le maître absolu et aucune directive ne peut l'obliger à fonctionner de telle ou telle manière. Il y va du principe même de l'indépendance judiciaire.

Les demandes de remise

[117] Les appelants plaident qu'ils ont été obligés de procéder de cette manière, car les juges refusaient systématiquement les remises. Toujours, lors de l'audition, le tribunal a souligné aux procureurs que cette affirmation ne reposait sur aucune preuve. Le soussigné, comme pour l'autre point, a laissé jusqu'au 5 décembre 2014 aux appelants pour produire une preuve quelconque de cette affirmation.

[118] Aucune preuve n'a été soumise sur ce point. Comme mentionné précédemment, lors d'une plaidoirie, on ne peut plaider que sur les faits prouvés. Comme les procureurs des appelants n'ont pas trouvé que la directive existait, ce point ne peut être retenu.

[119] Le juge Lemay^[25] écrivait :

« (...) Deuxième parenthèse. C'est si l'accusé avait refusé de procéder de cette façon, probablement que je l'aurais obligé à le faire.

Par contre, une fois les faits sauvegardés, la preuve testimoniale entendue, jamais je ne l'aurais obligé à déclarer sa preuve close si une demande justifiée, comme réserver ses droits en attente de la décision de la Cour suprême par exemple, m'avait été faite. Ce n'est pas le cas ici, la preuve a été déclarée généralement close par les parties. Je fais référence ici à la page 113 des notes sténographiques. »

[120] En aucun moment, tant dans les présents dossiers que dans d'autres dossiers similaires, les demandes de remise n'ont été refusées. Si les procureurs des appelants avaient demandé des remises, peut-être celles-ci auraient été refusées et qu'ils auraient été obligés de procéder. Mais comme l'indique le juge Lemay, la preuve n'aurait pas été close si une réserve avait été soumise au juge, ce qui n'a pas été le cas.

[121] Finalement, comme les procureurs n'ont jamais demandé de remise, ils ne peuvent aujourd'hui en faire un reproche aux juges de première instance.

Les requêtes en divulgation

[122] Les procureurs des appelants plaident que les requêtes en divulgation de la preuve étaient systématiquement rejetées depuis la décision de la juge Pelletier^[26].

[123] Avec raison, le procureur de l'intimée allègue qu'aucune requête en divulgation n'a été présentée avant que la preuve soit déclarée close dans les dossiers. Donc, il n'y a aucune preuve que les requêtes en divulgation étaient systématiquement rejetées et même dans son jugement, la juge Pelletier écrit :

« [118] Le Tribunal réserve à chacun des accusés la possibilité de présenter une nouvelle demande particularisée au cours du procès. »

[124] Donc, les appelants auraient pu présenter avant de déclarer leur preuve close, une requête en divulgation de preuve. Si cette requête avait été rejetée, ils auraient pu à tout le moins plaider ce motif en appel. Comme ils ne l'ont pas plaidé et comme ils n'ont jamais obtenu de refus de la part des juges de première instance, ils ne peuvent aujourd'hui s'en plaindre.

[125] Il aurait été facile pour les procureurs des appelants de soumettre soit des procès-verbaux, soit la transcription de notes sténographiques démontrant que dans plusieurs dossiers similaires, les requêtes en divulgation étaient rejetées ou refusées. Aucune preuve dans ce sens, il ne s'agit uniquement d'allégations qui ne sont aucunement appuyées.

[126] C'est le même principe qui s'applique comme précédemment. Comme il n'y a aucune preuve sur ce point, le tribunal ne peut le retenir.

La saine administration de la justice leur commandait de ne pas faire payer à leurs clients des frais d'experts inutilement

[127] Les avocats des appelants plaident que par souci d'économie ils n'ont pas présenté de requête en divulgation de la preuve appuyée d'un expert afin d'éviter des démarches coûteuses à leurs clients.

[128] Par contre, ceux-ci ont fait témoigner un expert pour leur défense de type Carter.

[129] Il est vrai que la partie des amendements qui a été déclarée inconstitutionnelle les obligeait de présenter ce type de défense en plus de démontrer le mauvais fonctionnement de l'appareil ou sa mauvaise utilisation.

[130] Mais les procureurs des appelants savaient pertinemment que si cet article n'était pas déclaré inconstitutionnel, ils devaient faire deux choses : démontrer le mauvais fonctionnement de l'appareil ou sa mauvaise utilisation et le taux d'alcoolémie de leurs clients. Sachant cela, ils ont quand même décidé de déclarer leur preuve close présumant que l'article serait déclaré inconstitutionnel.

[131] Respectueusement pour l'opinion contraire, ils ont fait un choix. Ils ont présenté leur défense de type Carter avec un expert, mais ils n'ont pas présenté de défense à l'encontre du bon fonctionnement et de la bonne utilisation de l'appareil. Ils n'ont pas réservé leurs recours comme ils pouvaient le faire.

[132] Oui, pour une saine administration de la justice, ils pouvaient peut-être éviter de faire cette preuve et réserver leurs recours, mais ils ne l'ont pas fait. Ils ont déclaré leur preuve close sans se garder d'autre issue. Le tribunal ne peut donc retenir ce point.

Les conclusions de la Cour suprême n'étaient pas prévisibles

[133] Avant les amendements, en vertu de l'article 258d)^[27] C.cr., la défense devait faire une preuve contraire. En quoi consistait cette preuve contraire? Avec le temps, les avocats de la défense ont développé la défense de type Carter, soit à l'aide d'un expert démontrer que si la consommation de l'accusé est acceptée, le taux d'alcoolémie aurait généralement été plus bas que celui indiqué par l'appareil.

[134] Contrairement aux prétentions des appelants, l'article 258 C.cr. tel qu'il existait auparavant permettait aux avocats de la défense de prouver le mauvais fonctionnement de l'appareil ou sa mauvaise utilisation.

[135] C'est d'ailleurs ce que les avocats de la défense faisaient en attaquant les résultats de l'alcool type. Ce n'est pas parce que les avocats n'utilisaient pas ce moyen de défense que le moyen n'était pas permis.

[136] En effet, si les résultats de l'alcool type n'étaient pas ceux prévus, on pouvait l'invoquer et ce moyen annulait la présomption dudit article. On démontrait ainsi soit la mauvaise utilisation de l'appareil, soit son mauvais fonctionnement.

[137] Respectueusement pour l'opinion contraire, le tribunal ne peut conclure comme les procureurs des appelants le soumettent, que cette preuve n'était pas ouverte avant les amendements. La preuve contraire n'était pas limitée à la seule défense de type Carter.

[138] Tant avant les amendements qu'après, les avocats en défense pouvaient démontrer probablement à l'aide d'un expert, que l'appareil avait mal fonctionné ou avait été mal utilisé.

[139] L'amendement à l'article 258 C.cr vient spécifier le genre de preuve contraire que l'on doit faire pour mettre fin à la présomption. Cet amendement vient restreindre la preuve contraire au seul fonctionnement et utilisation de l'appareil alors qu'auparavant, la preuve contraire n'était pas limitée.

[140] Comment les procureurs des appelants peuvent-ils plaider que les conclusions de la Cour suprême n'étaient pas prévisibles alors que celle-ci avait deux choix : déclarer constitutionnels ou inconstitutionnels lesdits amendements? C'était une des deux possibilités du jugement de la Cour suprême.

[141] La Cour suprême a décidé que pour contrer la présomption prévue par 258 C.cr., on devait démontrer que le fonctionnement de l'appareil n'était pas adéquat ou encore que son utilisation n'était pas adéquate.

[142] Avant comme après les amendements, il était toujours possible de faire la preuve que l'appareil avait été mal utilisé ou que son fonctionnement n'était pas normal. Ce genre de preuve devrait normalement se faire par un expert tout comme la défense Carter.

[143] Le tribunal en convient qu'il est toujours plus facile de dire après ce qui aurait pu être fait. Mais les appelants auraient pu demander, comme l'a souligné le juge Lemay, de réserver leurs droits en attente de la décision de la Cour suprême, ce qui n'a pas été fait.

[144] Dans l'ensemble des dossiers, la lecture des notes sténographiques qui ont été produites nous démontre que dans les quatre dossiers (Gilbert-Langlois, Denis, Germain et Faber) la preuve a été déclarée close. Dans les deux autres dossiers (Chouinard et Kirouack), les procureurs voulaient déclarer leur preuve close, c'est la juge Bouillon qui a mentionné que la preuve n'était pas close puisqu'il restait la requête sur l'inconstitutionnalité dudit article.

[145] Donc, dans tous les dossiers, à l'exception de l'audition de la requête sur l'inconstitutionnalité, la preuve était close.

[146] La Cour suprême n'a pas fait apparaître une nouvelle défense, cette défense existait avant les amendements. La décision de la Cour suprême était une des décisions prévisibles, les avocats ont fait un choix, ils se sont limités à la défense de typer Carter. Ils ne peuvent aujourd'hui plaider que les conclusions de l'arrêt de la Cour suprême n'étaient pas prévisibles.

S'ils avaient plaidé l'inconstitutionnalité, ils auraient pu présenter leurs requêtes en divulgation de la preuve après la décision du juge

[147] Comment procéder dans un dossier où l'inconstitutionnalité d'un article de loi est plaidée? Doit-on plaider l'inconstitutionnalité avant de plaider le fond du litige ou plaider le fond du litige avant l'inconstitutionnalité?

[148] Il n'y a pas de règle fixe pour ce genre de situation, c'est le juge du procès qui a la discrétion. Quels sont les principes qui guident cette discrétion judiciaire? La juge Lise Côté [28] écrivait :

« [38] Il est reconnu qu'une personne accusée d'un crime peut attaquer la constitutionnalité de la disposition en vertu de laquelle elle a été inculpée. Le juge possède une discrétion judiciaire pour décider de la question constitutionnelle en début de procès ou encore entendre la preuve au dossier et décider de la question constitutionnelle par la suite. »

[149] De son côté également, la Cour suprême a émis le principe de ne pas se prononcer sur une question constitutionnelle dans un vide factuel. La juge Sopinka^[29] s'exprimant au nom de la majorité écrivait :

«**17** Sauf de rares exceptions qui sont inapplicables en l'espèce, le juge de première instance a le pouvoir de réserver sa décision sur une demande jusqu'à la fin des débats. Il n'est donc pas obligé de statuer sur une requête en annulation fondée sur l'invalidité de l'acte d'accusation tant que toute la preuve n'a pas été entendue. Pour ce qui est de se prononcer sur la demande ou de réserver sa décision jusqu'à la fin des débats, il exerce un pouvoir discrétionnaire qui fait entrer en jeu deux principes. Selon le premier, les instances pénales ne doivent pas être fragmentées par des procédures interlocutoires qui deviennent des instances distinctes. C'est ce principe qui fonde la règle interdisant les appels interlocutoires en matière pénale. Voir l'arrêt Mills c. La Reine, [1986 CanLII 17 \(CSC\)](#), [1986] 1 R.C.S. 863. Le second, qui se rapporte aux contestations constitutionnelles, tend à dissuader les tribunaux de trancher les questions constitutionnelles dépourvues de fondement factuel. Voir par exemple les arrêts Moysa c. Alberta (Labour Relations Board), [1989 CanLII 55 \(CSC\)](#), [1989] 1 R.C.S. 1572, et Danson c. Ontario (Procureur général), [1990 CanLII 93 \(CSC\)](#), [1990] 2 R.C.S. 1086. Ces deux principes incitent les tribunaux à trancher les demandes à la fin des débats. En exerçant le pouvoir discrétionnaire dont j'ai parlé, le juge de première instance ne doit pas s'écarter de ces principes à moins d'avoir une bonne raison.»

[150] La jurisprudence^[30] a appliqué à maintes reprises ce principe. La Cour d'appel de l'Ontario^[31] également se prononçait ainsi :

« One further aspect of this case merits comment. The motion to stay was heard and decided during the trial before the Crown had completed its case. A trial judge has a discretion as to when in the proceedings a [Charter](#) motion should be heard and decided. This trial judge cannot be criticized for proceeding as she did since neither party objected nor suggested an alternative procedure. For future guidance, however, such motions should normally be decided after the trial is completed and a verdict rendered, in accordance with the procedure in R. v. Mack, supra, by analogy and in accordance with the principles discussed in R. v. DeSousa, [1992 CanLII 80 \(CSC\)](#), [1992] 2 S.C.R. 944 at p. 954, [76 C.C.C. \(3d\) 124](#) at p. 132. This procedure preserves the accused's opportunity to be acquitted where the trier of fact is not prepared to rely on the evidence which is the product of the alleged misconduct while ensuring that all issues relevant to the trial stage of the proceedings are resolved before the case winds its way through the appellate process.»

[151] La Cour d'Appel du Québec^[32] écrit dans le même sens :

« **52.** Lorsque la constitutionnalité d'une mesure législative est attaquée, un tribunal doit, dans un premier temps, se pencher sur les autres questions en litige avant d'étudier la question de la constitutionnalité. Selon les conclusions quant aux autres moyens invoqués, il sera nécessaire dans certains cas d'étudier la question de la constitutionnalité. Dans le cas devant nous, le juge de la Cour municipale s'est penché sur la question de validité constitutionnelle sans avoir entamé l'étude du bien-fondé de l'accusation. Après avoir conclu à l'inconstitutionnalité, il dit à cet égard:

Vu la conclusion précédente et celles à venir, le Tribunal ne considère que pure sémantique et inutile de trancher que l'infraction reprochée en vertu de cet article s'applique ou non à la requérante parce que son camion portant affiche serait situé ou non sur le même terrain que celui où le service est rendu.

53. Il est regrettable que le juge d'instance renverse l'ordre habituel de trancher les questions en litige. S'il avait, par exemple, déterminé que la poursuite n'avait pas prouvé le *res gestae* de l'infraction, l'acquittement aurait été prononcé et la règle quant à la façon de procéder aurait été respectée. Il n'aurait pas été nécessaire de traiter de la constitutionnalité de la disposition législative. De plus, dans l'éventualité où une Cour d'appel conclurait, contrairement à l'avis du premier juge, à la validité constitutionnelle de la mesure législative, il ne serait pas nécessaire de retourner le dossier à la Cour d'instance pour procès. La Cour d'appel pourrait se fonder sur la constatation du premier juge que la poursuite a prouvé les éléments constituant le *res gestae* de l'infraction pour prononcer la condamnation.»

[152] Il est vrai comme l'a dit la Cour suprême^[33] que ce principe n'est pas sans exception et qu'il peut arriver dans certaines circonstances où il est préférable d'avoir une décision immédiatement dès le début plutôt que d'attendre à la fin.

[153] Donc, contrairement aux prétentions des appelants, les juges de première instance n'étaient pas obligés d'entendre la requête en inconstitutionnalité dès le départ. Ils pouvaient entendre toute la preuve et se prononcer, si nécessaire, sur la constitutionnalité desdits amendements.

[154] C'est d'ailleurs ce qui s'est produit et c'est ce qui fait partie de l'entente entre la poursuite et la défense, c'est qu'ils ont plaidé les faits de la cause justement pour les conserver, qu'ils ont déclaré leur preuve close et ils ont attendu la décision de la Cour suprême sur la constitutionnalité.

[155] Même si les procureurs de la défense avaient décidé de plaider l'inconstitutionnalité plutôt que d'attendre la Cour suprême, les juges de première instance auraient entendu tout le dossier selon les principes établis par la jurisprudence et par la suite ils se seraient prononcés sur l'inconstitutionnalité.

[156] Les appelants se seraient retrouvés dans la même situation qu'aujourd'hui, celle que leur preuve aurait été close et ils n'auraient pas eu une deuxième chance, contrairement aux prétentions des appelants. Ce point ne peut être retenu.

Situation juridique compliquée et la diligence des appelants

[157] Les appelants soulèvent qu'il s'agissait d'une situation compliquée et qu'ils ont été diligents. Dès que le jugement de la Cour suprême a été prononcé, ils ont présenté rapidement leurs requêtes en divulgation de la preuve. Lorsque les juges de première instance leur reprochent leur manque de diligence, ce n'est pas parce qu'ils n'ont pas présenté une requête en divulgation rapidement après le prononcé du jugement de la Cour suprême, mais c'est qu'ils n'ont pas réservé leurs recours et qu'ils ont déclaré leur preuve close.

[158] Comme il est écrit dans les jugements, rien ne les empêchait de réserver ces recours-là.

[159] Lorsqu'on lit les notes sténographiques dans les quatre dossiers mentionnés précédemment, la preuve était close et dans les deux autres, c'est le juge qui a avisé les procureurs de ne pas déclarer leurs preuves closes pour continuer, parce qu'il restait encore la requête en vertu de l'article 95 *C.p.c.*, mais uniquement cette requête sur l'inconstitutionnalité.

[160] Dans les notes sténographiques, on retrace quelques autres requêtes que celle sur l'inconstitutionnalité. Alors que la preuve est close, que le procès est terminé, les appelants ne pouvaient, selon les juges de première instance et avec raison, faire une requête en divulgation de la preuve. Le procès était terminé, les appelants ont fait un choix, les juges de première instance ont considéré qu'ils devaient vivre avec leur choix.

[161] Toutes les situations juridiques peuvent être compliquées, surtout lorsqu'on plaide la constitutionnalité ou l'inconstitutionnalité d'un article, mais c'est le lot des avocats de travailler dans des dossiers qui peuvent être compliqués.

[162] Les avocats des appelants savaient pertinemment qu'il y avait deux possibilités : soit que l'article soit déclaré inconstitutionnel et leur défense de type Carter était la bonne chose à faire, soit que l'article soit déclaré constitutionnel et ils devaient faire une preuve tendant à démontrer le mauvais fonctionnement de l'appareil ou sa mauvaise utilisation.

[163] La situation était claire. D'ailleurs, dans d'autres dossiers similaires, les procureurs en défense ont présenté des requêtes en divulgation comme dans le dossier Dufour^[34] et ces requêtes en divulgation dans lesdits dossiers portaient sur des événements avant les amendements, ce qui démontre encore une fois que ce genre de défense existait même avant l'amendement à l'article 258 C.cr.

[164] De plus, dans un des dossiers (Chouinard) un des procureurs des appelants avait même déposé une lettre pour obtenir la divulgation de la preuve.

[165] Donc, au moment où les avocats ont plaidé leurs dossiers, ils savaient pertinemment qu'ils avaient l'obligation de démontrer le mauvais fonctionnement de l'appareil ou sa mauvaise utilisation. Ils connaissaient le jugement Dufour puisqu'ils ont plaidé que leurs requêtes en divulgation de la preuve étaient rejetées systématiquement.

[166] Respectueusement pour l'opinion contraire, il ne s'agissait pas d'une situation juridique compliquée. Avec les amendements, la défense devait faire deux choses : démontrer le mauvais fonctionnement de l'appareil ou sa mauvaise utilisation et le taux d'alcoolémie de son client. Les procureurs des appelants ont fait le choix de ne faire une preuve que sur une défense.

[167] Ce n'est qu'après que la preuve ait été déclarée close qu'ils ont présenté une requête en divulgation. Les juges de première instance l'ont refusée eu égard à la tardiveté.

[168] Le tribunal partage cette opinion. Lorsqu'une cause est terminée, on ne peut rouvrir la preuve, sauf dans des circonstances exceptionnelles à titre d'exemple soit qu'une preuve n'était pas disponible mais qu'elle l'est maintenant, entre autres. Ici, cette preuve était disponible, les appelants ont décidé de ne pas l'utiliser, c'est le choix qu'ils ont fait.

L'allègement du fardeau de la défense

[169] En ce qui concerne l'allègement du fardeau de la défense, le tribunal est d'accord avec les procureurs des appelants à l'effet que la Cour suprême, en enlevant l'obligation de démontrer le taux d'alcoolémie des appelants en plus de prouver le mauvais fonctionnement et la mauvaise utilisation de l'appareil, a allégé le fardeau de la défense. Par contre, comme souligné précédemment ce n'est pas parce qu'en défense on ne démontrait pas le mauvais fonctionnement et la mauvaise utilisation de l'appareil qu'on ne pouvait le faire, ce qui aurait mis fin à la présomption prévue à 258 C.cr.

[170] La preuve contraire antérieurement n'était pas limitée à la défense de type Carter ou à la vérification d'alcool type. On pouvait également démontrer le mauvais fonctionnement de l'appareil ou sa mauvaise utilisation.

[171] Il est vrai que la Cour suprême en déclarant inconstitutionnelles certaines parties de l'amendement a allégé le fardeau de la défense, mais il demeure le fardeau que la défense devait prouver soit le mauvais fonctionnement soit la mauvaise utilisation de l'appareil. Elle ne l'a pas fait. Le tribunal ne peut retenir ce point pour justifier d'accorder l'appel.

Lors d'une réouverture d'enquête, on doit tenir compte du préjudice subi par chacune des parties

[172] Les appelants ont raison lorsqu'ils font cette affirmation. Mais les requêtes en réouverture d'enquête ont été permises dans les quatre dossiers où la preuve avait été déclarée close. D'ailleurs, si elle n'avait pas été autorisée les procureurs n'auraient pu présenter leurs requêtes en divulgation.

[173] Donc, sûrement que les juges de première instance ont tenu compte du préjudice subi puisqu'ils ont accordé cette requête. Les procureurs des appelants ne peuvent se plaindre de ce point, puisque les juges de premières instances leur ont donné raison.

[174] Ce que les juges de première instance ont rejeté, c'est leurs requêtes en divulgation en accueillant la requête en irrecevabilité. Ce point ne peut être retenu par le soussigné.

Conclusion

[175] Dans quatre des six dossiers, la preuve a été déclarée close sous réserve de la requête en vertu de 95 C.p.c. Dans les deux autres, les procureurs des appelants voulaient eux-mêmes déclarer leur preuve close et la juge Bouillon leur a souligné qu'il restait l'audition de la requête sur 95 C.p.c.

[176] Les requêtes en divulgation de la preuve ont été soumises après que les preuves aient été déclarées closes et les procès presque terminés plusieurs mois ou années dans certains dossiers après le dépôt de la plainte.

[177] Les juges de première instance ont décidé que ces requêtes étaient tardives. Le tribunal ne peut voir dans cette décision, une erreur de droit qui lui permettrait d'intervenir.

[178] **POUR TOUS CES MOTIFS, LE TRIBUNAL :**

[179] **REJETTE** les appels.

RAYMOND W. PRONOVOST, J.C.S.

Me Pierre Côté, avocat
Procureur d'Éric Chouinard, Jean Faber, Éric Denis
et Pierre-Olivier Gilbert-Langlois

Me Gervais Labrecque, avocat
Procureure de Paul Germain

Me Myriam Tabet, avocate
Procureure de François Kirouack

Me Justin Tremblay, avocat
Me Michel Bérubé, avocat
Procureurs de l'intimée

Date d'audience : 6 novembre 2014, pris en délibéré le 6 décembre 2014

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- [1] 2012 CSC 57 (CanLII), [2012] 3R.C.S. 187.
- [2] Décision, notes sténographiques 12 décembre 2013, p. 7 et 8.
- [3] [1991] RCS 326.
- [4] 1998 CanLII 805 (CSC), [1998] 1RCS 244.
- [5] [2007] QCCA463.
- [6] Précité, voir note no 2.
- [7] *Carl Desjardins c. R.* 100-36-000263-105.
- [8] *Vincent Boutin c. R.* [2013] QCCA483.
- [9] *Caron c. R.* [2013] QCCQ13848.
- [10] *Dufour & al c. R.* [2009] QCCQ7790.
- [11] Id. p. 9.
- [12] 1995 CanLII 51 (CSC), [1995] 4RCS 411.
- [13] Notes sténographiques du 26 novembre 2013, p. 23.
- [14] *Dufour & al c. R.* 2009 QCCQ 7790.
- [15] *Steve Cusson c. R.* 400-05-01-029631-123, 30 mai 2014.
- [16] Précité, voir note no 4.
- [17] *R. c. Jean Faber*, 200-01-146008-101, 26 novembre 2013, p. 15.
Id. p. 16.
- [18] Id. p. 8.
- [19] Précité, voir note no 2.
- [20] Id. p. 17.
- [21] L.R.Q. C-T-16.
- [22] *Andrée Ruffo c. Albert Gobeil*, CS 500-05-005033-897, 27 juin 1989, p. 4-5.
- [23] Le premier entre les égaux, le premier entre ses paires.
- [24] Notes sténographiques du 26 novembre 2013, p. 8-9.
- [25] Notes sténographiques du 26 novembre 2013, p. 9-10.
- [26] *Dufour c. R.* 2009 QCCQ 7790.
- [27] « 258. d) lorsqu'un échantillon de sang de l'accusé a été prélevé conformément à un ordre donné en vertu du paragraphe 254(3), conformément à un mandat décerné en vertu de l'article 256 ou autrement avec le consentement de l'accusé, la preuve du résultat des analyses ainsi faites fait foi, en l'absence de toute preuve contraire, de l'alcoolémie de l'accusé au moment où l'infraction aurait été commise, ce taux correspondant aux résultats de ces analyses, lorsqu'ils sont identiques ou au plus faibles d'entre eux s'ils sont différents, si les conditions suivantes sont réunies : »
- [28] *R. c. Yannakopoulos* 2002 CanLII 23893 (QC CS).
- [29] *R. c. DeSousa* 1992 CanLII 80 (CSC), [1992] 2 R.C.S. 944.
- [30] *Parent v. Director of Criminal and Penal Prosecutions* [2012] QCCS 6313, *Director of Criminal and Penal Prosecutions v. Alcan Inc.* [2008] QCCQ 13886.
- [31] *R. c. Dikah* 1994 CanLII 8782 (ON CA), [1994] OJ No. 858 (ON CA) conf. by *R. c. Dikah* 1994 CanLII 43 (SCC), [1994] 3RCS 1020.
- [32] *City of Montreal v. 177380 Canada Inc.* [2003] JQ 10324 (QC CA).
- [33] Above cited, see note no. 26.
- [34] Cited above, see note no 9.

Tab 101

R. v. Q.H.T., 2004 ABQB 526 (CanLII)

Source: Court of King's Bench of Alberta
Date: 2004-07-08
File number: 031256142U1; 031271141U1
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Court of Queen's Bench of Alberta

Citation: R. v. Q.H.T., 2004 ABQB 526

Date: 20040708

Docket: 031256142U1, 031271141U1

Registry: Edmonton

Between:

Her Majesty the Queen

- and -

Q.H.T. and H.D.N.

Restriction on Publication: By Court Order, there is a ban on publishing the evidence taken, the information given, the representations made and these reasons for decision, until the accused is discharged after the preliminary hearing, or, if the accused is committed to stand trial, until the end of the trial. See the *Criminal Code*, s. 517.

Note: The publication ban expired on March 24, 2006.

**Reasons for Judgment
of the
Honourable Mr. Justice Jack Watson**

1. Introduction

[1] [ORALLY^[1]:] What comes before me this afternoon on Court File Nos. 031271141P1 and 031256142P1, are applications for review of judicial interim release dispositions made pursuant to Section 520 of the *Criminal Code of Canada*^[2].

[2] The guiding authority relative to the procedural steps to be taken in connection with Section 520 of the *Criminal Code* – which authority has been referred to by both Counsel is the decision of the Chief Justice in *Lysyk*^[3].

[3] I say the “guiding authority” because, like any other Judge, the Chief Judge in that particular respect is only another Judge and it is not an appellate ruling which has a direct legal effect upon the decision that I have to make.

[4] There is, however, a good amount of what is contained in the judgment in *Lysyk* which is of persuasive authority to me and indeed upon which I would place some considerable reliance in dealing with these two matters^[4].

2. Procedural Context

[5] The applications for judicial review come from a decision which was dated March 30th of 2004 in relation to Q.H.T. by His Honour Judge Allen of the Provincial Court– a Judge of long acquaintance of mine and for whom I have a great deal of respect.

[6] The other motion brought is by H.D.N. from the decision dated March 22nd of 2004 by His Honour Judge Stevens-Guille, also of the Provincial Court who I do not know quite as well. However, I have had considerable dealings with him in the past over many years.

[7] The situation that is set out as the basis upon which the application is brought in this instance is one where Counsel for the Applicants bears a burden of proof in relation to the matter arising from the terms of Section 515 of the *Criminal Code of Canada*^[5].

[8] The existence of a burden of proof in relation to such matters is, however, in some senses almost a neutral consideration because – factually speaking and realistically speaking – Judges are going to look for the justice of the situation and not be necessarily mesmerized as to exactly from what location the evidence comes.

[9] The issue of burden of proof becomes particularly important where it is a situation where there is an active disagreement as between the parties relative to the issues which are of great significance or great moment in relation to the decision which has to be made.

3. Factual Context

[10] I should clarify that by pointing out that in the circumstances of this particular case I did not hear from Counsel for the Applicants any serious dispute to the outline of factual circumstances and supporting material provided by the Crown in relation to what has been realistically characterized as a reasonably strong case for the Crown.

[11] On the other hand, I did not hear from the Crown any serious dispute about the conditions of the Edmonton Remand Centre which form one of the bases upon which the application for a judicial interim release is being brought in this instance.

[12] Crown Counsel is not conceding – in the absence of affidavits from either of the Applicants – some of the allegations perhaps as to their personal circumstances or as to their cultural circumstances or as to the circumstances under which they happen to be serving their remand status.

[13] However, it does seem to me that for the purposes of the relevance of the question of burden of proof in this instance there really is not all that much that is in front of me upon which burden of proof is a particularly important thing to consider at this stage.

[14] Burden of proof, in my view, is not a question that defines *the law* as to what are the factors to be considered in relation to the grant or denial of judicial interim release. It is a question that relates to *the evidence* which is to be considered in support of such an application.

[15] Also in relation to the question of evidence is relevant [Section 518](#) of the *Criminal Code* which provides that the justice who hears matters under Section 515 – or a Judge as in this particular case in both instances – as well as a Judge in my particular position is entitled to take into consideration evidence which is defined as “credible or trustworthy by him in the circumstances of each case”^[6].

[16] Certainly I am prepared to accept the position offered by the Applicants relative to the general configuration of the Edmonton Remand Centre and its limitations. It seems to me that His Honour Judge Allen addressed this in some measure as well and took a similar view about it. I do not discern from Judge Stevens-Guille’s decision whether he particularly had that at the centre of his mind when he was dealing with this particular matter or not.

[17] However, just to clarify that point, I want to emphasize that I am not making a determination in the absence of a complete inquiry into the opinion of Professor Jackson^[7] as to whether or not Professor Jackson’s adjectives and adverbs characterizing the conditions in the Edmonton Remand Centre are particularly appropriate.

[18] I think I can, however, take some notice of the fact that the Edmonton Remand Centre would be a place where (a) because of the turnover of people there, (b) because of the crowding of the institution as apparently recognized in the facts, and (c) because of the nature of such an institution as compared to a long serving institution, the inmates there are subject to conditions which would be generally speaking regarded as less beneficial to them from the point of view of long term rehabilitation, exercise of benefits such as enrolment in beneficial courses and so forth^[8].

[19] I, however, do not disregard the material that has been placed before me, particularly by Mr. Piragoff, supported by Mr. Klassen of course, as to the risks there attendant in an overcrowded institution such as the Edmonton Remand Centre. I have some sympathy for the contention that

this particular problem that is generated by overcrowding in such an institution is likely to lead to different types of problems down the line.

[20] Counsel indeed have pointed out that within recent memory there has been a small form of riot in that particular place, apparently in a part of the Edmonton Remand Centre currently occupied by H.D.N. – which resulted in some lockdown and loss of privileges on the part of at least one other client of Mr. Piragoff's. In addition, there has apparently been some sort of fire in that particular institution which was not detailed to me, which is not necessarily informative therefore in terms of exactly how risky the place is.

[21] Nevertheless, it is clear that it is designed to be a place where people are kept temporarily pending their appearances in Court. It is not designed to be a penitentiary where people are expected to serve sentences of 3, 4, or 5 years or whatever in relation to criminal offences.

[22] Consequently, I do also have to feel motivated to consider what has been indicated by the Ontario Court of Appeal and by the Supreme Court of Canada in terms of measuring the satisfactory nature, if that can be said to be the word for it, of long term incarceration in a remand status situation.

[23] Philosophically speaking, as well, I must bear in mind the position taken by the Supreme Court in *Hall*^[9] wherein the Supreme Court made it clear that the presumption of innocence is one of the modifying elements of the Constitutional rights that a person has which sheds light on whether or not a judicial interim release should be readily denied or not.

[24] The Supreme Court was prepared to uphold in a modified form the terms of Section 515(10)(c) in particular of the *Criminal Code* with a view to ensuring that it accorded conceptually and in policy terms with the terms of Section 11(e) of the *Canadian Charter of Rights and Freedoms* relative to the actual right of a person, charged with offences and not yet convicted, to reasonable bail^[10].

[25] The statutory and constitutional context having been briefly mentioned in that particular respect, I would return to the circumstances as described to me by Crown Counsel.

[26] It has been indicated and I think fairly so, based on the material that has been provided and that I have had a chance to read, that there is somewhat of a disparity as between H.D.N. and Q.H.T. relative to their depth of involvement, at least as currently charged, and as to the risks that they face in relation to ultimate conviction in relation to this matter which, as I have indicated, seems to be reasonably within the prospect of possibility having regard to the evidence which is available.

[27] I am not assuming anything with respect to possible *Charter* arguments which may impede the Crown's ability to persuade a Court to convict them but, be that as it may, there is some distinction between the two individuals.

[28] Crown Counsel most fairly has also pointed out that in relation to Q.H.T. the possible range of sentence for him upon conviction would be in the area of 6 to 8 years whereas with H.D.N. it would possibly be in the area of 5 to 7 years.

[29] These numbers were provided by virtue of the language of Section 515(10)(c) of the *Criminal Code*^[11] to explain something in relation to a comparison between the amount of legal risk that a Defendant as an inmate on remand is facing and the amount of time that that person as an inmate on remand might actually serve prior to being found guilty.

[30] In relation to that point, I would note that the context as provided to me suggests that a preliminary inquiry of approximately three weeks in length is scheduled from mid-October to early November of 2004. Crown Counsel believes that the trial might be conducted as early as the spring of 2005 or perhaps even earlier.

[31] The difficulty that Crown Counsel has, of course – and I accept the honesty of his position – is that he is not entirely in control of the events because of course there are different

Defendants^[12]. Different Defence Counsel may have different calendar problems and Defence Counsel who are representing individuals or persons who are themselves not in custody may have a considerable less interest in getting on with it than people who are sitting in custody.

[32] With that in mind, I do not dismiss, though, out of hand, the suggestion by Crown Counsel at least the Crown would try to get its act together and get these people on to trial within perhaps a year. The estimate provided by Counsel for the Applicants was for a period of perhaps 18 months to two years. I note those numbers then in relation to the figures offered as proposals relative to possible sentences for each of these two persons upon conviction.

4. Standard of Review

[33] I return then to the procedural point that I mentioned at the beginning, namely the guiding effects of the decision of *Lysyk*.

[34] It seems to me important to adopt, for the purposes of this hearing, one point which emerges directly in relation to *Lysyk* and that is the comment that the Chief Justice has made at paragraph 13, namely his decision that it is his view that bail review in most cases ought to be treated more like an appeal than like a hearing *de novo*.

[35] He was not persuaded by the logic in some decisions that because new evidence can be adduced on review this mandated a *de novo* approach. In his view fresh evidence applications did not drive a statutory construction of Section 520 of the *Criminal Code* to turn it into a *holus-bolus* type of reconsideration of the matter below.

[36] I might say that in that particular sense the philosophy that he expressed is supported by another decision called *Chan*^[13]. It, on the other hand, must be compared with the principles as mentioned in *Hall* and in a decision called *Smith*^[14], where the Court said:

[39] This right of the parties to apply to a judge for review of an order made by a justice is, of course, a right to a form of *hierarchical review*, common in the law, the object of which, consistent with the object of the scheme, *lies in giving better effect to the right of an accused not to be denied reasonable bail without just cause and to the attendant interest of society in the effective administration of the criminal law*. That object is achieved, at least primarily, by means of the review provided for by the provisions of subsections 520(7) and (8). [Emphasis added]

[37] Now, it should be mentioned that in that context the Saskatchewan Court of Appeal was getting into somewhat of a difficulty relative to going up and down the legal process – but I thought that particular philosophical observation was worth noting^[15].

[38] Again, relative to the question of the nature of a review, it seems to me that the type of deference which is commanded towards the Provincial Court Judges in relation to this particular point is primarily a form of deference towards factual findings which involve the resolution of matters in dispute.

[39] The point I made at the outset relative to there being few matters in significant dispute relevant to judicial interim release in this instance, applies to this situation as well, it seems to me. Deference on philosophical issues alone would not necessarily be something which it seems to me is driven by [Section 520](#) of the *Criminal Code* nor by the concept of the word “review” in and of itself^[16].

[40] At paragraph 32 of the decision in *M. (S.H.)*^[17], the Supreme Court said this relative to reviews in relation to young offender transfer cases^[18]:

[32] There is, however, an important limit on the power of the review tribunal. Because it has not heard the evidence, it must accept the Youth Court's findings of fact and defer to it in matters involving the credibility of witnesses. Parliament has conferred on the review court a discretion to confirm or reverse the Youth Court judge's decision, but it has left the task of hearing and evaluating the evidence entirely to the Youth Court judge. As Laycraft, C.J.A., pointed out, it is a fundamental rule that review tribunals which have not had the advantage of hearing and seeing the witnesses should defer to the trial judge who has had this advantage. Nothing in the Act suggests that Parliament intended to abridge this long-standing and eminently reasonable principle.

At paragraph 33:

[33] The appellant argues that it cannot have been the intention of Parliament to encourage appeals by giving the reviewing courts an independent discretion. The first difficulty with this submission is that it runs counter to the wording of the Act, which plainly confers an independent discretion on the reviewing courts. The second difficulty is that it is by no means self-evident that Parliament could not have intended to confer a broad right of appeal, including the exercise of new discretion, on the courts of review. The transfer of a young person to ordinary court is a serious matter, both from the point of view of the alleged offender and of society. The decision is one of great imprecision and difficulty, involving as it does the balancing of conflicting considerations. *It is entirely consistent with these concerns that Parliament give the reviewing court the power to interfere, not only when error of law can be found, but when it concludes that a proper weighing of the relevant factors leads to a different conclusion.* [Emphasis added]

At paragraph 34, the Court said:

[34] In summary, it is my conclusion that the review court must base its review on the facts found by the Youth Court judge and give due deference to the Youth Court judge's evaluation of the evidence. It must then proceed to apply the factors set out in s. 16(2) to that evidence. *In applying these factors, the review court is not confined to asking whether the Youth Court judge has erred, but should make an independent evaluation on the basis of the facts found by the Youth Court judge.*

The result of that evaluation will be either to confirm or to reverse the Youth Court's decision. [Emphasis added]

[41] In relation to that particular point Chief Justice Wachowich took a somewhat more stringent view. He said at paragraph 17 of *Lysyk* that:

[17] The fundamental purpose of a bail review hearing is to review the submissions made before and the decision made by the bail judge and to assess whether there was any error made which justifies disturbing that order. To treat a bail review hearing as *de novo* would run counter to good policy reasons for avoiding duplicating unnecessary proceedings between the Provincial Court and Court of Queen's Bench and would fail to recognize the expertise of the judicial officers of the Provincial Court when making such determinations.

At paragraph 18, he said:

[18] There are two grounds upon which an applicant seeking to vacate a bail judge's order may rely. The first is that the bail judge made a reversible error in his or her reasoning. That error must be relevant to release or show cause.

And he cites Section 520(7)(e) and then says:

Section 520(7)(e) requires the applicant to show cause why the order below should be vacated, so it is clear that a minor error or one unrelated to the show cause aspects of the bail judge's reasoning cannot justify disturbing that order.

[42] I pause to say that I entirely agree with the latter part of his decision that showing cause must be related to showing cause as to release, not showing cause as to a dispute about whether or not the initial Judge, bail Judge, made a mistake or not.

[43] In that particular regard it is partly in answer, therefore, to the position taken by Mr. Klassen as to the sufficiency of reasons given by the bail deciding Judge in this instance, that inadequacy of reasons is not necessarily sufficient as a point of law upon which one would justify disturbing the order or for that matter moving procedurally to a *de novo* review of the situation.

[44] Chief Justice Wachowich then went on to say, at paragraph 19:

[19] The second ground for disturbing a bail order is that there now exists new evidence not before the bail judge or a change in circumstances not before the bail judge which alters the perspective of the overall factual landscape such that the bail judge's determination requires reassessment.

He then says at paragraph 20:

[20] *Generally a reviewing judge should be apprehensive about interfering with a bail judge's order unless there is a review, reversible error, or some relevant new evidence or other compelling change in circumstances which makes the bail judge's decision no longer valid. If no such error can be found and no new information exists, it will be difficult for a reviewing judge to justify vacating the order made by the bail judge notwithstanding that the reviewing judge may disagree with a bail judge's ultimate determination.* [Emphasis added]

[45] With great respect to the Chief Justice in relation to that particular point, I am not entirely persuaded that I would go quite so far insofar as the rule of a review Judge in relation to judicial interim release under [Section 520](#) of the *Criminal Code*^[19].

[46] Likewise, I would not say the same – for that matter – in relation to [Section 521](#) of the *Criminal Code* relative to applications brought by the Crown^[20].

[47] In my view, with the guidance of the decision of *M. (S.H.)*, the role of a superior court Judge under Section 520 of the *Criminal Code of Canada* – and using the language that the *Criminal Code* provides for and not the language necessarily that I would prefer myself – and in light of the policy position taken in *Hall* and the right to reasonable bail under [Section 11\(e\)](#) of the *Charter*, it is not necessary in every single case that the only two grounds upon which release can be granted is substantive error by the bail Judge or new evidence.

[48] It does seem to me that Parliament contemplated – with the language of review – that in fact the Queen’s Bench Judge under the circumstances, if satisfied that the interests of justice would not be served by the continued detention of the person should be in a position to say I disagree: ‘I weigh all of the same considerations, I rely upon the facts found by the Provincial Court Judge, I rely entirely upon the wisdom that has been assigned to the matter by the Provincial Court Judge; however, in my view judicial interim release ought to be granted in these circumstances.’

[49] I would not disagree at all with the suggestion that as made by Chief Justice Wachowich that “a reviewing Judge should be apprehensive about interfering with a bail Judge’s order”.

[50] However, I think that Chief Justice Wachowich by signalling his position with those words was in fact deferring to the decision of Parliament that in fact it is not an automatic door slam against people applying for judicial interim release that in fact a previous Judge or Justice of the Peace has made a sound or a valid order on its face.

5. Analysis

[51] In this particular respect, let me turn then to what has been suggested in any event to be the issues which are “new evidence” issues and/or changes of circumstances and/or indications why there should be interference with the decision.

[52] I will talk firstly about the question of reasons for judgement because Mr. Klassen in that sense distinguished the decision of Judge Stevens-Guille from the decision of Judge Allen.

[53] Before turning to Judge Stevens-Guille’s decision let me say that in my view Judge Allen’s decision was amply sufficient to meet the criteria of *Sheppard*^[21] insofar as setting out with, in my view, some care, not only his assessment and evaluation of the evidence provided by way of oral submissions by Crown counsel as to the nature of the offence that the defendants were facing at that time, but also his assessment of the policy considerations.

[54] It was not inappropriate for Judge Allen to, in so doing, incorporate by reference into his decision the policy judgment given by His Honour Judge Malin, of the Provincial Court in

Smith^[22]. There is nothing wrong with one Judge quoting another Judge for simplicity in relation to laying out policy considerations which influence the Judge’s decision in relation to a subject such as judicial interim release.

[55] However, Judge Allen did not simply do that and simply lean on another judgment and thereby quote himself out of the obligation to give reasons.

[56] In fact he provided specific reasons, for instance, determining that in fact in his view a systematic and commercial crime was involved in this particular matter and also making a determination, brief as it was, as to the alternative of the sister coming forward and saying that she would offer him employment in their noodle shop.

[57] It does seem to me that Judge Allen was alive to what was put before him which was in fairly brief compass as far as facts are concerned and he was very clear when he stated that I am convinced that he would continue to commit drug offences.

[58] That is why, no doubt, Mr. Piragoff, on behalf of Q.H.T. did not raise the same argument about sufficiency of reasons as was raised by Mr. Klassen.

[59] On the other hand, by comparison Judge Stevens-Guille's approach to reasons is extremely brief. Judge Stevens-Guille to his credit properly pointed out that everyone who is charged with an offence is presumed innocent until proven guilty and he then goes on to characterize the various factors which are listed in the *Criminal Code*.

[60] He went on specifically to find that H.D.N. had not been demonstrated to be a flight risk. His reasons in relation to that particular point are not detailed but certainly, since that was in favour of H.D.N., it seems to me I cannot fault him on that basis.

[61] However, relative to the other grounds of appeal, that is to say, grounds of application, I should say, all that Judge Stevens-Guille said in relation to the so-called secondary^[23] and tertiary^[24] grounds was as follows:

I would, however, and do deny him bail under the secondary ground. Given what I have heard, given that he was a parolee at the time and being convicted of the same offences, it seems to me that he is a significant threat if at large under any paper order I might make to go right back to what it is alleged he was doing before and what he has previously been convicted of doing. Therefore, his bail is denied on the secondary ground..

[62] He then went on to say he did not need to address the tertiary ground.

[63] I have no criticism for the giving of brevity i.e. brief judgments – not having ever suffered from such an affliction myself. However, the situation in relation to that particular indication is that, according to Mr. Klassen at least, the learned Provincial Court Judge in his submission ought to have given somewhat more detail as to why alternatives such as bail conditions might not have addressed some of the concerns that were addressed.

[64] That is because the language of the paragraph which I just read is to some extent a mixture between the protection of the public element of it and perhaps the public impression element which is contained amongst the tertiary grounds.

[65] I do not wish to, in that sense, unduly fault Judge Stevens-Guille because this is a busy Provincial Court and their obligations to give reasons have to be appreciated in that light, as was held by the Supreme Court of Canada in *Burns*^[25].

[66] Nevertheless, the reasons for judgment given in this instance do not reach the point of actually addressing whether or not alternative conditions of judicial interim release could sufficiently address the risk of re-offence which was proposed as the strongest ground upon which the particular Applicant before him – Defendant before him – should be denied judicial interim release based on the urgings of the Crown.

[67] So in that sense I would somewhat agree with the position taken by Counsel for the Applicant, H.D.N., that the learned Provincial Court Judge's reasons fell short of being entirely of assistance in terms of a review in this particular instance.

[68] However, on the other hand it is abundantly clear from what was said that there was a very clear line of reasoning by the learned Provincial Court Judge that illuminated quite adequately his perception of the matter – which is that he was quite persuaded that H.D.N. would re-offend if released. I have to say in fairness to the Provincial Court Judge there was material upon which he certainly could have reached that particular point of view.

[69] However, as I said before because I somewhat part company with the decision of *Lysyk* as to the limitations upon which a Judge in this instance should act, it is also, it seems to me, within my jurisdiction to respectfully disagree with the learned Provincial Court Judge as to whether or not despite the risks of reoffence there is some alternative options which may be available which are closer to the principles set out in *Hall*.

[70] I turn then to the question of change of circumstances, and the relevant circumstances to judicial interim release. Apart from the question of the amount of time these people might remain in custody, which is by virtue of the language of Parliament under [Section 515\(10\)\(c\)](#) of the *Criminal Code*, a factor which should be given considerable weight, as well as the factor of the strength of the Crown's case, there is the additional factor already mentioned as to the conditions of the Edmonton Remand Centre which in this instance are now brought to bear on the subject of whether or not these people can be fairly tried.

[71] The argument made on behalf of the Applicants in this instance is that there is a serious practical problem in the carrying out of the benefits of the Crown's obligation to disclose. The Crown has, I think, been quite – very helpful and forthright in outlining and attempting to arrange for full disclosure in this instance.

[72] Although disclosure has not yet apparently been complete, I am told by Crown Counsel that efforts were made to have the RCMP attend upon the inmates or arrange their location in locations where various forms of CDs, DVDs and so forth could be accessed by them relative to the wiretap type of material in particular, so that they could prepare for a trial in light of that particular information. I have no fault for the efforts of the police in this respect. I assume that in all respects they are attempting to be sincere in so doing.

[73] But it must be kept in mind that the purpose of disclosure is to allow for a Defendant to consult with his Counsel to discuss the disclosure in private and under circumstances which are controlled from the point of the Defence.

[74] The Supreme Court has riveted into our legal system the Constitutionality of the solicitor/client role^[26]. It seems to me that even if there is no intention to interfere with that role on the part of the Crown – and indeed that the Crown is making every effort it reasonably can be said to make in order to ensure that that role is not undermined – the practical circumstances

whereby it can be undermined are a serious consideration to have regard to in relation to a question of judicial interim release.

[75] We are talking about a substantial amount of disclosure. We are talking about two individuals who I accept from Counsel's submissions are incompetent at the use of computers from the point of view of being able to review the materials. Furthermore, there is no possibility that they could examine this particular material with their Counsel present and discuss with their Counsel simultaneously while going through this particular material the documents, the wiretaps, and so forth.

[76] In addition, Mr. Piragoff adds the additional point that the opportunity to actually listen to the interceptions is a factor to be considered as well because, according to Mr. Piragoff, his client with his previous experience with the legal process, is somewhat suspicious about the accuracy, if not necessarily legitimacy, of the wiretap transcription and interpretation which is occurring in such matters. That appears to me to be a considerable factor in this instance as well.

[77] I am not in that sense suggesting that every time a person that is facing a charge where there is going to be wiretap evidence should therefore be sprung out of the Edmonton Remand Centre so that he can spend five years dithering about it and not get on to trial.

[78] But it does seem to me that the legitimacy of this particular complaint in this unique circumstance is a factor which would be added to other circumstances which have to be considered.

[79] The conditions in the Edmonton Remand Centre, the linguistic difficulties, the fact that these two men have roots in the community, the fact that these two men were at large for a considerable time while the investigation was going on are factors which have to be measured, it seems to me, in light of the policy in *Hall*, against the fact that they are recidivists and that they are individuals for whom it would have been reasonable to infer that they were likely to re-offend and so forth.

[80] The fundamental question it comes down to, it seems to me, is this: is it in the public interest that these people remain in custody and is it necessary to maintain them in custody in order to protect the public.

[81] No question in my mind that Counsel for the Crown is entirely correct that drug trafficking is a curse and that drug trafficking has connections to crimes of violence and danger noting that in this particular instance there is reference to the acquisition of a rifle at one point in the wiretaps. Whether that in fact panned out to any actual connection to violence or not is not alleged before me, but the situation here is that these two individuals are persons who are not on the fringes of a bad community, shall we say, that is a curse in our society.

[82] Nevertheless, the Supreme Court has demanded that we remember that people are still presumed to be innocent despite the strength of the case against them. Judicial interim release has been granted to people charged with first degree murder. I have to bear that in mind, as well, as a general context in which to assess the circumstances in this particular case.

[83] Having regard to all of that and having regard to the fact that there would be a considerable time period these people would be in custody, and having regard to the fact that in my view it is possible to compose a set of ruthlessly intrusive conditions to prevent these individuals from getting into any difficulties while they are awaiting their trial in this particular matter, I am prepared to grant judicial interim release for both of these individuals.

6. Conclusion

[84] [In the end result, judicial interim release was granted on the deposit of \$10,000.00 cash each, with conditions worded in more detail, but which conditions can be summarized as follows:

- (1) keep the peace and be of good behaviour,
- (2) appear before the Court when required;
- (3) report to a release supervisor immediately, then personally once a week and by telephone every second day;
- (4) remain in the jurisdiction of the Court unless given written permission by the Court or the supervisor;
- (5) reside as and where approved of by the supervisor and nowhere else;
- (6) not contact in any way, directly or indirectly, a list of individuals which will be provided by the Crown to the supervisor, with the Crown at liberty to change that list of names subject to judicial review on application;
- (7) be subject to zone restrictions that will be specified by the supervisor or by the Crown or police to, as a direction through to the supervisor, which may change from time to time all subject to judicial review on application;
- (8) if found in a motor vehicle when stopped by a police officer on articulable cause, consent to the extent that consent is relevant to the search of that motor vehicle, whether the police officers have any grounds to search that motor vehicle or not;
- (9) the police will have the opportunity to within the hours of daytime visit the residence between the hours of 6 p.m. and 8 p.m. on any given date and without warrant enter the residence for the purposes of reviewing the contents of the residence and determining if there is any evidence of drug activity going on in the residence;
- (10) not use a cell phone nor have a cell phone in their possession at any time;
- (11) however, have a landline telephone at their approved residence which landline telephone may be, without notice or consent by either one of these individuals, be intercepted at any time for any purpose by the police electronically and monitored for the purposes of determining what conversations are going on from that particular telephone;
- (12) abide by a curfew between the hours of 8 p.m. and 7 a.m., seven days a week, being within the confines of the residence which has been approved of by the assigned supervisor;
- (13) not have in their possession at any time or be found in possession of any scheduled drugs under Schedules 1 to 4 of the *Controlled Drugs and Substances Act*;
- (14) if they require any medical attention at all and obtain any prescriptions, report the existence of such medical attention and such prescriptions to their assigned supervisor within a period of at least 24 hours after having done so.]

Heard and delivered orally on the 20th day of May, 2004.

Dated at the City of Edmonton, Alberta this 6th day of July, 2004.

Jack Watson
J.C.Q.B.A.

Appearances:

G. Rice, Esq.
For the Crown

A. Piragoff, Q.C.
For the Defendant Q.H.T.

J. Klassen, Esq.
For the Defendant H.D.N.

[1] Edited for publication. Headlines and footnotes added.

[2] [Section 520\(1\)](#) of the *Criminal Code of Canada* provides as follows: “520. (1) If a justice, or a judge of the Nunavut Court of Justice, makes an order under subsection 515(2), (5), (6), (7), (8) or (12) or makes or vacates any order under paragraph 523(2)(b), the accused may, at any time before the trial of the charge, apply to a judge for a *review* of the order.” [Emphasis added]

[3] [R.v. Lysyk \(Nicholas Andrew\)](#), (January 15, 2003) [2003 ABQB 256 \(CanLII\)](#), [2003] A.J. No. 447 (Alta. Q.B. No. 020929972U; 2003 ABQB 256; Wachowich C.J.Q.B.).

[4] The role of Chief Justice such as for the superior court since defined under [s. 96](#) of the *Constitution Act, 1867*, has apparently existed since 1764 in what is now Canada. Our Chief Justice is rightly concerned with court efficiency and the ethics of the judges of the Court. Our Chief Justice is, in the relevant sense here, *primus inter pares* and entitled to respect according to his office as well as for his long experience as a judge: [Tobiass \(Eriches\) et al. v. Canada \(Minister of Employment and Immigration\)](#), [September 25, [1997 CanLII 322 \(SCC\)](#), 1997] 3 S.C.R. 391, 118 C.C.C. (3d) 443, 10 C.R. (5th) 163, 218 N.R. 81, 151 D.L.R. (4th) 119, 131 F.T.R. 230n, 1 Admin. L.R. (3d) 1, 14 C.P.C. (4th) 1, 40 Imm. L.R. (2d) 23, 1997 CarswellNat 1385, [1997] S.C.J. No. 82 (QL) (S.C.C. No. 25811), at para. 99; [Ruffo \(the Honourable Andrée\) v. Judicial Council of Québec et al.](#), [December 14, [1995 CanLII 49 \(SCC\)](#), 1995] 4 S.C.R. 267, 190 N.R. 1, 130 D.L.R. (4th) 1, 35 Admin. L.R. (2nd) 1, 33 C.R.R. (2nd) 269, [1995] S.C.J. No. 100 (QL) (S.C.C. No. 23127 and 23222) at paras. 52 to 59.

[5] [Section 515\(6\)\(d\)](#) of the *Criminal Code of Canada* includes the following: “515(6) (6) Notwithstanding any provision of this section, where an accused is

charged (d) with having committed an offence punishable by imprisonment for life under subsection 5(3), 6(3) or 7(2) of the Controlled Drugs and Substances Act or the offence of conspiring to commit such an offence, the justice shall order that the accused be detained in custody until he is dealt with according to law, unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified, but where the justice orders that the accused be released, he shall include in the record a statement of his reasons for making the order.”

[6]

Section 518(1) of the *Criminal Code* includes the following: “518(1) In any proceedings under section 515, (a) the justice may, subject to paragraph (b), make such inquiries, on oath or otherwise, of and concerning the accused as he considers desirable; (e) the justice may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case.”

[7]

Counsel for the Applicants cited a detailed report prepared by Prof. Michael Jackson relating to the Edmonton Remand Centre, and its functioning and alleged deficiencies as had been presented in evidence on a different matter before this Court at the present time.

[8]

See also *R.v. Wust (Lance William) et al.*, [April 13, 2000 SCC 18 (CanLII), 2000] 1 S.C.R. 455, 488, 481, 184 D.L.R. (4th) 385, 143 C.C.C. (3rd) 129, 32 C.R. (5th) 58, 252 N.R. 332, 134 B.C.A.C. 236, 219 W.A.C. 236, [2000] S.C.J. No. 19 (QL), 2000 CarswellBC 749 (S.C.C. Nos. 26732, 26802, 26800; 2000 S.C.C.18, 19, 20).

[9]

R.v. Hall (David Scott), [October 10, 2002 SCC 64 (CanLII), 2002] 3 S.C.R. 309, 167 C.C.C. (3rd) 449, 4 C.R. (6th) 197, 217 D.L.R. (4th) 536, 293 N.R. 239, 165 O.A.C. 319, 97 C.R.R. (2nd) 189, [2002] S.C.J. No. 65 (QL), 2002 CarswellOnt 3259 (S.C.C. No. 28223; 2002 SCC 64).

[10]

Section 11(e) of the *Canadian Charter of Rights and Freedoms* provides as follows: “11. Any person charged with an offence has the right (e) not to be denied reasonable bail without just cause”.

[11]

Section 515(10) of the *Criminal Code of Canada* provides as follows: “515(10) For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds: (a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law; (b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and (c) on any other just cause being shown and, without limiting the generality of the foregoing, where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, *including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.*” [Emphasis added]

[12]

As to the effect of there being more than one Defendant on delay, see R.v. Sapara (James), [March 5, 2001 ABCA 59 (CanLII), 2001] 6 W.W.R. 459, 277 A.R. 357, 242 W.A.C. 357, 41 C.R. (5th) 356, 91 Alta. L.R. (3rd) 28, 81 C.R.R. (2nd) 356 (2001 ABCA 59, Alta. C.A. No. 0003-0143-A; 2001 ABCA 59), leave denied (July 5, 2001) 275 N.R. 187 (S.C.C. No. 28583); R.v. Panousis (Constantin), (October 16, 2003) 2003 ABCA 17 (CanLII), [2003] A.J. No. 34 (QL), 2003 CarswellAlta 1504, [2003] A.R. Uned. 518 (MLB), [2004] A.W.L.D. 8 (2003 ABCA 294; Alta. C.A. No. 0203-0453-A3) leave denied, (March 25, 2004) 2004 CarswellAlta 368 (S.C.C. No. 30073).

[13]

United States of America v. Chan (Kwok Yeung), (February 2, 2000) 2000 CanLII 5619 (ON CA), 144 C.C.C. (3d) 93, [2000] O.J. No. 227 (QL), 128 O.A.C. 359, 2000 CarswellOnt 164 (Ont. C.A. No. M25327).

[14]

R.v. Smith (Daren Wayne), (January 24, 2003) 2003 SKCA 8 (CanLII), 171 C.C.C. (3rd) 383, 227 Sask.R. 279, 287 W.A.C. 279, 2003] 5 W.W.R. 30, 9 C.R. (6th) 12, [2003] S.J. No. 30 (QL), 2003 CarswellSask 26 (2003 SKCA 8; CA03008;538).

[15]

A deferential appellate approach to review appears to have been adopted by the Court of Appeal despite the power to “vary” or “substitute” under s. 680(1) of the *Criminal Code of Canada*: R.v. Cooper (Abraham Robert), (August 12, 1999) 1999 ABCA 249 (CanLII), 237 A.R. 355, 138 C.C.C. (3rd) 292, [2000] 2 W.W.R. 117, 73 Alta. L.R. (3rd) 144, 1999 CarswellAlta 757 (Alta. C.A., No. 9903-0353-A), and R.v. Cooper (Abraham Robert), (February 16, 2000) 2000 ABCA 75 (CanLII), 160 C.C.C. (3rd) 420, 286 A.R. 235, 253 W.A.C. 235, 2000 CarswellAlta 1633 (Alta. C.A., No. 9903-0353-A).

[16]

“Review” is defined in Black’s Law Dictionary, 7th Edition, [St. Paul, Minnesota: West Group, 1999], at p. 1320 as “Consideration, inspection, or reexamination of a subject or thing.”

[17]

R.v. M. (S.H.), [September 28, 1989 CanLII 31 (SCC), 1989] 2 S.C.R. 446, 71 C.R. (3d) 257, 50 C.C.C. (3rd) 503, 69 Alta. L.R. (2nd) 209, [1989] 6 W.W.R. 385, 100 A.R. 321, 100 N.R. 1, [1989] S.C.J. No. 93 (QL), 1989 CarswellAlta 139 (S.C.C. No. 20508).

[18]

The governing provisions of the Young Offenders Act at that time were Sections 16(9) and 16(10). Section 16(9) provided as follows: “16(9) Subject to subsection (11), an order made in respect of a young person under subsection (1) or a refusal to make such an order shall, on application of the young person or his counsel or the Attorney General or his agent made within thirty days after the decision of the youth court, be reviewed by the superior court *and that court may, in its discretion, confirm or reverse the decision of the youth court.*” Section 16(10) provided as follows: “16(10) A decision made in respect of a young person by a superior court under subsection (9) may, on application of the young person or his counsel or the Attorney General or his agent made within thirty days after the decision of the superior court, with the leave of the court of appeal, be reviewed by that court, and

the court of appeal *may, in its discretion, confirm or reverse the decision of the superior court.*"

[19]

Section 520(7) of the *Criminal Code* provides as follows: "520(7) On the hearing of an application under this section, the judge may consider (a) the transcript, if any, of the proceedings heard by the justice and by any judge who previously reviewed the order made by the justice, (b) the exhibits, if any, filed in the proceedings before the justice, and (c) such additional evidence or exhibits as may be tendered by the accused or the prosecutor, and *shall* either (d) dismiss the application, or (e) *if the accused shows cause*, allow the application, vacate the order previously made by the justice and *make any other order provided for in section 515 that he considers is warranted.*" [Emphasis added]

[20]

Section 521(8) of the *Criminal Code* provides as follows: "520(8) On the hearing of an application under this section, the judge may consider (a) the transcript, if any, of the proceedings heard by the justice and by any judge who previously reviewed the order made by the justice, (b) the exhibits, if any, filed in the proceedings before the justice, and (c) such additional evidence or exhibits as may be tendered by the prosecutor or the accused, and *shall* either (d) dismiss the application, or (e) *if the prosecutor shows cause*, allow the application, vacate the order previously made by the justice and *make any other order provided for in section 515 that he considers to be warranted.*" [Emphasis added] Protection of the public is a value of high importance as well.

[21]

R.v. Sheppard (Colin), [March 21, 2002 SCC 26 (CanLII), 2002] 1 S.C.R. 869, 162 C.C.C. (3d) 298, 284 N.R. 342, 210 D.L.R. (4th) 608, 50 C.R. (5th) 104, 211 Nfld. & P.E.I.R. 50, 633 A.P.R. 50, [2002] S.C.J. No. 30 (QL), 2002 CarswellNfld 74 (S.C.C. No. 27439; 2002 SCC 26).

[22]

R.v. Smith (Marcello Weymoor), (February 3, 2004) (Alta. P.C. No. 006583678P1 etc.; 2004 ABPC 22).

[23]

Referring to s. 515(10)(b) of the *Criminal Code* dealing with the "protection or safety of the public".

[24]

Referring to s. 515(10)(c) of the *Criminal Code* dealing with the need to maintain confidence in the administration of justice.

[25]

R.v. Burns (Robert Howard), [April 14, 1994 CanLII 127 (SCC), 1994] 1 S.C.R. 656, 29 C.R. (4th) 113, 89 C.C.C. (3d) 193, 165 N.R. 374, 42 B.C.A.C. 161, 67 W.A.C. 161, 23 W.C.B. (2d) 211, [1994] S.C.J. No. 30 (QL), 1994 CarswellBC 576 (S.C.C. No. 23115).

[26]

See e.g. *Maranda (Leo-René) v Québec (Justice of the Peace) and Canada (Attorney General), et al.*, [also as *LeBlanc (Norman) v. Maranda (Leo-René) et al.*], [November 14, 2003 SCC 67 (CanLII), 2003] 3 S.C.R. 193, 178 C.C.C. (3rd) 321, 232 D.L.R. (4th) 14, 15 C.R. (6th) 1, 311 N.R. 257, [2003] S.C.J. No. 69 (QL), 2003 CarswellQue 2478 (S.C.C. No. 28964; 2003 SCC 67); *C.(J.) v. R. and McClure (David Edward)*, [March 2, 2001 SCC 14 (CanLII), 2001] 1 S.C.R. 445,

195 D.L.R. (4th) 513, 151 C.C.C. (3d) 321, 266 N.R. 275, 142 O.A.C. 201, 40 C.R. (5th) 19, 80 C.R.R. (2nd) 217, [2001] S.C.J. No. 13 (QL), 2001 CarswellOnt 496 (S.C.C. No. 27109; 2001 SCC 14).

Tab 102

Gillespie v. Manitoba (Attorney General), 2000 CanLII 26952 (MB CA)

Source:	Court of Appeal of Manitoba
Date:	2000-04-20
File number:	AR99-30-04436
Other citations:	185 DLR (4th) 214 — [2000] 6 WWR 605 — 145 Man R (2d) 229 — 144 CCC (3d) 193 — [2000] MJ No 218 (QL)
Citation:	Gillespie v. Manitoba (Attorney General), 2000 CanLII 26952 (MB CA), < https://canlii.ca/t/2328l >, retrieved on 2026-03-23

Manitoba Court of Appeal Gillespie v. Manitoba (Attorney General) Date: 2000-04-20

R.I. Histed and D.J. Parker, for appellant.

H.S. Leonoff, Q.C., for respondent.

R.B. McNicol, Q.C., and J.S. Langhan, for the proposed intervener.

Court File No. AR99-30-04436

[1] TWADDLE J.A. (HUBAND and PHILP JJ.A. concurring) (giving the first judgment at the invitation of Scott C.J.M.):—At issue in this appeal is the jurisdiction of the Chief Justice of the Queen's Bench to make an order of general application authorizing the Sheriff to search persons seeking entrance to the Winnipeg Centre courthouse.

[2] Prior to August 1998, security at the Winnipeg courthouse was maintained, as it still is at all courthouses outside of Winnipeg, by the simple presence of the Sheriff and his officers. The officers were on duty during hours when members of the public had access to the building, whether to file or inspect documents, pay a fine, attend at one or other of the courts holding session or obtain access to the Great Library. Apart from fulfilling their duty of general surveillance, the Sheriff's officers were required:

(i) to ward off any threatened altercation;

- (ii) to determine, in their professional judgment, where in the building the attendance of officers was specifically required; and
- (iii) to respond to a request for special security arrangements made by a judge presiding in a courtroom and, where there were reasonable and probable grounds to believe that some person or persons were attempting to take a weapon into the courtroom, to conduct a search.

[3] Sometime in 1998, a committee known as the Manitoba Courts Security Advisory Committee considered the adequacy of security arrangements at the courthouse. In *R. v. Gillespie*, [1999 CanLII 4707 \(MB CA\)](#), [1999] M.J. No. 562 (QL) (C.A.) [reported 182 D.L.R. (4th) 599, 141 C.C.C. (3d) 526, as *R. v. Lindsay*], this Committee was described in these terms (at para. 4):

That committee, comprised of judges of the Court of Queen's Bench and Provincial Court (and, at one time, a judge of the Court of Appeal), as well as representatives of the Department of Justice and other Manitoba government departments, is described on the record as an “*ad hoc*”, “advisory” committee. Under what authority that committee is constituted and the scope of its jurisdiction are not apparent on the record.

[4] As a result of that Committee's deliberations, a perimeter security program was put in place. This program closed all public entrances to the courthouse other than the main entrance on York Avenue and the entrance via a walkway from the Woodsworth Building. At each of these entrances a security check was instituted. All persons without security clearance were required to pass through an electronic scanner that detected the presence of metal objects. Before doing so, each person was required to remove metal objects from his or her pockets. These were subject to visual inspection. Personal property had to be submitted for inspection, done either manually or by use of a fluoroscope. A person found to possess an object with the potential of becoming a weapon was denied admission unless they surrendered the object. If possession of the object constituted an offence, the object might be confiscated and the possessor charged.

[5] The present appellant refused to submit to being searched. Asserting a right to enter the courthouse without being searched, he sought a declaration that the search procedure violated his *Charter* right to be secure against unreasonable search and seizure. His application for relief was denied by a judge of the Queen's Bench [see *infra*, para. 7], but allowed on appeal to this Court [*supra*, para. 3].

[6] In reaching its decision, this Court stated (at para. 11):

The parties agree that the program under which the searches are undertaken must be authorized by law, the law must be reasonable, and the search itself must be carried out in a reasonable manner: *R. v. Collins*, [1987 CanLII 84 \(SCC\)](#), [1987] 1 S.C.R. 265, 33 C.C.C. (3d) 1, 38 D.L.R. (4th) 508. It is common ground that there is no statutory foundation for the program and that its authority must therefore be found in the common law: *R. v. Caslake*, [1998 CanLII 838 \(SCC\)](#), [1998] 1 S.C.R. 51, 121 C.C.C. (3d) 97, 155 D.L.R. (4th) 19.

[7] It had been argued, as the Queen's Bench judge had found, that common law authority for the program was to be found in the inherent jurisdiction of the Court of Queen's Bench "to control its own process and to ensure that justice takes place in a safe and orderly environment where all participants feel their physical security is protected". (The words are those of Steel J. (as she then was) in *R. v. Gillespie, sub nom. R. v. Lindsay (D.K.)* (1999), [1999 CanLII 14150 \(MB KB\)](#), 137 Man. R. (2d) 68, at para. 42.) The Court rejected that argument "for the simple reason that there is nothing on the record to establish that the court, or a judge thereof, exercised that jurisdiction in recommending or approving the implementation of the program" (*per* Philp J.A. in *Gillespie/Lindsay*, at para. 21). Philp J.A. concluded (also at para. 21): "There is no rule, no order, no direction to record the collective action of the court or the judicial act of a judge of the court."

[8] The question of whether the court's inherent jurisdiction, if exercised, was broad enough to enable it to authorize the search of persons entering the courthouse was not decided. Philp J.A. said (at para. 28):

Whether the exercise of the court's inherent jurisdiction would extend to the implementation of security measures as broad and unlimited in their scope and as arbitrary in their application as those of the program is a question that this Court need not decide on this appeal.

[9] That judgment was delivered on December 24, 1999. The impugned order was signed on December 28, 1999. It was in these terms:

The Court of Queen's Bench of Manitoba

WHEREAS there is a Manitoba Courts Security Advisory Committee composed of, among others, Justices of Manitoba's Court of Queen's Bench and Judges of Manitoba's Provincial Court;

AND WHEREAS the Manitoba Courts Security Advisory Committee has determined that persons who attend, visit and work in the Winnipeg Centre Courthouse should be able to do so in an environment that is reasonably secure from danger;

AND WHEREAS the Manitoba Courts Security Advisory Committee is of the view that the security program currently operated by the Sheriff, including the electronic screening of persons entering the Winnipeg Centre Courthouse is necessary to provide an environment that is reasonably secure from danger;

AND WHEREAS the Chief Justice of the Court of Queen's Bench of Manitoba and the Chair of the Manitoba Courts Security Advisory Committee are in agreement with and approve of the determination and view of the Courthouse Security Committee;

AND WHEREAS the Manitoba Court of Appeal has held that:

"It is a matter of notorious fact that security in the buildings that house the courts is a matter of real and sometimes pressing, concern — not just for the courts, but also for the government that is constitutionally responsible for the administration of justice in the province."

AND WHEREAS section 16 of *The Court of Queen's Bench Act* (C.C.S.M. c. 280) requires the Sheriff to assist and obey the Court of Queen's Bench in the exercise of its jurisdiction;

THEREFORE I, as the Chief Justice of the Court of Queen's Bench, hereby authorize and direct the following with respect to the Winnipeg Centre Courthouse at 408 York Avenue:

1. The Sheriff shall operate a security program for the inspection or screening of persons, personal belongings and baggage to prevent the unauthorized entry into the Courthouse of objects that pose security risks.
2. Measures for the security program are:
 - Public access to the Courthouse shall be through the main entrance or through the Woodsworth walkway between the Courthouse and 405 Broadway only.
 - Prior to entering the Courthouse, all persons who do not have security clearance shall be screened electronically to detect all dangerous objects that pose a security risk.
 - Prior to entering the Courthouse, the personal belongings and the baggage of all persons who do not have security clearance shall be screened electronically to detect all dangerous objects that pose a security risk.
 - No person shall enter the Courthouse with a dangerous object that poses a security risk.
3. For the purposes of this Order, a dangerous object that poses a security risk includes: a weapon, an explosive, an incendiary or any other object that could be used or could be intended for use to cause death or injury, or to threaten or intimidate, persons in the Courthouse.
4. This Order shall remain in force until further direction of the Court or until legislative measures are implemented.

Signed this 28th day of
December, 1999, in
Winnipeg, Manitoba.

[B. Hewak]

C.J.Q.B.

[10] The day following the making of the order, the appellant (who was also a party in the *Gillespie/Lindsay* case) filed a notice of appeal naming "The Chair of the Manitoba Courts Security Advisory Committee" as respondent. Leave was granted at the hearing to substitute the Attorney General of Manitoba as respondent.

[11] The Chief Justice of the Court of Queen's Bench appeared by counsel at the hearing and asked for leave to intervene. The Court denied the application — primarily on the ground that it is inappropriate for the judge whose order is the subject of an appeal to participate in the appeal proceedings — but allowed his counsel to appear as *amicus curiae* on the issue of the Chief Justice's jurisdiction.

[12] The Attorney General had filed a notice of motion asking that the appeal be struck out on the ground that "there was no jurisdiction to appeal" the order. By the time of the hearing, however, this position had been somewhat softened to become: "The Attorney General submits that the order of Hewak C.J.Q.B. was in the nature of an *ex parte* order and the matter should be returned to the Court of Queen's Bench for reconsideration."

[13] I agree that, as a matter of policy, this Court should ordinarily decline to hear appeals from *ex parte* orders where there has not first been a motion in the Queen's Bench to set aside or vary the order. But this policy does not apply, in my opinion, where the principal attack against the order is that it is beyond the jurisdiction of the judge who made it. [Section 89](#) of [The Court of Queen's Bench Act](#), S.M. 1988-89, c. 4, confers jurisdiction on this Court to hear an appeal from "an order made by the court" (meaning the Court of Queen's Bench or a judge thereof). Absent statutory provision to the contrary, this jurisdiction should not be whittled down to exclude *ex parte* orders alleged to be made beyond jurisdiction. Otherwise such orders would be difficult to challenge as *certiorari* does not lie to quash an order of a superior court judge: see *Dagenais v. Canadian Broadcasting Corp.*, [1994 CanLII 39 \(SCC\)](#), [1994] 3 S.C.R. 835 at p. 865, 120 D.L.R. (4th) 12, 94 C.C.C. (3d) 289. The Supreme Court of Canada held in *Dagenais* that an otherwise unappealable order of a superior court judge might be challenged by an application for leave to appeal it, but that case was a criminal proceeding in which no appeal lay to the provincial court of appeal from the order in question. That result can be avoided here by construing s. 89 of *The Court of Queen's Bench Act* as I have suggested.

[14] In a factum prematurely filed on the Chief Justice's behalf, it is argued that the impugned order is in the nature of a directive. I agree with this characterization, but find this only confirms my view that the order is appealable. It is this very type of order which will most frequently give rise to a question of jurisdiction.

[15] It is, of course, the issue of the Chief Justice's jurisdiction to make the order which concerns us. At least until a motion to set aside or vary the order has been denied, I do not think we should consider questions relating to the reasonableness of the order or the reasonableness of the searches authorized by it.

[16] Neither the Attorney General nor the *amicus* suggest that the impugned order falls within the ordinary jurisdiction of the Queen's Bench. What is urged upon us is that the order falls within the inherent jurisdiction of the court or, in the submission of the *amicus*, within the special authority of the Chief Justice under [s. 24](#) of [The Court of Queen's Bench Act](#). I will deal with each in turn.

Inherent Jurisdiction

[17] Although many instances can be found in which the inherent jurisdiction of the Queen's Bench (or equivalent court in other jurisdictions) has been invoked to justify an order, no satisfactory definition of inherent jurisdiction has been enunciated. That is perhaps because inherent jurisdiction has never been conferred on a court expressly, but exists as an auxiliary power to be invoked when necessary for the court "to fulfil itself as a court of law" (to use the words of Master I.H. Jacob, in his article "The Inherent Jurisdiction of the Court" (1970), 23 Curr. Legal Probs. 23 at p. 27).

[18] I have chosen the word "auxiliary" to describe the power in order to emphasize the power's supportive role. "Auxiliary" is defined in *Webster's New World Dictionary, Third*

College Edition, 1988, as “giving help or aid; assisting or supporting” and as “acting in a subsidiary, or subordinate, capacity”. Inherent power, as I understand it, is the power a judge may draw upon to assist or help him or her in the exercise of the ordinary jurisdiction of the court. It does not generally stand alone waiting to be exercised on the judge’s own initiative without a suit or application or without parties.

[19] The auxiliary nature of inherent jurisdiction is reflected in the words of Lord Morris of Borth-y-Gest in *Connelly v. Director of Public Prosecutions*, [1964] A.C. 1254 (H.L.). In *obiter* comments, he said (at p. 1301):

There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.

[20] The jurisdiction to which the inherent powers are auxiliary is primarily adjudicative. A judge’s ordinary function is to resolve disputes between parties in a pending or contemplated action. The judge’s resolution of the dispute is embodied in an order, judgment or decree which, as a general rule, is binding only on the parties to the action. Although this description of jurisdiction may not be quite as apt for criminal as for civil proceedings, I believe any difference is due to terminology rather than concept.

[21] To enable a judge to fulfil his or her adjudicative function, a judge has authority to maintain order and control process in the courtroom. A judge might order a witness yelling at him or her to desist. A judge might require counsel to disclose the general nature of the contents of a briefcase. Or a judge might order a person bringing a potential weapon into the courtroom to remove it. Each such order would be incidental to the exercise by the judge of primary jurisdiction and would be enforceable by the threat of punishment.

[22] A good example of a judge exercising such incidental or auxiliary jurisdiction is *R. v. Hothi* (1985), [1985 CanLII 3672 \(MB KB\)](#), 33 Man. R. (2d) 180 (Q.B.); affirmed (1985), [1985 CanLII 3682 \(MB CA\)](#), 35 Man. R. (2d) 159 (C.A.). In that case, the jurisdiction of a judge trying a criminal case to require the removal of kirpans (ceremonial daggers with religious significance) from the courtroom was upheld on the ground that they were possible weapons. Dewar C.J.Q.B. said (at 33 Man. R. (2d), para. 7):

The ruling serves a transcending public interest that justice be administered in an environment free from any influence which may tend to thwart the process. Possession in the courtroom of weapons, or articles capable of use as such, by parties or others is one such influence.

[23] Such incidental or auxiliary jurisdiction is, however, exercised in the course of a proceeding before the judge exercising his or her adjudicative jurisdiction. It is available to assist the judge in the performance of his or her primary function. It does not give the judge the right, because he or she is a judge, to demand respect outside the courtroom,

to require a traveller to open a suitcase at an airport or to authorize a general search for potential weapons.

[24] Save for one exception, to which I will later refer, I have found no case in which a judge of a superior court has purported to exercise inherent jurisdiction other than as an incident of, and in the course of exercising, the ordinary jurisdiction of the court. In his article “The Inherent Jurisdiction of the Court” (1983), *Aus. L.J.*, vol. 57, at 449, Keith Mason, Q.C., gives many examples of the exercise of inherent jurisdiction. They range from the inherent power to stay execution of a death sentence, including the grant of an injunction to restrain the executioners from carrying it out (*Tait v. The Queen* (1962), 108 C.L.R. 620 (H.C. of Aus.)), through the birth of the *Mareva* injunction and the *Anton Piller* order to the striking out of a notice of discontinuance and of proceedings which are fruitless and vexatious. The power to punish for contempt of court, including power to punish any conduct calculated to interfere with the due administration of justice, is also cited as an example. Save for the exception already referred to, even this latter power has only been exercised, as far as I am aware, in the course of a proceeding within the ordinary jurisdiction of the court and against someone involved, directly or indirectly, in that proceeding.

[25] It is against that background that Master Jacob’s article must be read. Many of the statements contained in it are broad enough to include within the ambit of inherent jurisdiction almost any order thought desirable for the better administration of justice. I do not believe, however, that Master Jacob intended to go that far. His statements, in my view, were intended to describe the broad auxiliary powers of a superior court, not to extend the ordinary jurisdiction of such a court into the realm of law-making. Justice is better administered by laws made by, or under authority from, the Legislature.

[26] In his article, “The Inherent Jurisdiction to Regulate Civil Proceedings” (1997), 113 L.Q.R. 120, Professor M.S. Dockray of The City University, London, England, reviews a number of recent cases dealing with inherent jurisdiction and concludes (at p. 132):

If we follow the approach of recent cases, we should not treat the inherent jurisdiction as a kind of ubiquitous judicial prerogative originating in the ineffable spirit of the court, but rather as a rational collection of related common law powers, each of which has a separate history, aims and boundaries ...

[27] I share Professor Dockray’s view that inherent jurisdiction is not a kind of “ubiquitous judicial prerogative”. Indeed, it is not a prerogative at all. The Divine Right of Kings is dead; it has not passed to judges. In a democracy, such as ours, judges have a distinct function which enables them to command others, but the power to do so must be exercised within the Constitution and the law. But for the case to which I will now refer, orders made in the exercise of inherent power have only been made in the course of ordinary proceedings on the initiative of a party to them.

[28] The exception I have referred to is *B.C.G.E.U. v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214, 53 D.L.R. (4th) 1, 44 C.C.C. (3d)

289. The Chief Justice of the Supreme Court of British Columbia arrived at the Vancouver courthouse early one morning to find government employees picketing outside the building. Believing this conduct to be a contempt of court in that it would seriously impair the ability of the courts to function, he issued an injunction on his own motion enjoining the government employees from continuing their conduct. There was neither a pending nor a contemplated action. No one had applied for an injunction. Nonetheless, the Supreme Court of Canada upheld the jurisdiction of the Chief Justice to make that order. In delivering the judgment of the Court, Dickson C.J.C. said (at p. 239) that the Chief Justice “had the legal constitutional right and duty to ensure that the courts of the province would continue to function”.

[29] *B.C.G.E.U.* was, however, an extraordinary case. An urgent situation had arisen in which it was imperative for the Chief Justice to act at once in order to ensure that the courts could continue to function. The impugned order had the following characteristics:

- (i) it was made to restrain conduct which was already illegal;
- (ii) it safeguarded court access for all;
- (iii) it neither took away nor lessened anyone’s legal right;
- (iv) it did not affect persons who were not wrongdoers;
- (v) it did not purport to change the law; and
- (vi) the order the Chief Justice made was no different from the order he could have made, and undoubtedly would have made, if the Attorney General of British Columbia had attended upon him that morning armed with an application to enjoin the employees and their union from continuing their illegal conduct.

[30] The order impugned in the present case is the very antithesis of that made in *B.C.G.E.U.* Despite the order of this Court declaring the perimeter security program to be illegal, the absence of such a program did not, in my opinion, constitute an immediate or significant threat to the court’s ability to function. In contrast to the order in *B.C.G.E.U.*, the order in this case:

- (i) purports to make otherwise illegal searches legal;
- (ii) denies court access to those not willing to be searched;
- (iii) takes away from those required to attend court their legal right to enter the courthouse freely;
- (iv) affects persons who are not wrongdoers;
- (v) purports to change the law by authorizing searches not previously authorized; and
- (vi) was not an order the Chief Justice could have made in an action.

[31] In my opinion, *B.C.G.E.U.* is pretty meagre authority for the making of the order in this case. It represents a marked departure from the general rule that a judge can

exercise inherent jurisdiction only in the course of a proceeding before him or her. I do not doubt that there will be circumstances, like those in *B.C.G.E.U.*, where a judge can make an order on his or her own motion to restrain illegal conduct which constitutes an immediate and significant threat to the administration of justice. But an order made on a judge's own motion must be confined, in my opinion, to upholding the law as it exists and not directed at changing it: see *R. v. Unnamed Person* (1985), [1985 CanLII 3501 \(ON CA\)](#), 22 C.C.C. (3d) 284 (Ont. C.A.), in which Zuber J.A., for the Court, said (at p. 286):

The limits of this power [inherent jurisdiction] are difficult to define with precision but cannot extend to the creation of a new rule of substantive law.

[32] The impugned order in the present case purports to require persons obligated to attend the courthouse to submit to a search which, without the order, would be unauthorized by law. It is an order of general application without time limit. It was not made to deal with a specific situation, but generally to change the law concerning the right to security from search. The power to do so does not, in my opinion, fall within the inherent power of the court.

[Section 24 of The Court of Queen's Bench Act](#)

[33] [Section 24\(1\)](#) of [The Court of Queen's Bench Act](#) provides:

24(1) The Chief Justice shall be responsible for the judicial functions of the court, including direction over sittings of the court and the assignment of judicial duties, and may assign to the judges of the court other duties relating to the administration of justice or for the purposes of an Act of the Legislature.

[34] As I read that provision, it is directed solely at the organization of the judges and business of the court. It gives the Chief Justice responsibility for the judicial functions of the court, but adds nothing to his or the court's jurisdiction. He is the first and most important judge, but the first among equals as far as jurisdiction is concerned.

The Proper Authority

[35] Few would doubt the wisdom of ensuring "that justice takes place in a safe and orderly environment where all participants feel their physical security is protected" (to repeat the words of Steel J. in *R. v. Lindsay*, at para. 42). But how is this best achieved? And at what price to the rights and freedoms of those seeking entry to the courthouse?

[36] Many believe that the courthouse already was a safe and orderly place before the perimeter search was instituted in August, 1998. Save for the explosion of a timing device delivered to the County Court office some 20 years ago, no major threat to the security of those in the courthouse has, as far as I am aware, ever been experienced.

[37] Many others believe, partly as a result of what has happened in other courthouses in Canada and, more particularly, in the United States of America, that individual rights against unreasonable search must take second place to the collective rights of the majority to conduct their legal business in a safe environment. These others think the cost of implementing a perimeter search program is well worth the price.

[38] The question for us is not which of these beliefs is right, but who makes that decision. The issue of courthouse security, as I see it, is a matter of public policy. Such policy issues are usually decided by the Legislature. This is usually so not only because the decision can then be made democratically, but also because it can be made by those responsible to the taxpayer for the cost of the program.

[39] American courts have made orders dealing with the administration of justice: see, for example, *Carlson v. State of Indiana*, 220 N.E.2d 532 (1966). This occurs because of the constitutional powers of American courts. These are different in Canada where each of the democratic institutions is required to respect the authority of the others. This was recognized in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993 CanLII 153 \(SCC\)](#), [1993] 1 S.C.R. 319 at p. 389, 100 D.L.R. (4th) 212, by McLachlin J. (as she then was):

Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.

[40] For that reason, I find American authorities of no assistance here.

The Request for a Stay

[41] The Attorney General asks that, in the event of the order of Hewak C.J.Q.B. being found to be invalid, the Court grant a stay of its decision, or suspend its operation, for a period of six months or until the Legislature has enacted a law authorizing a search of persons entering the courthouse, whichever first occurs.

[42] In support of that request, the Attorney General refers us to the decision of the Supreme Court of Canada in *R. v. Feeney*, [1997 CanLII 342 \(SCC\)](#), [1999] 2 S.C.R. 13, 146 D.L.R. (4th) 609, 115 C.C.C. (3d) 129, and [1999] 2 S.C.R. 117, 116 C.C.C. (3d) vi. That was a case in which the Supreme Court ruled that the police required a warrant before making an arrest in a dwelling house. This represented a change from the common law which permitted a warrantless arrest in certain circumstances. On subsequent application, the Supreme Court stayed the operation of its ruling for a period of six months (other than in the *Feeney* case itself) so that the change in the legal requirement for an arrest would not affect the legality of arrests already made.

[43] The difference in the present case, as I see it, is that there was no previously valid law permitting courthouse searches. Whether under the protocol established in 1998 or under the order of Hewak C.J.Q.B., the searches were not authorized by law. I do not believe that this Court has any greater power than Hewak C.J.Q.B. to authorize such searches. A stay of our decision would give effect to an order made without jurisdiction. I do not think that an appropriate thing to do.

[44] I am, of course, aware of other instances in which the Supreme Court of Canada has delayed the effective date of its judgment or has at least considered doing so. These instances include *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1 *sub nom. Reference re: Language Rights under the Manitoba Act, 1870*; *Schachter v. Canada*, 1992 CanLII 74 (SCC), [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1; and *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1, 100 C.C.C. (3d) 449.

[45] In *Re Manitoba Language Rights*, certain laws of the Province of Manitoba not enacted in both official languages were given temporary validity until the Legislature had time to re-enact the laws in both languages. This period of temporary validity was allowed, however, because without it a legal vacuum with consequent legal chaos in Manitoba would have resulted. I see no parallel here.

[46] In *Schachter*, the Supreme Court discussed the circumstances in which a declaration of invalidity should be suspended to permit the Legislature which had enacted the invalid law to pass an amendment which complied with constitutional requirements. This suggests that even an invalid law can be temporarily upheld to preserve the status quo until constitutional compliance. In my view, however, the temporary validation of a legislative enactment (invalid only because it offends the *Canadian Charter of Rights and Freedoms*) is entirely different from giving temporary validation to an order made without any jurisdiction whatsoever. The first is an invalid exercise of undoubted jurisdiction, the second a purported exercise of a non-existent jurisdiction. As I previously indicated, this Court has no more jurisdiction than the Chief Justice of the Queen's Bench to authorize a general search of persons which would otherwise be illegal.

[47] *RJR-MacDonald Inc.* was a case in which legislation regulating the advertising of tobacco products was held to be invalid on the ground that it contravened the *Charter* freedom of expression. Two of the justices would have suspended the declaration of invalidity. Here again, however, we are dealing with a legislative enactment which, but for the *Charter* breach, was within the jurisdiction of the enacting body. The effect of a suspension in such circumstances is to delay the *Charter* remedy, not to give temporary validity to a judicial order made in a total absence of jurisdiction.

[48] In my view, this Court has no jurisdiction to give temporary validity to a judicial order made in the total absence of jurisdiction.

Conclusion

[49] In the result, I would allow the appeal and set aside the order of Hewak C.J.Q.B. for want of jurisdiction.

[50] SCOTT C.J.M. (MONNIN J.A. concurring, dissenting):—This is a challenging and unique appeal. The principal issue that must be decided is whether the Chief Justice of the Court of Queen's Bench, as *primus inter pares* (first among equals) of the superior

court of inherent jurisdiction, has the authority to issue orders continuing the existing perimeter security system for the main courthouse complex, as well as the courthouse at 1501 Chevrier Boulevard, both in the City of Winnipeg, or whether it is only the legislative branch of government that has the ability to do so. Another subsidiary but important issue is whether, in the event this Court should strike down his direction, our decision should be stayed for a short period. Legislative intervention has recently been announced by the provincial government as a priority for the spring session of the Legislature.

The Background to the Appeal

[51] In August, 1998, the Winnipeg Law Courts Building (the Law Courts) perimeter security program started. The Law Courts complex is the principal court facility in the province. It consists of approximately fifty courtrooms. All matters heard by the Court of Appeal take place in the building. A multitude of trials and other hearings take place every day before judges of the Court of Queen's Bench and the Provincial Court. A majority of Manitoba judges from the two levels of trial court have their chambers within the Law Courts, as do all judges of the Court of Appeal. In addition, there are magistrates and numerous members of court staff whose daily work takes place there.

[52] 1501 Chevrier Boulevard is a dedicated, high security court facility specially designed for lengthy, multi-defendant criminal trials. While the arguments and reasons in this judgment apply equally to each facility, I will, for convenience, henceforth refer only to the Law Courts.

[53] The security program was implemented at the suggestion of an *ad hoc* committee known as the Law Courts Security Committee (the committee) comprising judges from the Court of Queen's Bench and the Provincial Court, as well as court officials and sheriff's officers. The program obliges every person who enters the Law Courts complex through either of the two public access points, other than persons such as court personnel (who enjoy "preclearance"), to submit to a personal security check. Approximately 1,500 persons per day enter the Law Courts after having gone through a security check.

[54] The appellant (Gillespie) (no stranger to the courts) had been convicted in August, 1998, very shortly after the security program was instituted, of breach of probation and ordered to attend on September 15, 1998, for sentencing. He refused to be searched as a condition of entering the Law Courts complex and in consequence a warrant issued for his arrest. Gillespie and another, one David Lindsay, then challenged the validity of the security program in the Court of Queen's Bench seeking a declaration that their rights to be secure against unreasonable search and seizure were violated. In a decision delivered April 23, 1999 (*R. v. Lindsay* (1999), [1999 CanLII 14150 \(MB KB\)](#), 137 Man. R. (2d) 68), Steel J. upheld the security program. Central to her reasoning was that (at para. 98):

... a superior court's inherent jurisdiction to control its process extends to ensuring that the courthouse is a safe place where all members of the public may have access to the justice system without fear of physical violence.

[55] Gillespie and Lindsay then appealed. When the appeal came on for hearing on November 22, 1999, Lindsay did not appear and argument proceeded only with respect to Gillespie. (On January 31, 2000, Lindsay's appeal was allowed by consent.) By judgment delivered December 24, 1999 ([1999 CanLII 4707 \(MB CA\)](#), [1999] M.J. No. 562 (QL) [reported as *R. v. Lindsay* (1999), 182 D.L.R. (4th) 599, 141 C.C.C. (3d) 526]), this Court concluded (at para. 40):

... the arbitrary searches conducted at the Winnipeg Law Courts under the program violate the citizen's [Charter](#) right to be secure against unreasonable search or seizure.

[56] Steel J., the Court opined, erred (at paras. 21, 22):

... in finding that "the program was authorized by law" for the simple reason that there is nothing on the record to establish that the court, or a judge thereof, exercised that jurisdiction in recommending or approving the implementation of the program. There is no rule, no order, no direction to record the collective action of the court or the judicial act of a judge of the court.

[22] Indeed, whatever direction was given in this case was given by an *ad hoc* committee comprised, in part, of persons not members of the court. Without enabling legislation, such a committee cannot be clothed with jurisdiction to authorize a general search such as that challenged in this case.

[57] Significantly, the Court accepted that (at para. 25):

[25] Security in courthouses — for the courts and their staff, for parties and witnesses in civil and criminal proceedings, and for the public and media, whose presence ensures that "citizens [will] enjoy the benefits of the rule of law under the protection of an independent judiciary" [the words of the court in *B.C.G.E.U. v. British Columbia (Attorney General)* (1985), [1985 CanLII 143 \(BC CA\)](#), 20 D.L.R. (4th) 399 at 401 (B.C.C.A.)] — is a proper concern for the judges of the courts. The authority of the Court of Queen's Bench, or of a judge thereof, to invoke the inherent jurisdiction of the court to address security issues is not in doubt.

[58] The Court delivered a strong "hint" as to what might be done (at para. 37):

It is a matter of notorious fact that security in the buildings that house the courts is a matter of real, and sometimes pressing, concern — not just for the courts, but also for the government that is constitutionally responsible for the administration of justice in the province. It may well be that a statute or properly sanctioned subordinate legislation authorizing a perimeter security program similar to the program that is presently challenged would be found to be reasonable.

[59] Finally, the Court declined to suspend the declaration of invalidity since (at para. 41):

A statutory provision has not been struck down; rather, searches carried out pursuant to the program have been declared unlawful for lack of statutory or common law authority.

[60] On December 28 and 29, 1999, the Chief Justice of the Court of Queen's Bench, ordered that the "Sheriff shall operate a security program for the inspection or screening of persons, personal belongings and baggage to prevent the unauthorized entry into the

Courthouse of objects that pose security risks” (the orders). The orders by their terms defined a “dangerous object that poses a security risk” as including:

... a weapon, an explosive, an incendiary or any other object that could be used or could be intended for use to cause death or injury, or to threaten or intimidate, persons in the courthouse.

[61] The orders are stated to remain in force “until further direction of the Court or until legislative measures are implemented.” (A full copy of the order affecting the main Law Courts complex is referred to in para. 9.)

[62] Gillespie then appealed the orders of Hewak C.J.Q.B. to this Court. Argument was heard on an expedited basis on January 25th, with the Court sitting as a panel of five.

The Appeal Proceedings

[63] The filing of the appeal in these proceedings spawned a number of procedural motions.

[64] The Attorney General of Manitoba applied for an order substituting the Attorney General of Manitoba as named respondent in place of “The Chair of the Manitoba Courts Security Advisory Committee”, for an order that the appeal be struck on the ground that there was no jurisdiction to appeal directly to this Court and finally, should this Court agree to entertain the appeal and decide the issue against the respondent, a stay of such decision “for a period of six months or until legislation is passed whichever shall be earlier”.

[65] Hewak C.J.Q.B., “in his official capacity”, retained counsel who applied on his behalf for intervener standing to make submissions on the appeal as an interested party or as an *amicus curiae*. In his factum, counsel took the position that “the proper respondent in this appeal is the Chief Justice in his official capacity, or alternatively, Her Majesty The Queen in right of Manitoba, as represented by the Attorney General of Manitoba”.

[66] At the commencement of the hearing, by agreement, the party respondent was changed to “Attorney General of Manitoba”.

[67] Counsel for Hewak C.J.Q.B., Mr. McNicol, then proceeded with his application to be granted intervener status. He argued that “the doctrine of judicial immunity, which is essential to ensuring the independence of judges, does not act as a bar to the making of voluntary submissions by the Chief Justice on behalf of his Court in an appropriate case”. This case, he asserted, goes to the root of the inherent jurisdiction of the Court of Queen’s Bench as a superior court of record. Counsel for the Attorney General of Manitoba supported the application. Counsel for Gillespie, not surprisingly, opposed. The essence of his submission was that there was no need for such an intervention since counsel for the Attorney General of Manitoba was fully capable of arguing all issues before the Court. Further, it was both unprecedented and unnecessary for the “judge

appealed from” to be given the opportunity to make submissions as to the “correctness of the decision”.

[68] In the result, we unanimously dismissed the application for intervener status, but appointed Mr. McNicol *amicus curiae* for the purpose of providing assistance to this Court on the issue of the jurisdiction of the Chief Justice of the Court of Queen’s Bench to make the orders.

The Issues

[69] The first issue, a procedural one, is whether the orders of Hewak C.J.Q.B., dated December 28 and 29, 1999, are appealable. The question is whether this Court has jurisdiction to hear the appeal (and even if it does, should we exercise our discretion to do so?) or should the dispute first be returned to the Court of Queen’s Bench for a hearing pursuant to Rule 38.10(1) of the Court of Queen’s Bench Rules. This rule permits a person affected by an order made in the Queen’s Bench without notice to move to set aside or vary the order. The rule also provides that where practical the motion should be made before the judge who pronounced the order — in this case Hewak C.J.Q.B.

[70] The *amicus curiae* submitted that the orders are not appealable because they are not “an order [*sic*] made by the court” under s. 89 of *The Court of Queen’s Bench Act*, C.C.S.M., c. C280. They are rather in the nature of an administrative directive made by the Chief Justice in his capacity as the chief administrative officer in charge of the judicial functions of the court. Administrative orders such as these, by themselves, counsel argued, do not result in an appealable disposition. Only after the issue is dealt with by the Court pursuant to Rule 38.10 — at which time there will be a *lis*, a trial record, and reasons for decision — is an appeal to this Court available.

[71] Mr. McNicol strongly relied upon the decision of the British Columbia Court of Appeal in *R. v. United Fishermen and Allied Workers’ Union* (1967), 1967 CanLII 555 (BC CA), 63 D.L.R. (2d) 356, [1968] 1 C.C.C. 194. In that case, the court unanimously held that there was no right of appeal from an order made by a judge of the British Columbia Supreme Court, on his own motion, directing the respondents to show cause why they should not be committed for contempt of court, because the “order” did not make an adjudication upon a point arising during the course of litigation. Hence, the decision of the trial judge to initiate contempt proceedings was not an appealable disposition; similarly, Mr. McNicol says, neither is this one. He relies in particular upon the following passage (at p. 358):

... the orders which are appealable to this Court are only those orders which make an adjudication upon some point arising during the course of a cause of action, or an adjudication upon the merits of the action or proceedings. I do not think that it was ever intended by the word “order” or the word “rule” to give a right of appeal against a mere process that makes no adjudication upon any point. And this order, this document, does not make any adjudication upon contempt of Court. It merely calls upon the persons named to appear and show cause why they should not be convicted of the alleged contempt.

[72] Support for his argument is also found, he asserts in *B.C.G.E.U. v. British Columbia (Attorney General)*, 1983 CanLII 594 (BC SC), [1984] 1 W.W.R. 399, 2 D.L.R. (4th) 705 (B.C.S.C); 1985 CanLII 143 (BC CA), [1985] 5 W.W.R. 421, 20 D.L.R. (4th) 399 (B.C.C.A.); 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214, 53 D.L.R. (4th) 1, 44 C.C.C. (3d) 289. In that decision, McEachern C.J.S.C. issued an *ex parte* injunction order *ex mero motu* prohibiting picketing or other similar conduct at any Court of Justice within the Province of British Columbia. The order provided that any person affected by the order could apply within 24 hours' notice in writing to set aside or vary the order. The union did so apply, unsuccessfully. The issue ultimately proceeded to the Supreme Court of Canada, where the authority of Chief Justice McEachern to make such an order was upheld, given the exigent circumstances where free and uninhibited public access to the courts was being seriously interfered with. The same procedure, Mr. McNicol says, should be followed in this case *to wit*: Gillespie should first proceed back before Hewak C.J.Q.B. pursuant to Rule 38.10.

[73] Counsel for the Attorney General took a somewhat different position. While virtually conceding that this Court has jurisdiction to hear the appeal, she asserted that we ought not to do so given the total absence at the trial court level of the essential factual underpinning. She also referred to *R. v. United Fishermen* to support her argument that it was premature and undesirable for this Court to hear the appeal. In *United Fishermen* (at p. 359), the court made the following observation:

This order was in effect an *ex parte* order. The appellants were not represented when it was made. The practice is, for good reason, that where objection is taken to an *ex parte* order the person objecting to it should first move below to set it aside on the grounds of irregularity or on grounds of nullity, as the case may be. That is because the Supreme Court is a superior Court of general jurisdiction; it is master of its own proceedings. If one of the Judges of that Court has made an order *ex parte* which turns out on further consideration to have been erroneous, it is the responsibility of that Court to correct the mistake. It would be mischievous for this Court to intervene and set aside a process of the Court below before it had had an opportunity to rectify any mistake. On that ground also I think this appeal would be premature, even if we had jurisdiction to hear it.

[74] Mr. Gillespie's challenge should, she said, be sent back to the Queen's Bench judge who made the orders to establish the appropriate evidentiary base and to provide this Court with the benefit of reasons for judgment.

[75] Counsel for Gillespie argued that since the orders were being attacked on the basis that they were made without jurisdiction, this Court had authority to hear the appeal, and ought to given the unique circumstances including that this appeal is the sequel to the earlier decision of this Court in *Lindsay*.

[76] In my opinion, this Court has jurisdiction to hear the appeal and should do so. The orders of Hewak C.J.Q.B. are not akin to a practice direction (see Master I.H. Jacob, Q.C., "The Inherent Jurisdiction of the Court" (1970), 23 Curr. Legal Probs. 23 at p. 37), or

the initiation of judicial process before the court as was the case in *United Fishermen*. As the court observed in *United Fishermen* (at p. 358):

Rules fall into two categories, a rule absolute and a rule *nisi*. A rule absolute is one that is operative forthwith and constitutes an adjudication upon some point at some stage in an action or a proceeding; a rule *nisi* does not. It merely indicates that the Court is satisfied that a *prima facie* case has been made out to justify calling upon the other side to make answer at the time and place indicated to the contention upon which the rule was founded. If the party does not appear when called upon, or if he does not show good grounds for setting aside the rule, the rule becomes absolute and it then constitutes an adjudication upon the matters in dispute and then becomes appealable. No case has been cited, I doubt if any can be found, certainly there are none to my knowledge where a rule *nisi* has been appealed, and the use of rules continued in some phases of practice after the process of appeal had been established.

[77] Nor is this a case like the *British Columbia Government Employees' Union* decision where the court proceeded entirely on its own initiative, but invited the parties to return to the court on very short notice to have the issue litigated in the usual way. These orders purport to be in effect until further order of the court or action by the Legislature.

[78] The impugned orders are described as such and have immediate effect upon the legal rights of all persons who use the courthouse facilities. To borrow the language of *United Fishermen*, each order is an order absolute, not an order *nisi*. There is no serious suggestion that this Court does not have an adequate factual foundation to enable us to decide the issues before us. If needed, ss. 24 and 25 of *The Court of Appeal Act*, C.C.S.M., c. C240, give this Court all the authority and jurisdiction of the Court of Queen's Bench.

[79] I reject this argument.

[80] This then brings us to the central dilemma before us: does the Chief Justice of the Court of Queen's Bench possess the inherent authority to make the orders restoring the courthouse perimeter security system, or must we wait for the Legislature to act?

Argument

[81] Counsel for the Attorney General of Manitoba and the *amicus curiae* both submit that the Chief Justice of the superior court, of necessity has jurisdiction to make the order. Strong reliance is placed upon two seminal articles which describe in detail the inherent jurisdiction of the court, the first by Master I.H. Jacob, Q.C., "The Inherent Jurisdiction of the Court", and the second also entitled "The Inherent Jurisdiction of the Court" (1983), Aus. L.J., vol. 57, at 449, by Keith Mason, Q.C. The scholarly paper by Master Jacob, in particular, has been relied upon in numerous decisions in Canada and elsewhere. Of particular relevance, as I shall shortly analyze in more detail, are the following extracts from the article by Master I.H. Jacob, Q.C. (at p. 23):

The inherent jurisdiction of the court may be invoked in an apparently inexhaustible variety of circumstances and may be exercised in different ways. This peculiar

concept is indeed so amorphous and ubiquitous and so pervasive in its operation that it seems to defy the challenge to determine its quality and to establish its limits.

And (at p. 27):

... the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called “inherent.” This description has been criticized as being “metaphysical,” but I think nevertheless that it is apt to describe the quality of this jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law.

(Hereinafter “the extract”.) And finally (at pp. 27-28):

The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.

[82] The Attorney General and the *amicus curiae* assert that it has long been established in the United States that courts have the inherent jurisdiction to ensure secure court facilities, personnel, equipment and services. See Richard W. Carter, “Keeping a Secure Courthouse” (1993), 76(6) *Judicature* 314 at 315, and the authorities referred to therein. It cannot be doubted, they say, that the court’s inherent jurisdiction can be invoked in circumstances other than those involving parties before the court in litigation. See, for example, *Ladner Downs v. Thauberger*, 1980 CanLII 504 (BC SC), [1983] 5 W.W.R. 522 at 533, 149 D.L.R. (3d) 21 (B.C.S.C.).

[83] Reference was also made by Mr. McNicol to s. 24(1) of *The Court of Queen’s Bench Act*, S.M. 1988-89, c. 4, which states:

Duties of the Chief Justice

24(1) The Chief Justice shall be responsible for the judicial functions of the court, including direction over sittings of the court and the assignment of judicial duties, and may assign to the judges of the court other duties relating to the administration of justice for the purposes of an Act of the Legislature.

[84] One of the “judicial functions” of the court under s. 24(1) of *The Court of Queen’s Bench Act* it is said is to ensure, to the extent reasonably possible, a secure courthouse within which the public can have safe access, and judges can preside and work. In *R. v. Valente*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673, 24 D.L.R. (4th) 161, 23 C.C.C. (3d) 193, the Supreme Court held that institutional independence is an essential element of judicial independence. Personal security too, they argue, is an essential prerequisite to the exercise of the judicial function, since the lack of personal security impairs and undermines the ability of the judiciary to judge impartially.

[85] No authority need be cited to support the proposition that an individual judge in a particular case can mandate such security as is reasonably necessary, and that the

legitimate requirements in such circumstances may extend beyond the four corners of the courtroom itself to include, if deemed necessary, the entire courthouse. Why then, counsel say, should the Chief Justice of the Court of Queen's Bench in the exercise of the superior court's inherent jurisdiction not be able to take the next logical step and mandate a reasonable scheme, intended only to protect the security of all persons who use the facility, in order to provide safe public access to the courts?

[86] In an intriguing and innovative argument, counsel for the Attorney General suggested that in considering the proper limits of the inherent authority of the court of superior jurisdiction on the one hand and, on the other, that of the Attorney General as the person constitutionally responsible for the administration of justice within the province, it is critical to recognize that there is a "grey area" of overlapping responsibility between the two jurisdictions, which is difficult if not impossible to define with precision. One benefit of this "vagueness" is that it enables either the Attorney General or the Court to act if required when there is a pressing and serious concern that impacts on the administration of justice in an area where there is joint responsibility. Potential conflict, for the most part, is avoided because of mutual respect and cooperation between the Attorney General and the judiciary. While the Attorney General and the judges may not always agree on the details and limits of each other's jurisdiction in these uncharted waters, here the Attorney General (perhaps uniquely) is entirely supportive of Chief Justice Hewak's use of inherent jurisdiction. This is due to the fact that the jurisdiction of the individual judge acting in a particular case is simply not adequate to protect public safety and ultimately the rule of law, and the order preserves the security system already in place, funded by government.

[87] It is acknowledged that the more appropriate long-term solution is for the government to enact legislation (an initiative that the government has publicly committed to promptly facilitate) with appropriate regulations mandating the courthouse perimeter system for all users and occupants of the facility. But time will not wait. The pressing public interest requires the continuation of the present system.

[88] The arguments in favour of the assertion of inherent jurisdiction by Chief Justice Hewak are all rejected by Gillespie. It is pointed out that the "blanket orders" of the Chief Justice affect all three levels of court that use the premises and not just the Court of Queen's Bench. It imposes upon the public, it is argued, the very system that this Court declared on December 24, 1999, to be invalid because it was not authorized by law. This is essentially a matter of policy and in the circumstances only the Legislature has the ability to act. Indeed, Mr. Histed says, only Parliament can do so since he maintains, quite wrongly in my view, that this dispute is in essence a matter of criminal law and hence within the exclusive authority of the federal government. If there should be a hiatus between the striking down of Chief Justice Hewak's orders and the enactment of the appropriate legislation and regulations, then so be it — despite the evidence of numerous dangerous articles "left" with the sheriff's officers by persons passing through the

perimeter security system. (For further particulars see the extensive reasons for judgment of Steel J., at the trial of Gillespie (at [1999 CanLII 14150 \(MB KB\)](#), 137 Man. R. (2d) 68). Finally, it is said, there has been no recorded incident of a person actually being threatened or injured as a result of the use of a weapon in the courthouse complex.

Decision

[89] While undoubtedly there are policy components to the jurisdictional dilemma before us — as indeed there are in many aspects of court administration — in my opinion, it is a legitimate exercise of the judicial function for the Chief Justice of the superior court of inherent jurisdiction, in the circumstances, to make these orders. Who better to fill the lacuna or void that would be left by the complete demise of the courthouse perimeter security system that has been in place now for almost a year and a half. A reasonable courthouse security system is necessitated by the reality described by this Court in the first Gillespie decision as (at para. [37](#)):

... a matter of real, and sometimes pressing, concern — not just for the courts, but also for the government that is constitutionally responsible for the administration of justice in the province.

[90] While it is true that the Chief Justice of the Court of Queen's Bench does not, by virtue of this high office alone, acquire additional inherent power and authority beyond those of a puisne judge of the Court of Queen's Bench:

... it is the Chief Justice of each superior court who manages the relationship between the court and the government which is responsible for the administration of justice in that jurisdiction. It is that relationship which carries the most obvious risks to the independence of the judiciary. The Chief Justice, therefore, has a unique responsibility, which is not shared with the puisne judges, for safeguarding the independence of the judiciary. [Professor Peter W. Hogg, "The Role of a Chief Justice in Canada" (1993), 19 *Queen's Law Journal* 248 at 249.]

[91] In this sense he is "unlike a puisne judge" (at p. 259). Hence, in my view, he is the appropriate, if not the only judge with the authority and responsibility to make the orders in question.

[92] The inherent jurisdiction of the court has been invoked in support of orders remedying denials of natural justice, controlling the conduct of proceedings, preventing steps being taken that would render judicial proceedings inefficacious, preventing abuse of process and so forth. It has been said that "it is a power which is exercisable in any situation where the requirements of justice demand it". See *Tringali v. Stewardson Stubbs & Collett Ltd.* (1966), 66 S.R. (N.S.W) 335 (S.C.) at 344, cited with approval in the Mason article.

[93] Master I.H. Jacob, Q.C., in his widely endorsed article earlier referred to, summarized the matter thusly (at pp. 51-52):

... the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the

observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

.

It may be objected that this view of the nature of the inherent jurisdiction of the court postulates the existence of an amplitude of amorphous powers, which may be arbitrary in operation and which are without limit in extent. The answer is that a jurisdiction of this kind and character is a necessary part of the armoury of the courts to enable them to administer justice according to law. The inherent jurisdiction of the court is a virile and viable doctrine which in the very nature of things is bound to be claimed by the superior courts of law as an indispensable adjunct to all their other powers.

[94] The research that I have seen persuades me that this pragmatic but robust view of the nature and extent of inherent jurisdiction is entirely consistent with recent Canadian decisions.

[95] In *MacMillan Bloedel Ltd. v. Simpson*, [1995 CanLII 57 \(SCC\)](#), [1995] 4 S.C.R. 725, 130 D.L.R. (4th) 385, 103 C.C.C. (3d) 225, the issue before the Court was whether Parliament, in the exercise of its criminal law power, could confer upon youth courts the exclusive power to try youths for contempt *ex facie* of superior courts. Lamer C.J.C., for the majority, concluded that it was an unconstitutional dilution of the authority of a superior court to deprive the court of its power to punish for contempt. He noted that (at para. 38):

The core jurisdiction of the provincial superior courts comprises those powers which are essential to the administration of justice and the maintenance of the rule of law.

[96] Because superior courts are central to our constitutional and judicial system, it follows that “to fulfil that central role, they must have the powers which are part of their essence as superior courts” (at para. 36).

[97] He cited with approval Master Jacob’s article, including the extract referred to in para. 81 of these reasons, and summarized (at para. 30):

While inherent jurisdiction may be difficult to define, it is of paramount importance to the existence of a superior court. The full range of powers which comprise the inherent jurisdiction of a superior court are, together, its “essential character” or “immanent attribute”. To remove any part of this core emasculates the court, making it something other than a superior court.

[98] The extract from Master Jacob’s article has been referred to with approval in numerous other Supreme Court cases. In *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988 CanLII 3 \(SCC\)](#), [1988] 2 S.C.R. 214 itself, the extract was cited by Dickson C.J.C. in support of the proposition that the courts have jurisdiction to defend their own authority. See as well *R. v. Rose*, [1998 CanLII 768 \(SCC\)](#), [1998] 3 S.C.R. 262, 166 D.L.R. (4th) 385, 129 C.C.C. (3d) 449; *R. v. Hinse*, [1995 CanLII 54 \(SCC\)](#), [1995] 4 S.C.R. 597, 130 D.L.R. (4th) 54, 102 C.C.C. (3d) 289; and *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986 CanLII 66 \(SCC\)](#), [1986] 1 S.C.R. 549, 27 D.L.R. (4th) 406.

[99] An interesting reference to Master Jacob's article occurred in *R. v. Morales*, [1992 CanLII 53 \(SCC\)](#), [1992] 3 S.C.R. 711, 77 C.C.C. (3d) 91, a criminal appeal which dealt with the constitutional validity of certain bail provisions in the *Criminal Code*. In reasons by Gonthier J. (for himself and L'Heureux-Dubé J.), concurring in the result, he concluded that the denial of bail was not part of the punishment or retribution process, but rather resulted from a process which safeguards the proper functioning of the judicial system. In his discussion of the inherent jurisdiction of the court, he acknowledged that (at p. 754):

... the common law has traditionally allowed special recognition of the fact that the adjudication of questions relating to the process and due administration of the court is to be handled as a matter relating to the administration of justice and, as such, on a case by case basis.

However (at pp. 754-55):

This inherent jurisdiction of the court includes not only the common law offence of contempt of court, for example, but also extends to the power of the court in relation to the regulation of process and the exercise of powers by summary process following an abuse of process. (See further: I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *C.L.P.* 23.) The importance of these rules [the power of the court in relation to regulation of its own process] is evident in their direct relationship with the citizen's right to access to justice, and the multiplicity and breadth of considerations which are brought to bear in this area of the law ought to be understood as a reflection of the fact that "the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority . . ." (Jacob, *supra*, at p. 27 [part of the extract]). The nature of the application of these rules reflects the requirement that they be reasonably flexible and applicable even in unforeseen and unusual circumstances.

[100] There are, of course, significant limits — it is a judicial power which "because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case" (*Montreal Trust Co. v. Churchill Forest Industries (Manitoba) Ltd.*, [1971 CanLII 960 \(MB CA\)](#), [1971] 4 W.W.R. 542 at 547, 21 D.L.R. (3d) 75 (Man. C.A.)). Similarly, in *R. v. Unnamed Person* (1985), [1985 CanLII 3501 \(ON CA\)](#), 22 C.C.C. (3d) 284 (Ont. C.A.), Zuber J.A., writing for the court, cautioned that (at p. 286): "The limits of this power are difficult to define with precision but cannot extend to the creation of a new rule of substantive law."

[101] In *W. v. W.*, [1997] E.W.J. No. 1739 (QL) (Eng. C.A.), the court cautioned that there is a distinction between a procedural power which is necessary to control courts' process and a substantive power affecting the legal right of the parties. As was noted (at para. 20):

There is powerful authority rejecting the contention that the inherent jurisdiction of the court confers a general residual discretion to make any order necessary to ensure that justice be done between the parties.

[102] Not surprisingly then, courts must be extremely cautious when asked to extend the scope of inherent jurisdiction to novel circumstances: *Montreal Trust*.

[103] Other jurisdictions have also adopted the extract from Master Jacob's article. In *Taylor v. Attorney-General*, [1975] 2 N.Z.L.R. 675, the New Zealand Court of Appeal

considered whether a judge had the inherent jurisdiction to prohibit the publication of information that would lead to the identification of members of the New Zealand security service. Wild C.J. answered the question in the affirmative because (at p. 679):

... the Judge was, in my opinion, bound to recognise and give effect to the will of Parliament as reflected in the Act that the security service should be maintained as an effective instrument to protect national security. Having regard to the nature of the charge and the evidence in the depositions there was plainly ample ground for the view that public disclosure of the names of the witnesses would impair the effectiveness of the security service to carry out that statutory function.

In other words, the order was necessitated by the public interest.

[104] Richmond J., concurring, was also of the view that safety of the witnesses was of primary concern. He concluded that the prohibition order was (at p. 684):

... linked with the administration of justice because the need for the direction arose from the attendance of the officers to give evidence at a trial in open Court and also because the interests of justice, as a continuing process, required the effectiveness of the service to be preserved.

[105] Woodhouse J., while dissenting in the result, agreed that (at p. 691):

... the particular power to exclude the public is one to be exercised not for the sake of individual litigants or witnesses but in the interests of the administration of justice itself.

[106] In a recent article, not referred to by counsel, Professor M.S. Dockray, "The Inherent Jurisdiction to Regulate Civil Proceedings" (1997), 113 L.Q.R. 120, attempted to "pin down" the concept of "inherent jurisdiction". He commenced his analysis by lamenting that (at p. 120):

There is no clear agreement on what it is, where it came from, which courts and tribunals have it and what it can be used for. The law reports are full of apparently contradictory statements on these questions. In this area, there is little which can be said with complete confidence; the uncertainty of the law is almost the only thing which is never in doubt.

[107] One reason for the "lack of agreement", he argues, is that the concept of inherent jurisdiction is used in a variety of ways and does not always mean the same thing. "[T]he factors which connect all the so-called inherent jurisdictions are therefore weak" (at p. 121).

[108] Dockray postulates an alternative theory to the oft-cited extract from Master Jacob which is that (at p. 126):

... inherent powers exist because they are necessary if the court in question is to manage the work which has been assigned to it in an appropriate fashion ...

and suggests, based on his analysis of English decisions including *Connelly v. Director of Public Prosecutions*, [1964] A.C. 1254 (H.L.), that (at pp. 126-27):

... it seems that inherent powers do not grow out of substantive jurisdiction, but rather arise at common law as the legal incidents of that jurisdiction.

[109] He concedes, however, that his version, while avoiding “metaphysical debate about the immanent attributes of superior courts”, “leaves the crucial question of the limits of the jurisdiction unanswered”. In addressing himself to these limits, he rejects the notion that “inherent jurisdiction is an unlimited reservoir from which new powers can be fashioned at will”, or that inherent powers can be defined by simply looking at the functions of a superior court. Instead, he suggests the general approach should be the same as with any other question of common law.

[110] There will, of course, be novel cases. With respect to these, he expresses a preference for major innovations or “revolutions” to be introduced by legislation or (if procedural) by rules of court, but even here he concedes that his preference “is clear in many but by no means all of the decisions”, and that “major innovations in procedural law should therefore be recognized as an institutional responsibility”.

[111] Important factors in novel cases (at pp. 130-31):

... include the contribution which the proposed power could make to the effective administration of justice in the substantive and procedural context in which the rule would be applied — “reasonable necessity” seems to be a popular standard in this context, the impact which the proposed power would have on persons subject to it, the importance of the rights thereby affected and the extent to which those rights could be protected by the provisions of an express order by the court; the degree of confidence with which the court can determine where the balance of fairness lies.

[112] In his concluding remarks, he makes a plea that inherent jurisdiction be treated not as a “kind of ubiquitous judicial prerogative originating in the ineffable spirit of the court, but rather as a rationale collection of related common law, powers each of which has a separate history, aims and boundaries” (at p. 132).

[113] Little assistance can be gleaned from consideration of American jurisprudence. Not only are the authorities conflicting, but the United States operates under a distinctly different constitutional regime from Canada. For example, in *Kelley v. Diana* (unreported, December 14, 1998, N.J. Superior Court (App. Div.) File A-1795-97T5) it was concluded that a single judge did not have the authority to mandate when a court facility would be kept open (every Tuesday night in that instance). But in *Board of County Commissioners of Weld County v. 19th Judicial District*, 895 P.2d 545 (Colo. 1995) (S.C.), it was held that the Chief Judge, invoking the “inherent powers doctrine”, had the authority to require the sheriff to provide courthouse security (but did not possess the authority to direct the Board of County Commissioners to pay for it).

[114] In the reasons of Twaddle J.A. (the majority), it is firstly stated that the inherent jurisdiction of a superior court is confined to circumstances where it is exercised “as an incident of, and in the course of exercising, the ordinary jurisdiction of the court”. Secondly, it is suggested that the orders impugned in this case are the very antithesis of the order made in *B.C.G.E.U.* essentially because the absence of a perimeter security

system does not “constitute an immediate or significant threat to the court’s ability to function”.

[115] I respectfully disagree with both propositions. As to the first, while it is correct to say that the doctrine should be used cautiously and sparingly in non-traditional circumstances, I do not agree that the broad interpretation of inherent jurisdiction as explained by Master Jacob some thirty years ago, so often endorsed by Canadian courts, is now to be so narrowly confined. I cite as one example the ability of trial judges to control the proceedings before them, including the ordering of security which can hardly be described as a mere adjunct or procedural enabler of a common law or statutory right; another is the courts’ inherent *parens patriae* jurisdiction over children.

[116] I acknowledge that the inherent jurisdiction of the court is traditionally invoked as an adjunct or aid to an existing common law or other right and that in such circumstances its effect is in the nature of a procedural remedy. This, in my opinion, is not its exclusive role. Its use can also be justified in novel circumstances where the failure to do so will adversely impact upon the court’s ability “to administer justice according to law” (Master Jacob, at p. 52). It is in this sense that the existence of an amorphous, indefinable residual power in a superior court becomes not a weakness, but a strength. This is because it is truly impossible to define with any sense of finality (and undesirable to attempt to do so) the circumstances in which this essential reserve of judicial powers should be utilized on a principled basis in the interests of justice.

[117] I conclude from all of the above that in certain unique and exigent circumstances, of which this is one, a superior court possesses the inherent jurisdiction to invoke its own “residual source of powers” (Jacob, at p. 51) when it is essential to enable it to preserve or maintain the essential role of the court itself as the institution responsible for maintaining the rule of law. What is being mandated here is the preservation of a government-funded system that is already in place; there is thus no conflict with existing statutory provisions. To suggest in circumstances such as these that the superior court is powerless to act and must wait for another branch of government to do what is essential to ensure safe public access to justice, is to risk a denial of the rule of law itself.

[118] As to Twaddle J.A.’s (the majority’s) second point, access to justice is an illusory concept if the public at large, to say nothing of the judiciary and court staff, have legitimate concerns about personal safety within a court facility. It is a notoriously well-known fact that persons come to a courthouse for a variety of reasons — some by choice and some not. Some are neutral spectators; some are partisan in a particular cause, or have a grievance, real or imagined, with authority. Emotions sometime run high. In the complicated and confrontational society that we live in, it is no answer to simply say, “There is no problem because an incident has not yet occurred.” Such a response is cold comfort to those persons with real or perceived concerns about their safety and security.

[119] With respect to this safety issue, it is helpful to note that United States courts now take judicial notice about the risk of courthouse violence. For example, in *Commonwealth v. Harris*, Mass., 421 N.E.2d 447 (S.C. 1981), the court noted (at para. 12):

We take judicial notice, as have other courts, that threats of violent acts directed at courthouses have given rise to an urgent need for protective measures.

[120] In *Gibson v. State*, 921 S.W.2d 747 (Tex. App.-El Paso, 1996) the court, in an extensive analysis, emphasized (at para. 34):

If we demand that the public at large come onto the courthouse premises to participate in the administration of justice, we have a duty to ensure minimal levels of protection during their participation. And while justice should eternally blind itself to differences in race, ethnicity, gender, and economic disparity, it cannot be blind to the reality of potential violence.

[121] Finally, in *Ryan v. County of DuPage*, 45 F.3d 1090 (7th Cir., 1995), the court recognized (at p. 1095):

... the high social value that society properly attaches to assuring that a courthouse is a place in which rational reflection and disinterested judgment will not be disrupted by intimations of violence.

[122] See as well *Legal Aid Society of Orange County v. Crosson*, 784 F.Supp. 1127 (S.D.N.Y., 1992) (Dist. Ct.); *McMorris v. Alioto*, 567 F.2d 897 (1978); and *State v. Kurth*, 981 S.W.2d 410 (Tex. App.-San Antonio, 1998). These cases all simply confirm the obvious, namely that because a courthouse can be a very dangerous place, the court has an obligation to do what is reasonably necessary to see to it that the premises are safe.

[123] The decision of the Australian Federal Court of Appeal in *Re Edward Thomas Skuse and Commonwealth of Australia*, No. NTG 7 of 1985, provides some helpful commentary. A barrister shot by an intruder in a courthouse sued the Commonwealth of Australia alleging a breach of the duty of care in failing to provide adequate security. In dismissing the claim for negligence, the court considered the role of the judiciary with respect to security in court facilities. While acknowledging that the judiciary usually relies on the other branches of government “to ensure the security of courts and those within them”, the court also noted (at para. 20):

But Judges, not the Executive or the Legislature, control activities within their Courts. They control the conduct of proceedings within them and the behaviour of those who are before them.

[124] While practical details are normally left to the government to administer, the court acknowledged that the line between the responsibility of the judges and that of government (at para. 20):

... is necessarily blurry, and it is sensible that this is so. These are delicate matters requiring care and respect on the part of all concerned. They demonstrate that the preservation of public safety within Courthouses is closely associated with matters of policy which involve the various arms of Government and which do not fit happily with the general law of negligence resting, as it does, upon the standards of the reasonable man.

[125] In the end, the court emphasized (at para. 21):

It is not only a question of securing courthouses or those within them for the sake of the buildings themselves and the lives of their occupants; it is vital to a civilised society that the Judicial arm of Government operates and is seen to operate in an atmosphere of security and calm.

[126] In short, while the details and administration of court security are ordinarily matters for government policy, courts too have a real responsibility, and a duty to act, if required.

[127] I am persuaded by the argument advanced on behalf of the Attorney General of Manitoba that the judiciary and the Attorney General collectively have an obligation to facilitate safe access to the courts of Manitoba in order to uphold the rule of law.

[128] In the circumstances before us, the judiciary must have the ability in the absence of an appropriate and reasonable legislative initiative to fill the void. To do less, or as Gillespie would have it, to do nothing, would be tantamount to a surrender of the court's inherent responsibility for its own mandate. I agree with the respondent that security, in this sense, is an essential element of judicial independence. The failure to recognize that there is an obligation to provide a secure and effective environment for all members of the public, whether witnesses, general members of the public, staff or judges, places at risk not only access to justice, but the ability of the judiciary to provide impartial justice for all.

Reasonableness

[129] Having determined that the courthouse perimeter security system is now "authorized by law" as a result of the order of Hewak C.J.Q.B., the only remaining question is whether the security scheme is reasonable. As this Court noted in *Gillespie/Lindsay* (at para. 26):

[26] While this authority, founded in the common law, is undoubted, a particular action taken, or a program implemented, by the court, or a judge thereof, to ensure that justice will be administered without obstruction or interference would, in my view, have to meet a test of reasonableness.

See *R. v. Caslake*, 1998 CanLII 838 (SCC), [1998] 1 S.C.R. 51, 155 D.L.R. (4th) 19, 121 C.C.C. (3d) 97; *R. v. Simmons*, 1988 CanLII 12 (SCC), [1988] 2 S.C.R. 495, 55 D.L.R. (4th) 673, 45 C.C.C. (3d) 296. The issue is one of proportionality, the key question being whether the terms of the restraint upon one's liberty (security of the person) are proportional to the perceived harm. The order attempts to establish some criteria particularly in para. 3 thereof which reads:

For the purposes of this Order, a dangerous object that poses a security risk includes: a weapon, an explosive, an incendiary or any other object that could be used or could be intended for use to cause death or injury, or to threaten or intimidate, persons in the courthouse.

(I observe that it might have been better to have used the word "means" rather than "includes" in the first line.) I agree that unlimited powers create by definition an unreasonable search, but there is no evidence that that is the situation here.

[130] Some discussion took place before this Court during argument about the failure of the courthouse security staff to provide a depository or a place of safekeeping where items that are lawful, but nonetheless potentially harmful in a courthouse environment — such as penknives and scissors — could be reclaimed upon departure from the facility. There is, however, no clear evidence on the record concerning this, nor is it clear how such a system might operate within the existing scheme, and the requirement, if any, for additional staff and other administrative details.

[131] Under the circumstances, I am not persuaded that the courthouse perimeter scheme authorized by the orders of Hewak C.J.Q.B. is unreasonable. This does not, of course, preclude a subsequent application supported by evidence, challenging the reasonableness of the security program.

The Stay

[132] As earlier noted in the decision in *Gillespie/Lindsay*, this Court declined to order a stay because, to put it bluntly, there was “nothing to stay”, since the security system was not authorized by law. In *R. v. Feeney*, [1997 CanLII 343 \(SCC\)](#), [1997] 2 S.C.R. 117, 116 C.C.C. (3d) vi, the Supreme Court ruled that the police needed to obtain a warrant before entering a dwelling house to make an arrest. Although the Court was dealing with a common law practice rather than a legislature provision, the Court granted a stay of its order for a period of six months in the following terms: “the operation of that aspect of the judgment herein relating to the requirement for a warrant to effect an arrest in a dwelling is stayed for a period of 6 months from the date such judgment was issued” (at para. 1).

[133] The Attorney General invites this Court to follow suit. (See as well [s. 26\(1\)](#) of *The Court of Appeal Act* which authorizes this Court upon appeal to “make such further or other order as is deemed just”.)

[134] But here, says Gillespie, there is no common law rule that already existed to be stayed. The status quo to be protected (and the “common law” position) is that there should be no security system. We are being asked, it is suggested, to permit the very scheme declared to be illegal on December 24th.

[135] I disagree. The status quo to be preserved is that of the courthouse perimeter security system that has been in place for a year and a half to the advantage of the public.

[136] Consideration of public safety and the preservation of the rule of law are clearly relevant considerations in determining whether a court should grant a temporary suspension of a declaration of invalidity. In *Schachter v. Canada*, [1992 CanLII 74 \(SCC\)](#), [1992] 2 S.C.R. 679 at p. 719, 93 D.L.R. (4th) 1, Lamer C.J.C., for the majority, wrote that even when striking down a law had been deemed the most appropriate constitutional remedy, temporary suspension was warranted when the failure to enact something in its place “would pose a danger to the public” (at p. 719). Furthermore, in considering whether

a stay (as opposed to any other relief) should be granted, I fail to see a distinction between a law that is invalid because it is declared to be unconstitutional and one that is invalid because it was made without jurisdiction. [Section 52\(1\)](#) of the [Constitution Act, 1982](#) clearly states that the Constitution of Canada is supreme and that any law inconsistent therewith is “of no force or effect”. In other words, they are both nullities.

[137] In addition to *Schachter*, there are a number of other decisions of the Supreme Court in which a declaration of invalidity was temporarily suspended. In *R. v. Swain*, [1991 CanLII 104 \(SCC\)](#), [1991] 1 S.C.R. 933, 63 C.C.C. (3d) 481, the majority of the Supreme Court provided for a six-month “period of temporary validity” after declaring the existing provisions of the [Criminal Code](#) requiring detention of a person acquitted on the ground of insanity to be unconstitutional. In *R. v. Bain*, [1992 CanLII 111 \(SCC\)](#), [1992] 1 S.C.R. 91, 87 D.L.R. (4th) 449, 69 C.C.C. (3d) 481, a declaration of invalidity pronounced with respect to the provisions of the *Criminal Code* that allowed the Crown but not the accused to “stand by prospective jurors” was suspended for six months to permit Parliament to remedy this situation if it chose to do so. See as well *Rodriguez v. British Columbia (Attorney General)*, [1993 CanLII 75 \(SCC\)](#), [1993] 3 S.C.R. 519, 107 D.L.R. (4th) 342, 85 C.C.C. (3d) 15.

[138] As an interesting aside, it should be noted that Iacobucci J., writing for himself and Cory J., for the minority, in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995 CanLII 64 \(SCC\)](#), [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1, 100 C.C.C. (3d) 449, at para. 190, while agreeing with the majority that the government’s products control legislation was unconstitutional, would have suspended the declaration of invalidity for a period of one year. To do otherwise, they reasoned (at para. 192):

... would permit the tobacco companies the untrammelled ability to advertise until minimally impairing legislation is drafted; *the suspensive veto would permit the government to design such legislation while the status quo remains in force.* [Emphasis added.]

[139] Public interest is clearly a valid consideration when dealing with an application for an interlocutory stay. See *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987 CanLII 79 \(SCC\)](#), [1987] 1 S.C.R. 110 at p. 146, 38 D.L.R. (4th) 321 *sub nom. Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, as is preservation of the status quo: *Exco Corp. v. Nova Scotia Savings & Loan Co.* (1987), [1987 CanLII 9356 \(NS CA\)](#), 79 N.S.R. (2d) 29 (S.C., App. Div.).

[140] All these factors militate in favour of granting the shortest possible stay to permit the appropriate legislative intervention.

[141] If necessary I would be prepared to grant a stay for a period of not more than two months or until the appropriate legislation is in place, whichever comes first.

Appeal allowed.

Tab 103

Reilly v. Wachowich, 1999 ABQB 309 (CanLII)

Source: Court of King's Bench of Alberta
Date: 1999-04-26
File number: 9801-08707
Other citations: [1999] 11 WWR 378 — 234 AR 1 — 71 Alta LR (3d) 214 —
64 CRR (2d) 57
Citation: Reilly v. Wachowich, 1999 ABQB 309 (CanLII),
<<https://canlii.ca/t/5p8x>>, retrieved on 2026-03-23

Reilly v. Wachowich, 1999 ABQB 309

Date: 19990426
Action No. 9801-08707

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

THE HONOURABLE JOHN D. REILLY,
JUDGE OF THE PROVINCIAL COURT OF ALBERTA

Applicant

- and -

THE HONOURABLE EDWARD R. WACHOWICH,
CHIEF JUDGE OF THE PROVINCIAL COURT OF ALBERTA

Respondent

REASONS FOR JUDGMENT
of The Honourable Mr. Justice D.B. Mason

I. INTRODUCTION

[1] This is an extremely distressing application because it forces the Court to balance certain fundamental principles of judicial independence. It is an application by Judge John R. Reilly (“Judge Reilly”), a judge of the Provincial Court of Alberta, for judicial review of a decision by Chief Judge Edward R. Wachowich (the “Chief Judge”). The Chief Judge re-assigned Judge Reilly from Canmore to Calgary and directed that he change his residence from Canmore to Calgary. I will refer to this as the “impugned decision”.

[2] While these changes were to be effective September 1, 1998, I granted a stay pending the outcome of this application. I previously decided ([1998] A.J. No. 975, supplementary reasons [1998 ABPC 78 \(CanLII\)](#), [1998] A.J. No. 990) that this Court does have the authority to conduct a judicial review. The Court of Appeal upheld that decision ([1998] A.J. No. 1475). I ordered the Chief Judge to produce the return required by Rule 753.13 of the *Rules of Court*, which is the documentary “Record” upon which the decision was based. That Record and the parties’ arguments before me, including pre-trial briefs, form the basis for the facts outlined in this judgment.

II. ISSUES

1. Can this Court judicially review the Chief Judge’s decision? (While this was dealt with in my September 8, 1998 decision, the parties have argued some further points, which I address briefly).
2. What is the appropriate standard of judicial review in this situation?
3. Does a chief judge have the statutory or constitutional authority to re-assign a judge and order a judge to change his or her residence?
4. If a chief judge has such authority in general, was it properly exercised by the Chief Judge in this case?
5. If the Chief Judge here did have the authority to make such a decision, was he required to follow procedural fairness in making it? If so, did he meet the procedural fairness requirement?

III. SUMMARY

[3] The Chief Judge did not have the authority to make the impugned decision. Accordingly, Judge Reilly’s re-assignment to Calgary and his change of residence to Calgary cannot be implemented. The concept of “judicial independence” is vital to this case. As stated by the late Sopinka J. in an October 2, 1997 speech to the Ukrainian-Canadian Conference on Judicial Independence and Accountability, judicial independence means that “even if the government doesn’t like your decisions, you still have a job.” I would broaden that statement to include others besides the traditional concept of “government”.

[4] The character of the decision made by the Chief Judge in this case was disciplinary, not administrative, in spite of the collaboration between the Chief Judge and Assistant Chief Judge Brian C. Stevenson (“Assistant Chief Judge Stevenson”) to tie it into a proposal made to the Deputy Minister of Justice to consider closing Canmore as a base point for the Provincial Court. The Record shows that although some preliminary administrative consideration had been given to this closure issue and preliminary costing had been done, such considerations were well short of any policy formulation. No consultation had taken place with Judge Reilly as promised. No consultation with other judges or any other participant in the system who might be affected is in evidence from the Record. No consultation is shown respecting the costing of the capital investment and costs and facility use in the event of closure.

[5] All this leads to the inescapable conclusion that tying the decision to transfer Judge Reilly and direct the movement of his residence from Canmore to Calgary with the closure of the Canmore Base Point was a mere subterfuge designed to cast the decision in an administrative context in an effort to disguise that disciplinary action was being meted out.

[6] Also, the Record is clear that the decision was effectively made at the time alleged by counsel for Judge Reilly, that is on or about April 3, 1998. It was put in place by the Chief Judge over the ensuing several weeks. No effective communication was made with Judge Reilly prior to the implementation of the decision as a *fait accompli* on May 26, 1998.

[7] The Chief Judge decided not to refer this matter to the Judicial Council. On my assessment of the law and the statutory authority under the *Provincial Court Judges Act*, R.S.A. 1998 c.P-20.1 (“*PCJA*”) that was an incorrect decision. It is irrelevant whether that was motivated in part by concern for Judge Reilly, including a desire to spare him from being on report before the Judicial Council. The Chief Judge chose to deal with the problem privately. He obviously assumed he had the authority and that such corrective measures were within his jurisdiction. They were not.

[8] It is appreciated that the Chief Judge and Assistant Chief Judge Stevenson faced a dilemma. There were deep differences between the Chief Judge, Assistant Chief Judge Stevenson and Judge Reilly as to Judge Reilly’s position respecting the treatment of aboriginals in criminal law matters and the interpretation of the new provisions of the *Criminal Code* respecting sentencing of aboriginal offenders. There was also conflict over the place of “restorative justice” in sentencing. Most of the matters at issue between the Chief Judge, Assistant Chief Judge Stevenson and Judge Reilly related to what Judge Reilly had stated in his judgments. Such statements were, therefore, protected by his adjudicative judicial independence. In *Judicial Independence: The Contemporary Debate* (Dordrecht: Martinus Nijhoff Publishers, 1985), editors S. Shetreet and J. Deschênes discuss the concept of “substantive independence” (at 630), which encompasses “administrative, procedural and substantive aspects of adjudication”. They state:

Substantive independence means that in the discharge of his function a judge is subject to nothing but the law and the commands of his conscience. This aspect of the concept of judicial independence refers to the neutrality of mind of the judge, to his impartiality and his total freedom from irrelevant pressures.

I will elaborate on this concept later in these Reasons.

[9] In my assessment, the issue in the present case is not so much whether Judge Reilly had lost his objectivity. Rather, it is that the Chief Judge and Assistant Chief Judge Stevenson were divided from Judge Reilly and his jurisprudential perspective as to the proper objectives and application of the justice system in general, and sentencing principles in particular, with respect to aboriginal peoples in a criminal law setting.

[10] There is no doubt that Judge Reilly went outside of his jurisdiction in his demands for the investigation into the affairs of the Stoney Reserve under the guise of obtaining pre-sentencing material for the purposes of sentencing Hunter. This was cured by reading down the scope of the request by this Court on judicial review, through the judgment of LoVecchio J. of this Court. Judges must accept that the freedoms attached to their adjudicative independence impose concurrent responsibilities to address only those issues properly before them, along with a duty to make every effort to maintain impartiality and objectivity in dealing with the issues and parties before them.

[11] As will be explained later in these Reasons, I am unable to read into the *PCJA*, either prior to its amendments or subsequent thereto, any statutory authority which invests in the Chief Judge the administrative authority to re-designate unilaterally where a judge is to reside after the initial appointment.

[12] Counsel for the Chief Judge submits that such authority may be found in s. 2(5) and s.9 of the *PCJA*. The statute before its amendment treated the designation of the place where a judge shall have his residence by a separate section altogether - s. 13. That is the very section which the Supreme Court of Canada found unconstitutional in *R. v. Campbell*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3, ruling that it violated s. 11(d) of the *Charter* by creating a reasonable apprehension that it could be used to punish judges whose decisions did not favour the government or, alternatively, to favour judges whose decisions did favour the government.

[13] Nothing in the s. 2(5) powers can, in any way, be extended to meet the proposition of counsel for the Chief Judge. Section 2(5) is a statutory attempt to cover the area of authority of a chief judge that has developed over time as necessary for the proper administrative direction of the Court. In turn, this facilitates the proper administration of justice. Again, I elaborate on this point later in these Reasons. Section 2(5)(d) raises concern in that it provides that the Chief Judge can also exercise powers and perform duties as may be prescribed by the Lieutenant Governor in Council. Such a provision could quickly become unconstitutional; for example, if there were purported delegation of duties or powers to the Chief Judge which would encroach upon a judge's judicial independence.

[14] Section 9 of the *PCJA* purported to grant the Chief Judge a power to review the conduct of a judge, with authority to take no action, or to reprimand a judge, take corrective measures or refer the matter to the Judicial Council. It is to be noted that this section has now been repealed, although it was in force at the time that the Chief Judge decided to transfer Judge Reilly and re-designate his residence unilaterally. Based on the parallel reasoning in the *Campbell* case, the powers in s. 9 would be unconstitutional if these disciplinary powers were effected on the basis that the Chief Judge differed with the judge being disciplined in a matter relating to that judge's adjudicative judicial independence. Giving the Chief Judge any statutory or constitutional power to discipline a judge with whom the Chief Judge disagrees with respect to judgments rendered, would threaten the judge's impartiality, and create the apprehension of bias that such authority could be used to punish judges whose decisions do not conform with the personal jurisprudence of the Chief Judge or, for that matter, to reward those whose judgments do so.

[15] Therefore, nothing in s. 2(5) or in s. 9 gives the Chief Judge authority to transfer a judge from his designated circuit or residence. That power was treated by a separate section in the *PCJA* (s. 13), which section has now been ruled unconstitutional by the Supreme Court of Canada in the *Campbell* case as invasive of judicial independence. Such an intrusion would violate the core characteristic of security of tenure and the dimension of individual independence. The historical core of judicial independence must remain inviolate and unassailable by any institutional or administrative independence. Restricting the exercise of the power to transfer to a chief judge alone does not cure the defect.

[16] The current amendment to s. 13 now in place provides that only the Judicial Council may make such a determination of re-designation. Such determination would be requested by the Chief Judge and would be approved and effected by the Judicial Council only if, in its opinion, it was necessary for the better administration of justice. This seems to be an effective standard for protecting judges from overzealous disciplinary action.

IV. FACTS

[17] The Record is in two thick volumes, plus a thin addendum volume. It details many events, which the parties went through in great detail. It also contains considerable correspondence. I also note that it contains many excerpts from newspapers, which is curious. I have not drawn these facts from such media excerpts, except to note that certain events caused specific reactions in the media.

[18] I have attempted to summarize the salient facts from the Record and the arguments. It would be impossible to touch on every factual point mentioned by each party. I have, however, taken all of the facts and arguments into consideration in reaching my decision. Throughout this judgment, unless otherwise indicated, references to “Tabs” refer to the documents in the Record.

A. The *Hunter* Pre-Sentencing Decision

[19] Judge Reilly’s June 26, 1997 ruling in *R. v. Hunter* (1997), [1997 CanLII 24559 \(AB CJ\)](#), 52 Alta. L.R. (3d) 359 (Prov. Ct.) (Tab 94) sparked considerable public controversy, media interest and political response. The accused, an aboriginal, had plead guilty to a serious spousal assault. The victim was kicked, suffering cuts and severe bruises. Her face was swollen beyond recognition. Both Hunter and the victim were considerably impaired by alcohol at the time. Hunter clearly had an alcohol abuse problem. Before he would consider a proper sentence, Judge Reilly ordered a comprehensive investigation and report by the Chief Crown Prosecutor into “social conditions, political corruption, and financial mismanagement on the Stoney Indian Reserve at Morley”. He asked for answers to 17 specific questions, divided into those three categories. He said that this report was necessary for him to address the appropriate sentence, in light of s.718.2(e) of the *Criminal Code*, which requires the judge to consider all reasonable sanctions in the circumstances other than imprisonment, “with particular attention to the circumstances of aboriginal offenders”.

[20] Justice LoVecchio of this Court judicially reviewed Judge Reilly’s order, and narrowed its scope on September 26, 1997 ((1997), [1997 CanLII 14834 \(AB KB\)](#), 53 Alta. L.R. (3d) 169 (Q.B.)) (Tab 64). While LoVecchio J. found that Judge Reilly had the jurisdiction to compel evidence for the sentencing hearing, such jurisdiction is not open-ended: “There must be some logical nexus or relevance between what is being ordered to be produced and the matter under consideration.” (at 181).

[21] Justice LoVecchio also held that the sentencing judge’s experience in the community will help him or her assess what evidence is required to meet the particular blend of sentencing goals appropriate for the community (at 182). Here, LoVecchio J. characterized parts of Judge Reilly’s order as “patently unreasonable”, because they lacked the necessary logical nexus (at 183).

[22] In the result, LoVecchio J. upheld asking some of the questions (sometimes in a different form), but disallowed others. His decision was not appealed. A report was prepared based on the narrowed order.

[23] The Record contains many newspaper articles and other materials regarding the public, media and political response to Judge Reilly’s ruling (e.g., Tabs 65-93), including mention of a federal Indian Affairs probe into the allegations, triggered by Judge Reilly’s ruling (e.g., Tab 83).

B. The *Hunter* Sentencing Decision

[24] Once LoVecchio J. narrowed the scope of the investigation ordered by Judge Reilly, the investigation and accompanying report were prepared and presented to Judge Reilly for his consideration. Judge Reilly then heard submissions as to the appropriate sentence. On November 28, 1997, he gave Hunter a two year suspended sentence, with two years’ probation, on certain conditions ([1997] A.J. No. 1215 (Prov. Ct.)) (Tab 47). Judge Reilly specifically noted that he was not following the Court of Appeal’s guidelines. He gave extensive reasons, including a large

section on the circumstances of the aboriginal accused, including social, political and historical circumstances.

[25] The Court of Appeal substituted a sentence of 18 months' imprisonment, with the same probation order ([1998] A.J. No. 510 (C.A.)). This decision is not in the Record.

[26] Hunter's counsel admitted at the appeal that a suspended sentence was inappropriate, but argued for a conditional sentence. The Court of Appeal referred to other spousal assault cases, and addressed the interaction of those principles with the principles relating to conditional sentences and to aboriginal offenders. The Court held that s. 718.2(e) is only one factor to consider in imposing a fit sentence, but that Judge Reilly had over-emphasized that one factor. The Court of Appeal made no further comments on Judge Reilly's approach.

[27] Some of the correspondence leading up to the release of the *Hunter* sentencing decision is also important. Judge Reilly gave a copy of his draft sentencing reasons to Assistant Judge Stevenson. As the Record does not contain any letter doing this, I cannot be certain with whom the idea originated, but I will assume it originated with Judge Reilly. On October 17, 1997, Judge Reilly's draft reasons and Assistant Judge Stevenson's draft response to Judge Reilly were sent to Judge Cioni for his comments and suggestions (Tab 63). A handwritten addendum to Tab 63, that appears to be from Judge Cioni, indicates that he "concur[red] absolutely" with Assistant Judge Stevenson's draft comments.

[28] On October 21, 1997, Assistant Judge Stevenson wrote to Judge Reilly, commenting on the draft sentencing reasons (Tab 61). I note that Assistant Judge Stevenson offered his response solely as a colleague offering requested comments (which is perfectly proper), not as an Assistant Chief Judge exercising any sort of supervisory role. He then expressed concerns with "unnecessarily inflammatory and confrontational" language, questioned whether some assertions were supported by evidence, and made some other comments.

[29] The Chief Judge's response to this draft and to Assistant Chief Judge Stevenson's comments is at Tab 60. In a handwritten note dated October 28, 1997, he states that the letter is very good, and that if Judge Reilly were to release the judgment, "it could mean his job and definitely he would be before Judicial Council". Another handwritten note (dated October 29, 1997) says "Vijay [Bhardwaj, legal counsel, Provincial Court] read this and he says the bottom line is this judgment should not be delivered".

[30] A letter dated November 25, 1997 from Assistant Chief Judge Stevenson to the Chief Judge mentions a later draft of the sentencing judgment as "toned down", but still going "beyond the issue before him" (Tab 56). This letter also refers to other matters, and I discuss it again later.

[31] As discussed above, the sentencing decision in *Hunter* was released on November 28, 1997 (Tab 47), and the sentence was changed on appeal.

C. The Goodstoney Case

[32] In *R. v. Goodstoney* (24 November 1997), No. 71585673-P10101 (Alta. Prov. Ct.), Judge Reilly refused the Crown's application to revoke Goodstoney's bail for violating a condition of his recognizance (Tab 50). Goodstoney was charged with 11 counts relating to deaths and injuries that he caused driving while impaired (he later plead guilty to the charges - see Tab 34). One of the conditions he was under was to refrain completely from any alcohol use. However, approximately 17 months later, he was found to have alcohol in his system (60 milligrams) while a passenger in a car. Judge Reilly held that this was not a serious enough violation to warrant returning Goodstoney to custody, as he had successfully complied with all of his other conditions until that point.

Goodstone had spent six days in custody pending this hearing, which Judge Reilly found more proportionate to his conduct than an additional several months before the trial. Judge Reilly also imposed a daily curfew of 9 p.m. to 6 a.m. I note that the Crown did not appeal this decision.

[33] The Chief Judge and Assistant Chief Judge Stevenson appear to have been upset by language Judge Reilly used in giving his decision. Judge Reilly said:

. . . I think one of the most culpable elements of the original horrible accident in which these four people were killed is that an 18-year-old boy with Grade 8 education who is unemployed, never had any money, is all of a sudden given a cheque by Indian Affairs for \$40,000. So he goes on a party. He gets 'roaring' drunk. He gets this new car and he drives it like an idiot and four people get killed. . . I think the degree of responsibility is shared by society in general and the Department of Indian Affairs in particular when they irresponsibly give people a big chunk of money like that with no training, no help in how they might use it to their own benefit.

Assistant Chief Judge Stevenson's concern is reflected in the November 25, 1997 letter already mentioned (Tab 56), where he refers to "disturbing" comments by Judge Reilly. In my view, he must be referring to the above-cited passage. I note that Assistant Chief Judge Stevenson was careful not to criticize the decision itself, just the comments.

D. The *Twoyoungmen* Case

[34] On February 17, 1998, Judge Reilly released a ruling in *R. v. Twoyoungmen* (17 February 1998), No. 7001599-P10101 (Alta. Prov. Ct.) (see Tab 33). In those reasons, he refused the Crown's request for an adjournment. There was to have been a preliminary hearing on the charges of sexual assault, unlawful confinement, assault causing bodily harm, and pointing a firearm. The sole Crown witness was to be the victim, but she did not attend court that day, although she had been subpoenaed. The Crown counsel indicated that he had not met with the witness. The witness had not attended once before, although there was a consensual adjournment at that time.

[35] Judge Reilly was clearly upset with the Crown for not understanding the situation and not communicating with the witness. He stated that he refused the adjournment for two reasons - this was the witness's second failure to appear and, more importantly, there had been no communication between the witness and the Crown counsel. He found the second factor especially disturbing because the witness is aboriginal. Judge Reilly set out several facets of aboriginal culture, including references to *The Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta - Justice on Trial* (the *Cawsey Report*).

[36] According to the judgment, one significant deviation between the "white" justice system and the aboriginals it has been "imposed on" is that the aboriginal society never gave decision-making authority to figures such as judges. Moreover, the aboriginal culture does not pit witnesses, even if victims, against accused, but all work together to reach a solution. Judge Reilly pointed out nine factors which he feels contribute to aboriginal witness's difficulties coming before the courts, including fear of repercussions, cultural ethics, community pride, lack of confidence in the "white" justice system, and lack of relationship between the prosecutor and witness.

[37] Judge Reilly concluded by stating:

It is a strange result that an alleged domestic abuser is set free because of concerns for the victim, but it is my view that unless some over-all program is established to deal with the widespread incidence of this problem in this community, the hit and miss prosecution of a few offenders will do more harm than

good. If offenders are unsuccessfully prosecuted they will get the message that they are above the law, and I believe that they will continue to be unsuccessfully prosecuted until something more is done for victims than just handing them a subpoena and leaving them to their own resources to deal with all of the fears and difficulties that they encounter in our justice system.

[38] On March 30, 1998, Assistant Chief Judge Stevenson sent a copy of the *Twoyoungmen* decision to the Chief Judge, along with a letter stating, in part (see Tab 25):

I enclose a recent ruling by Judge Reilly. Its content continues an apparent obsession of Judge Reilly to subjugate the law to his perception of unjust social conditions on the Stoney First Nation Reserve at Morley.

...

The last paragraph of his ruling indicates a pre-judgment attitude that would clearly, in my view, support an application to disqualify him from presiding over any case on the basis of bias.

For these reasons alone, it is my recommendation that Judge Reilly be re-assigned. . . .

The letter then addresses administrative details, as I discuss later in these Reasons. The letter was not copied to Judge Reilly.

E. The Corporal Young Complaint

[39] On February 11, 1998, Corporal W.F. Young of the Royal Canadian Mounted Police sent a letter to Assistant Chief Judge Stevenson making a complaint against Judge Reilly (see Tab 35). This stemmed from a sentencing of two individuals by Judge Reilly. In granting conditional sentences to both, Judge Reilly stated “I am somewhat of the view that, had the officer involved simply been more conciliatory, the difficulties may have been avoided with this man.” (see Tab 36, *R. v. Sigrist* (5 February 1998) No. 71720668-P10101.02, App. No. 9801-0354-s5 (Alta. Prov. Ct.), p.6). I note that the Crown initially appealed the sentence, but abandoned the appeal on April 20, 1998.

[40] Corporal Young stated that he was more concerned over comments made by Judge Reilly at the conclusion of court in the presence of Corporal Young’s subordinate and the Crown counsel. It appears that the comments were made after court had adjourned for the day. According to Corporal Young’s letter, Judge Reilly stated the reason for lenient sentences “was due to the fact that I [Corporal Young] have had several cases before the courts recently in which the use of force played in the arrest of the individuals involved.” Judge Reilly apparently stated that Corporal Young was “too aggressive”, and that he was contemplating reporting the corporal to his supervisor. As of the date of Corporal Young’s letter, no such report had been made.

[41] Corporal Young then outlined several concerns, foremost of which was his concern that Judge Reilly will not adjudicate fairly and impartially in cases where Corporal Young is involved.

[42] Assistant Judge Stevenson initiated an investigation by contacting Judge Reilly and the Crown counsel for their recollections. The Crown counsel’s response (see Tab 29) confirms the information set out in Corporal Young’s complaint letter. Judge Reilly’s response (see Tab 28) seems to agree with the main facts, but also states that Corporal Young’s complaint is an example of his confrontational attitude. Judge Reilly referred to another situation that caused him concern that Corporal Young used “excessive force” or “gratuitous violence”.

[43] Judge Reilly stated that his negative view of Corporal Young was a mitigating factor in the sentencing. Finally, Judge Reilly stated that it is the accused who is entitled to an independent and impartial tribunal. Any problems Corporal Young encounters in Judge Reilly's court are due to Corporal Young's own behaviour.

[44] The Chief Judge responded to Corporal Young's complaint on May 21, 1998 (see Tab 12). He stated that the off-bench comments (after court had adjourned) were inappropriate, that he had advised Judge Reilly of that (see Tab 11), and that he hoped it would not be repeated. However, the on-bench comments (as quoted from the transcript) are appealable, and the appeal was abandoned. As to Corporal Young's concern that Judge Reilly has lost impartiality regarding the corporal, the Chief Judge stated that the allegation is too broad. Allegations of bias or lack of impartiality need to be raised with a judge on a case by case basis - "Blanket disqualification can not be imposed administratively." The drafts of Tabs 11 and 12 were earlier sent to Assistant Chief Judge Stevenson for comments (Tab 14), along with the drafts of what have become the three main letters (Tabs 8, 9 and 10).

F. The Tsuu T'ina Nation Public Inquiry

[45] On March 26, 1998, Judge Reilly wrote to Chief Judge Wachowich, asking to be considered as the Provincial Judge appointed to hear the above inquiry (see Tab 27). Judge Reilly stated that he would have the confidence of the Treaty 7 Nations as someone who would be fair and thorough. He went through some of his efforts to educate himself on aboriginal justice matters. He also acknowledged that some of his fellow judges have suggested that he has been "grandstanding". Finally, he said that he wished to hear the inquiry "in order to further contribute to my understanding of the Aboriginal situation and to write a report that will hopefully be a contribution to Aboriginal/main-stream-Canadian relations."

[46] The Chief Judge responded on March 27, 1998 (see Tab 26). He stated that he was surprised by the request and emphasized that the hearing is "limited to finding of facts, circumstances, cause, and manner of death of the fatality victims", not to edify a judge, nor to make any political statement. After some further comments on the perception of Judge Reilly by his fellow judges and others, he referred to the "apparent apprehension of bias" against Judge Reilly, and concluded that Judge Reilly's solicitation of the appointment was "almost conduct unbecoming of a judge".

[47] This exchange led to two more letters, which are important to this application. They are a letter from Judge Reilly to the Chief Judge, dated April 1, 1998 (see Tab 24), and the Chief Judge's reply of April 3, 1998 (Tab 22). I note that the Chief Judge sent copies of each to Assistant Chief Judge Stevenson (see Tab 23). Excerpts of both can be found in the Appendix. I discuss both in detail later in these Reasons.

G. Miscellaneous Incidents

[48] Judge Reilly attended, and was keynote speaker at, a November 25-27, 1997 seminar entitled "Building Aboriginal Community-Controlled Justice Systems". While Assistant Chief Judge Stevenson stated in a November 25, 1997 letter to the Chief Judge (Tab 56) that he was aware Judge Reilly was attending the seminar, Assistant Chief Judge Stevenson wrote that he was unaware of Judge Reilly's position as keynote speaker until November 24, 1997: "I am concerned that he was being less than forthright with me on the extent of his involvement with the seminar".

[49] Assistant Chief Judge Stevenson faxed a copy of Judge Reilly's speech to the Chief Judge on November 28, 1997 at 3:57 p.m. (Tab 54). This was a few hours before the speech was delivered, according to the seminar schedule at Tab 48 and attached to Tab 56.

[50] The last reference to this matter that I note in the Record is a December 1, 1997 memorandum from Assistant Chief Judge Stevenson to all Provincial Court Judges in Calgary Criminal Division (copied to the Chief Judge) (Tab 46). It attaches a copy of Judge Reilly's November 28 speech and states:

I attach a copy of an address given by Judge Reilly on Friday, November 28, 1997 at the closing banquet of a week-long seminar entitled "Aboriginal Community-Controlled Justice Systems". It may be of interest to you and may give you some insight in relation to recent[*sic*] judicial and non-judicial pronouncements by our colleague.

This memo does not appear to have been sent to or copied to Judge Reilly.

[51] There are three letters in the Record dealing with the issue of sentencing circles and family group sentencing (restorative justice): (1) a February 5, 1998 letter from the Chief Judge to Judge Reilly (Tab 98); (2) a February 9, 1998 letter from Judge Reilly to the Chief Judge (Tab 97); and (3) a February 14, 1998 letter from the Chief Judge to Judge Reilly (Tab 96). All three were copied to Assistant Chief Judge Stevenson.

[52] In Tab 98, the Chief Judge responded to Judge Reilly's discussion of family group conferencing. While he applauded Judge Reilly's interest in the area, he stressed that it is not an area in which judges should organize seminars: "... that role belongs to community leaders, law reformers and other stake holders in the justice system like the crown (*sic*), corrections and police." Therefore, the Chief Judge did not approve Judge Reilly's participation in organizing a conference.

[53] According to Judge Reilly's Tab 97 letter, he had already taken organizational steps before receiving the Tab 98 letter. He asked the Chief Judge to consider several points, including the need to get the Stoneys involved in the justice system. He also mentioned that family group conferencing may be a good alternative to sentencing circles, which he stated some Stoneys are unwilling to use, for fear of repercussions. Finally, Judge Reilly noted that he hoped to use the method in an upcoming case, even though the private prosecutor was unwilling (whereupon Judge Reilly "indicated that if I found him to be acting unreasonably I would enter a Judicial Stay . . .").

[54] In reply, at Tab 96, the Chief Judge restated his opposition to judges participating in or organizing conferences in such matters: "Regrettably therefore, I reiterate that I cannot and do not approve of your participation in organizing any conference on this subject. I consider this matter now closed."

[55] I also note Tab 95, which contains a May 28, 1997 letter from Judge Reilly to the Chief Judge, along with Judge Reilly's reasons in *R. v. McKay* (27 May 1997) No. 61557104-P10101 (Alta. Prov. Ct.). In *McKay*, Judge Reilly used family group conferencing for the first time. The letter refers to this and states that Judge Reilly considers it a proper exercise of his sentencing discretion to use the method with non-aboriginals. He also stated that he had not ignored the Chief Judge's February 14 letter:

. . . Pursuant to that letter I advised the R.C.M.P. that it was your direction that I not participate in the organizing a conference of this kind. They were already committed to present the program and did so. Further to your admonition that I 'can only participate as a spectator and applaud from the sidelines' I encouraged attendance and will continue to encourage its use.

I hope this meets with your approval.

[56] The Record does not appear to contain any further reference to this matter.

[57] There are also materials in the Record detailing Judge Reilly's withdrawal from a commitment to speak during the Calgary Chamber of Commerce, Aboriginal Awareness Week. On June 11, 1998, Judge Reilly sent some materials to the Chief Judge, including Judge Reilly's proposed speaking notes for the conference (Tab 4). After both the Chief Judge and Assistant Judge Stevenson provided negative comments, including statements that the comments contravened judicial ethics (Tabs 2 and 3), Judge Reilly withdrew (Tab 1). I have described these events only because they are part of the filed Record. However, I note that these particular events occurred after the impugned decision was made and communicated to Judge Reilly. They could have formed no part of the impugned decision and are not a factor in these Reasons.

H. Judge Reilly's Complaint to the Judicial Council

[58] The parties returned before me on January 14, 1999 to address a complaint sent by Judge Reilly to the Judicial Council following the close of submissions in this case on December 18, 1998. The December 21, 1998 complaint relates to matters that are also the subject of this judicial review application. The complaint is directed at both the Chief Judge and Assistant Chief Judge Stevenson.

[59] While this complaint letter does not affect the impugned decision, which is the issue before me, it does potentially affect counsel for the Chief Judge's argument that Judge Reilly's proper course of action was to go to the Judicial Council, not to file this application. I deal with that argument later in these Reasons.

I. Other Relevant Documents

[60] Certain other documents are particularly relevant to this application. I have reproduced portions or summaries of those documents, as well as some already referred to, in the Appendix attached to these Reasons, and will refer to them throughout the Reasons, as necessary.

V. ARGUMENTS

[61] Each party made lengthy and detailed submissions before me, in addition to their comprehensive pre-trial briefs. Each party also took a different approach and viewed the issues from different angles. I will attempt to summarize briefly the framework and position laid out by each before addressing the issues with my own framework.

[62] Counsel for Judge Reilly (Mr. Hunter) sees the impugned decision as an unconstitutional interference with Judge Reilly's adjudicative independence. Mr. Hunter also alleges that the decision to close the Canmore Base Point was merely a convenient excuse to justify Judge Reilly's transfer.

[63] Counsel for the Chief Judge (Mr. Tavender) argues that the Chief Judge was not attempting to, and did not, interfere with Judge Reilly's adjudicative independence. According to Mr. Tavender, Judge Reilly had to be dealt with (from both an administrative and disciplinary standpoint) because he had lost his objectivity and impartiality regarding aboriginal people. Finally, Mr. Tavender argues that the transfer decision was made in conjunction with a valid cost-saving administrative decision to close the Canmore Base Point.

[64] As I have already reviewed the basic chronology and the matters of *Hunter*, the *Hunter* sentencing, *Goodstoney* and *Twoyoungmen* above, I will not repeat all of those facts, but only deal with each party's interpretation of the incidents.

A. Counsel for Judge Reilly (Mr. Hunter)

[65] Mr. Hunter presented the oral argument on behalf of Judge Reilly. He divided his submissions into seven areas: (1) the impugned decision itself; (2) authority and constitutionality; (3) the role of the Judicial Council; (4) the availability of judicial review of the impugned decision; (5) Judge Reilly's off-bench conduct; (6) comments on the Return; and (7) this Court's discretion in the judicial review process. The written argument also addressed the issues of standard of judicial review and procedural fairness. I summarize these here as points 8 and 9, respectively.

1. The Impugned Decision

[66] Mr. Hunter characterizes the Chief Judge's decision as punitive and disciplinary, made because of Judge Reilly's on-bench conduct. That is, Mr. Hunter argues that the decision was made because the Chief Judge, and Assistant Chief Judge Stevenson, disagreed with Judge Reilly's decision-making. Mr. Hunter continually emphasizes that criticism as shown in the Record is for the appellate court - it is an affront to adjudicative judicial independence for anyone, including a chief judge or assistant chief judge, to attempt to influence the course of a judge's decision-making.

[67] Mr. Hunter further submits that the actual decision to transfer Judge Reilly was made on April 3, 1998, as indicated by the handwritten note of the Chief Judge (at Tab 25 - see Appendix). According to Mr. Hunter, all of the documents and correspondence after this point are merely to provide a cover story for the plan of moving Judge Reilly. That is, the actual decision was made on April 3, 1998, and it was made for the main purpose of moving Judge Reilly, not for any administrative or cost-saving reasons. Mr. Hunter calls the combined effect of this process the "chill effect", whereby Judge Reilly, and all other Provincial Court judges, are made aware that the Chief Judge will move or otherwise discipline them if he disagrees with the content of their decisions. Mr. Hunter also claims that Judge Reilly was entitled to notice of what was being planned, and that there was a deliberate effort made to keep him from getting such notice.

2. Authority and Constitutionality

[68] Mr. Hunter states that the Provincial Court is a statutory tribunal, with its jurisdiction limited by its enabling statute and by the Constitution. This appears to be common ground, although Mr. Tavender states that its jurisdiction is supplemented by common law principles. Mr. Hunter then argues that the powers of the Chief Judge, as a statutory delegate, are limited by the provisions in the statute, and that the Chief Judge here acted outside of his statutory authority in re-assigning Judge Reilly. As the decision was made outside the Chief Judge's administrative and disciplinary jurisdiction, it is unconstitutional. Alternatively, it is unsustainable as being made for an improper purpose, based on an improper consideration, made in breach of applicable rules of natural justice, or determined to be constitutionally impermissible.

[69] Regarding the constitutionality of the Chief Judge's decision, Mr. Hunter submits that the Chief Judge has no constitutional power to interfere with the judicial adjudicative independence of another judge, even if the Chief Judge does have the authority to re-assign a judge. Adjudicative independence is essential so that justice is done and is seen to be done. Mr. Hunter argues that the public must know that a judge is free to make a decision without fear of sanctions by the Chief Judge if the Chief Judge disapproves.

3. Role of the Judicial Council

[70] Mr. Hunter agrees with Mr. Tavender that judicial review is not available where there is an adequate alternative remedy. Here, however, Mr. Hunter submits that there is no adequate alternative remedy before the Judicial Council, as the Judicial Council does not have the power to grant the relief that Judge Reilly is seeking here.

4. The Availability of Judicial Review of the Impugned Decision

[71] As in the earlier arguments before me, Mr. Hunter again contends that judicial review is available in this situation.

[72] As he mentioned in the earlier hearing on this matter (on the jurisdictional issue), Mr. Hunter states that there is no privative clause and no immunity in these circumstances. Further, as already discussed, he argues that there is no adequate alternative remedy here.

5. Off-Bench Conduct and Notice

[73] Mr. Hunter submits that there was no adequate warning about Judge Reilly's off-bench conduct, such that he would be aware that the Chief Judge was setting himself up to conduct the investigation, prosecution, conviction, sanction, and punishment of Judge Reilly without a hearing.

6. Comments on the Return

[74] Mr. Hunter notes that Tabs 1 to 6 of the Return are documents dated after May 26, 1998. As such, he submits they could not have had any impact on the impugned decision. He also comments on the large number of newspaper clippings contained in the Return.

7. Court's Discretion in the Judicial Review Process

[75] Finally, Mr. Hunter submits that the Court should exercise its discretion in Judge Reilly's favour, as Judge Reilly was given no notice or hearing. That is, Mr. Hunter argues that the decision was not made with procedural fairness; thus, the decision should not enjoy any favourable exercise of discretion.

8. Standard of Judicial Review

[76] Mr. Hunter argues that the extent to which a decision such as this may be judicially reviewed depends, in part, on how the decision is characterized. However, he further submits that all decisions made pursuant to statutory authority are liable to review (regardless of characterization) unless such review has been clearly prohibited by the Legislature through a private clause.

9. Procedural Fairness

[77] Mr. Hunter argues that the Chief Judge did not accord Judge Reilly procedural fairness in reaching the decision to transfer Judge Reilly and order him to move his residence.

B. Counsel for the Chief Judge (Mr. Tavender)

1. General

[78] Mr. Tavender approaches the matter using a different framework. He first emphasizes that neither he nor the Chief Judge question Judge Reilly's sincerity in the views he has expressed, on and off the bench. Nor, he says, did the Chief Judge interfere with Judge Reilly's adjudicative independence. However, Mr. Tavender states that that is not the issue. In his submission, the real issue is "how and under what circumstances the applicant should be held accountable to his Chief Judge in respect of the perception that the applicant has lost his objectivity which gives rise to concerns of judicial conduct in a proper area of responsibility of a Chief Judge." (transcript, p.105, lines 2-7).

[79] Mr. Tavender argues that it is inappropriate for Mr. Hunter to draw certain conclusions from the Record, when there has been no sworn evidence, oral testimony, or cross-examination.

2. Reasons for the Move

[80] Mr. Tavender submits that there were clearly two reasons for the decision to move Judge Reilly. The primary reason was because of concerns over his loss of objectivity, and an appearance

of bias and partiality, as demonstrated in the Record. The secondary reason was the administrative, cost-saving ground.

3. Role of the Chief Judge, Judicial Council and the Court of Appeal

[81] Mr. Tavender submits a different view of the roles of the Chief Judge, Judicial Council and the Court of Appeal than does Mr. Hunter. In Mr. Tavender's interpretation, Mr. Hunter claims that the contents of judgments are matters to be dealt with only by the Court of Appeal, with no jurisdiction for the Chief Judge to take any administrative or disciplinary measures. Mr. Tavender, however, submits that judges are responsible to their Chief Judge for judicial conduct both on and off the bench. Here, a loss of objectivity or impartiality, as shown in the decisions, is improper judicial conduct which is properly dealt with by the Chief Judge. Mr. Tavender states that the accounting for such improper judicial conduct, under the terms of the *Provincial Court Judges' Act*, is to the Chief Judge, the Judicial Council and, ultimately, the Lieutenant Governor in Council.

[82] Consequently, Mr. Tavender asks this Court to protect the institutional independence of the office of the Chief Judge. In his submission, this will internalize such disputes so that they are dealt with by chief judges and Judicial Councils, which is consistent with the legislative scheme of not airing such conflicts publicly.

[83] He states that the alternative approach, which he does not favour, is to enhance the individual independence of puisne judges, so that they can resist directions of a chief judge and allow them to challenge publicly the decisions of their chief judges. This would, in his view, indeed cause a "chilling effect", but it is chief judges who would be "chilled".

4. Specific Instances that Allegedly Demonstrate Bias or Loss of Impartiality

[84] Mr. Tavender submits that several of the specific instances discussed in the "Facts" sections demonstrate that Judge Reilly has bias or has lost his impartiality in dealing with aboriginal matters. He points to: (1) Judge Reilly's interest in sentencing circles and other restorative justice initiatives; (2) the *Hunter* pre-sentencing decision; (3) the *Hunter* sentencing decision; (4) Judge Reilly being keynote speaker at a seminar; (5) the *Goodstoney* decision; (6) Judge Reilly's concern over a potential Aboriginal Court for the Tsuu T'ina and Stoney Reserves; (7) the *Twoyoungmen* decision (which Mr. Tavender refers to as the "last straw"); (8) Judge Reilly's request to conduct the Tsuu T'ina inquiry; (9) reaction by the public and in the media, particularly to the controversial *Hunter* pre-sentencing decision; and (10) the complaint by Corporal Young.

5. Legal Issues

[85] Mr. Tavender submits that the *PCJA*, supplemented by common law principles, is a comprehensive scheme for the operation of the Provincial Court, including the appointment, powers, management, discipline and removal of provincial court judges. He argues that a chief judge has the power to order a puisne judge to move, as well as to take other disciplinary measures to enforce compliance with judicial ethics. He further argues that the Judicial Council provides an adequate alternative remedy, and that there are only natural justice or procedural fairness requirements at the Judicial Council stage. He also claims that the Chief Judge has immunity under s. 16 of the *PCJA* for this decision. Finally, he notes that the Court has discretion when ruling on a judicial review application, and urges me to use that discretion to disallow the relief sought by Judge Reilly.

VI. ANALYSIS

Issue 1: Can this Court judicially review the Chief Judge's decision?

Yes.

A. Summary

[86] Although I ruled earlier that judicial review of the decision of the Chief Judge was available in this case, arguments were presented by Mr. Tavender that referral to the Judicial Council was still an available course of action and that this availability augured for a renewed consideration of the discretion of this Court as to whether or not the relief requested by Judge Reilly should be granted. Mr. Tavender challenged my previous ruling before the Court of Appeal. That Court rejected his submissions and affirmed that this Court has jurisdiction to conduct the judicial review and further affirmed the direction that the Chief Judge return a record for the purposes of that review. I reiterate my earlier comments and note that nothing presented by Mr. Tavender in the current application has changed my view.

[87] My previous decision ruled that Judge Reilly's request for judicial review of the validity of the decision of the Chief Judge was not a matter for the Judicial Council for two reasons. First, it was not within the statutory mandate of the Judicial Council. Second, the request for a judicial review by Judge Reilly calls for a ruling as to the constitutionality of the Chief Judge's decision, whether under his statutory powers or pursuant to the precepts of judicial independence under the unwritten constitution as defined by the Supreme Court of Canada in the *Campbell* case.

[88] Had the Chief Judge referred the matter by way of complaint to the Judicial Council, as he should have, the Judicial Council under s. 11 would have had the jurisdiction and the authority to address such a complaint. By taking unto himself the process - "investigating" Judge Reilly, gathering evidence, making the decision and implementing it - the Chief Judge purported to give himself extensive disciplinary powers over individual judges of his court, and thus put into issue the disciplinary power of a chief judge with respect to any one or more of the members of his court.

[89] It is this unilateral action that is under attack. If it is beyond the statutory powers and finds no authority based on the common law powers under the Constitution, then the action is substantially *ultra vires* and must be quashed on judicial review. This is addressed further under the third issue.

[90] Defining the range of a chief judge's powers is beyond the scope of this judgment. While a chief judge may have the power to, for example, encourage a judge to release judgments more quickly, the disciplinary powers purportedly exercised by the Chief Judge in this case unquestionably fall outside any possible scope allowed for by the principles of judicial independence and the development of the position of chief judge as first among equals. If Judge Reilly's situation needs to be addressed, it must be done via powers exercised by the Judicial Council, not by the Chief Judge taking the powers for himself.

[91] There is an excellent passage from *Rees v. Crane*, [1994] 2 A.C. 173 (P.C.) at 187-88, which discusses and distinguishes the administrative and disciplinary powers of a chief judge:

. . . the Chief Justice must have the power to organise the procedures and sitting of the courts in such way as is reasonably necessary for the due administration of justice. This may involve allocating a judge to do particular work, to take on administrative tasks, requiring him not to sit if it is necessary because of the backlog of reserved judgments in the particular judge's list, or because of such matters as illness, accident or family or public obligations. It is anticipated that these administrative arrangements will normally be made amicably and after discussion between the Chief Justice and the judge concerned. It may also be necessary, if allegations are made against the judge, that his work programme should be rearranged so that for example he only does a particular type of work for a period, or does not sit on a particular type of case or even temporarily he does not

sit at all. Again this kind of arrangement can be and should be capable of being made by agreement or at least after frank and open discussion between the Chief Justice and the judge concerned.

The exercise of these powers, however, must be seen against the specific provisions of the Constitution [of the Republic of Trinidad and Tobago 1976] relating to the suspension of a judge's activities or the termination of his appointment. It is clear that section 137 of the Constitution provides a procedure and an exclusive procedure for such suspension and termination and, if judicial independence is to mean anything, a judge cannot be suspended nor can his appointment be terminated by others or in other ways. The issue in the present case is thus whether what Bernard C.J. did was merely within his competence as an administrative arrangement or whether it amounted to a purported suspension.

Their Lordships agree with the majority in the Court of Appeal that what happened here went beyond mere administrative arrangement.

The Privy Council held there was effectively an indefinite suspension in that case. I will return to the facts of *Rees* later in these Reasons.

[92] I also ruled in my earlier decision that the impugned decision was not part of any adjudicative decision-making to which immunity would apply pursuant to s. 16 of the *PCJA* or at common law. The only redress available to Judge Reilly respecting these directives of his Chief Judge is the process of judicial review. Mr. Tavender's further arguments have not convinced me otherwise.

B. Jurisdiction and Discretion for Judicial Review

[93] As mentioned in the above summary, I addressed this matter in my original judgment. Mr. Hunter again argues before me that there should be judicial review in these circumstances, while Mr. Tavender again takes the opposite viewpoint. Mr. Tavender approaches the matter from a somewhat different angle this time. He contends that this Court should opt not to exercise its discretion to judicially review. His reasons for not exercising the discretion are substantially the same as his earlier arguments claiming that this Court does not have the jurisdiction for judicial review. Although none of Mr. Tavender's arguments were persuasive, I will address them briefly for the sake of completeness.

[94] Mr. Hunter states that superior courts have an inherent jurisdiction for judicial review in five situations: (1) substantive *ultra vires*; (2) exercising discretion improperly (malice, bad faith, irrelevant considerations); (3) not considering relevant matters; (4) serious procedural errors; and (5) errors of law. His written brief summarizes his submissions in this area (p. 12):

- a. The Decision is subject to judicial review for lack of or abuse of jurisdiction regardless of how it is characterized;
- b. There is no evidentiary basis on which to characterize the decision as administrative;
- c. Even if administrative, there is no apparent administrative authority in the Chief Judge to designate a judge's residence;
- d. There is no administrative or judicial authority in the Chief Judge to designate a judge's residence because of displeasure with the content of the judge's decisions in the cases before him;

- e. Characterization of the Decision as disciplinary does not validate the Decision but does make it subject to rules of fairness which the Applicant will submit were not observed; and
- f. On the evidence, there is no indication that in making the decision the Appellant [sic] acted pursuant to any authority he may have had while there is every indication that he acted wrongly, arbitrarily and without jurisdiction.

[95] Mr. Hunter also states that there is no adequate alternative remedy here. He claims that this matter does not fall within the wording of *PCJA*, s. 11(1)(b), as it is not a complaint “respecting the lack of competence of, conduct or misbehaviour of, or neglect of duty by, judges or the inability of judges to perform their duties.”.

[96] Mr. Hunter disputes Mr. Tavender’s argument (addressed later) that the fact that Judge Reilly filed the December 21, 1998 complaint with the Judicial Council means that the Judicial Council is an adequate alternative remedy to the relief sought from this Court. Mr. Hunter re-emphasizes that the relief available from the Judicial Council is not the same as that available from this Court. He also notes that Judge Reilly’s complaint relates to the Chief Judge’s “conduct”, which is clearly within the Judicial Council’s authority under s. 11(1)(b) of the *PCJA*.

[97] Mr. Hunter also points to *Mackin v. New Brunswick (Minister of Finance)*, 1998 CanLII 9800 (NB QB), [1998] N.B.J. No. 267 (Q.B.). The plaintiff there was Judge Mackin, a Provincial Court Judge. He brought an action for damages and declaratory relief, relating to the constitutional validity of provincial legislation that purported to repeal supernumerary provisions. The Court of Queen’s Bench held that the repeal was unconstitutional.

[98] The relevant issue for the present case was Judge Mackin’s dispute with his chief judge. Pending the outcome of the original court challenge, Judge Mackin stated that he felt it would be improper for him to hear cases. The chief judge directed him to hear cases. Judge Mackin unsuccessfully sought a court order prohibiting the chief judge from assigning him cases or requiring him to perform judicial duties. The chief judge later obtained an order of mandamus forbidding Judge Mackin from recusing or disqualifying himself. Judge Mackin continued to adjourn or stay cases, leading to a complaint filed against him by the Minister of Justice with the Judicial Council (for misconduct or neglect of duty).

[99] The Judicial Council dismissed the complaint, stating that it had no jurisdiction to resolve the important legal issues relating to the independence of the judiciary. Moreover, it could not deal with the complaint until the Court dealt with the legal issues in the original challenge. Therefore, the complaint was premature. Relying on this authority, Mr. Hunter submits that (apart from his argument that the Judicial Council has no authority to grant the remedy sought before this Court) the Judicial Council will not deal with Judge Reilly’s complaint until the matters before this Court are resolved.

[100] Mr. Hunter also mentions that there have been some concerns raised over the existence (*R. v. Campbell*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3 at 146-47) and constitutionality (*R. v. Campbell* (1994), 1994 CanLII 5258 (AB KB), 25 Alta. L.R. (3d) 158 (Q.B.) at 255-58) of the Provincial Judicial Council. I need not deal with those concerns in this case.

[101] Mr. Tavender emphasizes that the Judicial Council does have a broad enough jurisdiction to declare the Chief Judge’s decision a nullity, to decide if his act was unconstitutional, and to

determine if any procedural fairness requirements had been met (and if not, whether any defects could be cured). He also argues that the Judicial Council provides an adequate alternative remedy, so that this Court should not exercise its discretion in favour of granting a judicial review of the impugned decision. He cites several authorities (brief, para. 52) for the proposition that the Judicial Council has a broad enough jurisdiction to provide an adequate alternative remedy. However, those authorities do not, in my view, support that contention. First, I note that the authorities largely refer to the Canadian Judicial Council - a completely different entity. While I accept that the provincial Judicial Council has powers of inquiry (see *PCJA*, s. 11) and will “search for the truth”, the issue here is not the Judicial Council’s investigative powers, but its remedial authority. I cannot find that the Judicial Council has the jurisdiction to grant an adequate alternative remedy. I also cannot equate, as Mr. Tavender urges, the powers of the Judicial Council with the powers of a chief judge. The roles are not, and cannot be, interchangeable.

[102] Mr. Tavender cites *C.U.P.E. v. Montreal*, 1997 CanLII 386 (SCC), [1997] 1 S.C.R. 793 and *C.P. Ltd. v Matsqui Indian Band*, 1995 CanLII 145 (SCC), [1995] 1 S.C.R. 3 as authorities for using the purposive and functional approach when interpreting the powers of the Judicial Council (*C.P. Ltd.* at 24-25). In *C.P. Ltd.*, the appellant Indian bands each had the power to pass taxation by-laws. One by-law provided for a lengthy appeal process; the others for a shorter appeal process. Both processes ended in the Federal Court, Trial Division. When C.P. Ltd. received its assessments, it commenced a judicial review application in the Federal Court, Trial Division, claiming that its lands could not be so taxed, as they were not “in the reserve”. The Federal Court of Appeal, in reversing the Trial Division, held that the right of appeal to the Trial Division was not an adequate alternative remedy. The majority of the Supreme Court of Canada dismissed the appeal, as the appeal tribunals were not an adequate alternative remedy (at 61).

[103] The majority discussed the importance of using a “purposive and functional” approach in these circumstances, because of Parliament’s objective in creating the new Indian taxation powers (at 24). This focuses the inquiry on the legislature’s intent (at 24-25). While I appreciate Mr. Tavender’s argument on this point, I cannot agree that the Judicial Council provides Judge Reilly with an adequate alternative remedy in these circumstances, as it cannot grant the remedy he seeks.

[104] Mr. Tavender also refers to *Ruffo v. Conseil de la Magistrature*, 1995 CanLII 49 (SCC), [1995] 4 S.C.R. 267, emphasizing that the chief judge’s complaint to the Judicial Council was upheld, and that any lingering problems of a Judicial Council decision can then be taken to the courts. As discussed elsewhere, *Ruffo* is a very different situation, precisely because the chief judge there did follow the proper course of action.

[105] Regarding Judge Reilly’s December 21, 1998 complaint to the Judicial Council, Mr. Tavender submits that the existence of this complaint proves his argument that Judge Reilly has an adequate alternative remedy at the Judicial Council. Therefore, he argues that this Court should exercise its discretion to deny Judge Reilly a remedy in this judicial review application.

[106] In response to Mr. Hunter’s submission on the *Mackin* case (where the Judicial Council stated it did not have authority to deal with the legal issues relating to judicial independence, and would not hear the Judicial Council complaint in the meantime), Mr. Tavender states that *Mackin*, *Ruffo* and *Gratton v. Canadian Judicial Council*, 1994 CanLII 3495 (FC), [1994] 2 F.C. 769 (T.D.) all dealt with a challenge to the constitutionality of legislation. That, says Mr. Tavender, is, of course, beyond the scope of a complaint to the Judicial Council. He would distinguish the present case. While the present case does not deal with the constitutionality of legislation, the legal issues (including constitutional issues) on judicial independence are, in my view, matters within the Court’s jurisdiction. The Judicial Council has a much different mandate.

1. Adequate Alternative Remedy

[107] I have already decided that the Judicial Council does not provide an adequate alternative remedy in this situation. The Judicial Council cannot provide the remedy that Judge Reilly is seeking - namely, declaring the impugned decision to be a nullity and setting it aside. Nor is it appropriate for the Judicial Council to determine the constitutionality of the impugned decision and the balance among different aspects of judicial independence. I agree with the statement in *Mackin* that a complaint to the Judicial Council would be premature where there are “important issues of law respecting the independence of the judiciary” (at para.14 of the findings of fact). The other authorities cited by Mr. Tavender are not helpful on this point.

[108] Mr. Tavender presented several additional authorities on the question of an adequate alternative remedy. For example, the majority of the Supreme Court of Canada held in *Harelkin v. University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 S.C.R. 561 that a student’s right of appeal to the university’s senate was an adequate alternative remedy to seeking certiorari from the court. The student had been required to discontinue his studies. The senate on appeal would have dealt with precisely the same matter, as it had the right to “hear and decide” the issue (at 588). That is not comparable to the present situation, where the Judicial Council could only have examined a complaint against the Chief Judge, not nullified the Chief Judge’s decision.

[109] In my view, it is irrelevant that Judge Reilly filed a complaint with the Judicial Council on December 21, 1998 against the Chief Judge and Assistant Chief Judge Stevenson. Judge Reilly is entitled under s.11(1) of the *PCJA* to file such a complaint, respecting the “. . . conduct or misbehaviour of, or neglect of duty by” those parties. This is entirely separate from the judicial review proceeding. In my view, the mere filing of this complaint is not any sort of admission or acknowledgment by Judge Reilly that he has an adequate alternative remedy at the Judicial Council. He is, in fact, seeking an entirely different type of remedy from the Judicial Council.

[110] I do accept Mr. Tavender’s contention that complaints should go to the Judicial Council, when within the scope of s.11 of the *PCJA*. Moreover, I agree that there is recourse to the courts after the Judicial Council makes a decision (as in *Ruffo*). The problem with Mr. Tavender’s argument is that the complaint that should have gone to the Judicial Council was the Chief Judge’s problems with Judge Reilly, rather than Judge Reilly’s problems with the Chief Judge’s impugned decision. Had the Chief Judge filed a complaint about Judge Reilly with the Judicial Council, this Court would not review matters relating to that complaint unless asked to after the Judicial Council made a ruling. Here, however, the Chief Judge decided, for whatever reason, not to use that available and acceptable process. Accordingly, it is the Chief Judge himself who opened up the availability of judicial review.

2. Discretion

[111] Mr. Hunter also argues that the Court should exercise its discretion in Judge Reilly’s favour, as Judge Reilly was given no notice or hearing. That is, Mr. Hunter argues that the impugned decision should not enjoy any favourable exercise of discretion because it was not made with procedural fairness.

[112] In discussing discretion, Mr. Tavender emphasizes the discretionary nature of granting either certiorari or discretionary relief in a judicial review application, as indicated in Rule 753.04 of the Alberta *Rules of Court*. He submits that factors that courts consider in deciding whether to exercise that discretion include: (1) the subject matter; (2) the intent and framework of the legislation; (3) whether there has been a serious injustice; and (4) whether there is an adequate alternative remedy.

[113] Regarding the subject matter, Mr. Tavender notes the important public policy considerations that are at issue. For example, courts have been reluctant to interfere in internal disciplinary matters in the armed services, the police force and penitentiaries. Mr. Tavender argues

that even more restraint should be shown when the judiciary is the subject matter. This should have remained, in his submission, a private and internal dispute within the administration of justice system, similar to the way a university was found to be the appropriate sphere for a matter of “substantial internal autonomy” (*Harelkin* at 594).

[114] I agree that it would be preferable if such a matter as this dispute did not have to come before a court. The problem here, as mentioned, is that the Chief Judge, by not following the proper and acceptable complaint procedure, invited this judicial review process.

[115] On the second point, Mr. Tavender states that the legislative intent, supplemented by principles of common law, is clear that natural justice does not have to be followed by a chief judge exercising administrative and disciplinary powers under ss. 2(5) and 9 respectively. I disagree, as discussed later.

[116] While Mr. Tavender does not seem to address specifically the issue of a serious injustice, he clearly believes there is neither a serious injustice, nor the perception of one. In my view, however, there will always be at least the perception of a serious injustice where a judge’s adjudicative independence is at stake.

[117] On the fourth point, he again discusses the adequate alternative remedy issue. I have already outlined his arguments on this point and my disagreement with his submission.

[118]

C. Immunity

[119] Section 16 of the *PCJA* prevents an action against a Provincial Court judge when the judge acts within the performance of the judge’s adjudicative role. This is an adjunct of the constitutional judicial independence of a judge.

[120] Mr. Hunter, as before, argues that this section is not a privative clause and does not grant immunity to the Chief Judge in these circumstances.

[121] Mr. Tavender argues there was immunity with respect to the administrative actions of a Chief Judge based on both s. 16 and on the decision of the Supreme Court of Canada in *MacKeigan v. Hickman*, 1989 CanLII 40 (SCC), [1989] 2 S.C.R. 796. Regarding s. 16, he argues that the Chief Judge should be protected, as he was exercising his administrative judicial independence in re-assigning Judge Reilly (with no malice or alleged malice).

[122] In *MacKeigan*, the Court dealt with judicial immunity, both of the adjudicative function and of the administrative function, with particular focus on a Chief Justice. There, the question was the make-up of an appeal panel which dealt with an appeal relating to the wrongful conviction of Mr. Marshall. The Royal Commission inquiring into the wrongful conviction wanted to know why the appellate court judge who had been Attorney General at the time of the prosecution of Marshall was chosen as a member of the Appeal Panel.

[123] In a very split decision, the members of the Court determined that the adjudicative privilege is, in the words of Cory J., “of fundamental importance and is absolute in nature”, whereas the administrative privilege “is not of the same fundamental importance and is qualified in nature” (at 841). However, the qualified administrative privilege allows disclosure only in exceptional circumstances. In the opinion of Lamer J. (as he then was), at p. 807, the only situation where the privilege would not apply was when there was an investigation into the conduct of a chief justice or other justices. That is the very issue before me in this matter. Wilson J. phrased the principle as “where the administration of justice is itself under review” (at 807).

[124] The impugned decision is internal to the Court. It was not made in the performance by a judge of his adjudicative role. Moreover, a chief judge cannot be protected from the consequences of doing that which he was statutorily and constitutionally unauthorized to do. Finally, as I decided on the earlier application, s. 16 is not relevant.

Issue 2: What is the appropriate standard of judicial review in this situation?

[125] Neither party spent much time on this issue. It is well accepted that there is a wide range of standards for judicial review. The appropriate point in the range depends on the legislature's intentions regarding the powers and authority of the decision maker (here, the Chief Judge). As D.J.M. Brown and J.M. Evans state when discussing the development of this range (***Judicial Review of Administrative Action in Canada*** (Toronto: Canvasback Publishing, 1998 looseleaf), Vol. 2, para. 13:1223): "... the overall thrust ... has been to require legislatures to spell out unequivocally any powers they intend to confer on a public official or institution that limits or removes an individual's common law rights." Here, in my view, Judge Reilly's right at issue (adjudicative independence) is as significant as basic individual common law rights, because both types of rights are keystones to the rule of law in a democratic society, as reflected by the ***Charter***. It is the constitutional guarantee of judicial independence upon which our entire judicial system rests.

[126] As discussed elsewhere in these Reasons, the legislature did not intend the Chief Judge to have the authority to make the impugned decision, nor can he claim such authority under the Constitution. Accordingly, I am entitled to review the impugned decision on a "correctness" standard; that is, whether the Chief Judge made a "correct" decision.

[127] Also, as noted elsewhere in these Reasons, there is no privative or immunity clause that affects the standard of review in these particular circumstances.

Issue 3: Does a chief judge have the statutory or constitutional authority to re-assign a judge and order a judge to change his or her residence?

[128] A chief judge may, in appropriate circumstances, have the statutory and constitutional authority to re-assign a judge. However, a chief judge in Alberta has neither statutory nor constitutional authority to order a judge to change his or her residence, either for administrative or disciplinary reasons.

A. General Comments on Judicial Independence of Provincial Court Judges and of the Provincial Court

[129] It is now settled that the Provincial Court and its judges are entitled to judicial independence (***R. v. Campbell***, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3 at 76). Chief Justice Lamer, for the majority, stated (at 77-78):

Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the ***Constitution Act, 1867***. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located.

The Queen v. Beauregard, 1986 CanLII 24 (SCC), [1986] 2 S.C.R. 56 at 72 also refers to the constitutional underpinnings of judicial independence (at 72).

[130] The goal of judicial independence is to ensure justice is done in individual cases and to ensure public confidence in the justice system (***Campbell*** at 79). ***Campbell*** continued by citing Le Dain J. from ***Valente v. The Queen***, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673 at 689:

Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.

I also note the following passage from *Beauregard* (at 70):

The rationale for this two-pronged modern understanding of judicial independence [individual and institutional] is recognition that the courts are not charged solely with the adjudication of individual cases. That is, of course, one role. It is also the context for a second, different and equally important role, namely as protector of the Constitution and the fundamental values embodied in it - rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important. In other words, judicial independence is essential for fair and just dispute-resolution in individual cases. It is also the lifeblood of constitutionalism in democratic societies.
[emphasis added]

[131] From my review of the decisions of the Supreme Court of Canada in cases such as *Valente*, *Beauregard*, *R. v. Lippé*, 1990 CanLII 18 (SCC), [1991] 2 S.C.R. 114, *Campbell* and *MacKeigan*, judicial independence has two dimensions: individual judicial independence and institutional judicial independence. The core principle of the individual judicial independence dimension is an individual judge's complete liberty to hear and decide cases. This is clearly stated by the majority in *Lippé* at 153, citing *Beauregard* at 69:

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another judge – should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.

At 153, the majority in *Lippé* continues by citing from *Valente*, at 685:

As such, it [independence] connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees. [emphasis added by *Lippé*]

I also note *Campbell* at 87, which emphasizes that judicial independence insulates courts from interference. This basic theme is also present in the earlier cited passage from Shetreet and Deschênes on “substantive independence” - that a judge must be subject only to the law and his or her own conscience, not to irrelevant pressures.

[132] Also, in *Lippé*, Lamer C.J.C. (at 138, for the minority) would have limited the insulation from interference to independence from “government”. However, he gave “government” in this sense a broad interpretation, even including the Chief Justice (at 138):

I do not intend, however, to limit this concept of ‘government’ to simply the executive or legislative branches. By ‘government’, in this context, I am referring to any person or body, which can exert pressure on the judiciary through authority under the state. This expansive definition encompasses, for example, the Canadian Judicial Council or any Bar Society. I would also include any person or body within

the judiciary which has been granted some authority over other judges; for example, members of the Court must enjoy judicial independence and be able to exercise their judgment free from pressure or influence from the Chief Justice. [original emphasis]

Chief Justice Lamer picked up on this again in *Campbell* at 78-79.

[133] At present, this core principle of individual judicial independence has concomitant immunities from suit and prosecution, as well as from being required to testify about the how and why of a particular decision. As McLachlin, J. stated for the majority in *MacKeigan* (at 830):

The judge's right to refuse to answer to the executive or legislative branches of government or their appointees as to how and why the judge arrived at a particular judicial conclusion is essential to the personal independence of the judge, one of the two main aspects of judicial independence . . . The judge must not fear that after issuance of his or her decision, he or she may be called upon to justify it to another branch of government. The analysis in *Beauregard v. Canada* supports the conclusion that judicial immunity is central to the concept of judicial independence.

[134] These immunities, while absolute, are not final because of the appeal process. It is that appeal process which corrects errors in a judge's reasons and properly applies established legal principles. To establish effectively individual judicial independence in a democratic federal state, present law has codified the two dimensions and three core characteristics as the elements of this independence (*Campbell* at 80-83, drawing on *Valente*). The core characteristics are: (1) security of tenure; (2) financial security; and (3) administrative independence. The dimensions are: (1) individual independence; and (2) institutional or collective independence of the court to which the judge belongs.

[135] The three core characteristics make up judicial independence, while the two dimensions indicate which entity (the judge or the court) is protected by a certain characteristic (*Campbell* at 82). A core characteristic may possibly have both an individual and an institutional dimension, although sometimes only one dimension is possible. As an example of the latter situation, *Campbell* stated at 83:

To be sure, sometimes a core characteristic only attaches to a particular dimension of judicial independence; administrative independence, for example, only attaches to the court as an institution (although sometimes it may be exercised on behalf of a court by its chief judge or justice). [emphasis added]

[136] *Valente* discussed the core characteristics to a degree; *Campbell* elaborated upon them, particularly financial security. Two of the requirements for security of tenure for provincial court judges are that they can only be removed for cause "related to the capacity to perform judicial functions" and after a "judicial inquiry at which the judge affected is given a full opportunity to be heard" (*Valente* at 697, cited in *Campbell* at 80).

[137] *Valente* defined financial security (at 706, cited in *Campbell* at 81): "The essential point, in my opinion, is that the right to salary of a provincial court judge is established by law, and there is no way in which the Executive could interfere with that right in a manner to affect the independence of the individual judge." [emphasis added by *Campbell*]. *Campbell* extended this to encompass three principles designed to ensure that the relationship between the judiciary and other government branches be as depoliticized as possible (at 88). Those principles are not relevant in the present case.

[138] *Valente* (at 712) also defined the administrative independence of the court: control by the courts “over the administrative decisions that bear directly and immediately on the exercise of the judicial function”. The court there earlier stated (at 709) that judicial control over such matters as:

... assignment of judges, sittings of the court, and court lists – as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions, has generally been considered the essential or minimum requirement for institutional or ‘collective’ independence ...

These statements were approved in *Campbell* at 81.

[139] In addition, *Valente* (at 687) discussed the two dimensions of judicial independence: a judge’s individual independence and a court’s institutional or collective independence:

The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal. [cited in *Campbell* at 82]

[140] The above passages also illustrate that the second dimension - institutional judicial independence - attaches to the Court as an institutional entity. In *Campbell*, Lamer, C.J. (at 81-82) stressed the importance of not confusing the concept of institutional independence (a dimension) with administrative independence (a core characteristic). Again, I note Lamer C.J.’s statement (*Campbell* at 83) that administrative independence only attaches to the court as an institution, but may be exercised by the chief judge on behalf of the court.

[141] The major factor determining whether institutional judicial independence must be present is the court’s role “as resolver of disputes, interpreter of the law and defender of the Constitution”. These qualities require the Courts to be separate in authority and function from all other branches of government or participants in the justice system. (*MacKeigan* at 827, citing *Beauregard* at 73). While there cannot be an absolute separation of the judiciary from the government, it is critical in achieving a proper balance that “the relations between the judiciary and other branches of government not impinge on the essential ‘authority and function’” of the Court. (*MacKeigan* at 827-28).

B. Judicial Independence in the Present Case

[142] Within this framework, I must characterize the issue in this case. On Judge Reilly’s part, this case raises the issue of his complete liberty to hear and decide cases without interference by his Chief Judge. I find that liberty is at risk here. There is a violation of Judge Reilly’s immunity from having to justify the how and why of his decisions, together with an attack on his security of tenure. Accordingly, I characterize the present case as involving Judge Reilly’s core characteristic of security of tenure and the individual judicial independence dimension.

[143] While security of tenure is typically used in the sense of outright dismissal or removal, it also must include the lesser, but no less real, threat of a move from the current place of appointment. Such a move, or threat, could seriously undermine a judge’s economic, family and social status in the community in which he or she is currently appointed. This undermining could approach or achieve dismissal. For example in *Rees*, the Privy Council held that a judge was subject to “in effect an indefinite suspension” (at 188). There, the chief justice, after receiving complaints about the judge, did not include him on the sitting roster for the following term. An investigation commenced after that action was taken. The Privy Council agreed with the judge that

this was not merely an administrative arrangement, but was an indefinite suspension, which the chief justice did not have the power to impose.

[144] On the Chief Judge's part, the present case involves the core characteristic of the administrative independence of the Provincial Court (exercised here by the Chief Judge), along with the institutional or collective dimension. Regrettably, the parties have raised the spectre of two core characteristics (security of tenure and administrative independence) of judicial independence being in conflict, thus putting the dimensions (individual and institutional) into conflict as well. I will address this later in these Reasons.

C. Statutory Authority

[145] Section 2(5) of the *PCJA* gives a chief judge certain administrative and supervisory powers:

2 (5) Subject to section 13, the chief judge has the power and duty to supervise the judges in the performance of their duties, including the power and duty to

- (a) designate a particular case or other matter or class of cases or matters in respect of which a particular judge shall act;
- (b) designate which court facilities shall be used by particular judges;
- (c) assign duties to judges;
- (d) exercise any other powers and perform any other duties prescribed by the Lieutenant Governor in Council.

[146] Part of s.13, referred to in s.2(5), was declared unconstitutional in *Campbell*. Section 13(1) provided:

13(1) The Minister of Justice and Attorney General or a person authorized by him may

- (a) designate the place at which a judge shall have his residence;
- (b) designate the day or days on which the Court shall hold sittings.

[147] In *Campbell*, the trial judge held that s.13(1)(a) and (b) were unconstitutional. The majority of the Supreme Court of Canada agreed, using its own reasons. Regarding s.13(1)(a), Lamer CJC stated (at 148):

. . . as it is presently worded, s.13(1)(a) creates the reasonable apprehension that it could be used to punish judges whose decisions do not favour the government, or alternatively, to favour judges whose decisions benefit the government. Section 13(1)(a)'s constitutional defect lies in the fact that it is not limited to the initial appointment of judges. [original emphasis]

[148] The unconstitutionality of s.13(1) left a vacuum (which, subsequent to the impugned decision, has been filled with new legislation giving the power over residency to the Judicial Council, on request from the chief judge, and only if, in the Judicial Council's opinion, the residency change "is required for the better administration of the Court" (Bill 25, *Judicial Statutes*

Amendment Act, 1998, 3rd sess., 24th Leg. Alta., s.4(7) , as amended)). Mr. Tavender suggests that vacuum should be filled by giving a chief judge the authority over the place of a judge's residence, as it is clearly an administrative concern. Moreover, he states that judges do not have "tenure" over an existing residence.

[149] Mr. Tavender cites the case of New Brunswick Provincial Court Judge Moreau-Bérubé, where her Chief Judge assigned her to sittings off of the Acadian Peninsula. Judge Moreau-Bérubé had made some comments during a sentencing regarding people on the Acadian Peninsula. Pending a Judicial Council hearing, the chief judge temporarily reassigned Judge Moreau-Bérubé.

[150] I note that this was a temporary reassignment, pending the outcome of the Judicial Council hearing. It was not, as in the present case, an attempt at a permanent re-assignment, in lieu of a Judicial Council hearing. The chief judge in the Judge Moreau-Bérubé case did not take it upon himself to discipline a judge for remarks over which he was concerned. He followed the proper route of allowing the Judicial Council to fulfil its role. I also note that in April 1999, the provincial cabinet removed Judge Moreau-Bérubé from the bench following a recommendation by the Judicial Council. Therefore, the issue of a possible permanent re-assignment never arose.

[151] Mr. Hunter disagrees that the vacuum left by s. 13 should be automatically filled by the chief judge; even if it were so filled, he argues that a chief judge could not exercise such a power for disciplinary reasons. I agree with Mr. Hunter that the vacuum should not be filled by giving the power to the chief judge, as further explained later in these Reasons.

[152] Mr. Tavender also points to the "disciplinary" section of the *PCJA* - s.9 (now repealed):

9 The chief judge shall review any matter regarding the conduct of a judge that comes to his attention, whether a complaint is made or not, and may do 1 or more of the following:

- (a) determine that no further action need be taken;
- (b) reprimand the judge;
- (c) take corrective measures;
- (d) refer the matter to the Judicial Council. [emphasis added]

Mr. Tavender argues throughout that the Chief Judge necessarily had to discipline Judge Reilly for improper judicial conduct - for losing his impartiality. This alleged disciplinary power presumably comes under the authority of s.9(c)'s "corrective measures". Mr. Hunter submits that the s.9 powers should not be allowed to interfere with adjudicative independence of Judge Reilly and, indeed, of all other Provincial Court judges who may feel a "chilling effect".

D. Constitutional Authority

[153] As discussed earlier in these Reasons, it is clear that judges of the Provincial Court have adjudicative independence. In the earlier-cited words of *Beauregard*, judges must be free from interference, even from other judges. It is also clear that the Provincial Court itself has administrative independence to deal with such matters as judges' assignments and court sittings (see *Campbell* and *Valente*, as cited above). The issue becomes balancing these two principles: adjudicative independence and administrative independence.

E. Conclusion

[154] Based on the foregoing, it is clear that a chief judge has certain statutory and constitutional powers. The issue is whether the Chief Judge here stayed within the bounds of the provisions of the *PCJA* and did not violate the constitutional principles outlined. In many instances, a chief judge's exercise of power is obviously valid and should not be questioned. For example, a decision to assign a judge to hear a particular case (in the absence of any conflict) would be both statutorily authorized and constitutional. Similarly, a decision to reprimand a judge for having reserve judgments outstanding for an excessive period of time would be both statutorily authorized and constitutional.

[155] The present circumstances are clearly more complicated, falling under neither extreme. The next section of these Reasons discusses the balance between administrative and adjudicative independence, in the context of a chief judge's statutory and constitutional powers. It then addresses the specific facts of this case.

Issue 4: If a chief judge has such authority in general, was it properly exercised by the Chief Judge in this case?

No.

A. Introduction

[156] I decided in the previous section that a chief judge has certain statutory and constitutional powers, as long as the exercise of such powers remains within the contemplated scope of the *PCJA* and does not infringe the constitutional principles discussed.

[157] In my view, the Chief Judge's decision here went beyond the scope of both his statutory authority under the *PCJA* and his constitutional authority. Moreover, the reasons for his decision, based on the Record before me, strike at, or could be perceived to strike, at Judge Reilly's fundamental entitlement to adjudicative independence. I note again that the right to adjudicative independence, while belonging to an individual judge, is for the benefit of the public and the judicial system as a whole. Because of its importance and history (elaborated on below), adjudicative independence must supercede administrative independence, where the two are at odds.

[158] I note that Mr. Tavender referred several times to the examples I gave in my earlier decision on judicial review ([1998] A.J. No. 975, para. 48a):

To choose a clear example, for instance, if a Chief Judge were to say 'I think you should decide for Party X in the case you are hearing tomorrow,' that would be outside a Chief Judge's powers and would be judicially reviewed. Characterizing such a statement as administrative, supervisory or disciplinary could not save it, as it clearly interferes with adjudicative independence. Conversely, a statement by a Chief Judge that 'I am assigning you the case of X v. Y' is clearly within a Chief Judge's powers and ordinarily would not be reviewable.

Mr. Tavender correctly emphasizes that the Chief Judge did not tell Judge Reilly how to decide a specific case on a specific date. However, Mr. Tavender misses the point of these examples. There is a spectrum of behaviour by a chief judge - the examples I gave are clear examples from each end of that spectrum. There are, however, many possible situations between those two extremes. The present case highlights one of those interim situations.

B. Discussion

1. Conflicting Core Characteristics and Dimensions

[159] In most situations, it would not be necessary to balance the principles of judicial independence, nor to consider which is to be given more weight. In this situation, however, the

parties have left me no choice but to address this question.

[160] As quoted above from *Beauregard*, the historical principal “core” of judicial independence is a judge’s individual adjudicative independence (at 69), although an institutional aspect later developed (at 69-70). *Campbell* describes these as the individual dimension and the institutional dimension (at 81-82). The second dimension (institutional) has evolved as the judiciary itself “has developed from a dispute-resolution mechanism, to a significant social institution with an important constitutional role which participates along with other institutions in shaping the life of its community” (*Beauregard* at 69, citing S. Shetreet and J. Deschênes (eds.), *Judicial Independence: The Contemporary Debate* (1985), “The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration” at 393).

[161] *Campbell* also discusses the historical development of the two dimensions (at 84-85). It is the institutional independence which allows the courts to protect the Constitution and its values (at 84). Chief Justice Lamer continued by stating that provincial courts play a critical role in enforcing the Constitution and protecting its values: “Inasmuch as that role has grown over the last few years, it is clear therefore that provincial courts must be granted some institutional independence.” (at 85).

[162] In my view, it is clear from that statement that institutional independence, while vital, developed in order to protect the central necessity for individual judicial independence. In particular, the necessity for institutional independence of the provincial courts has grown as the provincial courts’ role has grown, particularly over the last few years.

[163] In a similar way, the role and authority of the chief judges and chief justices has developed over time. Again, in my view, this authority developed as another means to ensure and protect the individual adjudicative independence that is vital and central to our justice system.

[164] In *Ruffo*, the majority of the Supreme Court of Canada discussed the functions and powers of a chief judge at 301-08. One of the issues in that case was whether the chief judge appropriately made a complaint about a judge to the Judicial Council. The majority held that the power to make such a complaint was an intrinsic part of a chief judge’s role (at 304).

[165] The majority in *Ruffo* noted that many of the provinces and territories give the chief judge a key role in ensuring compliance with judicial ethics. This was, of course, the situation in Alberta where, as mentioned, the chief judge had the explicit statutory authority to carry out certain administrative, supervisory and disciplinary functions. The disciplinary powers set out in *PCJA*, s. 9 have now been repealed. Justice Gonthier stated in *Ruffo* (at 303-04):

It must therefore be thought that chief judges or justices, because of their role as co-ordinators, were able to have a certain influence on compliance with rules of conduct in the specific context of a disciplinary authority that was initially in the hands of the executive branch and then, starting in the 19th century after the principle of security of tenure for judges was established, belonged exclusively to the legislative branch.

...

It must not be forgotten that a large part of the chief judge’s role in maintaining high-quality justice was defined gradually over the years, in the same way as judicial precedents...[T]he supervisory powers conferred on the chief judge by the

[legislation at issue]...must be seen as the expression of a reality that is consistent with the general practice and gradual developments over time. [emphasis added]

[166] In *R. v. Doyle*, 1992 CanLII 12827 (NWT CA), [1992] N.W.T.R. 81 (C.A.), the issue was the process for handling complaints about Territorial Court judges. There, the then Minister of Justice complained to the territorial council about certain sentences imposed by the judge, and certain “controversial social or criminological statements” made by the judge (during a private interview). The Minister also called a press conference denouncing the judge’s attitudes. The council (half of whom were appointed by the Minister) recommended a formal hearing, which was conducted by a justice of the Court of Queen’s Bench of Alberta. That report exonerated the judge and criticized the Minister in various respects.

[167] The court in *Doyle* emphasized several features relating to judicial independence, particularly the fact that the Minister’s attack stemmed from a disagreement with the judge’s perceived view. At no time was there a suggestion that the judge had acted unethically (at 86). The court continued (at 87-88):

Judicial “discipline” statutes exist to deal with any judge who becomes too ill to function, refuses to work, or acts unethically. They do not exist, like some 16th century ecclesiastical body, to root out unorthodoxy, or even plain error. If a judge makes errors, appellate courts sit to undo them. A host of periodicals and books, learned and popular, criticize the errors after the individual cases are over. The penalties for judicial error are reversal on appeal, and bad reviews in legal journals. Neither removal nor threat of discipline lies for such matters.

There are many reasons for that. One is that from time to time the multitude are wrong and the lone judge is right. . . .

What the former minister did here was to try to use the power to remove judges either to influence public sentiment, or to influence the future results in future court cases. The latter would be a natural tendency of his acts. That is the gravest perversion of the system, . . . It is precisely what our whole system of judicial tenure is designed to prevent. [emphasis added]

[168] Mr. Tavender accepts these propositions, but argues that they are inapplicable because the Chief Judge was not dealing with the merits of Judge Reilly’s decisions. I disagree - the Record clearly shows disagreement with Judge Reilly’s views and decisions.

[169] In my view, therefore, the historical development and its underlying rationale lead to the inescapable conclusion that institutional independence and the powers of chief judges developed over time in order to protect and enhance the fundamental and central principle of individual adjudicative independence. Consequently, if, as here, one dimension has to be given preference over the others, individual adjudicative independence must receive that preference. Therefore, the security of tenure core characteristic must also supercede the administrative independence core characteristic.

2. Was Judge Reilly’s Adjudicative Independence Threatened?

[170] I wish to address two preliminary points. First, I must deal with Mr. Tavender’s argument that Mr. Hunter (and, by implication, this Court) should not draw conclusions based solely on the Record, when there is no testimony to explain or clarify items in the Record. This is impractical. There is often no live testimony or cross-examination during a judicial review. In my view, I am entitled to make reasonable findings of fact based on the information contained in the Record.

[171] Second, I note that some members of the judicial community have expressed concerns over a chief judge or chief justice's potential power. In *A Place Apart: Judicial Independence and Accountability in Canada* (Canadian Judicial Council, 1995), Martin L. Friedland reproduces several comments at 225-26:

‘ . . . Will the new powers of the Chief Judges be confined to judicial administration? What of their power to control trips, travel and the education of judges – even the power to allocate desirable and undesirable cases to punish judges can represent a threat to judicial independence. Every increase in power to a Chief Judge over others might be seen as a threat to judicial independence.’

...

‘The opportunities for interference exist because of the unique nature of the chief judge's administrative authority and investigative, disciplinary and supervisory duties.’ [footnotes omitted]

While it is not for me to comment on this in the broader context, it is interesting that a definite concern exists on this issue.

[172] I agree with Mr. Hunter that the Record indicates that the Chief Judge made the decision on April 3, 1998 to move Judge Reilly from Canmore. This is shown by the letter at Tab 25 (see Appendix) from Assistant Chief Judge Stevenson to the Chief Judge dated March 30, 1998, stating:

I enclose a recent ruling by Judge Reilly [the *Twoyoungmen* decision]. Its content continues an apparent obsession of Judge Reilly to subjugate the law to his perception of unjust social conditions on the Stoney First Nation Reserve at Morley.

...

I can only conclude from his comments . . . that when matters before him involve aboriginal persons, he does not intend to act objectively, judicially or in accordance with Canadian law. The last paragraph of his ruling indicates a pre-judgment attitude that would clearly, in my view, support an application to disqualify him from presiding over any case on the basis of bias.

For these reasons alone, it is my recommendation that Judge Reilly be re-assigned to preside in a legal environment other than the circuit where he now presides.

The letter goes on to recommend that “consideration be given” to closing Canmore as a base point. In a handwritten note of April 3, 1998 (which was conceded to be written by the Chief Judge), the Chief Judge stated:

1. I agree with ACJ Stevenson [sic] request.
2. Vijay [Bhardwaj, Counsel to the Provincial Court] tell me what procedure we have to take to make Canmore from a base point to a circuit point.
3. Tell me the procedure to transfer Reilly from Canmore to Calgary. [emphasis added]

[173] Therefore, the decision was made on April 3, 1998. This handwritten note does not, however, indicate on what grounds the Chief Judge made the decision to move Judge Reilly. While it could possibly be inferred that the Chief Judge agreed with Assistant Chief Judge Stevenson's comments regarding Judge Reilly's objectivity, I cannot infer that from this handwritten note. To me, the note only indicates that the timing of the decision, not the reason behind it. In my view, the April 21, 1998 letter from Assistant Chief Judge Stevenson to the Chief Judge formally recommending that the Canmore Base Point be closed and that Judge Reilly be transferred is merely part of the justification process for a decision that had already been made. I disagree with Mr. Tavender's attempted characterization of the Chief Judge's April 3 decision as a "preliminary decision", "tentative decision", "recommendation" or the "beginning of a process that may lead ultimately to a decision". To my mind, it was clearly a final and definite decision.

[174] Other documents in the Record do convey the Chief Judge's rationale and mechanics for moving Judge Reilly. For example, see the comments made by the Chief Judge in the April 3, 1998 letter to Judge Reilly (Tab 22 - see Appendix).

[175] In fact, Mr. Tavender admits that the impugned decision was made, at least in part, because the Chief Judge felt that Judge Reilly was biased or had lost his impartiality in dealing with aboriginal matters. Undoubtedly, judges must accept that the freedoms attached to their adjudicative independence impose concurrent responsibilities to address only those issues properly before them, along with a duty to make every effort to maintain impartiality and objectivity in dealing with the issues and parties before them. Because I find in these Reasons that the Chief Judge did not have the statutory or constitutional authority to make the impugned decision, I need not, and will not, address the question of bias and loss of impartiality. Judge Reilly's conduct is not part of this judicial review.

[176] In Mr. Tavender's submission, the issue is not whether the Chief Judge and Assistant Chief Judge Stevenson acted in a patently unreasonable manner in reaching their conclusions, nor whether their conclusions were correct. What happened here, Mr. Tavender states, is that the Chief Judge and Assistant Chief Judge Stevenson, in exercising their statutory and common law administrative, supervisory and disciplinary powers and obligations, concluded that Judge Reilly had violated his duty to be impartial and objective. They then took what they felt were appropriate and necessary measures.

[177] While they may have felt themselves entitled to take such measures, I reiterate that this was not the appropriate course of action. They did not have the statutory or constitutional authority to take these steps. If they felt strongly about these matters, the proper course was reference to the Judicial Council.

[178] As a final point regarding the mechanics of making and implementing the impugned decision, Judge Reilly's affidavit states, at para.4, that Judge Reilly asked Assistant Chief Judge Stevenson on May 14, 1998 about the purpose of the May 26 meeting. According to the affidavit, Assistant Chief Judge Stevenson denied any knowledge of the meeting's purpose. The affidavit continues by averring that Assistant Chief Judge Stevenson told Judge Reilly on May 25 that the purpose of the meeting was the future of the west circuit, but that he said nothing about Judge Reilly's re-assignment. Finally, Mr. Hunter notes a letter dated December 3, 1997 from Assistant Chief Judge Stevenson to Judge Reilly (Tab 51.1). Assistant Chief Judge Stevenson admitted there have been some discussions about the future of all circuits, on the sole basis of cost-effectiveness. However, he continued "...prior to any final recommendations concerning the future of Canmore as a base point, you will be consulted and asked for input, as will other 'players' in the system (Crown, defence, R.C.M.P., Probation, Corrections, etc.)." I note that the Record does not show any such consultation with any of these parties. To my mind, this strengthens the argument that cost-effectiveness was not the real reason for the impugned decision.

[179] I am particularly disturbed by the Chief Judge's frequent references to decisions he obviously had problems with, along with comments as to their partiality or bias. These decisions had proceeded through the court process in a normal fashion. Once the normal court process is over, the matter is closed.

[180] Regarding the power in s.13(1)(a) of the *PCJA* to set the residence of judges, I agree with Mr. Hunter that the vacuum created when it was declared unconstitutional is not automatically filled by giving the power to the chief judge. I reach this conclusion for three reasons. First, as a practical matter, I note that the legislature, when it finally filled the hole, did not give the power to the chief justice, but to the Judicial Council. Second, I know of no interpretive principle saying that a gap is to be filled in the manner urged by Mr. Tavender.

[181] Third, and most importantly, giving the power to the chief judge could potentially lead to the same problems that motivated the court to strike down s.13(1)(a) in the first place. Chief Justice Lamer stated that s.13(1)(a) "creates the reasonable apprehension that it could be used to punish judges..." (*Campbell* at 148). While he was referring to a punishment for not ruling in the government's favour (or, alternatively, a reward for ruling in the government's favour), the same caution applies when dealing with any person or body that has the right to affect such a basic requirement of a judge's function and career. Here, the Chief Judge attempted to exercise this power. I have found that he did so to discipline Judge Reilly for decisions and an overall approach with which the Chief Judge did not agree. The fact that this occurred gives even more weight to Lamer C.J.C's. concerns. The issue of the new provision which gives this power to the Judicial Council is not before me; therefore, I will not comment on whether it courts the same danger.

[182] Regarding the constitutional authority of a chief judge, it seems clear to me that it is not unlimited, even in the exercise of administrative functions. I find support for this in the section of the *Campbell* decision dealing with provincial court closures in Manitoba for "Filmon Fridays" as a cost saving measure. The government had argued that the chief judge made the actual decision to close the court on those days, so that there was no interference with the court's administrative independence. The majority of the Supreme Court of Canada disagreed. Moreover, the majority held that the chief judge, had she in fact made the decision, would have exceeded her constitutional authority (at 152):

. . . administrative independence is a characteristic of judicial independence which normally has a collective or institutional dimension. It attaches to the court as a whole. Although certain decisions may be exercised on behalf of the judiciary by the Chief Judge, it is important to remember that the Chief Judge is no more than "*primus inter pares*": *Ruffo v. Conseil de la magistrature*, 1995 CanLII 49 (SCC), [1995] 4 S.C.R. 267, at para. 59. Important decisions regarding administrative independence cannot be made by the Chief Judge alone. In my opinion, the decision to close the Manitoba Provincial Court is precisely this kind of decision. [emphasis added]

[183] Therefore, while a chief judge can exercise his administrative independence (or exercise the Provincial Court's administrative independence) to a degree, a chief judge cannot interfere with a judge's individual adjudicative independence, or be perceived to interfere with that judge's individual adjudicative independence. I cannot emphasize enough that a judge's individual adjudicative independence must not be threatened or be perceived to be threatened. This is for the sake not only of the judge's independence, but for the integrity of the judicial system as a whole.

[184] In conclusion, I find that the actual decision to transfer Judge Reilly was made on April 3, 1998, and that it was made on improper grounds. The Record after April 3, 1998 shows an attempt

to colour the decision as a cost-saving and administrative measure. Even if those were real factors in the decision, they were not the primary motivation. The primary motivation was the Chief Judge's disagreement with Judge Reilly's views and conduct, particularly as expressed in certain judgments.

[185] I am particularly dismayed by the three letters dated May 25, 1998 (Tabs 10, 9 and 8 - see Appendix). The Tab 10 letter from the Chief Judge to Assistant Chief Judge Stevenson portrays the decision to close the Canmore Base Point and to move Judge Reilly as a "pragmatic" way to "improve the efficiency" of the courts. The Tab 9 letter from the Chief Judge to the then Deputy Minister also refers to improving the "efficiency of the justice delivery system". (I note that it also refers to a report by Assistant Chief Judge Stevenson, which never made it into the Record). The letter also acknowledges that the decision to close Canmore as a Base Point is in the Deputy Minister's jurisdiction, despite the Chief Judge's attempt to use this closure as a reason to justify Judge Reilly's transfer.

[186] The Tab 8 letter from the Chief Judge to Judge Reilly clearly sets out the real reason for Judge Reilly's transfer - his "obsession" and "pre-judgment attitude", as perceived by the Chief Judge. In my view, the most telling passage in that letter is: "For purposes of the executive branch, however, I have justified this move on administrative grounds." To my mind, this underscores the real reason for the transfer.

Issue 5: If the Chief Judge here did have the authority to make such a decision, was he required to follow procedural fairness in making it? If so, did he meet the procedural fairness requirements?

[187] Had I found that the Chief Judge had the authority to make the impugned decision in these circumstances, I would have found that Judge Reilly was entitled to procedural fairness. I would also have found that Judge Reilly did not receive the required level of procedural fairness.

[188] On the Record and after weighing the submissions of Mr. Tavender and Mr. Hunter, I find that the Chief Judge failed to accord Judge Reilly procedural fairness by deciding himself to deal with the matter as Chief Judge alone and by instituting an ad hoc process which denied clear notice and any opportunity for Judge Reilly to be heard effectively on his own behalf. Judge Reilly's right of adjudicative independence was at issue. There are distinct parallels here to the case of Mr. Justice Crane in the *Rees v. Crane* case, supra. The Privy Council in that case examined a number of decisions dealing with fairness and natural justice in any process that may affect another person's interests, rights and duties - individual or professional.

[189] Their Lordships emphasized (at 190) what Lord Morris of Borth-y-Gest stated in *Furnell v. Whangarei High Schools Board*, [1973] A.C. 660 at 679:

Natural justice is but fairness writ large and juridically. It has been described as 'fair play in action.' Nor is it a leaven to be associated only with judicial or quasi-judicial occasions.

[190] There are no hard and fast rules. The learned Law Lords noted that depending upon the nature of the proceeding, type of investigation, the process involved, the nature and authority of the tribunal or decision maker, it is not required to provide notice and an opportunity to be heard at the preliminary stages of the inquiry. Such a situation is acceptable where, for example, it is a matter of urgency, or administrative necessity and no substantive rights are affected, and provided that notice of what is at issue and an opportunity to be heard in reply is part of the later process.

Nevertheless, their Lordships made it clear that natural justice may require otherwise. At 191-92, they state:

It is clear from the English and Commonwealth decisions which have been cited that there are many situations in which natural justice does not require that a person must be told of the complaints made against him and given a chance to answer them at the particular stage in question. Essential features leading the courts to this conclusion have included the fact that the investigation is purely preliminary, that there will be a full chance adequately to deal with the complaints later, that the making of the inquiry without observing the *audi alteram partem* maxim is justified by urgency or administrative necessity, that no penalty or serious damage to reputation is inflicted by proceeding to the next stage without such preliminary notice, that the statutory scheme properly construed excludes such a right to know and to reply at the earlier stage.

But in their Lordships' opinion there is no absolute rule to this effect even if there is to be, under the procedure, an opportunity to answer the charges later. As Professor de Smith puts it in *de Smith's Judicial Review of Administrative Action*, 4th ed. (1980), p. 199:

"Where an act or proposal is only the first step in a sequence of measures which may culminate in a decision detrimental to a person's interests, the courts will *generally* decline to accede to that person's submission that he is entitled to be heard in opposition to this initial act, *particularly* if he is entitled to be heard at a later stage." [emphasis added by *Rees*.]

In considering whether this general practice should be followed the courts should not be bound by rigid rules. It is necessary, as was made clear by Tucker L.J. in *Russell v. Duke of Norfolk* [1949] 1 All E.R. 109, 118 (as approved by Lord Guest in *Wiseman v. Borneman* [1971] A.C. 297, 311, and by Lord Morris of Borth-y-Gest in *Furnell v. Whangarei High Schools Board* [1973] A.C. 660, 679) to have regard to all the circumstances of the case . . .

[191] Judge Reilly never received notice that he was to be re-assigned and his residence moved. The real purpose of his meeting with the Chief Judge and Assistant Chief Judge Stevenson was not disclosed. There was no opportunity granted to him to prepare himself and no opportunity to respond.

[192] Mr. Tavender's assertion that nothing in the legislative scheme of the *PCJA* requires any "natural justice" when a Chief Judge exercises his administrative, supervisory and disciplinary powers (prior to s. 9 being repealed) is met by the principle that if a statute is silent upon the question the Courts will imply a rule that natural justice be applied where required. See *Rees* at 191, quoting Lord Guest in *Wiseman v. Borneman*, [1971] A.C. 297 at 310.

[193] On this ground alone I would quash the decision of the Chief Judge.

DISPOSITION

[194] The Chief Judge did not have the authority to make the impugned decision and did not follow procedural fairness in making it. Accordingly, Judge Reilly's re-assignment to Calgary and his change of residence to Calgary cannot be implemented.

[195] The impugned decision is quashed.

[196] The parties may, on proper notice, speak to costs.

DATED at Calgary, Alberta, this 26th day of April, 1999.

J. C.Q.B.A.

COUNSEL:

Allan D. Hunter, Q.C.
for Applicant (Respondent)

E. David D. Tavender, Q.C. & J.M. Doyle
for Respondent (Applicant)

APPENDIX - LIST OF DOCUMENTS

- Tab 25 - March 30, 1998 letter from Assistant Chief Judge Stevenson to the Chief Judge**
- Tab 24 - Excerpts from April 1, 1998 letter from Judge Reilly to the Chief Judge**
- Tab 25 - April 3, 1998 handwritten note by the Chief Judge**
- Tab 22 - Excerpts from April 3, 1998 letter from the Chief Judge to Judge Reilly**
- Tab 20 - Excerpts from April 9, 1998 letter from the Chief Judge to Assistant Chief Judge Stevenson**
- Tab 18 - April 21, 1998 letter from Assistant Chief Judge Stevenson to the Chief Judge**
- Tab 16.1 - April 24, 1998 document from Dave Paul (Manager, Provincial Court) to Jim McLaughlin (Director, Court Services)**
- Tab 14 - May 13, 1998 letter from Vijay Bhardwaj (Legal Counsel, the Provincial Court of Alberta) to Assistant Chief Judge Stevenson (plus several draft letters)**
- Tab 10 - May 25, 1998 letter from the Chief Judge to Assistant Chief Judge Stevenson**
- Tab 9 - May 25, 1998 letter from the Chief Judge to Neil McCrank (Deputy Minister of Justice and Deputy Attorney General) (copied to Assistant Chief Judge Stevenson and Judge Reilly)**

- Tab 8 - May 25, 1998 letter from the Chief Judge to Judge Reilly (copied to Assistant Chief Judge Stevenson)**
- TAB 25 - March 30, 1998 letter from Assistant Chief Judge Stevenson to the Chief Judge**

“RE: JUDGE REILLY/CANMORE - BANFF BASE POINT

I enclose a recent ruling by Judge Reilly [the *Twoyoungmen* decision]. Its content continues an apparent obsession of Judge Reilly to subjugate the law to his perception of unjust social conditions on the Stoney First Nation Reserve at Morley.

While his approach may be well-intentioned, it is not, in my view, in conformity with his obligations as a jurist which is to apply appropriate legal considerations to applications before him.

I can only conclude from his comments on pages 9-10 (Point 9) of his ruling that when matters before him involve aboriginal persons, he does not intend to act objectively, judicially or in accordance with Canadian law. The last paragraph of his ruling indicates a pre-judgment attitude that would clearly, in my view, support an application to disqualify him from presiding over any case on the basis of bias.

For these reasons alone, it is my recommendation that Judge Reilly be re-assigned to preside in a legal environment other than the circuit where he now presides.

Furthermore, for the past 18 months I have been monitoring the caseload on Judge Reilly's circuit. As you are aware, Judge Reilly sits four days per week. The average sitting times for each location over the past 18 months are (according to statistics supplied by his Court Clerk, which includes the time when the court is in recess) [original emphasis]:

Banff	- 2:26
Canmore	- 3:07
Cochrane	- 2:51

Prosecution of cases on that circuit is all handled out of the Calgary Crown Office. Almost all defence counsel who appear in the courts on that circuit come from Calgary.

The Base Point in Canmore employs six persons. The budget request for 1998-1999 is \$416,000. Following extensive discussions with Mr. Paul, our Court Manager, it is estimated that if the Canmore Base Point were to be closed, the circuit could be serviced just as efficiently out of Calgary by a combination of Judges and Commissioners with a cost saving of approximately \$173,900.

- 2 -

A further consideration is the strong possibility that the initiation of an aboriginal justice component to deal with the Stoney Nation cases (plus Tsuu T'ina matters) would reduce the current combined Cochrane caseload by 80 percent.

For all of the above reasons, I recommend that consideration be given to closing the Canmore Base Point and transferring the court administration for that circuit to Calgary. That

closure should coincide with Judge Reilly's re-assignment.

I appreciate that the changes I am recommending may be interpreted in some quarters as being directed in a punitive way against Judge Reilly for his actions in the *Hunter* case and other matters involving aboriginals. While it will be impossible to prevent such interpretations from arising, the simple fact is that the changes, if approved, will not occur as a result of any government initiative; it will occur as a result of a judicial initiative. Simply put, at the moment there is not enough work for a judge on that circuit, with the anticipated aboriginal justice initiative there will be even less.

I look forward to your reaction and further direction."

TAB 24 - Excerpts from April 1, 1998 letter from Judge Reilly to the Chief Judge

"I sincerely apologize for my clumsiness and the consternation which it has caused you.

...

I do ask you to consider this. The Poles, the Irish and the Aboriginal People of Canada have all suffered from the humiliation and limitations of being dominated and oppressed by foreign powers. You and I escaped the foreign domination because our ancestors were able to leave their countries of origin and come here to Canada where we have enjoyed freedom and opportunity. That freedom and opportunity was not accorded the Aboriginal People except at the cost of assimilation, which meant the renunciation of their culture, tradition, traditional religion, and community in order to enjoy the benefits of 'white' society. It is my view that the phrase '... with particular attention to the circumstances of aboriginal offenders' in section 718.2(e) [of the *Criminal Code*] means that to do justice to these people today we must be aware of the injustices of yesterday and their current effects, and compensate for them. In attempting to put this into practice I created far more of a stir than I ever intended. I am unaware of the extent of the difficulties this has created for you, but for all of it, I apologize.

..."

Tab 25 - April 3, 1998 handwritten note by the Chief Judge

"April 3/98 (1) I agree with ACJ Stevenson[sic] request [referring to the other Tab 25 document].

(2) Vijay tell me what procedure we have to take to make Canmore from a base point to a circuit point.

(3) Tell me the procedure to transfer Reilly from Canmore to Calgary."

[NOTE: It is impossible to tell from the Record which of the two "April 3, 1998" documents was prepared first.]

TAB 22 - Excerpts from April 3, 1998 letter from the Chief Judge to Judge Reilly

“ . . .

I applaud you for your conversion on the road to Damascus and the help you are prepared to accord the Aboriginal People but I strongly object to how you are improperly abusing your judicial position to achieve this end. Your judgments in Hunter and others recently are the most atrocious judgments that I have seen as Chief Judge of the Provincial Court. An example is making findings of fact when there is no evidence before you and there are many others. You want to justify your actions under 718.2(e) which is an interpretation of that section by yourself whereby you have greatly exceeded your jurisdiction. You should pay attention to what was said by Justice Levechio in the Hunter appeal. In short your recent handling of native matters before you is in my humble opinion an embarrassment to our court.

. . .

In view of information that I have received from other judges . . . I am not aware of any corrective measure that I can take that will get you on, what I think is, the right track.”

TAB 20 - Excerpts from April 9, 1998 letter from the Chief Judge to Assistant Chief Judge Stevenson

“RE: Judge Reilly/Canmore - Banff Base Point

Thank you for your letter of March 30, 1998 on the above subject. I have given serious thought to this matter and I agree with you that the base point in Canmore be closed, Judge Reilly be moved to Calgary and the circuit be serviced from Calgary. This will be a cost saving measure which is further justified by our desire to preserve the good reputation of the Provincial judiciary.

.

I therefore suggest that you make a formal request to me to move Judge Reilly to Calgary, close to the Canmore base point and convert it into a circuit point, with your reasons showing how you arrive at cost-saving. I will order the closure of that base point, move Judge Reilly to Calgary and forward the matter to the Minister to take appropriate action regarding financial and administrative matters in accordance with their procedures.”

TAB 18 - April 21, 1998 letter from Assistant Chief Judge Stevenson to the Chief Judge

This letter sets out administrative details in various circuits. It details projected cost savings from closing the Canmore Base Point. It recommends closure of the Canmore Base Point, plus the re-assignment of Judge Reilly.

TAB 16.1 - April 24, 1998 document from Dave Paul (Manager, Provincial Court) to Jim McLaughlin (Director, Court Services)

This is an administrative document discussing various aspects of closing the Canmore Base Point. It cites advantages (e.g., cost savings, centralization, consistency) and disadvantages (reduced service to the public). It also attaches statistics on caseload volume for the various circuit courts.

TAB 14 - May 13, 1998 letter from Vijay Bhardwaj (Legal Counsel, the Provincial Court of Alberta) to Assistant Chief Judge Stevenson (plus several draft letters)

This letter states that the Chief Judge would like Assistant Chief Judge Stevenson's comments on the attached draft letters (which were later finalized as Tabs 10, 9, 8, 12 and 11, respectively). The letter also sets up the May 26, 1998 meeting among the Chief Judge, Assistant Chief Judge Stevenson and Judge Reilly.

TAB 10 - May 25, 1998 letter from the Chief Judge to Assistant Chief Judge Stevenson

“RE: Canmore Base Point - Judge Reilly

Thank you for your letter of April 21, 1998 on the above subject. I support, whole heartedly, your commitment to improve the efficiency of the justice delivery system west of Calgary. I accept your well thought out and pragmatic proposal to convert Canmore into a circuit point and move Judge Reilly to Calgary.

While I will designate sitting days for Canmore, as per your letter of April 21, 1998, the decision to keep it as a base point or change it to a circuit point belongs in the jurisdiction of the Minister (including Deputy Minister). I am requesting the Deputy Minister to do whatever is necessary to accommodate these changes, namely, to provide the cost of the move of Judge Reilly's residence from Canmore to Calgary and provide facilities for new sitting days in Canmore. (See enclosed letter to Neil McCrank).

I have reassigned Judge Reilly to preside in Calgary effective 1st of September 1998. A copy of my letter to him is enclosed for your information and necessary action."

TAB 9 - May 25, 1998 letter from the Chief Judge to Neil McCrank (Deputy Minister of Justice and Deputy Attorney General) (copied to Assistant Chief Judge Stevenson and Judge Reilly)

"As part of our ongoing commitment to improve the efficiency of the justice delivery system, Assistant Chief Judge Stevenson has thoroughly reviewed the operations of the court circuit west of Calgary (Banff, Canmore and Cochrane). I enclose his report for your perusal. [such report was not included in the record]

I agree with Assistant Chief Judge Stevenson that the above noted circuit can be run more efficiently from Calgary. This can be done by adjusting our sitting schedule on that circuit and by moving Judge Reilly from Canmore to Calgary.

Pursuant to the authority that I have under the existing laws, I intend to designate the sitting days on that circuit as suggested by Assistant Chief Judge Stevenson and re-assign Judge Reilly from Canmore to Calgary: both decisions to be effective 1st of September 1998.

Whether Canmore should remain a base point or not is in your jurisdiction: my concern is the provision of facilities there to hold sittings of our court on designated days from 1st of September 1998.

This is to request you to do whatever is necessary to facilitate the changes that I am making, namely the change of residence of Judge Reilly from Canmore to Calgary and appropriate staffing and facilities at Canmore on the new sitting days there.

Thank you for your cooperation."

TAB 8 - May 25, 1998 letter from the Chief Judge to Judge Reilly (copied to Assistant Chief Judge Stevenson)

“As a result of continuing and mounting concerns about your obsession to subjugate the law to your perception of unjust social conditions of the aboriginal peoples as well as your pre-judgement attitude which can more frequently become grounds for application to disqualify yourself from presiding over a case on the basis of bias, Assistant Chief Judge Stevenson and I have decided to re-assign you to sit in Calgary from 1st of September 1998.

This entails a change of residence for you from Canmore to Calgary. Assistant Chief Judge Stevenson will assist you with the administrative details in this matter.

I may add that this move is the only honourable way of keeping you and the Provincial Judiciary out of harm's way. For purposes of the executive branch, however, I have justified this move on administrative grounds. (See copy of enclosed letter to the Deputy Minister).

I am sending a copy of this letter to Assistant Chief Judge Stevenson. Please contact him at your early convenience to make plans to sit in Calgary from 1st of September 1998.”

Tab 104

Toronto (City) v. Ontario (Attorney General), 2021 SCC 34 (CanLII), [2021] 2 SCR 845

Source:	Supreme Court of Canada
Date:	2021-10-01
File number:	38921
Other citations:	462 DLR (4th) 1 — 495 CRR (2d) 272
Citation:	Toronto (City) v. Ontario (Attorney General), 2021 SCC 34 (CanLII), [2021] 2 SCR 845, < https://canlii.ca/t/jjc3d >, retrieved on 2026-03-23
Most recent unfavourable mention	Mercer v. Yukon (Government of) , 2025 YKCA 5 (CanLII) [...] He says City of Toronto is distinguishable because it was concerned with the position of municipalities within the constitutional structure. [...]



SUPREME COURT OF CANADA

CITATION: Toronto (City) v. Ontario (Attorney General), 2021 SCC 34, [2021] 2 S.C.R. 845

APPEAL HEARD: March 16, 2021
JUDGMENT RENDERED: October 1, 2021
DOCKET: 38921

BETWEEN:

City of Toronto
Appellant

and

Attorney General of Ontario
Respondent

- and -

Attorney General of Canada, Attorney General of British Columbia, Toronto District School Board, Cityplace Residents' Association, Canadian Constitution Foundation, International Commission of Jurists (Canada), Federation of Canadian Municipalities, Durham Community Legal Clinic, Centre for Free Expression at Ryerson University, Canadian Civil Liberties Association, Art Eggleton, Barbara Hall, David Miller, John Sewell, David Asper Centre for Constitutional Rights, Progress Toronto, Métis Nation of Ontario, Métis Nation of Alberta and Fair Voting British Columbia
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

JOINT REASONS FOR JUDGMENT: Wagner C.J. and Brown J. (Moldaver, Côté and Rowe JJ. concurring)

JUDGMENT:
(paras. 1 to 85)

DISSENTING REASONS: Abella J. (Karakatsanis, Martin and Kasirer JJ. concurring)
(paras. 86 to 186)

City of Toronto

Appellant

v.

Attorney General of Ontario

Respondent

and

**Attorney General of Canada,
Attorney General of British Columbia,
Toronto District School Board,
Cityplace Residents' Association,
Canadian Constitution Foundation,
International Commission of Jurists (Canada),
Federation of Canadian Municipalities,
Durham Community Legal Clinic,
Centre for Free Expression at Ryerson University,
Canadian Civil Liberties Association,
Art Eggleton,
Barbara Hall,
David Miller,
John Sewell,
David Asper Centre for Constitutional Rights,
Progress Toronto,
Métis Nation of Ontario,
Métis Nation of Alberta and
Fair Voting British Columbia**

Interveners

Indexed as: Toronto (City) v. Ontario (Attorney General)

2021 SCC 34

File No.: 38921.

2021: March 16; 2021: October 1.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Freedom of expression — Municipal elections — Province enacting legislation redrawing municipality's electoral ward boundaries and reducing number of wards during election campaign — Whether legislation limits electoral participants' right to freedom of expression and, if so, whether limitation justified — Canadian Charter of Rights and Freedoms, ss. 1, 2(b) — Better Local Government Act, 2018, S.O. 2018, c. 11.

Constitutional law — Unwritten constitutional principles — Democracy — Province enacting legislation redrawing municipality's electoral ward boundaries and reducing number of wards during election campaign — Whether legislation unconstitutional for violating unwritten constitutional principle of democracy.

On May 1, 2018, the City of Toronto municipal election campaign commenced and nominations opened in preparation for an election day on October 22, 2018. On July 27, 2018, the closing day for nominations, Ontario announced its intention to introduce legislation reducing the size of Toronto City Council. On August 14, 2018, the *Better Local Government Act, 2018*, came into force, reducing the number of wards from 47 to 25.

The City and two groups of private individuals challenged the constitutionality of the *Act* and applied for orders restoring the 47-ward structure. The application judge found that the *Act* limited the municipal candidates' right to freedom of expression under s. 2(b) of the *Charter* and municipal voters' s. 2(b) right to effective representation. He held that these limits could not be justified under s. 1 of the *Charter* and set aside the impugned provisions of the *Act*. Ontario appealed and moved to stay the judgment pending appeal. The Court of Appeal granted the stay and, on October 22, 2018, the municipal election proceeded on the basis of the 25-ward structure created by the *Act*. The Court of Appeal later allowed the appeal, finding no limit on freedom of expression. The majority held that the City had advanced a positive rights claim, which was not properly grounded in s. 2(b) of the *Charter*, and concluded that the application judge had erred in finding that the *Act* substantially interfered with the candidates' freedom of expression and in finding that the right to effective representation applies to municipal elections and bears any influence over the s. 2(b) analysis. The majority also held that unwritten constitutional principles do not confer upon the judiciary power to invalidate legislation that does not otherwise infringe the *Charter*, nor do they limit provincial legislative authority over municipal institutions.

Held (Abella, Karakatsanis, Martin and Kasirer JJ. dissenting): The appeal should be dismissed.

Per Wagner C.J. and Moldaver, Côté, Brown and Rowe JJ.: Ontario acted constitutionally. The *Act* imposed no limit on freedom of expression. Further, unwritten constitutional principles cannot be used as bases for invalidating legislation, nor can the unwritten constitutional principle of democracy be used to narrow provincial authority under s. 92(8) of the *Constitution Act, 1867*, or to read municipalities into s. 3 of the *Charter*.

A purposive interpretation of *Charter* rights must begin with, and be rooted in, the text and not overshoot the purpose of the right but place it in its appropriate linguistic, philosophic and historical contexts. Section 2(b) of the *Charter*, which provides that everyone has the fundamental freedoms of thought, belief, opinion and expression, including freedom of the press and other media of communication, has been interpreted as generally imposing a negative obligation rather than a positive obligation of protection or assistance. A claim is properly characterized as negative where the claimant seeks freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage. Such claims of right under s. 2(b) are considered under the framework established in *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927.

However, as explained in *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673, s. 2(b) may, in certain circumstances, impose positive obligations on the government to facilitate expression. Many constitutional rights have both positive and negative dimensions and this is so for s. 2(b). Central to whether s. 2(b) has been limited is, therefore, the appropriate characterization of the claim as between a negative and positive claim of right.

In the context of positive claims under s. 2(b), where a claimant seeks to impose an obligation on the government (or legislature) to provide access to a particular statutory or regulatory platform for expression, the applicable framework is that of *Baier*. As held in *Baier*, to succeed, a positive claim must satisfy the following three factors first set forth in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016: (1) the claim should be grounded in freedom of expression, rather than in access to a particular statutory regime; (2) the claimant must demonstrate that lack of access to a statutory regime has the effect of a substantial interference with freedom of expression, or has the purpose of infringing freedom of expression; and (3) the government must be responsible for the inability to exercise the fundamental freedom. These factors set an elevated threshold for positive claims and can usefully be distilled to a single core question: is the claim grounded in the fundamental *Charter* freedom of expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government has either substantially interfered with freedom of expression, or had the purpose of interfering with freedom of expression? This single question, a salutary clarification of the *Baier* test, emphasizes the elevated threshold in the second *Dunmore* factor while encompassing the considerations of the first and third factors. Substantial interference with freedom of expression occurs where lack of access to a statutory platform has the effect of radically frustrating expression to such an extent that meaningful expression is effectively precluded. While meaningful expression need not be rendered absolutely impossible, effective preclusion represents an exceedingly high bar that would be met only in extreme and rare cases.

In the present case, the City has not established a limit on s. 2(b). The City's claim is a claim for access to a particular statutory platform, and is thus, in substance, a positive claim. The *Baier* framework therefore applies, and the City had to show that the *Act* radically frustrated the expression of election participants such that meaningful expression was effectively precluded. The candidates and their supporters had 69 days to re-orient their messages and freely express themselves according to the new ward structure. The *Act* imposed no restrictions on the content or meaning of the messages that participants could convey. Many of the challengers who continued to campaign ultimately had successful campaigns, raising significant amounts of money and receiving significant numbers of votes. This would not have been possible had their s. 2(b) rights been so radically frustrated so as to effectively preclude meaningful expression. Some of the candidates' prior expression may have lost its relevance, but something more than diminished effectiveness is required under the *Baier* framework. In the context of a positive claim, only extreme government action that extinguishes the effectiveness of expression may rise to the level of a substantial interference with freedom of expression. Section 2(b) is not a guarantee of the effectiveness or continued relevance of a message, or that campaign materials otherwise retain their usefulness throughout the campaign.

Furthermore, the unwritten constitutional principle of democracy cannot be used as a device for invalidating otherwise valid provincial legislation such as the impugned provisions of the *Act*. Unwritten principles are part of the law of the Constitution, in the sense that they form part of the context and backdrop

to the Constitution's written terms. Their legal force lies in their representation of general principles within which the constitutional order operates and, therefore, by which the Constitution's written terms — its provisions — are to be given effect. In practical terms, unwritten constitutional principles may assist courts in only two distinct but related ways.

First, they may be used in the interpretation of constitutional provisions. Where the constitutional text is not itself sufficiently definitive or comprehensive to furnish the answer to a constitutional question, a court may use unwritten constitutional principles as interpretive aids. When applied to *Charter* rights, unwritten principles assist with purposive interpretation, informing the character and the larger objects of the *Charter* itself, the language chosen to articulate the specific right or freedom, and the historical origins of the concepts enshrined. Where unwritten constitutional principles are used as interpretive aids, their substantive legal force must arise by necessary implication from the Constitution's text. Secondly, and relatedly, unwritten principles can be used to develop structural doctrines unstated in the written Constitution *per se*, but necessary to the coherence of, and flowing by implication from, its architecture. Structural doctrines can fill gaps and address important questions on which the text of the Constitution is silent.

Neither of these functions support the application of unwritten constitutional principles as an independent basis for invalidating legislation. On the contrary, unwritten constitutional principles, such as democracy, a principle by which the Constitution is to be understood and interpreted, strongly favour upholding the validity of legislation that conforms to the text of the Constitution. Subject to the *Charter*, a province, under s. 92(8) of the *Constitution Act, 1867*, has absolute and unfettered legal power to legislate with respect to municipalities. This plenary jurisdiction is unrestricted by any constitutional principle.

As for s. 3 of the *Charter*, it guarantees citizens the right to vote and run for office in provincial and federal elections, and includes a right to effective representation. The text of s. 3 makes clear, however, that it does not extend to municipal elections. Effective representation is not a principle of s. 2(b) of the *Charter*, nor can the concept be imported wholesale into s. 2(b). Section 3 and its requirement of effective representation also cannot be made relevant to the current case by using the democratic principle. Section 3 democratic rights were not extended to candidates or electors to municipal councils. The absence of municipalities in the constitutional text is not a gap to be addressed judicially; rather, it is a deliberate omission. The text of the Constitution makes clear that municipal institutions lack constitutional status, leaving no open question of constitutional interpretation to be addressed and, accordingly, no role to be played by the unwritten principles.

Per Abella, Karakatsanis, Martin and Kasirer JJ. (dissenting): The appeal should be allowed and the application judge's declaration that the timing of the *Act* unjustifiably infringed s. 2(b) of the *Charter* restored. Changing the municipal wards in the middle of an ongoing municipal election was unconstitutional.

When a democratic election takes place in Canada, including a municipal election, freedom of expression protects the rights of candidates and voters to meaningfully express their views and engage in reciprocal political discourse on the path to voting day. That is at the core of political expression, which in turn is at the core of what is protected by s. 2(b) of the *Charter*. The right to disseminate and receive

information connected with elections has long been recognized as integral to the democratic principles underlying freedom of expression, and as a result, has attracted robust protection.

A stable election period is crucial to electoral fairness and meaningful political discourse. As such, state interference with individual and collective political expression in the context of an election strikes at the heart of the democratic values that freedom of expression seeks to protect, including participation in social and political decision-making.

A two-part test for adjudicating freedom of expression claims was established in *Irwin Toy*. The first asks whether the activity is within the sphere of conduct protected by freedom of expression. If the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. The second asks whether the government action, in purpose or effect, interfered with freedom of expression.

The legal framework set out in *Baier*, which was designed to address under inclusive statutory regimes, only applies to claims placing an obligation on government to provide individuals with a particular platform for expression. Claims of government interference with expressive rights that attach to an electoral process are the kind of claims governed by the *Irwin Toy* framework.

The distinction between positive and negative rights is an unhelpful lens for adjudicating *Charter* claims. All rights have positive dimensions since they exist within, and are enforced by, a positive state apparatus. They also have negative dimensions because they sometimes require the state not to intervene. A unified purposive approach has been adopted to rights claims, whether the claim is about freedom from government interference in order to exercise a right, or the right to governmental action in order to get access to it. The threshold does not vary with the nature of the claim to a right. Each right has its own definitional scope and is subject to the proportionality analysis under s. 1 of the *Charter*. There is therefore no reason to superimpose onto the constitutional structure the additional hurdle of dividing rights into positive and negative ones for analytic purposes.

In the present case, the s. 2(b) claim is about government interference with the expressive rights that attach to the electoral process and it is precisely the kind of claim that is governed by the *Irwin Toy* framework. Applying that framework, it is clear that the timing of the legislation, by interfering with political discourse in the middle of an election, violated s. 2(b) of the *Charter*. By radically redrawing electoral boundaries during an active election that was almost two-thirds complete, the legislation interfered with the rights of all participants in the electoral process to engage in meaningful reciprocal political discourse. The *Act* eradicated nearly half of the active election campaigns, and required candidates to file a change of ward notification form to continue in the race. The redrawing of ward boundaries meant that candidates needed to reach new voters with new priorities. Voters who had received campaign information, learned about candidates' mandates and engaged with them based on the 47-ward structure had their democratic participation put into abeyance. The timing of the *Act* breathed instability into the election, undermining the ability of candidates and voters in their wards to meaningfully discuss and inform one another of their views on matters of local concern.

The limitation on s. 2(b) rights in this case was the *timing* of the legislative changes. Ontario offered no explanation, let alone a pressing and substantial one, for why the changes were made in the middle of an ongoing election. In the absence of any evidence or explanation for the timing of the *Act*, no pressing and substantial objective exists for this limitation and it cannot, therefore, be justified in a free and democratic society.

As for the role of unwritten constitutional principles, there is disagreement with the majority's observations circumscribing their scope and power in a way that reads down the Court's binding jurisprudence. Unwritten constitutional principles may be used to invalidate legislation. The precedential Constitution of the United Kingdom is not a written document, but is comprised of unwritten norms, Acts of Parliament, Crown prerogative, conventions, custom of Parliament, and judicial decisions, among other sources. Canada's Constitution, as a result, embraces unwritten as well as written rules. Unwritten constitutional principles have been held to be the lifeblood of the Constitution and the vital unstated assumptions upon which the text is based. They are not merely "context" or "backdrop" to the text. On the contrary, they are the Constitution's most basic normative commitments from which specific textual provisions derive. The specific written provisions are elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*. Constitutional text emanates from underlying principles, but it will not always be exhaustive of those principles.

Apart from written provisions of the Constitution, principles deriving from the Constitution's basic structure may constrain government action. Those principles exist independently of and, as in the case of implied fundamental rights before the promulgation of the *Charter*, prior to the enactment of express constitutional provisions. The legislative bodies in Canada must conform to these basic structural imperatives and can in no way override them. Accordingly, unwritten principles may be used to invalidate legislation if a case arises where legislation elides the reach of any express constitutional provision but is fundamentally at odds with the Constitution's internal architecture or basic constitutional structure. This would undoubtedly be a rare case; however, to foreclose the possibility that unwritten principles can be used to invalidate legislation in all circumstances is imprudent. It not only contradicts the Court's jurisprudence, it is fundamentally inconsistent with the case law confirming that unwritten constitutional principles can be used to review legislation for constitutional compliance. Reviewing legislation for constitutional compliance means upholding, revising or rejecting it.

Unwritten constitutional principles are the foundational organizing principles of the Constitution and have full legal force. They serve to give effect to the structure of the Constitution and function as independent bases upon which to attack the validity of legislation since they have the same legal status as the text. Unwritten constitutional principles not only give meaning and effect to constitutional text and inform the language chosen to articulate the specific right or freedom, they assist in developing an evolutionary understanding of the rights and freedoms guaranteed in the Constitution, which have long been described as a living tree capable of growth and expansion. Unwritten constitutional principles are a key part of what makes the tree grow. They are also substantive legal rules in their own right. In appropriate cases, they may well continue to serve, as they have done in the past, as the basis for declaring legislation unconstitutional.

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Glenn K. L. Chu and Diana W. Dimmer, for the appellant.

Robin K. Basu and Yashoda Ranganathan, for the respondent.

Michael H. Morris, for the intervener the Attorney General of Canada.

Mark Witten, for the intervener the Attorney General of British Columbia.

Paul Koven, for the intervener the Toronto District School Board.

Selwyn A. Pieters, for the intervener the Cityplace Residents' Association.

Adam Goldenberg, for the intervener the Canadian Constitution Foundation.

Guy Régimbald, for the intervener the International Commission of Jurists (Canada).

Stéphane Émard-Chabot, for the intervener the Federation of Canadian Municipalities.

Omar Ha-Redeye, for the intervener the Durham Community Legal Clinic.

Jamie Cameron, for the intervener the Centre for Free Expression at Ryerson University.

Geetha Philipupillai, for the intervener the Canadian Civil Liberties Association.

Christine Davies, for the interveners Art Eggleton, Barbara Hall, David Miller and John Sewell.

Alexi N. Wood, for the intervener the David Asper Centre for Constitutional Rights.

Donald K. Eady, for the intervener Progress Toronto.

Jason Madden, for the interveners the Métis Nation of Ontario and the Métis Nation of Alberta.

Nicolas M. Rouleau, for the intervener Fair Voting British Columbia.

The judgment of Wagner C.J. and Moldaver, Côté, Brown and Rowe JJ. was delivered by

THE CHIEF JUSTICE AND BROWN J. —

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I. Introduction

[1] While cast as a claim of right under s. 2(b) of the *Canadian Charter of Rights and Freedoms*, this appeal, fundamentally, concerns the exercise of provincial legislative authority over municipalities. The issue, simply put, is whether and how the Constitution of Canada restrains a provincial legislature from changing the conditions by and under which campaigns for elected municipal councils are conducted.

[2] Section 92(8) of the *Constitution Act, 1867* assigns to provinces exclusive legislative authority regarding “Municipal Institutions in the Province”. Municipalities incorporated under this authority therefore hold delegated provincial powers; like school boards or other creatures of provincial statute, they do not have independent constitutional status (*Public School Boards’ Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 45, [2000] 2 S.C.R. 409, at paras. 33-34). The province has “absolute and unfettered legal power to do with them as it wills” (*Ontario English Catholic Teachers’ Assn. v. Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 S.C.R. 470, at para. 58, quoting with approval Campbell J. in *Ontario Public School Boards’ Assn. v. Ontario (Attorney General)* (1997), 1997 CanLII 12352 (ON SC), 151 D.L.R. (4th) 346 (Ont. C.J. (Gen. Div.)), at p. 361). No constitutional norms or conventions prevent a province from making changes to municipal institutions without municipal consent (*East York (Borough) v. Ontario* (1997), 1997 CanLII 1316 (ON CA), 36 O.R. (3d) 733 (C.A.), at pp. 737-38, per Abella J.A.). And “it is not for this Court to create constitutional rights in respect of a third order of government where the words of the Constitution read in context do not do so” (*Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673, at para. 39).

[3] Aside from one reference to s. 92(8) — and an acknowledgement that the Province of Ontario had constitutional authority to act as it did in this case — our colleague Abella J. all but ignores this decisive constitutional context (para. 112). And yet, these considerations loom large here. After the closing of a nomination period for elections to the Toronto City Council, the Province legislated a new, reduced ward structure for the City of Toronto and a correspondingly reduced Council. The City says that doing so was unconstitutional, because it limited the s. 2(b) *Charter* rights of electoral participants and violated the unwritten constitutional principle of democracy. It also, says the City, ran afoul of the constitutional requirements of effective representation, which it says flow from s. 2(b) of the *Charter* and s. 92(8) of the *Constitution Act, 1867* by virtue of that same unwritten constitutional principle of democracy.

[4] None of these arguments have merit, and we would dismiss the City’s appeal. In our view, the Province acted constitutionally. As to the s. 2(b) claim, the City seeks access to a statutory platform which must be considered under the framework stated in *Baier*. The change to the ward structure did not prevent electoral participants from engaging in further political expression on election issues under the new ward structure in the 69 days between the *Act* coming into force and the election day. There was no substantial interference with the claimants’ freedom of expression and thus no limitation of s. 2(b).

[5] Nor did the *Act* otherwise violate the Constitution. Unwritten constitutional principles cannot in themselves ground a declaration of invalidity under s. 52(1) of the *Constitution Act, 1982*, and there is no

freestanding right to effective representation outside s. 3 of the *Charter*. Further, the unwritten constitutional principle of democracy cannot be used to narrow provincial authority under s. 92(8), or to read municipalities into s. 3.

II. Background

[6] In 2013, the City of Toronto engaged consultants to conduct the Toronto Ward Boundary Review of Toronto's then 44-ward structure. They recommended an expanded 47-ward structure, which the City adopted in 2016.

[7] On May 1, 2018, the City of Toronto campaign commenced and nominations opened in preparation for an election day on October 22, 2018. By the close of nominations on July 27, 2018, just over 500 candidates had registered to run in the 47 wards. That same day, the Government of Ontario announced its intention to introduce legislation reducing the size of Toronto City Council to 25 wards. On August 14, 2018, the *Better Local Government Act, 2018*, S.O. 2018, c. 11 ("*Act*"), came into force, reducing the number of wards from 47 to 25 (based on the boundaries of the federal electoral districts), and extending the nomination period to September 14.

[8] The City and two groups of private individuals applied on an urgent basis to the Ontario Superior Court of Justice challenging the constitutionality of these measures and seeking orders restoring the 47-ward structure. They argued that the *Act* breached *Charter* guarantees of freedom of expression, freedom of association, and equality, and that it violated the unwritten constitutional principles of democracy and the rule of law.

[9] The application judge agreed, finding two limits on s. 2(b) of the *Charter* (2018 ONSC 5151, 142 O.R. (3d) 336). First, he found that the *Act* limited the municipal candidates' s. 2(b) right to freedom of expression, a conclusion largely tied to the timing of the *Act*, enacted as it was during the election campaign. Secondly, he found that the *Act* limited municipal voters' s. 2(b) right to effective representation — despite the fact that effective representation is a principle of s. 3 (and not s. 2(b)) of the *Charter* — due to his conclusion that the ward population sizes brought about by the *Act* were too large to allow councillors to effectively represent their constituents. Neither of these limits could, he further held, be justified under s. 1 and he set aside the impugned provisions of the *Act*. As a result, the election was to proceed on the basis of the 47-ward system.

[10] The Province appealed and moved to stay the judgment pending appeal. The Court of Appeal for Ontario granted the stay on September 19, 2018, concluding that there was a strong likelihood that the Province's appeal would be successful and, on October 22, 2018, the Toronto municipal election proceeded on the basis of the 25-ward structure created by the *Act* (2018 ONCA 761, 142 O.R. (3d) 481). No issue is taken with the integrity of the election or the results thereof.

[11] When the Court of Appeal decided the Province's appeal on its merits, it divided. While the dissenters would have invalidated the *Act* as unjustifiably limiting freedom of expression, the majority allowed the appeal, finding no such limit (2019 ONCA 732, 146 O.R. (3d) 705). The City had advanced a

positive rights claim — that is, a claim for a particular platform and not protection from state interference with the conveyance of a message. Consistent with the *Baier* framework governing such claims, the majority applied the factors stated in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, to conclude that the claim was not properly grounded in s. 2(b) of the *Charter*, and that the application judge had erred in finding that the *Act* substantially interfered with the candidates’ freedom of expression. Further, he had erred in finding that the right to effective representation — guaranteed by s. 3 — applies to municipal elections and bears any influence over the s. 2(b) analysis. Finally, the majority held that unwritten constitutional principles do not confer upon the judiciary power to invalidate legislation that does not otherwise infringe the *Charter*; nor do they limit provincial legislative authority over municipal institutions. Though unwritten constitutional principles are sometimes used to fill gaps in the Constitution, no such gap exists here.

[12] The Court of Appeal appears to have granted the City public interest standing to argue the appeal (para. 28). The City’s standing was not challenged before this Court.

III. Issues

[13] Two issues arise from the foregoing. First, did the *Act* limit (unjustifiably or at all) the freedom of expression of candidates and/or voters participating in the 2018 Toronto municipal election? And secondly, can the unwritten constitutional principle of democracy be applied, either to narrow provincial legislative authority over municipal institutions or to require effective representation in those institutions, so as to invalidate the *Act*?

IV. Analysis

A. *Freedom of Expression*

(1) Principles of *Charter* Interpretation in the Context of Section 2(b)

[14] This appeal hinges on the scope of s. 2(b) of the *Charter*, which provides that everyone has the fundamental freedoms “of thought, belief, opinion and expression, including freedom of the press and other media of communication”. A purposive interpretation of *Charter* rights must begin with, and be rooted in, the text (*Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, [2020] 3 S.C.R. 426, at paras. 8-10) and not overshoot the purpose of the right but place it in its appropriate linguistic, philosophic and historical contexts (*R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p. 344). Yet, it is undeniable that s. 2(b) has traditionally been interpreted expansively (*Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, at p. 976; *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712, at pp. 765-67). Indeed, s. 2(b) has been interpreted so broadly that the framework has been criticized for setting too low a bar for establishing a s. 2(b) limitation, such that any consideration of its substantive reach and bounds is generally consigned to the limitations analysis under s. 1 (K. Chan, “Constitutionalizing the Registered Charity Regime: Reflections on *Canada Without Poverty*” (2020), 6 *C.J.C.C.L.* 151, at p. 174, citing M. Plaxton and C. Mathen, “Developments in

Constitutional Law: The 2009-2010 Term” (2010), 52 S.C.L.R. (2d) 65). Following *Irwin Toy*, then, if an activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of “expression” (p. 969). Further, if the purpose or effect of the impugned governmental action is to control attempts to convey meaning through that activity, a limit on expressive freedom will be shown (p. 972).

[15] Freedom of expression is not, however, presently recognized as being without internal limits. Activities may fall outside the scope of s. 2(b) where the method of the activity itself — such as violence — or the location of that activity is not consonant with *Charter* protection (*Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at paras. 60 and 62).

[16] Further, and of particular significance to this appeal, s. 2(b) has been interpreted as “generally impos[ing] a negative obligation . . . rather than a positive obligation of protection or assistance” (*Baier*, at para. 20 (emphasis added), citing *Haig v. Canada*, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995, at p. 1035). A claim is properly characterized as negative where the claimant seeks “freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage” (*Baier*, at para. 35 (emphasis added)). Such claims of right under s. 2(b) are considered under this Court’s *Irwin Toy* framework.

[17] In *Baier*, however, this Court explained that s. 2(b) may, in certain circumstances, impose positive obligations on the government to facilitate expression. Put differently, while s. 2(b) typically “prohibits gags”, it can also, in rare and narrowly circumscribed cases, “compel the distribution of megaphones” (para. 21, quoting *Haig*, at p. 1035). Hence the Court of Appeal’s statement in this case that “[f]reedom of expression is respected, in the main, if governments simply *refrain* from actions that would be an unjustified interference with it”, and that positive claims under s. 2(b) may be recognized in only “exceptional and narrow” circumstances (paras. 42 and 48 (emphasis in original)).

[18] Central to whether s. 2(b) was limited by the Province here is, therefore, the appropriate characterization of the claim as between a negative and positive claim of right. In *Baier*, this Court shielded positive claims from the *Irwin Toy* framework and subjected them to an elevated threshold. This is necessary, given the ease with which claimants can typically show a limit to free expression under the *Irwin Toy* test. An elevated threshold for positive claims narrows the circumstances in which a government or legislature must legislate or otherwise act to support freedom of expression. To consider positive claims under *Irwin Toy* would be to force the government to justify, under s. 1, any decisions *not* to provide particular statutory platforms for expression.

[19] The *Baier* framework is therefore not confined, as our colleague suggests, “to address[ing] underinclusive statutory regimes” (para. 148). This Court could not have been clearer in *Baier* that it applies “where a government defending a *Charter* challenge alleges, or the *Charter* claimant concedes, that a positive rights claim is being made under s. 2(b)” (para. 30). Were it otherwise — that is, were *Baier*’s application limited to cases of underinclusion — claims seeking the creation or extension of a statutory platform for expression would be considered under *Baier* while claims seeking the preservation of that same platform would be considered under *Irwin Toy*. This is illogical. *Baier*’s reach extends beyond cases of

underinclusion or exclusion, and categorically limits the “obligation[s] on government to provide individuals with a particular platform for expression” (*Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 35). This reflects the separation of powers; choices about whether and how to design a statutory or regulatory platform are best left to the elected orders of the state.

[20] We should not be taken as suggesting that s. 2(b) is to be understood as conferring a right that is wholly positive or wholly negative. Many constitutional rights have both positive and negative dimensions and the *Baier* framework explicitly recognizes that this is so for s. 2(b). But the distinction between those positive and negative dimensions remains important when considering the nature of *the obligation* that the claim seeks to impose upon the state: a “right’s positive dimensions require government to act in certain ways, whereas its negative dimensions require government to refrain from acting in other ways” (P. Macklem, “Aboriginal Rights and State Obligations” (1997), 36 *Alta. L. Rev.* 97, at p. 101; see also A. Sen, *The Idea of Justice* (2009), at p. 282). For instance, would the claim, if accepted, require government action, or is the claim concerned with restrictions on the content or meaning of expression? And, were the claim rejected, would it deny the claimant access to a particular platform for expression on a subject, or would it preclude altogether the possibility of conveying expression on that subject? While in *Haig*, L’Heureux-Dubé J. correctly noted that the distinction between positive and negative entitlements is “not always clearly made, nor . . . always helpful”, she nevertheless distinguished typical negative claims from those that might require “positive governmental action” (p. 1039). This is the distinction with which we concern ourselves here.

[21] This appeal therefore presents an opportunity to affirm and clarify the application of *Baier* to positive claims under s. 2(b). *Baier* remains good law in the context of s. 2(b). It adopts a framework for analysis first set forth in *Dunmore*, which itself decided a claim under s. 2(d) (freedom of association). We need not decide here whether *Dunmore* remains applicable to s. 2(d) claims (an open question, given the decisions of this Court in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, and *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3). It suffices here for us to affirm *Baier* as a useful and necessary framework in the context of positive s. 2(b) claims (although, as we will explain, we would simplify the framework).

(2) The *Baier* Framework

[22] The *Baier* framework applies if a claimant seeks to impose an obligation on the government (or legislature) to provide access to a particular statutory or regulatory platform for expression (para. 30; *Greater Vancouver Transportation Authority*, at para. 35). Here, therefore, if the City’s claim would require the government or legislature to enact legislation or promulgate regulations, or otherwise act to provide a particular statutory or regulatory platform, it is advancing a positive claim (*Baier*, at para. 35).

[23] In *Baier*, this Court held that, to succeed, a positive claim must satisfy the three *Dunmore* factors: (1) Is the claim grounded in freedom of expression, rather than in access to a particular statutory regime? (2) Has the claimant demonstrated that lack of access to a statutory regime has the effect of a

substantial interference with freedom of expression, or has the purpose of infringing freedom of expression?

(3) Is the government responsible for the inability to exercise the fundamental freedom?

[24] These factors set an elevated threshold for positive claims. The first factor asks what the claimant is really seeking — in other words, whether the claim is grounded in freedom of expression or whether it merely seeks access to a statutory regime. Likewise, the second factor — which requires that the claimant establish a *substantial* interference with freedom of expression — sets a higher threshold than that stated in *Irwin Toy*, which asks only whether “the purpose or effect of the government action in question was to restrict freedom of expression” (p. 971; see also *Baier*, at paras. 27-28 and 45).

[25] So understood, these factors can usefully be distilled to a single core question: is the claim grounded in the fundamental *Charter* freedom of expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government has either substantially interfered with freedom of expression, or had the purpose of interfering with freedom of expression? This is, to be clear, a single question which emphasizes the elevated threshold in the second *Dunmore* factor while encompassing the considerations of the first and third factors. Given what we see as the significant overlap among the factors — particularly between the first and second — this is, in our view, a salutary clarification of the *Baier* test, entirely consistent with this Court’s approach in *Baier* and *Greater Vancouver Transportation Authority*. To be clear, s. 2(b) does not remove the authority that a legislature has to create or modify statutory platforms, because it does not include the right to access any statutory platform in particular. However, when a legislature chooses to provide such a platform, then it must comply with the *Charter* (*Haig*, at p. 1041).

[26] If, therefore, a claimant can demonstrate that, by denying access to a statutory platform, the government has substantially interfered with freedom of expression or acted with the purpose of doing so, the claim may proceed. Despite being a positive claim, the claimant has demonstrated a limit to its s. 2(b) right, and — subject to justification of such limit under s. 1 — government action or legislation may be required.

[27] There is no suggestion here that the Province acted *with the purpose* of interfering with freedom of expression, and we therefore confine our observations here to the claim presented — that is, a claim that a law has had *the effect* of substantially interfering with freedom of expression. In our view, a substantial interference with freedom of expression occurs where lack of access to a statutory platform has the effect of radically frustrating expression to such an extent that meaningful expression is “effectively preclude[d]” (*Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, at para. 33). While meaningful expression need not be rendered absolutely impossible, we stress that effective preclusion represents an exceedingly high bar that would be met only in extreme and rare cases (*Baier*, at para. 27; *Dunmore*, at para. 25). For example, a statutory reduction of the length of an election campaign to two days may well, as a practical matter, be shown to have the effect of constituting a substantial interference with freedom of expression. In such a case, meaningful expression may very well be found to be effectively precluded.

[28] The height of this bar of effective preclusion is demonstrated by *Baier*. There, legislation was amended to prohibit school employees from running for election as school trustees, and the Court —

applying the *Dunmore* factors — concluded that no substantial interference with freedom of expression was demonstrated. The claim was grounded merely in access to a particular statutory platform governing school trusteeship, rather than a substantial interference with freedom of expression. And, in any event, there was no interference, substantial or otherwise, with the appellants’ ability to express views on matters relating to the education system. Their exclusion from the statutory scheme deprived them only of one particular *means* of such expression (paras. 44 and 48).

(3) Application

(a) Nature of the Claim

[29] The first question to answer in deciding this appeal is whether the City advances a positive claim. There are two ways in which the City’s claim can be understood. Each leads to the conclusion that the claim is, in substance, a positive claim that must, therefore, show a substantial interference with freedom of expression.

[30] The first possible view of the City’s claim is that of *restoring an earlier statutory platform*, specifically the 47-ward structure. That this is so is evident from the City’s requested disposition, which asks that the next municipal election be conducted under the previous framework (A.F., at para. 152). The City, then, would have the Province act (either by enacting new legislation or repealing the impugned provisions of the *Act*) to restore the previous statutory platform. This reveals a straightforward positive claim. The fact that the City and the participants in the election had previously enjoyed access to the 47-ward structure is of no legal significance. In *Baier*, this Court viewed a claim for restoring the status quo as a positive claim, equating it with a demand to legislate a framework for the first time. Such an approach is necessary to prevent fettering; “[t]o hold otherwise would mean that once a government had created a statutory platform, it could never change or repeal it without infringing s. 2(b)” (para. 36).

[31] The second possible view of the City’s claim is that of *maintaining an existing statutory platform*. The City frames its claim as asking the Province, once a municipal election period commences, to ensure access to whatever election platform existed at that time. In the City’s view, what is otherwise political expression becomes what it calls “electoral expression” during an election period (A.F., at para. 54). Protection of this “electoral expression”, it says, requires the maintenance of the particular electoral framework that was in place at the beginning of the electoral period. Framed thusly, the City’s claim that the impugned provisions of the *Act* limited s. 2(b) turns squarely on the *timing* of the *Act*. Indeed, at the hearing of this appeal, the City conceded that barring any other potential issues, the Province was constitutionally permitted to enact this same legislation in the week *following* the election. Further, the City requested — in the event that this Court finds only that the timing of the *Act* was unconstitutional — a declaration to that effect, rather than a remedy that would restore the previous 47-ward structure.

[32] The City’s focus on the timing of the *Act* cannot, however, convert its positive claim into a negative one. While its claim is couched in language of non-interference — something that superficially resembles a negative claim to be considered under the *Irwin Toy* framework — the City does not seek protection of electoral participants’ expression from restrictions tied to content or meaning (as was the case,

for example, in *Greater Vancouver Transportation Authority*); rather, it seeks a particular platform (being whatever council structure existed at the outset of the campaign) by which to channel, and around which to structure, that expression.

[33] So understood, the claim is akin to that rejected in *Baier*. The only point of distinction is that *Baier* involved a request for a specific type of legislative regime (i.e., one that permitted school employees to run for and serve as school board trustees), while the claim in this case is for temporary protection — that is, for the duration of the campaign — of whatever particular type of election structure existed at the outset of the election period. But, for the purposes of deciding constitutionality, there is no difference between the present case and a hypothetical scenario in which the Province were to scrap the ongoing election and replace it with a completely new platform with a different structure and a reasonable campaign period altogether. Here, the City is able to frame its claim only in terms of non-interference because the *Act* modified the existing structure without scrapping it. But the ultimate result is the same. The City's claim is still a claim for access to a particular statutory platform; the precise disposition requested simply depends on whatever electoral framework is in place at the outset of the election process. It is thus a positive claim. Because municipal elections are merely statutory platforms without a constitutional basis, provinces can — subject to the elevated threshold of a substantial interference — change the rules as they wish.

[34] To hold otherwise would be to contemplate an unprecedented statutory freeze on provincial jurisdiction under s. 92(8), temporarily constitutionalizing a particular statutory platform for the duration of an election. What would normally be considered a positive claim under s. 2(b) would effectively transform into a negative claim for that period of time. This is constitutionally dubious, nonsensical, and even futile since the duration of such a freeze would depend entirely on the length of the election, over which the Province itself has ultimate authority. With respect, our colleague Abella J. ignores these concerns in holding that *Irwin Toy* ought to apply to a claim such as this. Provincial authority to legislate a change to Toronto's ward structure is accepted, but on our colleague's understanding this authority is operative only some of the time (para. 112). Combined with her broad articulation of the *Irwin Toy* threshold in this context — whether legislation “destabiliz[es] the opportunity for meaningful reciprocal discourse” — such an understanding would effectively freeze legislative authority to even tangentially affect a municipal election for the duration of the campaign (para. 115). Such a freeze sits awkwardly with the plenary authority that provinces enjoy under s. 92(8) of the *Constitution Act, 1867*.

[35] In sum, the City advances a positive claim and the *Baier* framework applies.

(b) *Application of Baier*

[36] As explained above, the *Baier* framework asks whether the claimant demonstrated that, by denying access to a statutory regime, the government has substantially interfered with freedom of expression. To repeat, this is a demanding threshold, requiring the City to show that the *Act* radically frustrated the expression of election participants such that meaningful expression was effectively precluded. In our view, the City cannot do so and therefore has not established a limit on s. 2(b).

[37] Here, the candidates and their supporters had 69 days — longer than most federal and provincial election campaigns — to re-orient their messages and freely express themselves according to the new ward structure. (Our colleague Abella J. is simply incorrect to suggest, at para. 104, that only one month of the campaign remained. It was twice that.) The *Act* did not prevent candidates from engaging in further political speech under the new structure. Candidates continued to campaign vigorously, canvassing and debating about issues unrelated to the impugned provisions, the size of council or the ward boundaries. And even had they not, nothing in the *Act* prevented them from doing so. It imposed no restrictions on the content or meaning of the messages that participants could convey. Many of the challengers who continued to campaign ultimately had, by any measure, successful campaigns, raising significant amounts of money and receiving significant numbers of votes. This would not have been possible had their s. 2(b) rights been so radically frustrated so as to effectively preclude meaningful expression.

[38] It is of course likely that some of the candidates' prior expression may have lost its relevance; pamphlets or other campaign paraphernalia with an old ward designation on them, for instance, had to be revised or discarded. But, with the new ward structure — and larger ward populations — came higher campaign expenditure limits, so candidates were able to raise more funds over the 69 days they had left in the campaign. This is, therefore, a complaint that the prior expression of the candidates was no longer meaningful or helpful in their project to secure election. It is, at its root, a complaint about diminished *effectiveness*.

[39] While diminished effectiveness might be enough to amount to a limit of s. 2(b) in its traditional negative orientation — see, for instance, *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 15, per McLachlin C.J. and Major J., dissenting in part, but not on this point, and *Libman v. Quebec (Attorney General)*, 1997 CanLII 326 (SCC), [1997] 3 S.C.R. 569 — more is required under the *Baier* framework. In the context of a positive claim, only extreme government action that extinguishes the effectiveness of expression — for instance, instituting a two-day electoral campaign — may rise to the level of a substantial interference with freedom of expression; such an act may effectively preclude meaningful expression in the context of the election. That is simply not what happened here. Section 2(b) is not a guarantee of the effectiveness or continued relevance of a message, or that campaign materials otherwise retain their usefulness throughout the campaign.

[40] Even accepting that the change in structure diminished the effectiveness of the electoral candidates' prior political speech by rendering some of their 47-ward campaign communications less relevant, this does not rise to the level of substantial interference. Again, the campaign that took place over 69 days following the imposition of the 25-ward system was vigorously contested by candidates whose freedom of expression was clearly not radically frustrated. We acknowledge that the application judge found a substantial interference with freedom of expression (para. 32). There are, however, three problems with his finding. First, this finding was made in the context of legal error, since he erroneously applied the *Irwin Toy* framework for a negative claim. Secondly, and relatedly, the reasons of the judge make clear that this finding was tied to the diminished effectiveness of the candidates' expression, something that, as explained, is simply insufficient to show a limit on freedom of expression under the *Baier* framework. Finally, given the truncated timelines of the matter at first instance, the judge was required to make this finding on a limited factual record. With the benefit of fresh evidence adduced by the Province and admitted at this Court, it is

clear that the candidates were not effectively precluded from expressing themselves in the context of the campaign. They conducted vigorous, hard-fought campaigns about the issues that mattered to them.

[41] The City says that the expression at issue here — again, what it calls “electoral expression” — is uniquely connected to, and dependent on, the framework of the election itself. Therefore, it says, the scope of s. 2(b) encompasses not only the expression itself but also the structure of the election. Put thusly, however, the claim is not dissimilar to the “unique role” of school trusteeship claimed by the appellants, and rejected by the Court, in *Baier*. Claiming a unique role or dependence on a statutory platform is not the same as claiming a fundamental freedom (*Baier*, at para. 44). Doing so is simply to seek access to that statutory platform. That is what the City seeks here.

[42] In sum, the *Baier* threshold is not met here. The *Act* imposed no limit on freedom of expression.

[43] Having found no limit to s. 2(b), we need not consider s. 1. We note, however, that our colleague Abella J. decides s. 1 against the Province on the basis that it “offered no explanation, let alone a pressing and substantial one, for why the changes were made in the middle of an ongoing election” (para. 161). This ignores the Province’s written and oral submissions that the newly elected government proceeded expeditiously so as to be able to implement these changes within the time constraints of its own elected mandate, rather than wait four years until the next municipal election (R.F., at para. 149; transcript, at pp. 111-12).

(c) *Effective Representation*

[44] The City also says that the impugned provisions of the *Act* infringe “effective representation”, an incident of the guarantee contained in s. 3 of the *Charter* which, the City says, can be imported into s. 2(b).

[45] Section 3 guarantees citizens the right to vote and run for office in provincial and federal elections, and includes a right to effective representation. The text of s. 3 makes clear, however, that it guarantees “only the right to vote in elections of representatives of the federal and the provincial legislative assemblies” (*Haig*, at p. 1031 (emphasis added)) and “does not extend to municipal elections” (p. 1031 (emphasis added), citing P. W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992), vol. 2, at p. 42-2). Simply put, ss. 2(b) and 3 record distinct rights which must be given independent meaning (*Thomson Newspapers Co. v. Canada (Attorney General)*, 1998 CanLII 829 (SCC), [1998] 1 S.C.R. 877, at paras. 79-80; *Harper*, at para. 67). Effective representation is not a principle of s. 2(b), nor can the concept be imported wholesale from a different *Charter* right.

[46] In any event, effective representation connotes *voter parity* which, while not exhaustive of the requirements of effective representation, is the overarching concern and the condition of “prime importance” (*Reference re Prov. Electoral Boundaries (Sask.)*, 1991 CanLII 61 (SCC), [1991] 2 S.C.R. 158, at p. 184). What matters is the *relative population* of the wards, *not* their *absolute size*. To hold otherwise implies keeping the population of wards relatively constant by increasing the number of councillors to keep pace

with population growth, a notion unknown to Canadian law (in s. 3 or elsewhere) and which would not be without its own difficulties, including potentially unwieldy growth in the size of Toronto City Council (M. Pal, “The Unwritten Principle of Democracy” (2019), 65 *McGill L.J.* 269, at pp. 298-99; J. C. Courtney, *Commissioned Ridings: Designing Canada’s Electoral Districts* (2001), at pp. 15 and 19).

[47] And even were effective representation to apply as a consideration here, we would not find that the principle has been violated due only to the larger population sizes of the wards created by the *Act*. It is not disputed that the 25-ward structure of the *Act* enhanced voter parity, relative to the 47-ward structure preferred by the City (which was not even designed to achieve voter parity until 2026) (A.F., at para. 150; R.F., at paras. 35, 38, 133, 143 and 148). Indeed, the Toronto Ward Boundary Review’s reasoning for having rejected the 25-ward structure was criticized on this very basis (R.R. (short), vol. II, at pp. 65, 69, 72-73 and 77-78). While the principle of effective representation encompasses more than simple voter parity, those who rely upon the principle of effective representation here fail to identify any other factors — geography, community history, community interests and minority representation — that could conceivably justify a departure from parity (see *Reference re Prov. Electoral Boundaries (Sask.)*, at p. 184).

B. Democracy

[48] The second issue on appeal is whether the impugned provisions of the *Act* are unconstitutional for violating the unwritten constitutional principle of democracy. Specifically, the City argues that the change in ward structure violated the unwritten principle of democracy by denying voters effective representation and disrupting the election process (A.F., at para. 105). It therefore asks the Court to use the democratic principle as a basis for invalidating otherwise valid provincial legislation. It says this is made possible by drawing from this Court’s s. 3 jurisprudence and from the concept of effective representation, and by viewing the principle as limiting provincial competence under s. 92(8). Conversely, and echoing the Court of Appeal on this point, the Attorney General of Ontario says that the unwritten constitutional principle of democracy cannot be used as a device for invalidating legislation, independently of written constitutional provisions and the law governing them. For the reasons that follow, the Attorney General is correct.

(1) Interpretive and Gap-Filling Roles of Unwritten Constitutional Principles

[49] The Constitution of Canada embodies written and unwritten norms. This Court has recognized that our Constitution describes an architecture of the institutions of state and of their relationship to citizens that connotes certain underlying principles (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3, at para. 93; *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, at paras. 50-51). These principles, such as democracy and the rule of law, “infuse our Constitution” (*Secession Reference*, at para. 50). Although not recorded outside of “oblique reference[s]” in the preamble to the *Constitution Act, 1867* and to the *Constitution Act, 1982* (para. 51), these principles are “foundational” (para. 49), without which “it would be impossible to conceive of our constitutional structure” (para. 51). These principles have “full legal force” and may give rise to substantive legal obligations (para. 54, quoting *Reference re Resolution to Amend the Constitution*, 1981 CanLII 25 (SCC), [1981] 1 S.C.R. 753, at p. 845). “[L]ike all principles of political morality, [they] can guide and constrain the decision-making of the executive and legislative branches” (C.A. reasons, at

para. 84, citing *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 52).

[50] Unwritten principles are therefore part of *the law* of our Constitution, in the sense that they form part of the context and backdrop to the Constitution’s written terms. Our colleague Abella J. seizes upon a statement from a dissenting opinion in *Reference re Resolution to Amend the Constitution* to support the proposition that “full legal force” necessarily includes the power to invalidate legislation. But the complete passage in *Reference re Resolution to Amend the Constitution*, and the jurisprudence cited therein, demonstrates that Martland and Ritchie JJ. are discussing *federalism* — and, while specific aspects of federalism may be unwritten and judicially developed, it is indisputable that federalism has a strong textual basis. Nor does our colleague’s reliance upon *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725 (at para. 176), support the capacity of unwritten constitutional principles to invalidate legislation, since the finding there was that granting exclusive jurisdiction to the youth court would infringe ss. 96 to 101 and 129 of the *Constitution Act, 1867*. Regardless, any uncertainty on the question of whether unwritten constitutional principles may invalidate legislation that may have remained after the *Reference re Resolution to Amend the Constitution* and the *Secession Reference* was, as we will explain, fully put to rest in *Imperial Tobacco*.

[51] Further, the authorities she cites as “recogniz[ing] that unwritten constitutional principles have full legal force and can serve as substantive limitations on all branches of government” (para. 166) do not support the proposition that unwritten constitutional principles can be applied to invalidate legislation. Indeed, it is quite the contrary — for example, in *R. (on the application of Miller) v. Prime Minister*, [2019] UKSC 41, [2020] A.C. 373, at para. 41, the Supreme Court of the United Kingdom stated that the constitutional principle of parliamentary sovereignty means that *legislation itself* (“laws enacted by the Crown in Parliament”), under the Constitution of the United Kingdom, remains “the supreme form of law”. While courts in the United Kingdom may find primary legislation to be inconsistent with the *European Convention on Human Rights*, 213 U.N.T.S. 221, they may only issue a declaration of incompatibility (*Human Rights Act 1998* (U.K.), 1998, c. 42, s. 4); they have not used unwritten constitutional principles to invalidate legislation.

[52] Our colleague is concerned about the “rare case” where “legislation [that] elides the reach of any express constitutional provision . . . is fundamentally at odds with our Constitution’s ‘internal architecture’ or ‘basic constitutional structure’” and recourse must be had to unwritten constitutional principles (para. 170, quoting *Secession Reference*, at para. 50, and *OPSEU v. Ontario (Attorney General)*, 1987 CanLII 71 (SCC), [1987] 2 S.C.R. 2, at p. 57). But it is inconceivable that legislation which is repugnant to our “basic constitutional structure” would not infringe the Constitution itself. And that structure, recorded in the Constitution’s text (as we discuss below), is interpreted with the aid of unwritten constitutional principles. This is clear from the context of Martland and Ritchie JJ.’s statement that unwritten principles have “full legal force in the sense of being employed to strike down legislative enactments” (*Reference re Resolution to Amend the Constitution*, at p. 845). As noted above, that case was about federalism, as was the jurisprudence cited in support of their statement; Martland and Ritchie JJ. were describing the “constitutional requirements that are derived from the federal character of Canada’s

Constitution” (pp. 844-45 (emphasis added)). And this is precisely the point — while the specific aspects of federalism at issue there may not have been found in the express terms of the Constitution, *federalism is*.

[53] To explain, federalism is fully enshrined *in the structure* of our Constitution, because it is enshrined *in the text* that is constitutive thereof — particularly, but not exclusively, in ss. 91 and 92 of the *Constitution Act, 1867*. Structures are not comprised of unattached externalities; they are embodiments of their constituent, conjoined parts. The structure of our Constitution is identified by way of its actual provisions, recorded in its text. This is why our colleague can offer no example of legislation that would undermine the structure of the Constitution that cannot be addressed as we propose, which is via purposive textual interpretation. It is also why, once “constitutional structure” is properly understood, it becomes clear that, when our colleague invokes “constitutional structure”, she is in substance inviting judicial invalidation of legislation in a manner that is wholly untethered from that structure.

[54] Ultimately, what “full legal force” means is dependent on the particular context. Any legal instrument or device, such as a contract or a will or a rule, has “full legal force” within its proper ambit. Our colleague’s position — that because unwritten constitutional principles have “full legal force”, they must necessarily be capable of invalidating legislation — assumes the answer to the preliminary but essential question: what is the “full legal force” of *unwritten constitutional principles*? And in our view, *because* they are unwritten, their “full legal force” is realized *not in supplementing* the written text of our Constitution as “provisions of the Constitution” with which no law may be inconsistent and remain of “force or effect” under s. 52(1) of the *Constitution Act, 1982*. Unwritten constitutional principles are not “provisions of the Constitution”. Their legal force lies in their representation of general principles within which our constitutional order operates and, therefore, by which the Constitution’s written terms — its *provisions* — are to be given effect. In practical terms, this means that unwritten constitutional principles may assist courts in only two distinct but related ways.

[55] First, they may be used in the interpretation of constitutional provisions. Indeed, that is the “full legal force” that this Court described in *Secession Reference* (para. 54). In this way, the unwritten constitutional principles of judicial independence and the rule of law have aided in the interpretation of ss. 96 to 100 of the *Constitution Act, 1867*, which have come to safeguard the core jurisdiction of the courts which fall within the scope of those provisions (*Provincial Court Judges Reference*, at paras. 88-89; *MacMillan Bloedel*, at paras. 10-11 and 27-28; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at paras. 29-33). When applied to *Charter* rights, unwritten principles assist with purposive interpretation, informing “the character and the larger objects of the *Charter* itself, . . . the language chosen to articulate the specific right or freedom, [and] the historical origins of the concepts enshrined” (*Quebec (Attorney General)*, at para. 7, quoting *Big M Drug Mart Ltd.*, at p. 344; see also *R. v. Poulin*, 2019 SCC 47, at para. 32).

[56] Secondly, and relatedly, unwritten principles can be used to develop structural doctrines unstated in the written Constitution *per se*, but necessary to the coherence of, and flowing by implication from, its architecture. In this way, structural doctrines can fill gaps and address important questions on which the text of the Constitution is silent, such as the doctrine of full faith and credit (*Morguard Investments Ltd. v. De Savoye*, 1990 CanLII 29 (SCC), [1990] 3 S.C.R. 1077; *Hunt v. T&N plc*, 1993 CanLII 43 (SCC),

[1993] 4 S.C.R. 289); the doctrine of paramountcy (*Huson v. The Township of South Norwich* (1895), 1895 CanLII 1 (SCC), 24 S.C.R. 145); the remedy of suspended declarations of invalidity (*Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721); and the obligations to negotiate that would follow a declaration of secession by a province (*Secession Reference*).

[57] Neither of these functions support the proposition advanced by the City that the force of unwritten principles extends to invalidating legislation. Indeed, the truth of the matter is to the contrary. Attempts to apply unwritten constitutional principles in such a manner as an independent basis to invalidate legislation, whether alone or in combination, suffer from a normative and a practical deficiency, each related to the other, and each fatal on its own.

[58] First, such attempts trespass into legislative authority to amend the Constitution, thereby raising fundamental concerns about the legitimacy of judicial review and distorting the separation of powers (*Imperial Tobacco*, at paras. 53-54, 60 and 64-67; J. Leclair, “Canada’s Unfathomable Unwritten Constitutional Principles” (2002), 27 *Queen’s L.J.* 389, at pp. 427-32). Our colleague’s approach, which invites the use of unwritten constitutional principles in a manner that is wholly untethered from the text, ignores this fundamental concern.

[59] Secondly, unwritten constitutional principles are “highly abstract” and “[u]nlike the rights enumerated in the *Charter* — rights whose textual formulations were debated, refined and ultimately resolved by the committees and legislative assemblies entrusted with constitution-making authority — the concep[t] of democracy . . . ha[s] no canonical formulatio[n]” (C.A. reasons, at para. 85). Unlike the written text of the Constitution, then, which “promotes legal certainty and predictability” in the exercise of judicial review (*Secession Reference*, at para. 53), the nebulous nature of the unwritten principles makes them susceptible to be interpreted so as to “render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers” (*Imperial Tobacco*, at para. 65). Accordingly, there is good reason to insist that “protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box” (para. 66). In our view, this statement should be understood as covering all possible bases for claims of right (i.e., “unjust or unfair” or otherwise normatively deficient).

[60] We add this. Were a court to rely on unwritten constitutional principles, in whole or in part, to invalidate legislation, the consequences of this judicial error would be of particular significance given two provisions of our *Charter*. First, s. 33 preserves a limited right of legislative override. Where, therefore, a court invalidates legislation using s. 2(b) of the *Charter*, the legislature may give continued effect to its understanding of what the Constitution requires by invoking s. 33 and by meeting its stated conditions (D. Newman, “Canada’s Notwithstanding Clause, Dialogue, and Constitutional Identities”, in G. Sigalet, G. Webber and R. Dixon, eds., *Constitutional Dialogue: Rights, Democracy, Institutions* (2019), 209, at p. 232). Were, however, a court to rely *not* on s. 2(b) but *instead* upon an unwritten constitutional principle to invalidate legislation, this undeniable aspect of the constitutional bargain would effectively be undone, since s. 33 applies to permit legislation to operate “notwithstanding a provision included in section 2 or sections 7 to 15” *only*. Secondly, s. 1 provides a basis for the state to justify limits on “the rights and freedoms set out” in the *Charter*. Unwritten constitutional principles, being *unwritten*, are not “set out” in the *Charter*. To find,

therefore, that they can ground a constitutional violation would afford the state no corresponding justificatory mechanism.

[61] Our colleague says that the application of s. 33 “is not directly before us” (para. 182). As the City has advanced its claim on the basis of s. 2(b), coupled with the unwritten principle of democracy, the prospect of circumventing s. 33’s application to the invalidation of legislation under s. 2(b) by recourse to unwritten constitutional principles is indeed squarely before us.

[62] We note an important caveat to the foregoing. The unwritten constitutional principle of the honour of the Crown is *sui generis*. As correctly noted in submissions of the interveners the Métis Nation of Ontario and the Métis Nation of Alberta, the honour of the Crown arises from the assertion of Crown sovereignty over pre-existing Aboriginal societies (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 32), and from the unique relationship between the Crown and Indigenous peoples (*Guerin v. The Queen*, 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335, at p. 385). We need not decide here whether the principle is capable of grounding the constitutional invalidation of legislation, but if it is, it is unique in this regard.

[63] In sum, and contrary to the submissions of the City, unwritten constitutional principles cannot serve as bases for invalidating legislation. A careful review of the Court’s jurisprudence supports this conclusion.

(a) *The Provincial Court Judges Reference*

[64] In the *Provincial Court Judges Reference*, this Court considered whether judicial independence, “an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*” (para. 109), restricted the extent to which a provincial government could reduce the salaries of provincial court judges. That principle, the Court held, emerged from the reading together of s. 11(d) of the *Charter*, and the preamble and ss. 96 to 100 of the *Constitution Act, 1867* (para. 124). For the majority, Lamer C.J. was explicit in emphasizing the merely *interpretive* role of the unwritten constitutional principle of judicial independence in supplementing the text of ss. 96 and 100:

The point which emerges from this brief discussion is that the interpretation of ss. 96 and 100 has come a long way from what those provisions actually say. This jurisprudential evolution undermines the force of the argument that the written text of the Constitution is comprehensive and definitive in its protection of judicial independence. The only way to explain the interpretation of ss. 96 and 100, in fact, is by reference to a deeper set of unwritten understandings which are not found on the face of the document itself. [First and second emphasis added; third emphasis in original; para. 89.]

[65] In other words, where the constitutional text is not itself sufficiently definitive or comprehensive to furnish the answer to a constitutional question, a court may use unwritten constitutional principles as interpretive aids. This is an approach that resorts to unwritten constitutional principles where necessary in order to give meaning and effect to constitutional text. It is thus not dissimilar to this Court’s approach to purposive constitutional interpretation, which begins with and is grounded in the text (*Quebec (Attorney General)*, at paras. 8-10); unwritten constitutional principles inform the purpose of the provisions

of the text, thus guiding the purposive definition (R. Elliot, “References, Structural Argumentation and the Organizing Principles of Canada’s Constitution” (2001), 80 *Can. Bar Rev.* 67, at p. 84). To be clear, this must be a textually faithful exercise; the text remains of primordial significance to identifying the purpose of a right, being “the first indicator of purpose” (*Quebec (Attorney General)*, at para. 11), and the application of constitutional principles to the interpretive exercise may not allow a court to overshoot that purpose (paras. 4 and 10-11). More particularly, and as the Court affirmed in *Quebec (Attorney General)*, the Constitution “is not ‘an empty vessel to be filled with whatever meaning we might wish from time to time’” (para. 9, quoting *Reference re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, at p. 394). Rather, constitutional interpretation “must first and foremost have reference to, and be constrained by, [its] text” (para. 9).

[66] Our colleague resists this, notwithstanding the clear direction in *Quebec (Attorney General)* regarding the centrality to the interpretational exercise of constitutional text. Indeed, her approach is completely the opposite: far from being the primary element of the Constitution whose interpretation can be informed by unwritten constitutional principles, the text *itself* “emanates” from those principles, and thus it is *the principles* which are paramount (para. 168). This is entirely inconsistent with the *Provincial Court Judges Reference*, upon which she relies. Lamer C.J. applied the unwritten constitutional principle of judicial independence to guide his interpretation of the scope of provincial authority under s. 92(14) of the *Constitution Act, 1867* and to fill a gap where provincial courts dealing with non-criminal matters were concerned (paras. 107-8). None of this supports applying unwritten constitutional principles as bases for invalidating legislation.

(b) *The Secession Reference*

[67] In *Secession Reference*, this Court said:

Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have “full legal force”, as we described it in [*Reference re Resolution to Amend the Constitution*], *supra*, at p. 845), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments. [para. 54]

A faithful reading of this passage must acknowledge the force ascribed to unwritten constitutional principles. Of significance, however, is that such force was conditioned by the nature of the questions posed in the reference — the conditions for secession of a province from Confederation — which the Court was called upon to answer. The case combined “legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity” (para. 1, quoting *Reference re Manitoba Language Rights*, at p. 728) to which the Court proposed an answer (being an obligation to negotiate in some circumstances) which, while constituting a “legal framework” in the form of a set of rules to legitimize secession, was enforceable only *politically* as “it would be for the democratically elected leadership of the various participants to resolve their differences” (para. 101 (emphasis added); see also Elliot, at p. 97).

[68] Of course, the Court made clear that it had identified “binding obligations under the Constitution of Canada” (para. 153), and that a breach of those obligations would occasion “serious legal repercussions” (para. 102). But the Court also acknowledged the “non-justiciability of [the] political issues” involved (para. 102), which meant that the Court could have “no supervisory role” over the political negotiations (para. 100). Recognizing that the “reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm” (para. 153), the Court fashioned rules in the event of whose breach the “appropriate recourse” would lie in “the workings of the political process rather than the courts” (para. 102). This is another instance of the separation of powers: courts do not supervise the legislature or the executive as to political process.

[69] Nothing, therefore, in the *Secession Reference* supports the proposition that unwritten constitutional principles can serve as an independent basis to invalidate legislation. While the obligations for the respective parties in that case had legal force by way of a judicial declaration, how that declaration would be given effect — that is, *enforced* — was deemed a question of political process, not legal process. Here again, as in the case of constitutional interpretation, the structural gap-filling role of unwritten constitutional principles was not and, we say, could not, be applied to *invalidate* legislation in the sense of declaring it under s. 52 to be of no force or effect.

(c) *Babcock and Imperial Tobacco*

[70] At issue in *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3, was the constitutionality of a provision of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, that allowed for an exception to disclosure, in litigation, based on Cabinet confidence. The respondents argued that the provision was *ultra vires* Parliament due to its inconsistency with the unwritten constitutional principles of the rule of law, judicial independence, and the separation of powers (by allowing the executive to prevent disclosure of evidence of its own unconstitutional conduct). McLachlin C.J., writing for the majority, held that “[a]lthough the unwritten constitutional principles are capable of limiting government actions, . . . they do not do so in this case” (para. 54 (emphasis added)). She reached this conclusion on the basis that “unwritten principles must be balanced against the principle of Parliamentary sovereignty” (para. 55), concluding:

It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government. [para. 57]

[71] McLachlin C.J.’s statement that unwritten constitutional principles are “capable of limiting government actions” was later explained by this Court in *Imperial Tobacco*. There, legislation authorizing action by the Province of British Columbia against tobacco manufacturers was challenged on the basis that it was inconsistent with, *inter alia*, the unwritten constitutional principle of the rule of law. For the Court, Major J. unequivocally rejected the appellants’ proposed use of the rule of law to invalidate legislation for two reasons, only one of which is of relevance here:

. . . the appellants’ arguments overlook the fact that several constitutional principles other than the rule of law that have been recognized by this Court — most notably democracy and constitutionalism — very strongly favour upholding the validity of legislation that conforms to the express terms of the Constitution (and to the requirements, such as judicial independence, that flow by necessary implication from those terms). Put differently, the appellants’ arguments

fail to recognize that in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box. [Emphasis added; para. 66.]

[72] In other words, unwritten constitutional principles are indeterminate, such that they could be in theory deployed *not only* in service of *invalidating* legislation, but of *upholding* it. Major J. continued: the recognition of an unwritten constitutional principle such as the rule of law “is not an invitation to trivialize or supplant the Constitution’s written terms”, nor “is it a tool by which to avoid legislative initiatives of which one is not in favour. On the contrary, it requires that courts give effect to the Constitution’s text, and apply, by whatever its terms, legislation that conforms to that text” (para. 67). From this, it follows that the statement in *Babcock* that unwritten constitutional principles are “capable of limiting government actions” is to be understood in a narrow and particular sense: legislative measures are restrained by the unwritten principle of the rule of law, “but only in the sense that they must comply with legislated requirements as to manner and form (i.e., the procedures by which legislation is to be enacted, amended and repealed)” (*Imperial Tobacco*, at para. 60). Again, this understanding of unwritten constitutional principles precludes entirely their application to invalidate legislation under s. 52.

[73] This, we would add, is a complete answer to our colleague Abella J.’s assertions that this Court has “never, to date, limited” the role of unwritten constitutional principles, and that their interpretive role is not “narrowly constrained by textualism” (paras. 171 and 179). Our colleague reads *Imperial Tobacco* as narrowing the use of one specific unwritten constitutional principle — the rule of law — and not unwritten constitutional principles generally. But the problem of indeterminacy would inevitably arise with the use of *any* unwritten constitutional principle to invalidate legislation. *Imperial Tobacco* thus unequivocally affirmed both a narrow interpretive role for unwritten principles, and the primacy of the text in constitutional adjudication.

(d) *Trial Lawyers Association of British Columbia*

[74] In *Trial Lawyers Association of British Columbia*, this Court was called upon to decide the constitutionality of court hearing fees imposed by British Columbia that denied some people access to the courts. For the majority, McLachlin C.J. held that those fees, enacted pursuant to s. 92(14) of the *Constitution Act, 1867*, violated s. 96 of the *Constitution Act, 1867* as they impermissibly infringed on the jurisdiction of superior courts by denying some people access to the courts (paras. 1-2). In *obiter*, she added that the connection between s. 96 and access to justice was “further supported by considerations relating to the rule of law” (para. 38), as “[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice” (para. 38, quoting *B.C.G.E.U. v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214, at p. 230). This was, she said, “consistent with the approach adopted by Major J. in *Imperial Tobacco*” (para. 37):

The legislation here at issue — the imposition of hearing fees — must conform not only to the express terms of the Constitution, but to the “requirements . . . that flow by necessary implication from those terms” (para. 66). The right of Canadians to access the superior courts flows by necessary implication from the express terms of s. 96 of the *Constitution Act, 1867* as we have seen. It follows that the province does not have the power under s. 92(14) to enact legislation that prevents people from accessing the courts. [Emphasis added; para. 37.]

[75] In our view, McLachlin C.J.'s invocation of Major J.'s "necessary implication" threshold from *Imperial Tobacco* signifies that, where unwritten constitutional principles are used as interpretive aids, their substantive legal force must arise by necessary implication from the Constitution's text. We therefore see nothing in this that is inconsistent with the *Provincial Court Judges Reference* and, in particular, with the limited scope of application of unwritten constitutional principles. The rule of law was used in *Trial Lawyers Association of British Columbia* as an interpretive aid to s. 96, which in turn was used to narrow provincial legislative authority under s. 92(14). The rule of law was not being used as an independent basis for invalidating the impugned court fees. In this way, McLachlin C.J.'s reasoning simply reflects a purposive interpretation of s. 96 informed by unwritten constitutional principles.

(2) Relevance of the Democratic Principle to Municipal Elections

[76] Democracy is, in light of the foregoing, a principle by which our Constitution is to be understood and interpreted. Though not explicitly identified in the text, the basic structure of our Constitution — including its establishment of the House of Commons and of provincial legislatures — connotes certain freely elected, representative, and democratic political institutions (*Secession Reference*, at para. 62).

[77] The democratic principle has both individual and institutional dimensions (para. 61). It embraces not only the process of representative and responsible government and the right of citizens to participate in that process at the provincial and federal levels, but also substantive goals including the promotion of self-government (paras. 64-65). So understood, the democratic principle sits alongside and indeed overlaps with other unwritten constitutional principles that this Court has recognized, including federalism and the rule of law (paras. 66-67).

[78] In this case, the democratic principle is relevant as a guide to the interpretation of the constitutional text. It supports an understanding of free expression as including political expression made in furtherance of a political campaign (*Reference re Prov. Electoral Boundaries (Sask.)*; *Reference re Alberta Statutes*, 1938 CanLII 1 (SCC), [1938] S.C.R. 100; *Switzman v. Elbling*, 1957 CanLII 2 (SCC), [1957] S.C.R. 285; *OPSEU*). But it cannot be used in a manner that goes beyond this interpretive role. In particular, it cannot be used as an independent basis to invalidate legislation.

(a) Section 92(8) of the Constitution Act, 1867

[79] The structure of neither the *Constitution Act, 1867* nor the *Constitution Act, 1982* requires by necessary implication the circumscription of provincial lawmaking authority under s. 92(8) in the manner proposed. Subject to the *Charter*, the province has "absolute and unfettered legal power" to legislate with respect to municipalities (*Ontario English Catholic Teachers' Assn.*, at para. 58). And this Court cannot grant constitutional status to a third order of government "where the words of the Constitution read in context do not do so" (*Baier*, at para. 39).

[80] Indeed, the City’s submissions neglect the fact, recognized in the passage from *Imperial Tobacco*, at para. 66, cited above, that unwritten constitutional principles other than the rule of law that have been recognized by this Court, including democracy and constitutionalism, strongly favour *upholding* the validity of legislation that conforms to the text of the Constitution. It follows that the unwritten constitutional principle of democracy cannot be used to narrow legislative competence under s. 92(8); as this Court has recognized, the provinces have plenary jurisdiction under this head of power, unrestricted by any constitutional principle (*Public School Boards’ Assn. of Alberta*).

(b) *Section 3 of the Charter*

[81] Nor can the democratic principle be used to make s. 3 of the *Charter* — including its requirement of effective representation — relevant to the current case. There is no open question of constitutional interpretation here. Section 3 democratic rights were not extended to candidates or electors to municipal councils. This is not a gap to be addressed judicially. The absence of municipalities in the constitutional text is, on the contrary, a deliberate omission (*Imperial Tobacco*, at para. 65). As the intervener the Federation of Canadian Municipalities argues, municipalities (or at least chartered towns) predate the *Magna Carta* (1215). Their existence and importance would have been known to the framers in 1867. The constitutional status of municipalities, and whether they ought to enjoy greater independence from the provinces, was a topic of debate during patriation (*House of Commons Debates*, vol. X, 1st Sess., 32nd Parl., June 15, 1981, at p. 10585). In the end, municipalities were not constitutionalized, either in amendments to the *Constitution Act, 1867* or by reference in the democratic rights enshrined in the *Charter*.

[82] Unlike in the *Provincial Court Judges Reference*, therefore, there is no textual basis for an underlying constitutional principle that would confer constitutional status on municipalities, or municipal elections. The entitlement to vote in elections to bodies not mentioned in s. 3 is therefore a matter for Parliament and provincial legislatures (*Haig*, at p. 1033; *Baier*, at para. 39). Again, and like the school boards at issue in *Baier*, municipalities are mere creatures of statute who exercise whatever powers, through officers appointed by whatever process, that provincial legislatures consider fit. Were the unwritten democratic principle applied to require *all* elections to conform to the requirements of s. 3 (including municipal elections, and not just elections to the House of Commons or provincial legislatures), the text of s. 3 would be rendered substantially irrelevant and redundant (*Imperial Tobacco*, at para. 65). To repeat: the withholding of constitutional status for municipalities, and their absence from the text of s. 3, was the product of a deliberate omission, not a gap. The City’s submissions ignore that application of the democratic principle is properly applied to *interpreting* constitutional text, and not *amending* it or *subverting* its limits by ignoring “the primordial significance assigned by this Court’s jurisprudence to constitutional text in undertaking purposive interpretation” (*Quebec (Attorney General)*, at para. 4). It is not for the Court to do by “interpretation” what the framers of our Constitution chose not to do by enshrinement, or their successors by amendment.

(3) Conclusion on the Democratic Principle

[83] Even had the City established that the *Act* was inconsistent with the principle of democracy, it follows from the foregoing discussion that a court could not rely on that inconsistency to find the *Act* unconstitutional. The *Act* was enacted pursuant to a valid legislative process and the Province had no obligation to consult with the City before it introduced the legislation, or to introduce the legislation at a particular time. (As the application judge correctly noted, the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A, does not impose an immutable obligation to consult since the Province could enact the *Act* and overrule its previous enactment. Moreover, the related *Toronto-Ontario Cooperation and Consultation Agreement* did not bind the Province in law.)

[84] In short, and despite their value as interpretive aids, unwritten constitutional principles cannot be used as bases for invalidating legislation, nor can they be applied to support recognizing a right to democratic municipal elections by narrowing the grant to provinces of law-making power over municipal institutions in s. 92(8) of the *Constitution Act, 1867*. Nor can they be applied to judicially amend the text of s. 3 of the *Charter* to require municipal elections or particular forms thereof. The text of our Constitution makes clear that municipal institutions lack constitutional status, leaving no open question of constitutional interpretation to be addressed and, accordingly, no role to be played by the unwritten principles.

V. Conclusion

[85] We would dismiss the appeal.

The reasons of Abella, Karakatsanis, Martin and Kasirer JJ. were delivered by

ABELLA J. —

[86] Elections are to democracy what breathing is to life, and fair elections are what breathe life into healthy democracies. They give the public a voice into the laws and policies they are governed by, and a chance to choose who will make those laws and policies. It is a process of reciprocal political discourse.

[87] The rules of an election, including the electoral boundaries and the timelines for campaigns, structure the process of reciprocal dialogue between candidates and voters in their electoral districts. The final act of voting, itself a form of political expression, is the culmination of the process of deliberative engagement throughout an election period. The stability of the electoral process is therefore crucial not only to political legitimacy, but also to the rights of candidates and voters to meaningfully engage in the political discourse necessary for voters to cast an informed vote, and for those elected to govern in response to the expressed views of the electorate.

[88] The 2018 Toronto municipal election had been underway for three and a half months when the Province of Ontario enacted legislation that radically redrew the City of Toronto's electoral ward boundaries by reducing the number of wards from 47 to 25. Nominations had closed, campaigns were in full swing, and voters had been notified of who wanted to represent them and why.

[89] The issue in this appeal is not whether the Province had the legal authority to change the municipal wards. It is whether the Province could do so in the middle of an ongoing municipal election, thereby destabilizing the foundations of the electoral process and interfering with the ability of candidates and voters to engage in meaningful political discourse during the period leading up to voting day.

[90] Completely revamping the electoral process in the middle of an election was unprecedented in Canadian history. The question is whether it was also unconstitutional. In my respectful view, it was.

Background

[91] In June 2013, City Council approved a Toronto Ward Boundary Review under its authority to establish, change or dissolve wards (*City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A, s. 128(1)). The mandate of the Boundary Review was “to bring a recommendation to Toronto City Council on a ward boundary configuration that respects the principle of ‘effective representation’” (Canadian Urban Institute, *Draw the Line: Toronto Ward Boundary Review Project Work Plan, Civic Engagement & Public Consultation Strategy*, April 28, 2014 (online), at p. 1). At the time, there were 44 wards in the City of Toronto.

[92] Over the next nearly four years, the Boundary Review conducted research, held public hearings, and consulted extensively. External consultants were hired who developed recommendations, organized extensive stakeholder consultations, held meetings with City Council and the Mayor’s staff, and individually interviewed members of the 2010-2014 City Council and new 2014-2018 members. Altogether, they held over 100 face-to-face meetings with City Council, school boards and other stakeholders, as well as 24 public meetings and information sessions.

[93] The four year process resulted in seven reports. A draft of each report was reviewed by an outside five-person Advisory Panel. The Boundary Review’s *Options Report*, in August 2015, analyzed eight options for drawing new ward boundaries, concluding that five options met the requirement of effective representation. Of particular significance to this appeal, one of the rejected options was redesigning the wards to mirror the 25 federal electoral districts.

[94] The Boundary Review’s *Final Report*, in May 2016, recommended *increasing* the number of wards from 44 to 47.

[95] At the direction of the Executive Committee of City Council, two further reports were prepared by the Boundary Review in 2016, one in August and one in October. Among other options, the 25 federal electoral district proposal was again examined. Those reports again recommended the 47-ward structure, concluding that applying the boundaries of the 25 federal electoral districts would not achieve effective representation or resolve significant population imbalances, in part, since they were based on the 2011 census and were expected to be redrawn after the 2021 census. The Boundary Review, on the other hand, was based on population estimates for 2026 “to ensure that any new ward structure will last for several elections and constant ward boundary reviews are not required” (*Additional Information Report*, August 2016 (online), at p. 10).

[96] City Council adopted the 47-ward structure in November 2016, which was enacted through By-laws Nos. 267-2017 and 464-2017 in March and April 2017. The goal was to create a stable electoral framework for multiple elections. The By-laws were intended to govern the City of Toronto's municipal elections from 2018 to 2026, and, possibly, 2030.

[97] The 47-ward structure was appealed to the Ontario Municipal Board by various individuals, including those seeking to have the city divided into wards that mirrored the 25 federal electoral districts. After seven days of hearings, a majority of the Board rejected the appeals and approved the By-laws on December 15, 2017 (*Di Ciano v. Toronto (City)*, 2017 CanLII 85757). In its decision, the Board explained why it found the By-laws to be reasonable:

The Board finds that the work undertaken by the [Boundary Review] culminating in the By-laws setting out a 47-ward structure was comprehensive. The ward structure delineated in the By-laws provides for effective representation and corrects the current population imbalance amongst the existing 44 wards. The decision made by Council to adopt the By-laws was defensible, fair and reasonable. The decision by Council to implement a 47-ward structure does not diverge from the principles of voter equity and effective representation. In this regard, there is nothing unreasonable in the decision of Council. [para. 51]

[98] An application was made to the Divisional Court for leave to appeal the Board's decision by two individuals who had unsuccessfully argued before the Board that the 25 federal electoral districts should be implemented. On March 6, 2018, the motion was dismissed (*Natale v. City of Toronto*, 2018 ONSC 1475, 1 O.M.T.R. 349). Swinton J. concluded that the Board applied the correct governing principle, namely, "effective representation":

Setting electoral boundaries is an exercise that requires a weighing of many policy considerations. The Board heard from a number of expert witnesses over the course of a seven day hearing. It considered relative voter parity as well as other factors. It concluded that communities of interest are best respected in a 47 ward structure. It also noted that a 25 ward structure could increase voter population in the wards "resulting in a significant impact on the capacity to represent". [Citations omitted; para. 10.]

[99] On May 1, 2018, nominations opened for candidates seeking election in Toronto's 47 wards.

[100] On June 7, 2018, a new provincial government was elected. On the day that nominations for City Council closed, July 27, 2018, the Premier, Doug Ford, announced that the government intended to introduce legislation that would reduce the size of Toronto's City Council from 47 to 25 councillors.

[101] The Boundary Review had researched the issue of effective representation for nearly 4 years, concluding that the 25 federal electoral districts would not achieve effective representation and would have an insignificant difference in terms of voter parity. Ontario did not conduct any redistricting studies or send the proposed legislation to Committee for consultation before it was enacted.

[102] The legislation was introduced for the first reading in the Legislative Assembly on July 30, 2018 and came into force on August 14, 2018, 69 days before the scheduled election date. The election had been underway for three and a half months. By then, thousands of candidates had signed up and 509 were certified and actively campaigning in Toronto's 47 wards.

[103] The nomination period was extended to September 14, 2018, but the election date remained the same — October 22, 2018. That gave candidates, all of whom would have to seek new nominations or notify the City Clerk of their intention to continue in the race by filing a change of ward notification form, just over one month to campaign in the new wards. Until nominations closed again on September 14, 2018, candidates and voters were in legal limbo awaiting the passage of regulations for the new electoral regime and the adjudication of a constitutional challenge to the mid-election changes that gave rise to this appeal. It was only after nominations closed that voters and candidates had a full picture of which candidates were running and in what wards.

[104] The new one-month campaign period was also characterized by the disruptive impact of abruptly changing the number, size and boundaries of the wards. Candidates who had been canvassing, responding to local issues, incurring expenses and developing community relationships were now faced with deciding whether and where to run. The old wards were eradicated, many of the new ones were almost twice as large, the populations were different, and there was only one month left to change wards, meet the new constituencies, learn what their concerns were, and engage with them on those issues.

[105] In the absence of any notice or additional time to fundraise, many previously certified candidates could no longer afford to run in these new and larger wards. Certified candidates had until September 14, 2018 to file a change of ward notification form or else their nominations would be deemed to be withdrawn (*Better Local Government Act, 2018*, S.O. 2018, c. 11 (“*Act*”), Sch. 3, s. 1; *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sch., s. 10.1(8)). When the present constitutional challenge was decided only days before that deadline, only 293 of the 509 previously certified candidates had taken the necessary steps to continue in the race. In the end, more than half of the previously certified candidates dropped out of the race before voting day.

[106] The City of Toronto and a number of candidates and electors applied to the Ontario Superior Court of Justice for an order declaring the legislation reducing the number of wards from 47 to 25 of no force or effect, pursuant to s. 52(1) of the *Constitution Act, 1982*.

[107] On September 10, 2018, Belobaba J. held that the *Act* was unconstitutional, infringing the rights of both candidates and voters under s. 2(b) of the *Canadian Charter of Rights and Freedoms* (2018 ONSC 5151, 142 O.R. (3d) 336). He held that the legislation violated the expressive rights of candidates by radically redrawing ward boundaries mid-election, and that it breached the rights of voters to cast a vote that could result in effective representation by doubling the population sizes of the wards.

[108] On September 19, 2018, the Ontario Court of Appeal ordered an interim stay of Belobaba J.’s order, meaning that the election would take place based on the new 25-ward structure (2018 ONCA 761, 142 O.R. (3d) 481). It took place on October 22, 2018.

[109] On September 19, 2019, the Court of Appeal allowed the appeal from Belobaba J.’s order (2019 ONCA 732, 146 O.R. (3d) 705). Writing for a 3-2 majority, Miller J.A. held that Belobaba J. “impermissibly extended the scope [of] s. 2(b)” to protect the effectiveness of efforts to convey political messages and to include a right to effective representation.

[110] In dissent at the Court of Appeal, MacPherson J.A. held that the timing of the *Act* infringed s. 2(b), concluding that “[b]y extinguishing almost half of the city’s existing wards midway through an active election, Ontario blew up the efforts, aspirations and campaign materials of hundreds of aspiring candidates, and the reciprocal engagement of many informed voters”.

[111] I agree with MacPherson J.A.

Analysis

[112] Under s. 92(8) of the *Constitution Act, 1867*, the provinces have exclusive jurisdiction over “Municipal Institutions in the Province”. The question therefore of whether the Province has the authority to legislate a change in Toronto’s ward structure is not the issue in this appeal. The issue is whether this *timing* mid-way through a municipal election was in violation of s. 2(b) of the *Charter*, which states:

2 Everyone has the following fundamental freedoms:

...

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

[113] The 2018 Toronto municipal election had already been underway for three and a half months when the number, size and boundaries of all the wards were changed.

[114] It is entirely beside the point to observe that elected municipal councils are creatures of statute. Section 2(b) of the *Charter* applies with equal vigour to protect political discourse during a municipal election as a federal or provincial one. When a province chooses to vest certain powers in a democratic municipality, municipal elections invariably become the locus of deliberative engagement on those delegated policy issues. It is incumbent on a provincial legislature to respect the rights of its citizens to engage in meaningful dialogue on municipal issues during an election period and, in particular, the rights of candidates and voters to engage in meaningful exchanges before voting day.

[115] When a democratic election takes place in Canada, including a municipal election, freedom of expression protects the rights of candidates and voters to meaningfully express their views and engage in reciprocal political discourse on the path to voting day. That is at the core of political expression, which in turn is at the core of what is protected by s. 2(b) of the *Charter*. When the state enacts legislation that has the effect of destabilizing the opportunity for meaningful reciprocal discourse, it is enacting legislation that interferes with the Constitution.

[116] Municipal elections have been a part of political life in Canada since before Confederation, and municipalities are a crucial level of government. The 1996 Greater Toronto Area Task Force explained their significance, emphasizing that “services should be delivered by local municipalities to ensure maximum efficiency and responsiveness to local needs and preferences” (*Greater Toronto*, at p. 174; see also D. Siegel, “Ontario”, in A. Sancton and R. Young, eds., *Foundations of Governance: Municipal Government in Canada’s Provinces* (2009), 20, at p. 22; A. Flynn, “Operative Subsidiarity and Municipal Authority: The

Case of Toronto's Ward Boundary Review" (2019), 56 *Osgoode Hall L.J.* 271, at pp. 275-76). As Professor Kristin R. Good explains, municipalities are not "mere 'creatures of the provinces'", they are

important democratic governments in their own right. The variations in multicultural policy making in Canadian cities are evidence that local choices, policies, and politics matter. Municipalities are important vehicles of the democratic will of local communities as well as important sites of multicultural democratic citizenship.

(*Municipalities and Multiculturalism: The Politics of Immigration in Toronto and Vancouver* (2009), at p. 5)

[117] The democratically accountable character of municipalities is well established in our jurisprudence. In *Godbout v. Longueuil (City)*, 1997 CanLII 335 (SCC), [1997] 3 S.C.R. 844, La Forest J. wrote that "municipal councils are democratically elected by members of the general public and are accountable to their constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to the electorates" (para. 51). Similarly, in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 (CanLII), [2012] 1 S.C.R. 5, McLachlin C.J. recognized that municipal councillors "serve the people who elected them and to whom they are ultimately accountable" (para. 19).

[118] The increasing significance of municipal governance has been accompanied by an increasingly generous interpretation of municipal powers. Writing for a unanimous Court in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19 (CanLII), [2004] 1 S.C.R. 485, Bastarache J. observed that "[t]he evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities" (para. 6). And in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 (CanLII), [2001] 2 S.C.R. 241, L'Heureux-Dubé J. confirmed that "law-making and implementation are often best achieved at a level of government that is . . . closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity" (para. 3; see also *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13 (CanLII), [2000] 1 S.C.R. 342).

[119] These cases built on McLachlin J.'s dissent in *Shell Canada Products Ltd. v. Vancouver (City)*, 1994 CanLII 115 (SCC), [1994] 1 S.C.R. 231, which stressed the "fundamental axiom" that

courts must accord proper respect to the *democratic responsibilities of elected municipal officials and the rights of those who elect them*. This is important to the continued healthy functioning of democracy at the municipal level. If municipalities are to be able to respond to the needs and wishes of their citizens, they must be given broad jurisdiction to make local decisions reflecting local values. [Emphasis added; p. 245.]

[120] The reciprocal relationship between the democratic responsibilities of elected municipal officials and the rights of those who elected them is crucial. It requires what Duff C.J. called "the free public discussion of affairs" so that two sets of duties can be discharged — the duties of elected members "to the electors", and of electors "in the election of their representatives" (*Reference re Alberta Statutes*, 1938 CanLII 1 (SCC), [1938] S.C.R. 100, at p. 133; see also *Switzman v. Elbling*, 1957 CanLII 2 (SCC), [1957] S.C.R. 285, at pp. 306 and 326-27; *RWDSU v. Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573, at p. 583).

[121] How then does all this relate to the rights in s. 2(b) of the *Charter*? Because in dealing with municipal elections, we are dealing with the political processes of democratic government and it is undeniable that s. 2(b) protects “the political discourse fundamental to democracy” (*R. v. Sharpe*, 2001 SCC 2 (CanLII), [2001] 1 S.C.R. 45, at para. 23; see also *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712, at p. 765).

[122] In *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, this Court held that one of the three underlying principles of the s. 2(b) right is that “participation in social and political decision-making is to be fostered and encouraged” (p. 976). Professors P. W. Hogg and W. K. Wright have referred to political expression as being “at the core of s. 2(b)”, and curtailed under s. 1 “only in service of the most compelling governmental interest” (*Constitutional Law of Canada* (5th ed. Supp.), at p. 43-9).

[123] This brings us to the central issue in this appeal, namely, whether the timing of the legislation, in redrawing and reducing the number of wards from 47 to 25 in the middle of an election, infringed the expressive rights protected by s. 2(b) of the *Charter*.

[124] *Irwin Toy* established a two-part test for adjudicating freedom of expression claims. The first asks whether the activity is within the sphere of conduct protected by freedom of expression. If the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. The second part asks whether the government action, in purpose or effect, interfered with freedom of expression.

[125] Dealing with the first part, the “activity” at the heart of this appeal is the expression of political views and the reciprocal political discourse among electoral participants during an election period, which engages the rights of both those seeking election and those deciding whom to elect. Political discourse undoubtedly has expressive content, and therefore, *prima facie* falls within the scope of the guarantee. Dickson C.J. in *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697, noted that

[t]he connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. [Emphasis added; pp. 763-64.]

[126] The second part of the test, namely, whether the state action interfered with the right in purpose or effect, is not, with respect, particularly complicated either. This Court’s jurisprudence under s. 2(b) of the *Charter* has usually arisen in circumstances where the *purpose* of the government action was to restrict expression by regulating who can speak, what they can say or how their messages can be heard.^[1] The case before us, on the other hand, deals with whether the *effect* of the legislation — redrawing the ward boundaries and cutting the number of wards nearly in half mid-election — was to interfere with these expressive activities.

[127] Freedom of expression does not simply protect the right to speak; it also protects the right to communicate with one another (R. Moon, *The Constitutional Protection of Freedom of Expression* (2000), at pp. 3-4). The words of Marshall J., in dissent, resonate with the reciprocal nature of expression:

. . . the right to speak and hear — including the right to inform others and to be informed about public issues — are inextricably part of [the First Amendment]. The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion. The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the “means indispensable to the discovery and spread of political truth.” [Citations omitted.]

(*Kleindienst v. Mandel*, 408 U.S. 753 (1972), at p. 775)

[128] In the electoral context, freedom of expression involves the rights of both candidates and voters to reciprocal deliberative engagement. The right to disseminate and receive information connected with elections has long been recognized as integral to the democratic principles underlying freedom of expression, and as a result, has attracted robust protection (see e.g. *Thomson Newspapers Co. v. Canada (Attorney General)*, 1998 CanLII 829 (SCC), [1998] 1 S.C.R. 877; *R. v. Bryan*, 2007 SCC 12 (CanLII), [2007] 1 S.C.R. 527; *Harper v. Canada (Attorney General)*, 2004 SCC 33 (CanLII), [2004] 1 S.C.R. 827; *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, 2017 SCC 6 (CanLII), [2017] 1 S.C.R. 93; see also K. Roach and D. Schneiderman, “Freedom of Expression in Canada” (2013), 61 *S.C.L.R.* (2d) 429; J. Weinrib, “What is the Purpose of Freedom of Expression?” (2009), 67 *U.T. Fac. L. Rev.* 165).

[129] Political expression during an election period is always “taking place within and being constrained by the legal and institutional framework of an election” (Y. Dawood, “The Right to Vote and Freedom of Expression in Political Process Cases Under the [Charter](#)” (2021), 100 *S.C.L.R.* (2d) 105, at p. 131). In *Libman v. Quebec (Attorney General)*, 1997 CanLII 326 (SCC), [1997] 3 S.C.R. 569, this Court explained that elections and referendums are “procedural structure[s] allowing for public discussion of political issues essential to governing”, which serve to ensure “a reasonable opportunity to speak and be heard” and “the right of electors to be adequately informed of all the political positions advanced by the candidates and by the various political parties” (paras. 46-47).

[130] The Intervener, the David Asper Centre for Constitutional Rights, cogently explained how there are different aspects of an election, each of which requires protection:

Election campaigns provide a special forum for voters and candidates to interact with each other. Citizens engage in the democratic process when they identify issues, test policy positions, bring incumbents to account, and assess new candidates’ skills, policies and positions. All exercises of expression, at each and every stage of the electoral process — not only the final act of voting — must receive consistent and robust [Charter](#) protection. [Footnotes omitted.]

(I.F., at para. 8)

[131] The democratic dialogue that occurs throughout an election period is crucial to the formation of public opinion and the ability to cast an informed vote. The process of deliberative engagement during an election period was aptly described by Professor Saul Zipkin:

. . . the electoral process is the primary site in which the representative relationship is constructed. Indeed, “[c]ampaigns . . . are a main point —perhaps *the* main point — of contact between officials and the populace over matters of public policy.” The period in which the putative representative goes before the voters for their approval is a time of creating that relationship, calling for special attention to the proper functioning of the democratic process at that time. As the representative relationship is historically a matter of constitutional concern, and is shaped by political activity and speech in the electoral setting, we might broaden the narrow focus on ballot-casting in our assessment of the democratic process. [Emphasis in original; footnotes omitted.]

(“The Election Period and Regulation of the Democratic Process” (2010), 18 *Wm. & Mary Bill Rts. J.* 533, at pp. 545-46; see also A. Bhagwat and J. Weinstein, “Freedom of Expression and Democracy”, in A. Stone and F. Schauer, eds., *The Oxford Handbook of Freedom of Speech* (2021), 82; N. Urbinati, “Free Speech as the Citizen’s Right”, in R. C. Post, *Citizens Divided: Campaign Finance Reform and the Constitution* (2014), 125.)

[132] An election is a process of allowing candidates and voters, as both speakers and listeners, to participate in reciprocal discourse so that their respective views can be fully expressed and heard. It is only through this process of free public discussion and debate that an informed vote can be cast, and ultimately, those elected can be responsive to the views of the electorate.

[133] State interference with individual and collective political expression in the context of an election strikes at the heart of the democratic values that freedom of expression seeks to protect, including “participation in social and political decision-making” (*Irwin Toy*, at p. 976). The *Irwin Toy* test is, as a result and as discussed later in these reasons, the appropriate legal framework for adjudicating the present claim of state interference with political expression during an election period.

[134] A stable election period is crucial to electoral fairness and meaningful political discourse. Redrawing the number, size and boundaries of electoral wards during this period destabilizes the process by “[i]nterrupting an election mid-campaign to change the rules of the game, including the electoral districts upon which candidates have crafted their campaigns and voters will have their preferences channelled” (M. Pal, “The Unwritten Principle of Democracy” (2019), 65 *McGill L.J.* 269, at p. 302).

[135] For three and a half months, candidates and voters engaged in political dialogue within the legal and institutional structure created in advance of the 2018 municipal election after years of research, public engagement and, finally, endorsement from the Ontario Municipal Board.

[136] After the *Act* came into force, candidates and voters found themselves in a suddenly altered electoral landscape. The *Act* eradicated nearly half of the active election campaigns, requiring those candidates to file a change of ward notification form to continue in the race. The redrawing of ward boundaries meant that candidates needed to reach new voters with new priorities. Campaign materials such as lawn signs or advertisements for abolished wards “no longer play[ed] the function of electoral expression given the change to the underlying institutional context within which that expression [was] taking place” (Dawood, at p. 132). Voters who had received campaign information, learned about candidates’ mandates and engaged with them based on the 47-ward structure had their democratic participation put into abeyance.

[137] The impact on some of the candidates and voters provides illuminating metaphors. One candidate, for example, Dyanoosh Youssefi, explained that she had been canvassing, e-mailing and organizing since the beginning of the campaign for 12-15 hours per day and all of her efforts had “focused

on the concerns and the needs of the approximately 55,000 residents of Ward 14” (A.R., vol. XV, at p. 80). Ward 14 was abolished by the *Act*.

[138] Another candidate, Chiara Padovani, who had been campaigning in Ward 11, described the effect of combining Ward 11 and Ward 12 into a new Ward 5:

Even before my registration as a candidate for the 2018 election, I engaged in substantial efforts to engage community members around important local issues in Ward 11 for over a one and a half year period such as flooding, road safety, and tenant rights. As a result, I . . . know where residents feel there should be additional speedbumps, crosswalks, and reduction in speed limits. I do not have this type of knowledge for any other ward, including Ward 12.

. . .

If I had notice of the change in ward boundaries prior to the commencement of the campaign, I would have been able to plan my ground strategy, and I would have attempted to gain a deeper knowledge of the local issues affecting residents in Ward 12 by actively canvassing in that ward. At this point, it will be impossible for me to carry out double the amount of canvassing that I have completed with the limited time remaining.

(A.R., vol. XI, at pp. 15-16)

[139] Ever since the 47-ward structure was enacted in 2017, Chris Moise, a Black and openly gay candidate, had been organizing a campaign in Ward 25. He had decided to run in Ward 25 because it encompassed the Gay Village and Yorkville. These were communities he felt he could meaningfully serve based on his experiences as a School Board Trustee for the area, an LGBTQ activist, a former police officer with an interest in police relations with the Black and LGBTQ communities in the Village, and a resident and property owner in Yorkville. When the legislation abolished Ward 25, he dropped out of the race because he could not pivot his campaign on such short notice to either the new Ward 13, which excluded Yorkville where he lived, or the new Ward 11, which had only a very small geographical overlap with the previous Ward 25 and excluded the Village where he had the most meaningful connections and policy goals.

[140] Another candidate, Jennifer Hollett, explained the effect of the two week “legal limbo” (A.R., vol. XI, at p. 144) before the legislation received Royal Assent:

Even after [the legislation] passed, my campaign team was uncertain what was going to happen to our campaign funds, and whether those funds could be transferred to a new campaign, or whether those funds could be refunded. It was only when regulations made pursuant to the Minister’s powers in [the legislation] were passed that we received any direction. The effect of that uncertainty is that my team did not make any campaign expenditures after July 27.

. . .

The voters I speak with are confused. They understand that the rules have changed, but do not understand why those rules have changed and how. Instead of discussing municipal issues in the campaign, such as transit and safer streets, residents are asking about ward boundary changes and how they affect them. [pp. 145-46]

[141] Megann Wilson, another candidate and participant in the Women Win TO’s training program, described the ensuing uncertainty vividly:

Since . . . the imposition of a 25-ward model, I have struggled to engage with residents on my platform, or key issues and policies in the ward. Many residents are simply tired of the changing wards, and no longer know what ward they live in — and that is what I spend my time talking to residents about when I am canvassing. In my view, the level of confusion in my ward will make it more difficult for voters to make a good decision about what candidate to vote for since

electors are not even aware of what ward they now live in let alone who the candidates are, given the sudden changes. Further, as a result of lack of communication to residents about the new ward boundaries, I have found myself having to fill that gap while canvassing residents — a significant distraction from the municipal issues I am trying to engage residents about.

As a result of [the legislation] I am hindered in getting to the root of municipal issues affecting electors while I am canvassing. I am now spending most of my time with voters explaining the changes to the ward boundaries, and discussing the provincial politics that led to these sudden changes. Time with prospective voters is precious for all candidates and [the legislation] has interrupted my ability to engage directly with voters about my platform and my ideas for the ward and its residents.

(A.R., vol. X, at p. 132)

[142] Since the *Act* did not reset campaign finance limits, new candidates entered the race with untapped campaign spending limits, while candidates who had already been campaigning lost what they had invested in now-defunct districts and continued in the race on a reduced budget. Some previously certified candidates stopped producing campaign materials entirely due to the uncertainty surrounding the transfer of campaign funds and expenditures to a new campaign. Others could not afford to compete in the new and larger wards. As one campaign volunteer described:

We do not know whether a donor who donated the maximum amount to a Ward 23 candidacy can now make a fresh donation to a Ward 13 candidacy. This is important because funds were spent on materials for the Ward 23 candidacy that are no longer useable. . . . It will likely not be possible to undertake sufficient fundraising to replace all of the items that are no longer usable, particularly given the limited amount of time in the campaign. Prior donors will likely not be able or willing to donate again, and it is unlikely we will be able to find enough new donors to produce sufficient new materials for a fresh campaign for a much larger ward area, particularly compared to more well-resourced incumbents.

(A.R., vol. IX, at p. 125)

[143] Voters, too, were affected. One voter, Ish Aderonmu, explained the consequence of candidates dropping out of the race as “deeply disappointing . . . as an elector who has been working to advance one of these campaigns, expressing myself politically for the first time” (A.R., vol. IX, at p. 124). Another voter, who had endorsed a candidate who dropped out of the race, conveyed that “his own political expression has been compromised” and that “candidates remaining in the race are dealing with making major changes to their campaigns, and are not available to discuss [important] issues with him” (A.R., vol. IX, at p. 104).

[144] It is important to remember the timeline. Nominations opened on May 1, 2018, and closed on July 27, 2018. On the same day that nominations closed, the government announced that it intended to introduce new legislation, cutting the wards nearly in half and radically redrawing ward boundaries mid-election. No one knew what the impact of the new boundaries would be. Candidates did not know how the new electoral wards would affect their campaigns, and voters had no idea who their new candidates would be. All this after being in an ongoing electoral process for almost three months.

[145] The new legislation came into force two weeks later on August 14, 2018. By then, candidates had been campaigning and engaging with voters for 105 days in the existing 47 wards. Candidates who had developed mandates to respond to the specific needs and interests of their wards had their campaign efforts eradicated, along with their opportunity to meaningfully engage with the right voters on those issues. Voters who had formed opinions, been persuaded on issues, refined their preferences and expressed their views to

their preferred representatives had their political expression thwarted. Some candidates persevered; others dropped out of the race. Volunteers quit, campaign endorsements were rescinded and confusion ensued.

[146] Nominations were extended to September 14, leaving only five weeks — from the date that nominations closed, solidifying which candidates were running and in what wards — for an election that was supposed to last nearly six months. More importantly, those five weeks were marred by the destabilizing impact of the timing of the legislation in the middle of an election that was technically 60 percent complete. The additional month for *new* candidates to seek nomination could not undo the damage and uncertainty that the change had created for candidates who had already been certified and voters who had already participated in three and a half months of deliberative engagement.

[147] The timing of the *Act*, in the middle of an ongoing election, breathed instability into the 2018 municipal election, undermining the ability of candidates and voters in their wards to meaningfully discuss and inform one another of their views on matters of local concern. For the remaining campaign period, candidates spent more time on doorsteps discussing the confusing state of affairs with voters than the relevant political issues. The timing of the legislation, by interfering with political discourse in the middle of an election, was a clear breach of s. 2(b) of the *Charter*.

[148] With respect, this leaves no role for the legal framework set out in *Baier v. Alberta*, 2007 SCC 31 (CanLII), [2007] 2 S.C.R. 673. It was designed to address underinclusive statutory regimes. The line of authority preceding *Baier* involved claims by individuals or groups seeking inclusion in an existing statutory regime, alleging that the absence of government support for them constituted a substantial interference with their exercise of a fundamental freedom.^[2] The *Baier* framework was originally developed for an underinclusive labour relations regime in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 (CanLII), [2001] 3 S.C.R. 1016, and then modified for an allegedly underinclusive school board trustee election regime in *Baier*. The framework specifically refers to “claims of underinclusion”, “exclusion from a statutory regime” and “underinclusive state action” (*Dunmore*, at paras. 24-26; *Baier*, at paras. 27-30). It has no relevance to the legal or factual issues in this case.

[149] The *Baier* framework was, additionally, confined to its unique circumstances by this Court’s subsequent decision in *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 (CanLII), [2009] 2 S.C.R. 295. Writing for a 7-1 majority, Deschamps J. explained that *Baier* “summarized the criteria for identifying the limited circumstances in which s. 2(b) requires the government to extend an underinclusive means of, or ‘platform’ for, expression to a particular group or individual” (para. 30). She also cautioned against extending *Baier* beyond these narrow confines:

... taken out of context, [*Baier*] could be construed as transforming many freedom of expression cases into “positive rights claims”. Expression in public places invariably involves some form of government support or enablement. Streets, parks and other public places are often created or maintained by government legislation or action. If government support or enablement were all that was required to trigger a “positive rights analysis”, it could be argued that a claim brought by demonstrators seeking access to a public park should be dealt with under the *Baier* analysis because to give effect to such a claim would require the government to enable the expression by providing the necessary resource (i.e., the place). But to argue this would be to misconstrue *Baier*.

When the reasons in *Baier* are read as a whole, it is clear that “support or enablement” must be tied to a claim requiring the government to provide a particular means of expression. In *Baier*, a distinction was drawn between *placing an obligation on government to provide individuals with a particular platform for expression* and *protecting the underlying freedom of expression of those who are free to participate in expression on a platform* (para. 42). [Emphasis added; paras. 34-35.]

[150] The *Baier* test has no application to this appeal. As Deschamps J.’s full quote shows, it is clear that *Baier* only applies to claims “placing an obligation on government to provide individuals with a particular platform for expression”. *Irwin Toy*, on the other hand, applies to claims that are about “protecting the underlying freedom of expression of those who are free to participate in expression on a platform”, like the case before us.

[151] None of the claimants involved in this case was excluded from participating in the 2018 Toronto municipal election, nor did they claim that s. 2(b) of the *Charter* requires the Province to provide them with a municipal election so that they can express themselves. The s. 2(b) claim in this case is about government interference with the expressive rights that attach to an electoral process. This is precisely the kind of claim that is governed by the *Irwin Toy* framework, not *Baier* (*Baier*, at para. 42; *Greater Vancouver Transportation Authority*, at para. 35; *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, 2010 SCC 23 (CanLII), [2010] 1 S.C.R. 815, at para. 31).

[152] In any event, the distinction between positive and negative rights is an unhelpful lens for adjudicating *Charter* claims. During nearly four decades of *Charter* litigation, this Court has recognized that rights and freedoms have both positive and negative dimensions. That recognition has led the Court to adopt a unified purposive approach to rights claims, whether the claim is about freedom *from* government interference in order to exercise a right, or the right *to* governmental action in order to get access to it.^[3] To paraphrase Gertrude Stein, a right is a right is a right. The threshold does not vary with the nature of the claim to a right. Each right has its own definitional scope and is subject to the proportionality analysis under s. 1 of the *Charter*.

[153] All rights have positive dimensions since they exist within, and are enforced by, a positive state apparatus (S. Fredman, “Human Rights Transformed: Positive Duties and Positive Rights”, [2006] *P.L.* 498, at p. 503; J. Rawls, *Political Liberalism* (exp. ed. 2005), at pp. 361-62; A. Sen, *The Idea of Justice* (2009), at p. 228). They also have negative dimensions because they sometimes require the state *not* to intervene. The distinction “is notoriously difficult to make Appropriate verbal manipulations can easily move most cases across the line” (S. F. Kreimer, “Allocational Sanctions: The Problem of Negative Rights in a Positive State” (1984), 132 *U. Pa. L. Rev.* 1293, at p. 1325).

[154] It is true that freedom of expression was once described by L’Heureux-Dubé J. in *Haig v. Canada*, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995, as prohibiting “gags” but not compelling “the distribution of megaphones” (p. 1035; see also K. Chan, “Constitutionalizing the Registered Charity Regime: Reflections on *Canada Without Poverty*” (2020), 6 *C.J.C.C.L.* 151, at p. 173). But even in *Haig* — a precursor to *Baier* — L’Heureux-Dubé J. acknowledged that this was an artificial distinction that is “not

always clearly made, nor . . . always helpful” (p. 1039; see also *Native Women’s Assn. of Canada v. Canada*, 1994 CanLII 27 (SCC), [1994] 3 S.C.R. 627, at pp. 666-68, per L’Heureux-Dubé J., concurring).

[155] There is no reason to superimpose onto our constitutional structure the additional hurdle of dividing rights into positive and negative ones for analytic purposes. Dividing the rights “baby” in half is not Solomonic wisdom, it is a jurisprudential sleight-of-hand that promotes confusion rather than rights protection.

[156] The purpose of the s. 2(b) right is not merely to restrain the government from interfering with expression, but also to cultivate public discourse “as an instrument of democratic government” (Hogg and Wright, at p. 43-8; see also Weinrib). Political discourse is at the heart of s. 2(b). Protecting the integrity of reciprocal political discourse among candidates and voters during an election period is therefore integral to s. 2(b)’s purpose. Elevating the legal threshold, as the majority proposes to do by applying *Baier*, adds a gratuitous hurdle, making it harder to prove a breach of this core aspect of s. 2(b) than other expressive activities. What should be applied instead is the foundational framework in *Irwin Toy*, which simply asks whether the activity in question falls within the scope of s. 2(b) and whether the government action, in purpose or effect, interfered with that expressive activity.

[157] Applying that framework, it is clear that the timing of the legislation violated s. 2(b) of the *Charter*. By radically redrawing electoral boundaries *during* an active election that was almost two-thirds complete, the legislation interfered with the rights of all participants in the electoral process to engage in meaningful reciprocal political discourse.

[158] This brings us to s. 1 of the *Charter*. The purpose of the s. 1 analysis is to determine whether the state can justify the *limitation* as “demonstrably justified in a free and democratic society” (*Charter*, s. 1; *Fraser v. Canada (Attorney General)*, 2020 SCC 28, at para. 125). The limitation on s. 2(b) rights in this case was the timing of the legislative changes.

[159] But rather than explaining the purpose and justification for the *timing* of the changes, Ontario relied on the pressing and substantial objectives of the changes themselves as the basis for the s. 1 analysis, saying they were to achieve voter parity, improve efficiency and save costs. This was set out in the press release announcing the proposed legislation, which stated: “We ran on a commitment to restore accountability and trust, to reduce the size and cost of government, including an end to the culture of waste and mismanagement” (Office of the Premier, *Ontario’s Government for the People Announces Reforms to Deliver Better Local Government*, July 27, 2018 (online)). And at the second reading of the legislation, the Minister of Municipal Affairs and Housing, the Hon. Steve Clark, declared:

During the recent provincial election campaign, my caucus colleagues and I heard very strongly from Ontarians that they want us to respect those taxpayers’ dollars. We heard very clearly from Ontarians that government is supposed to work for them. I think Ontario sent a very clear message on June 7 that they want a government that looks after those taxpayers’ dollars, and that is exactly what we’re doing with this bill.

So, Speaker, I want to get into some of the details of the bill, and specifically I want to talk first about the city of Toronto. The bill, if passed, would reduce the size of Toronto city council to 25 councillors from the present 47 plus the mayor. This would give the taxpayers of Toronto a

streamlined, more effective council that is ready to work quickly and puts the needs of everyday people first.

(Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, No. 14, 1st Sess., 42nd Parl., August 2, 2018, at p. 605)

[160] Leaving aside that voter parity was hardly mentioned in the legislative debates, this Court has never found voter parity to be the electoral lodestar, asserting, on the contrary, that the values of a free and democratic society “are better met by an electoral system that focuses on effective representation than by one that focuses on mathematical parity” (*Reference re Prov. Electoral Boundaries (Sask.)*, 1991 CanLII 61 (SCC), [1991] 2 S.C.R. 158, at p. 188).

[161] But of overriding significance, the government offered no explanation, let alone a pressing and substantial one, for why the changes were made in the middle of an ongoing election. There was no hint of urgency, nor any overwhelming immediate policy need.

[162] In the absence of any evidence or explanation for the *timing* of the *Act*, no pressing and substantial objective exists for this limitation and it cannot, therefore, be justified in a free and democratic society. The legislation is, as a result, an unjustified breach of s. 2(b).

[163] While this dispenses with the merits of the appeal, the majority’s observations circumscribing the scope and power of unwritten constitutional principles in a way that reads down this Court’s binding jurisprudence warrants a response.

[164] In the *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217 (“*Secession Reference*”), the Court identified the unwritten constitutional principles of democracy, judicial independence, federalism, constitutionalism and the rule of law, and the protection of minorities. These principles are derived from the preamble to the *Constitution Act, 1867*, which describes our Constitution as “a Constitution similar in Principle to that of the United Kingdom” (*Secession Reference*, at paras. 44-49; see also P. C. Oliver, “‘A Constitution Similar in Principle to That of the United Kingdom’: The Preamble, Constitutional Principles, and a Sustainable Jurisprudence” (2019), 65 *McGill L.J.* 207).

[165] The precedential Constitution of the United Kingdom is not a written document, but is comprised of unwritten norms, Acts of Parliament, Crown prerogative, conventions, custom of Parliament, and judicial decisions, among other sources (Oliver, at p. 216; M. Rowe and N. Déplanche, “Canada’s Unwritten Constitutional Order: Conventions and Structural Analysis” (2020), 98 *Can. Bar Rev.* 430, at p. 438). Our Constitution, as a result, “embraces unwrite[n] as well as written rules” (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3 (“*Provincial Judges Reference*”), at para. 92, per Lamer C.J.).

[166] It is notable that many Parliamentary systems, notwithstanding their different constitutional arrangements, have also recognized that unwritten constitutional principles have full legal force and can serve as substantive limitations on all branches of government.^{[\[4\]](#)}

[167] Unwritten constitutional principles have been held to be the “lifeblood” of our Constitution (*Secession Reference*, at para. 51) and the “vital unstated assumptions upon which the text is based” (para. 49). They are so foundational that including them in the written text “might have appeared redundant, even silly, to the framers” (para. 62).

[168] Unwritten constitutional principles are not, as the majority suggests, merely “context” or “backdrop” to the text. On the contrary, unwritten principles are our Constitution’s most basic normative commitments from which specific textual provisions derive. The specific written provisions are “elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*” (*Provincial Judges Reference*, at para. 107; see also *Switzman*, at p. 306, per Rand J.). Constitutional text emanates from underlying principles, but it will not always be exhaustive of those principles. In other words, the text is not exhaustive of our Constitution (*New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, 1993 CanLII 153 (SCC), [1993] 1 S.C.R. 319, at p. 378, per McLachlin J.).

[169] Apart from written provisions of the Constitution, principles deriving from the Constitution’s basic structure may constrain government action. Those principles exist independently of and, as in the case of implied fundamental rights before the promulgation of the *Charter*, prior to the enactment of express constitutional provisions (see e.g. *Reference re Alberta Statutes*, per Duff C.J.; *Switzman*, at pp. 327-28, per Abbott J.; *OPSEU v. Ontario (Attorney General)*, 1987 CanLII 71 (SCC), [1987] 2 S.C.R. 2, at p. 57, per Beetz J.). As Beetz J. wrote for the majority in *OPSEU*, at p. 57, “quite apart from *Charter* considerations, the legislative bodies in this country must conform to these basic structural imperatives and can in no way override them”:

There is no doubt in my mind that the basic structure of our Constitution, as established by the *Constitution Act, 1867*, contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels. In the words of Duff C.J. in *Reference re Alberta Statutes*, at p. 133, “such institutions derive their efficacy from the free public discussion of affairs . . .” and, in those of Abbott J. in *Switzman v. Elbling*, at p. 328, neither a provincial legislature nor Parliament itself can “abrogate this right of discussion and debate”. Speaking more generally, I hold that neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure. [p. 57]

[170] This leads inescapably to the conclusion — supported by this Court’s jurisprudence until today — that unwritten principles may be used to invalidate legislation if a case arises where legislation elides the reach of any express constitutional provision but is fundamentally at odds with our Constitution’s “internal architecture” or “basic constitutional structure” (*Secession Reference*, at para. 50; *OPSEU*, at p. 57). This would undoubtedly be a rare case. But with respect, the majority’s decision to foreclose the possibility that unwritten principles be used to invalidate legislation in all circumstances, when the issue on appeal does not require them to make such a sweeping statement, is imprudent. It not only contradicts our jurisprudence, it is fundamentally inconsistent with the case law confirming that unwritten constitutional principles can be used to review legislation for constitutional compliance. Reviewing legislation for constitutional compliance means upholding, revising or rejecting it. Otherwise, there is no point to reviewing it.

[171] In the *Secession Reference*, a unanimous Court confirmed that “[u]nderlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have ‘full legal force’, as we described it in the *Patriation Reference*, *supra*, at p. 845), which constitute substantive limitations upon government action” (para. 54, quoting *Reference re Resolution to Amend the Constitution*, 1981 CanLII 25 (SCC), [1981] 1 S.C.R. 753 (“*Patriation Reference*”); see also *Babcock v. Canada (Attorney General)*, 2002 SCC 57 (CanLII), [2002] 3 S.C.R. 3, at para. 54, per McLachlin C.J.). That means they can be used to assess state action for constitutional compliance, which in turn can lead to endorsing, rejecting, limiting or expanding the acts of the executive or legislative branches of government. Again, with respect, we have never, to date, limited their role in the manner the majority proposes.

[172] The Court’s reference to *Patriation Reference* dispels any doubt as to what it meant when it said that these principles have “full legal force”. In the passage cited approvingly from the *Patriation Reference*, Martland and Ritchie JJ., dissenting in part, explained that unwritten constitutional principles “*have been* accorded full legal force in the sense of *being employed to strike down legislative enactments*” (p. 845 (emphasis added)). While Martland and Ritchie JJ. dissented in the result in the *Patriation Reference*, they cited judgments in support of the principle of federalism that remain good law and were viewed as necessary to “preserving the integrity of the federal structure” (p. 821), notably *Attorney-General for Canada v. Attorney-General for Ontario*, 1937 CanLII 362 (UK JCPC), [1937] A.C. 326 (P.C.), and *Attorney General of Nova Scotia v. Attorney General of Canada*, 1950 CanLII 26 (SCC), [1951] S.C.R. 31 (see also *Secession Reference*, at para. 81, citing *Reference re Authority of Parliament in relation to the Upper House*, 1979 CanLII 169 (SCC), [1980] 1 S.C.R. 54, at p. 71). In other words, structural doctrine helps identify what the unwritten principles *are*, it does not limit their role.

[173] This Court expressly endorsed the unwritten principles of democracy as the “baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated” (*Secession Reference*, at para. 62); the rule of law as “a fundamental postulate of our constitutional structure” (*Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, at p. 142, per Rand J.), “the very foundation of the *Charter*” (*B.C.G.E.U. v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214, at p. 229, per Dickson C.J.), and the source of judicial authority to override legislative intent “where giving effect to that intent is precluded by the rule of law” (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 23); federalism as “a foundational principle of the Canadian Constitution” (*References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (CanLII), [2021] 1 S.C.R. 175, at para. 3, per Wagner C.J.); and judicial independence as a “constitutional imperative” in light of “the central place that courts hold within the Canadian system of government” (*Provincial Judges Reference*, at para. 108). And of course, the unwritten constitutional principle of the honour of the Crown has been affirmed by this Court and accorded full legal force (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 (CanLII), [2010] 3 S.C.R. 103, at para. 42, per Binnie J.; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII), [2004] 3 S.C.R. 511, at para. 16, per McLachlin C.J.).

[174] In the *Provincial Judges Reference*, this Court relied, in part, on the unwritten constitutional principle of judicial independence to strike down legislative provisions in various provincial statutes. The issue was whether the principle of judicial independence restricts the manner and extent to which provincial legislatures can reduce the salaries of provincial court judges. While the principle of judicial independence

finds expression in s. 11(d) of the *Charter*, which guarantees the right of an accused to an independent tribunal, and ss. 96 to 100 of the *Constitution Act, 1867*, which govern superior courts in the province, the unwritten principle of judicial independence was used to fill a gap in the written text to cover provincial courts in circumstances not covered by the express provisions. Writing for the majority, Lamer C.J. held that

[j]udicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located. [para. 109]

[175] In *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721, this Court invoked the unwritten principle of the rule of law to create a novel constitutional remedy — the suspended declaration of constitutional invalidity. The Court developed this remedy notwithstanding that the text of s. 52(1) of the *Constitution Act, 1982* states that unconstitutional laws are “of no force or effect” suggesting, when interpreted technically and in isolation from underlying constitutional principles, that declarations of invalidity can only be given immediate effect. As Karakatsanis J. wrote for the majority in *Ontario (Attorney General) v. G*, 2020 SCC 38, although s. 52(1) “does not explicitly provide the authority to suspend a declaration, in adjudicating constitutional issues, courts ‘may have regard to unwritten postulates which form the very foundation of the Constitution of Canada’” (para. 120, quoting *Manitoba Language Rights*, at p. 752).

[176] Beyond the Reference context, in *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725, this Court used the rule of law principle to read down s. 47(2) of the *Young Offenders Act*, R.S.C. 1985, c. Y-1, which granted youth courts exclusive jurisdiction over contempt of court by a young person, so as not to oust the jurisdiction of superior courts. Writing for the majority, Lamer C.J. held that Parliament cannot remove the contempt power from a superior court without infringing “the principle of the rule of law recognized both in the preamble and in all our conventions of governance” (para. 41).

[177] And in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 (CanLII), [2014] 3 S.C.R. 31, this Court struck down a regulation imposing hearing fees that were found to deny people access to the courts based in part on the unwritten constitutional principle of the rule of law, and relatedly, access to justice.

[178] The majority’s emphasis on the “primordial significance” of constitutional text is utterly inconsistent with this Court’s repeated declarations that *unwritten* constitutional principles are the foundational organizing principles of our Constitution and have full legal force. Being unwritten means there is no text. They serve to give effect to the structure of our Constitution and “function as independent bases upon which to attack the validity of legislation . . . since they have the same legal status as the text” (R. Elliot, “References, Structural Argumentation and the Organizing Principles of Canada’s Constitution” (2001), 80 *Can. Bar Rev.* 67, at p. 95; see also H.-R. Zhou, “Legal Principles, Constitutional Principles, and Judicial Review” (2019), 67 *Am. J. Comp. L.* 889, at p. 924). By definition, an emphasis on the words of the Constitution demotes unwritten principles to a diluted role. “Full legal force” means full legal force, independent of the written text.

[179] Unwritten constitutional principles do not only “give meaning and effect to constitutional text” and inform “the language chosen to articulate the specific right or freedom”, they also assist in developing an evolutionary understanding of the rights and freedoms guaranteed in our Constitution, which this Court has long described as “a living tree capable of growth and expansion” (*Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, at p. 156, quoting *Edwards v. Attorney-General for Canada*, 1929 CanLII 438 (UK JCPC), [1930] A.C. 124 (P.C.), at p. 136). Unwritten constitutional principles are a key part of what makes the tree grow (*Secession Reference*, at para. 52; *Provincial Judges Reference*, at para. 106). This Court has never held that the interpretive role of unwritten constitutional principles is narrowly constrained by textualism.

[180] Unwritten constitutional principles are, additionally, substantive legal rules in their own right. As Lamer C.J. wrote in the *Provincial Judges Reference*:

[The preamble] recognizes and affirms the basic principles which are the very source of the substantive provisions of the *Constitution Act, 1867*. As I have said above, those provisions merely elaborate those organizing principles in the institutional apparatus they create or contemplate. As such, *the preamble is not only a key to construing the express provisions of the Constitution Act, 1867, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme*. It is the means by which the underlying logic of the Act can be given *the force of law*. [Emphasis added; para. 95.]

[181] Professor Mark D. Walters effectively explained why the role of unwritten constitutional principles has not been limited as the majority suggests:

The relationship between unwritten and written constitutional law in Canada may be conceived in different ways. At one point, Chief Justice Antonio Lamer observed that the role of unwritten principles is “to fill out gaps in the express terms of the constitutional scheme.” This statement might suggest that judges are just reading between the lines in order to make the text complete. Or, to use another metaphor, judges are constructing bridges over the waters that separate islands of constitutional text, creating a unified and useable surface.

But the gap-filling and bridge metaphors do not capture fully the theory of unwritten constitutionalism as it has developed in the Canadian cases. . . . We must alter the bridge metaphor accordingly: The textual islands are merely the exposed parts of a vast seabed visible beneath the surrounding waters, and the bridges constructed by judges between these islands are actually causeways moulded from natural materials brought to the surface from this single underlying foundation. The constitutional text is not just supplemented by unwritten principles; it rests upon them. [Emphasis added; footnote omitted.]

(“Written Constitutions and Unwritten Constitutionalism”, in G. Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (2008 (reprinted 2010)), 245, at pp. 264-65)

[182] It is also difficult to understand the need for the majority’s conclusion that using unwritten constitutional principles to strike down legislation would circumvent the legislative override power in s. 33 of the *Charter*. This question is not directly before us.

[183] Finally, I see no merit to the majority’s argument that courts cannot declare legislation invalid on the basis of unwritten constitutional principles because s. 52(1) of the *Constitution Act, 1982* only applies to written text. This argument extinguishes the entire jurisprudence establishing that unwritten principles have full legal force. Section 52(1) provides that “any law that is inconsistent with the *provisions* of the Constitution is . . . of no force or effect”. The majority’s reading of s. 52(1), like much of the rest of its analysis, is a highly technical exegetical exercise designed to overturn our binding authority establishing that

unwritten constitutional principles are a full constitutional partner with the text, including for the purposes of s. 52 (*New Brunswick Broadcasting Co.*, at pp. 375-78; *Manitoba Language Rights*, at p. 752; *Ontario (Attorney General) v. G*, at para. 120).

[184] It is true that in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 (CanLII), [2005] 2 S.C.R. 473, the Court questioned whether the rule of law could be used to invalidate legislation based on its content, but this was based on the specific contours of one unwritten principle, not unwritten principles in general. The Court did not constrain the reach of judicial independence, the other unwritten constitutional principle raised in that case. As Major J. explained in describing the limits of the content of the rule of law:

... it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content. That is because none of the principles that the rule of law embraces speak directly to the terms of legislation. The first principle requires that legislation be applied to all those, including government officials, to whom it, by its terms, applies. The second principle means that legislation must exist. And the third principle, which overlaps somewhat with the first and second, requires that state officials' actions be legally founded. See R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar Rev.* 67, at pp. 114-15. [para. 59]

Never, however, has this Court, until now, foreclosed the possibility of *all* unwritten constitutional principles ever invalidating legislation.

[185] The inevitable consequence of this Court's decades-long recognition that unwritten constitutional principles have "full legal force" and "constitute substantive limitations" on all branches of government is that, in an appropriate case, they may well continue to serve, as they have done in the past, as the basis for declaring legislation unconstitutional (*Secession Reference*, at para. 54; see also Elliot, at p. 95; (A.) J. Johnson, "The *Judges Reference* and the *Secession Reference* at Twenty: Reassessing the Supreme Court of Canada's Unfinished Unwritten Constitutional Principles Project" (2019), 56 *Alta. L. Rev.* 1077, at p. 1082; P. Bobbitt, *Constitutional Fate: Theory of the Constitution* (1982)). There is no need, as a result, to constrain the role of unwritten constitutional principles and newly declare that their full legal force does not include the ability, in appropriate circumstances, to declare legislation to be constitutionally invalid.

[186] I would allow the appeal and restore Belobaba J.'s declaration that the timing of the *Act* unjustifiably infringed s. 2(b) of the *Charter*.

Appeal dismissed, ABELLA, KARAKATSANIS, MARTIN and KASIRER JJ. dissenting.

Solicitor for the appellant: City of Toronto, Toronto.

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

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

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

Solicitor for the intervener the Toronto District School Board: Toronto District School Board, Toronto.

Solicitor for the intervener the Cityplace Residents' Association: Selwyn A. Pieters, Toronto.

Solicitors for the intervener the Canadian Constitution Foundation: McCarthy Tétrault, Toronto.

Solicitors for the intervener the International Commission of Jurists (Canada): Gowling WLG (Canada), Ottawa.

Solicitor for the intervener the Federation of Canadian Municipalities: Federation of Canadian Municipalities, Ottawa.

Solicitor for the intervener the Durham Community Legal Clinic: Durham Community Legal Clinic, Oshawa.

Solicitor for the intervener the Centre for Free Expression at Ryerson University: Borden Ladner Gervais, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Goldblatt Partners, Toronto.

Solicitors for the interveners Art Eggleton, Barbara Hall, David Miller and John Sewell: Goldblatt Partners, Toronto.

Solicitors for the intervener the David Asper Centre for Constitutional Rights: St. Lawrence Barristers, Toronto.

Solicitors for the intervener Progress Toronto: Paliare Roland Rosenberg Rothstein, Toronto.

Solicitors for the interveners the Métis Nation of Ontario and the Métis Nation of Alberta: Pape Salter Teillet, Toronto.

Solicitor for the intervener Fair Voting British Columbia: Nicolas M. Rouleau, Toronto.

[1] This Court's jurisprudence has involved, for example, restrictions on: **publication** (*Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326; *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835; *Thomson Newspapers Co. v. Canada (Attorney General)*, 1998 CanLII 829 (SCC), [1998] 1 S.C.R. 877; *R. v. Bryan*, 2007 SCC 12 (CanLII), [2007] 1 S.C.R. 527); **obscene content** (*R. v. Butler*, 1992 CanLII 124 (SCC), [1992] 1 S.C.R. 452; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 (CanLII), [2000] 2 S.C.R. 1120); **advertising** (*Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927; *Greater Vancouver Transportation*

Authority v. Canadian Federation of Students — British Columbia Component, 2009 SCC 31 (CanLII), [2009] 2 S.C.R. 295); **language** (*Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712; *Devine v. Quebec (Attorney General)*, 1988 CanLII 20 (SCC), [1988] 2 S.C.R. 790); **harmful content** (*R. v. Sharpe*, 2001 SCC 2 (CanLII), [2001] 1 S.C.R. 45; *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697); **manner or place of expression** (*Committee for the Commonwealth of Canada v. Canada*, 1991 CanLII 119 (SCC), [1991] 1 S.C.R. 139; *Ramsden v. Peterborough (City)*, 1993 CanLII 60 (SCC), [1993] 2 S.C.R. 1084; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 (CanLII), [2005] 3 S.C.R. 141); **who can participate in a statutory platform for expression** (*Haig v. Canada*, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995; *Native Women's Assn. of Canada v. Canada*, 1994 CanLII 27 (SCC), [1994] 3 S.C.R. 627; *Baier v. Alberta*, 2007 SCC 31 (CanLII), [2007] 2 S.C.R. 673); **voluntary expression** (such as mandatory letters of reference or public health warnings) (*Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038; *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 (CanLII), [2007] 2 S.C.R. 610); **expenditures on expression** (*Libman v. Quebec (Attorney General)*, 1997 CanLII 326 (SCC), [1997] 3 S.C.R. 569; *Harper v. Canada (Attorney General)*, 2004 SCC 33 (CanLII), [2004] 1 S.C.R. 827); or **access to information** (such as court proceedings or government documents) (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, 1996 CanLII 184 (SCC), [1996] 3 S.C.R. 480; *Vancouver Sun (Re)*, 2004 SCC 43 (CanLII), [2004] 2 S.C.R. 332; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), [2010] 1 S.C.R. 815). This case does not fall into any of these categories.

[2] *Haig v. Canada*, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995 (s. 2(b) challenge to exclusion of Quebec resident from federal referendum); *Native Women's Assn. of Canada v. Canada*, 1994 CanLII 27 (SCC), [1994] 3 S.C.R. 627 (s. 2(b) challenge to exclusion of Native Women's Association of Canada from federal funding to present on Charlottetown Accord); *Delisle v. Canada (Deputy Attorney General)*, 1999 CanLII 649 (SCC), [1999] 2 S.C.R. 989, overruled by *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 (CanLII), [2015] 1 S.C.R. 3 (s. 2(d) challenge to exclusion of RCMP members from labour relations legislation); *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 (CanLII), [2001] 3 S.C.R. 1016 (s. 2(d) challenge to exclusion of agricultural workers from labour relations legislation).

[3] The same legal standard has applied to claims with respect to: **freedom of association under s. 2(d)** (*Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 (right to collective bargaining); *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3 (right to good faith bargaining); *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 (CanLII), [2015] 1 S.C.R. 3 (right to statutory protections for collective bargaining)); the **right to life, liberty and security of the person under s. 7** (*Carter v. Canada (Attorney General)*, 2015 SCC 5 (CanLII), [2015] 1 S.C.R. 331 (physician-assisted dying); *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30 (abortion); *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 (CanLII), [2011] 3 S.C.R. 134 (safe injection facility)); and **equality under s. 15** (*Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624 (interpretation services for deaf hospital patients); *Vriend v. Alberta*, 1998 CanLII 816 (SCC), [1998] 1 S.C.R. 493 (legislative protection against discrimination on the basis of sexual orientation)), to name a few examples.

[4] See also other jurisdictions in which unwritten constitutional principles have been accorded full legal force in the sense of being employed to invalidate legislative or executive action: **United Kingdom** (*R. (on the application of Miller) v. Prime Minister*, [2019] UKSC 41, [2020] A.C. 373 (parliamentary sovereignty and accountability); *R. (on the application of Jackson) v. Attorney General*, [2005] UKHL 56, [2006] 1 A.C. 262, at para. 102, per Lord Steyn (judicial independence); *R. (Privacy International) v. Investigatory Powers Tribunal*, [2019] UKSC 22, [2020] A.C. 491, at paras. 100 and 144, per Lord Carnwath (judicial independence and rule of law); *AXA General Insurance Ltd. v. HM Advocate*, [2011] UKSC 46, [2012] 1 A.C. 868, at para. 51, per Lord Hope (judicial independence and rule of law)); **Australia** (*Brandy v. Human Rights and Equal Opportunity Commission* (1995), 183 C.L.R. 245 (H.C.) (judicial independence); *Kable v. Director of Public Prosecutions (NSW)* (1996), 189 C.L.R. 51 (H.C.) (federalism); *Re Residential Tenancies Tribunal (NSW)*; *Ex parte Defence Housing Authority* (1997), 190 C.L.R. 410 (H.C.) (federalism); *Lange v. Australian Broadcasting Corporation* (1997), 189 C.L.R. 520 (H.C.) (freedom of political communication); *Roach v. Electoral Commissioner*, [2007] HCA 43, 233 C.L.R. 162 (the right to vote)); **South Africa** (*South African Association of Personal Injury Lawyers v. Heath*, [2000] ZACC 22, 2001 (1) S.A. 883 (separation of powers); *Fedsure Life Assurance Ltd. v. Greater Johannesburg Transitional Metropolitan Council*, [1998] ZACC 17, 1999 (1) S.A. 374, at para. 58 (legality)); **Germany** (*Elfs Case*, BVerfG, 1 BvR 253/56, Decision of January 16, 1957 (rule of law and social welfare state)); and **India** (*Kesavananda v. State of Kerala*, A.I.R. 1973 S.C. 1461, at pp. 1899-1900 (secularism, democracy and individual freedom)).

Tab 105

Alfano et al v. Piersanti et al, 2014 ONSC 60 (CanLII)

Source: Superior Court of Justice
Date: 2014-01-03
File number: CV-11-9318-00CL
Citation: Alfano et al v. Piersanti et al, 2014 ONSC 60 (CanLII),
<<https://canlii.ca/t/g2hl3>>, retrieved on 2026-03-23

CITATION: Alfano et al v. Piersanti et al, 2014 ONSC 60
COURT FILE NO.: CV-11-9318-00CL
DATE: 20140103

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Bertina Alfano, Trustee of the Carmen Alfano Family Trust, Bertina Alfano, Italo Alfano, trustee of the Italo Alfano Family Trust, Italo Alfano, Ulti Alfano Trustee of the Ulti Alfano Family Trust and Ulti Alfano ,

Plaintiffs

AND:

Terry Piersanti also known as Terry Scatcherd, Christian Piersanti, Piersanti and Co. Barristers and Solicitors, Piersanti and Co. Professional Corporation, 1269906 Ontario Limited, 1281111 Ontario Limited, 1281038 Ontario Limited, 1314112 Ontario Limited, 1281633 Ontario Limited, 1281632 Ontario Limited, 1466556 Ontario Limited, 3957331 Canada Inc., 3964400 Canada Inc., 3968626 Canada Inc., 4002598 Canada Inc., 4011902 Canada Inc., 6051685 Canada Inc., 6060439 Canada Inc., 6260365 Canada Inc., 6292470 Canada Inc., 6306560 Canada Inc., 6324223 Canada Inc., 6792715 Canada Inc., Yonge Centre Properties Inc., 6335144 Canada Inc., TMJ Investments, Tara Piersanti also known as Tara Piersanti-Blake, Justin Piersanti and Morgan Piersanti,

Defendants

BEFORE: Newbould J.

COUNSEL: *V. Ross Morrison and R. Samantha Chapman*, for the Piersantis/moving parties

Kevin D. Sherkin, for the plaintiffs/responding parties

HEARD: December 23, 2013

ENDORSEMENT

[1] The Piersantis move to quash the attempt of the plaintiffs to bring on for hearing a motion made to the trial judge, Justice Ellen Macdonald, in June 2009 towards the end of the trial. Part of the relief sought by the plaintiffs at that time was dismissed. Later, the trial judge released her reasons for judgment in the action in which she held for the plaintiffs in a number of respects. An appeal by the defendants to the Court of Appeal was partially successful. Leave to appeal to the Supreme Court of Canada was denied.

[2] In their motion to the trial judge, the plaintiffs asked for an order that a number of documents be produced, and an order that a number of the defendants pay \$4.8 million into court pending the release of the trial reasons for judgment on the basis that those defendants had paid that amount to various parties out of the ordinary course of business and therefore contrary to a Mareva injunction granted by Malloy J. in 2002 several years before the trial. That injunction had enjoined the defendants from dissipating their assets or dealing with their assets other than in the ordinary course of business. The plaintiffs also asked for a declaratory order that those defendants had breached the Mareva injunction.

[3] In her reasons for decision released on June 22, 2009, the trial judge declined the request to order that the \$4.8 million be paid into court, holding that the plaintiffs were protected by the Mareva injunction registered on title to three plaza properties. She did not make any decision on the request for a declaration that the defendants had breached the Mareva injunction and said she would make findings on this matter in her reasons for judgment. More particularly, she said:

[8]... With respect to the payment into court of the \$4,800,000, I decline to grant such relief. I do so even in the face of the very broad discretion that I have under Rule 60.02...

[9] The attitude of the Defendants towards their obligation to make full and timely production of all relevant documents was appalling, if not defiant. Collectively or individually, they held back many documents from the very early stages of these proceedings. They picked or chose the documents that they would produce. For example, there has been almost no production of the documents listed in paras. 1, 2, 3, and 4 of the notice of motion. Mr. Diamond conceded that it is too late to order this production. Except for closing submissions, scheduled to begin tomorrow, this case is closed. The Defendants justified their actions with respect to the three plazas to which the Alfanos claim an interest on a very fluid concept of

what is in the ordinary course of business. It will be for me to make findings on this matter and on the credibility of the parties and their witnesses when I am considering the totality of the evidence when writing my reasons for judgment. It must be kept in mind that I ordered the re-registration of the Mareva on title to the three plaza properties very recently. Bearing in mind that I have carefully listened to the Piersanti and Gold defendants, there are matters that I cannot decide until I hear and consider closing submissions. The plaintiffs are sufficiently protected with the existence of the Mareva injunction on title to the three plaza properties. The request for payment into court of the \$4,800,000 or such lesser sum as I might arbitrarily fix is therefore dismissed. Costs of this motion are reserved to be dealt with at the time of the ultimate disposition of costs in this action.

[4] In her reasons for judgment dated September 3, 2010 the trial judge appeared to make a finding, or come close to making a finding, that the Mareva injunction had been breached, and she ordered that 1281632 Ontario Limited, a Piersanti company, pay \$2.5 million into court. She stated:

103 The evidence is that they have conducted the operation of 1281632 Ontario Limited (the mall properties) without regard to the injunction. Ms. Piersanti was cross-examined extensively on payments made that appear to contravene the terms of the injunction. Ms. Piersanti justified these payments on the basis that it was necessary to do so because they were in the ordinary course of business. Her interpretation of what was in the ordinary course of business was a very fluid one. Mr. Diamond prepared a chart revealing a total of \$2,465,436.46 in payments that he submitted were not in the ordinary course of business.

104 There was brief reply evidence on June 5, 2009, followed by the renewal of a motion by the Plaintiffs to compel the Gold Defendants to pay into court \$2,465,436.43. The Plaintiffs alleged that these monies were used by Mr. and Ms. Piersanti in contravention of the injunction imposed by Molloy J. in September 2002. I declined to order the payment into court stating that I would deal with these issues in these reasons. The following is the chart prepared by Mr. Diamond setting out the details of payments made from the proceeds of mortgages on the Mall properties.

...

TOTAL \$2,465,436.46

105 I have concluded that \$2,500,000 shall be paid into court to the credit of the Plaintiffs within 30 days of the release of these reasons. This will not cause any hardship to the Piersanti Defendants and will be some security for the Plaintiffs who will most likely encounter great difficulty in enforcing any judgment granted by this court in respect of their damages for losses in Osler.

[5] In the Court of Appeal, this part of the judgment was set aside. It was held that the trial judge had made no finding of a breach of the Mareva injunction but that that issue had not finally been disposed of. O'Connor A.C.J.O stated:

[165] The appellants argue that the trial judge erred in ordering 128 (a Piersanti related company) to pay \$2.5 million into court.

[166] The respondents sought the payment into court on the basis that Ms. Piersanti had caused 128 to pay out approximately \$2.5 million in breach of the Mareva injunction granted on June 18, 2002.

[167] I would set aside this order.

...

[171] In para. 105, the trial judge did not link the award to the breach of the Mareva injunction. Notably, she did not make any finding of contempt, nor give any indication that the \$2.5 million award was being ordered for punitive or denunciatory purposes. On the contrary, she appears to have considered the payment of \$2.5 million as a down payment against her damage award.

[172] 128, the party ordered to pay the \$2.5 million, was not a defendant in the claim for fraud related to the Osler bankruptcy that gave rise to the judgment against Mr. Piersanti. The trial judge did not make any findings that would render 128 liable to pay the damage award for the fraud claim.

[173] In the result, I would set aside this order. To be clear, I do not conclude that there was no basis for a finding that the Piersantis breached the Mareva injunction. Rather, I am not satisfied that the trial judge, in her reasons, made that finding. That being the case, the trial judge's reasons and these reasons should not be read as finally disposing of that issue. (underlining added).

[6] Mr. Morrison for the Piersantis contends that by deciding in her reasons on the motion dated June 22, 2009 to refuse to order \$4.8 million be paid into court, the trial judge effectively dismissed the application for a declaration that the Mareva injunction had been breached. I do not read her decision that way. I read her decision to have put off any decision on the request for declaratory relief until her reasons for judgment would be prepared and released. To repeat, in her reasons on the motion she stated:

The Defendants justified their actions with respect to the three plazas to which the Alfanos claim an interest on a very fluid concept of what is in the ordinary course of business. It will be for me to make findings on this matter and on the credibility of the parties and their witnesses when I am considering the totality of the evidence when writing my reasons for judgment.

[7] The trial judge confirmed in paragraph 104 of her reasons for judgment of September 3, 2010 that in her reasons on the motion, she had put off the issue so it could be dealt with in her reasons for judgment.

[8] While it appeared in her reasons for judgment in paragraph 103 that the trial judge found that there had been a breach of the Mareva injunction, the Court of Appeal though otherwise, as set out in paragraph 173 of its reasons. The plaintiffs point to the underlined passages of that paragraph to assert that it cannot be said that the trial judge found there to have been no breach of

the Mareva injunction. Rather, the plaintiffs say, it is clear from that passage of the Court of Appeal's reasons that the issue has been left open.

[9] I agree with the plaintiffs. The decision of the Court of Appeal, binding on the parties and on me, means that the issue of whether there was a breach of the Mareva injunction was not finally disposed of and it cannot be said that there was no basis for a conclusion that the Piersantis breached the injunction.

[10] However, it is necessary to consider what happened after the decision of the Court of Appeal.

[11] On January 3, 2013, counsel for the plaintiffs provided written submission to Macdonald J. asking her to dispose of their motion that there had been a breach of the Mareva injunction and asked that it be dealt with at an appointment on February 8, 2013 that had been scheduled to deal with other issues. It was contended that rule 59.06 (1) provided her with the necessary jurisdiction. That rule provides that an order that requires amendment in any particular on which the Court did not adjudicate may be amended on a motion in the proceeding. Reliance was placed on the decision of the Court of Appeal that said the issue was still open.

[12] Counsel for the Piersantis filed written submissions opposing the request, essentially arguing that Macdonald J. had decided the issue in her reasons on the motion of June 22, 2009 in declining to order payment into court and therefore there was no issue that had not been adjudicated upon. This submission appears to have disregarded paragraph 173 of the reasons of the Court of Appeal.

[13] Due to health issues, the trial judge adjourned the appointment on several occasions. The appointment eventually took place on April 26, 2013. Oral submissions were made on the request of the plaintiffs that day to decide whether there had been a breach of the Mareva injunction. Near the end of that appointment, counsel for the Mrs. Piersanti provided a draft order to the trial judge that there be an inquiry into damages sustained by the Gold Defendants (some of the defendants, including Mrs. Piersanti) as a result of the Mareva injunction. This was caused by the action being dismissed against the Gold Defendants in the Court of Appeal. Macdonald J. signed the order that day.

[14] On June 13, 2013, the parties received an e-mail from Theresa Finelli, the administrative assistant to Macdonald J. The e-mail was as follows:

After hearing submissions on April 26, 2013, I have concluded that I am not prepared to amend my judgment.

Madam Justice Ellen Macdonald

[15] On the same day, June 13, 2013, Mr. Sherkin for the plaintiffs sent an e-mail back to Theresa Finelli and stated:

[16] Your Honour

With great respect, our clients did not ask that you amend your judgment. Our clients asked for a disposition on their motion which pursuant to your Endorsement on the motion was to form part of the Trial Endorsement. The Court of Appeal left that issue open for determination by stating that neither your Trial Endorsement nor the Court of Appeal's decision foreclosed that open motion and it was not disposed of.

We would graciously appreciate knowing the following:

1. Is your email to be codified in an Endorsement?
2. Will there be further reasons?
3. If not your Honour, is your email directing our clients to seek a disposition of that motion from another judge?

Thank you for your continued assistance and clarification in that regard.

[17] On the following day, June 14, 2013, Mr. Diamond on behalf of the plaintiffs emailed Mr. Morrison and other defence counsel and stated that depending on the response of Macdonald J. to Mr. Sherkin's email of the previous day, in the event that the email from Macdonald J. is the "Endorsement", he wished to place Mr. Morrison on the earliest possible notice that it was his clients' intention to appeal the ruling.

[18] On June 17, 2013 Mr. Diamond sent a further email to Mr. Morrison and other defence counsel and asked them if they required the plaintiffs to serve a formal notice of appeal from the email of Macdonald J. He said he was not sure how to proceed without an actual endorsement and was hopeful that Macdonald J. would provide a further response. He asked for a response a.s.a.p. if they needed a formal notice of appeal. No substantive response was received to this email.

[19] A further attendance before Macdonald J. was scheduled to deal with outstanding costs of the proceedings. Unfortunately, that attendance was also cancelled, again due to her health issues.

[20] On August 27, 2013, Mr. Sherkin wrote to Macdonald J. and asked that an appointment be scheduled to deal with his email to her of June 13, 2013. No response was received. Unbeknownst to the parties, on August 30, 2013 Justice Macdonald retired from the bench for health reasons. On October 10, 2013, and not knowing of her retirement, Mr. Sherkin emailed Ms. Finelli and asked Justice Macdonald to deal with the issues raised in his email of June 13, 2013.

[21] Mr. Morrison takes the position that by her email of June 13, 2013, Macdonald J. disposed of the request by the plaintiffs to have her rule on whether there had been a breach of the Mareva injunction. He says the only route open to the plaintiffs was to appeal that decision to the Court of Appeal, which did not occur. Mr. Sherkin says that the email was not an endorsement.

[22] This is an unfortunate situation. Madam Justice Macdonald was not well in the spring of 2013 and eventually retired from the court at the end of August. What is most concerning is that no reasons whatsoever were given by her for the statement that she was not prepared to amend her judgment. Requests of her for clarification of the e-mail went unanswered. If the e-mail could be considered to be a final decision dismissing the motion, it would not be possible for an appellate court to make any meaningful review of it in accordance with the principles of *R. v. Sheppard*, 2002 SCC 26 (CanLII), [2002] 1 S.C.R. 869 and the matter would have to be sent back for a rehearing.

[23] I disagree with the plaintiffs that they did not request the judgment to be amended. They justified their renewal of the motion on the basis that the judgment could be amended to deal with something not dealt with by the judge. To this extend the e-mail dealt with their request.

[24] The e-mail was not an order. Nor was it an endorsement as required by rule 59.02(1). That rule requires it to be “made” by a judge on the motion record. No such endorsement was made by Macdonald J. I would not treat the endorsement as a valid endorsement. Thus there has been no final decision on the motion.

[25] It seems to me that even if it could be said that the e-mail passed procedural muster, no order has been taken out and Macdonald J. was not *functus*. As I am the judge directed to hear the remaining issues in the action, it follows that I am not *functus*. This is not a rule 59.06(1) situation in which an order taken out is sought to be amended because of some accidental slip or omission or requires amendment in any particular on which the court did not adjudicate. There has been no order.

[26] There is authority, mainly in cases involving attempts to re-open matters because of alleged new evidence, that a court has a wide discretion to re-open a matter where the integrity of the process is at risk or a principle of justice is at stake that requires the reconsideration of the matter, and while a court should re-open a motion or other matter sparingly and with the greatest of care, it may re-open it when it is just to do so in exceptional circumstances. See *Strugarova v. Kissiov* (2009), 2009 CanLII 40552 (ON SC), 82 C.P.C. (6th) 298 at para. 7 per Roberts J. See also *Degroote v. Canadian Imperial Bank of Commerce*, [1998] O.J. No. 1696 at para. 6, per Lax J.; aff’d 1999 CanLII 4115 (ON CA), [1999] O.J. No. 2313 (C.A.).

[27] In these circumstances, even if the endorsement could be said to be a real or proper endorsement, which in my view it was not, the circumstances here, in which no reasons were provided by Macdonald J. who before her retirement failed to respond to requests for clarification of the e-mail, are exceptional and the integrity of the process is at stake. Moreover, any appeal would inevitably result in the matter being sent back to me for decision on the basis of *R. v. Sheppard*. I would exercise my discretion and re-hear the matter.

[28] In the circumstances, I am of the view that the matter of whether the Mareva injunction was breached is an open question and that I have jurisdiction to deal with the matter. Counsel may arrange a 9:30 a.m. appointment to discuss scheduling of the motion.

[29] The motion of the Piersantis is dismissed. The plaintiffs are entitled to their costs. If costs are not agreed, the plaintiffs may make brief written submissions no longer than three pages in length along with a proper cost outline within 10 days and the Piersantis may make brief written reply submissions no longer than three pages in length within a further 10 days.

Newbould J.

Date: January 3, 2014

Tab 106

König v. Hobza, 2015 ONCA 885 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2015-12-15
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König v. Hobza et al. **[Indexed as: König v. Hobza]**

Ontario Reports

Court of Appeal for Ontario,
Cronk, G.J. Epstein and Huscroft JJ.A.
December 15, 2015

129 O.R. (3d) 57 | 2015 ONCA 885

Case Summary

Civil procedure — Costs — Offer to settle — "No near miss" policy applying to mandatory timing requirement under [rule 49.03](#) of [Rules of Civil Procedure](#) — Trial judge erring in treating offer to settle which was served within seven days of commencement of trial as valid Rule 49 offer — Trial judge nevertheless entitled to take offer into account pursuant to [rule 49.13](#) — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 49.03, [49.13](#).

The ultimately unsuccessful defendants in an oppression action served an offer to settle nine calendar days before the trial. Having regard to the way in which [rule 3.01](#) of the [Rules of Civil Procedure](#) mandates the calculation of time, the offer was technically served fewer than seven days before trial. Despite that fact, the trial judge treated the offer as a valid Rule 49 offer which attracted the costs consequences of [rule 49.10](#). He awarded the plaintiff his costs on a substantial indemnity scale up to the date of the offer and the defendants their costs on a partial indemnity scale afterwards. The plaintiff appealed.

Held, the appeal should be dismissed.

The "no near miss" policy applies to the timing requirement under s. 49.03 of the Rules as well as to the amount of the judgment. The trial judge erred in treating the offer as a valid Rule 49 offer. However, the trial judge was entitled to take the offer into account pursuant to rule 49.13 despite the fact that it did not attract rule 49.10 consequences. While the trial judge did not specifically refer to rule 49.13, he employed a holistic approach and took all the applicable relevant factors, including the offer, into account. The award fell squarely within the trial judge's discretionary authority to fashion a costs award that was appropriate and proportionate in all the circumstances. [page58]

Elbakhiet v. Palmer (2014), 121 O.R. (3d) 616, [2014] O.J. No. 3302, [2014 ONCA 544](#), 323 O.A.C. 300, 242 A.C.W.S. (3d) 39 [Leave to appeal to S.C.C. refused [2014] S.C.C.A. No. 427], **apld**

Other cases referred to

Hamilton v. Open Window Bakery Ltd., [2004] 1 S.C.R. 303, [2003] S.C.J. No. 72, [2004 SCC 9](#), 235 D.L.R. (4th) 193, 316 N.R. 265, J.E. 2004-470, 184 O.A.C. 209, 40 B.L.R. (3d) 1, [2004] CLLC Â210-025, 128 A.C.W.S. (3d) 1111; *Igbokwe v. HB Group Insurance Management Ltd.* (2001), [2001 CanLII 3804 \(ON CA\)](#), 55 O.R. (3d) 313, [2001] O.J. No. 3018, 204 D.L.R. (4th) 434, 148 O.A.C. 222, 33 C.C.L.I. (3d) 183, [2002] I.L.R. I-4045, 20 M.V.R. (4th) 50, 107 A.C.W.S. (3d) 217 (C.A.) [Leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 470, 166 O.A.C. 200]; *König v. Hobza*, [2013] O.J. No. 2121, [2013 ONSC 1060](#), 31 B.L.R. (5th) 248, 228 A.C.W.S. (3d) 701 (S.C.J.); *König v. Hobza*, [2014] O.J. No. 4791, [2014 ONCA 691](#), 326 O.A.C. 213, 245 A.C.W.S. (3d) 838, varg [2013] O.J. No. 5279, [2013 ONSC 5531](#), 31 B.L.R. (5th) 301, 235 A.C.W.S. (3d) 53 (S.C.J.); *Matthew Brady Self Storage Corp. v. InStorage Limited Partnership* (2014), 125 O.R. (3d) 121, [2014] O.J. No. 5783, [2014 ONCA 858](#), 379 D.L.R. (4th) 368, 49 R.P.R. (5th) 1, 36 B.L.R. (5th) 41, 247 A.C.W.S. (3d) 715; *Wilson v. Cranley*, [2014] O.J. No. 5680, [2014 ONCA 844](#), 325 O.A.C. 396, 42 C.C.L.I. (5th) 173, 70 C.P.C. (7th) 21, 247 A.C.W.S. (3d) 283

Statutes referred to

[Courts of Justice Act](#), R.S.O. 1990, c. C.43, s. 133(b)

Rules and regulations referred to

[Rules of Civil Procedure](#), R.R.O. 1990, Reg. 194, rules 3.01, 49, 49.03, 49.10, 49.13, 57.01(1)

APPEAL from the costs order of Pattillo J., [2015] O.J. No. 250, [2015 ONSC 411](#) (S.C.J.).

Ronald Flom and Robert W. Trifts, for appellant.

Sarit E. Batner and Vladimira Ivanov, for respondents.

The judgment of the court was delivered by
G.J. EPSTEIN J.A.: —

A. Overview

[1] At the core of this appeal is a judge's discretion to award costs under [rule 49.13](#) of the [Rules of Civil Procedure](#), R.R.O. 1990, Reg. 194. However, this decision also clarifies that an offer to settle must strictly comply with the seven-day timing requirement set out in rule. 49.03 before the mandatory cost consequences of rule 49.10 apply.

[2] The appellant was successful in an oppression action against the respondents: *König v. Hobza*, [2013] O.J. No. 2121, [2013 ONSC 1060](#), 31 B.L.R. (5th) 248 (S.C.J.).

[3] The trial judge awarded the appellant his costs on a substantial indemnity basis. He considered an offer by the [page59] respondents served four days before the commencement of trial to be a valid Rule 49 offer (the "offer"), but held that rule 49.10 was not engaged because the trial judgment was more favourable than the offer: *König v. Hobza*, [2013] O.J. No. 5279, [2013 ONSC 5531](#), 31 B.L.R. (5th) 301 (S.C.J.), at paras. 21-23.

[4] The respondents appealed. This court upheld the finding of oppression but reduced the damages award and remitted the matter back to the trial judge to consider the costs award in the light of the reduction in damages: *König v. Hobza*, [2014] O.J. No. 4791, [2014 ONCA 691](#), 326 O.A.C. 213.

[5] In reconsidering costs, the trial judge found that the offer was more favourable than the revised judgment. Against that background, he awarded the appellant his costs up to the date of the offer on a substantial indemnity scale, and the respondents their costs thereafter, on a partial indemnity scale.

[6] The appellant sought leave to appeal this second discretionary costs award pursuant to s. 133(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. This court granted leave by order dated April 21, 2015.

[7] The appellant's main submission on appeal is that the trial judge erred in treating the offer as a valid Rule 49 offer given that it did not meet the rule 49.03 seven-day timing requirement. He requests that the previous costs decision be reinstated.

[8] For the following reasons, I would dismiss the appeal.

B. Applicable Rules

[9] The relevant portions of Rule 49 of the Rules are as follows:

49.03 An offer to settle may be made at any time, but where the offer to settle is made less than seven days before the hearing commences, the costs consequences referred to in rule 49.10 do not apply.

.....

49.10(2) Where an offer to settle,

- (a) is made by a defendant at least seven days before the commencement of the hearing;
- (b) is not withdrawn and does not expire before the commencement of the hearing; and
- (c) is not accepted by the plaintiff,

and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise.

49.10(3) The burden of proving that the judgment is as favourable as the terms of the offer to settle, or more or less favourable, as the case may be, is on the party who claims the benefit of subrule (1) or (2). [page60]

.....

49.13 Despite rules 49.03, 49.10 and 49.11, the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer.

C. Background Facts

[10] The appellant was a silent investor in the respondent company 1669051 Nova Scotia Limited, formerly East West Plastics & Electric Products Limited. He was the only shareholder not involved in its management.

[11] He brought an action against the respondents, as officers and directors of East West, alleging that they had awarded themselves excessive compensation over a period of 22 years -- conduct that the appellant maintained called for a damages award under the oppression remedy.

D. Procedural History

(a) The trial judge's decision

[12] The trial judge found that the respondents' oppressive conduct justified a damages award in the amount of \$250,000, plus prejudgment interest of \$49,793.83.

(b) The first costs decision

[13] The trial judge concluded, at para. 38, that the respondents' actions justified awarding substantial indemnity costs in the amount of \$413,000, inclusive of disbursements and taxes.

[14] Before trial, the parties had exchanged several offers and counter-offers. Nine calendar days before trial, the respondents served the offer. It provided for a payment to the appellant of \$300,000, inclusive of interest, plus partial indemnity costs and disbursements to be agreed upon or assessed. The appellant rejected the offer.

[15] The parties disputed whether the offer was a valid Rule 49 offer given that it was not served within seven days prior to the commencement of trial having regard to the way in which rule 3.01 mandates how time is calculated.

[16] In addressing this issue, the trial judge reasoned that the purpose of the seven-day requirement under rule 49.03 was to ensure that the party receiving the offer had sufficient time to properly consider it. The trial judge held that the appellant had enough time to do this in the light of the earlier offers and the nine calendar days between service of the offer and the commencement of trial. The trial judge therefore held that the offer was a valid Rule 49 offer. [page61]

[17] However, the mandatory cost consequences of rule 49.10 were not engaged because, after factoring in the substantial indemnity costs, to which the appellant was entitled, the judgment was more favourable than the offer.

(c) The Court of Appeal's decision

[18] On appeal, this court upheld the trial judge's finding of oppression but held that the trial judge erred in not considering the respondents' under-compensation during East West's early years. This court therefore reduced the damages to \$187,453.51, plus prejudgment interest of \$37,336.12.

[19] This court found no reason to interfere with the trial judge's finding that the respondents' conduct called for a costs award on a substantial indemnity basis but sent the matter back to the trial judge to reconsider the quantum of costs and the consequences of rule 49.10, in the light of the reduced damages award.

(d) The second costs decision

[20] In revisiting the issue of costs, the appellant argued that the trial judge erred in treating the offer as a valid Rule 49 offer as it did not comply with the rule 49.03 seven-day service requirement. He relied on *Elbakhiet v. Palmer* (2014), 121 O.R. (3d) 616, [2014] O.J. No. 3302, [2014 ONCA 544](#), leave to appeal to S.C.C. refused [2014] S.C.C.A. No. 427, a decision of this court released after the first costs decision.

[21] In *Elbakhiet*, Rosenberg J.A. considered whether the offer at issue in that case was more favourable than the judgment. At para. 31, he articulated what is known as the no "near miss" policy: "A party that comes close to meeting the judgment is not thereby entitled to an award of costs as if they did provide a successful offer."

[22] The trial judge rejected the appellant's argument that the no "near miss" policy established in *Elbakhiet* should be found to apply not only to quantum but also to timing. At para. 8, he concluded that the policy concerned only the former.

[23] He went on to find that because, under the revised judgment, the appellant was entitled to an award of damages and interest that was \$9,235.32 less than the offer, the cost consequences of rule 49.10 applied.

[24] Having regard to his finding that the respondents' conduct justified substantial indemnity costs, the trial judge relied on the overriding discretion afforded in rule 49.10 to award substantial indemnity costs to the appellant to the date of the offer in the amount of \$270,925.15. He concluded that the [page62] respondents were entitled to partial indemnity costs thereafter, in the amount of \$127,616.56, both amounts inclusive of disbursements and taxes.

[25] The appellant appeals this order.

Issues

[26] The issues raised are the following:

- (1) whether the trial judge was permitted to give effect to an offer to settle under rule 49.10 even if it was served fewer than seven days before trial; and
- (2) if not, whether the trial judge was nonetheless entitled to exercise his discretion to fix costs the way he did in this case.

Analysis

1. *Was the trial judge permitted to give effect to an offer to settle under rule 49.10 even if it was served fewer than seven days before trial?*

[27] The respondents' position is that the trial judge was within his discretion to decide that the offer was a valid rule 49.10 settlement offer. Effectively, interpreting the rule in a purposive fashion was in keeping with this court's decisions in *Igbokwe v. HB Group Insurance Management Ltd.* (2001), [2001 CanLII 3804 \(ON CA\)](#), 55 O.R. (3d) 313, [2001] O.J. No. 3018 (C.A.), leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 470, 166 O.A.C. 200 and *Matthew Brady Self Storage Corp. v. InStorage Limited Partnership* (2014), 125 O.R. (3d) 121, [2014] O.J. No. 5783, [2014 ONCA 858](#), cases in which this court held that technical deficiencies should not invalidate settlement offers.

[28] For the following reasons, I do not agree.

[29] First, the requirement that, in order to attract the mandatory cost consequences of rule 49.10, an offer to settle must be served at least seven days before the commencement of the hearing, is contained within Rule 49 itself. The wording of the provision makes clear that the timing requirement is just that -- a requirement. It is mandatory.

[30] Second, although Rosenberg J.A.'s comment about there being no "near misses" in *Elbakhiet* referred to quantum, in my view, the decision supports the conclusion that the no "near miss" policy should also apply to timing. His detailed examination of the timing requirement under rule 49.03, including a review of a number of appellate decisions, indicates that he viewed the two requirements for a valid Rule 49 offer as being equally important. [page63]

[31] Rosenberg J.A. noted, at para. 20, that the "consensus [that a trial commences on the first day of evidence] has provided certainty to parties making Rule 49 offers, and such certainty furthers the purposes of Rule 49". It goes without saying that certainty as to whether an offer

meets the seven-day timing requirement also furthers the purposes of Rule 49 by affording parties two important pieces of information.

[32] The first is whether the time has passed during which to expect an offer to settle that will attract the mandatory cost consequences under rule 49.10. The second is whether an offer will be treated as a valid Rule 49 offer. Both are necessary for a party to be fully equipped to assess the risk of proceeding to trial.

[33] I conclude that the no "near miss" policy applies to meeting the timing requirement under rule 49.03 as well as to the amount of the judgment. It follows that, in my view, the trial judge erred in treating the offer as a valid Rule 49 offer.

2. If the offer was not a valid Rule 49 offer, was the trial judge nonetheless entitled to exercise his discretion to fix costs the way he did in this case?

[34] Given my conclusion that the offer was not a valid Rule 49 offer, on a plain reading of Rule 49, the mandatory cost implications found in rule 49.10 are not applicable. This takes me to the trial judge's residual discretion to make an appropriate costs determination under rule 49.13.

[35] Rule 49.13 calls for a holistic approach to the determination of costs having regard to factors including any offers to settle -- regardless of whether they meet the requirements of Rule 49 -- where appropriate to do justice between the parties. Rosenberg J.A. addressed the role of rule 49.13 in *Elbakhiet*, at para. 33:

As this court pointed out in *Lawson v. Viersen* (2012), 108 O.R. (3d) 771, [2012] O.J. No. 109, [2012 ONCA 25](#), at para. 46, rule 49.13 is not concerned with technical compliance with the requirements of rule 49.10. Rather, it "calls on the judge to take a more holistic approach." The appellants complied with the spirit of Rule 49 even if they failed for technical reasons to provide an offer that exceeded the Judgment. As held in *Lawson*, at para. 49, this was the type of offer that ought to have been given "considerable weight in arriving at a costs award."

[36] This approach was endorsed by Gillese J.A. in *Wilson v. Cranley*, [2014] O.J. No. 5680, [2014 ONCA 844](#), 325 O.A.C. 396, at para. 26, where she said "even where an offer does not attract rule 49.10 consequences, pursuant to rule 49.13 the court should consider such offers when exercising its discretion with respect to costs". [page64]

[37] Here, although I have concluded that the trial judge should not have treated the offer as a valid rule 49.10 offer, he was entitled to take it into account pursuant to rule 49.13, and pursuant to rule 57.01(1), which sets out the general principles a court considers when exercising its discretion to award costs.

[38] I appreciate that the trial judge did not specifically refer to rule 49.13 in his reasons but I do not see this as a basis to interfere with his exercise of discretion in awarding costs. In *Cranley*, at para. 28, this court held that a trial judge can employ his or her discretion under rule 49.13 without explicitly referring to it.

[39] The question is whether the trial judge took the required holistic approach in awarding costs as he did in the second costs endorsement. In my view, he did.

[40] The only difference between the trial judge's first and second costs endorsements is this court's intervening judgment. The judgment reduced the damages award but did not alter the circumstances surrounding the offer. Significantly, as previously noted, this court expressly supported the trial judge's conclusion that the respondents' conduct called for costs on a substantial indemnity scale.

[41] In determining whether the trial judge employed a holistic approach to rule 49.13, it is therefore appropriate to consider the second costs endorsement in the light of its precursor.

[42] As previously mentioned, this court upheld the key factor considered by the trial judge, namely, the appropriateness of substantial indemnity costs. In his second costs endorsement, the

trial judge considered this fact in addition to the fact that the offer was more favourable than the judgment received by the appellant. In his first costs endorsement, at para. 21, the trial judge found that the offer complied with the spirit of Rule 49 since "[the appellant] had more than enough time to properly consider the offer before the trial started".

[43] After considering the trial judge's approach to costs in both of his costs endorsements, I am satisfied that in arriving at the award he did, the trial judge took into account the applicable relevant factors, including the offer. He employed a holistic approach.

[44] Finally, I note that the Supreme Court of Canada has made it clear that a costs award should be set aside on appeal only if the trial judge erred in principle or if the award was plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303, [2003] S.C.J. No. 72, 2004 SCC 9, at para. 27.

[45] Although, in the context of the history of this matter and the ultimate outcome, the trial judge's revised costs decision may appear unfair to the appellant, I find no error in principle. [page65]And I do not view the award as plainly wrong. The award fell squarely within the trial judge's discretionary authority to fashion a costs award that was appropriate and proportionate in all the circumstances. This was his call to make.

E. Disposition

[46] For these reasons, I would dismiss the appeal. The respondents are entitled to their costs of the appeal, fixed at \$6,500, inclusive of disbursements and applicable taxes.

Appeal dismissed.

Tab 107

Smith Bus Lines Ltd. v. Bank of Montreal, 1987 CanLII 4190 (ON SC)

Source:	Superior Court of Justice
Date:	1987-12-30
Other citations:	61 OR (2d) 688 — 25 CPC (2d) 255 — [1987] CarswellOnt 566 — [1987] OJ No 1197 (QL)
Citation:	Smith Bus Lines Ltd. v. Bank of Montreal, 1987 CanLII 4190 (ON SC), < https://canlii.ca/t/g1czc >, retrieved on 2026-03-23

Smith Bus Lines Ltd. v. Bank of Montreal

**61 O.R. (2d) 688
[1987] O.J. No. 1197**

**Ontario High Court of Justice
Sutherland J.
December 30, 1987.**

[QL Ed. note: In the paper version, the oral decision of Rosenberg J. in this matter, rendered July 30, 1987, was incorporated within the judgment of Sutherland J., beginning at [1987 CanLII 4189 \(ON SC\)](#), 61 O.R. (2d) 690. The two decisions have been separated in the online version to enable linking to citators. The following headnote was published on the combined case and applies to both decisions.]

Civil procedure -- Costs -- Security -- Insufficient assets in province -- Burden on plaintiff to show undisclosed assets or impecuniosity -- Showing of impecuniosity requiring examination of merits -
- Merits not determined from pleadings alone -- Where evidence of impecuniosity insufficient no need to examine merits -- Rule 56.01(d).

Courts -- Jurisdiction -- Provincial superior court -- High Court judge sitting in weekly court lacking jurisdiction to set aside order of other High Court judges.

The plaintiff appealed an order for security for costs and the appeal was allowed on the grounds of plaintiff's impecuniosity. The judge hearing the appeal, having learned before the order was taken out that, from the point of view of one of the parties, the argument had not been completed when

he adjourned, quashed his decision and referred the matter for rehearing. The judge rehearing the matter dismissed the appeal. In his reasons he held: (1) security for costs are awarded where the plaintiff has insufficient assets within the province to pay the costs; (2) the burden then shifts to the plaintiff to show either undisclosed assets or impecuniosity; (3) since impecuniosity would halt the action, the merits should be looked at to see if this would be just; (4) where the evidence of impecuniosity is insufficient to permit the master to determine whether or not the plaintiff is able to obtain the money to post security, the need to consider the merits does not arise; (5) nor can the merits be assessed on the basis of the pleadings alone.

The plaintiff moved in weekly court to quash the last decision as well as the decision to refer the matter for rehearing, and to restore the original decision allowing the appeal from the master. In the alternative the plaintiff asked for leave to appeal to the Divisional Court.

Held, the motion should be dismissed.

A judge in weekly court lacks jurisdiction to set aside an order of another High Court judge, at least where the order was not made ex parte and there is no allegation of fraud upon the other judges, nor any allegation of an error in calculation on the face of an order. Nor were there grounds for granting leave to appeal. The first judge had jurisdiction to vary or withdraw his order and refer the matter for rehearing. There was no reason to believe the decision of the second judge was wrong nor were there conflicting decisions.

MOTION (1) to quash an order of Rosenberg J., dismissing, after a rehearing, an appeal of an order for security for costs; (2) to quash an order of Hollingworth J. setting aside his own order, [1987 CanLII 4401 \(ON SC\)](#), 60 O.R. (2d) 185, and referring to the matter for rehearing; (3) to reinstate Hollingworth J.'s first order allowing the appeal; (4) in the alternative for leave to appeal to the Divisional Court.

Warren Industrial Feldspar Co. Ltd. v. Union Carbide Canada Ltd. (1986), [1986 CanLII 2683 \(ON SC\)](#), 54 O.R. (2d) 213, 8 C.P.C. (2d) 1; Smallwood v. Sparling (1983), [1983 CanLII 1930 \(ON SC\)](#), 42 O.R. (2d) 53, 34 C.P.C. 24; John Wink Ltd. v. Sico Inc. (1987), [1987 CanLII 4299 \(ON SC\)](#), 57 O.R. (2d) 705, 15 C.P.C. (2d) 187, consd Other cases referred to Re Cook and Morley, [1950] O.W.N. 739; Billinkoff's Ltd. v. Mid West Construction (1969) Ltd., [1973] 5 W.W.R. 26; Williams v. Adie (1966), [1966 CanLII 615 \(BC CA\)](#), 57 W.W.R. 221; Tozer v. New Brunswick (1985), 4 C.P.C. (2d) 164; Canadian Land & Emigration Co. v. Municipality of Dysart (1885), 9 O.R. 495; Craig v. Kanseen, [1943] 1 All E.R. 108; Re Constantineau and Jones (1912), 26 O.L.R. 160 Statutes referred to Courts of Justice Act, 1984 (Ont.), c. 11, ss. 15, 16(2)(c) Rules and regulations referred to Rules of Civil Procedure, rules 1.03 (am. O. Reg. 323/86, s. 1), 37.14(1), (4), 56.01 (d) (rep. & sub. O. Reg. 221/86, s. 16), 59.01, 59.06(2), 62.02(1), (5)

L.A. Vandor, for applicant.

B.L. Grossman, for respondent.

SUTHERLAND J.:-- This motion is brought with respect to an appeal from the April 3, 1987 order of Master Peterson made under rule 56.01 and requiring the plaintiff corporation to provide security for the costs of the defendant. Under the order of the learned master the plaintiff was required to post security of \$25,000 of which \$8,000 was to be posted within 60 days of the order, and a further \$17,000 within 30 days of the action being set down for trial. That order further provided that until security was posted the plaintiff was not to take any further step in the proceeding except for examinations of the defendant for discovery and except for an appeal of the order itself.

The plaintiff's appeal of the order came on on June 12, 1987, before the Honourable Mr. Justice Hollingworth who, on June 25th, released written reasons for an order allowing the appeal. After the release of those reasons counsel for the defendant wrote to Hollingworth J. expressing the view

that the hearing had not been completed on June 12th but was to have been adjourned to a date in July, to allow for further submissions and argument, especially by the defendant. After receipt of that letter Hollingworth J. informed counsel that he would allow them an opportunity to make further submissions, and he instructed that in the interim no order was to be taken out on the basis of his reasons released on June 25th.

By a further letter counsel for the defendant suggested that it would be preferable to have the appeal heard by another weekly court judge. On July 23rd there was a further hearing before Hollingworth J., at which submissions were made as to the latter suggestion. After that hearing Hollingworth J. decided to withdraw his decision of June 25th and he endorsed the record on July 23rd to the effect that there would be a rehearing of the appeal, de novo, before the Honourable Mr. Justice Rosenberg on the following day, July 24th.

When the matter was called by Rosenberg J. an objection as to jurisdiction was brought by the plaintiff, by way of a notice of motion dated July 24, 1987. Rosenberg J. reserved his decision on the motion and adjourned the appeal until the afternoon. On his return after lunch Rosenberg J. informed counsel that Hollingworth J. had made an addition to his July 23rd endorsement, the addition stating as follows: "A.H.H. I have decided to quash my decision." Rosenberg J. proceeded to hear the appeal de novo and on July 30th issued reasons dismissing the appeal and reinstating the master's order requiring the plaintiff to post security, with the variation that the first \$8,000 was to be paid by September 22, 1987.

Time estimated for the hearing of this motion

The defendant, in order to protect its position, had served and filed within the prescribed time-limit a notice of application for leave to appeal from the June 25, 1987 decision of Hollingworth J. allowing the appeal from the master. That application was scheduled to come on for hearing on September 2, 1987, and it was estimated that it would have taken one and a half hours. When the defendant later abandoned that appeal (of a decision the defendant believed had been effectively withdrawn), the plaintiff was able to obtain the same date for the hearing of this motion.

Notwithstanding that this motion covers a great deal more ground, the estimated time for the hearing of it was increased by a mere half-hour, making the total estimated time for the hearing two hours, i.e., the maximum estimated time for a regular weekly court motion or application. Matters estimated to take longer than two hours are classified, as is well known, as long motions and go on a different, and often slower, list or are made the subject of special arrangements. The court records show that this matter was heard on parts of three days -- and the total time of hearing was several times the estimated two hours. I tried to minimize the resulting inconvenience to counsel scheduled to appear on other matters in that court -- by commencing early on the second day and by adjourning this matter to the end of the list for that day, by the time we had reached the normal time of commencement, and by sitting later that day, and by commencing the hearing of the next matter as soon as the hearing of this one was completed on the third day. Despite those efforts it is clear that not only the court but several counsel on other matters were significantly inconvenienced by the gross and colourably self-serving under-estimate of the time required for this motion.

Order sought by moving party

As stated in the notice of motion dated July 29, 1987, the moving party (plaintiff) seeks:

- (a) an Order quashing the decision of Mr. Justice Rosenberg, dated July 24, 1987 and quashing the decisions of Justice Hollingworth dated July 23, 1987 and July 24, 1987;
- (b) an Order reinstating the decision of Mr. Justice Hollingworth, dated June 25, 1987;

(c) an Order requiring the Defendant to attend on Discovery regardless of the proceedings herein, and pursuant to the Order of Master Peterson dated April 3, 1987;

(d) in the alternative, leave to appeal to the Divisional Court from the Judgment of Mr. Justice Rosenberg dated July 24, 1987;

(e) in the further alternative, an Order to receive further evidence by Affidavit of Don McGinnis; and

(f) such further and other relief as this Court may deem just.

The application for relief made in para. (e) above was abandoned at the hearing, on the basis that it is properly brought to the court appealed to, if leave to appeal is granted, and so I have nothing more to say about it.

Requested order re attendance on discovery

Before I turn to a consideration of my jurisdiction to set aside orders of fellow judges of this court (and I believe that if there is such a jurisdiction the term "to set aside" would be appropriate and the term "to quash" inappropriate), I wish to deal with para. (c) set forth above, i.e., the request for an order that the defendant attend on discovery regardless of the other proceedings herein.

The master had permitted examinations for discovery to be proceeded with before any security for costs was posted. Hollingworth J. first issued reasons that would have allowed the appeal from the master's order as to security for costs, and subsequently he withdrew or purported to withdraw his order. The motion brought by the plaintiff before Rosenberg J. on July 24th included a motion for an order requiring the defendants to attend on discovery. The reasons of Rosenberg J. make no reference to the discovery question and the record does not show whether it was expressly dealt with by him elsewhere. Rosenberg J. dismissed, or purported to dismiss, the appeal from the order of the master, and the plaintiff contends that that means, either under the order of the master or under the first decision of Hollingworth J. herein allowing the appeal from the master there is no reason for not proceeding with the discoveries.

Counsel for the respondent bank points out that this part of the motion could be brought before a master, and that is acknowledged by counsel for the moving party. Moreover, there was no disputing of the assertion by counsel for the respondent that no proper material has been served on the respondent in respect of the alleged failure by the defendant to comply with a proper notice of appointment, in the sense that no affidavit (upon which there could be cross-examination seeking to show the impropriety of the notice of appointment) has ever been served. Counsel for the respondent asserts that the appointment was served for the wrong city and that if proper material were served she would be able to cross-examine with a view to establishing that.

Even if the time estimate for this motion had been much more accurate I would have dismissed this aspect of the motion without prejudice to the applicant's right to bring such a motion before the master on proper material. The woefully inaccurate time estimate might itself have been a reason for refusing to deal with this aspect of the motion even if proper material had been served and filed and an opportunity afforded for cross-examination thereon. Counsel for the moving party acknowledged that he found it more convenient to bring forward all matters in the same proceeding. Given that he was squeezing (if that is the appropriate term when the container bursts) this matter into a slight expansion of a time slot reserved for an obviously briefer matter, his blithe preference for his own convenience has little to commend it.

This aspect of the motion is dismissed without prejudice to the right, if any, of the applicant to bring such a motion before the master on proper notice and material.

Jurisdiction to hear and deal with this motion

It is clear, and not disputed, that under rule 62.02(1) the alternative relief, on application for leave to appeal the interlocutory order of Rosenberg J. to the Divisional Court, is properly brought before another High Court judge. With respect to the main relief sought by the moving party, that of setting aside orders of Hollingworth J. and Rosenberg J., I questioned whether one High Court judge sitting in weekly court had jurisdiction to set aside an order of another High Court judge, at least where, as here, the order in question was not made *ex parte* and there is no allegation of fraud upon the other judges, nor any allegation of an error in calculation apparent on the face of an order.

Counsel for both parties expressed the view that I had jurisdiction, except as stated above with respect to para. (e) of the notice of motion. Their reasons are, however, quite divergent.

Ms. Grossman, for the respondent, expressed with admirable clarity and economy, the view that, properly considered, the aspect of the motion as to which I found jurisdiction troubling, was not really a motion to set aside orders of my fellow judges of this court but an application for leave to appeal to those orders. Counsel points out that none of the orders have been entered. In her submission the reasons pronounced by Hollingworth J. have been withdrawn by him as he, acting judicially, had the right and power to do, and so exist no more. In the alternative, it is submitted that the decision of Hollingworth J. to withdraw his decision and to refer the matter to Rosenberg J. to be dealt with, *de novo*, is itself an interlocutory order of a High Court judge and so not appealable except by leave of another High Court judge, under Rule 62, the appeal, if such leave be granted, being to the Divisional Court. The order of Rosenberg J. is submitted to be another interlocutory order and subject to the same rule. At one level these submissions appear to pose the difficulty that they would make jurisdiction to enter upon the inquiry depend upon the (confidently predicted) result of the inquiry. It may be questioned whether the court could thus be said to be giving itself jurisdiction by, to use an old expression, hoisting itself by its own bootstraps. However, I do not believe that does justice to Ms. Grossman's argument. Her submissions as to jurisdiction do not depend on which way the court answers what she regards as the only proper question, i.e., whether or not to grant leave to appeal. Her submissions focus on what is the proper question and amount to an assertion that, because the applicant is wrong in its contention that Hollingworth J. lacked jurisdiction to withdraw his reasons of June 25th, and in its contention that Rosenberg J. either did not have jurisdiction to embark upon the hearing of the motion or lost jurisdiction by seeking a further endorsement by Hollingworth J., none of the July orders are nullities and therefore as interlocutory orders they can be attacked only by way of an application for leave to appeal. Those submissions would alone have been enough to cause me to embark upon the inquiry, reserving decision on the question of jurisdiction until the other submissions were made.

On behalf of the moving party Mr. Vandor made two main submissions in support of the position that I had jurisdiction to set aside the July orders referred to above. The first submission or group of submissions sought to establish that a single judge of the High Court sitting in weekly court had jurisdiction to set aside or declare null the impugned orders, on the basis of the interaction of a number of rules none of which, taken singly, would, or was asserted to, confer jurisdiction for such purposes. This submission involved quick oral references to a number of rules and was presented without the assistance of any written outline, in a factum or elsewhere, that could have been reviewed by me beforehand, or used as an aide memoire after or during the hearing. I am not able from my notes as supplemented from memory soon after the hearing to reconstruct the argument, but I do recall clearly that my conclusion at the time was that it was complex and unconvincing. I was reminded of the observation of the great French mathematician, Poincare, to the effect that if a mathematical equation looks elegant it is probably correct.

One of the provisions relied on by counsel for the moving party on the question of my jurisdiction is subrule 59.06(2), which states, as follows:

59.06(2) A party who seeks to,

- (a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;
- (b) suspend the operation of an order;
- (c) carry an order into operation; or
- (d) obtain other relief than that originally awarded,

may make a motion in the proceeding for the relief claimed.

It was acknowledged on behalf of the moving party that in this case there was not at any stage evidence of fraud relating to the order for security for costs, nor any evidence of facts arising or discovered after the decision of the master dealt with by Rosenberg J. or subsequent to the decision of Rosenberg J. The conditions precedent to an order under cl. (a) of subrule 59.06(2) are thus not met and in my opinion this motion cannot be brought within that paragraph. Nor in my opinion does cl. (d) authorize a motion for the relief sought.

On behalf of the moving party reference was also made on the question of my jurisdiction, to the provisions of rule 37.14 and especially to subrule (4) thereof. For convenience of reference that subrule and subrule 37.14(1) are set out below:

37.14(1) A person who,

- (a) is affected by an order obtained on motion without notice;
- (b) fails to appear on a motion through accident, mistake or insufficient notice; or
- (c) is affected by an order of a registrar,

may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion.

.

(4) A motion under subrule (1) or any other rule to set aside, vary or amend an order of a judge, local judge or master in a proceeding in the High Court or District Court may be made,

- (a) to the judge or master who made it, at any place; or
- (b) where the order was made by,
 - (i) a High Court judge, to any other High Court judge,
 - (ii) a local judge, to any other local judge or a High Court judge,
 - (iii) a District Court judge, to any other District Court judge, or
 - (iv) a master, to any other master or a local judge,

at any place in accordance with rule 37.03 (place of hearing of motions).

I cannot agree that subrule 37.14(4) is a free-standing grant of jurisdiction; it supplements subrule 37.14(1), "or any other rule to set aside, vary or amend an order of a judge, local judge or master in a proceeding in the High Court or District Court", by stating to what court a motion otherwise authorized may be made, but it is not of itself a provision sufficient to confer jurisdiction. Here the moving party has not brought itself within subrule 37.14(1) nor within any of the other rules referred to in subrule 37.14(4), and so that subrule does not help it. Two of the links in Mr. Vandor's chain being not applicable, this branch of the argument fails.

In the second branch of his submission as to my jurisdiction, Mr. Vandor pointed out that although sitting in weekly court I was also designated as a judge of the Divisional Court and so had jurisdiction to deal with this motion if it was directed to me after it was declared by the Chief Justice or Associate Chief Justice of the High Court, acting pursuant to cl. 16(2) (c) of the Courts of Justice Act, 1984 (Ont.), c. 11, to be a matter that can and ought to be heard and determined by one judge. I have two difficulties with that submission. The first is that I have seen nothing to indicate that such a declaration was made with respect to this motion. If that were the only difficulty I would be prepared to assume that the matter would not have come before me without such a declaration having been made. However, the second difficulty is more formidable. It is that Mr. Vandor has not directed my attention to anything that would lead me to believe that this motion, in so far as it is a motion to set aside interlocutory orders by judges of the High Court, can properly be regarded as "a proceeding in the Divisional Court" within the meaning of cl. 16(2)(c), and so eligible under that clause to be directed by the Chief Justice or the Associate Chief Justice to a single judge of the Divisional Court. It has not been established how the matter gets to be a Divisional Court proceeding in the first place. The Divisional Court is a statutory court and its jurisdiction, except for that conferred by other statutes, is that conferred by s. 15 of the Courts of Justice Act, 1984. As I read that section there is nothing in it that confers upon the Divisional Court a jurisdiction to entertain directly, i.e., without a prior application for leave, a motion to set aside an interlocutory order of a High Court judge. With regard to such orders it appears that the only jurisdiction of the Divisional Court is that conferred by cl. 15(1)(b) of the Courts of Justice Act, 1984, in the following terms:

15(1) Subject to the [Divorce Act \(Canada\)](#), an appeal lies to the Divisional Court from,

.....

(b) an interlocutory order of a judge of the High Court, with leave as provided in the Rules of Civil Procedure, other than an order made on an appeal from the District Court;

Accordingly, I conclude that this matter cannot be a proceeding in the Divisional Court and so cannot be directed to a single judge of that court under cl. 16(2)(c) of the Courts of Justice Act, 1984. It follows that this motion comes before me only in my capacity as a High Court judge. Thus, with respect to the remaining parts of this motion, the only question properly before me is whether or not to grant leave to appeal one or more of the July orders of Hollingworth J. and Rosenberg J.

I dispense with any requirement that the orders be settled and entered before the question of leave is considered.

The moving party has submitted that Hollingworth J. and Rosenberg J. did not have jurisdiction to make the above- mentioned orders purported to have been made by them in July. Before moving on to the leave to appeal application, I shall comment briefly on those jurisdiction questions.

Jurisdiction of Hollingworth J. and Rosenberg J. to make their orders herein

It is not disputed that Hollingworth J. had jurisdiction to enter upon and to dispose of the appeal from the master. As stated above, the moving party challenges the legal capacity of Hollingworth J.

to withdraw his June 25, 1987 reasons as he purported to do on July 23, 1987. Prior to July 23rd, Hollingworth J. had directed that, until further order, no order was to be entered in respect of his June 25th reasons for allowing the appeal from the master.

It is the submission of the moving party that Hollingworth J. was functus officio before he purported, on July 23rd, to withdraw his "order" of June 25th, and accordingly that the July 23rd order is a nullity. Two main arguments are put forth in favour of that proposition. The first is based upon subrule 59.06(2), which states as follows:

59.06(2) A party who seeks to,

- (a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;
- (b) suspend the operation of an order;
- (c) carry an order into operation; or
- (d) obtain other relief than that originally awarded,

may make a motion in the proceeding for the relief claimed.

(Emphasis added.)

The focus of Mr. Vandor is upon cl. (a) above. It is asserted that there was no evidence of either fraud or further facts arising or discovered after the June 25th order was made, and before that the respondent had not met the tests in *Re Cook and Morley* [1950] O.W.N. 739, with the result that the defendants' "motion" to set aside or vary should have failed. The submission is that the proceeding was reopened merely to allow further argument, and that that is not a proper ground under the subrule. I am not at all persuaded by this argument. It appears to be based upon a confusion of the limited circumstances in which a party may apply, by motion, to reopen an order, even after the order is entered with, on the other hand, the right of a judge of this court to vary or withdraw his order on his own motion before the order is entered. Explicit in Mr. Vandor's submissions is the proposition that it was improper for the respondent to be in communication with Hollingworth J. after his reasons of June 25th were released, except by a motion under subrule 59.06(2). There is no foundation for that proposition either on the authorities or in common sense. There is evidence in the record, in August 25, 1987, of Jasper Meyers, who appeared for the defendant bank not only before Master Peterson but also before Hollingworth J. on June 12, 1987. From that affidavit it appears that the appeal from the master was scheduled to come on in weekly court before one judge but, because that judge's list was very long, it was transferred that day to the list of another judge who at approximately 3:25 p.m. informed counsel that as he would not reach it that day the matter was being transferred to Hollingworth J. The court records show that counsel actually began making submissions at 3:50 p.m. and that at 4:10 p.m. His Lordship informed counsel that he had a previously scheduled appointment at 4:15 p.m. It is not disputed that Hollingworth J. had little or no opportunity to review the papers before the hearing began. According to the affidavit of Mr. Meyers, Mr. Vandor was called upon and made opening remarks and was asked to sit down, whereupon Mr. Meyers was allowed to outline his position before he, in turn, was asked to sit down without finishing. According to that affidavit Mr. Vandor was given an opportunity to make a few more remarks, before Hollingworth J. stated that the argument would have to be completed at a later date, after he had had an opportunity to read the material filed on the appeal. Reportedly, Hollingworth J. stated that he would be in Ottawa for a couple of weeks at the end of June but could be available in the first week in July, and when both counsel indicated their availability they were told that they would hear from His Lordship's secretary about a specific date. The next thing Mr. Meyers heard on the matter was that the weekly court office had called to say that written reasons dated June 25, 1987, were ready to be picked up.

Mr. Meyer's first action on learning of the issue of the written reasons was to call Mr. Vandor by telephone. After Mr. Meyers and Mr. Vandor had exchanged correspondence, in which the former took the position that Hollingworth J. had stated clearly that the hearing of the appeal would be resumed, and the latter took the position that His Lordship had merely reserved the right to call counsel back if required, Mr. Meyers wrote to Hollingworth J., with copy to Mr. Vandor. There is no suggestion whatever of unethical conduct by Mr. Meyers. He obviously kept Mr. Vandor fully informed of his intention to contact Hollingworth J. Before he wrote to His Lordship, Mr. Meyers had received a letter from Mr. Vandor to the effect that the latter would not consent to a rehearing before Hollingworth J. or before another judge. Mr. Meyers' letter to His Lordship resulted in an invitation to counsel to appear before him on July 23rd. Mr. Vandor had previously expressed his willingness to attend and he did attend, I would think with full knowledge of what would be submitted by Mr. Meyers.

At the rehearing Hollingworth J. was faced with submissions by Mr. Meyers that he had not been given an opportunity to make his submissions at the previous hearing and that he had then been promised an opportunity to make submissions at a later date. Those submissions raised in clear form an issue of natural justice in that they amounted to an assertion that the fundamental tenet *audi alteram partem*, had not been adhered to.

I do not agree with the submission that this was a situation governed by subrule 59.06(2) or that in these circumstances Mr. Meyers' only proper recourse was to proceed by way of a formal notice of motion. The order not having been entered and there being a serious issue of want of material justice, it was quite proper in my opinion for Mr. Meyers to have brought the issue to the attention of His Lordship in the way that he did, by letter and after full notice to Mr. Vandor.

In my opinion subrule 59.06(2) was not intended to restrict the course of action of either counsel or judge in a case like this, and the submissions based on that subrule must be rejected.

That brings me to the question of whether Hollingworth J. was *functus officio* in the sense that he lacked jurisdiction to vary or withdraw his reasons or "order" of June 25th even though no order had been entered. Although he raised the issue not even Mr. Vandor asserted flatly that Hollingworth J. was *functus officio*. Instead, Mr. Vandor conceded, citing *Billinkoff's Ltd. v. Mid West Construction (1969) Ltd.*, [1973] 5 W.W.R. 26 (Man. Co. Ct.), that until a judgment has been perfected by formal entry, a judge is not *functus officio*. However, citing *Williams v. Adie* (1966), [1966 CanLII 615 \(BC CA\)](#), 57 W.W.R. 221 (B.C.C.A.), and *Tozer v. New Brunswick* (1985), 4 C.P.C. (2d) 164 (N.B.Q.B.) (the latter being a case in which the order had been entered), that such jurisdiction to vary is exercisable only in exceptional circumstances.

On this branch of his argument the moving party seeks to gain support from the fact that under the Rules of Civil Procedure (rules 1.03 and 59.01) an order is effective from the date on which it is made, unless it provides otherwise, whereas under the (former) Rules of Practice a judgment had effect from when it was made or pronounced and an order had effect only from when it was entered. As with so many of Mr. Vandor's submissions on this motion, this one does not stand up to scrutiny. The new rules treat judgments and orders in the same way. It follows logically that the jurisprudence developed earlier with respect to what, if anything, an issuing judge or court could do, of its own motion, about varying or withdrawing its judgment before entry thereof would now apply equally to orders. As Ms. Grossman observed, this is not an uncharted sea.

I am satisfied that Hollingworth J. had jurisdiction to vary or withdraw his "order" of June 25th, and that when he withdrew it on July 23rd he was acting judicially, to avoid any suggestion or appearance that because he had already expressed views in his written reasons he might not be disinterested if he reopened the matter and heard further submissions on behalf of the parties. I am also of the opinion that he was acting judicially in concluding that additional submissions should be heard.

There is abundant authority, including many decisions reviewed in *Billinkoff's Ltd.*, supra, cited by the moving party for the proposition that a judgment can be reconsidered and varied or withdrawn before it is entered. In *Tozer*, also cited by the moving party, the jurisdiction to amend before entry was not questioned. Such a jurisdiction is quite independent of the rules, and of the fact that once entered an order takes effect from the time of its pronouncement. See in this regard *Canadian Land & Emigration Co. v. Municipality of Dysart* (1885), 9 O.R. 495, where, at p. 512, Ferguson J. stated as follows:

We were all then of the opinion that, at any time before formal judgment issued by the Court, the judgment, or part of it, might be recalled and a term imposed, or a change made. It is, of course, not a desirable thing to do, but circumstances may well justify its being done.

See also *Craig v. Kanseen*, [1943] 1 All E.R. 108, where the Court of Appeal stated that a court has an inherent jurisdiction to set aside its own order and that where it moves to do so an appeal from the order is not necessary.

In my opinion Hollingworth J. was not *functus officio* when he withdrew his reasons, but had jurisdiction to do so and to refer the matter to Rosenberg J. for a hearing *de novo*. Those reasons being withdrawn there was no reason for Rosenberg J. not to embark upon the hearing of the appeal. When Rosenberg J. called the matter he was confronted with a motion by Mr. Vador challenging his jurisdiction. He reserved his decision on that motion and recessed for lunch before embarking upon the hearing of the actual appeal. As stated, before returning after lunch, Rosenberg J. obtained a further endorsement of Hollingworth J. in the terms set forth above. Mr. Vador contends that if Rosenberg J. had jurisdiction to hear the appeal he lost it when he obtained that further endorsement -- because by so doing he reinvolved Hollingworth J. and two judges cannot be seized of the same matter at the same time. I do not agree. I have two reasons, either of which is sufficient. The first is that Rosenberg J. had not, in fact, entered upon the hearing of the appeal until after the second, i.e., the July 24th endorsement by Hollingworth J., and so he was free to embark upon the hearing of the appeal when he did. The second is that even if Rosenberg J. had embarked upon the appeal before Hollingworth J. made his clarifying endorsement he would not have lost jurisdiction by seeking and obtaining such clarification. To hold otherwise would be carrying formalism to ridiculous lengths. It would also be contrary to precedent. See in this regard *Canadian Land Co.*, supra, where, at p. 504, Ferguson J. made it clear that he had spoken to the judge who granted an interim injunction to obtain clarification of the meaning of his endorsement. Moreover, in *Re Constantineau and Jones* (1912), 26 O.L.R. 160, it is clear from p. 162 that Middleton J. (as he then was) on hearing an appeal from a taxing officer's certificate consulted the trial judge in order to obtain an explanation of his endorsement.

The endorsement made by Hollingworth J. does no more, in my opinion, than was implicit in his endorsement of July 23rd. After all, it would be pretty difficult, impossible in my view, to interpret the July 23rd endorsement, in which it was stated that the appeal would be heard *de novo* on July 24th by Rosenberg J. as anything other than a withdrawal by Hollingworth J. of his June 25th reasons, and as his complete withdrawal from the appeal itself. In my opinion, it is clear that Rosenberg J. had jurisdiction to hear and deal with the appeal.

I have dealt with the moving party's submission as to the jurisdiction to make the July orders herein, notwithstanding my opinion, as expressed above, that the only motion properly before me is a motion for leave to appeal the July orders. I did that for two reasons. The first is that in case I am wrong about my lack of jurisdiction to entertain a motion to set aside an interlocutory order of a fellow judge of the High Court, it will be clear that, in my opinion, the orders in question were properly made by judges having jurisdiction to make them. I will so declare.

My second reason is that a great deal of time was spent on the jurisdiction question, and the moving party's arguments were in my opinion so devoid of merit as to raise a question as to costs

regardless of whether leave to appeal were granted.

I turn, at long last, to the issue of leave to appeal.

Leave to appeal

In my opinion, there is no basis upon which to grant leave to appeal the July 23rd order of Hollingworth J. As stated above, it is my opinion that His Lordship had jurisdiction to withdraw his order before it was entered, and he was acting judicially when he did so. The July 23rd endorsement by Hollingworth J. was, at most, a clarification and in my view not even a necessary one. There is nothing about either of those orders that meets either of the double-barrelled tests in subrule 62.02(5).

Leave to appeal the "order" of Rosenberg J. herein is refused, for the reason that neither of the tests in subrule 62.02(5) have been met. To deal first with the test in cl. (b) of the subrule, there does not appear to me to be good reason to believe the decision of Rosenberg J. to be wrong. On the contrary, I find myself in complete agreement with all of his reasons that are relevant to this motion, including his statement that the relevant tests are those set forth by Trainor J. in *Warren Industrial Feldspar Co. Ltd. v. Union Carbide Canada Ltd.* (1986), [1986 CanLII 2683 \(ON SC\)](#), 54 O.R. (2d) 213, 8 C.P.C. (2d) 1.

Under rule 56.01(d) a defendant seeking an order for security for costs where the plaintiff is a corporation must show that there is good reason to believe that the plaintiff corporation has insufficient assets in Ontario to pay the defendant's costs if the plaintiff is unsuccessful in the litigation. The master found that on the evidence the defendant met that test and there has been no successful attack on that finding, nor in my opinion could there be on the evidence.

The obligation on the defendant is not to prove that the plaintiff corporation has insufficient assets; to do so would require the defendant to do something that is uniquely within the plaintiff's knowledge: see *Warren Industrial Feldspar and Smallwood v. Sparling* (1983), [1983 CanLII 1930 \(ON SC\)](#), 42 O.R. (2d) 53, 34 C.P.C. 24.

When the defendant has shown that there is good reason to believe that the plaintiff has insufficient assets in Ontario the defendant has met its onus and is *prima facie* entitled to an order for security for costs, and the onus shifts to the plaintiff to introduce evidence to show either:

(a) that it has sufficient assets in Ontario, or

(b) that (i) it is impecunious and (ii) an injustice would result if it were not allowed to proceed with its action.

Here the plaintiff did not introduce evidence to show that it had sufficient assets in Ontario, nor did it introduce evidence to show that it was "impecunious". There was simply no evidence on the question from the plaintiff. Accordingly, on that basis alone, there is nothing to displace the *prima facie* entitlement of the defendant for an order for security. Pleadings which are contradictory are not evidence. Impecuniosity has to be established by evidence.

The term "impecuniosity" does not appear in the rule; it is a term introduced as part of the judicial gloss upon the rule in response to the words "as is just" in the part of the rule stating that (upon satisfaction of the stated conditions precedent) "the court ... may make such order as is just". The corporate plaintiff wishing to be allowed to proceed with its action, without either showing sufficient assets or putting up security, must first show "impecuniosity" meaning not only that it does not have sufficient assets itself but also that it cannot raise the security for costs from its shareholders and associates, partly because the courts do not want a successful defendant to be effectively deprived of costs where, for example, wealthy shareholders have decided to carry on

business and litigation through a shell corporation. To go the impecuniosity route the plaintiff must establish by evidence that it cannot raise security for costs because, if a private company, its shareholders have not sufficient assets. As expressed by Reid J. in *John Wink Ltd. v. Sico Inc.* (1987), 1987 CanLII 4299 (ON SC), 57 O.R. (2d) 705 at p. 709, 15 C.P.C. (2d) 187: "If an order for security stops a plaintiff in its tracks it has disposed of the suit." To raise impecuniosity there must be evidence that if security is required the suit will be stopped -- because the amount of the security is not only not possessed by the plaintiff but is not available to it. Here there is simply no evidence to that effect.

The moving party (plaintiff) has also sought to base its application for leave to appeal upon cl. (a) of subrule 62.02(5), i.e., on the basis that there is a conflicting decision by another judge or court in Ontario or elsewhere, and it is desirable that leave to appeal be granted. One of the conflicting decisions cited on behalf of the plaintiff is the June 25, 1987 decision of Hollingworth J., but in my opinion it cannot count because, as stated above, it has been properly withdrawn and is no more. There is no decision of which I am aware where a plaintiff was allowed to proceed where it had produced no evidence of either sufficient assets in Ontario or, on the other hand, impecuniosity, and so I am not persuaded that there are any conflicting decisions within the meaning of the subrule.

The moving party has submitted that there is a conflict between the decision in *Warren Industrial Feldspar* and that in *John Wink v. Sico*. I agree that there does appear to be a conflict between those decisions, but it relates only to the last of the criteria to be met by a plaintiff that has already established its impecuniosity, that is, to the degree of merit that there must be to the case of an impecunious plaintiff an order to induce a court to refrain from making an order for security for costs. As I read the decision of Reid J. in *Wink* he accepts the reasoning of Trainor J. in *Warren* except as to the strength of the plaintiff's case. In my opinion there is no conflict between *Warren* and *Wink* on the question of the need for the corporate plaintiff to establish its impecuniosity by evidence before the court goes on to consider the merits of the plaintiff's case. When leave to appeal *Wink* was granted by Austin J., by an endorsement dated March 9, 1987, it was on the basis of a difference between *Wink* on the one hand and *Warren* and other decisions on the other, as to the required degree of merit of the plaintiff's case. (It is noted that the case was settled before the appeal was heard.) That difference is not relevant to this appeal; this case does not get to that question, because there is no evidence of impecuniosity. The decision of Rosenberg J. is not in conflict with either *Warren* or *Wink* or with any other decision to which I have been referred or of which I am aware.

Accordingly, the motion for leave to appeal the order of Rosenberg J. is also dismissed.

Costs to the respondent.

Motion dismissed.

Tab 108

Yatar v. TD Insurance Meloche Monnex, 2024 SCC 8 (CanLII)

Source:	Supreme Court of Canada
Date:	2024-03-15
File number:	40348
Other citations:	489 DLR (4th) 191 — [2024] SCJ No 8 (QL) — [2024] ACS no 8
Citation:	Yatar v. TD Insurance Meloche Monnex, 2024 SCC 8 (CanLII), < https://canlii.ca/t/k3gs5 >, retrieved on 2026-03-23
Most recent unfavourable mention	Humberplex Developments Inc. v. Ontario (AG) , 2024 ONSC 2335 (CanLII) [...] In these circumstances, Yatar SCC is distinguishable and this court is justified in declining to determine procedural fairness issues in the context of the applicants' judicial review application. [...]



SUPREME COURT OF CANADA

CITATION: Yatar v. TD Insurance Meloche Monnex, 2024 SCC 8

APPEAL HEARD: November 15, 2023
JUDGMENT RENDERED: March 15, 2024
DOCKET: 40348

BETWEEN:

Ummugulsum Yatar
Appellant

and

TD Insurance Meloche Monnex and Licence Appeal Tribunal
Respondents

- and -

**Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec,
Attorney General of British Columbia, Attorney General of Alberta, Income Security Adv
ocacy Centre, Advocacy Centre for Tenants Ontario, Canadian Telecommunications Assoc
iation, Insurance Bureau of Canada, Forest Appeals Commission, Aboriginal Council of
Winnipeg, Inc. and Social Planning Council of Winnipeg**
Intervenors

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

REASONS FOR JUDGM ENT: Rowe J. (Wagner C.J. and Karakatsanis, Côté, Martin, Kasirer, Jamal,
O'Bonsawin and Moreau JJ. concurring)
(paras. 1 to 78)

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

Ummugulsum Yatar

Appellant

v.

**TD Insurance Meloche Monnex and
Licence Appeal Tribunal**

Respondents

and

**Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Alberta,
Income Security Advocacy Centre,
Advocacy Centre for Tenants Ontario,
Canadian Telecommunications Association,
Insurance Bureau of Canada,
Forest Appeals Commission,
Aboriginal Council of Winnipeg, Inc. and
Social Planning Council of Winnipeg**

Interveners

Indexed as: Yatar v. TD Insurance Meloche Monnex

2024 SCC 8

File No.: 40348.

2023: November 15; 2024: March 15.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Administrative law — Judicial review — Limited statutory right of appeal on questions of law — Tribunal finding insured's application contesting denial of statutory accident benefits by insurer time-barred — Provincial legislation limiting right of appeal from tribunal's decision to questions of law — Insured appealing decision on questions of law and seeking judicial review on questions of fact and mixed fact and law — Appeal and application for judicial review dismissed — Whether courts should have exercised discretion to undertake judicial review on merits in light of limited statutory right of appeal on questions of law — Proper approach to judicial review where limited statutory right of appeal.

Insurance — Automobile insurance — Statutory accident benefits — Denial — Limitation period — Insured injured in automobile accident — Insurer denying statutory accident benefits — Tribunal finding insured's application contesting denial of benefits time-barred — Whether Tribunal's decision was reasonable.

Y was injured in an automobile accident in 2010. Her insurer initially paid her accident benefits. However, in January 2011, the insurer informed Y by letter that payment of all benefits had been stopped in the absence of a completed disability certificate. A dispute resolution form was attached to the letter. Then, in February 2011, the insurer informed Y that following a medical assessment her income replacement benefits were reinstated but her claim to the other two benefits — housekeeping and home maintenance — was denied. Finally, in September 2011, the insurer informed Y that her income replacement benefits were denied and payments would be stopped. No dispute resolutions forms were attached to either of the last two letters.

Y applied for mediation, which was mandatory at the time, to dispute the denial of her benefits. The mediation process came to an end in January 2014 and the mediator released his report. At the time of Y's accident, [Ontario's Insurance Act](#) provided for a two-year limitation period after the insurer's refusal to pay the benefits to commence a proceeding to contest the denial. It also provided that the limitation period was extended by a period of 90 days after the mediator provided their report. Y commenced a proceeding before the Licence Appeal Tribunal ("LAT") in March 2018. Her application was dismissed as being time-barred and her request for reconsideration was dismissed.

Pursuant to [Ontario's Licence Appeal Tribunal Act, 1999](#), Y's right of appeal from the LAT adjudicator's reconsideration decision was restricted to questions of law. Y pursued an appeal on questions of law, and also sought judicial review regarding questions of fact or mixed fact and law. The Divisional Court dismissed the appeal, holding that Y showed no errors of law made by the LAT adjudicator. It also dismissed Y's application for judicial review, on the basis that there were no exceptional circumstances that would justify judicial review. The Court of Appeal dismissed Y's appeal, holding that it would only be in rare cases that the remedy of judicial review

would be exercised given the legislated scheme for the resolution of such disputes, and that Y had an appropriate alternative remedy. It also concluded that even if the judicial review application ought to have been considered, it would have been denied as the LAT adjudicator's decision was reasonable.

Held: The appeal should be allowed and the matter remitted to the LAT adjudicator.

It was an error for the courts below to hold that, where there is a limited right of appeal, judicial review should only be exercised in exceptional or rare cases. The limited right of appeal from LAT decisions to pure questions of law does not reflect an intention by the legislature to restrict recourse to the courts on other questions arising from the LAT's administrative decision. The legislative decision to provide for a right of appeal on questions of law only denotes an intention to subject LAT decisions on questions of law to correctness review, and proceeding with judicial review on questions of fact or mixed fact and law is fully respectful of the legislature's institutional design choices. Furthermore, the LAT adjudicator's reconsideration decision was unreasonable, as he failed to take into account relevant legal constraints. The matter should be referred back to the LAT adjudicator for reconsideration.

As held by the Court in *Vavilov*, a right of appeal does not preclude an individual from seeking judicial review for questions not dealt with in the appeal. Where there is a statutory right of appeal limited to questions of law, judicial review is available for questions of fact or mixed fact and law. However, while there is a right to seek judicial review, it is open to the judge before whom judicial review is sought to decide whether to exercise his or her discretion to grant relief — although this discretion does not extend to decline to consider the application for judicial review. The discretion whether to undertake judicial review should be exercised by the judge having regard to the framework set out in *Strickland v. Canada (Attorney General)*, [2015 SCC 37](#). At a minimum, the judge must determine whether judicial review is appropriate. If, in considering the application, the judge determines that one of the discretionary bases for refusing a remedy is present, they may decline to consider the merits of the judicial review application. The judge also

has the discretion to refuse to grant a remedy even if they find that the decision under review is unreasonable.

In exercising its discretion, in addition to the suitability and appropriateness of judicial review in the circumstances, the court should consider the available alternatives. This balancing exercise should take account of the purposes and policy considerations underpinning the legislative scheme in issue. Alternative remedies exist where internal review processes have not been exhausted or where there is a statutory right of appeal that is not restricted, such that questions of law, fact and mixed fact and law could be considered on appeal. It would be ignoring *Strickland* to conclude that only in exceptional circumstances would judicial review be available where there is a limited right of appeal. It would also be an error to hold that judicial review should only be exercised in rare cases.

In the instant case, the Divisional Court should have exercised its discretion to undertake judicial review for issues not dealt with under the statutory right of appeal. The statutory right to appeal and the LAT adjudicator's reconsideration decision do not constitute adequate alternative remedies. Y raises errors of fact or mixed fact and law which are not reviewable under the statutory right of appeal, and access to internal reconsiderations cannot be an adequate alternative remedy, as the reconsideration decision itself is the subject of the review.

Furthermore, the LAT adjudicator's reconsideration decision is unreasonable, as he failed to have regard to the effect of the reinstatement of the income replacement benefits between February and September 2011 on the validity of the initial denial. In addition, he did not consider earlier tribunal decisions, some of which had held that when an applicant's benefits are reinstated, the limitation period can only be triggered when they are validly terminated again. It is arguable that there needed to be a valid denial of the income replacement benefits to start the clock running on the limitation period, and this question is one to be properly decided by the LAT.

Cases Cited

Applied: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#), [2019] 4 S.C.R. 653; *Strickland v. Canada (Attorney General)*, [2015 SCC 37](#), [2015] 2 S.C.R. 713; **referred to:** *Smith v. Co-operators General Insurance Co.*, [2002 SCC 30](#), [2002] 2 S.C.R. 129; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995 CanLII 145 \(SCC\)](#), [1995] 1 S.C.R. 3; *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989 CanLII 73 \(SCC\)](#), [1989] 2 S.C.R. 49; *Smith v. The Appeal Commission*, [2023 MBCA 23](#), 479 D.L.R. (4th) 121; *Wongkingsri v. Alberta (Appeals Commission for Alberta Workers' Compensation)*, [2022 ABQB 545](#), 61 Alta. L.R. (7th) 170; *Zarooben v. Workers' Compensation Board*, [2021 ABQB 232](#), 84 Admin. L.R. (6th) 96, aff'd [2022 ABCA 50](#), 95 Admin. L.R. (6th) 163; *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991 CanLII 82 \(SCC\)](#), [1991] 1 S.C.R. 326; *Dunsmuir v. New Brunswick*, [2008 SCC 9](#), [2008] 1 S.C.R. 190; *Housen v. Nikolaisen*, [2002 SCC 33](#), [2002] 2 S.C.R. 235; *Canada (Attorney General) v. Pier 1 Imports (U.S.), Inc.*, [2023 FCA 209](#); *Canada (Attorney General) v. Best Buy Canada Ltd.*, [2021 FCA 161](#); *Democracy Watch v. Canada (Attorney General)*, [2023 FCA 39](#), 14 Admin. L.R. (7th) 42; *Democracy Watch v. Canada (Attorney General)*, [2022 FCA 208](#); *Canada (Citizenship and Immigration) v. Khosa*, [2009 SCC 12](#), [2009] 1 S.C.R. 339; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, [2013 SCC 34](#), [2013] 2 S.C.R. 458; *Veldhuizen v. Coseco Insurance Co.*, [1995 ONICDRG 144 \(CanLII\)](#); *Rudnicki v. Certas Direct Insurance Co.*, [2001 ONFSCDRS 60 \(CanLII\)](#).

Statutes and Regulations Cited

Insurance Act, R.S.O. 1990, c. I.8, ss. 280(3), [281\(2\)](#), [281.1\(1\)](#), [\(2\)\(b\)](#) [rep. [2014, c. 9](#), Sch. 3, s. 14].

Judicial Review Procedure Act, R.S.O. 1990, c. J.1, s. 2(1).

Licence Appeal Tribunal Act, [1999](#), S.O. 1999, c. 12, Sch. G, s. 11(6).

Statutory Accident Benefits Schedule — Accidents on or After November 1, 1996, O. Reg. 403/96, s. 51(2) [rep. & sub. 45/16, s. 5].

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APPEAL from a judgment of the Ontario Court of Appeal (Lauwers, Nordheimer and Zarnett JJ.A.), [2022 ONCA 446](#), 25 C.C.L.I. (6th) 1, [2022] O.J. No. 2602 (Lexis), 2022 CarswellOnt 7863 (WL), affirming a decision of Swinton, Penny and Kristjanson JJ., [2021 ONSC 2507](#), 157 O.R. (3d) 337, [2021] O.J. No. 2154 (Lexis), 2021 CarswellOnt 5678 (WL), dismissing an application for judicial review of a decision of the Licence Appeal Tribunal, [2020 CanLII 34442](#), 2020 CarswellOnt 6879 (WL). Appeal allowed.

Sean Dewart, Tim Gleason and Ian McKellar, for the appellant.

Christine Lonsdale, Adam Goldenberg and Erin Chesney, for the respondent TD Insurance Meloche Monnex.

Brian Blumenthal and Valerie Crystal, for the respondent the Licence Appeal Tribunal.

John Provart and Michelle Kellam, for the intervener Attorney General of Canada.

Michael J. Sims and Matthew Chung, for the intervener Attorney General of Ontario.

Stéphane Rochette and Francesca Boucher, for the intervener Attorney General of Quebec.

Meera Bennett and Katherine Reilly, for the intervener the Attorney General of British Columbia.

Michael Wall and Adam Ollenberger, for the intervener the Attorney General of Alberta.

Nabila F. Qureshi, Anu Bakshi and Anna Rosenbluth, for the intervener the Income Security Advocacy Centre.

Ryan Hardy, for the intervener the Advocacy Centre for Tenants Ontario.

Paul Daly, for the intervener the Canadian Telecommunications Association.

Nina Bombier and Nikolas De Stefano, for the intervener the Insurance Bureau of Canada.

Robin J. Gage and Julia W. Riddle, for the intervener the Forest Appeals Commission.

Allison Fenske and Natalie Copps, for the interveners Aboriginal Council of Winnipeg, Inc. and the Social Planning Council of Winnipeg.

The judgment of the Court was delivered by

ROWE J. —

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I. Overview

[1] This case deals with a court’s exercise of discretion as to whether to undertake judicial review on the merits in light of a limited statutory right of appeal.

[2] Ummugulsum Yatar is contesting the denial of her insurance benefits, following an accident in 2010. After having her application dismissed by the Licence Appeal Tribunal (“LAT”) in 2019, due to the matter being time-barred, Ms. Yatar requested reconsideration of this decision, which was dismissed. Then, she simultaneously appealed the decision before the Divisional Court of Ontario, and applied for judicial review. [Section 11\(6\)](#) of the *Licence Appeal Tribunal Act, 1999*, S.O. 1999, c. 12, Sch. G (“*LAT Act*”), provides that an appeal from a decision of the LAT relating to a matter under the *Insurance Act*, R.S.O. 1990, c. I.8, may be made on a question of law only.

[3] As per *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#), [2019] 4 S.C.R. 653, a right of appeal does not preclude an individual from seeking judicial review for questions not dealt with in the appeal. In this case, despite the statutory right of appeal limited to questions of law, judicial review is available for questions of fact or mixed fact and law. It is then a matter of discretion whether to undertake judicial review, having regard to the framework

for analysis set out in *Strickland v. Canada (Attorney General)*, [2015 SCC 37](#), [2015] 2 S.C.R. 713.

[4] The Divisional Court erred when it concluded that only in “exceptional circumstances” would judicial review be available where there is a limited right of appeal ([2021 ONSC 2507](#), 157 O.R. (3d) 337, at para. 4); this ignored *Strickland*. The Court of Appeal for Ontario also erred when it held that only in “rare cases” judicial review would be exercised ([2022 ONCA 446](#), 25 C.C.L.I. (6th) 1, at para. 42), and that in this case, Ms. Yatar had an appropriate alternative remedy. Both courts sought to apply *Strickland*, but erred in principle in doing so. They did so by relying on a statutory right of appeal for questions of law as indicative of legislative intent to restrict access to judicial review for questions of fact and mixed fact and law. No such inference is warranted. Properly applying *Strickland*, the Divisional Court should have exercised its discretion to undertake judicial review for issues not dealt with under the statutory right of appeal.

[5] As to the LAT adjudicator’s reconsideration decision ([2020 CanLII 34442](#) (“reconsideration decision”)), it is unreasonable, as he failed to consider the effects of the reinstatement of benefits on the limitation period, and he did not have regard to jurisprudence relevant to the matter. Accordingly, the appeal is allowed and the matter is referred back to the LAT adjudicator for reconsideration.

II. Factual Context

A. *The Underlying Insurance Claim*

[6] Ms. Yatar “was injured in an automobile accident in February 2010 and sought benefits under the *Statutory Accident Benefits Schedule — Accidents on or After November 1, 1996*, O. Reg. 403/96 (‘SABS’)” (Divisional Court decision, at para. 5). One of the two respondents, TD Insurance Meloche Monnex, was her insurer at the time, and received Ms. Yatar’s application for accident benefits on February 22, 2010, as well as her employer’s confirmation

form on March 13, 2010. Ms. Yatar's claim also included income replacement benefits ("IRBs") as well as housekeeping and home maintenance benefits.

B. *Denial of Requested Benefits and Subsequent Proceedings*

[7] Ms. Yatar's request for benefits was initially considered valid by TD Insurance, which paid benefits to Ms. Yatar. In the months that followed, however, TD Insurance denied the benefits in three letters:

- (a) *The January Letter*: On January 7, 2011, TD Insurance informed Ms. Yatar that payment of IRBs, as well as housekeeping and home maintenance benefits, had been stopped in the absence of a completed disability certificate. The letter contained directions for a medical examination, which Ms. Yatar attended on January 17 and January 27. A dispute resolution form was attached to that letter.
- (b) *The February Letter*: On February 16, 2011, Ms. Yatar was informed by TD Insurance that following the medical assessment, her claim to housekeeping and home maintenance benefits was denied. However, her IRBs were reinstated. No dispute resolution form was attached to that letter.
- (c) *The September Letter*: On September 19, 2011, Ms. Yatar was advised that her IRBs were denied by TD Insurance, and that the payments would be stopped on September 28, 2011. No dispute resolution form was attached to that letter.

[8] There have been significant legislative amendments since Ms. Yatar commenced her procedures. At the time of the accident, in 2010, the *Insurance Act* provided for a two-year limitation period after the insurer's refusal to pay the benefits to commence a proceeding (s. 281.1(1)), as well as mediation as a mandatory first step to resolve a dispute (s. 281(2)), which extended the limitation period to 90 days after the mediator provided their report (s. 281.1(2)(b)).

Ms. Yatar applied for mediation on September 13, 2012, to dispute the denial of her benefits. The mediation process came to an end on January 14, 2014.

[9] However, what is most relevant in this case is that when Ms. Yatar commenced her proceeding before the LAT in March 2018, both the *Insurance Act* and the *SABS* had been redesigned. Under the amended *Insurance Act*, the LAT was given exclusive jurisdiction at first instance over the resolution of *SABS* disputes. As well, mandatory mediation was eliminated. The *LAT Act* was also amended to provide for an appeal from a decision of the LAT on a question of law only (s. 11(6)).

[10] On March 31, 2016, Ms. Yatar commenced an action in the Superior Court of Justice. The action was dismissed through a consent order on March 27, 2017, and the application underlying this appeal was brought to the LAT in March 2018.

III. Judicial History

A. Licence Appeal Tribunal

[11] In the LAT adjudicator's first decision in April 2019 ([2019 CanLII 43918](#) ("preliminary decision")), the LAT adjudicator considered Ms. Yatar's claim for IRBs, housekeeping benefits and home maintenance benefits and dismissed it, concluding that the claim was time-barred since April 2014. When Ms. Yatar proceeded with mediation in early 2011, both [s. 281.1\(2\)\(b\)](#) of the *Insurance Act* and s. 51(2) of the *SABS* provided for a limitation period that expired 90 days after the mediator's report was released.

[12] The LAT adjudicator found that TD Insurance denied the IRBs, home maintenance and housekeeping benefits in a letter dated January 7, 2011. Given that "[Ms. Yatar] filed this Application before the [LAT] on March 16, 2018, more than seven years after these benefits were denied on January 7, 2011" (para. 19), and even taking into account the extensions of the limitation

period due to the evaluation and mediation, the LAT adjudicator found that the claims were time-barred since April 2014.

[13] The LAT adjudicator noted that “[f]rom counsel’s evidence, it is clear that lawyers at her firm should have been aware of the applicable two-year limitation period. It is also clear that [Ms. Yatar] relied on the expertise of her counsel, to her detriment, in the face of the statutory limitation period” (preliminary decision, at para. 25).

[14] In the reconsideration decision, the LAT adjudicator reviewed his earlier reasons as well as the evidence. A factual error was corrected at para. 12 of the decision, but the LAT adjudicator re-affirmed the original decision.

[15] The LAT adjudicator relied on *Smith v. Co-operators General Insurance Co.*, 2002 SCC 30, [2002] 2 S.C.R. 129. He concluded that the dispute resolution form, attached to the January 2011 letter, “clearly sets out three steps in the dispute process and warns in clear straightforward language of the two-year limitation period” (para. 13). The LAT adjudicator stated that, in *Smith v. Co-operators*, the Supreme Court of Canada sought to ensure that the applicant is aware of the dispute resolution process. He noted that there was an “implicit acceptance of the denials effective January 4, 2011” and affirmed his previous finding that the January 7, 2011 letter constituted a valid denial of benefits (reconsideration decision, at para. 15; see also para. 16).

[16] The limitation period was extended into April 2014 following the mediation. However, Ms. Yatar made the application to the LAT for benefits on March 16, 2018. Thus, the request was time-barred. The application was dismissed.

B. *Ontario Superior Court of Justice (Divisional Court)*, 2021 ONSC 2507, 157 O.R. (3d) 337 (Swinton, Penny and Kristjanson JJ.)

[17] Ms. Yatar’s right of appeal from the LAT adjudicator’s reconsideration decision was restricted to questions of law, per s. 11(6) of the *LAT Act*. In light of this, Ms. Yatar pursued an

appeal on questions of law, and also sought judicial review regarding questions of fact or mixed fact and law.

[18] The Divisional Court held that its authority to hear the judicial review application stemmed from s. 280(3) of the *Insurance Act* and s. 2(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1; this authority was not precluded by the limited right of appeal on questions of law provided by s. 11(6) of the *LAT Act*.

[19] The appeal was dismissed, as Ms. Yatar showed no errors of law made by the LAT adjudicator and, instead, recited “findings of fact made by the [LAT] adjudicator and then baldly assert[ed] that the [LAT] adjudicator erred in law, without identifying the legal error or any extricable legal principle” (Divisional Court decision, at para. 27).

[20] On judicial review with respect to the questions of fact and mixed fact and law, the Divisional Court concluded that, per *Vavilov*, the limited right of appeal in the *LAT Act* did not “deprive this court of jurisdiction to consider other aspects of a decision in judicial review proceedings” (para. 36). The court added that judicial review is a discretionary remedy, and should thus be declined when alternative remedies are adequate (see *Strickland*, at paras. 37 and 40).

[21] As to whether to exercise its discretion to undertake judicial review in this case, the Divisional Court considered four factors: (i) the legislative intent to limit judicial review of LAT decisions on statutory accident benefits to questions of law only, (ii) the breadth of the LAT’s reconsideration power, (iii) the nature of the alleged errors, and (iv) the systemic difficulties associated with dealing with judicial review and an appeal (paras. 41-45).

[22] The Divisional Court concluded that there were “no exceptional circumstances” in this case that would justify judicial review (para. 46). On this basis, the Divisional Court declined to grant the application for judicial review.

C. *Court of Appeal for Ontario, 2022 ONCA 446, 25 C.C.L.I. (6th) 1 (Lauwers, Nordheimer and Zarnett JJ.A.)*

[23] Two issues were appealed to the Court of Appeal: (i) whether “the Divisional Court err[ed] in limiting judicial review, in cases where there has been a statutory appeal . . . to ‘exceptional circumstances’” and (ii) whether “the [LAT]’s reconsideration decision [was] reasonable” (para. 27).

[24] The Court of Appeal observed that when the Divisional Court referred to the availability of judicial review, “the use of the language ‘exceptional circumstances’ was an unfortunate one” and led to potential confusion (para. 35). The Court of Appeal held that what the Divisional Court “was attempting to communicate is that it would only be in rare cases that the remedy of judicial review would be exercised, given the legislated scheme for the resolution of disputes over SABS” (para. 42).

[25] The Court of Appeal held that a limited statutory right of appeal does not preclude judicial review. The right to seek judicial review is always available, but this does not “change the fact that judicial review is a discretionary remedy” (para. 41). The Court of Appeal also stated that “[t]he court’s discretion with respect to judicial review applies both to its decision to undertake review and to grant relief”, relying on *Strickland* (para. 44).

[26] The Court of Appeal held that the Divisional Court correctly considered the factors in *Strickland* as to whether there are alternative remedies to judicial review. There is “legislative intent to limit access to the courts regarding these disputes” (para. 43).

[27] The Court of Appeal concluded that even if “the judicial review application ought to have been considered”, Ms. Yatar had failed to show that the LAT adjudicator’s reconsideration decision was unreasonable: “. . . that application would have failed on the presumptive standard of review of reasonableness . . .” (para. 52).

[28] The Court of Appeal held that the LAT adjudicator’s underlying finding, that the valid denial of benefits triggered the beginning of the limitation period, was also reasonable:

. . . the limitation period would have expired in 2013, but for the . . . mediation process that extended that limitation period to April 2014. In either event, the fact that [Ms. Yatar] had not launched her application to the [LAT] until March 16, 2018 meant that it was outside of the limitation period. [para. 51]

[29] Thus, while the Court of Appeal concluded that judicial review of the LAT adjudicator's decision ought not to have been considered, the application for judicial review would have been denied as the LAT adjudicator's decision on the reconsideration was reasonable.

IV. Issues on Appeal

[30] Ms. Yatar raises two questions on appeal: first, whether the Court of Appeal erred when it concluded that the legislature's decision to limit the right of appeal from LAT decisions to "pure" questions of law restricted the availability of judicial review of LAT decisions for errors of fact or mixed fact and law to "rare" or "unusual" cases; and second, whether the Court of Appeal erred in concluding that the LAT adjudicator's reconsideration decision was reasonable (A.F., at para. 28).

V. Submissions of the Parties

A. Ms. Yatar

[31] Ms. Yatar submits that the Court of Appeal erred in finding that the existence of a limited statutory right of appeal can be a basis to decline to undertake judicial review regarding issues outside the scope of the statutory appeal. *Vavilov* confirms that "a right to appeal on a question of law is not an adequate remedy if a litigant seeks judicial review of a question of fact, or a question of mixed fact and law, . . . the two remedies are compl[e]mentary" (A.F., at para. 52).

[32] Regarding judicial review in this case, Ms. Yatar argues that since no dispute resolution form accompanied the letters in February and September 2011, the latter cannot be considered valid denials of benefits. The LAT adjudicator erred in considering that the letter from

January 2011 was a valid denial, as it was a temporary suspension of benefits and “did not constitute notice in ‘straightforward and clear language, directed towards an unsophisticated person’ that benefits would not be provided” (A.F., at para. 79). Thus, the letter from January 2011 cannot be the starting point for the limitation period.

[33] The fact that the LAT adjudicator did not address the issue of “ambiguities” in the January 2011 letter, Ms. Yatar submits, is a central flaw in the analysis and, therefore, the decision is unreasonable.

B. *TD Insurance and Licence Appeal Tribunal*

[34] TD Insurance submits that the Divisional Court did not err in exercising its discretion to decline to undertake judicial review of the LAT adjudicator’s reconsideration decision. The Ontario legislature chose to limit the courts’ involvement in appeals on questions of law.

[35] Judicial review is discretionary and the Divisional Court’s exercise of this discretion is entitled to deference. As this Court recognized in *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995 CanLII 145 \(SCC\)](#), [1995] 1 S.C.R. 3, prerogative writs are an “extraordinary remedy”. The right to seek judicial review does not entail “a right to require the court to undertake judicial review” regardless of the nature of the question (para. 30; *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989 CanLII 73 \(SCC\)](#), [1989] 2 S.C.R. 49, at p. 93).

[36] TD Insurance submits that the *Strickland* factors provide a sufficient basis on which to dismiss this appeal. If the alternatives to judicial review are adequate, as they are here, then it is “appropriate” to give effect to the legislature’s intent and to decline to undertake judicial review. Other factors from the jurisprudence confirm that judicial review was not appropriate here, including: the nature of the statutory scheme, the nature of the decision and the process followed in making it, the importance of the decision to the individual or individuals affected, and whether the case is of public interest.

[37] In the alternative, TD Insurance submits, if the LAT adjudicator’s reconsideration decision is to be judicially reviewed, the LAT adjudicator reasonably determined that the application was statute-barred.

[38] The LAT submits that the Court of Appeal correctly held that the discretion to entertain judicial review on questions of fact and mixed fact and law should be exercised “only . . . in rare cases” (C.A. reasons, at para. 42). Otherwise, the legislative intent in enacting the restrictive appeal clause would be undermined.

[39] The LAT submits this is consistent with *Strickland*’s holding on the exercise of discretion on judicial review. *Vavilov* did not change the law on the discretion to decline to undertake judicial review where there is an alternative remedy; *Vavilov* did not overrule *Strickland*.

[40] In the LAT’s view, reading *Vavilov* and *Strickland* together leads to the conclusion that the exercise of discretion on judicial review must consider the adequacy of the restrictive appeal as an alternative remedy while also being respectful of the legislature’s choice to create a right of appeal limited to questions of law only. The LAT takes no position on the reasonableness of its decision.

VI. Analysis

A. *Standard of Review*

[41] The main issue in this appeal relates to the decision by the Divisional Court and the Court of Appeal not to undertake judicial review. As this is a discretionary decision, deference is to be shown (see *Strickland*, at para. 39). However, the exercise of discretion can be set aside when a judge “considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion” (*Matsqui Indian Band*, at para. 39). As I will explain, the Divisional Court and the Court of Appeal erred in their application of *Strickland* in that they acted on the basis of a “wrong principle” (*Matsqui Indian Band*, at para. 112, per Sopinka J.).

[42] Once it is determined that it is appropriate to undertake judicial review in this case, the issue arises whether the LAT adjudicator's reconsideration decision was reasonable. Per *Vavilov*, there is "a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions" (para. 16). That presumption is not rebutted here.

B. *The Existence of a Circumscribed Right of Appeal Does Not, on Its Own, Preclude Applications for Judicial Review*

[43] When the dispute arose in early 2011, mediation was a mandatory first step to challenge an insurer's denial of benefits. Both s. 281.1(2)(b) of the *Insurance Act* and s. 51(2) of the *SABS* provided for a 90-day extension of the limitation period after the mediator's report is released. Ms. Yatar undertook mediation in September 2012. When Ms. Yatar commenced her proceeding before the LAT in March 2018, the statutory scheme had been amended and provision was made for an appeal from a decision of the LAT on a matter under the *Insurance Act* on questions of law only.

[44] In the case at bar, the Divisional Court and the Court of Appeal held that a party can both exercise a statutory right of appeal and seek judicial review for questions outside the scope of the statutory right of appeal. Other courts have also determined that a statutory right of appeal does not alter the availability of judicial review (see *Smith v. The Appeal Commission*, 2023 MBCA 23, 479 D.L.R. (4th) 121; *Wongkingsri v. Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2022 ABQB 545, 61 Alta. L.R. (7th) 170; *Zarooben v. Workers' Compensation Board*, 2021 ABQB 232, 84 Admin. L.R. (6th) 96, aff'd 2022 ABCA 50, 95 Admin. L.R. (6th) 163).

[45] The question remains: what role does the right of appeal play in the exercise of discretion to undertake judicial review? In settling this question, it is important to have regard to first principles. In *Immeubles Port Louis Ltée v. Lafontaine (Village)*, 1991 CanLII 82 (SCC), [1991] 1 S.C.R. 326, this Court held that "[t]he principle that public authorities are subordinate to

the supervisory power of the superior courts is the cornerstone of the Canadian and Quebec system of administrative law. Such judicial review is a necessary consequence of the rule of law” (p. 360).

[46] The importance of judicial review was affirmed by this Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 27:

As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers.

[47] This Court held in *Vavilov*, at para. 52, that the legislative intent to restrict statutory rights of appeal does not, on its own, affect the availability of judicial review:

. . . the existence of a circumscribed right of appeal in a statutory scheme does not on its own preclude applications for judicial review of decisions, or of aspects of decisions, to which the appeal mechanism does not apply, or by individuals who have no right of appeal.

[48] This Court’s precedent contemplates a person pursuing both a statutory appeal on questions of law and judicial review on questions of fact and mixed fact and law. In such an instance, as set out in *Vavilov*, at para. 37, the questions of law being appealed would be subject to review on a standard of correctness (see also *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235), and questions of fact and mixed fact and law would be subject to review on a standard of reasonableness on judicial review (see *Vavilov*).

[49] A person has a right to seek judicial review, and “[t]o give courts a discretion not to hear judicial review applications because of their perception of the quality and quantity of internal reconsiderations would allow judicial discretion to trump [a] constitutional principle” (P. Daly, *A Culture of Justification: Vavilov and the Future of Administrative Law* (2023), at p. 226, note 94).

While there is discretion to hear the application on the merits and deny relief, this discretion does not extend to decline to consider the application for judicial review, as will be explained below.

[50] I would note recent jurisprudence from the Federal Court of Appeal as to the availability of judicial review where there is a privative clause, i.e. a clause that seeks to bar or restrict judicial review (see, e.g., *Canada (Attorney General) v. Pier 1 Imports (U.S.), Inc.*, 2023 FCA 209; *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161; *Democracy Watch v. Canada (Attorney General)*, 2023 FCA 39, 14 Admin. L.R. (7th) 42; *Democracy Watch v. Canada (Attorney General)*, 2022 FCA 208). But that is not the question at issue in this case. Accordingly, I leave that question for another day.

C. *The Exercise of Discretion To Grant Relief on Judicial Review*

[51] While there is a right to seek judicial review, it is open to the judge before whom judicial review is sought to decide whether to exercise his or her discretion to grant relief. This Court stated in *Strickland*, at para. 37, quoting *Minister of Energy, Mines and Resources*, at p. 90:

Judicial review by way of the old prerogative writs has always been understood to be discretionary. This means that even if the applicant makes out a case for review on the merits, the reviewing court has an overriding discretion to refuse relief Declarations of right, whether sought in judicial review proceedings or in actions, are similarly a discretionary remedy: “. . . the broadest judicial discretion may be exercised in determining whether a case is one in which declaratory relief ought to be awarded” [Emphasis added.]

[52] In *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 135, Rothstein J. stated:

The traditional common law discretion to refuse relief on judicial review concerns the parties’ conduct, any undue delay and the existence of alternative remedies: *Immeubles Port Louis Ltée v. Lafontaine (Village)*, 1991 CanLII 82 (SCC), [1991] 1 S.C.R. 326, at p. 364. As *Harekin [v. University of Regina]*, 1979 CanLII 18 (SCC), [1979] 2 S.C.R. 561, affirmed, at p. 575, courts may exercise their discretion to refuse relief to applicants “if they have been guilty of unreasonable delay or misconduct or if an adequate alternative remedy exists, notwithstanding that they have proved a usurpation of jurisdiction by the inferior tribunal or an omission to perform a public duty”. As in the case of interlocutory injunctions, courts exercising discretion to grant relief on

judicial review will take into account the public interest, any disproportionate impact on the parties and the interests of third parties. [Emphasis added.]

[53] In the case at bar, the Court of Appeal stated that “[t]he court’s discretion with respect to judicial review applies both to its decision to undertake review and to grant relief” (para. 44). This wording is unclear; thus, there is need for clarification.

[54] When an applicant brings an application for judicial review, a judge must consider the application: that is, at a minimum, the judge must determine whether judicial review is appropriate. If, in considering the application, the judge determines that one of the discretionary bases for refusing a remedy is present, they may decline to consider the merits of the judicial review application (*Strickland*, at paras. 1, 38 and 40; *Matsqui*, at para. 31). The judge also has the discretion to refuse to grant a remedy, even if they find that the decision under review is unreasonable (*Khosa*, at para. 135; *Strickland*, at para. 37, quoting *Minister of Energy, Mines and Resources*, at p. 90).

[55] The Court of Appeal initially found no reversible error in the Divisional Court’s decision to refuse to hear the judicial review application and agreed with the Divisional Court that: (i) there were alternative remedies, and (ii) the legislative scheme demonstrates “the legislative intent to limit access to the courts regarding these disputes” (para. 43). The Court of Appeal then went on to conduct a judicial review, as had the Divisional Court.

[56] Per *Strickland*, the exercise of discretion requires the court to determine the appropriateness of judicial review: “The court should consider not only the available alternative, but also the suitability and appropriateness of judicial review in the circumstances. In short, the question is not simply whether some other remedy is adequate, but also whether judicial review is appropriate. . . . This balancing exercise should take account of the purposes and policy considerations underpinning the legislative scheme in issue . . .” (paras. 43-44).

[57] Respectfully, the Court of Appeal erred in its application of the *Strickland* factors. As I will explain, there is no proper basis to infer legislative intent to eliminate judicial review for issues (of fact and mixed fact and law) outside the scope of a statutory appeal. Furthermore, there was no adequate alternative remedy for Ms. Yatar on questions of fact and mixed fact and law.

[58] The Court of Appeal erred by holding that the limited right of appeal reflected an intention to restrict recourse to the courts on other questions arising from the administrative decision, and that judicial review should thus be rare. The legislative decision to provide for a right of appeal on questions of law only denotes an intention to subject LAT decisions on questions of law to correctness review. The idea that the LAT should not be subject to judicial review as to questions of facts and mixed facts and law cannot be inferred from this.

[59] The respondent TD Insurance argues that the legislative scheme and its amendments in 2016 reflects a policy choice by the legislature to severely limit the courts' involvement in accident benefits disputes: “Section 11(6) of the *LAT Act* restricts appeals to questions of law. . . . For LAT decisions made under nearly twenty other statutes, the legislature has made appeals available on all questions” (R.F., at paras. 62-63). TD Insurance further submits that “applying a deferential standard of review (reasonableness) to factual and mixed questions arising out of LAT decisions concerning SABS would not be appropriately respectful of the legislature’s institutional design choices” (para. 84).

[60] With respect, I do not agree. The legislature could have decided to encompass all types of errors in the right to appeal, but it did not. Moreover, s. 2(1) of the *Judicial Review Procedure Act* preserves the right of litigants to seek a judicial review “despite any right of appeal”. Errors of fact or mixed fact and law, thus, are not subject to a correctness standard of review. With that in mind, proceeding with judicial review of questions of fact or mixed fact and law is fully respectful of the legislature’s institutional design choices.

[61] In *Vavilov*, this Court held that “because judicial review is protected by s. 96 of the *Constitution Act, 1867*, legislatures cannot shield administrative decision making from curial

scrutiny entirely” (para. 24). Professor Paul Daly argues that “[w]here the judicial review jurisdiction of the courts *has been* successfully ousted by statute . . . the legislature has provided a particular channel for oversight of the legality, rationality and procedural fairness of administrative action” (*Understanding Administrative Law in the Common Law World* (2021), at p. 188 (emphasis in original)). In other words, there was an appropriate alternative forum or remedy.

[62] The statutory right to appeal and the LAT adjudicator’s reconsideration decision do not constitute adequate alternative remedies. The right to appeal under s. 11(6) of the *LAT Act* is restricted to errors of law only. Ms. Yatar raises errors of fact or mixed fact and law. Review of these questions is not available under the statutory right of appeal.

[63] The access to internal reconsideration cannot be an adequate alternative remedy, as the reconsideration decision itself is the subject of the review. Alternatives do exist where internal review processes have not been exhausted or where there is a statutory right to appeal that is not restricted, such that questions of law, fact, and mixed fact and law could be considered on appeal. But, that is not so here.

[64] This Court in *Strickland*, at para. 43, also emphasizes the appropriateness of judicial review in the circumstances, referring to a “balancing exercise”:

The categories of relevant factors are not closed, as it is for courts to identify and balance the relevant factors in the context of a particular case: *Matsqui*, at paras. 36-37, citing [*Minister of Energy, Mines and Resources*], at p. 96. Assessing whether there is an adequate alternative remedy, therefore, is not a matter of following a checklist focused on the similarities and differences between the potentially available remedies. The inquiry is broader than that. The court should consider not only the available alternative, but also the suitability and appropriateness of judicial review in the circumstances. In short, the question is not simply whether some other remedy is adequate, but also whether judicial review is appropriate. Ultimately, this calls for a type of balance of convenience analysis: *Khosa*, at para. 36; *TeleZone*, at para. 56. As Dickson C.J. put it on behalf of the Court: “Inquiring into the adequacy of the alternative remedy is at one and the same time an inquiry into whether discretion to grant the judicial review remedy should be exercised. It is for the courts to isolate and balance the factors which are relevant . . .” [*Minister of Energy, Mines and Resources*], at p. 96). [Emphasis added.]

[65] It has been argued by both respondents that judicial review was not appropriate in the circumstances, as the legislative intent was to “streamline dispute resolution and reduce costs” (R.F., TD Insurance, at para. 61). Respectfully, I do not agree. Judicial economy is a legitimate concern. However, the countervailing consideration is to ensure that those whose interests are being decided by a statutory delegate have a meaningful and adequate means to challenge decisions that they consider to be unreasonable having regard to their substance and justification, or were taken in a way that was procedurally unfair.

[66] Thus, in this case, the elements of the reconsideration decision that are not covered by the limited right of appeal should be judicially reviewed.

[67] I turn now to whether the LAT adjudicator’s decision was reasonable.

D. *The LAT Adjudicator’s Decision Was Unreasonable*

[68] Ms. Yatar received a letter from the insurer in January 2011 advising her that she would not receive further IRBs, housekeeping and home maintenance benefits, as she had not submitted a disability certificate. Attached to the letter was a dispute resolution form.

[69] Ms. Yatar provided the disability certificate and per the letter she received from the insurer in February 2011, her IRBs were reinstated, but her housekeeping and home maintenance benefits were denied. Following another medical examination, the insurer denied further IRBs as set out in the letter of September 2011.

[70] Ms. Yatar argues that the letters of February and September 2011 are not valid denials as no dispute resolution form was attached. While the LAT adjudicator also arrived at that conclusion, Ms. Yatar submits that the LAT adjudicator erred in finding that the letter from January was a valid denial.

[71] Per *Vavilov*, two types of flaws can render a decision unreasonable: first, a “failure of rationality internal to the reasoning process”, and second, “when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it” (para. 101). The LAT adjudicator’s reconsideration decision should be “approached as an organic whole, without a line-by-line treasure hunt for error” (*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at para. 54).

[72] The LAT adjudicator relied on *Smith v. Co-operators* and concluded from the affidavit adduced by Ms. Yatar that there was an “implicit acceptance of the denials effective January 4, 2011” (reconsideration decision, at para. 15) and that her counsel should have been aware of the two-year limitation period, but that nothing was done to protect her rights.

[73] At the time, both s. 281.1(2)(b) of the *Insurance Act* and s. 51(2) of the *SABS* provided for a 90-day extension of the limitation period after the mediator’s report was released. The LAT adjudicator took into account the fact that Ms. Yatar commenced the mediation process after receiving the September letter. The LAT adjudicator had regard to the letters as well as the mediation process, and concluded that “[t]he limitation period lapsed April 14, 2014, [at the end of] the statutory ninety-day extension following the report of the mediator” (preliminary decision, at para. 26, aff’d in reconsideration decision, at para. 17).

[74] However, the LAT adjudicator failed to have regard to the effect of the reinstatement of the IRBs between February and September. The LAT adjudicator did not consider earlier tribunal decisions, some of which had held that when an applicant’s benefits are reinstated, the limitation period can only be triggered when they are validly terminated again (see *Veldhuizen v. Coseco Insurance Co.*, 1995 ONICDRG 144 (CanLII); *Rudnicki v. Certas Direct Insurance Co.*, 2001 ONFSCDRS 60 (CanLII)).

[75] It is not in question that Ms. Yatar initiated mediation in September 2012. The mediation took place between June 18, 2013 and January 14, 2014. On January 14, 2014, the mediator released his report. However, s. 281.1(2)(b) of the *Insurance Act* and s. 51(2) of the *SABS*

(as they existed at the time) do not *trigger* a 90-day limitation period from the release of the mediator's report. Rather, they provide for an *extension* of the two-year limitation period from the mediator's report. In other words, it is arguable that there still needed to be a valid denial of the IRBs to start the clock running. I do not purport to decide this question; it is one properly to be decided by the LAT.

[76] The LAT adjudicator failed to take into account relevant legal constraints. In light of this, his decision is unreasonable.

VII. Conclusion

[77] The appeal is allowed. Having concluded that the reconsideration decision is unreasonable, I send the matter back to the LAT adjudicator to consider the issue of the effects of the reinstatement of benefits on the validity of the initial denial and, thus, on the limitation period.

[78] As Ms. Yatar succeeded on the jurisprudential question relating to the exercise of discretion to undertake judicial review when there is a limited statutory right of appeal, and in the judicial review, she is awarded her costs in this Court and the courts below payable by TD Insurance.

Appeal allowed with costs.

Solicitors for the appellant: Dewart Gleason, Toronto.

Solicitors for the respondent TD Insurance Meloche Monnex: McCarthy Tétrault, Toronto.

Solicitor for the respondent the Licence Appeal Tribunal: Tribunals Ontario — Legal Services Branch, Toronto.

Solicitors for the intervener the Attorney General of Canada: Department of Justice Canada — Ontario Regional Office, National Litigation Sector, Toronto; Department of Justice Canada — Quebec Regional Office, National Litigation Sector, Montréal.

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

Solicitor for the intervener the Attorney General of Quebec: Ministère de la Justice du Québec, Québec.

Solicitor for the intervener the Attorney General of British Columbia: Ministry of the Attorney General, Legal Services Branch, Vancouver.

Solicitor for the intervener the Attorney General of Alberta: Alberta Justice, Legal Services Division — Constitutional and Aboriginal Law Team, Edmonton.

Solicitors for the intervener the Income Security Advocacy Centre: Income Security Advocacy Centre, Toronto; Clinic Resource Office — Legal Aid Ontario, Toronto.

Solicitor for the intervener the Advocacy Centre for Tenants Ontario: Advocacy Centre for Tenants Ontario, Toronto.

Solicitor for the intervener the Canadian Telecommunications Association: Paul Daly Law, Ottawa.

Solicitors for the intervener the Insurance Bureau of Canada: Lenczner Slaght, Toronto.

Solicitors for the intervener the Forest Appeals Commission: Arvay Finlay, Victoria.

Solicitor for the interveners Aboriginal Council of Winnipeg, Inc. and the Social Planning Council of Winnipeg: Public Interest Law Centre, Winnipeg.

Tab 109

Sugar v. Peat Marwick Ltd. (Ont. H.C.J.), 1988 CanLII 4635 (ON SC)

Source:	Superior Court of Justice
Date:	1988-12-07
Other citations:	66 OR (2d) 766 — [1988] CarswellOnt 874 — [1988] OJ No 1959 (QL)
Citation:	Sugar v. Peat Marwick Ltd. (Ont. H.C.J.), 1988 CanLII 4635 (ON SC), < https://canlii.ca/t/g1dm4 >, retrieved on 2026-03-23

**Sugar et al. v. Peat Marwick Ltd. et al.
Indexed as: Sugar v. Peat Marwick Ltd.
(Ont. H.C.J.)**

**66 O.R. (2d) 766
[1988] O.J. No. 1959
Action No. 3197/85**

**ONTARIO
High Court of Justice
Southey J.
December 7, 1988.**

Torts -- Deceit -- Receiver-manager acting as bank's agent making innocent misrepresentation -- Employees of bank, knowing representation to be false, remaining silent -- Bank guilty of fraud.

In August of 1983, a bank, which had lent money to a company, learned through two of its inspectors that the amount of the accounts receivable was overstated in the company's records. In September the bank appointed a receiver-manager. S., relying on the company's records, invested money in the purchase of the company from the receiver-manager by a new company in which S. had part ownership. S. was advised to verify the statements but did not do so. There was no evidence that the receiver-manager knew of the false statement of accounts receivable. The new company failed, and S.'s investment was lost. In October, 1984, S. learned of the bank's inspection of August, 1983, and brought an action against the receiver-manager and the bank.

Held, the bank was guilty of fraud in remaining silent and permitting S. to rely on the statements of the receiver-manager acting as the bank's agent, when employees of the bank knew the statements to be false.

S.'s negligence in failing to verify the statements was no defence; nor was her delay, since she did not learn of the bank's knowledge until October, 1984. S. was entitled to recover the full amount of her investment before that date.

ACTION for damages for deceit.

Cases referred to Lloyd's Bank Ltd. v. Bundy, [1975] 1 Q.B. 326; Woods v. Martin's Bank Ltd., [1959] 1 Q.B. 55; Standard Investments Ltd. v. C.I.B.C. (1985), [1985 CanLII 164 \(ON CA\)](#), 52 O.R. (2d) 473, 22 D.L.R. (4th) 410, 30 B.L.R. 193 [leave to appeal to S.C.C. refused 53 O.R. (2d) 663n, 65 N.R. 78 n]; Doyle v. Olby (Ironmongers) Ltd., [1969] 2 Q.B. 158 Rules and regulations referred to Rules of Civil Procedure, O. Reg. 560/84, rule 5.02(2)

J.B. Berkow and R.L. Youd, for plaintiffs.

J.D. Crane, Q.C., and J.P. Hoffman, for defendants.

SOUTHEY J.:-- The plaintiffs sue to recover an investment of about \$250,000 in a business that failed. Their investment was in Dimension Furniture Ltd. ("Newco"), a corporation which purchased the assets of Dimension Furniture Design Canada Ltd. ("Oldco") in September, 1983, from the defendant Peat Marwick Limited ("Peats") as receiver and manager and trustee in bankruptcy of Oldco. The defendant bank had appointed Peats as receiver and manager and was the petitioning creditor in the bankruptcy. Newco continued the furniture manufacturing business of Oldco for about 18 months, but without success. Newco went into bankruptcy in June, 1985, again on a petition of the bank. The plaintiffs lost all the money they had invested in Newco.

The plaintiffs claim that the bank had knowledge at the time of the sale to Newco of a substantial falsification of the books and records of Oldco pertaining to the accounts receivable of the company. It is common ground that the bank gave no warning of any such falsification to Stanley Sugar ("Sugar"). Sugar is the husband of the plaintiff, Sandra Sugar, and he had acted on behalf of his wife in investigating Oldco and in negotiating the purchase of its assets. Newco was a company incorporated for the purpose of purchasing the assets of Oldco and continuing its business. Sandra Sugar invested money in Newco. The corporate plaintiff, 582087 Ontario Limited, was incorporated after the purchase. It is wholly owned by Sandra Sugar and assumed her investment in Newco. The plaintiffs claim that they would not have invested in Newco, if the bank had disclosed to Sugar its knowledge of the falsifications.

The falsifications resulted in a gross overstatement of the accounts receivable of Oldco in statements and reports prepared by or for Jacqueline and Thomas Klein, the principal shareholders and operators of Oldco. These statements were subsequently used by Peats in its reports and statements at the time of the sale of assets.

The issues

Among the grounds on which the plaintiffs' claim is based is the allegation that the conduct of the bank and Peats amounted to a fraudulent or negligent misrepresentation as to the state of the accounts receivable. Alternatively, even if there was no misrepresentation, the plaintiffs claim that the bank was guilty of a breach of a fiduciary duty owed by it to the plaintiffs as valued customers. It is further submitted that the bank is liable simply because it remained silent at the time of the purchase without disclosing facts which would have led the Sugars to refrain from becoming involved in the purchase.

The issues are complicated by the fact that the Kleins, who were responsible for the falsifications, continued in the business until August, 1984, as owners of 50% of the shares of Newco and managers of its operations. In addition, and perhaps of greater significance, Sugar admittedly became aware of the falsifications in January, 1984, yet continued to cause the plaintiffs to increase their investment in Newco, and the bank to increase its loans to Newco, without making the claims now asserted in this action. These claims were not made until this action was commenced in May, 1985.

Sugar did not inform the bank of his discovery of the falsifications until a meeting on October 18, 1984. It was at that meeting, according to Sugar, that a statement was made by Peter De Guerre, an employee of the bank, which revealed to Sugar for the first time that the bank had been aware all along of the falsifications. Only then, Sugar says, did Sugar become aware of the actionable conduct of the bank. The claim made at that time was for an adjustment of the purchase price. That was a contractual claim and could be asserted only by Newco. Newco is now bankrupt, and the claims in the action are on behalf of the investors in Newco, and are founded primarily in tort or breach of fiduciary duty.

The bank denies having knowledge of the falsifications at the time of the purchase. The bank also denies that any representation as to the validity of the accounts receivable of Oldco was made by Peats or the bank, or was relied upon by Sugar, or that there was any special relationship between the bank and the Sugars which gave rise to a fiduciary duty by the bank to the plaintiffs. The bank further relies on an "As is, Where is" clause in the agreement of purchase and sale, which confirmed that Peats gave no warranty or condition with respect to the assets sold. Finally, the bank asserts that the Sugars' delay in informing the bank of the falsifications gives rise to an estoppel.

What knowledge and belief as to the falsifications did the bank have at the time of the purchase by Newco?

The bank became concerned in August, 1983, about the safety of its loan to Oldco, which then exceeded \$600,000. An important part of the bank's security was the accounts receivable of Oldco, which had been reported by the Kleins as having a face value of \$592,119. On August 18, 1983, De Guerre and Klaus Spies, another inspector in the special loans department of the bank, attended at the premises of Oldco. They examined the files of the company relating to accounts receivable and discovered, from spot checks made within a period of several hours, that there was a substantial number of cases in which the price of goods ordered had been entered in the accounts receivable, when the goods had not yet been manufactured, let alone delivered. These entries reflected situations in which the customers could not have been under any legal obligation to pay for the goods, so that the accounts receivable had not yet come into existence. The practice was described as "pre-billing". Its effect was to overstate the amount of the accounts receivable, and De Guerre considered it to be fraudulent.

Because he had made only a cursory examination, De Guerre could not have known with any certainty the extent of the falsifications due to pre-billing. The evidence is conflicting as to what he suspected or believed the extent to be. Sugar's evidence is that De Guerre said at the meeting on October 18, 1984, that he could find valid accounts receivable in August, 1983, of only \$150,000 or so. De Guerre's evidence was that Sugar's recollection and notes of what he said at the meeting were inaccurate, and that what he, De Guerre, had said was that the bank inspectors thought the accounts receivable were overstated by \$100,000 to \$150,000. As accounts receivable of almost \$600,000 had been reported to the bank by the Kleins, this would have left valid accounts receivable of \$450,000 to \$500,000.

The evidence of Spies, the other bank inspector who accompanied De Guerre on the visit to Oldco on August 18, 1983, confirmed that they had found a number of instances of pre-billing. In a

memorandum written in April, 1985, he said they had estimated that receivables were overstated by about \$150,000. On the other hand, he acknowledged that he had made no effort to correct a report dated August 25, 1983, written by the acting manager of the Alness & Supertest branch at which the Oldco account was located, that some \$200,000 of the listed receivables were suspected to be merely orders in hand, and that the real value of the receivables "on a stress collection basis" was estimated at some \$150,000. Spies accepted that this report was probably based on information received from him. I assume that the valuation of the accounts receivable on a "stress collection basis" would be considerably lower than that at which they would be included in a sale of the assets of the company as a going concern.

I find as a fact on the foregoing evidence that Spies and De Guerre believed, as a result of their investigations at Oldco on August 18, 1983, that the accounts receivable reports and records of Oldco had been falsely inflated by as much as \$200,000.

It is undisputed that Sugar was given no warning by the bank of any suspected falsification in the accounts receivable records of Oldco before he arranged for the purchase of the assets of Oldco. The purchase by Newco, which involved the investment of funds by Sandra Sugar, avoided for the time being a loss to the bank in the bankruptcy of Oldco, which Spies estimated might have been as much as \$200,000.

The difficult legal issue in the case is whether the silence of the bank regarding its knowledge and belief as to the falsifications constituted in the circumstances a misrepresentation to Sugar, on which he relied, respecting the validity of the accounts receivable entries. The determination of this question requires an examination of the roles played by Sugar and Peats.

Sugar's conduct and capabilities and his reliance on Peats

Sugar was a chartered accountant and a sophisticated businessman. He had been considering the purchase of another company in August, 1983, when his brother Harvey, who was engaged in a branch of the furniture business, suggested he get in touch with the Kleins. The Kleins told Sugar that they had a very viable business, but they needed someone to act as financial controller and to provide them with additional working capital of \$200,000 or more. One of the bank's documents contained the statement that Sugar and his brother Harvey had reportedly had previous success in restoring the health of ailing businesses.

Sugar was provided with the financial statements of Oldco for the past few years, and he prepared an analysis of them. He said he did not go behind the statements and look at the company's books. His analysis showed a company that was recovering from a disastrous loss, and appeared to have "turned the corner". He decided against investing in Oldco in August, however, because its debt load was too great. The investigations of Oldco by Sugar and the discussions with the Kleins in August, 1983, took place over 10 to 12 days.

Sugar was approached again by the Kleins in mid-September. They told him their relationship with the bank was deteriorating, and that the bank had threatened to call their loan and appoint a receiver. Sugar told them he would be interested in making a deal to purchase the assets, if a receiver was appointed. Peats was appointed receiver and manager on September 14th, and on September 15th, Sugar, accompanied by his lawyer and a business advisor, met with the Kleins to discuss the purchase of the assets of Oldco. The meeting took place at the Toronto General Hospital, where Mrs. Klein was receiving treatment. The discussions contemplated the formation of a new company, in which the Kleins would have a 50% interest, after repayment of the investment to be made by the Sugars. The Kleins would continue to direct the sales and manufacturing aspects of the business. The Kleins told Sugar that they thought a price of \$450,000 would be required for acquisition of the assets.

On September 20th, Sugar met with Joseph Atkins, the officer of Peats in charge of the receivership of Oldco, at the offices of the bank's solicitors, Strathy, Archibald and Seagram. Sugar and Atkins reached a firm agreement as to the basis of a purchase of the assets of Oldco. The total price would be \$450,000, of which \$65,000 would be paid in cash on closing, with the balance to be financed by loans from the bank. The portion of the purchase price allocated to accounts receivable was \$330,000, with that amount to be adjusted up or down on closing in accordance with any variation in the book value of the accounts receivable from a total of \$400,000. Atkins insisted that there be no delay in concluding an agreement. He said that he must have an agreement in writing by the end of the week, Friday, September 23rd, or he would close the business and liquidate the assets on Monday, September 26th.

A written agreement was prepared by Andrew Brands of the Strathy firm for the sale of the assets by Peats as receiver and manager and trustee in bankruptcy of Oldco to Newco, a company to be incorporated. The agreement was made as of September 23, 1983, and was signed on that day on behalf of Newco by Jacqueline Klein, as president, and Sugar as general manager. Jacqueline Klein and Thomas Klein consented in writing to the terms of the agreement. The purchase was completed in escrow on September 26, 1983. The bank entered into a loan agreement with Newco on that date, to which the Kleins and Stanley, Harvey and Sandra Sugar consented. The Kleins executed a formal acknowledgment under seal acknowledging that Newco was purchasing the accounts receivable of Oldco based on the representations and warranties of the Kleins, that the collectable portion of such accounts receivable would be not less than \$300,000, and that the Sugars were loaning money to and investing money in the capital of Newco based on such representations and warranties. The Kleins agreed to indemnify Newco for any amount by which the collectable portion of the accounts receivable was less than \$300,000, or, alternatively, to indemnify Stanley and Sandra Sugar for 50% of such deficiency.

It was emphasized in the evidence that there was no suggestion, prior to closing, of any problem with the accounts receivable, or of any pre-billing or fraud. Sugar spent several days at the Oldco premises prior to closing, but said he was unable to examine the accounts receivable ledger because it was in the possession of the receiver and manager or of Mrs. Klein in the hospital. All witnesses agreed that the books and records were in bad shape. The ledgers were written up only to July 31st. The bookkeeper was on holidays. Sugar telephoned some of the Oldco customers to determine the outstanding balances of their accounts, but many would give him no information.

Sugar received from John Riviere of Peats a series of type-written documents marked exs. A to F, prepared by Peats as part of their assessment of the affairs of Oldco done by Peats for the bank. Exhibit A showed accounts receivable (unaudited) at July 31, 1983, in an estimated amount of \$592,000. The accounts receivable values at August 19, 1983, were estimated in ex. B at \$505,000 for book value and \$300,000 for realizable value. In the cash flow projections for the period ending February 28, 1984, cash receipts from accounts receivable were shown at \$475,000, which allows a loss of \$30,000 for doubtful accounts. Sugar testified that he relied on these documents as showing what Peats had learned about Oldco. I accept that evidence as meaning that he relied on the statements as showing what Peats had found in the books and records of Oldco.

Sugar also received from Peats on September 23rd, the day the agreement was signed, two untyped lists of the outstanding balances for all customers to September 14, 1983. These were prepared by the Kleins or employees of Oldco. They showed total balances ranging from \$400,000 to \$410,000. I am satisfied that Sugar relied on these statements as well as accurately reflecting the books and records of Oldco.

All of the statements provided to Sugar by Peats were based on the accounting records of Oldco which De Guerre and Spies knew had been falsified.

The accounts receivable were adjusted at closing to \$405,955 in a statement prepared by Peats for the purpose of determining the adjusted purchase price. The escrow was lifted on September 28th, notwithstanding a disagreement as to the manner of adjusting the accounts receivable. By letter of that date, Sugar's solicitors proposed that the matter be settled in one of two ways:

- (i) adjustments be made from an opening book value of accounts receivable of \$402,883.00 which is the assumption that the Purchaser made at the time of entering into the agreement of purchase and sale; or
- (ii) an accurate determination be made of the accounts receivable by way of circulating such accounts receivable, verifying accounts receivable with the Purchaser accepting all risks of collectability being the rationale for the discrepancy between the \$400,000.00 book value and the \$330,000.00 allocation to accounts receivable.

The letter concluded with these prophetic words:

If neither of the above alternatives are acceptable to the Vendor we once again stress to you difficulties will arise when the adjustments are to be finalized.

It is clear that Atkins was pressing Sugar to proceed with extraordinary haste to make the purchase, and that Sugar did so against the specific advice of his accountant that he carefully check the accounts receivable. Sugar was keen to complete the deal and get on with the business of Newco. Any break in the continuity of operations would probably have caused costly problems with customers, suppliers and employees. Any delay in the sale would have resulted in a rapid decline in the value of the assets. It was in the interests of both sides to avoid delay.

The role of Peats

There were no significant direct communications between the bank and Sugar prior to the purchase. Sugar was dealing with Peats, and their solicitors (who were the bank's solicitors) and with the Kleins. The role of Peats' employees requires careful consideration, not only because they were the persons communicating with Sugar, but also because they made reports to the bank, which both De Guerre and Spies say they relied upon as satisfying their concerns about the accounts receivable, and provide the reason why they gave no warning to Sugar of the falsifications.

Peats had been instructed on the day after the visit by De Guerre and Spies to make a viability study of Oldco. The representatives of Peats were told that the bank's inspectors had been unable to find some of the supporting documentation for the accounts receivable and Peats was asked, while its representatives were there, to check for missing documents, with particular attention being paid to two large accounts, De Boers and the Art Shoppe. On the basis of a random check one afternoon of De Boers and Art Shoppe files, and those of 10 to 20 other customers by Riviere, it was reported by Peats to the bank that there were no documents missing in connection with the accounts receivable. The significance of this report is greatly reduced by the fact that no one at the bank had told any employee of Peats that the bank had found the falsification of records by pre-billing. Peats was told only that documents appeared to be missing. All Riviere did was to check that the normal supporting documents were present. If he had been told of the discovery by De Guerre and Spies of the falsification records, he would no doubt have scrutinized the dates in the documents.

I cannot believe, in these circumstances, that the report by Riviere of Peats that there were no documents missing could have led De Guerre and Spies to believe that they had been mistaken in thinking that they had discovered fraudulent entries, or otherwise affects the legal significance of their failure to warn Sugar of the falsifications.

Did the bank make a misrepresentation?

The result of my findings is this: that the bank stood by and let the Sugars invest in Newco without warning them of the bank's discovery that the books of Oldco had been falsified. Statements containing the false total of accounts receivable were furnished by Peats to Sugar, and were relied on him in proceeding with the investment. There is no evidence that Peats knew them to be false. If Peats had known them to be false, the use of those statements would have constituted a fraudulent misrepresentation by Peats.

Peats was initially appointed by the bank to make investigations of Oldco, and then to monitor its affairs. Later, it was appointed by the bank as receiver and manager of the undertaking, property and assets of Oldco under the security held by the bank. Peats was being paid by the bank, and the bank's solicitors acted for Peats in connection with the sale of assets. There is evidence that Peats acted on the instructions of the bank, and no evidence of Peats receiving instructions from any other creditor. Although Peats was not an agent of the bank in its capacity as trustee in bankruptcy, I am satisfied that one of the capacities in which Peats was acting in dealing with Sugar was as agent of the bank. De Guerre and Spies must have known that Peats was providing Sugar with the statements which the bank knew was false. In the circumstances, in my judgment, the bank was guilty of fraud.

The relevant law is stated as follows in Chitty on Contracts, 25th ed. (1983), vol. I, p. 228:

Again, if one agent makes a statement honestly believing it to be true, but another agent or the principal himself knows that it is not true, knows that the statement will be or has been made, and deliberately abstains from intervening, the principal will be liable. In these circumstances the party with the guilty knowledge can himself be treated as being guilty of fraud.

Sugar's knowledge and lack of care

I accept the evidence of Sugar that he was unaware of the falsification of the accounts receivable records at the time the purchase of assets was completed, and that he did not find out about it until late December, 1983.

On the other hand, it is clear that Sugar was being advised to check the accounts receivable before completing the transaction. According to L.S. Rosen, a chartered accountant called to give evidence on behalf of the plaintiffs, it would have been an obvious thing to do in the circumstances. But Sugar did not do it. As Mr. Crane pointed out, Sugar deliberately took a chance on the validity of the accounts receivable. He may have been negligent in so doing, but it is no defence to the claim for fraud against the bank that he might have discovered the falsity by the exercise of reasonable care (Chitty on Contracts, p. 223).

The materiality of the inducement

The evidence as to the extent of the falsifications is conflicting. Sugar calculated them to be \$289,464, leaving a balance of genuine accounts receivable at closing of only \$116,491. These figures are quite inconsistent with a letter written by Sugar's solicitor, dated December 16, 1983, informing the bank's solicitors that:

... it appears that the accurate calculation of the accounts receivable that were acquired by Dimension Furniture Ltd. ... was \$333,313.00. As of November 30, 1983, \$189,944.00 of the said amount was collected and the balance is still outstanding.

It would appear from that letter that the falsifications would not have totalled more than about \$200,000. The expert witnesses who testified on this subject -- L.S. Rosen for the plaintiffs and Michael Beber for the defendants -- gave totals in the range of \$200,000 to \$290,000.

It is unnecessary to determine the extent of the falsifications, provided it was such that Sugar, if he had known of it, would not have caused his family to invest in Newco. I am satisfied from the evidence that the falsification totalled at least \$150,000, and that Sugar would not have proceeded with the investment if he had known of them. As was explained by L.S. Rosen, if Sugar had known of the true state of the accounts receivable, it would have appeared to him not that Oldco had "turned the corner", but that Oldco remained a very sick company that would not have been a reasonable investment.

Sugar's delay in reporting the fraud to the bank

After the purchase by Newco was completed, and Sugar had taken over control of the accounting of the business, he instructed that a new list of accounts receivable be prepared in which each invoice number was listed. When this was completed in late October or early November, 1983, it showed a total at September 30, 1983, of \$349,072, which was more than \$50,000 less than the figure used at the closing on September 28, 1983. This total was further reduced later by Mrs. Klein to \$335,935. Sugar accepted Mrs. Klein's explanation that the books had not been kept up to date, and that the figure used on closing was simply inaccurate. Sugar informed the bank of the discrepancy in the accounts receivable total, and arranged for the bank to change the margin requirements for the Newco loan, because the accounts receivable were less than what they were believed to have been at the time of closing.

Sugar's evidence is that he did not discover the existence of the falsification of the accounts receivable until the latter part of December, 1983, when the Kleins were away on vacation. Sugar did some "digging" at that time, and found from a partial analysis that there was pre-billing to the extent of \$100,000 to \$150,000. He did not confront the Kleins with his discovery immediately upon their return, because he needed their help in operating the enterprise which he was struggling to keep alive. He finally confronted them with the pre-billing at a meeting on January 30, 1984, in the presence of lawyers for both Sugar and the Kleins, and Mrs. Klein's father, who had invested in the business. There was no denial by the Kleins of the falsification of accounts receivable records. Mrs. Klein's father left the meeting in tears.

Despite the discovery of what is now regarded as massive fraud, Sugar felt it was necessary for him to live with the Kleins, because he had no one to take over the production and sales aspects of the business. Instead of demanding their withdrawal from Newco, he told them they must somehow get the money back into the business. He gave them two to three months to come up with a viable solution. Sugar thought that Mrs. Klein might be able to "pull a rabbit out of a hat".

The contributions of the Kleins to the business went from bad to worse in the following months, and, by May, Sugar was negotiating with them to withdraw from the business. These negotiations finally resulted in an agreement made as of August 3, 1984, between the Kleins, Sugar, Newco and Harvey Sugar, a brother of Stanley, who had invested money in Newco. The agreement contained the immediate resignation of the Kleins as officers, directors and employees of Newco, and a non-competition agreement by the Kleins. The Kleins agreed to pay \$50,000 to Harvey Sugar, whereupon they would be released from their indemnity agreement regarding the accounts receivable. They also agreed not to withdraw their guarantee of the indebtedness of Newco to the bank until they paid the \$50,000 to Harvey Sugar.

The Kleins ceased to be involved in the operation of Newco after August 3, 1984, and a person knowledgeable about the furniture manufacturing business was brought in as general manager. The Kleins never paid to Harvey Sugar any part of the \$50,000 provided for in the agreement of August 3, 1984, so that the release of the Kleins from the claims under the indemnification agreement respecting accounts receivable was never effective. No money was ever recovered from the Kleins under that agreement, because they became bankrupt.

During all this time, however, the bank had not been informed of the discovery by Sugar of extensive pre-billing. Sugar said he did not do so, because this would have revealed to the bank that the financial condition of Newco was much worse than had been indicated by the statements produced at the time of closing, and might have resulted in the bank's calling the loan to Newco and putting Newco out of business. What Sugar did not know until the meeting on October 18, 1984, was that the bank had been aware of the pre-billing since De Guerre and Spies visited Oldco on August 18, 1983.

The bank called the Newco loan on November 5, 1984, shortly after Sugar told it of the falsifications. The bank instructed Ernst & Whinney Inc. to conduct an investigation of Newco's financial position, including a review of the accounts receivable purchased by Newco from Peats, to determine, if possible, whether certain accounts receivable were inaccurately stated, as alleged by Sugar. Meanwhile the bank's solicitors continued to deny all allegations made against the bank.

The Ernst & Whinney report, dated December 17, 1984, concluded from a "cursory review" that the receivables as of June 30, 1983, might have been overstated, and suggested that further evidence might be obtained. Mr. W.C. Simpson, superintendent, special loans department of the bank interpreted this somewhat cautious report as saying that there had been fraud perpetrated by the principals of Oldco relating to the receivables, and that Sugar's claims were basically correct.

The bank did not follow up the suggestion of Ernst & Whinney to obtain further evidence, because, according to the evidence of Mr. Cameron of the special loans department, it would serve no good purpose to do so. He said that knowledge as to the exact amount of the discrepancy did not matter, if there was a problem.

The bank did not respond to Sugar's claim for an adjustment in the price paid for the assets of Oldco, but did increase its advances to Newco by \$250,000. As a condition of this increase, the Sugars were required to invest an additional \$30,000 in Newco. This brought their total investment to \$245,000, which is the principal amount claimed in this action.

The action was commenced by statement of claim dated May 23, 1985. The bank responded with a demand for payment, dated June 12, 1985. Ernst & Whinney were appointed as receiver and manager of the undertaking of Newco on June 26, 1985. A petition for a receiving order was filed on June 25, 1985.

The essential element in the claim against the bank for damages for fraudulent misrepresentation is the bank's knowledge, through De Guerre and Spies, of the fraudulent conduct of the Kleins. I accept the evidence of Sugar that he was unaware of the bank's knowledge of the fraud by the Kleins until October 18, 1984. It was, of course, unnecessary for Sugar then to confront the bank with his discovery of its complicity in the fraud, because he had learned of the bank's knowledge from De Guerre, an employee of the bank. I accept the evidence of Sugar that De Guerre was incredulous that Sugar had not known all along of the fraudulent conduct of the Kleins in inflating the accounts receivable, as had been discovered by De Guerre and Spies in short order on August 18, 1983.

In my opinion, the delay of the Sugars after October 18, 1984, in commencing this action does not give rise to any bar to the action by way of estoppel or otherwise. The claim made initially by the Sugars was for an adjustment in the purchase price paid by Newco for the assets of Oldco. The bank made no response to this claim, but co-operated by extending further credit to Newco in hopes that the ill-starred venture could be nursed back to success. Nor does the delay cast doubt on the factual basis of Sugar's claim that he relied on a representation by the bank as to the validity of the accounts receivable. Until Sugar became aware of the bank's knowledge of the inflation of the accounts receivable by the Kleins, Sugar had no reason to suppose that the misrepresentation by the bank was other than innocent.

Different considerations apply in respect of Sugar's knowledge of the fraud by the Kleins. Sugar was aware of pre-billing by the Kleins in January, 1984, but did not inform the bank of the pre-billing until October, 1984. It may be that the bank and the Kleins were joint tortfeasors. In that event, if the Sugars had released the Kleins from liability under the agreement of August 3, 1984, the bank might also have been released. No release of the Kleins occurred, however, because the Kleins never paid to Harvey Sugar any part of the sum of \$50,000 specified in the agreement of August 3, 1984.

Breaches by Newco of its loan agreement

Mr. Crane submitted that the bank had a good defence to the plaintiffs' claim, because of breaches by Newco of its loan agreement with the bank. This agreement is contained in a letter dated September 26, 1983, and was one of the related agreements made at the time the assets of Oldco were purchased. Mr. Crane referred specifically to cls. 6(e) (warranty that statements furnished to the bank should be accurate and complete), 7.1(g) (notice of adverse changes), and 7.2 (covenant against corporate reorganization).

The loan agreement was one of the related transactions which the Sugars were induced by the fraudulent misrepresentation of the bank to enter into, and which caused the loss and damages which the plaintiffs seek to recover. If the bank caused damage to the plaintiffs by fraudulently inducing the Sugars to cause this agreement to be made as part of the venture, it would be a travesty if the bank could rely on a provision of the agreement as providing a defence to the claim against the bank for fraud. If the fraud had not occurred, there would have been no loan agreement and no provisions to rely on.

In any event, I am not satisfied that any breaches of the covenants in question (or, at least those to which the Sugars were privy) had any material effect on the financial condition of Newco, or the extent of the loan to it from the bank.

"As is, Where is" clause

The "As is, Where is" clause would probably have provided a complete answer to a claim in contract by Newco against Peats. It might also have been relevant to a claim for negligent misrepresentation against Peats or the bank, because it could be taken as a disclaimer of responsibility. But, the "As is, Where is" clause has no application, in my opinion, to a claim in fraud by the Sugars against the bank. It is a provision in the agreement of purchase and sale which would not have been entered into if the fraudulent misrepresentation had not been made. Its only possible relevance to that claim might be to make more doubly certain the loss by the Sugars at being induced to make the investment, if it prevented any claim under the agreement of purchase and sale.

Liability for fraud

In my judgment, the bank is liable to the plaintiffs, or one of them, for damages for fraudulent misrepresentation. Before considering the amount of those damages, I shall deal with the claim advanced by the plaintiffs at trial that the bank was guilty of a breach of fiduciary duty to the plaintiffs.

Claim of breach of fiduciary relationship

The allegation of breach of fiduciary duty was made by amendment to the statement of claim at trial. The amendment was as follows:

15.(a) The Plaintiffs allege that the Defendant C.I.B.C. was in a special relationship with the Plaintiffs as valued customers of the C.I.B.C. As a result, the Plaintiffs allege that the

Defendant CIBC owed them a fiduciary duty which the Defendant C.I.B.C. breached by its failure to reveal to the Plaintiffs its knowledge of the discrepancy in the accounts receivable as aforesaid.

Spies stated in a report dated September 30, 1983, that "the Sugar family are valued customers of our St. Clair & Dufferin Branch". Oldco and Newco dealt at another branch of the bank, namely, Alness & Supertest. There was no other evidence as to the nature of the dealings between the Sugar family and the bank at the St. Clair & Dufferin branch. The mere fact that the Sugars were customers of the bank is not enough to establish a fiduciary relationship.

Sugar accepted at trial the description of himself as a knowledgeable trouble-shooter. He was an experienced businessman. He was introduced to the Oldco situation by his brother, Harvey, not by the bank. There is no evidence that either the bank or Peats offered any advice to Sugar regarding the soundness of an investment in Oldco or Newco. Sugar had his own legal and accounting advisors and was not relying on the bank for advice as to what he should do. Although he was required by Atkins to act quickly to enter into and complete the agreement for the purchase of the assets of Oldco, the health of the business as a going concern required prompt action. There was no evidence of anything that would suggest duress or undue influence in law.

Mr. Youd relied on *Lloyd's Bank Ltd. v. Bundy*, [1975] 1 Q.B. 326; *Woods v. Martin's Bank Ltd.*, [1959] 1 Q.B. 55, and *Standard Investments Ltd. v. C.I.B.C.* (1985), [1985 CanLII 164 \(ON CA\)](#), 52 O.R. (2d) 473, 22 D.L.R. (4th) 410, 30 B.L.R. 193 (C.A.). In my judgment, none of these decisions is applicable to the case at bar, because of the facts I have mentioned in the preceding paragraph. The plaintiffs dealt with the bank through Sugar. In my opinion, there was no fiduciary relationship between the plaintiffs and the bank in connection with the sale of assets to Newco.

The claim against Peats

As stated above, the evidence is that the bank did not inform Peats of the discovery of pre-billing by De Guerre and Spies. The employees of Peats did not themselves discover the falsification of records by the Kleins. There is no factual basis for a claim of fraud against Peats.

Nor can there be a valid claim for negligent misrepresentation as against Peats. The employees of Peats did a viability study of Oldco, during the course of which they prepared statements of the assets of Oldco based on existing accounting records. They did not purport to verify those records. The only entries for which Peats was responsible were those which adjusted the Oldco records for transactions occurring after Peats had arrived at the Oldco premises. There was no evidence of any errors in those adjusting entries. There was no evidence that Peats did not accurately represent to Sugar and the bank the contents of the accounting records prepared by Oldco. There was, therefore, no misrepresentation by Peats.

Furthermore, the "As is, Where is" clause in the agreement of sale from Peats to Newco constitutes a valid disclaimer of responsibility by Peats for the accuracy of any statements as to the assets being sold.

Peats was a proper defendant to the action under rule 5.02(2) of the Rules of Civil Procedure, because of doubt as to the person from whom the plaintiff was entitled to relief. Peats was defended by the same solicitors and counsel as the bank, and the presence of Peats as a party defendant did not add to the length or expense of the trial. The action is dismissed as against Peats, but without costs.

Damages

The proper measure of damages for fraudulent misrepresentation is that which will put the innocent party in the position he would have been in if the representation had not been made: see

Doyle v. Olby (Ironmongers) Ltd., [1969] 2 Q.B. 158. In this case, if the fraudulent representation had not been made, the plaintiffs would not have invested money in Newco. In my opinion, they are entitled to recover the full amount of that investment up to the time at which they became aware of the bank's knowledge of the falsification.

The evidence is that Sandra Sugar had invested \$175,000 in Newco prior to April 30, 1984. On April 30, 1984, the investment by Sandra Sugar in Newco was assumed by her wholly owned company, the corporate plaintiff. Although the evidence was presented in a very confusing way, I understand the facts to be that the indebtedness of Newco to Sandra Sugar was satisfied by payment of \$175,000 to 582087 Ontario Limited, but that an equal amount was repaid on the same day from the corporate plaintiff to Newco. The Sugars were aware at the time of these transactions of the falsifications by the Kleins, but not of the complicity of the bank in the fraud. No new money was invested. In my judgment, the effect of the transaction was to place the numbered company in a position where it was entitled to recover from the bank the damages for fraud that were initially sustained by Sandra Sugar.

Further payments of \$40,000 were made by the corporate plaintiff to or on behalf of Newco during August and September, 1984. These sums were invested in a futile effort to keep Newco afloat. They were the result of the initial investment caused by the fraudulent misrepresentation, and were made without knowledge of the facts giving rise to a claim for fraud against the bank. I find that the corporate plaintiff is entitled to recover these additional investments of \$40,000.

The final investment by the corporate plaintiff was of the sum of \$30,000 on February 4, 1985. At the time of this investment, the Sugars were fully aware of the bank's knowledge of the fraudulent conduct of the Kleins. The investment was made, as noted above, as a condition of the further extension of credit by the bank to Newco. In my opinion, the corporate plaintiff cannot recover this last investment of \$30,000 that was made with full knowledge of the fraudulent misrepresentation for which the bank was responsible.

For the foregoing reasons, there will be judgment for 582087 Ontario Limited against the bank for \$215,000, together with interest at 12% per annum from May 23, 1985, the date of the statement of claim. Counsel may speak to me on the question of costs. This should be done before the end of term.

Judgment for plaintiffs.

Tab 110

Enbridge Gas Distribution Inc. v. Marinaccio, 2012 ONCA 650 (CanLII)

Source: Court of Appeal for Ontario
Date: 2012-10-01
File number: C53671; C53759
Other citations: 355 DLR (4th) 333 — 220 ACWS (3d) 659 —
298 OAC 189 — 7 BLR (5th) 173 — 96 CCLT (3d) 89 —
[2012] OJ No 4558 (QL)
Citation: Enbridge Gas Distribution Inc. v. Marinaccio, 2012 ONCA
650 (CanLII), <<https://canlii.ca/t/fsz3m>>, retrieved on 2026-
03-23

COURT OF APPEAL FOR ONTARIO

CITATION: Enbridge Gas Distribution Inc. v. Marinaccio, 2012 ONCA 650
DATE: 20121001
DOCKET: C53671 & C53759

Laskin and Blair JJ.A. and Brown R.S.J. (*Ad Hoc*)

BETWEEN

Enbridge Gas Distribution Inc.

Plaintiff (Respondent)

and

Michael Marinaccio, also known as Mike Marinaccio, also known as Miguel Marinaccio, also known as Micahel Marinaccio, Maria Lettizia Marinaccio, also known as Maria Marinaccio, also known as Maria Messina, Angelo Piro, Angelica Piro, Italo Tony Montaldi, also known as Tony Montaldi, also known as Italo Montaldi, Nancy Nunziatina Montaldi also known as Nancy Montaldi, also known

as Nunziatina Montaldi, 1639374 Ontario Ltd., 1316679 Ontario Limited, Maverick & Associates (1991) Limited, also known as Maverick & Associates, 2132329 Ontario Ltd., 2132264 Ontario Ltd., Tera X Technologies Inc., Tarrco Construction, also known as Tarrco, Tek-Con, Mike Marinaccio Services, Tekka-Ent, Provac and 2138337 Ontario Inc.

Defendants (Appellants)

Ross Morrison and Natalie Schernitzki, for the appellant, Italo Tony Montaldi

Bryan Fromstein, for the appellant, Angelo Piro

Reid Lester and Matthew Morden, for the respondent

Heard: February 15, 2012

On appeal from the judgments of Justice Frank J.C. Newbould of the Superior Court of Justice, dated April 14, 2011 and August 22, 2011, with reasons reported at [2011 ONSC 2313](#) and [2011 ONSC 4962](#), 206 A.C.W.S. (3d) 685.

Laskin J.A.

A. OVERVIEW

[1] Piro and Montaldi appeal the summary judgment granted to Enbridge.

[2] Piro was a labourer. Montaldi was an accountant. The primary defendant, Marinaccio, was an operations supervisor for Enbridge. Enbridge, a regulated utility, frequently had to repair property it had damaged during its regular maintenance. In 2001, Marinaccio, Piro and Montaldi devised a scheme to do this repair work.

[3] According to the appellants, the scheme was to operate as follows. Piro alone would register business entities to do the work. Marinaccio's involvement would be concealed from his employer, Enbridge. However, Marinaccio would hire contractors to do the work. Montaldi would prepare the invoices to be given to Enbridge. Marinaccio would approve the invoices. Marinaccio, Piro and Montaldi would share the payments from Enbridge in predetermined percentages.

[4] The appellants and Marinaccio carried out the venture for over six years. Enbridge paid out over \$6.5 million. Marinaccio has now admitted that the entire scheme was a fraud. No work was ever done. All the invoices were phoney. Marinaccio also claims that Piro and Montaldi were aware of the fraud. After the lawsuit began, Marinaccio settled Enbridge's claim against him for \$1.9 million.

[5] Enbridge then moved for summary judgment against Piro and Montaldi. The motion judge, Newbould J., found that Marinaccio owed a fiduciary duty to Enbridge and that he breached his fiduciary duty by secretly profiting at the expense of his employer. The motion judge granted summary judgment against Piro and Montaldi on three separate bases: knowing assistance to Marinaccio in breaching his fiduciary duty; bribery; and unjust enrichment.

[6] On Enbridge's main claim for knowing assistance, the motion judge found Piro and Montaldi jointly and severally liable for \$5,723,339.60, which was the entire amount received from Enbridge less the net settlement amount paid by Marinaccio (after deducting the costs of collection).

[7] On their appeal, Piro and Montaldi make four main arguments:

- (1) Piro alone argues that the motion judge erred in finding that Marinaccio owed a fiduciary duty to Enbridge.
- (2) Even if Marinaccio owed a fiduciary duty to Enbridge and he breached that duty, the motion judge erred in finding Piro and Montaldi liable for knowing assistance. They submit that to be liable for knowing assistance, they had to know that the scheme was a fraud. They contend that whether they knew at the time it was a fraud raises a genuine issue for trial.
- (3) The motion judge erred in finding them liable for the tort of bribery because Enbridge did not plead bribery and did not prove the payment of a secret commission.

- (4) The motion judge erred in finding them liable for unjust enrichment. They submit that as they did some work and did not know the scheme was a fraud they are entitled to keep their share of the profits.

[8] Montaldi argues two additional grounds of appeal:

- (5) The motion judge erred in his calculation of the amount of the judgment.
- (6) The motion judge erred in awarding compound interest.

[9] For the reasons that follow, I would dismiss both appeals in their entirety.

B. RELEVANT FACTUAL BACKGROUND

[10] Although the record before the motion judge was lengthy, the material facts are largely not disputed. Piro's and Montaldi's discovery evidence was filed, but neither filed an affidavit in response to Enbridge's motion. I am satisfied that the motion judge was entitled to dispose of this case by a summary judgment.

[11] The motion judge concisely summarized the factual background of this litigation. His summary is sufficient to put the issues on appeal in context. I therefore simply reproduce his summary taken from paras. 2, 3 and 5-10 of his endorsement:

[2] This action arises from a business arrangement made by Piro and Montaldi with the defendant Michael Marinaccio who at the time was an employee of Enbridge. ... Marinaccio was an operations supervisor with Enbridge with authority to retain third party contractors on behalf of Enbridge and to approve payment of invoices. Piro was a labourer who worked for various companies that did business with Enbridge and he got to know Marinaccio. Montaldi is an accountant and financial planner and sole shareholder and principal of the defendant Maverick.

[3] Enbridge often required repair work to be done on properties where Enbridge technicians had done the maintenance work such as repairing damaged

landscaping. The business engaged in by Marinaccio, Piro and Montaldi that has given rise to this action was a venture under which Enbridge paid approximately \$6.7 million from 2001 to 2007 for work and equipment allegedly supplied to Enbridge by four entities set up by Piro. Marinaccio and Piro each received at least 31.5% or 32.5% of this money, depending upon the year. Maverick received either 5% or 7% of the money, depending upon the year. There is a difference between the parties as to what happened to the remaining 30%. Piro and Montaldi say that it was given in cash to Marinaccio to be used to pay subcontractors and suppliers who were to do the work for the four entities set up by Piro. Marinaccio denies ever receiving the cash.

[5] The four entities set up by Piro were unincorporated. The first was Tarrco, followed by Tek-Con, Tekka-Ent and Provac. Invoices were sent out by each entity at different times. Tarrco invoices were submitted to Enbridge for a period of about 18 months from July, 2001 to January, 2003. Tek-Con submitted invoices from June, 2003 to January, 2004. Tekka-Ent submitted invoices from February to December, 2004. Provac submitted invoices from February, 2005 to October, 2007.

[6] Piro and Montaldi were aware that Marinaccio worked at Enbridge. Piro's evidence is that the businesses were registered in his name alone without Marinaccio's name appearing because he knew that Marinaccio had a conflict of interest because of his involvement with Enbridge and that Marinaccio's name was not to appear anywhere on the record. Montaldi's evidence was that the business was to be in Piro's and Marinaccio's name but that Marinaccio told him that his name could not appear on the ownership of the company because it would be a conflict of interest with Enbridge. Marinaccio made clear that he would ensure that Enbridge did not learn about his involvement in the venture.

[7] Montaldi was the accountant for the Piro entities. He also prepared all of the invoices to Enbridge from information supplied by Piro or Marinaccio. The invoices gave Maverick as the address for the entity supplying the invoice. These invoices were not sent to Enbridge. Rather they were hand delivered to Marinaccio by either Montaldi or Piro. Both Piro and Montaldi knew that it was

Marinaccio who approved these invoices on behalf of Enbridge.

[8] The total paid by Enbridge was \$6,665,853.51. Montaldi received the Enbridge checks for the invoices either at the Maverick office or at a post box controlled by Montaldi, and these checks were deposited into the bank account for the entity that had invoiced Enbridge. The bank accounts for the four Piro entities were controlled by Piro and Montaldi who had the signing authority for the accounts.

[9] From these bank accounts, 5% and later 7% of the Enbridge payments were paid to Montaldi. His evidence is that these payments were for his fees for providing accounting services. That amounted to approximately \$408,000. 30% of the Enbridge payments was taken out in cash and according to Piro and Montaldi was paid to Marinaccio for the purpose of paying the sub-contractors who allegedly did the work. Their evidence is that the cash was put in brown envelopes and given to Marinaccio from time to time along with the invoices. Marinaccio denies ever receiving this cash. The balance, being 63%, and later 61% after Montaldi's percentage was increased from 5 to 7%, was paid out equally to Marinaccio and Piro.

[10] Marinaccio's evidence was that no work was done by the Piro entities that had invoiced Enbridge and that the work had been done by other contractors to Enbridge. His evidence is that the invoices were phony to the knowledge of both Piro and Montaldi. Piro and Montaldi both assert that they were told by Marinaccio that the work was being done by subcontractors arranged by Marinaccio and that the 30% of the Enbridge payments made in cash to Marinaccio was for the purpose of paying those subcontractors. Their evidence is that they do not know who those subcontractors or persons were and it is admitted that Montaldi, purportedly the accountant for the Piro entities, kept no record of any of such subcontractors or persons or of amounts allegedly paid to them.

C. ANALYSIS

(1) Did the motion judge err in finding that Marinaccio owed a fiduciary duty to Enbridge?

[12] Marinaccio began working for Enbridge in 1979. He was promoted over the years. By 2001 he was an operations supervisor. He had authority to hire outside contractors to do work for Enbridge and to approve payment of their invoices. At first, he could only approve invoices of up to \$2,000, but by late 2003 he could approve invoices of up to \$5,000. The motion judge found at para. 20, “in this case there can be no question but that Marinaccio owed a fiduciary duty to Enbridge.”

[13] Montaldi does not challenge the motion judge’s finding. However, Piro does. He argues that Marinaccio was not a key Enbridge employee, but merely a mid-level manager with limited authority. Like any employee, Marinaccio owed a duty of loyalty to his employer. However, his role within Enbridge did not make him a fiduciary. At the very least, whether he owed a fiduciary duty is an issue that requires a trial. Piro attempts to buttress his argument by pointing out that the motion judge’s finding of a fiduciary duty is unsupported by any analysis.

[14] I would not give effect to Piro’s argument. As a starting point, the motion judge cannot be faulted for his brief treatment of the question whether Marinaccio owed a fiduciary duty to Enbridge because that question did not appear to have been a live issue before him. As the motion judge noted, Montaldi implicitly conceded that Marinaccio owed a fiduciary duty. And Piro, who now alone challenges the motion judge’s finding, expressly conceded that Marinaccio owed a fiduciary duty. That express concession is evident from para. 19 of Piro’s factum on the motion for summary judgment where he accepted that “it is established that Marinaccio owed a fiduciary duty to Enbridge and that his action amounted to a breach of fiduciary duty vis-à-vis Enbridge.”

[15] Although we no doubt have authority to revisit an issue that was conceded before a motion judge, we should be reluctant to do so. Moreover, even if we do revisit this issue, the question whether a person owes a fiduciary duty is largely a factual inquiry. Accordingly, a trial judge's or a motion judge's finding of a fiduciary duty is entitled to significant deference from an appellate court: see *Hodgkinson v. Simms*, 1994 CanLII 70 (SCC), [1994] 3 S.C.R. 377, at pp. 425-426; *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157, at para. 13; *GasTOPS Ltd. v. Forsyth*, 2012 ONCA 134, at para. 81.

[16] In this case, the motion judge's finding of a fiduciary duty deserves deference because there is evidence to support it. A fiduciary relationship may exist where the fiduciary undertakes to act in the best interests of the beneficiary, the fiduciary has the power to affect the legal or substantial interests of the beneficiary, and, as a result, the beneficiary is vulnerable to the fiduciary: see *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247 at paras. 68-70; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261 at paras. 30-34. In the employment context, an employee may therefore be said to owe a fiduciary duty to his or her employer where the employee has discretionary power to affect adversely the employer's interests and the employer is vulnerable to the exercise of that power.

[17] Here, Marinaccio had discretionary power both to hire outside contractors for Enbridge and to approve the payment of invoices they submitted. Enbridge was undoubtedly vulnerable to the exercise of that power because Marinaccio used his power to defraud his employer of over \$6.5 million over the course of six and a half years.

[18] I recognize the admonition of my colleague Gillese J.A. in *Hunt v. TD Securities Inc.* (2003), 2003 CanLII 3649 (ON CA), 66 O.R. (3d) 481, leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 473, at para. 46:

[O]ne cannot reason backwards from the fact that an individual is harmed by the unauthorized act of their

broker, to the conclusion that they are vulnerable. Rather, the individuals and the nature of the relationship must be examined.

[19] Nonetheless, that Marinaccio had the authority, opportunity and ability to perpetrate such a large-scale fraud on his employer over such a prolonged period of time is some evidence that he possessed the hallmarks of a fiduciary duty: discretionary power over a correspondently vulnerable employer.

[20] For these reasons, I would not interfere with the motion judge's finding that during the period of the fraud, Marinaccio owed a fiduciary duty to Enbridge. In upholding this finding I should not be taken to signify that many mid-level employees of large corporations will owe a fiduciary duty to their employer. The finding in this case not only rests on its particulars facts but was largely uncontested. If the question whether Marinaccio owed a fiduciary duty to Enbridge had been more vigorously challenged, the motion judge may have taken a different view.

(2) Did the motion judge err in finding that Piro and Montaldi knowingly assisted Marinaccio in breaching his fiduciary duty?

[21] If Marinaccio had a fiduciary duty to Enbridge, unquestionably he breached that duty. He participated in an undisclosed scheme by which he induced Enbridge to unknowingly make payments to business entities in which he had an interest. He personally profited from those payments. These were acts of dishonesty, inconsistent with Marinaccio's fiduciary duty.

[22] If Marinaccio owed a fiduciary duty to Enbridge, neither Piro nor Montaldi contest that he breached this duty. However, both dispute their liability for knowingly assisting in the breach.

[23] In the recent case of *Harris v. Leikin Group Inc.*, [2011 ONCA 790](#), at para. 8, this court set out the components of a claim for knowingly assisting in a breach of a fiduciary duty:

There is no dispute concerning the constituent elements of the tort of knowing assistance in breach of fiduciary duty: (1) there must be a fiduciary duty; (2) the fiduciary must have breached that duty fraudulently and dishonestly; (3) *the stranger to the fiduciary relationship must have had actual knowledge of both the fiduciary relationship and the fiduciary's fraudulent and dishonest conduct*; and (4) the stranger must have participated in or assisted the fiduciary's fraudulent and dishonest conduct. The knowledge requirement for liability based on this tort is actual knowledge, which, as the Supreme Court confirmed in *Air Canada* [*Air Canada v. M & L Travel Ltd.*, [1993 CanLII 33 \(SCC\)](#), 1993] 3 S.C.R. 787], at para. 38, includes recklessness and wilful blindness. As this court observed in *Keeton v. The Bank of Nova Scotia*, [2009 ONCA 662](#), 254 O.A.C. 251, at para. 82, "to found liability [on knowing assistance in a breach of fiduciary duty], the stranger to the trust must have actual (as opposed to constructive) knowledge of the misconduct, or be wilfully blind to the breach or reckless in his failure to realize that there was a breach." [Emphasis added; internal citations omitted.]

[24] This ground of appeal turns on the third component, the knowledge requirement. Piro and Montaldi submit that to be liable for knowing assistance they had to know both that Marinaccio's conduct was dishonest *and* that the scheme was a fraud. And although the motion judge found that they both knew Marinaccio acted dishonestly, and indeed they participated in that dishonesty, they did not know at the time that the entire scheme was a fraud. They claim they believed work was being done, and that Marinaccio was hiring and paying sub-contractors out of the money received from Enbridge.

[25] And yet Marinaccio says that they knew. And by the time of discovery, Piro acknowledged that the scheme was fraudulent. However, he says that he did not

know that it was fraudulent at the time. Montaldi says that he never knew that the scheme was fraudulent. In the face of this conflicting evidence I accept, and Enbridge has accepted, that whether Piro or Montaldi knew at the time that the scheme was a fraud raises a genuine issue requiring a trial. Thus, if Enbridge were required to show the appellants' knowledge of the fraud, it would not be entitled to summary judgment on the basis of knowing assistance.

[26] Enbridge, however, submits that it is required to show only that Piro and Montaldi had knowledge of Marinaccio's dishonesty. It is not necessary to prove they knew that a fraud was committed, Enbridge argues, so long as they were aware that Marinaccio was dishonestly breaching his fiduciary duty by participating in the scheme. The motion judge agreed with Enbridge's position. He wrote at paras. 24-25 of his endorsement:

[24] In this case both Piro and Montaldi knowingly assisted in the breach of Marinaccio's fiduciary obligations to Enbridge. They were aware that Marinaccio had a conflict and assisted him in taking steps to hide Marinaccio's role in the venture. They knew as well that Marinaccio was making sure that Enbridge was not aware of the venture. Montaldi was far more than an accountant for the Piro entities. He prepared the invoices, which he and Piro hand delivered to Marinaccio rather than sending them to Enbridge. The invoices directed payment to a Maverick address. He along with Piro opened bank accounts in which the Enbridge money was deposited and he arranged for wire transfers to Marinaccio as well, on his evidence, of taking cash and giving it to Marinaccio.

[25] The fact that Piro and Montaldi assert that they were not aware that work was not being done for which invoices were sent does not assist them. It was a breach of Marinaccio's fiduciary obligations to Enbridge to be involved in a venture that resulted in him being the recipient of money, regardless of whether the work was done. Piro and Montaldi were quite aware of that breach and took steps in furtherance of it.

[27] I agree with the motion judge. In the context of a claim for knowing assistance in the breach of a fiduciary duty, dishonest and fraudulent conduct signify a level of misconduct or impropriety that is morally reprehensible but does not necessarily amount to criminal behaviour. The term fraudulent does not signify that an additional degree of corruption is necessary to make out the tort; it simply emphasizes the required dishonest quality of the fiduciary's act. As Buckley L.J. stated in *Belmont Finance Corp. v. Williams Furniture Ltd. (No. 1)*, [1979] 1 All E.R. 118, at p.130, cited with approval in *Air Canada*, at p. 815:

...I do not myself see that any distinction is to be drawn between the words 'fraudulent' and 'dishonest'; I think they mean the same thing, and to use the two of them together does not add to the extent of dishonesty required.

In *Air Canada*, at p. 826, Iacobucci J. described the type of conduct captured by the two terms used together as "the taking of a knowingly wrongful risk resulting in prejudice to the beneficiary." By extension, liability for knowing assistance requires only that the assister knew of the dishonest nature of the fiduciary's conduct.

[28] Here, both Piro and Montaldi knew that Marinaccio took a wrongful risk that prejudiced Enbridge. They knew that Marinaccio worked for Enbridge. Piro knew and the motion judge found that Montaldi knew that Marinaccio had authority to retain outside contractors and to approve invoices for payment by Enbridge. Piro and Montaldi also knew that Marinaccio had a conflict of interest by participating in the scheme. They knew that he wanted to conceal his involvement in the scheme from Enbridge and they assisted him in doing so. And they knew that he secretly profited from the scheme at the expense of Enbridge.

[29] In short, Piro and Montaldi knew that Marinaccio's conduct was dishonest, and indeed morally reprehensible, and that his conduct harmed Enbridge. They

cannot escape liability by their assertion that they did not know at the time that they were participating in a fraud.

[30] I would not give effect to this ground of appeal.

[31] Piro and Montaldi accept that if they are liable for knowing assistance then the motion judge was correct to hold them jointly and severally responsible for the full amount advanced by Enbridge. As I would uphold the motion judge's finding of liability for knowing assistance, strictly speaking, it is not necessary to deal with the two other bases of the appellants' liability. For completeness, however, I will address them briefly.

(3) Did the motion judge err in finding Piro and Montaldi liable for bribery?

[32] The motion judge found Piro and Montaldi liable for bribery because of the payments they made to Marinaccio out of the money received from Enbridge.

[33] The civil tort of bribery is the payment of a secret commission. In *Ruiter Engineering & Construction Ltd. v. 430216 Ontario Ltd.* (1989), [1989 CanLII 4257 \(ON CA\)](#), 67 O.R. (2d) 587 (C.A.), at p. 591, Morden J.A. set out the three elements of a cause of action in bribery:

The term "bribe" has, for the purposes of the civil law, received a wide interpretation. In *Industries & General Mortgage Co. v. Lewis*, [1949] 2 All E.R. 573 (K.B.D.), Slade J. said at p. 575:

For the purposes of the civil law a bribe means the payment of a secret commission, which only means (i) that the person making the payment makes it to the agent of the other person with whom he is dealing; (ii) that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; and (iii) that he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent. Those three are the

only elements necessary to constitute the payment of a secret commission or bribe for civil purposes.

[34] Once all the elements of bribery are established, the court will presume in favour of the principal and against the briber and the agent bribed, that the agent was influenced by the bribe. The presumption is irrebuttable: see *Optech Inc. v. Sharma*, [2011 ONSC 680](#), at para. 23. Moreover, the motive of the person making the bribe is irrelevant: see *Ruiter Engineering*, at p. 591-592; *Barry v. Stoney Point Canning Co.*, [1917 CanLII 620 \(SCC\)](#), [1917] 55 S.C.R. 51, at p. 74.

[35] The motion judge found that Enbridge had established the three elements of bribery:

[31] The three elements cited by Morden J.A. as constituting the only elements necessary to constitute the payment of a secret commission or bribe clearly are applicable to this case. The dealings were clearly surreptitious and in the language of James L.J. constituted a fraud on Enbridge entitling Enbridge to adequate relief as the court may think right to give.

[32] Piro and Montaldi controlled the bank accounts and they together arranged for payment to Marinaccio of approximately \$2.086 million pursuant to his 32.5% interest in two of the entities and his 31.5% interest in the other two entities. They also say they acted in paying approximate \$2 million in cash to Marinaccio, representing 30% of the proceeds received from Enbridge, although Marinaccio denies receiving this money or telling them that he was paying any subcontractors. If in fact they paid this cash to Marinaccio, I find that none of this was paid by Marinaccio to any subcontractors. That was Marinaccio's evidence and neither Piro nor Montaldi have provided any evidence of any payments to any subcontractors or indeed of the existence of any subcontractors. If they did not pay the cash to Marinaccio, they have retained it for their own purposes.

[33] In the circumstances, the appropriate remedy under the claim for bribery is to require Piro and Montaldi to pay

Enbridge the \$2.086 million paid to Marinaccio and a further \$2 million either paid to Marinaccio or kept by them. Thus under this heading Piro and Montaldi are jointly and severally responsible to pay Enbridge \$4.086 million.

[36] Piro and Montaldi challenge the motion judge's finding on three grounds. First, they say that Enbridge did not plead a cause of action in bribery. The motion judge, therefore, was wrong to grant judgment on a claim that was not pleaded. Second, they say that bribery was not made out because the payments to Marinaccio were not made to him as an agent of Enbridge, but as a principal of the Piro entities. Third, Piro says that the motion judge ought to have limited his damages award to \$2 million, which was the amount of Piro's profit. I do not agree with any of these grounds advanced by the appellants.

[37] On the first ground, although Enbridge did not use the word "bribery" in its amended claim, it did plead all of the material facts required to establish a cause of action in bribery. More important, in its notice of motion, Enbridge expressly moved for summary judgment for bribery. Its motion was served on the appellants 14 months before it was heard, and the issue of bribery was fully argued before the motion judge. Therefore, neither Piro nor Montaldi can seriously claim that he was prejudiced by the omission of the word bribery from Enbridge's pleading.

[38] On the second ground, Piro and Montaldi admitted that they acted in concert to make secret payments to Marinaccio of approximately \$2.086 million, which represented his percentage interest in the Piro entities. They have also asserted that they acted in concert in paying Marinaccio in cash a further \$2 million, representing 30 per cent of the total proceeds of the fraud.

[39] Accepting their admission and their assertion, Piro and Montaldi secretly paid to Marinaccio approximately \$4.086 million from the amounts invoiced to Enbridge and paid by Enbridge to the Piro entities. In other words, they paid bribes to

Marinaccio amounting to \$4.086 million and they kept these payments secret from Enbridge. Their motive in making these payments is irrelevant. Thus, Piro cannot escape liability by claiming that the payments were made to Marinaccio as a principal of the Piro entities and not as an agent of Enbridge.

[40] And Montaldi cannot escape liability by claiming that he did not know of the fraud or deal directly with Enbridge. Neither his reasons for transferring funds to Marinaccio nor his awareness of the fraudulent nature of the scheme has any bearing on his liability. His knowledge that Marinaccio was acting as an employee of Enbridge and his failure to disclose the payments to Enbridge are sufficient. Further, he dealt with Enbridge extensively: he prepared all of the invoices addressed to Enbridge on behalf of the Piro entities; he received Enbridge's checks at either the Maverick office or a post box he controlled; he deposited Enbridge's checks into bank accounts he controlled. The tort of bribery does not require that dealing be "direct."

[41] In his article "Remedies for the Victims of a Bribe" (1999-2000) 22 Advoc. Q. 198, at para. 198, Paul M. Perell describes the expansive nature of liability for bribery:

The payment may be made to induce the recipient to exercise his influence in a way that favours the briber, but the motive is not determinative and *the essential factor is the secrecy*; if the payment is secret then a corrupt motive and the success of the inducement will be assumed. The secret payment is a bribe *even if the person making the payment did not intend a bribe and believed or expected that the recipient would properly disclose the payment*. [Emphasis added; footnotes omitted.]

[42] In my view, this passage is a complete response to Montaldi's claim.

[43] On the third ground, the measure of damages for bribery is generally the amount of the bribe or secret commission paid to the agent – in this case

Marinaccio. Both Piro and Montaldi said that they made secret payments to Marinaccio of \$4.086 million. Therefore, the motion judge did not err in awarding damages for this amount. I would not give effect to this ground of appeal.

(4) Did the motion judge err in finding Piro and Montaldi liable for unjust enrichment?

[44] Liability for unjust enrichment has three components:

- The defendant obtains an enrichment.
- The plaintiff incurs a corresponding deprivation.
- There is no juristic reason for the defendant's enrichment: *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 30.

[45] The motion judge held that Enbridge had established these three components:

[35] This cause of action has undoubtedly been established. Piro and Montaldi were enriched by the amounts received by them and Enbridge is out the money. Piro admits that there was a fraud. Montaldi can point to no evidence that any work was done or equipment supplied by the four Piro entities. In the circumstances I find that no work was done and that there was no juristic reason whatsoever for the payments made by Enbridge.

[46] Piro and Montaldi submit that the motion judge erred in holding that the third component had been established because the Piro entities did some work and neither appellant knew at the time that the scheme was a fraud. Retaining the money paid by Enbridge was, therefore, not unjust. I do not accept this submission.

[47] On the first branch of the argument, Piro essentially conceded when he acknowledged the scheme was a fraud that the four entities registered in his name never provided anything of value to Enbridge. Therefore, all of the payments

Enbridge made to the Piro entities represented a loss. Although Montaldi claims that the Piro entities did some work, he has no direct evidence that they did. He also failed to make any further inquiries into which sub-contractors were doing the work he alleges was done, and whether they were in fact paid by Marinaccio out of the funds allegedly earmarked for that purpose. The motion judge, thus, reasonably held that the appellants could not credibly claim a juristic reason for their enrichment on the basis some work had been done.

[48] On the second branch of the argument, the appellants contend that because they did not have knowledge of the fraud at the time, or at the very least whether they had knowledge raises a genuine issue for trial, they cannot by a summary judgment be required to disgorge the money they received from Enbridge. I do not agree with this contention.

[49] The entire scheme was a fraud, as Marinaccio claimed and Piro later admitted. That neither Piro nor Montaldi may have known it rose to the level of fraud at the time does not make out a juristic reason for their enrichment at the expense of Enbridge. Had either Piro or Montaldi been an innocent stranger to the scheme who could claim to have received the money from Enbridge lawfully, his position may have been different: see *Citadel General Assurance Co. v. Lloyds Bank Canada*, 1997 CanLII 334 (SCC), [1997] 3 S.C.R. 805, at para. 51. But neither Piro nor Montaldi was an innocent stranger to the scheme. Both fully participated and assisted Marinaccio in arranging what was shown to be a fraud on Enbridge. In these circumstances, Piro and Montaldi can have no juristic reason to retain Enbridge's money. I would not give effect to this ground of appeal.

(5) Did the motion judge err in calculating the amount of the judgment?

[50] As I have said, each appellant acknowledges that if he is liable for knowingly assisting in Marinaccio's breach of fiduciary duty then he is liable to account for the full amount paid by Enbridge and not just his share of the profit. Montaldi,

however, submits that the motion judge erred in calculating the amount of the judgment for knowing assistance.

[51] In assessing Piro's and Montaldi's liability, the motion judge properly reduced the total loss incurred by Enbridge by the sum from the Marinaccio settlement. Instead of deducting the gross amount of the settlement, however, the motion judge took account of the fees and disbursements Enbridge incurred in collecting the settlement funds. Therefore, in fixing the amount of the judgment against Piro and Montaldi, he reduced the appellants' liability by the amount of Enbridge's *net* recovery from Marinaccio after legal costs. Montaldi contends that the motion judge should have instead deducted the gross amount of the settlement.

[52] Enbridge paid the four Piro entities \$6,542,928.63. The Marinaccio settlement amounted to \$1,948,727. The cost of collecting the settlement amounted to \$1,129,138. Thus, the net recovery on the settlement was \$819,589 (\$1,948,727 minus \$1,129,138). The motion judge granted judgment for \$5,723,339.60 (\$6,542,928.63 minus \$819,589). Montaldi submits that he ought to have granted judgment for \$4,594,201.63 (\$6,542,928.63 minus \$1,948,727).

[53] I do not agree with this submission. The motion judge addressed this submission at para. 19 of his supplementary endorsement. He held that Enbridge was entitled to be compensated for its loss. Its loss had to take account of the costs of recovery on the settlement. The motion judge wrote:

In my reasons for judgment I held that the plaintiff was entitled to its loss, being the amount paid by it to the four Piro entities, less the net recovery after the costs of collecting resulting from the Marinaccio settlement. The loss was \$6,542,928.63. The gross amount collected under the Marinaccio settlement was \$1,948,727. The total fees and disbursements incurred by the plaintiff in collecting that amount was \$1,129,138, leaving a net recovery under the settlement of \$819,589. Mr. Morrison contends that the gross amount recovered from the Marinaccio settlement should be deducted from the loss

rather than the net amount after costs as there is no breakdown or calculation of this amount in the evidence. I think if Mr. Morrison seriously contended that the amounts were not spent, he could have asked for more particulars, assuming they are not contained in the two inch thick bundle of invoices provided by the plaintiff. I am prepared to accept that the amount was spent. I ordered that the net recovery after costs under the Marinaccio settlement should be deducted from the plaintiff's loss in order that there not be double recovery. To deprive the plaintiff of the cost of the recovery under the Marinaccio settlement would deprive it of a portion of its loss. The net recovery of \$819,589 is to be used with the result that the loss to be paid by Piro and Montaldi is \$5,723,339.60. [Footnote omitted.]

[54] I agree. I would not give effect to this ground of appeal.

(6) Did the motion judge err in awarding Enbridge compound interest?

[55] For pre-judgment interest, the motion judge awarded Enbridge compound interest (at 4.3 per cent) compounded monthly. Montaldi does not dispute the rate but submits that the motion judge erred in ordering compound interest. He relies on s. 128(4)(b) of the *Courts of Justice Act*, R.S.O. 1990 c. C-43, which provides that pre-judgment interest shall not be awarded on interest accruing under this section. He also submits that unlike in *Bank of America v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601, a case the motion judge referenced in support of his discretion to award compound interest, there was no loan agreement specifically providing for compound interest between the parties.

[56] At para. 17 of his supplementary endorsement, the motion judge explained why he awarded compound interest:

Courts of equity have always exercised the power to award compound interest whenever a wrongdoer deprives a company of money which it uses in its business. On general principles it should be presumed that had the business not been deprived of the money, it would have made the most beneficial use of it available to it. Alternatively, it should be presumed that the wrongdoer

made the most beneficial use of it. [Internal citations omitted.]

[57] I agree. I would simply add that this court has consistently approved of the trial court's exercise of discretion to award compound interest for breach of fiduciary duty or breach of trust: see *Kooner v. Kooner*, 2006 CarswellOnt 5884 (C.A.), at para. 2; *Waxman v. Waxman*, 2008 ONCA 426, at para. 5; and *Brock v. Cole* (1983), 1983 CanLII 1952 (ON CA), 40 O.R. (2d) 97 (Ont. C.A.), at p. 103.

[58] I would not give effect to this ground of appeal.

D. CONCLUSION

[59] I would dismiss both Piro's appeal and Montaldi's appeal. Enbridge is entitled to the costs of the appeal, which I would fix in the amount of \$40,000, inclusive of disbursements and applicable taxes.

Released: Oct. 1, 2012
"JL"

"John Laskin J.A."
"I agree R.A. Blair J.A."
"I agree M.F. Brown R.S.J. (ad hoc)"

Tab 111

Jones v. Tsige, 2012 ONCA 32 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2012-01-18
File number:	C53577
Other citations:	108 OR (3d) 241 — 346 DLR (4th) 34 — 287 OAC 56 — 96 BLR (4th) 1 — 251 CRR (2d) 124 — 89 CCLT (3d) 221 — [2012] CarswellOnt 274 — [2012] OJ No 148 (QL)
Citation:	Jones v. Tsige, 2012 ONCA 32 (CanLII), < https://canlii.ca/t/fpnld >, retrieved on 2026-03-23
Most recent unfavourable mention	Roque v Peters , 2022 MBQB 34 (CanLII) [...] [135] Jones is clearly distinguishable . [...]

Jones v. Tsige

**108 O.R. (3d) 241
2012 ONCA 32**

**Court of Appeal for Ontario,
Winkler C.J.O., Sharpe J.A. and Cunningham
A.C.J. (ad hoc)
January 18, 2012**

Torts -- Invasion of privacy -- Intrusion upon seclusion -- Right of action for intrusion upon seclusion existing in Ontario -- Range of damages for intrusion upon seclusion being up to \$20,000 -- Defendant committing tort of intrusion upon seclusion when she used her position as bank employee to repeatedly examine private banking records of her spouse's ex- wife -- Damages in amount of \$10,000 awarded.

The plaintiff and the defendant did not know each other, but they worked for different branches of the same bank and the defendant had formed a common law relationship with the plaintiff's ex-husband. For about four years, the defendant used her workplace computer to access the plaintiff's personal bank accounts at least 174 times. She did not publish, distribute or record the information in any way. When she discovered the conduct, the plaintiff brought an action for damages for invasion of privacy and moved for summary judgment. The defendant brought a cross-motion for

summary judgment dismissing the action. The motion judge found that the tort of invasion of privacy does not exist at common law in Ontario. He dismissed the plaintiff's motion and granted the defendant's motion. The plaintiff appealed.

Held, the appeal should be allowed.

A right of action for intrusion upon seclusion should be recognized in Ontario. The case law supports the existence of such a cause of action. Privacy has long been recognized as an important underlying and animating value of various traditional causes of action to protect personal and territorial privacy. Charter jurisprudence recognizes privacy as a fundamental value in our law and specifically identifies, as worthy of protection, a right to informational privacy that is distinct from personal and territorial privacy. The right to informational privacy closely tracks the same interest that would be protected by a cause of action for intrusion upon seclusion. It is within the capacity of the common law to evolve to respond to the problem posed by the routine collection and aggregation of highly personal information that is readily accessible in electronic form.

Technological change poses a novel threat to a right of privacy that has been protected for hundreds of years by the common law under various guises and that, since 1982 and the Charter, has been recognized as a right that is integral to our social and political order. Finally, the facts of this case cried out for a remedy.

The key features of the cause of action of intrusion upon seclusion are, first, that the defendant's conduct must be intentional (which includes recklessness); second, that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive, causing distress, humiliation or anguish. Proof of harm to a recognized economic interest is not an element of the cause of action.

Given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum. The appropriate range is up to \$20,000. Awards of aggravated and punitive damages may be appropriate in exceptional cases, but are not to be encouraged, as predictability and consistency are paramount values in an area where symbolic or moral damages are awarded. [page242]

The defendant committed the tort of intrusion upon seclusion when she repeatedly examined the plaintiff's private bank records. The intrusion was intentional, it amounted to an unlawful invasion of the plaintiff's private affairs, it would be viewed as highly offensive to the reasonable person and it caused distress, humiliation or anguish. The plaintiff was awarded damages in the amount of \$10,000. The intrusion upon her seclusion did not exhibit any exceptional quality calling for an award of aggravated or punitive damages.

APPEAL by the plaintiff from the summary judgment of Whitaker J., [2011] O.J. No. 1273, [2011 ONSC 1475 \(S.C.J.\)](#) dismissing an action for damages for breach of privacy.

The judgment of the court was delivered by

Cases referred to: *Euteneier v. Lee* (2005), [2005 CanLII 33024 \(ON CA\)](#), 77 O.R. (3d) 621, [2005] O.J. No. 3896, 260 D.L.R. (4th) 123, 202 O.A.C. 278, 133 C.R.R. (2d) 292, 142 A.C.W.S. (3d) 340 (C.A.), revg [2003] O.J. No. 4239, 113 C.R.R. (2d) 44 (Div. Ct.) [Leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 516], conso Other cases referred to: *Athans v. Canadian Adventure Camps Ltd.* (1977), [1977 CanLII 1255 \(ON SC\)](#), 17 O.R. (2d) 425, [1977] O.J. No. 2417, 80 D.L.R. (3d) 583, 4 C.C.L.T. 20, 34 C.P.R. (2d) 126, [1977] 2 A.C.W.S. 1066 (H.C.J.); *Aubry v. Editions Vice Versa*, [1998 CanLII 817 \(SCC\)](#), [1998] 1 S.C.R. 591, [1998] S.C.J. No. 30, 157 D.L.R. (4th) 577, 224 N.R. 321, J.E. 98-878, 39 C.C.L.T. (2d) 100, 45 C.C.L.T. (2d) 119, 78 C.P.R. (3d) 289, 50 C.R.R. (2d) 225, 78 A.C.W.S. (3d) 775, REJB 1998-05646; *Campbell v. MGN Ltd.*, [2004] UKHL 22, [2004] 2 A.C. 457, [2004] 2 All E.R. 995 (H.L.); *Capan v. Capan*, [1980] O.J. No. 1361, 14 C.C.L.T. 191, 5 A.C.W.S. (2d) 245 (H.C.J.); *Dulude v. Canada*, [2000 CanLII 16085](#)

(FCA), [2000] F.C.J. No. 1454, [2001] 1 F.C. 545, 192 D.L.R. (4th) 714, 264 N.R. 1, 100 A.C.W.S. (3d) 1006 (C.A.); Dyne Holdings Ltd. v. Royal Insurance Co. of Canada, [1996 CanLII 3672 \(PE SCAD\)](#), [1996] P.E.I.J. No. 28, 135 D.L.R. (4th) 142, 138 Nfld. & P.E.I.R. 318, 34 C.C.L.I. (2d) 180, [1996] I.L.R. I-3366, 62 A.C.W.S. (3d) 1206 (S.C. App. Div.) [Leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 344]; Evans v. Detlefsen, 857 F.2d 330 (6th Cir. 1988); F. (J.M.) v. Chappell, [1998 CanLII 14973 \(BC CA\)](#), [1998] B.C.J. No. 276, 158 D.L.R. (4th) 430, [1998] 7 W.W.R. 57, 103 B.C.A.C. 110, 45 B.C.L.R. (3d) 64, 41 C.C.L.T. (2d) 26, 15 C.R. (5th) 259, 77 A.C.W.S. (3d) 673 (C.A.) [Leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 154, 231 N.R. 400]; Garrett v. Mikalachki, [2000] O.J. No. 1326, [2000] O.T.C. 248 (S.C.J.); Grant v. Torstar Corp., [2009] 3 S.C.R. 640, [2009] S.C.J. No. 61, [2009 SCC 61](#), 204 C.R.R. 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Christopher Du Vernet and Carlin McGoogan, for appellant.

Alex Cameron and N. Melanson, for respondent.

[1] SHARPE J.A.: -- Does Ontario law recognize a right to bring a civil action for damages for the invasion of personal privacy?

[2] In July 2009, the appellant, Sandra Jones, discovered that the respondent, Winnie Tsige, had been surreptitiously looking at Jones' banking records. Tsige and Jones did not know each other despite the fact that they both worked for the same bank and Tsige had formed a common-law relationship with Jones' former husband. As a bank employee, Tsige had full access to Jones' banking information and, contrary to the bank's policy, looked into Jones' banking records at least 174 times over a period of four years.

[3] The central issue on this appeal is whether the motion judge erred by granting summary judgment and dismissing Jones' claim for damages on the ground that Ontario law does not recognize the tort of breach of privacy. Facts

[4] Jones and Tsige worked at different branches of the Bank of Montreal ("BMO"). Jones maintains her primary bank account there. Jones and Tsige did not know or work with each other. However, Tsige became involved in a relationship with Jones' former husband. For about four years, Tsige used her workplace computer to access Jones' personal BMO bank accounts at least 174 times. The information displayed included transactions details as well as personal information, such as date of birth, marital status and address. Tsige did not publish, distribute or record the information in any way.

[5] Jones became suspicious that Tsige was accessing her account and complained to BMO. When confronted by BMO, Tsige admitted that she had looked at Jones' banking information, that she had no legitimate reason for viewing the information and that she understood it was contrary to BMO's code of business conduct and ethics and her professional responsibility. Tsige explained then, and maintains in this action, that she was [page246] involved in a financial dispute with the appellant's former husband and accessed the accounts to confirm whether he was paying child support to the appellant. Jones does not accept that explanation as she says it is inconsistent with the timing and frequency of Tsige's snooping.

[6] Tsige has apologized for her actions and insists that she has ceased looking at Jones' banking information. Tsige is contrite and embarrassed by her actions. BMO disciplined Tsige by suspending her for one week without pay and denying her a bonus.

[7] In her statement of claim, Jones asserts that her privacy interest in her confidential banking information has been "irreversibly destroyed" and claims damages of \$70,000 for invasion of privacy and breach of fiduciary duty, and punitive and exemplary damages of \$20,000. 1. Motions for summary judgment

[8] Jones proceeded under the simplified procedure of Rule 76 of the [Rules of Civil Procedure, R.R.O. 1990, Reg. 194](#) and moved for summary judgment. Tsige brought a cross-motion for summary judgment to dismiss the action.

[9] The motion judge found that Tsige did not owe Jones a fiduciary obligation and dismissed that claim. Jones has not appealed that finding.

[10] The motion judge then reviewed the jurisprudence concerning the existence of a tort of invasion of privacy. He observed that recent Superior Court decisions have refused to strike out such claims at the pleading stage and that some academic writing indicates that the tort may exist.

[11] The motion judge concluded, however, that the statement of Cronk J.A. in *Euteneier v. Lee* (2005), [2005 CanLII 33024 \(ON CA\)](#), 77 O.R. (3d) 621, [2005] O.J. No. 3896 (C.A.), at para. 63, leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 516 is, in his words, "binding and dispositive of the question" of whether the tort of invasion of privacy exists at common law in Ontario. *Euteneier* concerned a lawsuit brought by a woman whose clothes were forcibly removed by police following her suicide attempt while she was detained in a holding cell. In considering whether the trial judge had accurately described the plaintiff's privacy and dignity interests, Cronk J.A. observed, at para. 63, "[the plaintiff] properly conceded in oral argument before this court that there is no 'free-standing' right to dignity or privacy under the [Charter](#) or at common law".
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[12] The motion judge added that given the existence of privacy legislation protecting certain rights, any expansion of those rights should be dealt with by statute rather than common law.

[13] The motion judge dismissed Jones' motion for summary judgment and granted the motion brought by Tsige. He rejected Jones' submission that costs should be denied on the ground that the issue was novel and that Tsige's conduct was objectionable. The motion judge felt that Jones had pursued the litigation aggressively and failed to accept reasonable settlement offers. He awarded costs fixed at \$35,000. Issues

[14] Jones appeals to this court, raising the following issues:

(1) Did the motion judge err in holding that Ontario law does not recognize a cause of action for invasion of privacy? (2) Did the motion judge err with respect to costs? Analysis

Issue 1. Does Ontario law recognize a cause of action for invasion of privacy?

(a) Introduction

[15] The question of whether the common law should recognize a cause of action in tort for invasion of privacy has been debated for the past 120 years. Aspects of privacy have long been protected by causes of action such as breach of confidence, defamation, breach of copyright, nuisance and various property rights. Although the individual's privacy interest is a fundamental value underlying such claims, the recognition of a distinct right of action for breach of privacy remains uncertain. As Adams J. stated in *Ontario (Attorney General) v. Dieleman* (1994), [1994 CanLII 10546 \(ON SC\)](#), 20 O.R. (3d) 229, [1994] O.J. No. 1864, 117 D.L.R. (4th) 449 (Gen. Div.), at p. 688 D.L.R., after a comprehensive review of the case law, "invasion of privacy in Canadian common law continues to be an inceptive, if not ephemeral, legal concept, primarily operating to extend the margins of existing tort doctrine".

[16] Canadian, English and American courts and commentators almost invariably take the seminal articles of S.D. Warren and L.D. Brandeis, "The Right to Privacy" (1890), 4 Harv. L. Rev. 193 and William L. Prosser, "Privacy" (1960), 48 Cal. L. Rev. 383 as their starting point.

[17] Warren and Brandeis argued for the recognition of a right of privacy to meet the problems posed by technological and social [page248] change that saw "instantaneous photographs" and "newspaper enterprise" invade "the sacred precincts of private life" (at p. 195). They identified the "general right of the individual to be let alone", the right to "inviolate personality" (at p. 205), "the more general right to the immunity of the person" and "the right to one's personality" (at p. 207) as fundamental values underlying such well-known causes of action as breach of confidence, defamation and breach of copyright. They urged that open recognition of a right of privacy was well-supported by these underlying legal values and required to meet the changing demands of the society in which they lived.

[18] Professor Prosser's article picked up the threads of the American jurisprudence that had developed in the 70 years following the influential Warren and Brandeis article. Prosser argued that what had emerged from the hundreds of cases he canvassed was not one tort, but four, tied together by a common theme and name, but comprising different elements and protecting different interests. Prosser delineated a four-tort catalogue, summarized as follows, at p. 389:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

[19] Most American jurisdictions now accept Prosser's classification and it has also been adopted by the Restatement (Second) of Torts (2010). The tort that is most relevant to this case, the tort of "intrusion upon seclusion", is described by the Restatement, at 652B as:

One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.

[20] The comment section of the Restatement elaborates this proposition and explains that the tort includes physical intrusions into private places as well as listening or looking, with or without mechanical aids, into the plaintiff's private affairs. Of particular relevance to this appeal is the observation that other non-physical forms of investigation or examination into private concerns may be actionable. These include opening private and personal mail or examining a private bank account, [page249] "even though there is no publication or other use of any kind" of the information obtained.

[21] If Jones has a right of action, it falls into Prosser's first category of intrusion upon seclusion. While I will make some reference to the fourth category of appropriation of the plaintiff's name or likeness in my discussion below, I will focus primarily on intrusion upon seclusion. I do so for two reasons. First, I accept Prosser's insight that the general right to privacy embraces four distinct torts, each with its own considerations and rules, and that confusion may result from a failure to maintain appropriate analytic distinctions between the categories. Second, as a court of law, we should restrict ourselves to the particular issues posed by the facts of the case before us and not attempt to decide more than is strictly necessary to decide that case. A cause of action of any wider breadth would not only over-reach what is necessary to resolve this case, but could also amount to an unmanageable legal proposition that would, as Prosser warned, breed confusion and uncertainty.

[22] The following discussion will examine whether the common law recognizes a cause of action for invasion of privacy. I will canvass case law from Ontario and other provinces and examine federal and provincial legislation relating to privacy. For completeness, I will also discuss the state of the law in foreign jurisdictions.

(b) Case law

[23] Reflecting on Canadian jurisprudence, Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law*, 9th ed. (Toronto: LexisNexis, 2011) observed, at p. 59, that "[w]e seem to be drifting closer to the American model". See, also, Colin H.H. McNairn and Alexander K. Scott, *Privacy Law in Canada* (Toronto: Butterworths, 2001), at ch. 3; Barbara McIsaac, Rick Shields and Kris Klein, *The Law of Privacy in Canada*, looseleaf (Toronto: Carswell, 2000), at 2.4; Philip Osborne, *The Law of Torts*, 4th ed. (Toronto: Irwin Law, 2011), at pp. 267-71.

[24] My analysis of the case law supports the same conclusion: Ontario has already accepted the existence of a tort claim for appropriation of personality and, at the very least, remains open to the proposition that a tort action will lie for an intrusion upon seclusion.

(i) Ontario case law

[25] In Canada, there has been no definitive statement from an appellate court on the issue of whether there is a common law right of action corresponding to the intrusion on seclusion [page250] category. Ontario trial judges have, however, often refused to dismiss such claims at the pleading stage as disclosing no cause of action and some have awarded damages for claims based on violations of the right to be free of intrusion upon seclusion. The clear trend in the case law is, at the very least, to leave open the possibility that such a cause of action does exist.

[26] *Saccone v. Orr* (1981), [1981 CanLII 1708 \(ON SC\)](#), 34 O.R. (2d) 317, [1981] O.J. No. 3132 (Co. Ct.), for example, involved the recording of a private conversation without the knowledge or consent of the plaintiff. The recording was then played at a municipal council meeting and a transcript of the conversation published in a local newspaper. Jacob Co. Ct. J. dismissed the defendant's argument against the existence of a tort of invasion of privacy, found in favour of the plaintiff and awarded damages of \$500.

[27] *Roth v. Roth* (1991), [1991 CanLII 7220 \(ON SC\)](#), 4 O.R. (3d) 740, [1991] O.J. No. 1301 (Gen. Div.) involved interference with the plaintiffs' ability to use and enjoy their cottage property. Mandel J. considered the application of several torts -- assault, battery, nuisance and trespass -- but found that the cumulative effect of the defendants' actions could best be described as an invasion of privacy. He rejected the contention that the common law did not allow for a claim for invasion of privacy and held, at p. 743 O.R., that the common law should not be confined to existing categories but must evolve. In recognizing the right of privacy, Mandel J. quoted a passage from a leading torts text indicating that liability for breach of privacy should only be imposed where the intrusion is substantial and would be regarded as offensive and intolerable to a person of reasonable sensitivity. He then stated, at p. 758 O.R., "whether the invasion of privacy of an individual will be actionable will depend on the circumstances of the particular case and the conflicting rights involved".

[28] A third trial judgment to award damages for breach of privacy falls under Prosser's fourth category of appropriation of the plaintiff's name or likeness. *Athans v. Canadian Adventure Camps Ltd.* (1977), [1977 CanLII 1255 \(ON SC\)](#), 17 O.R. (2d) 425, [1977] O.J. No. 2417 (H.C.J.) involved a claim by an expert water-skier against a public relations firm that had copied a distinctive photograph of the plaintiff water skiing. Henry J. relied on *Krouse v. Chrysler Canada Ltd.* (1973), [1973 CanLII 574 \(ON CA\)](#), 1 O.R. (2d) 225, [1973] O.J. No. 2157 (C.A.), in which Estey J.A. had suggested that an action in tort for the appropriation of personality did exist under the common law of Ontario. Henry J. held that the plaintiff failed to make out the tort of passing off, but did have a claim for the tort of "appropriation of personality". The plaintiff recovered damages [page251] measured by the amount the plaintiff ought reasonably to have received in the market for permission to use his image.

[29] There are also several Ontario cases in which the trial judge refused to strike pleadings alleging the tort of invasion of privacy as disclosing no cause of action.

[30] *Somwar v. McDonald's Restaurants of Canada Ltd.* (2006), [2006 CanLII 202 \(ON SC\)](#), 79 O.R. (3d) 172, [2006] O.J. No. 64 (S.C.J.) contains perhaps the most coherent and definitive pronouncement in Ontario jurisprudence of the existence of a common law tort of invasion of privacy corresponding to the intrusion upon seclusion category. Somwar accused his employer, McDonald's Restaurants, of unlawfully invading his privacy by conducting a credit bureau check on him without his consent. The plaintiff claimed damages for invasion of privacy and for punitive damages. The defendant moved to strike the statement of claim and dismiss the plaintiff's action on

the basis that it did not disclose a reasonable cause of action under [rule 21.01\(1\)\(b\)](#) of the [Rules of Civil Procedure](#).

[31] Stinson J. reviewed the Ontario case law and observed that while the cases were not entirely consistent, even where the courts did not accept the existence of a privacy tort, they rarely went so far as to rule out the potential of such a tort. The body of case law, together with the recognition by the Supreme Court of Canada of the protection of privacy under [s. 8](#) of the [Canadian Charter of Rights and Freedoms](#), led him to conclude, at paras. 29 and 31:

With advancements in technology, personal data of an individual can now be collected, accessed (properly and improperly) and disseminated more easily than ever before. There is a resulting increased concern in our society about the risk of unauthorized access to an individual's personal information. The traditional torts such as nuisance, trespass and harassment may not provide adequate protection against infringement of an individual's privacy interests. Protection of those privacy interests by providing a common law remedy for their violation would be consistent with [Charter](#) values and an "incremental revision" and logical extension of the existing jurisprudence.

Even if the plaintiff's claim for invasion of privacy were classified as "novel" (which, in any event, is not a proper basis for dismissing it), the foregoing analysis leads me to conclude that the time has come to recognize invasion of privacy as a tort in its own right. It therefore follows that it is neither plain nor obvious that the plaintiff's action cannot succeed on the basis that he has not pleaded a reasonable cause of action.

[32] Somwar was followed in *Nitsopoulos v. Wong*, [2008 CanLII 45407 \(ON SC\)](#), [2008] O.J. No. 3498, 298 D.L.R. (4th) 265 (S.C.J.). See, also, *Capan v. Capan*, [1980] O.J. No. 1361, 14 C.C.L.T. 191 (H.C.J.); *Lipiec v. Borsa*, [1996] O.J. No. 3819, 31 C.C.L.T. (2d) 294 (Gen. Div.); [page252] *Shred-Tech Corp. v. Viveen*, [2006] O.J. No. 4893, 2006 CarswellOnt 7762 (S.C.J.), at para. 30. Compare *Haskett v. Trans Union of Canada Inc.*, [2001] O.J. No. 4949, 10 C.C.L.T. (3d) 128 (S.C.J.).

(ii) Provincial case law

[33] While there appears to be no appellate decision from another province definitively establishing a common law right of action for intrusion upon seclusion, dicta in at least two cases support the idea. In *Motherwell v. Motherwell*, [1976 ALTASCAD 155 \(CanLII\)](#), [1976] A.J. No. 555, 73 D.L.R. (3d) 62 (S.C. App. Div.), a case involving harassing telephone calls, the court held the plaintiff had a right of action in nuisance but added, at para. 25, that "the interests of our

developing jurisprudence would be better served by approaching invasion of privacy by abuse of the telephone system as a new category, rather than seeking by rationalization to enlarge" the existing categories of nuisance.

[34] The issue in *Dyne Holdings Ltd. v. Royal Insurance Co. of Canada*, 1996 CanLII 3672 (PE SCAD), [1996] P.E.I.J. No. 28, 135 D.L.R. (4th) 142 (S.C. App. Div.), leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 344, was an insurer's duty to defend. One aspect of the claim arguably amounted to an invasion of privacy akin to the category of intrusion upon exclusion. After a review of the jurisprudence, Carruthers C.J. observed, at p. 160 D.L.R.: "the courts in Canada are not far from recognizing a common law right to privacy if they have not already done so. It is also clear that Canadian courts do not hesitate to protect privacy interests under some recognized tort."

(iii) *Euteneier v. Lee*

[35] This brings me to *Euteneier v. Lee*, and the statement from the case that the motion judge here found to be dispositive. In my respectful view, the motion judge's reliance on *Euteneier* for the proposition Ontario law excludes any and all claims for breach of privacy interests was misplaced. The plaintiff in *Euteneier* had been arrested and detained on criminal charges. She complained of her treatment while in police custody and sought damages for negligence, assault, civil conspiracy and breach of her ss. 7, 9, 12 and 15 rights under the [Charter](#). The trial judge found that based on the appellant's own behaviour while in custody, which included an apparent suicide attempt, the defendant police officers had conducted themselves in a reasonable and prudent manner. They had breached no duty nor exhibited any bad faith or malice to ground any of the claims she had asserted and the claim was dismissed. [page253]

[36] The plaintiff's first appeal was to the Divisional Court on account of the quantum of damages assessed by the trial judge: see *Euteneier v. Lee*, [2003] O.J. No. 4239, 113 C.R.R. (2d) 44 (Div. Ct.). The Divisional Court allowed the appeal in part. A new trial was ordered on the issue of whether, after disrobing the plaintiff to prevent her from continuing to use articles of clothing to hang herself, the police were negligent, committed assault or breached the plaintiff's [Charter](#) rights [at para. 42] "by confining her in the [holding cell] and by handcuffing her to its bars without taking steps to maintain her dignity or to prevent her humiliation".

[37] The defendants appealed the order for a new trial to this court and the plaintiff cross-appealed seeking a new trial on all issues. This court allowed the appeal and dismissed the cross-appeal. Cronk J.A., writing for the court, held that the Divisional Court had failed to apply the proper standard of review with respect to the trial judge's factual findings. Of particular significance to the point at issue on this appeal is Cronk J.A.'s observation, at paras. 47 and 56. She noted that the plaintiff did not plead that the defendants owed her any duty to maintain her dignity and prevent her humiliation, and that any reference to her dignity or privacy interests were as particulars of other causes of action or as the consequences she alleged flowed from the actions of the defendants. Cronk J.A. held that the Divisional Court had erred in treating those allegations as stand-alone causes of action.

[38] Accordingly, it is clear from the context and from the words used that the passage, at para. 63, relied on by the motion judge -- "[the plaintiff] properly conceded in oral argument before this court that there is no 'free standing' right to dignity or privacy under the [Charter](#) or at common law" -- could not have been intended to express any dispositive or definitive opinion as to the existence of a tort claim for breach of a privacy interest. No such claim had been advanced by the plaintiff, no argument on that point was addressed by counsel, and in my view, no opinion on that point was expressed by this court.

(c) *Charter* jurisprudence

[39] [Charter](#) jurisprudence identifies privacy as being worthy of constitutional protection and integral to an individual's relationship with the rest of society and the state. The Supreme Court of

Canada has consistently interpreted the Charter's s. 8 protection against unreasonable search and seizure as protecting the underlying right to privacy. In *Hunter v. Southam Inc.*, [1984 CanLII 33 \(SCC\)](#), [1984] 2 S.C.R. 145, [1984] S.C.R. No. 36, at pp. 158-59 S.C.R., [page254] Dickson J. adopted the purposive method of Charter interpretation and observed that the interests engaged by s. 8 are not simply an extension of the concept of trespass, but rather are grounded in an independent right to privacy held by all citizens.

[40] In *R. v. Dyment*, [1988 CanLII 10 \(SCC\)](#), [1988] 2 S.C.R. 417, [1988] S.C.J. No. 82, at p. 427 S.C.R., La Forest J. characterized the s. 8 protection of privacy as "[g]rounded in a man's physical and moral autonomy" and stated that "privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order." La Forest J. added, at p. 429 S.C.R.:

In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.

[41] [Charter](#) jurisprudence has recognized three distinct privacy interests: *Dyment*, at pp. 428-29 S.C.R.; *R. v. Tessling*, [2004] 3 S.C.R. 432, [2004] S.C.J. No. 63, [2004 SCC 67](#), at paras. 19-23. The first two interests, personal privacy and territorial privacy, are deeply rooted in the common law. Personal privacy, grounded in the right to bodily integrity, protects "the right not to have our bodies touched or explored to disclose objects or matters we wish to conceal". Territorial privacy protects the home and other spaces where the individual enjoys a reasonable expectation of privacy. The third category, informational privacy, is the interest at stake in this appeal. In *Tessling*, Binnie J. described it, at para. 23:

Beyond our bodies and the places where we live and work, however, lies the thorny question of how much information about ourselves and activities we are entitled to shield from the curious eyes of the state (*R. v. S.A.B.*, [2003] 2 S.C.R. 678, [2003 SCC 60](#)). This includes commercial information locked in a safe kept in a restaurant owned by the accused (*R. v. Law*, [2002] 1 S.C.R. 227, [2002 SCC 10](#), at para. 16). Informational privacy has been defined as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others": A. F. Westin, *Privacy and Freedom* (1970), at p. 7. Its protection is predicated on the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain . . . as he sees fit.

(Report of a Task Force established jointly by Department of Communications/Department of Justice, Privacy and Computers (1972), at p. 13).

[42] This characterization would certainly include Jones' claim to privacy in her banking records. [page255]

[43] In *Hill v. Church of Scientology of Toronto* (1995), [1995 CanLII 59 \(SCC\)](#), 24 O.R. (3d) 865, [1995] 2 S.C.R. 1130, [1995] S.C.J. No. 64, Cory J. observed, at para. 121, that the right to privacy has been accorded constitutional protection and should be considered as a [Charter](#) value in the development of the common law tort of defamation. In *Hill*, Cory J. stated, at para. 121: "reputation is intimately related to the right to privacy which has been accorded constitutional protection". See, also, *R. v. O'Connor*, [1995 CanLII 51 \(SCC\)](#), [1995] 4 S.C.R. 411, [1995] S.C.J. No. 98, at para. 113, per L'Heureux-Dubé J.: identifying privacy as "an essential component of what it means to be 'free'".

[44] The Charter treatment of privacy accords with art. 12 of the Universal Declaration of Human Rights, G.A. Res. 271(III), UNGAOR, 3d Sess., Supp. No. 13, UN. Doc. A/810 (1948) 71, which provides that "[n]o one shall be subjected to arbitrary interference with his privacy, home or correspondence" and proclaims that "[e]veryone has the right to the protection of the law against such interference or attacks". Privacy is also recognized as a fundamental human right by art. 17 of the International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S. 171.

[45] While the [Charter](#) does not apply to common law disputes between private individuals, the Supreme Court has acted on several occasions to develop the common law in a manner consistent with Charter values: see *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.*, [1986 CanLII 5 \(SCC\)](#), [1986] 2 S.C.R. 573, [1986] S.C.J. No. 75, at p. 603 S.C.R.; *R. v. Salituro*, [1991 CanLII 17 \(SCC\)](#), [1991] 3 S.C.R. 654, [1991] S.C.J. No. 97, at pp. 666 and 675 S.C.R.; *Hill v. Scientology*, at p. 1169 S.C.R.; *R.W.D.S.U., Local 558 v. Pepsi- Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, [2002] S.C.J. No. 7, [2002 SCC 8](#); *Grant v. Torstar Corp.*, [2009] 3 S.C.R. 640, [2009] S.C.J. No. 61, [2009 SCC 61](#).

[46] The explicit recognition of a right to privacy as underlying specific [Charter](#) rights and freedoms, and the principle that the common law should be developed in a manner consistent with Charter values, supports the recognition of a civil action for damages for intrusion upon the plaintiff's seclusion: see John D.R. Craig, "Invasion of Privacy and Charter Values: The Common-Law Tort Awakens" (1997), 42 McGill L.J. 355.

(d) Legislation

(i) Acts relating to private information

[47] The federal and Ontario governments have enacted a complex legislative framework addressing the issue of privacy. [page256] These include [Personal Information Protection and Electronic Documents Act](#), S.C. 2000, c. 5 ("PIPEDA"); [Personal Health Information Protection Act](#), 2004, S.O. 2004, c. 3, Sch. A; [Freedom of Information and Protection of Privacy Act](#), R.S.O. 1990, c. F.31; [Municipal Freedom of Information and Protection of Privacy Act](#), R.S.O. 1990, c. M.56; [Consumer Reporting Act](#), R.S.O. 1990, c. C.33.

[48] Tsige argues that it is not open to this court to adapt the common law to deal with the invasion of privacy on the ground that privacy is already the subject of legislation in Ontario and Canada that reflects carefully considered economic and policy choices. It is submitted that expanding the reach of the common law in this area would interfere with these carefully crafted regimes and that any expansion of the law relating to the protection of privacy should be left to Parliament and the legislature.

[49] I am not persuaded that the existing legislation provides a sound basis for this court to refuse to recognize the emerging tort of intrusion upon seclusion and deny Jones a remedy. In my view, it would take a strained interpretation to infer from these statutes a legislative intent to supplant or halt the development of the common law in this area: see Robyn Bell, "Tort of Invasion of Privacy -- Has its Time Finally Come?" in Archibald and Cochrane, eds., *Annual Review of Civil Litigation* (Toronto: Carswell, 2005), at p. 225.

[50] [PIPEDA](#) is federal legislation dealing with "organizations" subject to federal jurisdiction and does not speak to the existence of a civil cause of action in the province. While BMO is subject to PIPEDA, there are at least three reasons why, in my view, Jones should not be restricted to the remedy of a PIPEDA complaint against BMO. First, Jones would be forced to lodge a complaint against her own employer rather than against Tsige, the wrongdoer. Second, Tsige acted as a rogue employee contrary to BMO's policy and that may provide BMO with a complete answer to the complaint. Third, the remedies available under PIPEDA do not include damages, and it is difficult to see what Jones would gain from such a complaint.

[51] The Ontario legislation essentially deals with freedom of information and the protection of certain private information with respect to government and other public institutions. Like PIPEDA, it has nothing to do with private rights of action between individuals.

(ii) Provincial Privacy Acts

[52] Four common law provinces currently have a statutorily created tort of invasion of privacy: British Columbia, [page257] [Privacy Act, R.S.B.C. 1996, c. 373](#); Manitoba, [Privacy Act, R.S.M. 1987, c. P125](#); Saskatchewan, [Privacy Act, R.S.S. 1978, c. P-24](#); and Newfoundland, [Privacy Act, R.S.N.L., 1990, c. P-22](#). All four Privacy Acts are similar. They establish a limited right of action, whereby liability will only be found if the defendant acts wilfully (not a requirement in Manitoba) and without a claim of right. Moreover, the nature and degree of the plaintiff's privacy entitlement is circumscribed by what is "reasonable in the circumstances".

[53] Under Quebec law, the right to privacy is explicitly protected both by arts. 3 and 35-37 of the [Civil Code of Québec, S.Q. 1991, c. 64](#) and by s. 5 of the [Charter of Human Rights and Freedoms, R.S.Q. c. C-12](#). See *Robbins v. Canadian Broadcasting Corp.* (1957), [1957 CanLII 430 \(QC CS\)](#), 12 D.L.R. (2d) 35(Que. S.C.); *Aubry v. Éditions Vice-Versa*, [1998 CanLII 817 \(SCC\)](#), [1998] 1 S.C.R. 591, [1998] S.C.J. No. 30; H. Patrick Glenn, "The Right to Privacy in Quebec Law" in Dale Gibson, ed., *Aspects of Privacy Law: Essays in Honour of John M. Sharp* (Toronto: Butterworths, 1980), at ch. 3.

[54] Significantly, however, no provincial legislation provides a precise definition of what constitutes an invasion of privacy. The courts in provinces with a statutory tort are left with more or less the same task as courts in provinces without such statutes. The nature of these acts does not indicate that we are faced with a situation where sensitive policy choices and decisions are best left to the legislature. To the contrary, existing provincial legislation indicates that when the legislatures have acted, they have simply proclaimed a sweeping right to privacy and left it to the courts to define the contours of that right.

(e) Other jurisdictions

(i) United States

[55] As already indicated, most American states have recognized a right of action for invasion of privacy rights as defined by the four categories identified by Prosser and now adopted by the Restatement.

[56] Generally speaking, to make out cause of action for intrusion upon seclusion, a plaintiff must show (1) an unauthorized intrusion; (2) that the intrusion was highly offensive to the reasonable person; (3) the matter intruded upon was private; and [page258] (4) the intrusion caused anguish and suffering. See William Prosser, *Law of Torts*, 4th ed. (West Publishing Company, 1971), at pp. 808-12.

[57] The first element indicates that the tort focuses on the act of intrusion, as opposed to dissemination or publication of information: *Roe v. Cheyenne Mt. Conf. Resort, Inc.*, 124 F.3d 1221 (10th Cir. 1997), at p. 1236 F.3d. The focus of the court in determining whether this element is satisfied is on "the type of interest involved and not the place where the invasion occurs": *Evans v. Detlefsen*, 857 F.2d 330 (6th Cir. 1988), at p. 338 F.2d.

[58] With regard to the second element, factors to be considered in determining whether a particular action is highly offensive include the degree of intrusion, the context, conduct and circumstances of the intrusion, the tortfeasor's motives and objectives and the expectations of those whose privacy is invaded: see J.D. Lee and Barry A. Lindahl, *Modern Tort Law: Liability & Litigation*, 2nd ed., looseleaf (West Group, 2002), at 48:6.

[59] In determining the third element, the plaintiff must establish that the expectation of seclusion or solitude was objectively reasonable. The courts have adopted the two-prong test used in the

application of the Fourth Amendment of the United States Constitution. The first step is demonstrating an actual subjective expectation of privacy, and the second step asks if that expectation is objectively reasonable: *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507 (1967), at p. 361 U.S.

[60] The fourth element has received considerably less attention as anguish and suffering are generally presumed once the first three elements have been established.

(ii) Commonwealth jurisdictions

[61] In England, privacy is expressly protected by art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221 at 223, incorporated by the Human Rights Act 1998 (U.K.), 1998 c. 42:

"Everyone has the right to respect for his private and family life, his home and his correspondence." However, the House of Lords held in *Wainwright v. Home Office*, [2003] UKHL 53, [2003] 4 All E.R. 969 (H.L.), at para. 31, that while privacy may be "a value which underlies the existence of a rule of law (and may point the direction in which the law should develop)", privacy is not "a principle of law in itself" capable of supporting a private law right of action for damages. Yet the next year, in *Campbell v. MGN Ltd.*, [2004] UKHL 22, [2004] 2 A.C. 457 (H.L.), the House of Lords granted an injunction to restrain on grounds of breach [page259] of confidence publication of newspaper stories and photographs of a supermodel leaving a drug addiction treatment facility. Lord Hoffman held, in *Campbell*, at para. 51, that the tort of breach of confidence had evolved into a form of privacy protection, described by the court as a tort of misuse of private information:

[T]he new approach takes a different view of the underlying value which the law protects.

Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity

-- the right to control the dissemination of information about one's private life and the right to the esteem and respect of people.

[62] The reformulated action for breach of confidence has been held to embrace damages claims to protect privacy interests that would easily fall within the intrusion upon seclusion category: see *Mosely v. News Group Newspapers Ltd.*, [2008] EWHC 1777, [2008] All E.R. (D) 322 (Q.B.), at para. 7: "[t]he law now affords protection to information in respect of which there is a reasonable expectation of privacy, even in circumstances where there is no pre-existing relationship giving rise of itself to an enforceable duty of confidence".

[63] In *Lenah Game Meats Pty Ltd v. Australian Broadcasting Corp.*, [2001] H.C.A. 63, 185 A.L.J. 1 (H.C. Aust.), the High Court of Australia expressly left the door open to the recognition of a common law right to privacy despite earlier authority to the contrary. This was applied in *Grosse v. Purvis*, [2003] Q.D.C. 151, Aust. Torts Reports 81-706, where the elements for the tort were found to be (1) a willed act by the defendant; (2) which intrudes upon the privacy or seclusion of the plaintiff; (3) in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities; and (4) which causes the plaintiff detriment in the form of mental, psychological or emotional harm or distress or which prevents or hinders the plaintiff from doing an act which she is lawfully entitled to do.

[64] In *Hosking v. Runting*, [2004] NZCA 34, [2005] 1 NZLR 1 (C.A.), the New Zealand Court of Appeal recognized a common law tort of breach of privacy that is separate and distinct from the tort of breach of confidence. Although the court dismissed the claim on the merits, the majority judgment confirmed the existence of a privacy tort in New Zealand dealing with wrongful

[page260] publication of private facts to address publicity that is (at para. 126) "truly humiliating and distressful or otherwise harmful". The elements of the tort were described, at para. 117:

1. The existence of facts in respect of which there is a reasonable expectation of privacy; and
 2. Publicity given to those private facts must be considered highly offensive to an objective reasonable person.
2. Defining the tort of intrusion upon seclusion
- (a) Introduction

[65] In my view, it is appropriate for this court to confirm the existence of a right of action for intrusion upon seclusion. Recognition of such a cause of action would amount to an incremental step that is consistent with the role of this court to develop the common law in a manner consistent with the changing needs of society.

(b) Rationale

[66] The case law, while certainly far from conclusive, supports the existence of such a cause of action. Privacy has long been recognized as an important underlying and animating value of various traditional causes of action to protect personal and territorial privacy. [Charter](#) jurisprudence recognizes privacy as a fundamental value in our law and specifically identifies, as worthy of protection, a right to informational privacy that is distinct from personal and territorial privacy. The right to informational privacy closely tracks the same interest that would be protected by a cause of action for intrusion upon seclusion. Many legal scholars and writers who have considered the issue support recognition of a right of action for breach of privacy: see, e.g., P. Winfield, "Privacy" (1931), 47 Law Q. Rev. 23; D. Gibson, "Common Law Protection of Privacy: What to do Until the Legislators Arrive" in Lewis Klar, ed., *Studies in Canadian Tort Law* (Toronto: Butterworths, 1977) 343; Robyn M. Ryan Bell, "Tort of Invasion of Privacy -- Has its Time Finally Come?" in Todd Archibald and Michael Cochrane, eds., *Annual Review of Civil Litigation* (Toronto: Carswell, 2005) 225; Peter Burns, "The Law and Privacy: The Canadian Experience" (1976), 54 Can. Bar Rev. 1; John D.R. Craig, "Invasion of Privacy and Charter Values: The Common-Law Tort Awakens" (1997), 52 McGill L.J. 355.

[67] For over 100 years, technological change has motivated the legal protection of the individual's right to privacy. In modern times, the pace of technological change has accelerated exponentially. Legal scholars such as Peter Burns have written [page261] of "the pressing need to preserve 'privacy' which is being threatened by science and technology to the point of surrender": "The Law and Privacy: the Canadian Experience", at p. 1. See, also, Alan Westin, *Privacy and Freedom* (New York:

Atheneum, 1967). The Internet and digital technology have brought an enormous change in the way we communicate and in our capacity to capture, store and retrieve information. As the facts of this case indicate, routinely kept electronic databases render our most personal financial information vulnerable. Sensitive information as to our health is similarly available, as are records of the books we have borrowed or bought, the movies we have rented or downloaded, where we have shopped, where we have travelled and the nature of our communications by cellphone, e-mail or text message.

[68] It is within the capacity of the common law to evolve to respond to the problem posed by the routine collection and aggregation of highly personal information that is readily accessible in electronic form. Technological change poses a novel threat to a right of privacy that has been protected for hundreds of years by the common law under various guises and that, since 1982 and the [Charter](#), has been recognized as a right that is integral to our social and political order.

[69] Finally, and most importantly, we are presented in this case with facts that cry out for a remedy. While Tsige is apologetic and contrite, her actions were deliberate, prolonged and shocking. Any person in Jones' position would be profoundly disturbed by the significant intrusion

into her highly personal information. The discipline administered by Tsige's employer was governed by the principles of employment law and the interests of the employer and did not respond directly to the wrong that had been done to Jones. In my view, the law of this province would be sadly deficient if we were required to send Jones away without a legal remedy.

(c) Elements

[70] I would essentially adopt as the elements of the action for intrusion upon seclusion the Restatement (Second) of Torts (2010) formulation which, for the sake of convenience, I repeat here:

One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.

[71] The key features of this cause of action are, first, that the defendant's conduct must be intentional, within which I would [page262] include reckless; second, that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action. I return below to the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum.

(d) Limitations

[72] These elements make it clear that recognizing this cause of action will not open the floodgates. A claim for intrusion upon seclusion will arise only for deliberate and significant invasions of personal privacy. Claims from individuals who are sensitive or unusually concerned about their privacy are excluded: it is only intrusions into matters such as one's financial or health records, sexual practises and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive.

[73] Finally, claims for the protection of privacy may give rise to competing claims. Foremost are claims for the protection of freedom of expression and freedom of the press. As we are not confronted with such a competing claim here, I need not consider the issue in detail. Suffice it to say, no right to privacy can be absolute and many claims for the protection of privacy will have to be reconciled with, and even yield to, such competing claims. A useful analogy may be found in the Supreme Court of Canada's elaboration of the common law of defamation in *Grant v. Torstar* where the court held, at para. 65, that "[w]hen proper weight is given to the constitutional value of free expression on matters of public interest, the balance tips in favour of broadening the defences available to those who communicate facts it is in the public's interest to know." 3. Damages

(a) Introduction

[74] As I have indicated, proof of actual loss is not an element of the cause of action for intrusion upon seclusion. However, the question necessarily arises: what is the appropriate approach to damages in cases, like the present, where the plaintiff has suffered no pecuniary loss? [page263]

[75] Where the plaintiff has suffered no provable pecuniary loss, the damages fall into the category of what Professor Stephen M. Waddams, *The Law of Damages*, looseleaf (Toronto: Canada Law Book, 2011), at para. 10.50, describes as "symbolic" and others have labelled as "moral" damages: see *Dulude v. Canada*, [2000 CanLII 16085 \(FCA\)](#), [2000] F.C.J. No. 1454, 192 D.L.R. (4th) 714 (C.A.), at para. 30. They are awarded "to vindicate rights or symbolize recognition of their infringement": Waddams, at para. 10.50. I agree with Prof. Waddams' observation that a conventional range of damages is necessary to maintain "consistency, predictability and fairness between one plaintiff and another".

[76] Guidance in determining an appropriate range of damages can be gleaned from existing case law from Ontario as well as from the provinces where there is a statutory cause of action.

(b) Damages under Ontario case law

[77] Although the tort of intrusion upon exclusion has not been fully recognized in Ontario law, several cases award damages for invasion of privacy in conjunction with, or under the head of, a traditional tort such as nuisance or trespass. These claims typically involve intangible harm such as hurt feelings, embarrassment or mental distress, rather than damages for pecuniary losses. I attach, as Appendix A, a summary of these cases and the damages awarded and will briefly discuss the facts of some of those cases here.

[78] In *Saccone v. Orr*, the court found that the proven damages were minimal; the plaintiff had not lost his job or suffered any material loss. However, acknowledging that the plaintiff's privacy was invaded and that he was embarrassed and felt that his confidence had been betrayed, the court awarded damages in the amount of \$500. Similarly, in *Provincial Partitions Inc. v. Ashcor Inplant Structures Ltd.*, [1993 CanLII 5579 \(ON SC\)](#), [1993] O.J. No. 4685, 50 C.P.R. (3d) 497 (Gen. Div.), the judge found that the defendant committed the tort of nuisance by invasion of privacy through abuse of telephone communications when they called the plaintiff, a competitor company, dozens of times. The judge awarded only \$500 against each defendant and because the defendants had already ceased placing the phone calls, the judge declined to provide injunctive relief.

[79] In *Roth v. Roth*, the plaintiff claimed \$100,000 in damages for intimidation, harassment and invasion of privacy, in addition to approximately \$400,000 in additional damages for other tortious acts. The judge found that because the various causes of action overlapped, damages were best addressed as a lump sum and that the plaintiff was entitled to aggravated [page264] damages. Despite the lack of evidence of actual physical or psychological harm, the plaintiff was awarded the sum of \$20,000.

[80] *MacKay v. Buelow*, [1995 CanLII 17903 \(ON SC\)](#), [1995] O.J. No. 867, 24 C.C.L.T. (2d) 184 (Gen. Div.) involved a family law dispute in which the defendant had harassed his ex-wife over a period of four months. He continuously called her, stalked her on several occasions, threatened to kill her and threatened to kidnap their child and take her to another country. The trial judge found that the plaintiff was entitled to a remedy for the [at para. 17] "calculated, devilishly creative and entirely reprehensible conduct by the defendant" and awarded \$25,000 general damages, \$15,000 aggravated damages, \$15,000 punitive damages, together with special damages and a significant award for the future medical care she would require.

(c) Damages under provincial legislation

[81] The four provincial privacy acts do not require proof of damage as an element of the cause of action. The Manitoba Privacy Act, however, is the only statute that provides specific guidance with regard to the determination of damages:

Considerations in awarding damages

4(2) In awarding damages in an action for a violation of privacy of a person, the court shall have regard to all the circumstances of the case including

(a) the nature, incidence and occasion of the act, conduct or publication constituting the violation of privacy of that person;

(b) the effect of the violation of privacy on the health, welfare, social, business or financial position of that person or his family;

(c) any relationship, whether domestic or otherwise, between the parties to the action;

(d) any distress, annoyance or embarrassment suffered by that person or his family arising from the violation of privacy; and

(e) the conduct of that person and the defendant, both before and after the commission of the violation of privacy, including any apology or offer of amends made by the defendant.

[82] The other provincial statutes leave this determination to judicial discretion. The case law, however, demonstrates that courts frequently consider the same factors enumerated in the Manitoba Act. Appendix B contains a summary of these cases, mostly from British Columbia.

[83] Absent proof of actual pecuniary loss, the awards are, for the most part, modest. For example, in *Heckert v. 5470 Investments Ltd.*, [2008] B.C.J. No. 1854, [2008 BCSC 1298](#), 299 D.L.R. (4th) 689, [page265] the judge noted [at para. 148] that the only evidence regarding damages were "Ms. Heckert's general statements that she felt stressed and needed to see her chiropractor and acupuncturist for additional visits". The judge still found that Ms. Heckert's landlord had invaded her privacy by installing close imaging cameras in the hallway outside of her door, but that the lack of medical evidence meant that the award could be not more than nominal damages of \$3,500.

[84] Egregious conduct, however, has attracted awards of aggravated damages. In *Watts v. Klaemt*, [2007] B.C.J. No. 980, [2007 BCSC 662](#), 71 B.C.L.R. (4th) 362, the plaintiff was terminated from her job when her next door neighbour, the defendant, recorded her phone calls and after discovering she was perpetrating fraud against her company, reported this to her employer. The plaintiff claimed general damages for emotional pain and suffering, loss of enjoyment of life and diminution of her reputation as well as punitive or exemplary damages for the invasion of privacy. In assessing the quantum of damages, the judge considered the degree to which the plaintiff's life was destroyed following the invasion of privacy -- notably the termination of her employment, the need to seek psychological care for depression and post-traumatic stress disorder -- and weighed this against the plaintiff's own misconduct. The judge awarded [at para. 68] \$30,000, including aggravated damages for the "substantial degree of suffering experienced by the plaintiff".

[85] The benchmark case for exemplary or punitive damages for an invasion of privacy under the British Columbia regime is *Malcolm v. Fleming*, [2000] B.C.J. No. 2400, 2000 CarswellBC 1316 (S.C.). The defendant, the plaintiff's landlord, installed a video camera in the plaintiff's apartment and recorded her in various stages of undress in her bathroom and bedroom. The judge awarded punitive damages of \$35,000 in addition to \$15,000 in general damages. In determining the figure for punitive damages the judge considered such factors as the intimate location of the invasion, the relationship between the parties as landlord and tenant as having a high expectation of privacy, the substantial premeditation and planning, the additional humiliation of discovery prior to trial, the fact that a permanent record of the violation existed creating the potential for future embarrassment and the fact that there was no other means of punishment as there was no criminal act perpetrated.

[86] Other cases have awarded punitive damages in consideration of society's abhorrence of the defendant's actions, a lack of remorse on the part of the defendant and the desire to promote specific deterrence: see [page266] *Watts v. Klaemt*; *Lee v. Jacobson*; *Weber v. Jacobson*, [1992 CanLII 8556 \(BC SC\)](#), [1992] B.C.J. No. 132, 87 D.L.R. (4th) 401 (S.C.), rev'd [1994 CanLII 1419 \(BC CA\)](#), [1994] B.C.J. No. 2459, 120 D.L.R. (4th) 155 (C.A.). In *Hollinsworth v. BCTV*, a division of Westcom TV Group Ltd., [1996] B.C.J. No. 2638, 34 C.C.L.T. (2d) 95 (S.C.), aff'd [1998] B.C.J. No. 241, 1998 B.C.C.A. 304 (C.A.), for example, the court assessed the plaintiff's damages for both breach of confidentiality and for the invasion of privacy at \$15,000. The court there noted, at para. 27 (S.C.), that these damages were higher than usual for breaches of the [Privacy Act](#) in consideration of the "reprehensible conduct" of the defendant. In *Hollinsworth*, the defendant lied to a reporter, saying that he had consent to use a videotape of the plaintiff

undergoing surgery to treat baldness. The video was then aired during a news broadcast.

(d) Determining the quantum of damages

[87] In my view, damages for intrusion upon seclusion in cases where the plaintiff has suffered no pecuniary loss should be modest but sufficient to mark the wrong that has been done. I would fix the range at up to \$20,000. The factors identified in the Manitoba Privacy Act, which, for convenience, I summarize again here, have also emerged from the decided cases and provide a useful guide to assist in determining where in the range the case falls: (1) the nature, incidence and occasion of the defendant's wrongful act; (2) the effect of the wrong on the plaintiff's health, welfare, social, business or financial position; (3) any relationship, whether domestic or otherwise, between the parties; (4) any distress, annoyance or embarrassment suffered by the plaintiff arising from the wrong; and (5) the conduct of the parties, both before and after the wrong, including any apology or offer of amends made by the defendant.

[88] I would neither exclude nor encourage awards of aggravated and punitive damages. I would not exclude such awards as there are bound to be exceptional cases calling for exceptional remedies. However, I would not encourage such awards as, in my view, predictability and consistency are paramount values in an area where symbolic or moral damages are awarded and absent truly exceptional circumstances, plaintiffs should be held to the range I have identified. [page267] 3. Application to this case

[89] It is my view that, in this case, Tsige committed the tort of intrusion upon seclusion when she repeatedly examined the private bank records of Jones. These acts satisfy the elements laid out above: the intrusion was intentional, it amounted to an unlawful invasion of Jones' private affairs, it would be viewed as highly offensive to the reasonable person and caused distress, humiliation or anguish.

[90] In determining damages, there are a number of factors to consider. Favouring a higher award is the fact that Tsige's actions were deliberate and repeated and arose from a complex web of domestic arrangements likely to provoke strong feelings and animosity. Jones was understandably very upset by the intrusion into her private financial affairs. On the other hand, Jones suffered no public embarrassment or harm to her health, welfare, social, business or financial position and Tsige has apologized for her conduct and made genuine attempts to make amends. On balance, I would place this case at the mid- point of the range I have identified and award damages in the amount of \$10,000. Tsige's intrusion upon Jones' seclusion, this case does not, in my view, exhibit any exceptional quality calling for an award of aggravated or punitive damages.

Issue 2. Did the motion judge err with respect to costs?

[91] As I would set aside the judgment in favour of Tsige and grant judgment in favour of Jones, it is not necessary for me to consider Jones' contention that the motion judge erred in his costs award. Disposition

[92] Accordingly, I would allow the appeal, set aside the summary judgment dismissing the action and in its place substitute an order granting summary judgment in Jones' favour for damages in the amount of \$10,000.

[93] Both parties have filed bills of costs asking for significant awards. In my view, it is appropriate to take into account the novel issue raised by this case which has clearly broken new ground. There is discretion to depart from the usual order in cases of novelty. In my view, in the unusual circumstances of this case, the parties should bear their own costs throughout and I would make no order as to costs.

Appeal allowed. [page268] Appendix A: Ontario damage awards

[QL:GRAPHIC NAME="108OR3d241-1.jpg"/] [page269]

[QL:GRAPHIC NAME="108OR3d241-2.jpg"/] [page270] Appendix B: Damage awards under provincial privacy legislation

[QL:GRAPHIC NAME="108OR3d241-3.jpg"/] [page271]

[QL:GRAPHIC NAME="108OR3d241-4.jpg"/] [page272]

Tab 112

R. v. Davis, 1999 CanLII 638 (SCC), [1999] 3 SCR 759

Source:	Supreme Court of Canada
Date:	1999-11-25
File number:	26441
Other citations:	182 Nfld & PEIR 78 — 179 DLR (4th) 385 — 248 NR 44 — 554 APR 78 — 139 CCC (3d) 193 — 29 CR (5th) 1 — 44 WCB (2d) 119 — EYB 1999-15271 — [1999] SCJ No 67 (QL) — [1999] ACS no 67 — 99 DTC 5841
Citation:	R. v. Davis, 1999 CanLII 638 (SCC), [1999] 3 SCR 759, < https://canlii.ca/t/1fqj7 >, retrieved on 2026-03-23

R. v. Davis, [1999] 3 S.C.R. 759

Glenn Norman Davis

Appellant

v.

Her Majesty The Queen

Respondent

Indexed as: R. v. Davis

File No.: 26441.

1999: February 26; 1999: November 25.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, * McLachlin, Major and Binnie JJ.

on appeal from the court of appeal for newfoundland

Criminal law – Extortion – Extortion of sexual favours – Complainants persuaded to pose nude or semi-nude for accused who misrepresented himself as having connections with modelling agencies – Extortion of sexual favours by threatened exposure of compromising photographs – Whether extortion offence in [Criminal Code](#) includes extortion of sexual favours – Scope of word “anything” in extortion provision of Criminal Code – Criminal Code, R.S.C. 1970, c. C-34, s. 305(1).

Appeals – Supreme Court of Canada – Appeals as of right – Kienapple principle – Accused obtaining sexual favours from complainant by threatened exposure of compromising photographs – Supreme Court upholding both extortion and sexual assault convictions – Kienapple issue not raised in dissenting judgment in Court of Appeal – Whether Supreme Court has jurisdiction to address Kienapple issue – [Supreme Court Act, R.S.C., 1985, c. S-26, s. 691\(1\)](#) (a).

Criminal law – Kienapple principle – Extortion – Sexual assaults – Accused obtaining sexual favours from complainant by threatened exposure of compromising photographs – Whether principle against multiple convictions arising from same delict precluded convictions for both extortion and sexual assault.

Criminal law – Sexual assaults – Defence of honest but mistaken belief in consent – Whether trial judge failed to consider defence of honest but mistaken belief in consent – If so, whether there was air of reality to defence.

Criminal law – Sexual assaults – Reasonable doubt – Whether trial judge erred in applying principle of reasonable doubt – Whether trial judge’s comment that he was “not convinced” that complainants consented to sexual activity reversed burden of proof.

Between 1984 and 1991, the accused, holding himself out as a photographer with connections to a modelling agency, invited the complainants, who ranged in age from 15 to 20, to pose for a portfolio of photographs with a view to initiating a modelling career. He persuaded all of them to pose nude or semi-nude, and some of them were photographed in bondage. The accused allegedly sexually assaulted the complainants D., K., S. and R. while they were posing in various stages of undress or were tied up and completely vulnerable. In the cases of B. and D., it was alleged that the accused threatened to send revealing photographs to either their parents or to a pornographic magazine if they did not agree to perform sexual favours for him. While D. ignored the accused's threats, B. acceded to them and performed sexual favours over the course of a two-to three-month period in exchange for the negatives. In her testimony, B. indicated that during that period there were at least two incidents in which the accused persisted in sexual activity after she had communicated her lack of consent. The accused testified that any sexual activity between B. and himself was consensual and that the photography sessions began after they had already been involved in a sexual relationship. He thus had no reason to threaten to expose the complainant, and never did so. In the case of D., the accused admitted taking her photos, but denied that any semi-nude photos were taken or that any sexual impropriety had occurred. He also denied trying to extort sexual favours from her, as there were no photographs with which to threaten her. With respect to K., S. and R., the accused claimed that any sexual contact was consensual. The trial judge convicted the accused of two counts of extortion against B. and D. and of five counts of sexual assault against the five complainants. On appeal, the majority of the Court of Appeal upheld the convictions.

Held: The appeal should be dismissed.

It is a crime to extort sexual favours. Although the extortion provision is located in the Part of the *Criminal Code* entitled "Offences Against Rights of Property", the word "anything" in the provision is not limited to things of a proprietary or pecuniary nature. Headings will never

be determinative of legislative intention, but are merely one factor to be taken into account. In this case, the extortion provision's location in the *Criminal Code* is outweighed by competing considerations in determining the scope of "anything". First, the ordinary meaning of "anything" in its immediate context is clear and supports a broad interpretation, which would include sexual favours. Second, an interpretation of "anything" that includes sexual favours is suggested by the purpose and nature of the offence of extortion. That purpose, which can be directly inferred from the wording of the provision, is that extortion criminalizes intimidation and interference with freedom of choice. Given this objective, it would be unreasonable to criminalize extortion of money or property, but not extortion of sexual favours. Third, Parliament could have easily limited the scope of the word "anything" to things of a proprietary or pecuniary nature. Finally, a number of Canadian courts have found that "anything" includes sexual favours.

It is unnecessary in this case to decide whether there is consent to sexual activity if it is obtained by threatened exposure of nude photographs. The accused's conviction of sexually assaulting B. may be affirmed on the basis of an independent sexual assault, wholly apart from his extortionate conduct. B. testified that, during the two- to three-month period in which she went to the accused's apartment and had sexual intercourse with him in exchange for the negatives, there were at least two incidents in which the accused persisted in sexual activity after she had unambiguously communicated her lack of consent. The trial judge found B. to be a credible witness and this Court is satisfied that the events unfolded as the complainant described them. This evidence supports a conviction of sexual assault.

Even though this is an appeal as of right pursuant to [s. 691\(1\)\(a\)](#) of the *Criminal Code* and the dissenting judge in the Court of Appeal dissented only on the extortion and sexual assault convictions in relation to B., the Court has jurisdiction to address the application of *Kienapple* in the case of B. The Court's jurisdiction over both the extortion and sexual assault convictions must, of necessity, include the jurisdiction to make whatever order that is required to dispose of these grounds of appeal. The Court cannot make an order that would violate established principles or rules of law. In the case of B., there is a possibility that in affirming the convictions without

considering the potential application of *Kienapple* the Court might be convicting the accused of multiple offences arising from the same delict. Such a disposition would be illegal, as it would contravene an established legal principle. Here, there is not a sufficient factual nexus between the extortion and sexual assault convictions to trigger the application of *Kienapple* in the case of B. The convictions arise out of different factual transactions. Any one of the occasions over the two-to three-month period in which the accused engaged in sexual activity with B. is sufficient to ground the extortion conviction. By contrast, the sexual assault conviction arises from one or two specific occasions in which B. explicitly communicated her lack of consent to sexual contact.

In the case of K., assuming, without deciding, that the trial judge failed to consider the defence of honest but mistaken belief in consent, a review of the evidence leads to the conclusion that there was no air of reality to the defence. Even if the testimony of the accused is completely accepted, it discloses that, at a minimum, he was wilfully blind as to whether K. consented to the fondling of her breasts and vagina. There is no suggestion by the accused that K. posed nude for any reason other than to further her modelling career. Nor was there any evidence that she invited him to touch her prior to his fondling of her breasts and vagina.

The trial judge did not err in his application of the principle of reasonable doubt. He clearly directed himself properly and his judgment reveals a thorough review of the evidence. In the cases of S. and R., the trial judge's remarks that he was "not convinced" that the complainants consented to the sexual activity in question suggest, when read out of context, that he may have reversed the burden of proof. These remarks, however, when viewed in the context of the entire judgment, were effectively neutralized by other passages.

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Applied: *R. v. Bird* (1969), [1969 CanLII 961 \(BC CA\)](#), 9 C.R.N.S. 1; **considered:** *Kienapple v. The Queen*, [1974 CanLII 14 \(SCC\)](#), [1975] 1 S.C.R. 729; **referred to:** *R. v. Coughlan* (1992), [1992 CanLII 7124 \(NL CA\)](#), 100 Nfld. & P.E.I.R. 326; *R. v. Caskenette* (1993), [1993](#)

CanLII 6879 (BC CA), 80 C.C.C. (3d) 439; *R. v. Guerrero* (1988), 1988 CanLII 9868 (ON CA), 64 C.R. (3d) 65; *R. v. W. (D.)*, 1991 CanLII 93 (SCC), [1991] 1 S.C.R. 742; *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27; *R. v. McCraw*, 1991 CanLII 29 (SCC), [1991] 3 S.C.R. 72; *R. v. Clemente*, 1994 CanLII 49 (SCC), [1994] 2 S.C.R. 758; *R. v. Vasil*, 1981 CanLII 46 (SCC), [1981] 1 S.C.R. 469; *Paul v. The Queen*, 1982 CanLII 179 (SCC), [1982] 1 S.C.R. 621; *R. v. Natarelli*, 1967 CanLII 11 (SCC), [1967] S.C.R. 539; *Attorney-General of Canada v. Jackson*, 1946 CanLII 29 (SCC), [1946] S.C.R. 489; *Law Society of Upper Canada v. Skapinker*, 1984 CanLII 3 (SCC), [1984] 1 S.C.R. 357; *Skoke-Graham v. The Queen*, 1985 CanLII 60 (SCC), [1985] 1 S.C.R. 106; *R. v. Lohnes*, 1992 CanLII 112 (SCC), [1992] 1 S.C.R. 167; *R. v. D.K.P. (No. 1)* (1991), 11 W.A.C. 302; *R. v. Bloch-Hansen* (1977), 1977 CanLII 2110 (SK KB), 38 C.C.C. (2d) 143; *R. v. Prince*, 1986 CanLII 40 (SCC), [1986] 2 S.C.R. 480; *R. v. Ewanchuk*, 1999 CanLII 711 (SCC), [1999] 1 S.C.R. 330; *Pappajohn v. The Queen*, 1980 CanLII 13 (SCC), [1980] 2 S.C.R. 120; *R. v. Osolin*, 1993 CanLII 54 (SCC), [1993] 4 S.C.R. 595; *R. v. Park*, 1995 CanLII 104 (SCC), [1995] 2 S.C.R. 836; *R. v. Bulmer*, 1987 CanLII 56 (SCC), [1987] 1 S.C.R. 782; *R. v. Esau*, 1997 CanLII 312 (SCC), [1997] 2 S.C.R. 777; *Sansregret v. The Queen*, 1985 CanLII 79 (SCC), [1985] 1 S.C.R. 570.

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APPEAL from a judgment of the Newfoundland Court of Appeal (1998), [1998 CanLII 18030 \(NL CA\)](#), 159 Nfld. & P.E.I.R. 273, [1998] N.J. No. 16 (QL), dismissing the accused’s appeal from his conviction of five counts of sexual assault, one count of extortion and one count of attempted extortion by Easton J., [1993] N.J. No. 143 (QL) (S.C.). Appeal dismissed.

Robin Reid, for the appellant.

Wayne Gorman, for the respondent.

The judgment of the Court was delivered by

1 THE CHIEF JUSTICE – This is an appeal as of right of the appellant’s convictions of five counts of sexual assault and two counts of extortion involving five complainants. The appellant challenged his convictions on a number of grounds. The main issue to be decided in this appeal is whether the scope of the offence of extortion as set out in the [Criminal Code](#) includes the extortion of sexual favours.

I. Factual Background

2 The appellant was charged with a total of 10 counts involving seven complainants: four counts of sexual assault contrary to s. 246.1(1)(a) of the *Criminal Code*, R.S.C. 1970, c. C-34 (now s. 271(1)(a)), on complainants C.B., P.V.B., T.R., and C.D.; two counts of extortion contrary to s. 305(1) (now s. 346(1)) involving complainants P.V.B. and C.D.; one count of buggery contrary to s. 155 (now s. 159) involving complainant T.R.; and three counts of sexual assault contrary to s. 271(1)(a) of the *Criminal Code*, R.S.C., 1985, c. C-46, on complainants E.V.K., D.A.S., and J.C.H. The events which are the subject of the charges occurred on various dates between 1984 and 1991. The facts in this case are quite intricate and were set out in considerable detail in the trial judgment. A brief overview is provided below. I will discuss the facts in greater detail in my review of the trial judgment.

3 In every case the appellant held himself out as a photographer with connections to a modelling agency. In actual fact he had no such connections. Under this guise, he would interest the complainants, who ranged in age from 15 to 20, in the idea of having a portfolio of photographs taken with a view to initiating a modelling career. He persuaded all of the complainants to pose nude or semi-nude, and four of the complainants were photographed in bondage. In all but one of the cases he allegedly sexually assaulted the complainants while they were posing in various stages of undress. Some of them were assaulted when they were tied up and completely vulnerable. In the cases of P.V.B. and C.D., it was alleged that the appellant threatened either to send some of the more revealing photographs to their parents or to a pornographic magazine if they did not agree to perform sexual favours for him. While C.D. ignored the appellant's threats, P.V.B. acceded to them and performed sexual favours over the course of a two- to three-month period in exchange for the negatives of the impugned photographs.

4 The appellant was convicted of sexual assault on E.V.K., D.A.S., T.R. and of extortion and sexual assault in the cases of P.V.B. and C.D. He was acquitted of the charges of sexual assault relating to C.B. and J.C.H., and of the charge of buggery involving T.R. He was

sentenced to a total of nine years imprisonment. This was later reduced to seven years by the Newfoundland Court of Appeal.

5 The majority of the Court of Appeal dismissed the appellant's appeals against the convictions. O'Neill J.A., dissenting, would have allowed the appeals and ordered a new trial on the counts of sexual assault involving E.V.K., D.A.S., T.R. and C.D. He would have acquitted the appellant on the count of sexual assault involving P.V.B. and on the counts of extortion involving P.V.B. and C.D.

II. Relevant Statutory Provisions

6 The relevant section of the *Criminal Code* at the time of the events was as follows:

305. (1) Every one who, without reasonable justification or excuse and with intent to extort or gain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done, is guilty of an indictable offence and is liable to imprisonment for fourteen years.

III. Judicial History

A. *Supreme Court of Newfoundland, Trial Division*, [1993] N.J. No. 143 (QL)

7 Easton J. addressed two issues at trial that are not before this Court on appeal. The first was whether the Crown fulfilled its obligation of timely disclosure in respect of its intention to call expert evidence regarding post traumatic stress syndrome in sexual assault cases, as well as

expert toxicological evidence. The second was whether similar fact evidence should have been introduced at trial. He found that the Crown made adequate disclosure. He would also have admitted similar fact evidence, but limited its use to the *modus operandi* used by the appellant and as a tool in the assessment of the credibility of all witnesses.

8 After cautioning himself as to the proper application of the presumption of innocence in a case with a large number of complainants and a total of 10 charges, he then turned to an assessment of the evidence presented by each complainant and the appellant on each count. I will not review the evidence pertaining to the complainant C.B. The appellant was acquitted of sexually assaulting her and his acquittal is not in issue in this appeal.

(1) P.V.B.

9 P.V.B., who was 15-16 years old at the time of the events in question, came to know the appellant through the motorcycle federation of which he was the chairman. The complainant went to the appellant's residence in the early spring of 1985 for several photo sessions. After some coaxing, nude photographs were taken. She testified that she kept asking the appellant about the photographs but he refused to show them to her. She finally refused to pose for any more photographs and insisted that he give her the negatives. The appellant told her that if she wanted the negatives she would have to perform sexual favours for him, and if she refused, he would send the photographs to her mother.

10 The complainant explained that because of her fear that she would be, in her words, "exposed", she agreed to his terms. Her evidence was that for the next two to three months she would regularly go to the appellant's apartment to have sexual intercourse with him. During these visits she was subjected to bondage and whipping, and had vibrators and dildos inserted in her

vagina. At the end of each session, she received a strip of negatives. She collected them all and burned them. A friend of P.V.B.'s and her boyfriend of the time confirmed that they were aware of the "arrangement" she had with the appellant, and the friend saw P.V.B. destroy some of the negatives.

11 The appellant's claim was that any sexual activity between the complainant and himself was consensual and that the photography sessions only began after they had been involved in a sexual relationship for some time. As a result, he would have had no reason to threaten to expose the complainant, and he never did so.

12 Easton J. accepted P.V.B.'s evidence, and convicted the appellant of sexual assault contrary to s. 246.1(1)(a), and extortion contrary to s. 305(1).

(2) C.D.

13 C.D. met the appellant at a local mall during the summer of 1984. She was 19 years old at the time. Photographs were eventually taken at C.D.'s parents' home. A second session was later arranged in the basement of her apartment building. A friend of hers was present at this second photo session. At one point during the shoot, she asked her friend to go and check on her daughter who was upstairs with a third person. While her friend was away, the appellant asked her to take off her clothes. She refused, and he became angry and said that she was wasting his time. After some persuasion, she took off her top. He then grabbed her breasts with his hands, squeezed them, and made lewd comments. The complainant testified that she was shocked and did not know what to do. The appellant then slid his hand inside her bikini bottom and onto her vagina. C.D. claimed she became very upset and got up just as her friend returned from checking on her daughter. The appellant packed up his photographic equipment and left.

14 C.D. testified that he later returned to her apartment and brought the photographs with him. She told him they were disgusting. He replied that she would have to pay for them if she wanted them back. A figure was mentioned but she did not have the money. The appellant then told her that if she went to bed with him, she would not have to pay. He also threatened to publish the photographs in a pornographic magazine and to put others in her father's mailbox if she did not have sex with him although he did not, in the end, carry out his threats.

15 The appellant admitted taking photographs of the complainant, but denied that any semi-nude photos were taken or that any sexual impropriety had occurred. He also denied trying to extort sexual favours from her, as there were no photographs with which to threaten her.

16 Easton J. accepted the complainant's evidence and convicted the appellant of sexual assault contrary to s. 246.1(1)(a) and of extortion contrary to s. 305(1).

(3) E.V.K.

17 E.V.K., who was approximately 20 years old at the time of the alleged assault, met the appellant near the Fraser Mall in August 1990. The appellant approached her and asked if she would consider modelling. She expressed interest, and later attended his apartment on several occasions for photo sessions. At her last photo session, the appellant convinced her to pose nude and tied her wrists with ropes to hooks in an archway in his apartment. While she was tied up, he came up behind her, touched her breasts, and fondled and inserted a finger in her vagina. She asked him: "[D]o you have to do that?" and he said: "No." He then untied her, brought over a chair, and proceeded to tie her to the chair. He again fondled her breasts and vagina. According to

her evidence she saw his reflection in the glass of the stereo and watched him undo his pants. She asked him to untie her. He did, but not before touching her vagina with his penis.

18 The accused confirmed the two incidents in his testimony but claimed they were consensual. Easton J. disagreed, and convicted him of sexual assault contrary to s. 271(1)(a).

(4) T.R.

19 T.R., who was 19 years old at the time of the assault, was approached by the appellant in the spring of 1986. She posed for semi-nude photographs at his apartment. A couple of weeks later, she returned to his apartment. Photographs were taken and some wine was consumed. The appellant suggested some bondage shots, and she agreed. He tied her wrists to each side of the archway, and while he was behind her, he moved her clothes aside and had intercourse with her from behind. She said she tried to stop him when he tried to put his penis in her vagina, but he did not until he ejaculated. She was very upset and he untied her. According to her testimony, they had more wine and he assured her that nothing of that nature would ever happen again. She later posed over a blanket on a coffee table. The appellant coaxed her into being tied to the table. She was fairly drunk at the time. He took some more photographs of her, then sodomized her. Afterwards, he untied her and she gathered her belongings and left. She later came back to his apartment to see some of the photographs, but there was no sexual contact, nor were any photographs taken.

20 The evidence of the appellant was considerably different than that of the complainant. He testified that he had a sexual relationship with T.R. prior to the events in question. He also claimed that the two incidents T.R. complained of – intercourse and anal intercourse – did not occur on the same night. He admitted that he had intercourse with the

complainant while she was tied up, but that it was wholly consensual and that they had later gone into the bedroom to continue having sex. The anal intercourse took place on another occasion. It was his evidence that T.R. had discussed the idea with him. She then performed oral sex on him until he became aroused and he reciprocated before anally penetrating her with her consent. The appellant also described another consensual sexual encounter following the alleged offences when the complainant came over to look at photographs.

21 Easton J. convicted the appellant of sexual assault contrary to s. 246.1(1)(a). Although he wasn't sure whether the anal intercourse occurred on the same night as the sexual assault, even if the complainant's evidence that it occurred on the same night was accepted, he had grave doubts about her credibility *vis-à-vis* this second episode. He found it surprising that the complainant would allow herself to be put in an even more vulnerable and compromising position following a sexual assault. Accordingly, he was not convinced that the anal sex was not consensual and he acquitted the appellant of buggery.

(5) D.A.S. and J.C.H.

22 The sexual assault on D.A.S. allegedly occurred on the night of August 4, 1991. D.A.S., who was 15 years old at the time, went to Davis's apartment with her friend J.C.H., who had previously posed for photographs with the appellant. After a discussion about modelling, D.A.S. signed a consent form. She was then asked to stay in the bedroom for about half an hour while photographs were taken of J.C.H. D.A.S. then remembers being photographed as she was tied to the archway, and said that the appellant tried to take the straps off her bathing suit and touched her breasts and pinched her nipples "to make them hard". D.A.S. told him to leave her alone, and he untied her. This was the only allegation of sexual assault she made. The next thing she remembered was J.C.H. phoning for a ride and leaving the appellant's apartment.

23 D.A.S.'s recollection of the events was sketchy, and there was a period of about one and one-half hours for which she could not account. She could not remember how she got tied up, and did not know if she consented to sexual activity with the appellant during that time frame.

24 J.C.H., who was 17 years old, had previously been to the appellant's apartment and posed nude for him. On August 4, while D.A.S. was in the bedroom, it was J.C.H.'s testimony that he tied her to a chair and inserted a dildo in her vagina without her consent. She said nothing because she was scared. She further alleged that the appellant had touched her breasts while she was tied to the archway. She also offered the following account of the sexual activities between the appellant and D.A.S.: the appellant tied D.A.S. to a chair and had J.C.H. perform oral sex on him. The appellant then inserted his penis in D.A.S., who was crying at the time, and ejaculated over her. They left shortly afterwards, after being picked up by J.C.H.'s former boyfriend. He confirmed that when he picked them up both J.C.H. and D.A.S. appeared upset, and that D.A.S. seemed to be annoyed with J.C.H.

25 The appellant claimed that he had slept with J.C.H. on one of her previous visits, and that any sexual activity that took place, including the incidents on the night of August 4, was purely consensual. It was his evidence that on the night in question J.C.H. was urging D.A.S. to pose for photographs, and that J.C.H. suggested D.A.S. be tied to the chair. Once tied up, J.C.H. inserted a vibrator into D.A.S. and motioned him over and gave him oral sex. He said that J.C.H. then took out the vibrator and that he had intercourse with D.A.S. while J.C.H. was urging him on. He ejaculated over D.A.S., then untied her. D.A.S. then said: "Get out, get me out of here", which the appellant said was in response to J.C.H.'s proposal of lesbian sex with her.

26 A video of J.C.H. that had been seized at the appellant's residence was also shown to the court. It included a segment in which J.C.H., who was obviously a willing participant, was masturbating herself with a dildo. According to the appellant, the video had been made sometime after August 4, 1991. J.C.H. denied having any knowledge whatsoever of this video.

27 Easton J. found it extremely difficult to reconstruct the events of the night in question. D.A.S. did not remember many events and contradicted herself at times. In addition, there were numerous discrepancies between J.C.H.'s and D.A.S.'s testimony. Nevertheless, he found at paras. 95-97:

Here, even though we have the claimed lapse of memory; which I found suspect on the part of the complainant, this is not to say that she was not sexually assaulted. For many reasons she may not have told what I believe happened that evening at that residence. While her evidence about the pinching of her breasts may or may not have been true and was the only sexual assault which she asserted had occurred, nevertheless, I am not convinced that a sexual assault did not in fact take place.

... In my view, here there is other evidence, including that of the accused, which proves to me beyond a reasonable doubt that the accused did, in fact, commit a sexual assault upon the complainant without her consent.... [T]he accused admits that he had sex with the complainant.... He stated that the complainant, D.A.S. was very upset. It was his evidence that D.A.S.'s arms and legs had been tied and that D.A.S. was complaining while being tied to the chair.... D.A.S. said: "Get out, get out". While the accused tries to divert this comment more towards J.C.H. than himself, I am not convinced that it was not equally applicable to him.

I also accept the evidence of J.C.H. that at the time the accused inserted his penis in D.A.S., she was crying. I take this as a manifestation of lack of consent.

He convicted Davis of sexually assaulting D.A.S., contrary to [s. 271\(1\)\(a\)](#) of the *Criminal Code*.

28 Easton J. acquitted Davis of sexually assaulting J.C.H. The fact that she did not remember doing the video, in which she appeared to be a willing participant, along with the fact that similar memory losses were claimed by C.B. and D.A.S., who were all good friends, cast doubts on her credibility.

(1) Green J.A. for the majority (Steele J.A. concurring).

29 The appellant challenged his convictions on a number of grounds. I will deal with each ground of appeal in the order disposed of by the majority of the Court of Appeal.

30 Green J.A. first dismissed the appellant's arguments that the trial judge erred in holding that the Crown fulfilled its disclosure obligations and in admitting similar fact evidence. He then turned to consider more specific grounds of appeal relating to individual charges.

31 The appellant argued that the trial judge erred in a number of respects in convicting him of extortion in the cases of P.V.B. and C.D. His principal argument was that the word "anything" in s. 346(1) of the *Criminal Code*, R.S.C., 1985, c. C-46 (formerly 305(1)), was limited to things of a proprietary or pecuniary nature and therefore did not include sexual favours. Green J.A. rejected this argument. Relying on the case of *R. v. Bird* (1969), [1969 CanLII 961 \(BC CA\)](#), 9 C.R.N.S. 1 (B.C.C.A.), he held that the scope of the word "anything" extended to intangibles and included sexual favours. Acknowledging that the trial judge did not undertake a specific analysis of the law of extortion, he nevertheless found after a review of the record that the necessary elements of the offence were established. He therefore dismissed this ground of appeal.

32 The appellant argued that the trial judge erred in convicting him of sexual assault in the case of P.V.B. Although P.V.B. chose to have sexual intercourse with him as a result of his threatened exposure of nude photographs of her, the appellant submitted that a threat of this nature

did not render her choice non-consensual. He argued that s. 265(3)(b) (formerly s. 244(3)(b)), which refers to threats of force, was exhaustive of the types of threats that vitiate consent. Green J.A. found that threatened exposure of nude photographs did not fall within the ambit of s. 265(3). However, relying on *R. v. Coughlan* (1992), [1992 CanLII 7124 \(NL CA\)](#), 100 Nfld. & P.E.I.R. 326 (Nfld. C.A.), and *R. v. Caskenette* (1993), [1993 CanLII 6879 \(BC CA\)](#), 80 C.C.C. (3d) 439 (B.C.C.A.), he concluded that s. 265(3) was not exhaustive of the circumstances in which threats can vitiate consent. He also held that the appellant's threat in this case was sufficiently coercive to vitiate the complainant's consent. Accordingly, he dismissed this ground of appeal.

33 Green J.A. then considered the appellant's argument that the principle against multiple convictions arising from the same delict articulated by this Court in *Kienapple v. The Queen*, [1974 CanLII 14 \(SCC\)](#), [1975] 1 S.C.R. 729, should have precluded one of the two convictions on the charges related to P.V.B. He found that for the *Kienapple* principle to apply, there must be both a factual and legal nexus between the offences. In this case there was not a sufficient legal nexus between extortion and sexual assault, given the different societal interests the two offences sought to protect. He dismissed this ground of appeal.

34 The appellant argued that the trial judge erred in not considering whether there was an air of reality to the defence of honest but mistaken belief in consent in the case of E.V.K. Green J.A. held that the trial judge's failure to advert to the defence in an otherwise detailed judgment raised the question of whether he failed to consider it. Another possibility was that the trial judge had decided the defence had no "air of reality" and therefore did not need to be addressed in his reasons. Finding it impossible to resolve this question from a review of the judgment, Green J.A. conducted a review of the evidence and concluded there was no air of reality to the defence, and therefore dismissed this ground of appeal.

Finally, Green J.A. addressed the appellant's contention that the trial judge erred in his application of the principle of reasonable doubt in the cases of all five complainants. He noted that the trial judge made two problematic statements in the cases of D.A.S. and T.R. where, in reviewing the evidence, he said he was "not convinced" that the complainants consented to the sexual activity in question. Green J.A. found that the trial judge properly directed himself as to the presumption of innocence and the principle of reasonable doubt at the outset of his judgment. He concluded that the problematic remarks, when viewed in the context of the entire judgment, were effectively neutralized by other passages. Green J.A. also found that the verdicts were all reasonable and supported by the evidence.

(2) O'Neill J.A. in dissent

O'Neill J.A. would have acquitted the appellant on both counts of extortion. Adopting the views of A.W. Mewett and M. Manning (*Mewett & Manning on Criminal Law* (3rd ed. 1994), at p. 833), he found that the word "anything" in the context of s. 346(1) could only refer to "something of some tangible proprietary or pecuniary nature". Therefore, "anything" could not include sexual acts. With respect to the extortion of sexual favours from C.D., O'Neill J.A. found that the offence required that an actual attempt be made by the appellant. An attempt in law required something more than a statement of intention. There was no evidence of any further contact between the appellant and the complainant after the meeting in her apartment, nor was there evidence to show that anything was done by the appellant in furtherance of the threats. Accordingly, the charge should have been dismissed.

O'Neill J.A. would have acquitted the appellant of sexual assault in the case of P.V.B. Relying on *R. v. Guerrero* (1988), [1988 CanLII 9868 \(ON CA\)](#), 64 C.R. (3d) 65 (Ont. C.A.), he found that s. 265(3) was exhaustive of the circumstances in which threats vitiate consent.

38 With respect to the appellant's conviction of sexual assault in the case of E.V.K., O'Neill J.A. found that the trial judge was in error in not considering whether there was an air of reality to the defence of honest but mistaken belief in consent, and would have ordered a new trial.

39 Finally, O'Neill J.A. held that the trial judge erred in his application of the principle of reasonable doubt in the cases of all five complainants. He found that the trial judge made two notable errors. First, in each case the trial judge failed to consider all of the evidence in determining whether there was a reasonable doubt in the manner set out by this Court's decision in *R. v. W. (D.)*, [1991 CanLII 93 \(SCC\)](#), [1991] 1 S.C.R. 742. Second, that in the cases of D.A.S. and T.R., the trial judge used language that suggests that he reversed the onus on the burden of proof from the Crown to the appellant. He would have ordered new trials on the charges of sexual assault in the cases of D.A.S., T.R., and C.D. O'Neill J.A. specifically did not dissent on the reasonableness of verdicts or whether they were supported by the evidence.

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IV. Issues

40 This is an appeal as of right, and the issues on which this Court has jurisdiction are limited to questions of law on which O'Neill J.A. dissented. There are five issues:

1. Is it a crime to extort sexual favours?
2. Is there consent to sexual activity if it is obtained by threatened exposure of nude photographs?

3. Does the *Kienapple* principle apply to the convictions of extortion and sexual assault in the case of P.V.B.?
4. Did the trial judge err in failing to consider the defence of honest but mistaken belief in consent in convicting the appellant of sexually assaulting E.V.K.?
5. Did the trial judge err in his application of the principle of reasonable doubt in the cases of all five complainants?

V. Analysis

A. *Is it a crime to extort sexual favours?*

41 Is it a crime to extort sexual favours? The answer to this question depends on the scope of the word “anything” in the extortion provision of the *Criminal Code*. The appellant was charged under s. 305, where extortion was defined as follows:

305. (1) Every one who, without reasonable justification or excuse and with intent to extort or gain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done, is guilty of an indictable offence and is liable to imprisonment for fourteen years.

Section 305(1) was slightly modified in 1985 (S.C. 1985, c. 19, s. 47). It is now s. 346(1), which reads as follows:

346. (1) Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened,

accused or menaced or to whom violence is shown, to do anything or cause anything to be done.

Both Green J.A. and O'Neill J.A. referred to s. 346(1) in their reasons. While ss. 305(1) and 346(1) are virtually identical, the words “with intent to extort or gain” precede the first reference to “anything” in s. 305, whereas the words “with intent to obtain” precede the first reference to “anything” in s. 346. Given this subtle difference and the fact that the appellant was charged and convicted under s. 305, I will refer to s. 305 in the course of my analysis.

42 In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998 CanLII 837 \(SCC\)](#), [1998] 1 S.C.R. 27, at para. 21, the Court adopted the following passage from Driedger’s *Construction of Statutes* (2nd ed. 1983) as the general approach to be taken to statutory construction:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

43 I begin with the grammatical and ordinary sense of “anything”. The *Oxford English Dictionary* (2nd ed. 1989), vol. 1, defines anything as follows: “A combination of ANY and THING, in the widest sense of the latter, with all the varieties of sense belonging to ANY.” The dictionary definition suggests a broad interpretation, which would include sexual favours. Such an interpretation is also supported by the immediate context of the provision. “Anything” is referred to three times in s. 305(1):

305. (1) Every one who, without reasonable justification or excuse and with intent to extort or gain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done, is guilty of an indictable offence and is liable to imprisonment for fourteen years. [Emphasis added.]

In my view, the meaning of “anything” in the immediate context of “to extort or gain anything” and inducing any person “to do anything or cause anything to be done” is clearly in keeping with the wide, unrestricted dictionary definition, and includes sexual favours.

44 Mewett and Manning, *supra*, take a differing view. Commenting on *R. v. Bird*, they argue at p. 833 that:

Not a great deal of discussion appears in *Bird* on this wide interpretation of “anything”, the court being content to say that the word is clear and unambiguous and used in this context is of wide unrestricted application. Yet this is not what is normally meant by “extort or gain”. It is true that, in isolation, “anything” can be of the widest meaning, but in the context of “extort or gain”, one might have thought that it referred to something of some tangible proprietary or pecuniary nature.

I respectfully disagree. I do not believe the authors place sufficient weight on the fact that the meaning of “anything” is further qualified by the words “to do anything or cause anything to be done” at the end of the section.

45 I also find that an interpretation of “anything” that includes sexual favours is suggested by the purpose and nature of the offence of extortion. Extortion criminalizes intimidation and interference with freedom of choice. It punishes those who, through threats, accusations, menaces, or violence induce or attempt to induce their victims into doing anything or causing anything to be done. Threats, accusations, menaces and violence clearly intimidate: see *R. v. McCraw*, [1991 CanLII 29 \(SCC\)](#), [1991] 3 S.C.R. 72, at p. 81; *R. v. Clemente*, [1994 CanLII 49 \(SCC\)](#), [1994] 2 S.C.R. 758, at pp. 761-62. When threats are coupled with demands, there is an inducement to accede to the demands. This interferes with the victim’s freedom of choice, as the victim may be coerced into doing something he or she would otherwise have chosen not to do.

Given this purpose, I find it difficult to accept the appellant's contention that "anything" should be limited to things of a proprietary or pecuniary nature. If the appellant's argument is accepted, it would be criminal to threaten exposure of nude photographs when coupled with a demand for money, but it would not be criminal to make that same threat when coupled with a demand for sex. This strikes me as unreasonable, and at odds with the purpose of the provision. The threat is equally intimidating in both cases, as the consequences of non-compliance are identical. With respect to interference with freedom of choice, in both cases the victim is asked to do something he or she may not want to do. It is likely that the victim would much sooner accede to the monetary demand than the sexual demand. Freedom of choice in sexual matters is at least as highly valued as freedom of choice in matters concerning property. Accordingly, there is no reason to think that extortion of sexual favours is not also a criminal offence.

It may be objected that this conception of the purpose of s. 305 is overly broad, and does not take into account two important contextual factors: that the offence of extortion was historically a property offence and that the extortion provision was located in Part VII (now Part IX) of the *Code*, entitled "Offences Against Rights of Property". When these factors are properly taken into account, it is submitted that extortion only criminalizes demands of a proprietary or pecuniary nature. Accordingly, "anything" should be given a more limited interpretation.

In assessing the arguments about the historical origins of the offence, I will briefly review the evolution of the offences of blackmail and extortion in English and Canadian law. In Great Britain, "[b]lackmail was originally the tribute exacted by free-booters in the northern border countries to secure lands and goods from despoilment or robbery": see W. H. D. Winder, "The Development of Blackmail" (1941), 5 *Modern L. Rev.* 21, at p. 24. It later came to denote a number of offences in which property or some other advantage was demanded with threats: see G. L. Williams, "Blackmail", [1954] *Crim. L. Rev.* 79, at p. 79. In the early stages of its development, the crime of blackmail "seems to have been pretty well coextensive with robbery and attempted

robbery, but over the years the definition has been extended to embrace more subtle methods of extortion”: J. C. Smith and B. Hogan, *Criminal Law* (8th ed. 1996), at p. 618. Extortion was originally a separate common law offence punishing the conduct of public officials who sought personal financial gain under colour of their office. It has since been statutorily expanded in some jurisdictions, such as Canada, to include more familiar forms of blackmail.

49 The roots of s. 305 of the *Criminal Code* lie in five separate and relatively narrowly defined offences from the first *Criminal Code* of 1892 (S.C. 1892, c. 29). The five offences were defined in ss. 402 to 406, and may be briefly described as follows:

s. 402: Compelling the execution of a document by violence or restraint or by the threat of violence or restraint.

s. 403: Uttering a letter or other writing demanding with menaces any property, chattel, money, valuable security or other valuable thing.

s. 404: Demanding with menaces anything capable of being stolen with intent to steal it.

s. 405: Accusing or threatening to accuse a person of certain listed crimes with intent to extort or gain anything or to compel the execution of a document.

s. 406: Accusing or threatening to accuse a person of crimes other than those listed in s. 405 with intent to extort or gain anything or to compel the execution of a document.

Minor changes were made to the provisions in the 1906 revision (R.S.C. 1906, c. 146), when ss. 402 to 406 were renumbered as ss. 450 to 454, and in the 1927 revision (R.S.C. 1927, c. 36). In the comprehensive 1955 amendments (S.C. 1953-54, c. 51), ss. 450 to 455 were combined into one global offence called “extortion” and re-enacted as s. 291, which in turn was subsequently renumbered unchanged as s. 305 in the 1970 revision (R.S.C. 1970, c. C-34).

50 Legislative history may be used as an aid in determining the intention of the legislature: see *Rizzo Shoes*, *supra*, at para. 31; see also *R. v. Vasil*, 1981 CanLII 46 (SCC), [1981] 1 S.C.R. 469, at p. 487; *Paul v. The Queen*, 1982 CanLII 179 (SCC), [1982] 1 S.C.R. 621, at pp. 635, 653 and 660. However, the legislative history of s. 305 does not shed much light on the meaning of “anything”. As Cartwright J. (as he then was) held for a unanimous five-person bench in *R. v. Ntarelli*, 1967 CanLII 11 (SCC), [1967] S.C.R. 539, at pp. 543-44:

It appears to me that the wording of s. 291 [later s. 305] of the present *Code* is so different from that of ss. 450 to 454 of the former *Code* that little is to be gained from a consideration of the cases decided under those sections.

The words of Lord Herschell in *Bank of England v. Vagliano Brothers* [[1891] A.C. 107, at pp. 144-45] appear to me to be appropriate to the problem before us. They are accurately summarized in *Halsbury*, 3rd ed., vol. 36, p. 406, s. 614, as follows:

In construing a codifying statute the proper course is, in the first instance, to examine its language and to ask what is its natural meaning; it is an inversion of the proper order of consideration to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear interpretation in conformity with this view. The object of a codifying statute has been said to be that on any point specifically dealt with by it the law should be ascertained by interpreting the language used, instead of roaming over a number of authorities. After the language has been examined without presumptions, resort must only be had to the previous state of the law on some special ground, for example for the construction of provisions of doubtful import, or of words which have acquired a technical meaning.

As a final point regarding legislative history I would note that there is no Hansard evidence or Committee Reports which illuminate Parliament’s intention in enacting the new extortion provision in 1955.

I turn now to the fact that extortion is located in the Part of the *Code* entitled “Offences Against Rights of Property”. The Court has held on a number of occasions that headings may be used as an aid in statutory construction: see *Attorney-General of Canada v. Jackson*, 1946 CanLII 29 (SCC), [1946] S.C.R. 489, at pp. 495-96; *Law Society of Upper Canada v. Skapinker*, 1984 CanLII 3 (SCC), [1984] 1 S.C.R. 357; *Skoke-Graham v. The Queen*, 1985 CanLII 60 (SCC), [1985] 1 S.C.R. 106, at pp. 119-20; *R. v. Lohnes*, 1992 CanLII 112 (SCC), [1992] 1 S.C.R. 167, at p. 179.

In *Skapinker*, Estey J. discussed the role of headings in constitutional interpretation. His reasons are just as apposite to the interpretation of ordinary statutes. At pp. 376-77 he held:

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

...

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

In my view, Estey J.’s approach to the role of headings in statutory interpretation is the correct one. Headings “should be considered part of the legislation and should be read and relied on like any other contextual feature”: *Driedger on the Construction of Statutes* (3rd ed. 1994), by R. Sullivan, at p. 269. The weight to be given to the heading will depend on the

circumstances. Headings will never be determinative of legislative intention, but are merely one factor to be taken into account: see *Lohnes, supra*, at p. 179.

54 In this case, I find the fact that the extortion provision is located in the “Offences Against Rights of Property” Part of the *Code* is outweighed by competing considerations in determining the scope of “anything”. First, the ordinary meaning of “anything” in its immediate context is clear and supports a broad interpretation. Greater weight should be given to ordinary meaning than to headings. As Estey J. held in *Skapinker, supra*, at p. 377, “[i]f . . . it becomes apparent that the section when read as a whole is clear and without ambiguity, the heading will not operate to change that clear and unambiguous meaning.” See also *Jackson, supra*, at pp. 495-96, *per Kellock J.*

55 Second, the purpose of s. 305 that can be directly inferred from the wording of the provision is that extortion criminalizes intimidation and interference with freedom of choice. Given this objective, it would be unreasonable to criminalize extortion of money or property, but not extortion of sexual favours. Adopting a narrower formulation of the purpose in light of the heading would lead to this consequence.

56 Third, Parliament could have easily limited the scope of the word “anything” to things of a proprietary or pecuniary nature. In Great Britain, the offence of blackmail is defined in s. 21 of the *Theft Act 1968* (U.K.), 1968, c. 60, in part as follows:

(1) A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces;

The ordinary meaning of “any unwarranted demand” is of similar breadth as “anything” in s. 305. However, the scope of s. 21 is expressly limited by s. 34 of the *Theft Act*, which states that for the

purposes of the *Theft Act* (and thus for the purpose of s. 21) “‘gain’ and ‘loss’ are to be construed as extending only to gain or loss in money or other property”. The fact that Parliament did not limit s. 305 in this manner is yet another reason in favour of adopting a broad interpretation.

57 Finally, a number of courts in Canada have found that “anything” includes sexual favours: see *Bird, supra*; *R. v. D.K.P. (No. 1)* (1991), 11 W.A.C. 302 (B.C.); *R. v. Bloch-Hansen* (1977), [1977 CanLII 2110 \(SK KB\)](#), 38 C.C.C. (2d) 143 (Sask. Dist. Ct.).

58 For all these reasons, I agree with the British Columbia Court of Appeal in *Bird, supra*, at p. 17, that “anything” should be given a “wide unrestricted application” and that sexual favours fall “squarely within the meaning of the word ‘anything’ as used in the section”.

59 I note that O’Neill J.A. dissented on the ground that the appellant did not attempt to extort anything from C.D. because his threats amounted merely to a statement of intention. I respectfully disagree with this conclusion. The appellant’s threats clearly amounted to an attempt to extort sexual favours from C.D., thereby constituting the *actus reus* of extortion, which includes an attempt at inducing any person to do anything or to cause anything to be done. The attempt is completed once the offender threatens the victim with a view to extorting or gaining anything.

B. *Is there consent to sexual activity if it is obtained by threatened exposure of nude photographs?*

60 The trial judge found that P.V.B. chose to engage in sexual activity with the appellant by reason of his threats to expose the nude photographs he had taken of her. He found this choice to be non-consensual and convicted the appellant of sexual assault.

61 The appellant, adopting O'Neill J.A.'s dissent, argued that the trial judge erred because s. 265(3)(b), which refers to threats of force, was exhaustive of the circumstances in which no consent is obtained by reason of threats. The Crown took the contrary position, arguing that s. 265(3)(b) was merely illustrative, and not exhaustive.

62 I find that I do not need to decide this issue. The appellant's conviction of sexually assaulting P.V.B. may be affirmed on the basis of an independent sexual assault, wholly apart from his extortionate conduct. This alternative basis of affirming the appellant's conviction was argued by the Crown.

63 Over the course of a two- to three-month period P.V.B. would go to the appellant's apartment and have sexual intercourse with him in exchange for the negatives of the photographs he had taken of her. By the appellant's own admission P.V.B. was tied up on several occasions. On at least two such occasions, P.V.B. testified that the appellant persisted in sexual activity after she had unambiguously communicated her lack of consent. I reproduce the following excerpts from her examination in chief:

A. He would tie my wrists, one in each corner; and my ankles
to the bottom corners and then he would blindfold me and perform sexual
acts on me in there[,] [i]nsert objects in me and sometimes he would use a
leather strap to hit me with.

Q. Where would he hit you?

A. He would hit me on various parts of my body and on my vagina.

Q. Were you consenting to these activities, what would you, what did you say to him?

A. No, I never told him anything to do to me. And I told him to stop hitting me with [the] strap, it was hurting me.

Q. Yes.

A. And he would continue to do so. [Emphasis added.]

P.V.B. also referred to at least one other incident in which the appellant persisted notwithstanding her lack of consent:

A. He had me bent over the back of the couch with each leg tied to a corner and my hands tied together and bound around the middle leg of the couch and I was blindfolded and he was performing sexual acts on me this way and it was very uncomfortable. He was inserting objects in me that were very uncomfortable and it was hurting me and I managed to get my hands free and I took the blindfold off and I looked at him and said to stop, he was hurting me and he said you're not playing fair. And the tone of his voice and the look in his eyes frightened me that I went back to the position and he tied my hands again and I just stayed still, just hoping that it would be over soon so I could leave.

...

Q. There was that occasion where you had broken free and told him to stop and you'd also mentioned other occasions when he was strapping you?

A. Yes.

...

Q. Okay. What other forms of resistance did you make known to him?

A. I had asked him to stop inserting large objects because it was hurting me. I was experiencing discomfort and pain and he would not. He would continue to do so. Most times though, I was in bondage, [so] I couldn't stop him. [Emphasis added.]

64 Davis was cross-examined by Crown counsel as to these incidents. I reproduce the relevant excerpts:

Q. She was consenting to everything that took place.

A. Yes.

Q. How about the vegetables inserted up her?

A. There was no vegetables inserted up her.

Q. How about the dildos inserted up her?

A. There was one time that I can recall, maybe twice, that the vibrator was used.

Q. Consensual.

A. Yes.

Q. How about the strapping of her?

A. She was never strapped.

Q. The tying up, that took place.

A. She was never blindfolded either.

Q. Never blindfolded. How about being bent over the couch?

A. She was.

Q. She wasn't blindfolded at that time. She didn't indicate it hurt at that time.

A. She indicated that she was sore.

65 While the trial judge did not comment directly on these incidents in his reasons, he did find P.V.B. to be a credible witness. At para. 62 he held: "On an overall assessment of the credibility of the complainant, it is fair to say that she gave her evidence in a straightforward manner with no apparent evasiveness". The trial judge made only one qualification to this conclusion: "[O]n cross-examination it was evident that she was somewhat defensive and on occasions almost belligerent". However, he quickly went on to add, "When considering the nature of the evidence that was given and the type of cross-examination which obviously had to be conducted, it is not surprising that the witness would react in a defensive manner".

66 By contrast, the trial judge found the appellant's testimony incredible. The appellant contended that he had an ongoing consensual relationship with P.V.B. well before the photography sessions took place, and that P.V.B. initiated the sexual activity between them. He denied ever threatening to expose the photographs. He said there was no reason to extort sex from her, since they were already having sex anyway. Despite his testimony, the trial judge was satisfied beyond a reasonable doubt that the appellant threatened to expose the photographs and that any sexual activity that took place occurred because of P.V.B.'s fear that the appellant would expose her.

67 Given the trial judge’s findings in this regard, I am satisfied that the events unfolded as the complainant described them. The testimony of a friend of the complainant, provides further support for this conclusion. P.V.B.’s friend testified that on a couple of occasions following sexual encounters with the appellant, P.V.B. arrived at her apartment distraught. She further testified that she knew P.V.B. was hurt because she was bleeding from her vagina even though she was not menstruating. I would note that her testimony was accepted by the trial judge to corroborate P.V.B.’s testimony regarding the burning of the negatives after P.V.B. received them from the appellant.

68 The question, then, is whether this evidence supports a conviction of sexual assault. The Crown argued before us that it does. I agree. P.V.B. clearly communicated her lack of consent to the appellant. She asked him to stop, yet he persisted. He did so even though, through his own admission, he knew she was “sore”. As such, both the *actus reus* and *mens rea* of sexual assault have been made out. I would therefore affirm the appellant’s conviction of sexual assault on these grounds.

C. *Does the Kienapple principle apply to the convictions of extortion and sexual assault in the case of P.V.B.?*

69 The appellant argued that the *Kienapple* principle, which precludes multiple convictions in respect of the same “delict”, “matter”, or “cause”, ought to apply to his convictions of sexual assault and extortion in relation to P.V.B.

70 As a preliminary matter, I will first consider whether the Court has jurisdiction to address this issue. At the hearing the Crown argued that the Court does not have jurisdiction because this issue was not raised by O’Neill J.A. in his dissenting judgment. Since this is an appeal as of right pursuant to s. 691(1)(a) of the *Code*, the jurisdiction of this Court is limited to

questions of law on which a judge of the court of appeal dissents. O'Neill J.A. dissented only on the extortion and sexual assault convictions in relation to P.V.B. He did not dissent on the application of *Kienapple*. Accordingly, the Crown contended the Court's jurisdiction is limited solely to these grounds, unless leave to appeal to address the application of *Kienapple* is granted.

71 I do not find this argument convincing. In light of the fact that I would affirm both convictions, the Court has, by necessary implication, the jurisdiction to consider *Kienapple*. The Court's jurisdiction over both the extortion and sexual assault convictions must, of necessity, include the jurisdiction to make whatever order is required to dispose of these grounds of appeal. It goes without saying that any order the Court makes in this regard must be a legal order. The Court cannot make an order that would violate established principles or rules of law. There is a possibility, however, that in affirming the convictions without considering the potential application of *Kienapple* that the accused could be convicted of multiple offences arising from the same delict. Such a disposition would be illegal, as it would contravene an established legal principle. Thus, in order to safeguard against this possibility, the Court has an implied jurisdiction to consider the application of *Kienapple*, to which I now turn.

72 The scope of the *Kienapple* principle was considered in *R. v. Prince*, [1986 CanLII 40 \(SCC\)](#), [1986] 2 S.C.R. 480. Dickson C.J. found that the application of the principle required that there be both a factual and legal nexus between the offences in issue. At p. 493 he held "[o]nce it has been established that there is a sufficient factual nexus between the charges, it remains to determine whether there is an adequate relationship between the offences themselves".

73 In this appeal there is not a sufficient factual nexus between the extortion and sexual assault convictions to trigger the application of *Kienapple*. The convictions arise out of different

factual transactions. Any one of the occasions over the two- to three-month period in which the appellant engaged in sexual activity with P.V.B. is sufficient to ground the extortion conviction. By contrast, the sexual assault conviction arises from one or two specific occasions in which the complainant explicitly communicated her lack of consent to sexual contact. Since there are separate factual circumstances which give rise to the different convictions, *Kienapple* does not apply.

D. *Did the trial judge err in failing to consider the defence of honest but mistaken belief in consent in convicting the appellant of sexually assaulting E.V.K.?*

74 The appellant argued that the trial judge erred in convicting him of sexual assault in the case of E.V.K. because the trial judge failed to consider the defence of honest but mistaken belief in consent.

75 Although the trial judge gave detailed reasons for his findings, he did not specifically advert to the possibility that the appellant honestly but mistakenly believed the complainant consented to the sexual activity in question.

76 Green J.A. held that the trial judge's failure to advert to the defence of honest but mistaken belief in an otherwise detailed judgment raised the question of whether the trial judge failed to consider it. If so, the accused may not have been afforded the benefit of the doubt on that issue. Another possibility was that the trial judge had decided that the defence had no "air of reality" and therefore did not need to be addressed in his reasons. Finding it impossible to resolve this question from a review of the judgment, Green J.A. conducted an extensive review of the evidence to determine whether there was an air of reality to the defence. He concluded there was none. Therefore, he held that even if the trial judge had failed to consider the issue at all, no reversible error was committed. O'Neill J.A. dissented, and would have ordered a new trial.

77 In order for the appellant to succeed on this ground of appeal, he must establish two things. First, that the trial judge failed to consider the defence, and second, that there was an air of reality to the defence. Failure of a trial judge to consider the defence when there is an air of reality to it, whether sitting alone or with a jury, is an error of law.

78 Since the trial judge did not advert to the defence at all in his reasons, it cannot be determined whether he in fact considered it. Resolving this issue requires the Court to determine whether in these circumstances the failure to give reasons may be deemed a failure to consider the defence, and thus an error of law.

79 Counsel did not address this issue in either oral or written arguments, focussing instead on whether there was an air of reality to the defence. Given that there was no argument on this point and that I am of the opinion that the appeal can be disposed of on the grounds that there was no air of reality to the defence, it is safer to assume without deciding that the failure of the trial judge to advert to the defence amounted to a failure to consider it. It is best to leave to another day the question of whether a trial judge's complete silence as regards a defence raised by the evidence constitutes a failure to consider it and therefore an error of law.

80 The defence of honest but mistaken belief in consent is simply a denial of the *mens rea* of sexual assault: *R. v. Ewanchuk*, 1999 CanLII 711 (SCC), [1999] 1 S.C.R. 330, at para. 44; *Pappajohn v. The Queen*, 1980 CanLII 13 (SCC), [1980] 2 S.C.R. 120, at p. 148. The *actus reus* of sexual assault requires a touching, of a sexual nature, without the consent of the complainant. The *mens rea* requires the accused to intend the touching and to know of, or to be reckless or wilfully blind as to the complainant's lack of consent: *Ewanchuk*, *supra*, at paras. 25 and 42. In

some circumstances, it is possible for the complainant not to consent to the sexual touching but for the accused to honestly but mistakenly believe that the complainant consented. In these circumstances, the *actus reus* of the offence is established, but the *mens rea* is not.

81 Before the defence can be considered, there must be sufficient evidence for a reasonable trier of fact to conclude that (1) the complainant did not consent to the sexual touching, and (2) the accused nevertheless honestly but mistakenly believed that the complainant consented: see *R. v. Osolin*, [1993 CanLII 54 \(SCC\)](#), [1993] 4 S.C.R. 595, at p. 648, *per* McLachlin J. In other words, given the evidence, it must be possible for a reasonable trier of fact to conclude that the *actus reus* is made out but the *mens rea* is not. In these circumstances, the defence is said to have an “air of reality”, and the trier of fact, whether a judge or jury, must consider it. Conversely, where there is no air of reality to the defence, it should not be considered, as no reasonable trier of fact could acquit on that basis: see *R. v. Park*, [1995 CanLII 104 \(SCC\)](#), [1995] 2 S.C.R. 836, at para. 11.

82 In determining whether there is an air of reality to the defence, the trial judge should consider the totality of the evidence: see *Osolin*, *supra*, at p. 683, *per* Cory J.; *Park*, *supra*, at para. 16. The role of the judge in making this determination was set out by Major J. in *Ewanchuk*, *supra*, at para. 57. He held that the judge should make “no attempt to weigh the evidence”. The sole concern is “with the facial plausibility of the defence”, and the judge should “avoid the risk of turning the air of reality test into a substantive evaluation of the merits of the defence”. Care should be taken not to usurp the role of the trier of fact. Whenever there is a possibility that a reasonable trier of fact could acquit on the basis of the defence, it must be considered.

83 It is not necessary for the accused to specifically assert a belief that the complainant consented. By simply asserting that the complainant consented, either directly under oath or

through counsel, the accused is also asserting a belief that the complainant consented: see *Park, supra*, at para. 17. However, the accused's mere assertion will not give the defence an air of reality: see *R. v. Bulmer*, 1987 CanLII 56 (SCC), [1987] 1 S.C.R. 782, at p. 790.

84 While this is evidence of a belief in consent, it is not sufficient evidence of an honest but mistaken belief in consent. Sexual assault is not a crime that is generally committed by accident: see *Pappajohn*, at p. 155, *per* Dickson J.; *Osolin*, at pp. 685-86, *per* Cory J. In most cases, the issue will be simply one of "consent or no consent", and there will be only one of two possibilities. The first is that the complainant consented, in which case there is no *actus reus*. The second is that the complainant did not consent, and the accused had subjective knowledge of this fact. Here, the *actus reus* is made out, and the *mens rea* follows straightforwardly.

85 For example, suppose the complainant and the accused relay diametrically opposed stories. The complainant alleges a brutal sexual assault and vigorous resistance, whereas the accused claims consensual intercourse. Suppose further that it is impossible to splice together the evidence to create a third version of events in which the accused honestly but mistakenly believed the complainant consented. In such circumstances, the trial becomes, essentially, a pure question of credibility. If the complainant is believed, the *actus reus* is made out and the *mens rea* follows straightforwardly. If the accused is believed, or if there is a reasonable doubt as to the complainant's version of events, there is no *actus reus*. There is no third possibility of an honest but mistaken belief in consent, notwithstanding the accused's assertion that the complainant consented: *Park, supra*, at paras. 25-26.

86 Although the accused's mere assertion that the complainant consented will not be sufficient evidence to raise the defence, the requisite evidence may nevertheless come from the accused: see *Park, supra*, at paras. 19-20, *per* L'Heureux-Dubé J.; *Osolin, supra*, at pp. 686-87, *per*

Cory J., and pp. 649-50, *per* McLachlin J. It may also come from the complainant, other sources, or a combination thereof. In *R. v. Esau*, [1997 CanLII 312 \(SCC\)](#), [1997] 2 S.C.R. 777. McLachlin J., dissenting in the result, accurately conveyed the nature of this evidence at para. 63:

There must be evidence not only of non-consent and belief in consent, but in addition evidence capable of explaining how the accused could honestly have mistaken the complainant's lack of consent as consent. Otherwise, the defence cannot reasonably arise. There must, in short, be evidence of a situation of ambiguity in which the accused could honestly have misapprehended that the complainant was consenting to the sexual activity in question.

87 Finally, the Court has held that there will be no air of reality where the evidence shows that the accused was reckless or wilfully blind as to whether the complainant consented. In those circumstances, the accused has subjectively adverted to the absence of consent, and therefore cannot have an honest but mistaken belief that the complainant consented.

88 I note that the appellant was charged with offences allegedly committed prior to the introduction of s. 273.2 in August of 1992. Consequently, the statutory amendments to the defence of honest but mistaken belief in consent do not apply to this appeal.

89 With these principles in mind I turn to consider the evidence in the case of E.V.K. I will begin with the complainant's testimony. She claims to have first met the appellant while walking near a mall in Gander, Newfoundland in August 1990. She was 20 years old at the time. The appellant, who was in his late thirties, approached her on his motorcycle. He held himself out as a photographer for a Toronto agency and asked her if she would consider modelling, as she had great potential. Some time later, she met with him at his residence to discuss the matter further, and she thought it a good idea. No photographs were taken on this occasion.

90 A few days later, the appellant contacted the complainant and told her to come to his residence and to bring some clothes with her. She posed for photographs, fully clothed. Towards the end of the session, he discussed the possibility of nude photographs, as they were needed if she wanted to be sent to Toronto to pursue a career. She demurred because of her religious upbringing.

91 Roughly one week later she returned to his apartment. Photographs were taken of her in a bathing suit and lingerie. Eventually he convinced her to pose nude. She was very hesitant, but he assured her that only he and some people in Toronto would see the photographs. While she was posing nude in his living room, the appellant approached her, took her hands, and tied her wrists with ropes that were attached to hooks inserted in an archway such that her arms were reaching up towards the ceiling. He took some photographs of her in that position. He then came up behind her and, without asking her permission, touched her breasts and inserted his finger into her vagina. The complainant said that she froze and did not know what to do.

92 After some time he untied her. He then brought over a chair, bent her over it, and tied her to it by her hands and feet. While tied to the chair, the complainant saw his reflection in the glass of the stereo and watched him approach her and undo his pants. She said he touched her vagina with his penis. She screamed for him to untie her, saying “I don’t want to do this”. The appellant then untied her and apologized for his conduct, and the complainant left his apartment. There were no more photography sessions after that.

93 The accused confirmed that he met the complainant near the Fraser Mall and that she was interested in modelling. He testified that there were one or two photo sessions in August of 1990. In his direct examination he offered the following description of events on the evening during which the alleged assault occurred:

She did everything that she did that night was just lingerie and nudes, and I had asked her about if she would like to try something different with the light bondage. As I told you, I was having very, very strong feelings for her. When she was in the archway I did come up behind her one time. She had her breasts exposed and I reached around behind her and I said, "I really like you". I was just telling her I really liked her, she really turned me on. I was just gently fondling her breasts and she said, "What are you doing?" I said, "I really like you and I'm making your breasts hard for the pictures". She didn't say anything else. I placed my hand down on her vagina. I was fondling her for a little while and she said, "Well do you have to do that?" I said, "No", and I left her alone. So anyway we took some more pictures, then we did the – tied her up over the chair. Again, after taking a couple of photographs I leaned forward, I touched her, I was fondling her vagina and I said, "I really want you. I really, really like you. I want to have sex with you." She had not said no or anything before that and I was touching her on her vagina, and I don't know, I started to undo my pants. I don't know if she heard the noise or what it was at the time, but all of a sudden like she sort of lifted her head and said, "No, don't do that." I said, "Oh, come on, I really, really want you." She said, "No, no, don't do that. I have no protection, you can't do it. Stop." I just withdrew like that, and what I was touching her with was my hand, and I immediately withdrew. I said, "I'm sorry." I immediately untied her. [Emphasis added.]

The appellant also testified that he never asked the complainant for permission to touch her.

94 In my view, even if the testimony of the appellant is completely accepted, it discloses that, at a minimum, he was wilfully blind as to whether the complainant consented to the fondling of her breasts and vagina. Consequently, the defence of honest but mistaken belief has no air of reality.

95 There is no suggestion by the appellant that the complainant posed nude for any reason other than to further her modelling career. Nor was there any evidence that she invited him to touch her prior to his fondling of her breasts and vagina. Nevertheless, the appellant approached the complainant when she was in an extremely vulnerable position and began fondling her breasts. I agree with Green J.A., who held at p. 314 that:

This is not a case of a subtle and tentative initiation of preliminary sexual exploration by one person towards another in a situation of autonomy, in the belief or hope that the feelings will be reciprocated and that the other party will be receptive to progressively more intimate activity. E.V.K. had made no prior request for sexual

activity and had given no other indication she was interested. There was a manifest power imbalance present of which the appellant took advantage. The appellant was directing operations, ostensibly for a photographic purpose, but with the (unexpressed, before the first touching) intent of pursuing a sexual encounter. The touching occurred when E.V.K. was vulnerable by being tied up. There was no basis in the evidence for the appellant thinking, at the time of the initiation of sexual touching, that E.V.K. might have been receptive to his advances.

96 In cross-examination, the appellant testified that he did not immediately touch the complainant's breasts, but rather began by touching her shoulders and telling her how much he liked her. The complainant was silent. Taking her silence and passivity as evidence of consent, he then proceeded to fondle her breasts. In these circumstances, I fail to see how the complainant's silence could have led the appellant to believe she was consenting to more intimate sexual contact.

97 Moreover, after he pinched her nipples, the appellant admits that the complainant said, "What are you doing?". Undeterred, he fondled her vagina. She then said "Do you have to do that?". The appellant stopped. This is clear evidence that he understood she was not consenting to further contact. Notwithstanding these statements, he tied her to a chair and again fondled her breasts and vagina. The appellant provided no evidence to suggest that the complainant had a change of heart. As the Court held in *Ewanchuk, supra*, at para. 58, there can be no air of reality in these circumstances.

98 In *Sansregret v. The Queen*, 1985 CanLII 79 (SCC), [1985] 1 S.C.R. 570, at p. 584, McIntyre J. held that "wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant". More recently in *Esau, supra*, McLachlin J. described wilful blindness as follows at para. 70:

The term wilful blindness connotes a deliberate avoidance of the facts and circumstances. It is the legal equivalent of turning a blind eye, of not seeing or hearing what is there to hear or see. It is the making of an assumption that the complainant consents without determining whether, as a matter of fact, the complainant consents. Blindness as to the need to obtain consent can never be raised by an accused as a defence.... [Emphasis in original.]

In light of the foregoing evidence, I am convinced that the appellant was wilfully blind as to whether the complainant consented. Accordingly, the defence of honest but mistaken belief in consent has no air of reality.

99 I note that O'Neill J.A. also dissented on the grounds that the trial judge failed to consider the defence of honest but mistaken belief in consent in the cases of T.R. and D.A.S. The appellant, however, made no submissions on this point in either oral or written arguments. It is not clear whether this was an oversight, or a concession that there was no air of reality to the defence in either case and thus a waiver of this ground of appeal. To rule out the possibility of a potentially harmful oversight and in an abundance of caution, I have reviewed the record, and am of the opinion that there was no air of reality to the defence. The issue was simply one of consent or no consent in both cases.

E. *Did the trial judge err in his application of the principle of reasonable doubt in the cases of all five complainants?*

100 The appellant argued that the trial judge erred in his application of the principle of reasonable doubt to each of the charges against him in the cases of all five complainants. O'Neill J.A. in dissent held that the trial judge made two notable errors. First, in each case the trial judge failed to consider all of the evidence in determining whether there was a reasonable doubt in the manner set out by this Court's decision in *R. v. W. (D.)*, *supra*. Second, that in the cases of D.A.S.

and T.R., the trial judge used language that suggests that he reversed the onus on the burden of proof from the Crown to the appellant.

101 At the beginning of his judgment, before dealing with any of the individual charges, the trial judge specifically referred to *W. (D.)*. At paras. 3-5 he held:

. . . it is important to ensure that one applies the presumption of innocence to the accused in each of the cases. The obligation is never lifted from the Crown to prove the guilt of the accused beyond a reasonable doubt on each of the counts. It has been pointed out in numerous cases that proof beyond a reasonable doubt is that degree of proof which “convinces the mind and satisfies the conscience that the Crown has proven all the essential elements of the offence”: see *R. v. W. (D.)*. . . .

It has been said by a number of trial judges that it is incorrect to approach these cases in terms of whether or not one believes the defence’s evidence or the Crown’s evidence. The correct approach is to ask oneself; even if I do not believe the evidence of the accused, whether or not, viewing the evidence as a whole, I have a reasonable doubt as to the accused’s guilt. . . .

It is important to review all of the testimony and consider the evidence in its totality in the broader context of the presumption of innocence and the requirement for proof beyond a reasonable doubt to finally reach a decision on each count.

102 The trial judge clearly directed himself properly as to the principle of reasonable doubt. His judgment also reveals a thorough review of the evidence. While he did not specifically advert to *W. (D.)* while dealing with each count, this does not mean that he erred. I agree with Green J.A. who held at pp. 325-26:

. . . the trial judge, near the beginning of his reasons for judgment, when dealing with general principles, specifically referred to and properly stated, the effect of *R. v. D. W.* as it affects the application of the principle of reasonable doubt on the issue of credibility. The fact that he did not repeat the admonition each time as he dealt with the facts of each count does not necessarily mean that he failed to consider or apply the principle in each case. Just because a judge, after considering the evidence, decides to accept a complainant’s version of events over that of an accused’s does not mean he has fallen into the trap which *R. v. D. W.* warns against.

103 With respect to the cases of T.R. and D.A.S., in the course of reviewing the evidence, the trial judge said that he was “not convinced” that the complainants consented to the sexual activity in question. Read out of context, these comments suggest that the trial judge may have reversed the burden of proof. However, in my view, this is simply plucking colloquial elements of the trial judge’s thorough reasons. I agree with Green J.A., who held at p. 316:

It is not sufficient to “cherry pick” certain infelicitous phrases or sentences without enquiring as to whether the literal meaning was effectively neutralized by other passages. This is especially true in the case of a judge sitting alone where other comments made by him or her may make it perfectly clear that he or she did not misapprehend the import of the legal principles involved. As McLachlin J. said in [*R. v. B. (C.R.)*, 1990 CanLII 142 (SCC), [1990] 1 S.C.R. 717, at p. 737]: “[t]he fact that a trial judge misstates himself at one point should not vitiate his ruling if the preponderance of what was said shows that the proper test was applied and if the decision can be justified on the evidence.”

I would dismiss this ground of appeal.

-

VI. Disposition

104 In the result, the appeal is dismissed.

Appeal dismissed.

Solicitor for the appellant: Robin Reid, St. John’s, Newfoundland.

Solicitor for the respondent: The Department of Justice, St. John’s, Newfoundland.

* Cory J. took no part in the judgment.

Tab 113

R. v. Alexander, 2005 CanLII 32566 (ON CA)

Source: Court of Appeal for Ontario
 Date: 2005-09-14
 File number: C40654; C41042
 Other citations: 202 OAC 54 — 206 CCC (3d) 233 — 32 CR (6th) 159 —
 [2005] CarswellOnt 4269 — [2005] OJ No 3777 (QL)
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DATE: 20050914
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COURT OF APPEAL FOR ONTARIO

DOHERTY, FELDMAN and LAFORME JJ.A.

B E T W E E N :	)	
	)	
HER MAJESTY THE QUEEN	))	Patrick McCann and
	)	Gregory Lafontaine
Respondent	)	for the appellant Alexander
	)	
- and -	)	Joseph Di Luca
	)	for the appellant Blake
HARRY ALEXANDER and NORRIS B	))	
LAKE	)	Roger A. Pinnock
	)	for the respondent
Appellants	)	
	)	
	)	
	)	
	)	Heard: June 29, 2005

On appeal from the convictions entered by Justice G. Valin of the Superior Court of Justice, sitting without a jury, on July 3, 2003 and from the sentence imposed on September 30, 2003.*

DOHERTY J.A.:

I

Overview

[1] The appellants, Alexander and Blake, were tried by a judge of the Superior Court of Justice, sitting without a jury, on a sixteen-count indictment. They were jointly charged on counts one to three, Blake was charged alone on counts four to six and Alexander was charged alone on counts seven to sixteen.

[2] Alexander was convicted on four charges:

- conspiring with Blake to extort P.G. (count three);
- unlawfully possessing an electromagnetic device knowing that its design rendered it primarily useful for surreptitious interception of private communications (count eleven);
- extorting M.M. (count twelve); and
- conspiring with an unindicted co-conspirator to extort P.M. (count fifteen).

[3] Blake was convicted on two counts:

- conspiring with Alexander to extort P.G. (count three); and
- conspiring with various unindicted co-conspirators, including Alexander, to extort M.C. (count five).

[4] Alexander received sentences totalling thirty months. Blake received sentences totalling eight months.

[5] Alexander appeals his convictions and sentence. Blake initially appealed his convictions and sentence, but has abandoned his sentence appeal.

[6] In my view, the conspiracy convictions cannot stand. I would allow Alexander's appeal from his convictions on counts three and fifteen, quash those convictions and enter acquittals on those counts. I would dismiss Alexander's appeal from his remaining two convictions and affirm the sentences totalling ten months imposed by the trial judge on those convictions. I would allow Blake's appeal from both conspiracy convictions, quash those convictions and enter acquittals on both counts.

II

(i) Factual Background

[7] Alexander had been involved in the sales and marketing business for many years. He became embroiled in several legal disputes with former business partners, lawyers, accountants and employees. In 1997, Alexander and a former policeman named Raymond Sabourin started a private investigation firm known as C.[...] Inc. ("C."). The firm was to investigate various forms of white collar fraud.

[8] The Crown contended that Alexander used the facilities of C. to pursue investigations against individuals with whom he had ongoing litigation or personal disputes. The Crown alleged that Alexander hired female "operatives" to lure the subjects of these investigations to hotels or apartments that had been rigged with hidden audio and video recording equipment. The operatives were to attempt to seduce the targets of the investigations into compromising sexual positions that would be recorded by the equipment and later used by Alexander in attempts to extract money or other gain from the targets.

[9] A number of audio and video recordings were made. In at least one case, the target of these activities received photographs in the mail, which had been taken from the video recording, showing the target engaged in sexual activity. The photographs were accompanied by a note demanding payment of money to Alexander.

[10] Blake had done various jobs, including landscaping and carpentry for Mrs. Alexander over the years. Alexander hired Blake, at first to do handy work around the C. office. Later, with Alexander's permission, Blake became involved in hiring the operatives. Blake had no involvement in Alexander's other business dealings outside of C. or in the various disputes between Alexander and the targets of the surreptitious activity described above.

[11] The Crown's case was based on the evidence of some of the individuals who were targets of the investigations and evidence from employees at C., including some of the female operatives.

[12] Alexander gave evidence. He testified that C. used female operatives in an effort to get admissions and other damaging information from individuals who were the targets of the C. investigations. Alexander testified that he was looking for professional con women who could play the role of innocent persons with a lot of money to spend. He thought that the targets would believe that they could bilk these individuals. Alexander acknowledged that some of the meetings between the operatives and the targets were audiotaped and/or videotaped. He denied that any of the operatives were instructed to engage in sexual activity. He said that he used pretty young women as operatives because male targets tended to let their guard down and become more talkative around pretty young women. Alexander testified that he intended to use any admissions or evidence of dishonest conduct to assist C. clients in their civil suits, or to pass that information on to Revenue Canada or the police.

[13] Blake did not testify.

(ii) The Conspiracy Allegations

[14] Four of the convictions involved conspiracy allegations. Although the counts in the indictment were not worded as clearly as they might have been, the thrust of the allegation in each count was basically the same. It was alleged that the conspirators conspired to extort money or other personal gain from named victims by videotaping the victims in compromising sexual positions and then threatening to make public photographs from the videotapes unless the targets paid the demanded sum to Alexander. A brief outline of the evidence relating to each of the conspiracy counts that gave rise to convictions follows.

(a) Count Three

[15] Count three alleged that Alexander and Blake conspired along with Sabourin to extort P.G. P.G. had been a long-time friend of Alexander and vice-president and general manager of Alexander's marketing firm. He left the firm on bad terms in 1994 and Alexander sued him when he took a job with another company. By the time C. was in business in early 1998, Alexander's lawsuit against P.G. was still outstanding.

[16] Alexander arranged for persons employed by C. to meet with P.G. posing as potential clients. Alexander advised these individuals that P.G. was a "serial embezzler" who had taken large amounts of money from several people. Alexander made it clear that his aim was to get P.G. into some form of compromising situation as soon as possible. At one meeting, two C. employees discussed a proposed business transaction with P.G. The meeting was videotaped. Alexander said that in subsequent meetings, P.G. had to be put in a more compromising position, specifically a sexually compromising position. Arrangements were made for a meeting with P.G. at the Chateau Laurier Hotel. Prior to the meeting, audio/video recording equipment was surreptitiously installed in the hotel room.

[17] Blake hired a woman (S.T.) who worked for an escort agency, to pose as one of the individuals meeting with P.G. at the Chateau Laurier. Blake told her that she would be paid \$200.00 if she did not have sex with P.G. and \$400.00 if she did. The woman went to the hotel room posing as a friend of the two C. employees who had previously met P.G. These two left, leaving P.G. alone with the woman. Unbeknownst to her, this meeting was being videotaped. The woman did not attempt to engage in sexual activity with P.G. After P.G. had left the hotel room, Blake returned, paid the woman \$200.00 and drove her home. The next day, Blake told the woman that they had to go to see Alexander. Alexander told her that it had been reported to him that she was not appropriately dressed when she met P.G. the night before.

[18] Alexander testified that the day-to-day operations at C. were controlled by Sabourin and not by him. He denied any knowledge of a plan to try to place P.G. in a compromising sexual position so that it could be videotaped and used to extort money from P.G.. Alexander did admit that he wanted his operatives to induce P.G. to engage in some act of dishonesty or to admit that he had misused corporate information after he was fired by Alexander's marketing company.

[19] There was no evidence that Blake knew P.G., knew of his prior relationship with Alexander, nor that Alexander was suing him.

(b) Count Five

[20] Count five alleged that Blake conspired with various unindicted co-conspirators, including Alexander, to commit extortion by videotaping M.C. in a compromising situation for personal gain.

[21] M.C., an accountant, had directed a client who was having problems with a former partner, to C.. M.C.'s client hired C. and agreed to provide a \$10,000.00 retainer. Shortly afterwards, Sabourin purported to uncover information suggesting that M.C. was defrauding his client. C.'s relationship with M.C.'s client ended suddenly and she did not pay the \$10,000.00 retainer. Alexander believed that M.C. had convinced his client to discontinue her relationship with C. and C. then sued M.C.. Alexander, through C. employees, made attempts to put M.C. in a compromising sexual position.

[22] C.K. testified that she was introduced to Alexander by Blake. At a second meeting, they told her that they wanted her to get together with an accountant (M.C.) and try to get some information from him. She inferred from what Alexander said that she was to sleep with the accountant, if necessary. Blake and Alexander told her that she would be paid \$400.00. A C. employee installed a clock radio with a camera inside in a hotel bedroom. C.K. eventually took M.C. to that hotel room and they engaged in sexual activity.

[23] Some time after the meeting in which the sexual activity occurred, M.C. received a photograph in the mail of himself and C.K. engaged in sexual activity. The writing on the back of the photo said:

The next photo will be to your address and all your clients.
Butter [sic] you pay Mr. H. Alexander his \$10,000.00 and shut
up.

[24] M.C. was subject to a second set-up involving a different woman that was much the same as the first. He later received a photograph in the mail of himself and that woman engaging in sexual activity.

[25] M.C. went to the police and their investigation led to the charges in the indictment.

(c) Count Fifteen

[26] Count fifteen charged Alexander with conspiring with Y.A. to extort P.M.. P.M., a lawyer, had acted for Alexander and his partners in a real estate transaction many years earlier. Alexander had a falling out with his partners and sued them. Later, Alexander became convinced that P.M. had failed to represent him adequately and that P.M. knew that Alexander's partners had cheated him. About ten years after the transaction, Alexander complained about P.M. to the Law Society of Upper Canada. The Law Society took no action.

[27] Y.A. worked for an escort service. She wanted to get into the private investigation business and was referred to Alexander. He asked her to go see a lawyer, "M.", and ask questions about offshore banking. Alexander told her to record the conversation.

[28] Y.A. had a meeting with P.M. and provided the tape to Alexander. Alexander was unhappy about the quality of the tape and asked her to see the lawyer again and on this occasion to have sex with him. Alexander promised her \$1,400.00 if she would have sex with P.M. and tape it. Y.A. testified that she knew there was something wrong with this suggestion, so she went to the lawyer's office and reported what she had been asked to do. She decided not to have any further contact with Alexander.

[29] P.M. testified and confirmed the first meeting with Y.A. He said that she also called him and attempted to arrange a second meeting at her apartment. P.M. testified that Y.A. phoned him a second time a short time later and said that her meeting with him had been orchestrated by Alexander and that Alexander had told her to have sex with him and to videotape that activity. P.M. went to his lawyer who arranged to obtain a statement from Y.A. Armed with the statement, P.M. and his lawyer went to the police.

[30] Alexander testified that he hired Y.A. on the advice of an Ottawa police officer. He wanted an attractive young woman with the ability to beguile male businessmen so that they would make admissions that would assist in C.'s investigations. He thought Y.A. might have that ability. Alexander insisted that he did not know that Y.A. worked for an escort service and that he never offered her money to have sex with P.M. or anyone else. Alexander relied on inconsistencies in Y.A.'s testimony and the statement she had given to the police. Most notably, in her statement, Y.A. had told the police that Alexander did not tell her to have sex with P.M.

[31] The trial judge accepted Y.A.'s evidence and rejected the evidence of Alexander.

(iii) The Extortion Charge (Count Twelve)

[32] Count twelve charged extortion in these terms:

Harry Alexander ... without reasonable justification or excuse
and with intent to obtain a sum of money, did attempt to induce
M.M. by threats to send a letter containing an attack on M.M.'s
character if an amount of money was not paid ...

[33] M.M. had been employed at Alexander's marketing company where P.G. (referred to in count three) was also employed. After P.G. had left that company, M.M. told Alexander that she had been sexually assaulted by P.G. Eventually, she sued P.G. She was unable to finance the litigation and borrowed some \$7,000.00 from Alexander's wife. In January 1997, M.M. settled her action against P.G. and received a monetary settlement. She did not tell Mrs. Alexander that the action had been settled. Mrs. Alexander found out about the settlement and she attempted to contact M.M. to discuss the status of the loan. When M.M. did not reply, Mrs. Alexander wrote to her demanding repayment and threatening a lawsuit. Mrs. Alexander discussed the problem with her husband. Both were angry that M.M. had not told Mrs. Alexander about the settlement or replied to her phone calls or letters.

[34] Mr. Alexander prepared a draft letter addressed to Michael Cowpland, M.M.'s employer in January 1997. Alexander knew Mr. Cowpland. The letter read in part:

I would like to make you aware of highly questionable ethical and moral conduct on behalf of one of your employees – [M.M.] There are too many good people looking for work in our present times without having such people of low character represent you, Corel and your products.

[35] Alexander testified that he initially intended to send this letter to Cowpland, but that his wife convinced him that he should not do so. Alexander then decided to send a copy of the letter to M.M. at her place of employment along with a note that read:

[M.] – Any advice, direction, or suggestions before this goes off? It will be couriered marked “Personal and Confidential” and he will read it.

[36] Alexander did not send the letter to Cowpland. When asked why he sent a draft of the letter to M.M. with the note attached, Alexander testified.

... I was angry, no ifs, ands or buts. I wanted to shake her up and have her respond to my wife’s telephone calls and faxes.

(iv) Possession of “Bugging” Equipment (Count Eleven)

[37] Count eleven charged Alexander with possession of electromagnetic devices in the form of audio video cameras concealed in clock radios knowing that the design rendered them primarily useful for the surreptitious interception of private communications.

[38] Alexander’s possession of the clock radios containing the video cameras was not challenged. He purchased the devices for use by C. employees in the course of their investigations. The clocks were used on several occasions in efforts to videotape and record persons having sexual contact with the operatives hired by C..

[39] Alexander testified that he purchased the clock radios equipped with audio/video cameras in the normal course of C.’s business and that these devices were readily available on the market. He also indicated he had obtained legal advice as to what he could or could not do in terms of intercepting private communications.

III

The Grounds of Appeal

(i) The Unreasonable Delay Argument

[40] Prior to trial, both appellants argued that their right to trial within a reasonable time guaranteed by s. 11(b) of the *Charter* had been infringed and that the proceedings should be stayed against them. In careful reasons, the trial judge fully analyzed the unreasonable delay claim and rejected the appellants’ contention. The appellants renew the argument on appeal.

[41] I see no need to repeat the unreasonable delay analysis carefully undertaken by the trial judge. I agree with his conclusion. This case took too long to get to trial (46 months). The appellants' complaints focused on the 31 months it took to move the proceedings through the committal for trial stage. Most of the delay related to disclosure problems and disputes. Some of that delay was clearly attributable to the Crown's failure to make timely disclosure of material that on any reasonable view was subject to the Crown's disclosure obligation. However, there was also considerable delay in resolving disclosure disputes over material that the Crown quite legitimately declined to produce without a judge's order. As observed by the trial judge, the appellants took some time to bring disclosure disputes to a head after the Crown had unequivocally set forward its position in respect of the disclosure of certain sensitive material generated in another investigation that the defence sought produced in this case.

[42] The trial judge did not attribute any part of the time needed to resolve the disclosure disputes to the defence. He did, however, use what he described as "defence inaction" in pursuing its disclosure remedies when measuring the prejudice, if any, to the appellants flowing from the delay and when determining what part of the delay should count against the Crown in the s. 11(b) analysis. I see no error in the trial judge's approach, or in his characterization of the facts presented to him.

(ii) The Appeals from the Conspiracy Convictions

[43] The appellants' submissions on the conspiracy convictions come down to the claim that the Crown failed to produce evidence from which it could be reasonably inferred that either Alexander or Blake agreed with any of the alleged co-conspirators to commit the particular extortions alleged in the conspiracy counts.

[44] Blake submits that although there was evidence that he assisted Alexander in enlisting, paying and de-briefing the operatives, there was no evidence that Blake knew, much less agreed to, the plan to use surreptitiously taken videotapes of sexual encounters between the operatives and the targets to extort money from the targets.

[45] Alexander submits that while the evidence may demonstrate that he had a plan to surreptitiously record individuals engaged in sexual activity and to use the product of those activities to recover money from the targets, there was no evidence that Blake or Sabourin (count three) or Y.A. (count fifteen) had any knowledge of Alexander's plan, much less had agreed to it with him. Alexander submits that he cannot be convicted of conspiracy absent proof that he agreed with at least one of the alleged co-conspirators to commit the crime alleged in the particular count in the indictment.

[46] The appellants' submissions stand on firm legal footing. The *actus reus* of the crime of conspiracy lies in the formation of an agreement, tacit or express, between two or more individuals, to act together in pursuit of a mutual criminal objective. Co-conspirators share a common goal borne out of a meeting of the minds whereby each agrees to act together with the other to achieve a common goal: G. Williams, *Criminal Law: The General Part*, 2nd ed. (London: Stevens & Sons, 1961) at 667-68; *R. v. Cotroni* (1979), 1979 CanLII 38 (SCC), 45 C.C.C. (2d) 1 at 17-18, 23-24 (S.C.C.); *U.S.A. v. Dynar* (1997), 1997 CanLII 359 (SCC), 115 C.C.C. (3d) 481 at 511-12 (S.C.C.); *R. v. McNamara* (1981),

[1981 CanLII 3120 \(ON CA\)](#), 56 C.C.C. (2d) 193 at 452-55 (Ont. C.A.), aff'd without reference to this point (1985), [1985 CanLII 32 \(SCC\)](#), 19 C.C.C. (3d) 1 (S.C.C.); P. MacKinnon, "Developments in the Law of Criminal Conspiracy" (1981), 59 Can. Bar Rev. 301 at 308; M.R. Goode, *Criminal Conspiracy in Canada* (Toronto: Carswell Toronto, 1975) at 6-18.

[47] It follows from the mutuality of objective requirement of the *actus reus* that a conspiracy is not established merely by proof of knowledge of the existence of a scheme to commit a crime or by the doing of acts in furtherance of that scheme. Neither knowledge of nor participation in a criminal scheme can be equated with the *actus reus* of a conspiracy: see *R. v. Lamontagne* (1999), [1999 CanLII 13463 \(QC CA\)](#), 142 C.C.C. (3d) 561 at 575-76 (Que. C.A.); *R. v. Cotroni*, *supra*, at pp. 17-8. Knowledge and acts in furtherance of a criminal scheme do, however, provide evidence, particularly where they co-exist, from which the existence of an agreement may be inferred.

[48] The *actus reus* of the crime emphasizes the need to establish a meeting of the minds to achieve a mutual criminal objective. This emphasis on the need for a consensus reflects the rationale justifying the existence of a separate inchoate crime of conspiracy. Confederacies bent upon the commission of criminal acts pose a powerful threat to the security of the community. The threat posed by a true agreement to jointly bring about a criminal end justifies a preemptive strike by the criminal law as soon as the agreement exists, even if it is far from fruition. However, absent a true consensus to achieve a mutual criminal objective, the rationale for the crime of conspiracy cannot justify criminalizing joint conduct that falls short of an attempt to commit the substantive crime: see I.H. Dennis, "The Rationale of Criminal Conspiracy" (1977), 93 Law Q. Rev. 39; P. Gillies, *The Law of Criminal Conspiracy* (Sydney, Australia: Law Book Co. Ltd., 1981) at 327.

[49] I turn next to the trial judge's reasons on each of the conspiracy convictions.

(a) Count Fifteen

[50] This count alleged a conspiracy between Alexander and the operative Y.A. The trial judge found that Y.A. agreed with Alexander to meet P.M., the target, for a second time to videotape a sexual encounter with him. He said:

There was an agreement between [Y.A.] and Alexander that she would attempt to have sex with [P.M.] and that it would be taped.

[51] Although Y.A. denied that she ever agreed to attempt to have sex with P.M., it was open to the trial judge to make the finding he did based on P.M.'s evidence. The agreement described by the trial judge does not, however, constitute the agreement to commit extortion alleged in count fifteen.

[52] The trial judge went on to hold:

The only possible use that could be made of it [the videotape of the sexual activity] would be to pressure [P.M.] into telling

Alexander where Kemper and Morphy [Alexander's former partners] were hiding their assets.

[53] Once again, this finding was open to the trial judge as it applied to Alexander. The trial judge failed, however, to separately consider whether Y.A. had agreed with Alexander to extort P.M. so that he would reveal the location of the assets. There is no evidence that Y.A. had any knowledge of the prior relationship between Alexander and P.M. or any knowledge of Alexander's belief that P.M. knew where certain assets could be located. Furthermore, there is no evidence that she had any knowledge of the ongoing dispute involving Alexander and his former partners. Absent that knowledge, it cannot be reasonably inferred that she agreed with Alexander to mutually achieve the criminal objective described by the trial judge.

[54] At most, it could be said that Y.A. knew that Alexander was up to no good and planned to use the videotapes for some nefarious purpose. That knowledge cannot be equated with a meeting of the minds pursuant to which each agreed to jointly work towards the criminal objective of extorting P.M.

[55] Y.A. was the only alleged co-conspirator in count fifteen. As it takes two to conspire, Alexander must be acquitted on count fifteen.

(b) Count Five

[56] Count five alleges a conspiracy among Blake and three unindicted co-conspirators, including Alexander, to extort the accountant, M.C. The trial judge found that it was Alexander's intention to videotape M.C. in a compromising sexual situation and use the videotape to pressure him to pay Alexander the money that Alexander believed M.C. owed to him. In holding that Blake was a party to this plan and a co-conspirator with Alexander, the trial judge referred to the following:

- Blake introduced Alexander to the operative (C.K.) hired by Alexander to meet with M.C.;
- Blake and Alexander spoke with the operative about having sex with M.C.; and
- Blake advised the operative that she would be meeting with another C. employee who would pose as her husband as part of the ruse intended to get M.C. in a compromising sexual situation.

[57] The trial judge did not specifically identify the inferences that he drew from Blake's conduct. That conduct cannot reasonably support the inference that Blake knew of Alexander's plan and more importantly, that Blake and Alexander had agreed that the plan should go forward and M.C. be extorted in the manner described by the trial judge.

[58] Blake did not have any management function at C., nor any prior or ongoing business relationship with Alexander. Neither the nature of Blake's employment at C., nor his relationship with Alexander could justify the inference that he and Alexander had agreed to act together in pursuit of Alexander's plan to extort M.C. At the highest, the facts demonstrate that Blake, as Alexander's employee, performed certain tasks that furthered Alexander's plan to pressure M.C. into paying him money by threatening public disclosure

of the contents of embarrassing videotapes. On the totality of the evidence, the acts done by Blake do not reasonably permit the inference that he conspired with Alexander to bring about the extortion of M.C.

[59] There is no basis in the evidence upon which to infer that Blake conspired with any of the other co-conspirators alleged in count five. Blake should be acquitted on count five.

(c) Count Three

[60] Count three alleged that Alexander and Blake conspired with the unindicted co-conspirator, Sabourin. The trial judge's analysis of the evidence relating to count three is very similar to the analysis of the evidence relating to count five. The trial judge had no difficulty finding that Alexander had a plan to put his former friend and business associate, P.G., in a compromising sexual situation, videotape that situation and use the product to extort money from P.G.

[61] The trial judge also described Blake's role in the facts underlying count three. Blake recruited the operative (S.T.), paid her and drove her home after her meeting with P.G.

[62] In determining whether a conspiracy existed between Alexander and Blake, the trial judge said:

The only possible use that could be made of a videotape of [P.G.] having sex with a call girl would be to put pressure on him to pay the money claimed in the lawsuit commenced by Alexander, failing which the tape would be revealed to people in a way that would be damaging to [P.G.]. I therefore find that the Crown has proved beyond a reasonable doubt that a conspiracy did exist.

[63] The trial judge did not deal separately with either Blake's knowledge of the object of the conspiracy or his adherence to that object. With respect to the thorough reasons of the trial judge, I see no evidence to support a finding that Blake was aware of Alexander's intended use of the videotapes or that Blake mutually agreed with Alexander to bring about that criminal objective. As in count five, all that can be said is that Blake, as a C. employee, did things which furthered Alexander's criminal plan. That does not make Blake a conspirator.

[64] It is worth noting, as counsel for Blake pointed out in his factum, that the trial judge acquitted Blake on count one, also a charge of conspiracy to commit extortion. The trial judge found that Blake had agreed with Alexander to recruit women to act as operatives to engage in sexual activity with the male targets. The trial judge held that the agreement did not amount to a conspiracy to extort. I agree with counsel's observations that there is little, if any, difference between the evidence against Blake on count one and the evidence against Blake on counts three and five.

[65] As there was no basis upon which it could reasonably be found that Blake was a participant in the conspiracy alleged in count three, he should have been acquitted on this count. The trial judge made no finding of a conspiracy between Alexander and Sabourin. As with count fifteen, the Crown's failure to establish that Alexander conspired with any of the alleged co-conspirators means that Alexander should also have been acquitted on count three.^[1]

(iii) The Appeal from the Extortion Conviction

[66] Counsel for Alexander acknowledged, correctly in my view, that based on the trial judge's findings, the letter and attached note sent by Alexander to M.M. amounted to a threat made by Alexander to M.M. to have her fired from her job unless she paid Mrs. Alexander the money that she owed to her. Counsel contended, however, that Alexander's actions could not in law constitute the crime of extortion. He submitted that a "legally permissible threat" to collect a "legitimately owed debt" could not constitute extortion.

[67] It is not entirely clear to me what counsel meant by the phrase "legally permissible threat". In his factum, counsel used the phrase in a broad sense to mean a threat that was "perfectly legal and permissible". In oral argument, however, counsel seemed to use the phrase in a narrower sense as meaning a threat that was not in and of itself unlawful.

[68] If counsel intended the broader meaning, his argument, even if valid in law, would fail on the facts of this case. Had Alexander carried out his threat to have M.M. fired, his actions would have constituted a tortious interference with M.M.'s contractual relationship with her employer: see L.N. Klar, *Tort Law*, 3rd ed. (Toronto: Thomson Canada, 2003) at 610-20; *Payjack v. Spring Hill Farms*, 2002 MBQB 98 (CanLII), [2002] 7 W.W.R. 354 at paras. 52-70 (Man. Q.B.). A threat to engage in tortious conduct cannot be described as a "perfectly legal and permissible" threat.

[69] I do not think, however, that the validity of this argument ultimately turns on whether Alexander's threat was tortious or even unlawful. The real question, as identified by the trial judge, is whether the Crown proved that the threat was made "without reasonable justification or excuse".

[70] The relevant part of s. 346(1) of the *Criminal Code* provides:

Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats ... induces or attempts to induce any person, ... to do anything ...

[71] Section 346(1) is broadly worded to criminalize threats of any kind made in an attempt to induce any person to do anything, if those threats are made with the intention of obtaining anything. The section is aimed at those who would use coercion to overcome the free will of others for the purpose of extracting some gain: *R. v. Davis* (1999), 1999 CanLII 638 (SCC), 139 C.C.C. (3d) 193 at 210 (S.C.C.); B. Fisse, *Howard's Criminal Law*, 5th ed. (Melbourne, Australia: Law Book Co. Ltd., 1990) at 267.

[72] The broad prohibition in s. 346(1) is tempered by the availability of the defence of “reasonable justification or excuse”.^[2] That defence and similarly-phrased defences appear in many of the offence-creating provisions of the *Criminal Code* (e.g., ss. 69, 254(5), 349, 351, 450, 452). A reasonable justification or excuse refers to some matter that is extraneous to the existence of the essential elements of the offence that justifies or excuses actions that would otherwise constitute the crime. An accused who relies on a “reasonable justification or excuse” admits that he committed the prohibited act with the requisite culpable mental state, but argues that the circumstances in which he did so justify or at least excuse what he did: *R. v. Taraschuk* (1975), 1975 CanLII 37 (SCC), 25 C.C.C. (2d) 108 at 110 (S.C.C.); *R. v. Holmes* (1988), 1988 CanLII 84 (SCC), 41 C.C.C. (3d) 497 at 520-21 (S.C.C.); *R. v. Santeramo* (1976), 1976 CanLII 1456 (ON CA), 32 C.C.C. (2d) 35 at 44 (Ont. C.A.); *R. v. Moser* (1992), 1992 CanLII 2839 (ON CA), 71 C.C.C. (3d) 165, per Doherty J.A. (concurring) at 178-79 (Ont. C.A.); J.C. Smith, *Justification and Excuse in the Criminal Law* (London: Stevens & Sons, 1989) at 47-50.

[73] It is impossible to list the circumstances that could give rise to a successful claim of reasonable justification or excuse to an extortion charge. The defence is both fact and offence specific: see E. Colvin, *Principles of Criminal Law*, 2nd ed. (Toronto: Carswell, 1991) at 199. For example, what may constitute a reasonable excuse for possession of counterfeit money would probably have no relevance to a claim of reasonable excuse in response to a charge of possession of house-breaking instruments.

[74] Two general statements can, however, be made. First, although I refer to the defence of “reasonable justification or excuse”, the ultimate burden of persuasion is on the Crown to demonstrate beyond a reasonable doubt the absence of any reasonable justification or excuse: *R. v. Ntarelli and Volpe*, 1967 CanLII 11 (SCC), [1968] 1 C.C.C. 154 at 161 (S.C.C.). If on the totality of the evidence there is an air of reality to the claim of reasonable justification or excuse, the trier of fact must determine whether the Crown has negated that claim beyond a reasonable doubt. Second, the use of the qualifying word “reasonable” connotes a partially objective inquiry when an accused advances a reasonable justification or excuse defence. The ultimate question is not whether the particular accused believed his threats were reasonably justifiable or excusable, but whether a reasonable person in the accused’s position would have formed that view.^[3]

[75] *Ntarelli, supra*, is the leading authority on the meaning of the phrase “without reasonable justification or excuse” in s. 346. In that case, the accused threatened the victim and members of his family with death or bodily injury unless the victim paid money to the accused or gave certain shares to the accused. There was evidence that the money or shares demanded by the accused were legitimately owed to them, or that at least the accused believed that the money or shares were owed.

[76] A jury acquitted the accused. This court dismissed the Crown appeals, holding that a person who believed he was legally entitled to the thing demanded could not be convicted of extortion. The Supreme Court of Canada reversed. Cartwright J., for a unanimous court, rejected the contention that a genuine claim to the thing demanded precluded a conviction for extortion. He said at p. 160:

To constitute a defence, there must be reasonable justification or excuse not only for the demand but for the making of the threats or menaces by which the accused sought to compel compliance with the demand.

...

When it is proved that threats have been made for the making of which there could be no justification or excuse, that the threats were made with intent to gain something and were calculated to induce the person threatened to do something, the commission of the crime defined in s. 291 [now s. 346] is established, and it is unnecessary to inquire whether the person making the threats had a lawful right to the thing demanded or entertained an honest belief that he had such a right; that inquiry would be necessary only if the threats were such that there could be reasonable justification or excuse for making them [emphasis added].

[77] Cartwright J., at p. 161, emphasized that the Crown could establish culpability on a charge of extortion by proving beyond a reasonable doubt either that the demand was not reasonably justifiable or excusable, or that the threat used was not reasonably justifiable or excusable. Cartwright J. further observed that an intention to kill or cause grievous bodily harm could never be reasonably justified. Consequently, if the jury on the retrial was satisfied that the accused had made the threats alleged against them, they were guilty of extortion regardless of whether they were owed the money or shares demanded by them.

[78] It is true, as counsel for Alexander contends, that *Natarelli* is distinguishable from this case in that the threats allegedly used to collect the debt in that case were clearly unlawful. I cannot, however, find any support in *Natarelli* for equating all lawful threats with the reasonable justification or excuse defence. *Natarelli* does not suggest that the existence of a reasonable justification or excuse for a threat made to collect a lawful debt turns solely on the lawfulness of the conduct constituting the threat. To the contrary, Cartwright J. explicitly states at p. 161 that the entire course of the accused's conduct, including both the threat and the demand, must be considered in deciding whether the Crown has proved that the threat used to collect a legitimate debt was made without reasonable justification or excuse. The very same threat could be reasonably justified when made in connection with one demand and in one set of circumstances, and not reasonably justified when made in other circumstances or in connection with a different demand.

[79] A distinction between threats used to collect legitimate debts that is based exclusively on whether the conduct constituting the threat is in and of itself unlawful would undermine the rationale for the crime of extortion. The potential for a threat to overwhelm a person's free choice and compel that person to act in the manner dictated by the threat is not necessarily tied to the lawfulness of the conduct constituting the threat. Some threats, while not *per se* unlawful (e.g., the threat to disclose some despicable act from one's distant past), will have a much more coercive effect than a threat to do something which is in and of itself unlawful (e.g., a threat to trespass on property).

[80] If Alexander's interpretation of a reasonable justification or excuse defence is accepted, the extortion prohibition would be rendered ineffective in circumstances that have historically been regarded as typical examples of blackmail. For example, in *R. v. McClure* (1957), [1957 CanLII 485 \(MB CA\)](#), 118 C.C.C. 192 (Man. C.A.), the accused threatened to sell a story to the newspaper providing the details of the victim's recent criminal conviction on a charge of disorderly conduct unless the victim paid the accused \$200.00. Publication of the details surrounding the conviction had the potential to seriously harm the victim's standing in the community and his employment. Applying the appellant's analysis, the offence of extortion would not be made out because the accused was legally entitled to sell the story to the newspaper and a demand for payment in lieu of publication is not *per se* unlawful. However, the threat and the demand taken together constitute powerful intimidation calculated to overcome the free choice of even the strongest person.

[81] The Manitoba Court of Appeal, in upholding the accused's conviction on extortion, approved the following jury instruction relating to "reasonable justification and excuse" at p. 198:

... The question is simply whether on all the facts the accused had some reason for his demand of money. Supposing it was not unreasonable to threaten to publish something, was it reasonable to demand money as the price for his refraining to do so? That is a question for you [the jury] to determine, whether he had any reasonable justification for demanding this money.^[4]

[82] A review of the statutory provisions governing blackmail in England, Australia and New Zealand lends support to the Crown's contention that demands can be unjustified even if not *per se* unlawful and even if made to collect a legitimate debt. While the provisions in the other jurisdictions are worded differently from s. 346(1) and offer little assistance in interpreting s. 346(1), they all appear to contemplate convictions where an accused who is owed a debt uses threats that, while not necessarily unlawful, are regarded as "improper" or "unwarranted" in an effort to collect the debt.^[5]

[83] I think the phrase "reasonable justification or excuse", used in the context of the crime of extortion where the accused seeks to collect a debt, exists to distinguish between situations where individuals use what could reasonably be regarded as warranted or legitimate – albeit perhaps harsh – tactics to collect debts and situations where the means used to attempt to collect those debts goes beyond what could reasonably be regarded as warranted or legitimate. The "reasonable justification or excuse" defence seeks to draw the line, for criminal purposes, between hard bargaining and criminal blackmail. That line may be difficult to draw in any given case. Like any factual issue in a criminal trial, the dividing line between guilt and innocence will turn on the trier of fact's assessment of the evidence and the application of the burden of proof to that assessment. In this regard, the defence of "reasonable justification or excuse" to an extortion charge is no more uncertain than other contextual defences that depend in part at least on an assessment of the reasonableness of the conduct of the accused in the circumstances measured against a necessarily general standard.

[84] When an accused charged with extortion has used threats in an attempt to collect a legitimate debt, the trier of fact must consider all of the circumstances, including the nature of the threat and the nature of the demand, to determine whether the Crown has proved beyond a reasonable doubt that there was no reasonable justification or excuse for the threat. In jury cases, trial judges will instruct juries that it is not every distasteful threat used to support a legitimate demand for repayment of a debt that will constitute extortion. The jury will be told that the threat must go beyond that which a reasonable person in the circumstances of the accused would view as a legitimate or warranted means of attempting to collect the debt.

[85] As is evident from my analysis to this point, the phrase “reasonable justification or excuse” in s. 346 requires a fact-specific inquiry. In some circumstances, a trier of fact may find that a threat to contact a debtor’s employer was a reasonable means of seeking to collect a debt. For example, if the debt was somehow connected to the employment and if the purpose for involving the employer was to obtain repayment of the debt from the employer, a trier of fact could well have a reasonable doubt as to whether an accused’s threat to go to the employer was made without reasonable justification or excuse.

[86] Although the defence of reasonable justification or excuse is fact-driven, it is not entirely free from judicial control. As with any defence, there must be an air of reality to the reasonable justification or excuse claim. If the trial judge is satisfied that no reasonable person in the circumstances of the accused would have viewed the threat made as a legitimate or warranted means of attempting to collect the debt, the trial judge will instruct the jury that the threat cannot, as a matter of law, be excused or justified: see *R. v. Ntarelli, supra*. There may also be circumstances when a trial judge will instruct a jury that as a matter of law, a given threat is reasonably justified or excused. For example, if an accused claims that his or her actions said to constitute the threat were a statutorily-authorized means of collecting a debt, the defence of reasonable justification or excuse would prevail unless the Crown proved beyond a reasonable doubt that the conduct said to constitute the threat was not authorized by the statute.

[87] In the vast majority of cases, however, the ultimate applicability of the defence of “reasonable justification or excuse” will depend on the findings of fact made and the trier of fact’s assessment of whether the conduct said to constitute a threat was reasonable in all of the circumstances.

[88] Throughout my analysis of the “reasonable justification or excuse” defence, I have treated the phrase as creating one rather than two discrete defences. I recognize the distinction between justifications and excuses as applied to criminal law defences. I see no purpose, however, in drawing that distinction when addressing the “reasonable justification or excuse” defence in s. 346. In my view, the approach outlined above properly draws the distinction between threats used to collect legitimate debts that do attract criminal liability under the extortion provision and those that do not. I note that counsel did not suggest the need to draw any distinction between reasonable justifications and reasonable excuses for the purposes of the extortion provision.

[89] In the case at bar, it is acknowledged that M.M. owed Mrs. Alexander money. Alexander's demand for repayment of that money was clearly reasonable. As *Natarelli, supra*, instructs, however, a legitimate demand does not alone provide a reasonable justification or excuse. The question remained whether there was any basis upon which to conclude that Alexander had a reasonable justification or excuse for threatening to have M.M. fired if she did not repay the legitimate debt.

[90] The trial judge, after observing that Alexander relied on the defence of reasonable justification or excuse, said:

It is one thing to demand payment of a loan. It is quite another thing to threaten the continuance of a person's employment by reason of her failure to keep an agreement to repay a loan.

[91] As this was a trial by judge alone, it was for the trial judge to decide on the totality of the evidence whether the Crown had negated Alexander's claim of justification or excuse beyond a reasonable doubt. I read the above-quoted passage as an implicit finding in favour of the Crown on this issue.

[92] A threat to have someone fired can be a powerfully coercive one, especially where the threat is made by someone like Alexander, who has apparent connections to the victim's employer. Employment is a mainstay of most people's lives. Consequently, any threat to that employment can strike at the very heart of that individual's autonomy and free will. Like the trial judge, I see no basis for a reasonable justification or excuse claim by Alexander. The fact that M.M. owed Alexander's wife a debt that was completely unconnected to M.M.'s employment did not provide a reasonable justification for an attempt to compel repayment by threatening to have M.M.'s employment terminated. That threat went beyond what any reasonable person in Alexander's circumstances could view as a justified means of attempting to obtain repayment of the money owed to Mrs. Alexander.

[93] I would not interfere with the conviction on count twelve.

(iv) The Appeal from the Conviction on the Possession of "Bugging" Equipment

[94] Count eleven charged Alexander with an offence under s. 191(1) of the *Criminal Code*. The relevant parts of that provision provide:

Everyone who possesses ... any electromagnetic, acoustic, mechanical or other device or any component thereof knowing that the design thereof renders it primarily useful for surreptitious interception of private communications is guilty of an indictable offence ...

[95] Count eleven particularized the device as "audio video cameras concealed in clock radios". Counsel for Alexander argued that these devices were not "primarily useful for surreptitious interception of private communications" because they were designed for both the surreptitious recording of private communications and the surreptitious taking of

photographs or videos. Counsel observed that as the law presently stands, there is no criminal prohibition against the possession of devices primarily used for the surreptitious taking of photographs or videos.^[6]

[96] Counsel's argument places an unduly restrictive interpretation on the word "primarily" in s. 191 and ignores how the devices in question worked. These devices were designed to surreptitiously intercept private communications and at the same time surreptitiously videotape those involved in the private communications. It cannot be said that the primary purpose of the devices was either to intercept private communications or to videotape. The primary purpose was to do both at the same time.

[97] The criminal prohibition in s. 191 attaches as long as the primary, if not the exclusive, purpose of the device is to surreptitiously intercept private communications. It would be an odd result if it were a defence under s. 191 that a device had the ability not only to intrude upon private communications, but at the same time to surreptitiously invade other facets of individual privacy.

[98] I would dismiss the appeal from the conviction on this count.

(v) Alexander's Sentence Appeal

[99] Alexander received sentences totalling thirty months. He received a sentence of ten months on the extortion charge, two consecutive ten month sentences on each of the conspiracy convictions and a sentence of six months concurrent on the possession of "bugging" equipment charge. As I would quash the conspiracy convictions against Alexander and enter acquittals, I think it is appropriate to consider the appropriateness of the sentence imposed on the extortion conviction without the usual deference accorded to sentences imposed at trial.

[100] In sentencing Alexander on the conspiracy counts, the trial judge took a very dim view of his behaviour. Although I would quash those convictions for the reasons detailed above, the trial judge's observations remain valid and relevant to the determination of a fit sentence on the extortion charge. Alexander's willingness to extort M.M. to recover the debt owed to his wife was not an isolated incident. As the evidence demonstrates, it was typical of Alexander's conduct. Alexander's conduct through the facilities of C. made a strong case for the need to specifically deter Alexander from further criminal actions if those actions might somehow advance Alexander's personal agenda. Alexander appears to regard any conduct, no matter how despicable, as justified if in the end it helps him get whatever it is that he believes he is entitled to have. I also agree with the trial judge's description of the specific extortion of M.M. as "cold and calculated".

[101] The trial judge recognized that Alexander was a first offender and that there were many positive features in his background. It is also relevant that the threatening letter was never actually sent to the employer. Like the trial judge, however, I am satisfied that a period of incarceration was necessary on the extortion charge. While I would be inclined to impose a sentence of something less than ten months, I note that the trial judge imposed a concurrent sentence on the possession of "bugging" equipment charge. I would have

imposed a short, sharp consecutive sentence on that charge. Consequently, I am satisfied that a total sentence of ten months is an appropriate sentence in respect of the convictions that remain outstanding against Alexander. I would dismiss the sentence appeal.

IV

Conclusion

[102] I would allow Blake's appeal, quash his conspiracy convictions (counts three and five) and enter acquittals. I would allow Alexander's appeals on the conspiracy convictions (counts three and fifteen), quash those convictions and enter acquittals. I would dismiss Alexander's appeals from the convictions on counts eleven and twelve. I would dismiss his sentence appeal from the sentences totalling ten months imposed on counts eleven and twelve.

RELEASED:"DD" "SEP 14 2005"

"Doherty J.A."

"I agree K. Feldman J.A."

I agree H.S. LaForme J.A."

* At trial, the court at the Crown's request made an order under s. 486(3) of the *Criminal Code* prohibiting the publication, broadcast or other disclosure of information that might disclose the names or identities of any civilian witnesses and named complainants who testified at the trial. That order was not challenged on appeal and it remains in effect until otherwise ordered.

[1] My analysis of the conspiracy allegations does not address possible culpability as an aider or abetter of a conspiracy entered into by others. That was not the Crown's theory in this case: see *R. v. Vucetic* (1998), 1998 CanLII 7162 (ON CA), 129 C.C.C. (3d) 178 (Ont. C.A.).

[2] The prohibition is also tempered by s. 346(2), which provides that a threat to institute civil proceedings is not a threat for the purposes of s. 346.

[3] There does not appear to be any authority directly on point. However, the New Zealand blackmail provision, which requires that the threat be a "reasonable and proper means for effecting his or her purpose" has been interpreted as requiring an objective assessment of the propriety of the threat: see L. Atkins et al., *Adams on Criminal Law* (Wellington, New Zealand: Brooker's, 1992) at C.A. 237.13. The comparable English provision does not use the word "reasonably" and arguably imports a purely subjective defence: see J.C. Smith and B. Hogan, *Criminal Law*, 10th ed. (London: Butterworths, 2002) at 628-29; *R. v. Harvey* (1980), 72 Cr. App. R. 139 at 141-42 (C.A.). Generally, as to the reasonableness component of contextual defences, see *Colvin, supra*, at pp. 202-3.

[4] The demand made by the accused in *McClure* was in fact unlawful in that, as a member of the police force, he was under an obligation of confidentiality with respect to the information he threatened to disclose; however, this fact played no part in the court's holding that the conviction was proper.

[5] Section 21 of the *Theft Act 1968* (U.K.) provides:

21(1) A person is guilty of blackmail, if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief –

- (a) that he has reasonable grounds for making the demand; and
- (b) that the use of the menaces is a proper means of reinforcing the demand.

Section 87 of the *Crimes Act 1958* of Victoria, Australia is worded identically to s. 21 of the *Theft Act 1968*. Section 237 of the New Zealand *Crimes Act 1961*, as amended, states:

237 (1) Every one commits blackmail who threatens, expressly or by implication, to make any accusation against any person (whether living or dead), to disclose something about any person (whether living or dead), or to cause damage to property or endanger the safety of any person with intent –

(a) to cause the person to whom the threat is made to act in accordance with the will of the person making the threat; and

(b) to obtain any benefit or to cause loss to any other person.

(2) Every one who acts in the manner described in subsection (1) is guilty of blackmail, even though that person believes that he or she is entitled to the benefit or to cause the loss, unless the making of threat is, in the circumstances, a reasonable and proper means for effecting his or her purpose.

[6] Bill C-2, *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, which received Royal Assent on July 21, 2005 (to come into force on a date to be determined), creates the offence of voyeurism. This offence would capture the surreptitious video recording of P.G. and M.C. in the hotel rooms.

Tab 114

R v Barros, 2016 ABQB 243 (CanLII)

Source: Court of King's Bench of Alberta
Date: 2016-04-29
File number: 050551845Q1
Citation: R v Barros, 2016 ABQB 243 (CanLII),
<<https://canlii.ca/t/gpr4z>>, retrieved on 2026-03-23

Court of Queen's Bench of Alberta

Citation: R v Barros, 2016 ABQB 243

Date: 20160429
Docket: 050551845Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

Ross Barros

Accused

**Reasons for Judgment
of the
Honourable Mr. Justice Donald Lee**

Introduction

[1] The Accused stands charged with the following two offences:

1. That he, between the 7th day of March, 2005, and the 12th day of May, 2005, both dates inclusive, at or near Edmonton, Alberta, did unlawfully and wilfully attempt to obstruct, pervert or defeat the course of justice by taking investigative steps to identify a confidential police source for the purpose of interfering with criminal proceedings against Irfan Qureshi, contrary to [Section 139\(2\)](#) of the *Criminal Code of Canada*.
2. That he, on or about the 6th day of May, 2005, at or near Edmonton, Alberta, did, without reasonable justification or excuse and with intent to obtain an end to criminal proceedings against Irfan Qureshi, by threats, accusations, menace or violence induce or attempt to induce detective Kevin Brezinski to take steps to cease criminal proceedings against Irfan Qureshi, thereby committing extortion, contrary to section 346(1.1)(B) of the *Criminal Code of Canada*.

[2] Originally the docket contained a third count namely a charge of extortion as against a group of named criminal associates, but the Accused was found not guilty on Count Three in his first trial, and the Supreme Court of Canada upheld that acquittal in *R v Barros*, 2011 SCC 51.

[3] The Crown called two witnesses. An Agreed Statement of Admissions was entered as Exhibit 5, and a series of items presented to the Court were entered as additional exhibits by the Crown. The Accused did not testify.

[4] On March 7, 2005, Edmonton Police executed a CDSA search warrant and arrested Irfan Qureshi (“Qureshi”). The lead officer in that investigation was Detective Brezinski, now Inspector Brezinski (“Brezinski”). Brezinski was a detective at that time in 2005 with the Integrated Response to Organized Crime Unit (“IROC”), and had had extensive dealings with sources or confidential informants since 1999.

[5] Qureshi was represented by now deceased defence counsel, Sid Tarrabain (“Tarrabain”). On April 12, 2005, Tarrabain retained the private investigation services of a veteran City of Edmonton (“EPS”) police officer recently retired from the force, Ross Barros (“the Accused”), to analyze the investigation and determine the validity of the Information to Obtain the Search Warrant.

[6] Brezinski recommended bail initially for Qureshi thru the Crown agent police officer speaking to bail before the presiding Justice of the Peace. However the Justice of the Peace declined to release Qureshi. Following this application, the Crown reversed its position and asked for a denial of bail when a review application was made to the Court of Queen’s Bench.

[7] These two charges against the Accused essentially arise out of a series of conversations between him and Brezinski on May 6, 2005, the day when Qureshi’s bail review application was before the Court of Queen’s Bench. A second police officer, Detective Kelly Krewenchuk (“Krewenchuk”) was, at the Accused’s request, present as a witness at a golf course meeting that day between the Accused and Brezinski.

The Law

The Obstruction of Justice Charge

[8] 139(2) Everyone who wilfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

[9] The basis of the charge in this case is not just that the Accused sought the name of the police informer, which is lawful according to *R v Barros* 2011 SCC 51, which involved the same the Accused on these same charges, plus one other that the Accused was acquitted on. The Crown now alleges that the Accused's discovery of the Crown informant was "for the purpose of interfering with criminal proceedings", that is to have the charges against Qureshi dropped. This, if established beyond a reasonable doubt, was not information gathering for a lawful purpose.

[10] The Section 139 obstruction charge describes a crime that is complete upon proof of an attempt, without the necessity of success or actual completion: *R. v. Hearn*, 1989 CanLII 14 (SCC), [1989] 2 SCR 1180 (SCC). While the offence is framed broadly, the necessary limit is found in the obligation of the Crown to prove the mental element: *R. v. Beaudry*, 2007 SCC 5, [2007] 1 SCR 190 (SCC), at paragraph 52.

[11] As to the relationship between the obstruction charge and the defence's right to make full answer and defence, the Supreme Court of Canada stated at paragraph 41 from *Barros* that:

41 Whether an investigation has crossed a line into obstruction of justice must be determined on a case-by-case evaluation of the totality of circumstances, which may include the methods and purpose of the defence investigation, and the use to which any information obtained is put. If all the elements of the offence of obstruction are met, a bald assertion that the investigation furthers the mounting of a full answer and defence will not excuse otherwise unlawful conduct.

The Extortion Charge

[12] Section 346(1) of the *Criminal Code* states that: Everyone commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, the Accused or menaced or to whom violence is shown, to do anything or cause anything to be done.

[13] Extortion requires the Crown to establish beyond a reasonable doubt (a) that the Accused has induced or attempted to induce someone to do something or to cause something to be done; (b) that the Accused has used threats, accusations, menaces or violence; (c) that he or she has done so with the intention of obtaining something by the use of threats; and (d) that either the use of the threats or the making of the demand for the thing sought to be obtained was without reasonable justification or excuse: see *R. v. Ntarelli*, 1967 CanLII 11 (SCC), [1967] SCR 539 (SCC); D. Watt, Watt's Manual of Criminal Jury Instructions (2005).

(a) The Conduct of the Accused

[14] First the Crown must identify the "something" sought by the Accused by alleged threats or menaces, and the person from whom this was sought. This indictment identifies the "something" as obtaining "an end to criminal proceedings against Irfan Qureshi", and accuses Barros of seeking to obtain this by inducing or attempting "to induce Brezinski to take steps" to withdraw the charges against Qureshi. This is alleged to have happened during the golf course meeting of May 6, 2005

(b) Threats by the Accused

[15] The Crown concedes that the Accused did not come right out and say that if the police did not drop the charges against Qureshi, the "source" would suffer bad consequences. On the other hand, the law does not require the person of extortion to act clumsily and without subtlety. What is

required is that the message be sent in words definite enough to convey to a person of ordinary intelligence in the position of Brezinski, taking into account his shared police background with the Accused, a threat of harm to his “secret source” if the prosecution was not ended.

[16] Extortion criminalizes intimidation and interference with freedom of choice. Accordingly a veiled reference may constitute a threat if it is sufficient, in light of all the circumstances, to convey to the complainant the consequences which he or she fears or would prefer to avoid: *R. v. McClure* (1957), 1957 CanLII 485 (MB CA), 22 WWR 167 (Man. C.A.), at p. 172. The courts have adopted a similar contextual interpretation elsewhere: *R. v. Hodson*, 2001 ABCA 111, 92 Alta. L.R. (3d) 262 (Alta. CA), at paragraphs 11-13; *R. c. Pelletier* (1992), 1992 CanLII 12794 (QC CA), 71 CCC (3d) 438 (Que. CA).

[17] The question is, as a matter of law, what would a reasonable person in the position of Brezinski understand?

(c) The Intent of the Accused

[18] The Crown must prove beyond a reasonable doubt that the Accused intended his declaration of knowledge of the identity of the confidential informer to influence police decision making.

(d) Reasonable Justification or Excuse

[19] The legal test for extortion requires a court to delve below the surface of the exchanges between the Accused and those whom he or she is accused of threatening, particularly where, as here, the individuals come from the same occupational background. Much that is understood between them need not be stated explicitly

The Trial Evidence

Inspector Brezinski’s Evidence

[20] Brezinski explained that “source” and “confidential informant” are interchangeable terms referring to persons who voluntarily provide information to police, but who are not directed by police, and who do not want to be identified or to testify in Court. On the other hand, an “agent” Brezinski explained is directed by police to perform certain acts, are identified by police, and do testify in Court.

[21] The Accused spoke to Brezinski on his cell phone at 6:42 a.m. at his home on May 6, 2005, and arranged a meeting for that afternoon to discuss the Qureshi and Ajaj files. Brezinski says that the Accused advised that he had been hired by Tarrabain to analyse both files, that he had met with Brezinski’s source yesterday and knew 100% that was the Detective’s source.

[22] Brezinski also testified that the Accused said on the phone, “this is bad for you and bad for me”, that Tarrabain did not want to know the identity of the source, and that Brezinski would have to trust him. Brezinski told him he would be very surprised if he knew his source, and “laughed it off”. They made arrangements to meet at a Tim Hortons at 2:30 that afternoon. The Accused asked Brezinski to bring someone else along and they agreed to bring fellow police officer, Krewenchuk, as he was golfing with Brezinski that morning.

[23] At 8:02 a.m., the Accused called Brezinski again to move the scheduled meeting earlier for that morning, so that it would precede the pending bail application, as that was important to Tarrabain and Qureshi who was in custody. It was mutually agreed to meet at 8:45 a.m. at the golf course before the scheduled 9:00 a.m. golf game.

[24] Once they arrived at the clubhouse and sat down, according to Brezinski, the Accused indicated that he had been hired by Tarrabain to review the file and identify Brezinski’s source, that he had been meeting with 15 to 20 members of the Qureshi group, many of whom were Tarrabain’s clients, and in the course of his meetings, he had discovered 100% who the source was.

[25] After the Accused named the source, and named some of the 15 to 20 individuals specifically, he described how he went about discovering Brezinski's source amongst this group. Brezinski testified that he was extremely concerned about the tactics that the Accused was employing.

[26] Brezinski was upset that the Accused had gathered 15 to 20 relatively serious criminals in a room together and had asked them to provide their name and phone numbers in writing in an attempt to identify who the confidential informant/source was. Brezinski then testified that he told the Accused that his actions in putting these people into this room and trying to identify the confidential source could lead to someone being seriously injured or killed. Brezinski tried to appeal to the Accused's senses as a former police officer who had previously dealt with confidential informants.

[27] In response the Accused, according to Brezinski's evidence, said that trying to identify a confidential source happens all the time, and further that in his experience, the Accused mentioned something to the effect that when a source was discovered, he would have to withdraw the charges and that was something that happened to him in the past.

[28] The Accused according to Brezinski's evidence relayed his experience in an Andy Polo file, where apparently some information in a police disclosure or in an Information to Obtain ("ITO"), may have revealed one source, and in that case the Accused believed that the charges were withdrawn or stayed. According to Brezinski, the Accused was basically trying to justify his position as to why he was doing what he was doing.

[29] Brezinski then testified that he told the Accused at that meeting that what he was doing and the tactics that he was using to uncover who the source was, were extortion and obstructing justice.

[30] The Accused denied that that was what he was doing, and that he was hired by Tarrabain to analyze the file and identify the confidential source, at which point Brezinski told him that Tarrabain should be reported to the Law Society, or something to that effect. The Accused then realized that he was being serious when he classified his conduct as criminal in nature, and the accused according to Brezinski, then back tracked and said Tarrabain had not wanted him to identify the source, but to simply analyze the file.

[31] At this point in the meeting, matters were getting relatively heated, although he told the Accused that he had no problem with people identifying inconsistencies in his work or in the investigation itself, or to attack the credibility of the confidential source or the information to obtain documents.

[32] In elaborating with respect to the problem he had with the Accused's conduct of the investigation, Brezinski testified that if he was one of the 15 or 20 people who was the confidential source, he certainly would not want to write his name and number to allow his cell phone records to be searched, or to be cross-referenced against the others, and he indicated this to the Accused.

[33] In response to this, the Accused as reported by Brezinski, said that he was doing a job for Tarrabain, that neither Tarrabain nor Qureshi wanted to know who the source was, and that the Accused would simply speak to the source directly.

[34] Brezinski also did not think it was appropriate for the Accused to require 15 to 20 individuals to write their cell phone numbers down, and to provide their cell phone records, and if they didn't the Accused was going to have them do a polygraph.

[35] When the Accused specifically named the confidential source and Brezinski denied that that individual was his confidential source, Brezinski became upset because he felt the Accused was interrogating him. At that point Brezinski testified that he told the Accused that as a policeman and drug detective he could not understand how the Accused could go to the "dark side" like that, knowing the potential harm that could come to the confidential informant.

[36] According to Brezinski, Krewenchuk the third person who had been invited to take part in the meeting said very little if anything during the course of the ten minutes.

[37] Prior to the actual meeting after the Accused's second phone call to his home that morning, Brezinski testified that he spoke to his supervisor and reviewed with the supervisor what to do if a confidential source was identified during the course of the meeting. He was told by the supervisor Staff Sgt. Sauve that if the Accused had an issue, or thinks he knows who the source was, to document it and send it to the Department of Justice, which advice Brezinski says he passed on to the Accused during the latter part of the meeting.

[38] According to Brezinski, the Accused's response was that he would not document that and send it to the Department of Justice. Rather he would be forced to write a report and give it to Tarrabain and wash his hands of it. Brezinski's response to this was that he was going to document everything that was said at the meeting and he would be forwarding that information to the Department of Justice, which he meant was the Special Prosecutions Section of the Provincial Crown as opposed to the Federal Crown.

[39] From there, according to Brezinski, the Accused asked him what would happen if the group offered to take certain guns off the street and surrender the weapons to the police, to which Brezinski indicated he was not interested. It was Brezinski's belief that these guns were being offered for a withdrawal of the criminal charges against Quereshi, which according to Brezinski was clearly the main purpose of the entire meeting.

[40] Brezinski identified in Court a small piece of cardboard paper which contained the Accused's handwriting, which Brezinski recognized.

[41] As the three of them got up to leave the meeting, Brezinski testified that he made one last effort to try to appeal to the Accused's senses telling him that he was a policeman for 27 years, had a good family, wife and children and questioned the Accused as to why he was doing this. Brezinski testified that the Accused's response was 'what do you expect me to do the way I was treated by the police service?' Brezinski took this to mean that the Accused had left the EPS on bad terms, having been moved against his choice from the drug unit to the communications unit, before ultimately resigning.

[42] Brezinski then told the Accused to do whatever he thought was right, at which point the Accused asked if this ended their friendship, to which Brezinski replied "you bet". These were the last words that were exchanged between the two of them at the meeting.

[43] After the parties all left the meeting, Brezinski testified that he went to make a phone call at the club house to his supervisor directly afterwards. Brezinski outlined to Staff Sgt. Sauve what transpired in the meeting, in a telephone call that took approximately three minutes. He then went to his tee time at the golf course which was approximately 9:15 a.m., and he made it on time. Krewenchuk said he played 18 holes of golf, following which, Brezinski went home and made notes of the conversation and meeting. He also contacted certain individuals that the Accused had named during the course of the meeting to advise them that their names had been mentioned by the Accused.

Detective Krewenchuk's Evidence

[44] Krewenchuk was the only other Crown witness called to testify. He was the third party that the Accused had suggested come to the meeting with him and Brezinski on May 6, 2005.

[45] Krewenchuk testified that the Accused told them during the course of the meeting that he knew 100% who Brezinski's confidential source was, and he named the source. Krewenchuk described how Brezinski denied that that was the source and laughed it off.

[46] Krewenchuk testified that the Accused indicated he had gathered ten individuals together and asked them to provide their names, cell phone numbers and that he had the individuals compare the phone numbers to know that they were accurate numbers for each individual. If they

were unwilling to provide their name and cell phone number, he would ask them to take a polygraph test as well.

[47] Krewenchuk also testified that the Accused referred to his notes written on the small cardboard piece of paper throughout the meeting. Krewenchuk indicated that the Accused had looked at the confidential informant's phone records and he knew that the informant had contacted Brezinski on four specific dates relevant to the investigation, although the dates meant nothing to Krewenchuk. The Accused knew that this source also did not show up to the second meeting that he had with the group of ten individuals, and that the Accused indicated that he had confronted this individual as being the confidential source personally.

[48] Krewenchuk in his evidence also recalled Brezinski's words about Tarrabain and "the Law Board" or Law Society, in reference to extortion and obstructing justice allegations levied against the Accused by Brezinski.

[49] Krewenchuk testified that the Accused then clarified by talking about his previous experience referring to an individual by the name of Andy Polo, and to a previous RCMP investigation where in reviewing the report, it was obvious that you could identify one of two people as being a source in that investigation by just reading the report.

[50] Krewenchuk was unfamiliar with the Andy Polo investigation, and felt that the Accused was just using that case to make a comparison to the present investigation that Brezinski was involved in.

[51] By the end of the meeting Brezinski was visibly upset, when he said to the Accused that he had to be careful with what he was doing because if the source is identified it could result in someone being killed, and if the wrong person was identified as a source, they were at risk of being killed.

[52] Krewenchuk testified that Brezinski then tried to switch the meeting to a different topic and asked the Accused why he was doing this. Brezinski told the Accused that he used to respect him as a detective and as a friend, and asked the Accused why had he gone to the dark side.

[53] The Accused accordingly to Krewenchuk replied that it had to do with his relationship with EPS and the way he was treated, that all he knew how to be was an investigator and that was what he was doing.

[54] The Accused then said that neither Qureshi nor Tarrabain wanted to know who the source was, and only the associates in the group of ten wanted to know because they wanted to cut their ties with this person. The Accused said according to Krewenchuk that he was not going to tell anybody who the source was, but he would write a report to summarize what had gone on and would provide that report to Tarrabain, at which point Brezinski told the Accused that he would realize that he had not discovered the source.

[55] The Accused also said that in his experience that he at times had to withdraw charges in some of the investigations he had solely because the source could be identified, and that this was not out of the ordinary. The Accused handed Krewenchuk the small piece of paper he was holding and referenced a line written there, but Krewenchuk could not make out what was written there.

[56] Krewenchuk testified that the Accused then talked about providing Brezinski with guns, and that in the past individuals have provided weapons off the street to deal with a potential reduction in charges or no charges being laid, but that Brezinski was not interested in receiving any guns from the group.

[57] At the end of the meeting Krewenchuk testified that neither Brezinski nor the Accused shook hands with each other, but that he did shake hands with the Accused and indicated that they were still friends and could go golfing in the future.

[58] Krewenchuk testified that he made no notes during the meeting and observed and listened, but started making notes after the 18 hole round of golf that afternoon. After the meeting ended,

Brezinski was on the phone for some time for approximately 20 minutes or so before their golf game began. Krewenchuk then three days later was asked to provide a witness statement with respect to the meeting when he came into work next, and he produced a three page statement dated May 9, 2005.

Analysis

The Personal Relationship between the Detectives and the Accused

[59] The Supreme Court of Canada commented in *Barros*, at paragraph 74 that the first trial judge in this case erred in law by failing to consider the issue of the threats or menaces in the context of the conduct of the Accused in its entirety, and in particular, of the longstanding relationship between the two men.

[60] In that regard, the Accused and Brezinski had worked closely together previously. Brezinski saw the Accused as a respected mentor, and the Accused respected Brezinski. The Accused could obviously contact Brezinski on short notice at home on his cell phone very early in the morning on his day off and potentially interrupt a previously scheduled 18 hole golf game to arrange an immediate meeting. This is not something an ordinary private investigator would likely have been able to accomplish.

[61] It is clear to me that there was a personal long standing relationship and friendship between the Accused and Brezinski, such that Brezinski seemed to take great personal offence that the Accused was now a private investigator acting to free criminals.

[62] While Brezinski never comes out to exactly state this, this appears, at least in part, to be the basis for Brezinski's personal comments about the Accused's family and the Accused going over to the "dark side". At times as the May 6, 2005 meeting ends, Brezinski seems more concerned about the Accused's changed behaviour and attitude from when he was a police officer, and the affect it will have on his wife and family, than he is about any threat or menace posed by the Accused's actions to his drug investigation.

[63] It was clear that Brezinski assumed that the purpose of everything the Accused did in respect of this case was to get the charges dropped or stayed as against Qureshi. Brezinski is understandably very concerned with the Accused's investigative techniques with respect to a number of persons the Accused has been interrogating. Importantly though this issue has already been addressed at least in part by the Accused's acquittal on the original count three, the extortion charge as against a group of named criminal associates.

[64] Additionally the Supreme Court of Canada has pointed out, it is not a crime *per se* to seek the identity of an informant. It is only a crime when the purpose is to interfere with criminal proceedings, which in this case was ultimately to have the charges against Qureshi dropped or stayed.

[65] While I conclude that the Crown has advanced a strong case that the purpose of the Accused's actions in this case was to have the charges against Qureshi dropped, this is not the only reasonable inference that can be drawn from the Accused's actions during the course of the May 6, 2005 meeting.

[66] The Accused was conducting an otherwise lawful investigation on behalf of his employer in order for Qureshi to make full answer and defence to serious charges he was facing. Brezinski acknowledged that he had no problem with the Accused testing the information contained in the ITO, and the source information contained therein as well to test the credibility of the source. In my view it is obvious that the best way to test credibility, is to know or think you know, who the source is.

[67] The Accused said in setting up the meeting that he believed that he knew who the source was and it was very important they meet as soon as possible. The Accused said to Brezinski "this

was bad for you, and bad for me”, but that Tarrabain the lawyer (and later during the meeting that Qureshi) both did not want to know who the source was.

[68] What is also clear in the Accused’s written reports to his employer Tarrabain about the meeting is they contained nothing about a stay or withdrawal of charges, nor is there any mention of bail. By the time the report was written, Qureshi had already been released as a result of the bail review hearing.

[69] While the Crown’s key witness Brezinski was certain that the Accused was interfering with, and taking steps to cause the criminal proceedings to cease against Qureshi, thereby committing obstruction of justice and extortion, I am satisfied that there is another reasonable possibility namely that the Accused was attempting to advise his good friend and former close colleague of the identity of his confidential informant in order that the confidential informant’s safety could be protected by Brezinski.

[70] This is essentially what the Accused writes in his reports to Tarrabain about his meeting with Brezinski, which reports would have been in the Accused’s mind at the time would always have remained confidential.

[71] These reports would normally be viewed as self-serving and/or after the fact statements, however in this case they are actually reliable because they were solicitor/client private reports written by the Accused with no expectation that they would end up with the police. Tarrabain had fought to keep the reports privileged: *R v Tarrabain, O’Byrne & Company*, [2006 ABQB 14](#).

[72] Brezinski himself acknowledges that he would appreciate someone telling him who his source was. The Accused indicates in his report to Tarrabain that no other private investigator would make the effort to let the lead investigator know that his source had been identified, which is also very likely the case.

[73] These factors raise a reasonable doubt in my mind as to the Accused’s guilt because the Accused may have felt duty bound or obliged to bring this knowledge to the attention of his good friend the investigating officer Brezinski. Brezinski needed to know this information in order to protect the safety or life of the source, and neither the lawyer or his client wanted to know the source’s identity. This seems to me to be a plausible reason why the meeting had to take place so quickly that very day and morning, in part because there was no other reason why the meeting had to occur immediately.

Was there a Meeting of the Minds During the Course of the Meeting

[74] Brezinski is seemingly certain that the Accused was guilty of obstruction and extortion because of the Accused’s references to prior investigations. Krewenchuk, on the other hand, thought the Accused was just giving background or making anecdotal references in talking about these prior investigations. Krewenchuk acknowledges that he still considers the Accused to be a friend.

[75] The Accused arrived at the meeting with notes of some type written on a small cardboard piece of paper, which contained nothing about any stay of proceedings or withdrawal of charges.

[76] Neither Brezinski nor Krewenchuk seemed to have the same recollection or impression as to what the Accused said in this regard. Both Brezinski and Krewenchuk personally also had a very limited, or different, understanding or knowledge about these previous investigations. I find that there is obviously a big difference in the impression being left by the Accused as between these two experienced investigators.

[77] The Accused made an offer at the end of the meeting to turn over guns from the group of criminal associates either for bail, or for some unspecified consideration, which I also conclude is important in this case. The Accused never even indirectly suggested a withdrawal or stay of Qureshi’s charges in exchange for getting guns off the street, or for any other reason either, during the short May 6, 2005 meeting. Any offer for bail would have been beyond Brezinski’s part to

deliver since he already recommended bail in the first instance before the Justice of the Peace, who had turned down bail for Qureshi. From Brezinski's evidence, no other consideration could flow from turning over guns from the group other than the dropping/staying of charges, but Brezinski acknowledged that would have been a ridiculously one sided proposition.

[78] The evidence is also clear that no one in charge of an investigation would reduce charges or stay charges simply to get some guns off the street in a matter of Qureshi's seriousness. The evidence is clear that Brezinski had no power to stay or withdraw any charges. Both of these aspects of drug investigations would have been well known to both Brezinski and to the Accused, who both had a long involvement in the criminal justice system.

[79] Although Brezinski was certain that the Accused wanted the charges stayed or withdrawn and believed that that was the intention of the whole meeting and investigation that the Accused was carrying out, he never tried to get the Accused to admit or acknowledge this at any time. For example when the Accused offered to take guns off the street in exchange for something, Brezinski never tried to get the Accused to say what exactly he wanted in exchange. I find all this unusual for a skilled experienced investigator convinced that the Accused was committing serious criminal acts of obstruction and extortion in his presence at the time.

[80] Furthermore the only specific case that is mentioned by the accused at the May 6, 2005 meeting about charges being withdrawn or stayed was that of Andy Polo.

[81] Defence counsel has provided the Court with the B.C. Court of Appeal decision in *R v Illes*, 2007 BCCA 125 at paragraphs 109 to 114 in which one Michael Maze is described as a confidential informant in the criminal proceedings against Andy Polo. Mr. Maze was ultimately determined to be a police agent and not a confidential informant. Brezinski thought the Polo case was about a stay of proceedings, and does not remember Maze being mentioned in the meeting, but Krewenchuk does recall Maze being referred to by the Accused.

[82] Regardless of what the Andy Polo case meant to Brezinski or Krewenchuk, it is important to note the Accused was referring to a case in which a police agent, and not a confidential informant, was involved. A police agent expects to have his/her identity revealed and expects to testify in Court, whereas a confidential informant clearly wants to remain unidentified at all times.

[83] The Crown argues that the Accused shared with Brezinski and Krewenchuk common knowledge about certain previous investigations that were withdrawal or stayed when the identity of the informant was revealed. However I conclude in this regard that there was no meeting of the minds as to what the Accused allegedly said to Brezinski and Krewenchuk, let alone what the Accused meant, about these certain prior specific investigations during the May 6, 2005 meeting.

Inconsistencies in the Evidence of Detectives Brezinski and Krewenchuk

[84] Another problem in the Crown's case is that a great deal of this case centers around the 8:45 a.m. May 6th, 2005 meeting between the Accused, Brezinski and Krewenchuk, but both Brezinski and Krewenchuk testify about the meeting largely from his own memory of events that occurred almost ten years ago. When Brezinski and Krewenchuk do eventually make notes, it is after their 18 hole golf game that is not completed until the afternoon.

[85] Krewenchuk basically listened throughout the meeting and did not participate actively or at all in the discussion. Even though Krewenchuk was listening, presumably carefully, throughout the short meeting, his evidence varies in a number of details from that of Brezinski about the meeting. For example:

- a. Brezinski says 15-20 criminal associates were involved by the Accused in the group meetings, whereas Krewenchuk says ten people were involved;
- b. Brezinski says the Accused named five people at the meeting specifically, but Krewenchuk said the Accused named three people specifically;

- c. Brezinski described the Accused as being interrogative, whereas Krewenchuk describes the Accused as being calm and Brezinski as being very upset;
- d. Brezinski says Tarrabain should report to the Law Society, but Krewenchuk says Brezinski referred to it as the law board;
- e. Brezinski says the Accused would report who the source was to Tarrabain, but Krewenchuk says the Accused said he would not report the identity of the source to anyone;
- f. Brezinski claims the Accused was backtracking in the face of his accusations against him, but Krewenchuk says the Accused was clarifying and just giving background;
- g. Brezinski doesn't remember anything about the name Maze, but Krewenchuk says Maze was brought up in conjunction with the Polo matter;
- h. Brezinski says the meeting lasted ten minutes, but Krewenchuk says it lasted 15-20 minutes;
- i. Brezinski says he went to the clubhouse after the meeting to make a call for three minutes, but Krewenchuk says Brezinski went to his car and was on the phone for 20 minutes;

[86] These are not in and of themselves major contradictions, and suggest that both Brezinski and Krewenchuk were trying to remember what happened, as opposed to putting together a joint version of what happened. However they do reveal the danger of convicting the Accused primarily on the basis of somewhat conflicting evidence as to what transpired in a meeting, that occurred almost ten years ago prior to this trial, that was not recorded and in which no contemporaneous notes are made.

[87] The trier of fact must be sure as to what transpired in that meeting with respect to the essential elements of the offences the Accused is charged with, and I cannot say that I am sure what was said based on the evidence before me.

[88] This is regrettable and also important in the context of this trial given that Brezinski is already aware of the serious nature of the meeting. Brezinski knows from the initial phone call that the Accused believes that he has identified his confidential source in a major investigation. Brezinski almost immediately realized the seriousness of such a development. He also phoned his supervisor Staff Sgt. Sauve immediately after arranging the 8:45 a.m. meeting with the Accused to discuss with his supervisor what to do if a confidential source was actually identified, and again right after the meeting took place.

[89] Yet despite this Brezinski attends the meeting with no notes, and no audio recorder, which Brezinski acknowledges in hindsight he should have had.

[90] After the Accused suggested on his own accord that a third party be in attendance at the meeting, Brezinski contacted Krewenchuk, who he was scheduled to golf with, to be the third party. But Brezinski does not tell Krewenchuk to be prepared to take any notes either, and Krewenchuk does not even bring note paper. In fact, it does not appear in the evidence that Krewenchuk knew about the importance of the meeting beforehand.

[91] The Accused never asked or, even mentioned that Brezinski should cease criminal proceedings against Quereshi. As for Brezinski's belief that that was the only purpose for the Accused talking about prior police investigations he was involved in where criminal charges were dropped, I am not sure what was said by the Accused about these prior investigations given that there is some discrepancy between the evidence of Brezinski and Krewenchuk. Krewenchuk's evidence was very different from that of Brezinski's with respect to the purpose in which the accused spoke of these prior investigations since Krewenchuk believed that the accused was clarifying or just giving background in referencing these prior investigations.

[92] There is a major difference between clarifying and giving background which was what Krewenchuk thought the Accused was doing, and Brezinski's impressions of what the Accused was doing by raising these prior investigations.

[93] During the conversation Brezinski described himself as becoming upset only after the accused became interrogative, but Krewenchuk describes the Accused as being calm and Brezinski as being very upset.

[94] While it is common ground that the Accused does offer to take guns off the street, it is unclear from Brezinski's and Krewenchuk's evidence what that offer was in exchange for.

[95] Furthermore the evidence before me is clear that neither Brezinski, nor any other police officer, would ever have agreed to drop the serious criminal charges that Quershi was facing in exchange for taking some guns off the street.

[96] Brezinski said the Accused was going to report who his source was to Tarrabain, but Krewenchuk said the accused assured them that he would not report the identity of the source to anyone. Brezinski's version of what the Accused said about revealing the source was much more problematic for Brezinski's investigation, than Krewenchuk's version would have been.

[97] The Crown points out that regardless of what the Accused or Tarrabain would have done to protect the identity of a confidential source, the identity of the confidential source would have been compromised if Quershi had demanded that information from his lawyer Tarrabain. Well this may well be the case, it is doubtful that the Accused would have ever been aware of this potential conflict of interest on Tarrabain's part, so that it was most likely in the Accused's mind it was he and he alone that controlled the identity of the source.

[98] Even if I accept Brezinski's evidence that the Accused was going to wash his hands of the matter and simply write a report to Tarrabain as to whom the source was, the evidence before me supports the view that the Accused was confident that Tarrabain was not going to reveal the identity of the source.

[99] These and other inconsistencies as between Brezinski and Krewenchuk about what the Accused said to them during this rather short meeting lead me to have a reasonable doubt as to what exactly took place during this critical meeting.

[100] Accordingly while Brezinski's interpretation of the Accused's actions and intentions were very clear to him, there is a reasonable doubt in my mind as to the Accused's intention to obstruct justice, and to have the proceedings against Quershi stopped though committing extortion.

The Accused Insisted that Another Detective be Present to Witness the Meeting

[101] In this regard the Crown argues that accused persons do not always take the safest or smartest method of committing crimes, and I agree that this can be the case.

[102] However in the present case, I conclude that it defies common sense and logic that an experienced former detective such as the Accused intended to commit the serious criminal offences of obstruction and extortion, after insisting on having another police officer attend the May 6, 2005 meeting, and then commit those criminal acts in the third party police detective Krewenchuk's presence.

Conclusion

[103] Extortion criminalizes intimidation and interference with Brezinski's freedom of choice, but in this context the Accused's references to other previous cases where a stay or withdrawal of charges resulted from the outing of a police informant did not seem to mean the same thing to Krewenchuk and Brezinski.

[104] At other times references by the Accused to other investigations were seen as material to Brezinski, but just background narratives to Krewenchuk. The Andy Polo case referenced by the

Accused in the meeting dealt with a police agent whose identity was expected to be revealed in the normal course, which is unlike the present matter which involved revealing a confidential police informant.

[105] These references to previous files and investigations by the Accused are the only possible acts of obstruction and extortion that occurred, and they are not sufficient in light of all of the facts and circumstances to convey any criminal intent on the part of the Accused to obstruct justice, or for Brezinski to fear the consequences of non-compliance with the alleged threat. Brezinski was free to proceed in any manner in which he wished because the Accused was not going to reveal the source to either Tarrabain or Quereshi. Brezinski proceeded with his investigation, and Quereshi was subsequently convicted.

[106] The meeting occurred almost ten years ago and obviously memories have faded. What Brezinski and Krewenchuk do now recall during the course of this ten minute very short meeting contain various inconsistencies. I have a reasonable doubt as to whether there was ever a meeting of the minds between the two detectives and the Accused.

[107] The lack of contemporaneous notes or any recording of the meeting, along with other reasons that I have described, lead me to conclude that it would be dangerous to enter convictions on obstruction and extortion charges based on what allegedly occurred during the course of that meeting according to Brezinski's and Krewenchuk's current evidence.

[108] I do however wish to make it clear that none of these comments are meant to be overly critical of Brezinski or Krewenchuk, as they were both generally credible witnesses and overall were competent police detectives.

[109] Finally it defies logic and common sense that an experienced police officer intent on committing the criminal offences of obstruction and extortion would insist on having another police officer attend the meeting, and then go about committing these criminal acts in the face of that police detective's presence.

[110] For these reasons, and for the other reasons that I have identified in my analysis of this case, I have a reasonable doubt as to the Accused's guilt. I conclude that the Crown has failed to prove the essential elements of obstruction of justice and extortion beyond a reasonable doubt.

[111] I find the Accused not guilty of both counts remaining on the indictment namely that of obstruction of justice (count one), and extortion (count two).

Heard on November 16th to 26th, 2015

Dated at the City of Edmonton, Alberta this 29th day of April, 2016.

Donald Lee
J.C.Q.B.A.

Appearances:

Richard Tchir and Brendan Gaunt
for the Crown

Heresh Wolch, Q.C. and Lynn Rideout
for the Accused

Tab 115

Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), 1992 CanLII 84 (SCC), [1992] 1 SCR 623

Source:	Supreme Court of Canada
Date:	1992-03-05
File number:	22060
Other citations:	95 Nfld & PEIR 271 — 134 NR 241 — 89 DLR (4th) 289 — 31 ACWS (3d) 1124 — 301 APR 271 — 4 Admin LR (2d) 121 — [1992] CarswellNfld 170 — JE 92-380 — [1992] SCJ No 21 (QL) — [1992] ACS no 21
Citation:	Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), 1992 CanLII 84 (SCC), [1992] 1 SCR 623, < https://canlii.ca/t/1fsf0 >, retrieved on 2026-03-23
Most recent unfavourable mention	McLaren v. Castlegar (City) , 2010 BCSC 1629 (CanLII) [...] [47] Mr. Howieson for the City of Castlegar argued that Newfoundland Telephone is distinguishable in that it involved an administrative tribunal, not an elected body, and that in Newfoundland Telephone there was evidence that the tribunal member had expressed his strong views about the matter in question on numerous [...]

Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 S.C.R. 623

Newfoundland Telephone Company Limited

Appellant

v.

Indexed as: Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)

File No.: 22060.

1991: November 7; 1992: March 5.

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

on appeal from the court of appeal for newfoundland

Administrative law -- Apprehension of bias -- Policy-making board -- Board member expressing strong views as to issue board considering -- Decision made after Board declined to remove member from panel -- Extent to which an administrative board member may comment on matters before the board -- Whether or not reasonable apprehension of bias -- If so, whether or not decision void or merely voidable.

Respondent Board, whose members are appointed by cabinet subject only to the qualification that they not be employed by or have an interest in a public utility, regulates appellant. One commissioner, a former consumers' advocate playing the self-appointed role of champion of consumers' rights on the Board, made several strong statements which were reported in the press against appellant's executive pay policies before a public hearing was held by the Board into appellant's costs. When the hearing commenced, appellant objected to this commissioner's participation on the panel because of an apprehension of bias. The Board found that it had no jurisdiction to rule on its own members and decided that the panel would continue as constituted. A number of public statements relating to the issue before the Board were made by this commissioner during the hearing and before the Board released its decision which (by a majority which included the commissioner at issue) disallowed some of appellant's costs. A minority would have allowed these

costs. Appellant appealed both the order of the Board and the Board's decision to proceed with the panel as constituted to the Court of Appeal.

The Court of Appeal found that the Board had complete jurisdiction to determine its own procedures and all questions of fact and law and that it declined to exercise its jurisdiction when it refused to remove the commissioner from the panel. Although the court concluded that there was a reasonable apprehension of bias, it held that the Board's decision was merely voidable and that, given that the commissioner's mind was not closed to argument, the Board's order was valid.

The issues under consideration here were: (1) the extent to which an administrative board member may comment on matters before the board and, (2) the result which should obtain if a decision of a board is made in circumstances where a reasonable apprehension of bias is found.

Held: The appeal should be allowed.

The duty of fairness applies to all administrative bodies. The extent of that duty, however, depends on the particular tribunal's nature and function. The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. Because it is impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision, an unbiased appearance is an essential component of procedural fairness. The test to ensure fairness is whether a reasonably informed bystander would perceive bias on the part of an adjudicator.

There is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts: there must be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members where the standard will be much more lenient. In such circumstances, a reasonable apprehension of bias occurs if a board member pre-judges the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of elected members.

For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature.

A member of a board which performs a policy-formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to the hearing. As long as those statements do not indicate a mind so closed that any submissions would be futile, they should not be subject to attack on the basis of bias. Statements manifesting a mind so closed as to make submissions futile would, however, even at the investigatory stage, constitute a basis for raising an issue of apprehended bias. Once the matter reaches the hearing stage a greater degree of discretion is required of a member.

The statements at issue here, when taken together, indicated not only a reasonable apprehension of bias but also a closed mind on the commissioner's part on the subject. Once the order directing the holding of the hearing was given, the Utility was entitled to procedural fairness. At the investigative stage, the "closed mind" test was applicable but once matters proceeded to a hearing, a higher standard had to be applied. Procedural fairness at that stage required the commission members to conduct themselves so that there could be no reasonable apprehension of bias.

A denial of a right to a fair hearing cannot be cured by the tribunal's subsequent decision. A decision of a tribunal which denied the parties a fair hearing cannot be simply voidable and rendered valid as a result of the subsequent decision of the tribunal. The damage created by apprehension of bias cannot be remedied. The hearing, and any subsequent order resulting from it, must be void. The order of the Board of Commissioners of Public Utilities was accordingly void.

Cases Cited

Considered: *Szilard v. Szasz*, 1954 CanLII 4 (SCC), [1955] S.C.R. 3; *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, 1990 CanLII 31 (SCC), [1990] 3 S.C.R. 1170; *Save Richmond Farmland Society v. Richmond (Township)*, 1990 CanLII 1132 (SCC), [1990] 3 S.C.R.

1213; *Cardinal v. Director of Kent Institution*, [1985 CanLII 23 \(SCC\)](#), [1985] 2 S.C.R. 643; **referred to:** *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1978 CanLII 24 \(SCC\)](#), [1979] 1 S.C.R. 311; *Martineau v. Matsqui Institution Disciplinary Board*, [1979 CanLII 184 \(SCC\)](#), [1980] 1 S.C.R. 602.

Statutes and Regulations Cited

Public Utilities Act, R.S.N. 1970, c. 322, ss. 5(1) [as am. by S.N. 1979, c. 30, s. 1], (8), 6, 14, 15, 79, 83, 85, 86.

Authors Cited

Janisch, Hudson N. Case Comment: *Nfld. Light & Power Co. v. P.U.C. (Bd.)* (1987), 25 Admin. L.R. 196.

APPEAL from a judgment of the Newfoundland Court of Appeal (1990), [1990 CanLII 2626 \(NL CA\)](#), 83 Nfld. & P.E.I.R. 257, 260 A.P.R. 257, 45 Admin. L.R. 291, dismissing an appeal from an order and from a ruling of the Board of Commissioners of Public Utilities. Appeal allowed.

James R. Chalker, Q.C., and *Evan J. Kipnis*, for the appellant.

Chesley F. Crosbie, for the respondent.

//Cory J.//

The judgment of the Court was delivered by

CORY J. -- Two issues are raised on this appeal. The first requires a consideration of the extent to which an administrative board member may be permitted to comment upon matters before the board. The second, raises the question as to what the result should be if a decision of a board is made in circumstances where there is found to be a reasonable apprehension of bias.

The Factual Background

Pursuant to the provisions of *The Public Utilities Act*, R.S.N. 1970, c. 322, the Board of Commissioners of Public Utilities ("the Board") is responsible for the regulation of the Newfoundland Telephone Company Limited. Commissioners of the Board are appointed by the Lieutenant-Governor in Council. The statute simply provides that commissioners cannot be employed by, or have any interest, in a public utility (s. 6). In 1985, Andy Wells was appointed as a Commissioner to the Board. Earlier, while a municipal councillor, Wells had acted as an advocate for consumers' rights.

When he was appointed, Wells publicly stated that he intended to play an adversarial role on the Board as a champion of consumers' rights. *The Public Utilities Act* neither provides for the appointment of commissioners as representatives of any specific group nor does it prohibit such appointments. The appointment of Wells has not been challenged.

Acting in accordance with *The Public Utilities Act*, the Board commissioned an independent accounting firm to provide an analysis of the costs and of the accounts of Newfoundland Telephone for the period between 1981 and 1987. The Board received the report from the accountants on November 3, 1988. In light of the report the Board, on November 10, decided to hold a public hearing. The hearing was to be before five commissioners including Wells and was to commence on December 19.

On November 13, 1988, *The Sunday Express*, a weekly newspaper published in St. John's, reported that Wells had described the pay and benefits package of appellant's executives as "ludicrous" and "unconscionable". Wells was quoted as saying:

"If they want to give Brait [the Chief Executive Officer of the appellant] and the boys extra fancy pensions, then the shareholders should pay it, not the rate payers," ...

...

"So I want the company hauled in here -- all them fat cats with their big pensions -- to justify (these expenses) under the public glare... I think the rate payers have a right to be assured that we are not permitting this company to be too extravagant."

On November 26, *The Evening Telegram*, a daily newspaper, published in St. John's, quoted Wells:

"Who the hell do they think they are?" Mr. Wells asked. "The guys doing the real work, climbing the poles never got any 21 per cent increase."

"Why should we, the rate payers, pay for an extra pension plan," he continued, adding that if the executive employees want more money put in their pensions they should take it out of shareholders' profits.

...

Mr. Wells said he senses an attitude of contempt by the telephone company towards the Public Utilities Board. The company seems to expect to always get its own way, he said, adding that the auditors had problems getting information from the company to do the audit requested by PUB. "But, I'm not having anything to do with the salary increases and big fat pensions," said Mr. Wells.

...

The telephone company wants the report kept confidential, "but, who do they think they are," said Mr. Wells. "This document should be public."

When the hearing commenced on December 19, the appellant objected to Wells' participation on the panel on the grounds that his statements had created an apprehension of bias. The Board found that there was no provision in the Act which would allow it to rule on its own members and it decided that it did not have jurisdiction to do so. The Board rejected the appellant's submission and ruled that the panel would continue as constituted.

On December 20, *The Evening Telegram* reported the previous day's events at the hearing. The article read in part:

Following Monday's proceedings, Mr. Wells said he was not surprised by the request to remove him from the PUB panel for the Newfoundland Telephone hearing.

"I don't think those expenses can be justified," said Mr. Wells. "I'm concerned about bias the other way."

On January 24, 1989, the "NTV Evening News" (a television news program originating in St. John's) reported on the continuation of the hearing. That report contained the following statements made by a reporter, Jim Thoms, and by Mr. Wells. They were as follows:

Jim Thoms:Before the hearing began last night board member Andy Wells went public with what he thought of the phone company. He nailed in particular increases in salary and pension benefits for top executives including president Anthony Brait and let it be known even before the board heard any evidence what his judgment would be.

...

Andy Wells:I was absolutely astounded to find out for 1988 that, that Brait is now about up to two hundred and thirty-five thousand dollars and I think that's an incredible sum of money to be paid for to manage a small telephone company.

Jim Thoms:Now Mr. Wells is trying to find out what happened for this year. He was going after '89 salary figures at a meeting today.

Andy Wells:And I just think that it is unfair to expect ratepayers, the consumers, you and I to pay for this kind of extravagance.

Jim Thoms:Okay now....Mr. Wells has left no doubt how his vote will come down in this matter. He wants the board to disallow the salary and pension increases as unreasonable for rate making purposes and to tell the stockholders to pick up the tab.

Andy Wells:And I think that's, that's a reasonable way of proceeding, it's too easy, it's too easy for, for the Company to pass off all these expenses as, onto the ratepayers....

On January 30, 1989 *The Evening Telegram* reported further comments of Mr. Wells pertaining to the salaries of the executives. The article read in part:

Mr. Wells complained in December that the salaries paid to the company executives, in particular to president Anthony Brait, were so high they were driving up the cost of telephone service to consumers.

...

Mr. Wells said Sunday that additional company documents subpoenaed by the board indicate Mr. Brait's salary for 1988 was close to \$235,000, a figure Mr. Wells described as "ludicrous".

...

"I can't see what circumstances would justify that kind of money," Mr. Wells said.

"I don't think the ratepayers of this province should be expected to pay that kind of salary. The company can bloody well take it out of the shareholders' profits."

...

Mr. Wells said he doesn't know when the case will be before the court, but said if he is biased, it is on the side of the consumers who pay too much for their phone bills.

On April 4, Mr. Wells discussed the issue that was before the Board on the CBC morning radio program. His comments in part are as follows:

What's wrong is that it's not necessary to provide telephone services to the people of this Province for chief executive officer of a company operating in a protected enclave in the economy like that where revenues are down too where there's no real business pressure. To be paid at that level, I think the company is asking the board, I suppose, or asking the rate payers to approve a level of compensation which is excessive and I just don't know, there's absolutely no justification for it at all. The company, obviously, is out of touch with reality and insensitive to the cold hard facts of life that many Newfoundlanders face in earning living from day to day.

During the same program Commissioner Wells also commented:

There's no question about that, the question is whether or not this is excessive and very clearly, in my mind, it's certainly is and when you're as I say, you're not talking about a free enterprise situation where you have the competitive pressures in the market place, you're talking about a monopoly that's got a guaranteed situation and if something goes wrong then they can come crying to the board and get rate relief....

...

Well that's the point, that's the point, I mean I don't particularly care what the company decides to pay its top executives, I care about how much of that compensation is to be paid for by rate payers, by you, as consumers of telephone services and very clearly that issue has to be addressed and I hope when we have an order out on this issue later on the month, they, they will in fact, be addressed. No justification whatsoever to expect the consumers of telephone services in this Province to be paying the full cost of salary levels for these people, no justification whatsoever.

...

Very clearly, very clearly there is a significant level of executive over compensation and very clearly the board has to deal with that. To what degree the board does in fact deal with it, by that I mean, to what level we're, we're prepared to allow for rate making purposes, of course, awaits determination and the result of the hearing.

...

Well I, no you're right, it's not the amount of money, I mean the amount of money relative to the overall revenues of the company is in fact incidental, it's peanuts but what's important here is the issue of equity, the issue of fairness.... what's important is that pay levels be set with in tune with what's paid generally in the community and that they be fair and be perceived to be fair, very clearly in the minds of I suppose, 99 percent of Newfoundlanders, paying Mr. Brait over \$200,000.00 a year along with what's being paid to the rest of the executives is not fair in the minds of ordinary Newfoundlanders and I think they're perfectly right and indeed, I think it's incumbent on this board to address that inequity even though as you say, it's not going to result in lower telephone bills. But as somebody once said if you watch the pennies the dollars look after themselves you know.

It is to be noted that all these comments were made before the Board released its decision on the matter. The decision was contained in Order No. P.U. 20 (1989) dated August 3, 1989. In that order, the Board (i) disallowed the "cost of the enhanced pension plan" for certain senior executive

officers of the appellant as an expense for rate-making purposes, and (ii) directed the appellant to refund to its customers in the former operating territory of the Newfoundland Telephone Company Limited the sums of \$472,300 and \$490,300 which were the amounts charged as expenses to the appellant's operating account for 1987 and 1988 to cover the costs of the enhanced pension plan; (iii) made no order respecting the individual salaries of the senior executive officers of the appellant.

Mr. Wells and two others constituted the majority of the Board which disallowed the costs of the enhanced pension plan for executive officers of the appellant. A minority of the Board would have allowed this item as a reasonable and prudent expense. Although the Board made no order respecting the salaries of senior executive officers, Mr. Wells added a concurring opinion and comment in which he stated:

Because the Board failed to properly address those issues and on the basis of the evidence presented, I have to agree with the rest of the Board.

...

In conclusion I am in complete agreement with the Majority on the issue of the special executive retirement plan and given the evidence as presented at the hearing, I have to concur with the rest of the Board on the issue of executive salaries. However, the latter issue requires a more thorough examination by the Board in the future. It is not an issue that has been finally resolved.

Proceedings in the Court of Appeal (1990), [1990 CanLII 2626 \(NL CA\)](#), 83 Nfld. & P.E.I.R. 257

The appellant appealed both the order itself and the ruling of the Board to proceed with Wells as a member of the hearing panel.

The Court of Appeal found that the Board had been in error in concluding that it had no jurisdiction to change the composition of the panel. It noted that the Board had complete jurisdiction to determine its own procedures as well as all questions of law and fact. It held that the Board had declined to exercise its jurisdiction when it refused to consider the removal of Wells from the hearing panel.

Morgan J.A. for the Court of Appeal then considered whether the comments of Wells had raised a reasonable apprehension of bias with regard to the Board's decision. He observed that natural justice requires that an administrative board proceed without actual bias or in a way that does not raise a reasonable apprehension of bias. He noted that the standard of natural justice varies with the nature and functions of the tribunal in question. While he found that the enabling statute required the Board in this case to act as investigator, prosecutor and judge, he rejected the contention that the hearing formed part of the investigatory process. He held that the members of the Board must act fairly and with their minds open to persuasion. The fact that they have given prior opinions should not disqualify them. However, he concluded that Wells' comments did indeed raise a reasonable apprehension of bias which might well have disqualified him from the hearing if the appellant had sought a writ of mandamus to have the matter resolved.

He then considered the consequences of his conclusion that a reasonable apprehension of bias had been established. In his view a hearing of an administrative board is void *ab initio* if the adjudicator has an actual conflict of interest. On the other hand, if only a reasonable apprehension of bias exists, the proceedings are simply voidable. He then examined the conclusions of the Board and observed that Wells did not find against the company on the matter of executive wage increases. He took this as proof that Wells' mind had not been closed to argument. As a result he determined that the order of the Board was valid.

Analysis

The Composition and Function of Administrative Boards

Administrative boards play an increasingly important role in our society. They regulate many aspects of our life, from beginning to end. Hospital and medical boards regulate the methods and practice of the doctors that bring us into this world. Boards regulate the licensing and the operation of morticians who are concerned with our mortal remains. Marketing boards regulate the farm products we eat; transport boards regulate the means and flow of our travel; energy boards control the price and distribution of the forms of energy we use; planning boards and city councils

regulate the location and types of buildings in which we live and work. In Canada, boards are a way of life. Boards and the functions they fulfil are legion.

Some boards will have a function that is investigative, prosecutorial and adjudicative. It is only boards with these three powers that can be expected to regulate adequately complex or monopolistic industries that supply essential services.

The composition of boards can, and often should, reflect all aspects of society. Members may include the experts who give advice on the technical nature of the operations to be considered by the Board, as well as representatives of government and of the community. There is no reason why advocates for the consumer or ultimate user of the regulated product should not, in appropriate circumstances, be members of boards. No doubt many boards will operate more effectively with representation from all segments of society who are interested in the operations of the Board.

Nor should there be undue concern that a board which draws its membership from a wide spectrum will act unfairly. It might be expected that a board member who holds directorships in leading corporations will espouse their viewpoint. Yet I am certain that although the corporate perspective will be put forward, such a member will strive to act fairly. Similarly, a consumer advocate who has spoken out on numerous occasions about practices which he, or she, considers unfair to the consumer will be expected to put forward the consumer point of view. Yet that same person will also strive for fairness and a just result. Boards need not be limited solely to experts or to bureaucrats.

The Duty of Boards

All administrative bodies, no matter what their function, owe a duty of fairness to the regulated parties whose interest they must determine. This was recognized in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, 1978 CanLII 24 (SCC), [1979] 1 S.C.R. 311. Chief Justice Laskin at p. 325 held:

...the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question....

Although the duty of fairness applies to all administrative bodies, the extent of that duty will depend upon the nature and the function of the particular tribunal. See *Martineau v. Matsqui Institution Disciplinary Board*, [1979 CanLII 184 \(SCC\)](#), [1980] 1 S.C.R. 602. The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.

In *Szilard v. Szasz*, [1954 CanLII 4 \(SCC\)](#), [1955] S.C.R. 3, Rand J. found a commercial arbitration was invalid because of bias. He held that the arbitrator did not possess "judicial impartiality" because he had a business relationship with one of the parties to the arbitration. This raised an apprehension of bias that was sufficient to invalidate the proceedings. At p. 7 he wrote:

Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs.

This principle was relied upon in *Committee for Justice and Liberty v. National Energy Board*, [1976 CanLII 2 \(SCC\)](#), [1978] 1 S.C.R. 369. In that case a member of the Board had participated in a Study Group which had examined the feasibility of the Mackenzie pipeline. The appellants objected to his assignment to a panel which was considering competing applications for a certificate to undertake the pipeline. The standard the Board was required to apply in considering the applications was one of public convenience and necessity. Chief Justice Laskin held that the

member's prior activity raised a reasonable apprehension of bias. He observed that the National Energy Board was charged with the duty to consider the public interest. Public confidence in the impartiality of Board decisions was required to further the public interest.

Bias was considered in a different setting in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990 CanLII 31 \(SCC\)](#), [1990] 3 S.C.R. 1170. That case concerned a planning decision which was made by elected municipal councillors. The governing legislation for municipalities was designed so that councillors would become involved in planning issues before taking part in their final determination. The decision of the Court recognized that city councillors are political actors who have been elected by the voters to represent particular points of view. Considering the spectrum of administrative bodies whose functions vary from being almost purely adjudicative to being political or policy-making in nature, the Court held that municipal councils fall in the legislative end. Sopinka J., at p. 1197, set forth the "open mind" test for this type of situation:

The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of Council while they may very well give rise to an appearance of bias will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged.

This same principle was applied in the companion case, *Save Richmond Farmland Society v. Richmond (Township)*, [1990 CanLII 1132 \(SCC\)](#), [1990] 3 S.C.R. 1213. That case concerned a municipal councillor who campaigned for election favouring a residential development. He made public statements that he would not change his mind with regard to his position despite public hearings on the issue. Sopinka J. found that the councillor should not be disqualified for bias because he did not have a completely closed mind. He determined that to have ruled otherwise would have distorted the democratic process by discouraging politicians from expressing their views openly.

It can be seen that there is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the Board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are

boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a pre-judgment of the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature.

Janisch published a very apt and useful Case Comment on *Nfld. Light & Power Co. v. P.U.C. (Bd.)* (1987), 25 Admin. L.R. 196. He observed that Public Utilities Commissioners, unlike judges, do not have to apply abstract legal principles to resolve disputes. As a result, no useful purpose would be served by holding them to a standard of judicial neutrality. In fact to do so might undermine the legislature's goal of regulating utilities since it would encourage the appointment of those who had never been actively involved in the field. This would, Janisch wrote at p. 198, result in the appointment of "the main line party faithful and bland civil servants". Certainly there appears to be great merit in appointing to boards representatives of interested sectors of society including those who are dedicated to forwarding the interest of consumers.

Further, a member of a board which performs a policy formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to the hearing. This does not of course mean that there are no limits to the conduct of board members. It is simply a confirmation of the principle that the courts must take a flexible approach to the problem so that the standard which is applied varies with the role and function of the Board which is being considered. In the end, however, commissioners must base their decision on the evidence which is before them. Although they may draw upon their relevant expertise and their background of knowledge and understanding, this must be applied to the evidence which has been adduced before the Board.

Application to the Case at Bar

It is first necessary to review the legislation which constitutes the Board and sets out its role and function. The key sections to *The Public Utilities Act* are as follows:

5. (1) The Lieutenant-Governor in Council may appoint three or more persons who shall constitute a Board of Commissioners of Public Utilities, and shall designate a chairman and two vice-chairmen of and appoint a clerk for the Board.

...

(8) The commissioners and the clerk shall be paid such salaries as the Lieutenant-Governor in Council determines.

14. The Board shall have the general supervision of all public utilities, and may make all necessary examinations and enquiries and keep itself informed as to the compliance by public utilities with the provisions of law and shall have the right to obtain from any public utility all information necessary to enable the Board to fulfil its duties.

15. The Board may enquire into any violation of the laws or regulations in force in this province by any public utility doing business therein, or by the officers, agents or employees thereof, or by any person operating the plant of any public utility, and has the power and it is its duty to enforce the provisions of this Act as well as all other laws relating to public utilities.

79. Whenever the Board believes that any rate or charge is unreasonable or unjustly discriminatory, or that any reasonable service is not supplied, or that an investigation of any matter relating to any public utility should for any reason be made, it may, of its own motion, summarily investigate the same with or without notice.

83. The Board shall give the public utility and the complainant, if any, ten days' notice of the time and place when and where the hearing and investigation referred to in Section 82 [i.e. when a complaint is made] will be held and such matters considered and determined and both the public utility and the complainant are entitled to be heard and to have process to enforce the attendance of witnesses.

85. If after making any summary investigation, the Board becomes satisfied that sufficient grounds exist to warrant a formal hearing being ordered as to the matters so investigated, it shall furnish such public utility interested a statement notifying the public utility of the matters under investigation and ten days after such notice has been given the Board may proceed to set a time and place for a hearing and an investigation as provided in this Act.

86. Notice of the time and place for the hearing referred to in Section 85 shall be given to the public utility and to such other interested persons as the Board shall deem necessary as provided in this Act and thereafter proceedings shall be held and conducted in reference to the matter investigated in like manner as though complaints had been filed with the Board relative to the matter investigated [see s. 83], and the same order or orders may be made in reference thereto as if such investigation had been made on complaint.

It can be seen that the Board has been given the general supervision of provincial public utilities. In that role it must supervise the operation of Newfoundland Telephone which has a monopoly on the provision of telephone services in the Province of Newfoundland. The Board, when it believes any charges or expenses of a utility are unreasonable, may of its own volition summarily

investigate the charges or expenses. As a result of the investigation it may order a public hearing regarding the expenses. In turn, at the hearing the utility must be accorded the fundamental rights of procedural fairness. That is to say, the utility must be given notice of the complaint, the right to enforce the attendance of witnesses and to make submissions in support of its position.

When determining whether any rate or charge is "unreasonable" or "unjustly discriminatory" the Board will assess the charges and rates in economic terms. In those circumstances the Board will not be dealing with legal questions but rather policy issues. The decision-making process of this Board will come closer to the legislative end of the spectrum of administrative boards than to the adjudicative end.

It can be seen that the Board, pursuant to s. 79, has a duty to act as an investigator with regard to rates or charges and may have a duty to act as prosecutor and adjudicator with regard to these same expenses pursuant to ss. 83, 85 and 86.

What then of the statements made by Mr. Wells? Certainly it would be open to a commissioner during the investigative process to make public statements pertaining to the investigation. Although it might be more appropriate to say nothing, there would be no irreparable damage caused by a commissioner saying that he, or she, was concerned with the size of executive salaries and the executive pension package. Nor would it be inappropriate to emphasize on behalf of all consumers that the investigation would "leave no stone unturned" to ascertain whether the expenses or rates were appropriate and reasonable. During the investigative stage, a wide licence must be given to board members to make public comment. As long as those statements do not indicate a mind so closed that any submissions would be futile, they should not be subject to attack on the basis of bias.

The statements made by Mr. Wells before the hearing began on December 19 did not indicate that he had a closed mind. For example, his statement: "[s]o I want the company hauled in here -- all them fat cats with their big pensions -- to justify (these expenses) under the public glare... I think the rate payers have a right to be assured that we are not permitting this company to be too

extravagant" is not objectionable. That comment is no more than a colourful expression of an opinion that the salaries and pension benefits seemed to be unreasonably high. It does not indicate a closed mind. Even Wells' statement that he did not think that the expenses could be justified, did not indicate a closed mind. However, should a commissioner state that, no matter what evidence might be disclosed as a result of the investigation, his or her position would not change, this would indicate a closed mind. Even at the investigatory stage statements manifesting a mind so closed as to make submissions futile would constitute a basis for raising an issue of apprehended bias. However the quoted statement of Mr. Wells was made on November 13, three days after the hearing was ordered. Once the hearing date had been set, the parties were entitled to expect that the conduct of the commissioners would be such that it would not raise a reasonable apprehension of bias. The comment of Mr. Wells did just that.

Once the matter reaches the hearing stage a greater degree of discretion is required of a member. Although the standard for a commissioner sitting in a hearing of the Board of Commissioners of Public Utilities need not be as strict and rigid as that expected of a judge presiding at a trial, nonetheless procedural fairness must be maintained. The statements of Commissioner Wells made during and subsequent to the hearing, viewed cumulatively, lead inexorably to the conclusion that a reasonable person appraised of the situation would have an apprehension of bias.

On January 24, while the hearing was already in progress, Wells was making statements that might readily be understood by a reasonable observer, as they were by the telecast reporter Jim Thoms, that Wells had made up his mind what his judgment would be even before the Board had heard all the evidence. Evidence sufficient to create a reasonable apprehension of bias can be found in some of the statements made by Wells during the course of a January 24th telecast, and in the subsequent comments to the press and to the radio. For example, during a radio broadcast he said:

To be paid at that level, I think the company is asking the board, I suppose, or asking the rate payers to approve a level of compensation which is excessive and I just don't know, there's absolutely no justification for it at all.

...

There's no question about that, the question is whether or not this is excessive and very clearly, in my mind, it's certainly is and when you're as I say, you're not talking about a free enterprise

situation where you have the competitive pressures in the market place, you're talking about a monopoly that's got a guaranteed situation....

...

No justification whatsoever to expect the consumers of telephone services in this Province to be paying the full cost of salary levels for these people, no justification whatsoever.

Very clearly, very clearly there is a significant level of executive over compensation and very clearly the board has to deal with that.

...

... I suppose, 99 percent of Newfoundlanders, paying Mr. Brait over \$200,000.00 a year along with what's being paid to the rest of the executives is not fair in the minds of ordinary Newfoundlanders and I think they're perfectly right and indeed, I think it's incumbent on this board to address that inequity even though as you say, it's not going to result in lower telephone bills.

These statements, taken together, give a clear indication that not only was there a reasonable apprehension of bias but that Mr. Wells had demonstrated that he had a closed mind on the subject.

Once the order directing the holding of the hearing was given the Utility was entitled to procedural fairness. At that stage something more could and should be expected of the conduct of board members. At the investigative stage, the "closed mind" test was applicable. Once matters proceeded to a hearing, a higher standard had to be applied. Procedural fairness then required the board members to conduct themselves so that there could be no reasonable apprehension of bias. The application of that test must be flexible. It need not be as strict for this Board dealing with policy matters as it would be for a board acting solely in an adjudicative capacity. This standard of conduct will not of course inhibit the most vigorous questioning of witnesses and counsel by board members. Wells' statements, however, were such, that so long as he remained a member of the Board hearing the matter, a reasonable apprehension of bias existed. It follows that the hearing proceeded unfairly and was invalid.

The Consequences of a Finding of Bias

Everyone appearing before administrative boards is entitled to be treated fairly. It is an independent and unqualified right. As I have stated, it is impossible to have a fair hearing or to have procedural fairness if a reasonable apprehension of bias has been established. If there has been a denial of a right to a fair hearing it cannot be cured by the tribunal's subsequent decision. A decision of a tribunal which denied the parties a fair hearing cannot be simply voidable and rendered valid as a result of the subsequent decision of the tribunal. Procedural fairness is an essential aspect of any hearing before a tribunal. The damage created by apprehension of bias cannot be remedied. The hearing, and any subsequent order resulting from it, is void. In *Cardinal v. Director of Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643, at p. 661, Le Dain J. speaking for the Court put his position in this way:

... I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

In my view, this principle is also applicable to this case. In the circumstances, there is no alternative but to declare that the Order of the Board of Commissioners of Public Utilities is void.

Disposition

In the result the appeal will be allowed, the order of the Court of Appeal will be set aside, and Order No. P.U. 20 (1989) of the Board of Commissioners of Public Utilities is declared void *ab initio*. The appellant should have the costs of the appeal in this Court and in the Court of Appeal.

Appeal allowed with costs.

Solicitors for the appellant: Chalker, Green & Rowe, St. John's.

Solicitors for the respondent: Kendell & Crosbie, St. John's.

Tab 116

Benedict v. Ontario, 2000 CanLII 16884 (ON CA)

Source:	Court of Appeal for Ontario
Date:	2000-10-13
File number:	C33628; C33629
Other citations:	51 OR (3d) 147 — 193 DLR (4th) 329 — 100 ACWS (3d) 58 — 136 OAC 259 — 48 CPC (4th) 1 — [2000] OJ No 3760 (QL)
Citation:	Benedict v. Ontario, 2000 CanLII 16884 (ON CA), < https://canlii.ca/t/1fbcw >, retrieved on 2026-03-23

Benedict v. Her Majesty the Queen in Right of Ontario
[Indexed as: Benedict v. Ontario]

51 O.R. (3d) 147
[2000] O.J. No. 3760
Docket Nos. C33628 and C33629

Court of Appeal for Ontario
Finlayson, Doherty and Borins JJ.A.
October 13, 2000

Courts -- Judges -- Bias -- Reasonable apprehension of bias -- Motion to disqualify judge on grounds of reasonable apprehension of bias -- Judge being party in ongoing litigation over claim similar to employment-related claim being advanced in case before her -- Judge having interest in outcome of motion that disqualified her from hearing motion -- Disqualifying interest broader than pecuniary or proprietary interest -- Sufficient for disqualification that judge have some relevant interest in matter -- Motion for disqualification granted.

The provincial Crown was the respondent in an application brought by JB for severance or pay in lieu of reasonable notice and for a declaration of his rights under the [Public Service Act, R.S.O. 1990, c. P.47](#) and the Public Service Pension Plan Act, [R.S.O. 1990, c. P.48](#). The Crown moved for an order staying JB's application on the ground that he ought to file a grievance before the Public Service Grievance Board. Molloy J. dismissed the Crown's motion. The Crown then submitted that Molloy J. should withdraw her decision on the ground that she was disqualified from hearing the motion because prior to her appointment to the bench she was a plaintiff in an outstanding action against the Crown arising from her employment as a lawyer for the Ontario Human Rights

Commission. Molloy J. refused to withdraw the decision, reasoning that the issues on the Crown's motion did not overlap with any issues in her own litigation and that the real defendant in her own litigation was not the Crown, which is a huge organization, but the Ontario Human Rights Commission. The Crown appealed.

Held, the appeal should be allowed.

A judge must be free of any interest that might improperly affect the determination of the case, or might reasonably be perceived to do so. When the impartiality of a judge is in question, the appearance of bias is just as important as the reality. Although the judge may, with justification, believe that he or she is unbiased, if the appearance of bias is present, he or she should withdraw from the case. If there is a reasonable apprehension of bias, a decision cannot stand, and in this case there was a reasonable apprehension of bias. Molloy J. ought not to have heard the motion because she was engaged in ongoing litigation over a claim that was similar to the employment-related claim being advanced in the case before her. It is well established that the Crown is indivisible, and she was hearing a motion brought by a party against whom she was actively asserting the same type of employment-related claim. Any decision she reached which was unfavourable to the Crown could be perceived as advancing or vindicating her own claim. In these circumstances, she had an interest in the outcome of the motion that disqualified her from hearing the motion. A disqualifying interest is broader than a pecuniary or proprietary interest, and it is sufficient for disqualification that the judge have some relevant interest in the matter.

APPEAL from a refusal to withdraw a decision on the grounds that there was a reasonable apprehension of bias.

Cases referred to *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1976 CanLII 2 \(SCC\)](#), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115; *Dimes v. Grand Junction Canal Proprietors* (1852), 3 H.L. Cas. 759, 8 State Tr. N.S. 85, 19 L.T.O.S. 317, 17 Jur. 73, 10 E.R. 301; *Great Atlantic & Pacific Co. of Canada Ltd. v. Ontario (Human Rights Commission)* (1993), [1993 CanLII 8616 \(ON SC\)](#), 13 O.R. (3d) 824, 109 D.L.R. (4th) 214, 93 C.L.L.C. 17,017 (Div. Ct.); *Metropolitan Properties Co. (FGC) Ltd. v. Lannon*, [1968] 3 All E.R. 304, [1969] 1 Q.B. 577, [1968] 3 W.L.R. 694, 19 P. & C.R. 856, 112 Sol. Jo. 585, [1968] R.V.R. 490 (C.A.) (sub nom. *R. v. London Rent Assessment Panel Committee, Ex p. Metropolitan Properties Co. (FGC) Ltd.*); *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992 CanLII 84 \(SCC\)](#), [1992] 1 S.C.R. 623, 95 Nfld. & P.E.I.R. 271, 89 D.L.R. (4th) 289, 134 N.R. 241, 301 A.P.R. 271; *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet Ugarte (No. 2)*, [1999] 1 All E.R. 577 (H.L.); *R. v. S. (R.D.)*, [1997 CanLII 324 \(SCC\)](#), [1997] 3 S.C.R. 484, 161 N.S.R. (2d) 241, 151 D.L.R. (4th) 193, 218 N.R. 1, 477 A.P.R. 241, 118 C.C.C. (3d) 353, 10 C.R. (5th) 1 Statutes referred to [Public Service Act, R.S.O. 1990, c. P.47](#) *Public Service Pension Plan Act, R.S.O. 1990, c. P.48* Authorities referred to Canadian Judicial Council, *Ethical Principles for Judges* (1998), pp. 27, 42

Kenneth P. Swan, for respondent.

Dennis W. Brown, Q.C., Malliha Wilson and Ben Ratelband, for appellant.

[1] BY THE COURT: -- This proceeding is brought by James Benedict by notice of application against Her Majesty the Queen in Right of Ontario (the "Crown"), by whom he had been employed for 28 years, for "severance or pay in lieu of reasonable notice" and benefits, as well as a declaration of his rights under certain legislation, including the [Public Service Act, R.S.O. 1990, c. P.47](#) and the *Public Service Pension Plan Act, R.S.O. 1990, c. P.48*, arising from the cessation of his employment.

Background

[2] The Crown moved for an order staying Mr. Benedict's application on the ground that because he had a right to file a grievance before the Public Service Grievance Board (the "Board"), the court should defer to the jurisdiction of the Board. The motion came on for hearing before Molloy J. On the day after the hearing, she released a lengthy written endorsement containing her reasons for the conclusion that the court, and not the Board, had the jurisdiction to determine Mr. Benedict's claims.

[3] On the day on which the endorsement was released, the lawyer who argued the Crown's motion learned that the motions judge is the plaintiff in an action against the Crown, arising from her employment as a lawyer by the Ontario Human Rights Commission before her appointment to the bench, in which she is seeking damages for wrongful dismissal plus the value of lost benefits. The action was ongoing when Molloy J. heard the government's motion to stay Mr. Benedict's application. She made no disclosure to the parties of her personal litigation. Upon learning of her personal litigation, the Crown moved before Molloy J. requesting that she withdraw her endorsement. It submitted that she was disqualified from hearing its motion. The Crown claimed that as a result of her claim against it, she could not have given the motion an unbiased hearing. On that account Molloy J., the Crown said, should not have sat on its motion to stay Mr. Benedict's claim. Molloy J. did not agree. She dismissed the Crown's motion.

The Appeal

[4] The Crown has appealed both decisions. In its first appeal, it submits that Molloy J.'s decision refusing to stay Mr. Benedict's claim was wrong in point of law. In its second appeal, it submits that this decision should be set aside on the ground that the circumstances surrounding the hearing of the motion to stay by Molloy J. gave rise to a reasonable apprehension of bias on her part. We heard the second appeal first and agreed with the Crown's submission and set aside the decision refusing to stay claim, making it unnecessary to hear the first appeal. We stated that our reasons would be delivered later. Our reasons now follow.

Reasons of the Motions Judge

[5] Before reviewing the test that applies in determining whether the result of a trial, or an interlocutory motion, should be set aside on the ground that there existed a reasonable apprehension of bias on the part of the presiding judicial officer, it is necessary to review the reasons given by Molloy J. for her refusal to withdraw her decision on the Crown's motion to stay. Before doing so, it cannot be made too clear that the Crown expressly disclaims actual bias in the motions judge.

[6] From Molloy J.'s reasons, it is clear that when the motion was assigned to her for hearing, she was alert to whether it was appropriate that she hear the motion in view of her outstanding wrongful dismissal claim against the Crown. She said: "I certainly looked at it carefully to see if there was any possibility of an overlap between my own litigation and the issues raised in this motion." (Emphasis added) She checked the pleadings in her litigation and spoke to her counsel to find out if the Crown had raised the issue of whether the Board or the court was the proper forum in which her claim was to be litigated. She learned that the issue had not been raised. She concluded that as "[t]he sole issue before me was the legal question as to whether Mr. Benedict was entitled to proceed in this court," it was not improper for her to hear the motion.

[7] The motions judge continued:

Likewise, there was no issue before me, and therefore I did not deal with anything relating to the conduct of the Crown, much less the conduct of the Crown agency that was involved in my own litigation, which was the Ontario Human Rights Commission.

Therefore, I cannot see any connection between the issue that I decided and any issue that I could have been aware of as being involved in my own litigation. If that issue (failure to pursue grievance procedures) had been raised prior to my hearing the motion, I do believe it could have given rise to a reasonable apprehension of bias. I say that quite apart from any consideration of what the merits would be if such a motion were brought in my action. I think it is improper for me to give any consideration to that. But if that issue had ever been raised over the ten years or so since these incidents occurred, then that would be a different matter. But it simply did not. This is completely new to me.

Therefore, I do not know how the reasonable person looking at this situation could possibly think there would be a bias arising from something that person could not possibly have known about.

[8] Molloy J. then distinguished the circumstances surrounding the motion she had been assigned to hear from the circumstances which led the Supreme Court of Canada in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1976 CanLII 2 \(SCC\)](#), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716 and the Divisional Court in *Great Atlantic & Pacific Co. of Canada Ltd. v. Ontario (Human Rights Commission)* (1993), [1993 CanLII 8616 \(ON SC\)](#), 13 O.R. (3d) 824, 109 D.L.R. (4th) 214, to find the existence of a reasonable apprehension of bias in those cases. She concluded her reasons as follows:

. . . So, in my view, what it really comes down to is in fact what the argument was before me ultimately, which is, is there a reasonable apprehension of bias from my hearing any case in which the provincial government in any of its emanations is a party. It seems to me that that simply goes too far. The government is such a huge organization. The real defendant in my own litigation is the Ontario Human Rights Commission. The Crown is named, as it has to be, but it has not in truth been the defendant in the proceeding. I certainly have, over the course of the number of years that I have been sitting, heard other cases involving the provincial Crown, none involving anything related to the issues in my litigation, but then as I see it, that is the situation with Mr. Benedict's motion. The issue I decided had nothing to do with anything that is raised in my own litigation. Therefore, I do not see any reason to rescind my decision. It stands.

[9] Thus, there were two reasons why the motions judge was of the opinion that it was unnecessary that she disqualify herself from hearing the Crown's motion to stay Mr. Benedict's application. There was nothing improper in her hearing any proceeding to which the Crown is a party because it "is such a huge organization" and, in any event, the "real defendant" in her litigation was the Ontario Human Rights Commission. As well, the issue raised in respect to the proper forum to decide Mr. Benedict's claims "had nothing to do with anything that is raised in [her] own litigation". However, she did not consider that the claims in her case against the Crown and those in Mr. Benedict's case against the Crown had the common feature of being employment related.

Reasonable Apprehension of Bias

[10] The test which applies in determining the existence of a reasonable apprehension of bias has been considered by the Supreme Court of Canada in a number of cases, among which *Committee for Justice and Liberty v. Canada (National Energy Board)* and *R. v. S. (R.D.)*, [1997 CanLII 324 \(SCC\)](#), [1997] 3 S.C.R. 484, 151 D.L.R. (4th) 193 are prominent. As well, the test was considered recently by the House of Lords in *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet Ugarte (No. 2)*, [1999] 1 All E.R. 577 (H.L.).

[11] In *S. (R.D.)*, L'Heureux-Dubé and McLachlin JJ. described the test at p. 207 D.L.R. [p. 502 S.C.R.]:

The test for reasonable apprehension of bias is that set out by de Grandpré J. in *Committee for Justice and Liberty v. Canada (National Energy Board)*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716. Though he wrote dissenting reasons, de Grandpré J.'s articulation of the test for bias was adopted by the majority of the Court, and has been consistently endorsed by this Court in the intervening two decades: see, for example, *Valente v. The Queen*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673, 23 C.C.C. (3d) 193, 24 D.L.R. (4th) 161; *R. v. Lippé*, 1990 CanLII 18 (SCC), [1991] 2 S.C.R. 114, 64 C.C.C. (3d) 513; *Ruffo v. Conseil de la Magistrature*, 1995 CanLII 49 (SCC), [1995] 4 S.C.R. 267, 130 D.L.R. (4th) 1. De Grandpré J. stated, at pp. 394-95:

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

.

The grounds for this apprehension must, however, be substantial and I . . . [refuse] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

[12] At pp. 229-31 D.L.R. [pp. 531-32 S.C.R.], Cory J. elaborated on the test as follows:

This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See *Bertram*, supra, at pp. 54-55; *Gushman*, supra, at para. 31. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": *R. v. Elrick*, [1983] O.J. No. 515 (QL) (H.C.J.), at para. 14. See also *Stark*, supra, at para. 74; *R. v. Lin*, [1995] B.C.J. No. 982 (QL) (S.C.), at para. 34 [summarized 27 W.C.B. (2d) 199].

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Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See *Stark*, supra, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegation. Yet, this is a serious step that should not be undertaken lightly.

[13] *Pinochet* is an exceptional case. It involved a petition to the House of Lords to set aside its earlier decision restoring an extradition warrant for the arrest of Senator Pinochet rendered by a majority, of which Lord Hoffmann was a member, on the ground that Lord Hoffmann's links with Amnesty International ("AI"), which had been granted leave to intervene in the appeal, gave the appearance of possible bias. This case is helpful not only for its discussion of the rationale for the principle that a decision rendered by a judge in circumstances which give rise to a reasonable apprehension of bias cannot stand, but also for its discussion of the nature of the interest which a judge has in the outcome of a case which he or she is assigned to hear which will result in the

automatic disqualification of the judge. As in this case, it was alleged that there was an appearance of bias, but not actual bias, on the part of Lord Hoffmann.

[14] It is worthwhile, therefore, to refer extensively to the opinion of Lord Browne-Wilkinson, whose reasoning and conclusion were agreed to by the other Law Lords, each of whom delivered concurring opinions.

[15] At p. 586, Lord Browne-Wilkinson began his discussion of apparent bias by setting out the circumstances that will result in the automatic disqualification of a judge:

The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.

In my judgment, this case falls within the first category of case, viz where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure: see *Shetreet Judges on Trial* (1976) p. 303 and *De Smith, Woolf and Jowell Judicial Review of Administrative Action* (5th edn, 1995) p. 525. I will call this "automatic disqualification".

(Emphasis added)

[16] He referred to *Dimes v. Grand Junction Canal Proprietors* (1852), 3 H.L. Cas. 759, 10 E.R. 301, in which authorities were cited that show how the principle was developed. Lord Cottenham, who owned a substantial shareholding in the defendant company which succeeded at trial, sat on appeal from the trial judgment, which he affirmed. Lord Browne-Wilkinson described what followed the hearing of the appeal at pp. 586-87:

. . . There was an appeal to your Lordships' House on the grounds that Lord Cottenham LC was disqualified. Their Lordships consulted the judges, who advised that Lord Cottenham LC was disqualified from sitting as a judge in the cause because he had an interest in the suit (see 3 HL Cas 759 at 786, 10 ER 301 at 312.) This advice was unanimously accepted by their Lordships. There was no inquiry by the court as to whether a reasonable man would consider Lord Cottenham LC to be biased and no inquiry as to the circumstances which led to Lord Cottenham LC sitting. Lord Campbell said (3 HL Cas 759 at 793, 10 ER 301 at 315):

No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern: but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest.

(Emphasis added)

He went on to explain at p. 587 that although in the beginning disqualification was required only in cases where the judge was an actual party, this "absolute prohibition was then extended to cases where, although not nominally a party, the judge had an interest in the outcome".

[17] Lord Browne-Wilkinson discussed the nature of the "interest" which a judge has in a proceeding that will lead to his or her automatic disqualification. He stated at p. 587: "Hitherto only pecuniary and proprietary interests have led to automatic disqualification." He continued at p. 588:

. . . My Lords, in my judgment, although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties. Thus in my opinion if Lord Hoffmann had been a member of AI he would have been automatically disqualified because of his non-pecuniary interest in establishing that Senator Pinochet was not entitled to immunity.

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If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to the suit. There is no room for fine distinctions if Lord Hewart CJ's famous dictum is to be observed: it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" (see *R. v. Sussex Justices*, ex p. *McCarthy* [1924] 1 KB 256 at 259, [1923] All ER Rep 233 at 234).

Earlier, at p. 587, Lord Browne-Wilkinson observed that the area of apparent bias is one "in which legal technicality is particularly to be avoided".

[18] In the result, Lord Browne-Wilkinson was of the opinion that Lord Hoffmann's association with AI was such that he had a sufficient interest in the appeal to require his automatic disqualification. He found the critical facts to be that AI was a party to the appeal, that AI was joined as an intervener to the appeal in order to argue for a particular result, that the result was achieved and that Lord Hoffmann was the director of a charity closely allied to AI and sharing, in this respect, AI's objects.

[19] It is important, in our view, to emphasize, as Lord Nolan stated at p. 592, "that in any case where the impartiality of a judge is in question the appearance of the matter is just as important as the reality". Lord Hope also addressed this concern at p. 593:

As my noble and learned friend Lord Goff of Chieveley said in *R. v. Gough* [1993] 2 All ER 724 at 730, [1993] AC 646 at 661, the nature of the interest is such that public confidence in the administration of justice requires that the judge must withdraw from the case or, if he fails to disclose his interest and sits in judgment upon it, the decision cannot stand. It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of impartiality. The disqualification does not follow automatically in the strict sense of that word, because the parties to the suit may waive the objection. But no further investigation is necessary and, if the interest is not disclosed, the consequence is inevitable. In practice the

application of this rule is so well understood and so consistently observed that no case has arisen in the course of this century where a decision of any of the courts exercising a civil jurisdiction in any part of the United Kingdom has had to be set aside on the ground that there was a breach of it.

(Emphasis added)

[20] The importance of the appearance of impartiality was also emphasized by Lord Denning M.R. in *Metropolitan Properties Co. (FGC) Ltd. v. Lannon*, [1968] 3 All E.R. 304 at p. 310, [1969] 1 Q.B. 577 (C.A.):

. . . It brings home this point; in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand: see *R. v. Huggins*; *R. v. Sunderland Justices*, per Vaughan Williams, L.J. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see *R. v. Camborne Justices*, Ex p. Pearce; *R. v. Nailsworth Justices*, Ex p. Bird. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: "The judge was biased."

We note that while Lord Denning M.R. spoke in terms of a "real likelihood" rather than a "reasonable apprehension", in *National Energy Board, de Grandpré J.* took care to state that such variations in the expression used should not generally be treated as involving any substantive difference in the approach to be taken. "Reasonable apprehension", "real likelihood", "reasonable likelihood" and "reasonable suspicion" amount to the same standard.

[21] This passage from the reasons of Lord Denning M.R. in *Lannon* was cited, with approval, by Major J. in *S. (R.D.)* at p. 203 D.L.R. [pp. 496-97 S.C.R.]. At p. 232 D.L.R. [p. 533 S.C.R.] Cory J. added:

It is right and proper that judges be held to the highest standards of impartiality since they will have to determine the most fundamentally important rights of the parties appearing before them. This is true whether the legal dispute arises between citizen and citizen or between the citizen and the state. Every comment that a judge makes from the bench is weighed and evaluated by the community as well as the parties. Judges must be conscious of this constant weighing and make every effort to achieve neutrality and fairness in carrying out their duties. This must be a cardinal rule of judicial conduct.

[22] In 1998 the Canadian Judicial Council published *Ethical Principles for Judges* to assist judges in carrying out their responsibilities. At p. 27, at the beginning of the chapter entitled "Impartiality", the following statement appears:
"Judges must be and should appear to be impartial with respect to their decisions and decision making." In the commentary on this statement, the following is found at p. 42:

As elsewhere in this area, the concern is with reasonable perception, as well as actual conflict of interest. In general, a judge should not preside over a case in which he or she has a financial or property interest that could be affected by its outcome or in which the judge's

interest would give rise in a reasonable, fair minded and informed person, to reasoned suspicion that the judge would not act impartially. This general rule applies whether the interest is itself the subject matter of the controversy or where the outcome of the case could substantially affect the value of any interest or property owned by the judge, the judge's family or close associates. It will not apply where the judge's interest is limited to one shared by citizens generally.

(Emphasis added)

Analysis

[23] In our view, the issue of whether a reasonable apprehension of bias existed in Molloy J. presiding over the Crown's motion to stay Mr. Benedict's application can be addressed on the basis of three propositions:

- (1) The motions judge was the plaintiff in an ongoing action against the Crown.
- (2) The motions judge was the plaintiff in an ongoing action against the Crown the subject of which was an employment- related claim as in Mr. Benedict's case.
- (3) The motions judge was the plaintiff in an ongoing action against the Crown the subject of which was an employment- related claim and in which it was open to Crown, as in the Crown's motion she was required to decide, to raise the issue whether the court should defer to the Public Services Grievance Board for the determination of her claim.

[24] Counsel for the Crown, pursuing the first proposition, took the position that Molloy J. should have disqualified herself because it was improper for her to preside in any case in which the Crown is a party while her personal litigation was ongoing. He submitted that if this proposition is too broad, she should not have heard the motion on the basis of the second proposition.

[25] In advancing his alternative argument, counsel emphasized that it is the appearance of bias that is central to the determination of whether Molloy J. should have disqualified herself from hearing the motion. He submitted that the appearance of bias arose from these facts:

- the motions judge was in a position where she could decide the motion against the party she was actively suing in respect to an employment-related claim.
- in determining the appropriate forum for the resolution of Mr. Benedict's claim, the motions judge was in a position in which she would be adjudicating on rights relevant to the viability of her own claim.
- in presiding over the motion in Mr. Benedict's case with respect to the issue of grievance rights, she placed herself in a position to vindicate her rights against the Crown.

Although some of these facts can also be considered in respect to the third proposition by which apparent bias may be judged, counsel for the Crown submitted that he did not have to go that far to make out a case of apparent bias.

[26] In our view, the alternative position of counsel for the Crown is correct. As we will explain, a reasonable apprehension of bias existed in Molloy J. presiding over the Crown's motion in Mr. Benedict's case as she was the plaintiff in an ongoing action against the Crown the subject of which, as in Mr. Benedict's case, was an employment-related claim.

[27] Dealing with the reasons given by Molloy J. for declining to withdraw her decision, we do not agree that the defendant in the Benedict case is different from the defendant in her action because

she and Mr. Benedict worked for different government agencies. As it is well established that the Crown is indivisible, the defendant is the same in each proceeding. Nor, as will be explained, does it matter in determining apparent bias whether the issue raised by the Crown's motion had, or had not, been raised in her own case.

[28] There are a number of important principles reflected in the authorities which we have reviewed. Foremost among them is the principle that the focus of the disqualification of a judge for apparent bias is the maintenance of public confidence in the absolute impartiality of the judiciary. When the impartiality of a judge is in question, the appearance of bias is just as important as the reality. That is why, when the issue of apparent bias is raised, it is necessary that fine distinctions and legal technicalities be avoided. Although the judge may, with justification, believe that he or she is unbiased, if the appearance of bias is present he or she should withdraw from the case. As Lord Denning M.R. stated in the passage quoted earlier in Lannon at p. 310 [All E.R.]:

. . . The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand.

[29] Judges are professionals, accustomed to weighing evidence and considering submissions and doing their work in the public eye and subject to public criticism. They seek to give effect to the basic precepts of procedural fairness -- natural justice and due process. That is why a judge must be free of any relationship to the case under consideration which might improperly affect the determination of the case, or might reasonably be perceived to do so. As we have said, the common law recognizes that justice lies partly in the cold neutrality of impartial judges and precludes judges from acting in cases where there is a reasonable apprehension of bias on their part. Judges recognize this and regularly decline to preside in cases in which they have an interest that might reasonably be perceived as affecting their neutrality. No doubt this accounts for the exceedingly few cases in Canada which have considered apparent bias on the part of judges in civil cases. As Lord Hope noted in Pinochet at p. 593 [All E.R.], in the United Kingdom the principle of disqualification has been so consistently observed by judges that in the twentieth century no decision of a court exercising civil jurisdiction was set aside on the ground of apparent bias.

[30] Although Molloy J. is not a party to Mr. Benedict's case, she has a relevant interest in its subject matter. As Pinochet illustrates, the self-interest which a judge may have in a case over which he or she is presiding is much broader than a pecuniary or proprietary interest. Self-interest may arise in many ways. We find no need to attempt to catalogue them. For a judge to disqualify himself or herself from hearing a case, it is sufficient that the judge have some relevant interest in its subject. This follows from the principle that a person may not be a judge in his or her own cause.

[31] Mindful that the threshold for finding a reasonable apprehension of bias is high, in our view, applying the appropriate test, the circumstances that deprive the hearing of the motion of the appearance of evenhanded justice are that the motions judge was herself a party to an ongoing action against the Crown, arising out of her previous employment by it, involving issues broadly similar to those found in Mr. Benedict's claims arising out of his employment by the Crown. Both the motions judge and Mr. Benedict had asserted claims against the Crown which can be described generically as wrongful dismissal claims. Thus, in the context of a wrongful dismissal claim, the motions judge was hearing a motion brought by a party against whom she was actively asserting the same claim. Any decision she reached unfavourable to the Crown could have been perceived as advancing or vindicating her own claim. Applying the broad approach to self-interest discussed in Pinochet, the motions judge had an interest in the outcome of the motion.

[32] In our view, the motions judge should not have heard the motion. And later, when asked by the Crown to withdraw her decision, she should have done so. This is all that we are deciding in this appeal. In doing so, we are deciding the appeal by the application of the second proposition outlined earlier. We are not deciding that a judge who is a party to litigation against the Crown is per se disqualified from presiding in a case in which the Crown is a party. This is to be determined by whether or not the judge has an interest in the case. Nor are we deciding that before a judge must disqualify himself or herself from hearing a case in which a party is also a party in a case brought by the judge, that there must be an identity of a discrete issue, or issues, in each case. What we do decide, in what undoubtedly will be the rare case, is that a judge should not hear any case in which a party and the judge are engaged in ongoing litigation over a claim that is similar to the claim in the case before the judge for adjudication.

[33] Counsel for Mr. Benedict submitted that even if we were to find apparent bias we should, nevertheless, affirm the result reached by Molloy J. on the motion, or, in the alternative, permit counsel to argue the motion de novo. We declined counsel's request. For the reasons discussed in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CanLII 84 (SCC), [1992] 1 S.C.R. 623 at p. 625, 95 Nfld. & P.E.I.R. 271, if a reasonable apprehension of bias arises, it colours the entire proceedings and it cannot be cured by the affirmation of the underlying decision. As stated in *Pinochet* and in *Lannon*, where there is a reasonable apprehension of bias, the decision cannot stand.

[34] It is unfortunate that the motion will have to be reheard by another judge, given the delay, the inconvenience and the expense to the parties that this will occasion. This will probably have a more serious impact upon Mr. Benedict than upon the Crown. In the exercise of a relatively autonomous system of self-regulation, particularly where the public is to be reassured about the integrity of the courts, a judge is expected to disqualify himself or herself from hearing a case in certain circumstances -- particularly where it may be said that the judge has an interest in its outcome.

[35] In circumstances like this case, it is only the judge who knows the particulars that could give rise to apparent bias should the judge hear a case. Where a judge perceives a potential self-interest, especially where the circumstances may not be known to the litigants, he or she should withdraw from the case or should raise the potential problem and make full disclosure of all the relevant facts prior to, or at the outset of, the proceedings. Where any party takes the position that a reasonable apprehension of bias exists, the judge must carefully weigh that submission and when in doubt should disqualify himself or herself. Had Molloy J. followed that course in this case, another judge would have been assigned to the case through the normal administrative processes operating in the Metropolitan Toronto Region and the motion would have been heard and disposed of on its merits without delay or additional expense.

Conclusion

[36] For the foregoing reasons, the appeal is allowed and Molloy J.'s order of January 13, 2000, refusing to withdraw her decision of November 23, 1999, is set aside. In consequence of allowing the appeal, Molloy J.'s order of November 23, 1999 is also set aside and the Crown's motion to stay Mr. Benedict's application is remitted to the Superior Court for hearing by a different judge. In the circumstances, there will be no costs.

Order accordingly.

Tab 117

Benedict v. Ontario, 2000 CanLII 16884 (ON CA)

Source:	Court of Appeal for Ontario
Date:	2000-10-13
File number:	C33628; C33629
Other citations:	51 OR (3d) 147 — 193 DLR (4th) 329 — 100 ACWS (3d) 58 — 136 OAC 259 — 48 CPC (4th) 1 — [2000] OJ No 3760 (QL)
Citation:	Benedict v. Ontario, 2000 CanLII 16884 (ON CA), < https://canlii.ca/t/1fbcw >, retrieved on 2026-03-23

Benedict v. Her Majesty the Queen in Right of Ontario
[Indexed as: Benedict v. Ontario]

51 O.R. (3d) 147
[2000] O.J. No. 3760
Docket Nos. C33628 and C33629

Court of Appeal for Ontario
Finlayson, Doherty and Borins JJ.A.
October 13, 2000

Courts -- Judges -- Bias -- Reasonable apprehension of bias -- Motion to disqualify judge on grounds of reasonable apprehension of bias -- Judge being party in ongoing litigation over claim similar to employment-related claim being advanced in case before her -- Judge having interest in outcome of motion that disqualified her from hearing motion -- Disqualifying interest broader than pecuniary or proprietary interest -- Sufficient for disqualification that judge have some relevant interest in matter -- Motion for disqualification granted.

The provincial Crown was the respondent in an application brought by JB for severance or pay in lieu of reasonable notice and for a declaration of his rights under the [Public Service Act, R.S.O. 1990, c. P.47](#) and the Public Service Pension Plan Act, [R.S.O. 1990, c. P.48](#). The Crown moved for an order staying JB's application on the ground that he ought to file a grievance before the Public Service Grievance Board. Molloy J. dismissed the Crown's motion. The Crown then submitted that Molloy J. should withdraw her decision on the ground that she was disqualified from hearing the motion because prior to her appointment to the bench she was a plaintiff in an outstanding action against the Crown arising from her employment as a lawyer for the Ontario Human Rights

Commission. Molloy J. refused to withdraw the decision, reasoning that the issues on the Crown's motion did not overlap with any issues in her own litigation and that the real defendant in her own litigation was not the Crown, which is a huge organization, but the Ontario Human Rights Commission. The Crown appealed.

Held, the appeal should be allowed.

A judge must be free of any interest that might improperly affect the determination of the case, or might reasonably be perceived to do so. When the impartiality of a judge is in question, the appearance of bias is just as important as the reality. Although the judge may, with justification, believe that he or she is unbiased, if the appearance of bias is present, he or she should withdraw from the case. If there is a reasonable apprehension of bias, a decision cannot stand, and in this case there was a reasonable apprehension of bias. Molloy J. ought not to have heard the motion because she was engaged in ongoing litigation over a claim that was similar to the employment-related claim being advanced in the case before her. It is well established that the Crown is indivisible, and she was hearing a motion brought by a party against whom she was actively asserting the same type of employment-related claim. Any decision she reached which was unfavourable to the Crown could be perceived as advancing or vindicating her own claim. In these circumstances, she had an interest in the outcome of the motion that disqualified her from hearing the motion. A disqualifying interest is broader than a pecuniary or proprietary interest, and it is sufficient for disqualification that the judge have some relevant interest in the matter.

APPEAL from a refusal to withdraw a decision on the grounds that there was a reasonable apprehension of bias.

Cases referred to *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1976 CanLII 2 \(SCC\)](#), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115; *Dimes v. Grand Junction Canal Proprietors* (1852), 3 H.L. Cas. 759, 8 State Tr. N.S. 85, 19 L.T.O.S. 317, 17 Jur. 73, 10 E.R. 301; *Great Atlantic & Pacific Co. of Canada Ltd. v. Ontario (Human Rights Commission)* (1993), [1993 CanLII 8616 \(ON SC\)](#), 13 O.R. (3d) 824, 109 D.L.R. (4th) 214, 93 C.L.L.C. 17,017 (Div. Ct.); *Metropolitan Properties Co. (FGC) Ltd. v. Lannon*, [1968] 3 All E.R. 304, [1969] 1 Q.B. 577, [1968] 3 W.L.R. 694, 19 P. & C.R. 856, 112 Sol. Jo. 585, [1968] R.V.R. 490 (C.A.) (sub nom. *R. v. London Rent Assessment Panel Committee, Ex p. Metropolitan Properties Co. (FGC) Ltd.*); *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992 CanLII 84 \(SCC\)](#), [1992] 1 S.C.R. 623, 95 Nfld. & P.E.I.R. 271, 89 D.L.R. (4th) 289, 134 N.R. 241, 301 A.P.R. 271; *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet Ugarte (No. 2)*, [1999] 1 All E.R. 577 (H.L.); *R. v. S. (R.D.)*, [1997 CanLII 324 \(SCC\)](#), [1997] 3 S.C.R. 484, 161 N.S.R. (2d) 241, 151 D.L.R. (4th) 193, 218 N.R. 1, 477 A.P.R. 241, 118 C.C.C. (3d) 353, 10 C.R. (5th) 1 Statutes referred to [Public Service Act, R.S.O. 1990, c. P.47](#) *Public Service Pension Plan Act, R.S.O. 1990, c. P.48* Authorities referred to Canadian Judicial Council, *Ethical Principles for Judges* (1998), pp. 27, 42

Kenneth P. Swan, for respondent.

Dennis W. Brown, Q.C., Malliha Wilson and Ben Ratelband, for appellant.

[1] BY THE COURT: -- This proceeding is brought by James Benedict by notice of application against Her Majesty the Queen in Right of Ontario (the "Crown"), by whom he had been employed for 28 years, for "severance or pay in lieu of reasonable notice" and benefits, as well as a declaration of his rights under certain legislation, including the [Public Service Act, R.S.O. 1990, c. P.47](#) and the *Public Service Pension Plan Act, R.S.O. 1990, c. P.48*, arising from the cessation of his employment.

Background

[2] The Crown moved for an order staying Mr. Benedict's application on the ground that because he had a right to file a grievance before the Public Service Grievance Board (the "Board"), the court should defer to the jurisdiction of the Board. The motion came on for hearing before Molloy J. On the day after the hearing, she released a lengthy written endorsement containing her reasons for the conclusion that the court, and not the Board, had the jurisdiction to determine Mr. Benedict's claims.

[3] On the day on which the endorsement was released, the lawyer who argued the Crown's motion learned that the motions judge is the plaintiff in an action against the Crown, arising from her employment as a lawyer by the Ontario Human Rights Commission before her appointment to the bench, in which she is seeking damages for wrongful dismissal plus the value of lost benefits. The action was ongoing when Molloy J. heard the government's motion to stay Mr. Benedict's application. She made no disclosure to the parties of her personal litigation. Upon learning of her personal litigation, the Crown moved before Molloy J. requesting that she withdraw her endorsement. It submitted that she was disqualified from hearing its motion. The Crown claimed that as a result of her claim against it, she could not have given the motion an unbiased hearing. On that account Molloy J., the Crown said, should not have sat on its motion to stay Mr. Benedict's claim. Molloy J. did not agree. She dismissed the Crown's motion.

The Appeal

[4] The Crown has appealed both decisions. In its first appeal, it submits that Molloy J.'s decision refusing to stay Mr. Benedict's claim was wrong in point of law. In its second appeal, it submits that this decision should be set aside on the ground that the circumstances surrounding the hearing of the motion to stay by Molloy J. gave rise to a reasonable apprehension of bias on her part. We heard the second appeal first and agreed with the Crown's submission and set aside the decision refusing to stay claim, making it unnecessary to hear the first appeal. We stated that our reasons would be delivered later. Our reasons now follow.

Reasons of the Motions Judge

[5] Before reviewing the test that applies in determining whether the result of a trial, or an interlocutory motion, should be set aside on the ground that there existed a reasonable apprehension of bias on the part of the presiding judicial officer, it is necessary to review the reasons given by Molloy J. for her refusal to withdraw her decision on the Crown's motion to stay. Before doing so, it cannot be made too clear that the Crown expressly disclaims actual bias in the motions judge.

[6] From Molloy J.'s reasons, it is clear that when the motion was assigned to her for hearing, she was alert to whether it was appropriate that she hear the motion in view of her outstanding wrongful dismissal claim against the Crown. She said: "I certainly looked at it carefully to see if there was any possibility of an overlap between my own litigation and the issues raised in this motion." (Emphasis added) She checked the pleadings in her litigation and spoke to her counsel to find out if the Crown had raised the issue of whether the Board or the court was the proper forum in which her claim was to be litigated. She learned that the issue had not been raised. She concluded that as "[t]he sole issue before me was the legal question as to whether Mr. Benedict was entitled to proceed in this court," it was not improper for her to hear the motion.

[7] The motions judge continued:

Likewise, there was no issue before me, and therefore I did not deal with anything relating to the conduct of the Crown, much less the conduct of the Crown agency that was involved in my own litigation, which was the Ontario Human Rights Commission.

Therefore, I cannot see any connection between the issue that I decided and any issue that I could have been aware of as being involved in my own litigation. If that issue (failure to pursue grievance procedures) had been raised prior to my hearing the motion, I do believe it could have given rise to a reasonable apprehension of bias. I say that quite apart from any consideration of what the merits would be if such a motion were brought in my action. I think it is improper for me to give any consideration to that. But if that issue had ever been raised over the ten years or so since these incidents occurred, then that would be a different matter. But it simply did not. This is completely new to me.

Therefore, I do not know how the reasonable person looking at this situation could possibly think there would be a bias arising from something that person could not possibly have known about.

[8] Molloy J. then distinguished the circumstances surrounding the motion she had been assigned to hear from the circumstances which led the Supreme Court of Canada in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1976 CanLII 2 \(SCC\)](#), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716 and the Divisional Court in *Great Atlantic & Pacific Co. of Canada Ltd. v. Ontario (Human Rights Commission)* (1993), [1993 CanLII 8616 \(ON SC\)](#), 13 O.R. (3d) 824, 109 D.L.R. (4th) 214, to find the existence of a reasonable apprehension of bias in those cases. She concluded her reasons as follows:

. . . So, in my view, what it really comes down to is in fact what the argument was before me ultimately, which is, is there a reasonable apprehension of bias from my hearing any case in which the provincial government in any of its emanations is a party. It seems to me that that simply goes too far. The government is such a huge organization. The real defendant in my own litigation is the Ontario Human Rights Commission. The Crown is named, as it has to be, but it has not in truth been the defendant in the proceeding. I certainly have, over the course of the number of years that I have been sitting, heard other cases involving the provincial Crown, none involving anything related to the issues in my litigation, but then as I see it, that is the situation with Mr. Benedict's motion. The issue I decided had nothing to do with anything that is raised in my own litigation. Therefore, I do not see any reason to rescind my decision. It stands.

[9] Thus, there were two reasons why the motions judge was of the opinion that it was unnecessary that she disqualify herself from hearing the Crown's motion to stay Mr. Benedict's application. There was nothing improper in her hearing any proceeding to which the Crown is a party because it "is such a huge organization" and, in any event, the "real defendant" in her litigation was the Ontario Human Rights Commission. As well, the issue raised in respect to the proper forum to decide Mr. Benedict's claims "had nothing to do with anything that is raised in [her] own litigation". However, she did not consider that the claims in her case against the Crown and those in Mr. Benedict's case against the Crown had the common feature of being employment related.

Reasonable Apprehension of Bias

[10] The test which applies in determining the existence of a reasonable apprehension of bias has been considered by the Supreme Court of Canada in a number of cases, among which *Committee for Justice and Liberty v. Canada (National Energy Board)* and *R. v. S. (R.D.)*, [1997 CanLII 324 \(SCC\)](#), [1997] 3 S.C.R. 484, 151 D.L.R. (4th) 193 are prominent. As well, the test was considered recently by the House of Lords in *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet Ugarte (No. 2)*, [1999] 1 All E.R. 577 (H.L.).

[11] In *S. (R.D.)*, L'Heureux-Dubé and McLachlin JJ. described the test at p. 207 D.L.R. [p. 502 S.C.R.]:

The test for reasonable apprehension of bias is that set out by de Grandpré J. in *Committee for Justice and Liberty v. Canada (National Energy Board)*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716. Though he wrote dissenting reasons, de Grandpré J.'s articulation of the test for bias was adopted by the majority of the Court, and has been consistently endorsed by this Court in the intervening two decades: see, for example, *Valente v. The Queen*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673, 23 C.C.C. (3d) 193, 24 D.L.R. (4th) 161; *R. v. Lippé*, 1990 CanLII 18 (SCC), [1991] 2 S.C.R. 114, 64 C.C.C. (3d) 513; *Ruffo v. Conseil de la Magistrature*, 1995 CanLII 49 (SCC), [1995] 4 S.C.R. 267, 130 D.L.R. (4th) 1. De Grandpré J. stated, at pp. 394-95:

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

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The grounds for this apprehension must, however, be substantial and I . . . [refuse] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

[12] At pp. 229-31 D.L.R. [pp. 531-32 S.C.R.], Cory J. elaborated on the test as follows:

This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See *Bertram*, supra, at pp. 54-55; *Gushman*, supra, at para. 31. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": *R. v. Elrick*, [1983] O.J. No. 515 (QL) (H.C.J.), at para. 14. See also *Stark*, supra, at para. 74; *R. v. Lin*, [1995] B.C.J. No. 982 (QL) (S.C.), at para. 34 [summarized 27 W.C.B. (2d) 199].

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Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See *Stark*, supra, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegation. Yet, this is a serious step that should not be undertaken lightly.

[13] *Pinochet* is an exceptional case. It involved a petition to the House of Lords to set aside its earlier decision restoring an extradition warrant for the arrest of Senator Pinochet rendered by a majority, of which Lord Hoffmann was a member, on the ground that Lord Hoffmann's links with Amnesty International ("AI"), which had been granted leave to intervene in the appeal, gave the appearance of possible bias. This case is helpful not only for its discussion of the rationale for the principle that a decision rendered by a judge in circumstances which give rise to a reasonable apprehension of bias cannot stand, but also for its discussion of the nature of the interest which a judge has in the outcome of a case which he or she is assigned to hear which will result in the

automatic disqualification of the judge. As in this case, it was alleged that there was an appearance of bias, but not actual bias, on the part of Lord Hoffmann.

[14] It is worthwhile, therefore, to refer extensively to the opinion of Lord Browne-Wilkinson, whose reasoning and conclusion were agreed to by the other Law Lords, each of whom delivered concurring opinions.

[15] At p. 586, Lord Browne-Wilkinson began his discussion of apparent bias by setting out the circumstances that will result in the automatic disqualification of a judge:

The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.

In my judgment, this case falls within the first category of case, viz where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure: see *Shetreet Judges on Trial* (1976) p. 303 and *De Smith, Woolf and Jowell Judicial Review of Administrative Action* (5th edn, 1995) p. 525. I will call this "automatic disqualification".

(Emphasis added)

[16] He referred to *Dimes v. Grand Junction Canal Proprietors* (1852), 3 H.L. Cas. 759, 10 E.R. 301, in which authorities were cited that show how the principle was developed. Lord Cottenham, who owned a substantial shareholding in the defendant company which succeeded at trial, sat on appeal from the trial judgment, which he affirmed. Lord Browne-Wilkinson described what followed the hearing of the appeal at pp. 586-87:

. . . There was an appeal to your Lordships' House on the grounds that Lord Cottenham LC was disqualified. Their Lordships consulted the judges, who advised that Lord Cottenham LC was disqualified from sitting as a judge in the cause because he had an interest in the suit (see 3 HL Cas 759 at 786, 10 ER 301 at 312.) This advice was unanimously accepted by their Lordships. There was no inquiry by the court as to whether a reasonable man would consider Lord Cottenham LC to be biased and no inquiry as to the circumstances which led to Lord Cottenham LC sitting. Lord Campbell said (3 HL Cas 759 at 793, 10 ER 301 at 315):

No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern: but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest.

(Emphasis added)

He went on to explain at p. 587 that although in the beginning disqualification was required only in cases where the judge was an actual party, this "absolute prohibition was then extended to cases where, although not nominally a party, the judge had an interest in the outcome".

[17] Lord Browne-Wilkinson discussed the nature of the "interest" which a judge has in a proceeding that will lead to his or her automatic disqualification. He stated at p. 587: "Hitherto only pecuniary and proprietary interests have led to automatic disqualification." He continued at p. 588:

. . . My Lords, in my judgment, although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties. Thus in my opinion if Lord Hoffmann had been a member of AI he would have been automatically disqualified because of his non-pecuniary interest in establishing that Senator Pinochet was not entitled to immunity.

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If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to the suit. There is no room for fine distinctions if Lord Hewart CJ's famous dictum is to be observed: it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" (see *R. v. Sussex Justices*, ex p. *McCarthy* [1924] 1 KB 256 at 259, [1923] All ER Rep 233 at 234).

Earlier, at p. 587, Lord Browne-Wilkinson observed that the area of apparent bias is one "in which legal technicality is particularly to be avoided".

[18] In the result, Lord Browne-Wilkinson was of the opinion that Lord Hoffmann's association with AI was such that he had a sufficient interest in the appeal to require his automatic disqualification. He found the critical facts to be that AI was a party to the appeal, that AI was joined as an intervener to the appeal in order to argue for a particular result, that the result was achieved and that Lord Hoffmann was the director of a charity closely allied to AI and sharing, in this respect, AI's objects.

[19] It is important, in our view, to emphasize, as Lord Nolan stated at p. 592, "that in any case where the impartiality of a judge is in question the appearance of the matter is just as important as the reality". Lord Hope also addressed this concern at p. 593:

As my noble and learned friend Lord Goff of Chieveley said in *R. v. Gough* [1993] 2 All ER 724 at 730, [1993] AC 646 at 661, the nature of the interest is such that public confidence in the administration of justice requires that the judge must withdraw from the case or, if he fails to disclose his interest and sits in judgment upon it, the decision cannot stand. It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of impartiality. The disqualification does not follow automatically in the strict sense of that word, because the parties to the suit may waive the objection. But no further investigation is necessary and, if the interest is not disclosed, the consequence is inevitable. In practice the

application of this rule is so well understood and so consistently observed that no case has arisen in the course of this century where a decision of any of the courts exercising a civil jurisdiction in any part of the United Kingdom has had to be set aside on the ground that there was a breach of it.

(Emphasis added)

[20] The importance of the appearance of impartiality was also emphasized by Lord Denning M.R. in *Metropolitan Properties Co. (FGC) Ltd. v. Lannon*, [1968] 3 All E.R. 304 at p. 310, [1969] 1 Q.B. 577 (C.A.):

. . . It brings home this point; in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand: see *R. v. Huggins*; *R. v. Sunderland Justices*, per Vaughan Williams, L.J. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see *R. v. Camborne Justices*, Ex p. Pearce; *R. v. Nailsworth Justices*, Ex p. Bird. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: "The judge was biased."

We note that while Lord Denning M.R. spoke in terms of a "real likelihood" rather than a "reasonable apprehension", in *National Energy Board, de Grandpré J.* took care to state that such variations in the expression used should not generally be treated as involving any substantive difference in the approach to be taken. "Reasonable apprehension", "real likelihood", "reasonable likelihood" and "reasonable suspicion" amount to the same standard.

[21] This passage from the reasons of Lord Denning M.R. in *Lannon* was cited, with approval, by Major J. in *S. (R.D.)* at p. 203 D.L.R. [pp. 496-97 S.C.R.]. At p. 232 D.L.R. [p. 533 S.C.R.] Cory J. added:

It is right and proper that judges be held to the highest standards of impartiality since they will have to determine the most fundamentally important rights of the parties appearing before them. This is true whether the legal dispute arises between citizen and citizen or between the citizen and the state. Every comment that a judge makes from the bench is weighed and evaluated by the community as well as the parties. Judges must be conscious of this constant weighing and make every effort to achieve neutrality and fairness in carrying out their duties. This must be a cardinal rule of judicial conduct.

[22] In 1998 the Canadian Judicial Council published *Ethical Principles for Judges* to assist judges in carrying out their responsibilities. At p. 27, at the beginning of the chapter entitled "Impartiality", the following statement appears:
"Judges must be and should appear to be impartial with respect to their decisions and decision making." In the commentary on this statement, the following is found at p. 42:

As elsewhere in this area, the concern is with reasonable perception, as well as actual conflict of interest. In general, a judge should not preside over a case in which he or she has a financial or property interest that could be affected by its outcome or in which the judge's

interest would give rise in a reasonable, fair minded and informed person, to reasoned suspicion that the judge would not act impartially. This general rule applies whether the interest is itself the subject matter of the controversy or where the outcome of the case could substantially affect the value of any interest or property owned by the judge, the judge's family or close associates. It will not apply where the judge's interest is limited to one shared by citizens generally.

(Emphasis added)

Analysis

[23] In our view, the issue of whether a reasonable apprehension of bias existed in Molloy J. presiding over the Crown's motion to stay Mr. Benedict's application can be addressed on the basis of three propositions:

- (1) The motions judge was the plaintiff in an ongoing action against the Crown.
- (2) The motions judge was the plaintiff in an ongoing action against the Crown the subject of which was an employment- related claim as in Mr. Benedict's case.
- (3) The motions judge was the plaintiff in an ongoing action against the Crown the subject of which was an employment- related claim and in which it was open to Crown, as in the Crown's motion she was required to decide, to raise the issue whether the court should defer to the Public Services Grievance Board for the determination of her claim.

[24] Counsel for the Crown, pursuing the first proposition, took the position that Molloy J. should have disqualified herself because it was improper for her to preside in any case in which the Crown is a party while her personal litigation was ongoing. He submitted that if this proposition is too broad, she should not have heard the motion on the basis of the second proposition.

[25] In advancing his alternative argument, counsel emphasized that it is the appearance of bias that is central to the determination of whether Molloy J. should have disqualified herself from hearing the motion. He submitted that the appearance of bias arose from these facts:

- the motions judge was in a position where she could decide the motion against the party she was actively suing in respect to an employment-related claim.
- in determining the appropriate forum for the resolution of Mr. Benedict's claim, the motions judge was in a position in which she would be adjudicating on rights relevant to the viability of her own claim.
- in presiding over the motion in Mr. Benedict's case with respect to the issue of grievance rights, she placed herself in a position to vindicate her rights against the Crown.

Although some of these facts can also be considered in respect to the third proposition by which apparent bias may be judged, counsel for the Crown submitted that he did not have to go that far to make out a case of apparent bias.

[26] In our view, the alternative position of counsel for the Crown is correct. As we will explain, a reasonable apprehension of bias existed in Molloy J. presiding over the Crown's motion in Mr. Benedict's case as she was the plaintiff in an ongoing action against the Crown the subject of which, as in Mr. Benedict's case, was an employment-related claim.

[27] Dealing with the reasons given by Molloy J. for declining to withdraw her decision, we do not agree that the defendant in the Benedict case is different from the defendant in her action because

she and Mr. Benedict worked for different government agencies. As it is well established that the Crown is indivisible, the defendant is the same in each proceeding. Nor, as will be explained, does it matter in determining apparent bias whether the issue raised by the Crown's motion had, or had not, been raised in her own case.

[28] There are a number of important principles reflected in the authorities which we have reviewed. Foremost among them is the principle that the focus of the disqualification of a judge for apparent bias is the maintenance of public confidence in the absolute impartiality of the judiciary. When the impartiality of a judge is in question, the appearance of bias is just as important as the reality. That is why, when the issue of apparent bias is raised, it is necessary that fine distinctions and legal technicalities be avoided. Although the judge may, with justification, believe that he or she is unbiased, if the appearance of bias is present he or she should withdraw from the case. As Lord Denning M.R. stated in the passage quoted earlier in Lannon at p. 310 [All E.R.]:

. . . The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand.

[29] Judges are professionals, accustomed to weighing evidence and considering submissions and doing their work in the public eye and subject to public criticism. They seek to give effect to the basic precepts of procedural fairness -- natural justice and due process. That is why a judge must be free of any relationship to the case under consideration which might improperly affect the determination of the case, or might reasonably be perceived to do so. As we have said, the common law recognizes that justice lies partly in the cold neutrality of impartial judges and precludes judges from acting in cases where there is a reasonable apprehension of bias on their part. Judges recognize this and regularly decline to preside in cases in which they have an interest that might reasonably be perceived as affecting their neutrality. No doubt this accounts for the exceedingly few cases in Canada which have considered apparent bias on the part of judges in civil cases. As Lord Hope noted in Pinochet at p. 593 [All E.R.], in the United Kingdom the principle of disqualification has been so consistently observed by judges that in the twentieth century no decision of a court exercising civil jurisdiction was set aside on the ground of apparent bias.

[30] Although Molloy J. is not a party to Mr. Benedict's case, she has a relevant interest in its subject matter. As Pinochet illustrates, the self-interest which a judge may have in a case over which he or she is presiding is much broader than a pecuniary or proprietary interest. Self-interest may arise in many ways. We find no need to attempt to catalogue them. For a judge to disqualify himself or herself from hearing a case, it is sufficient that the judge have some relevant interest in its subject. This follows from the principle that a person may not be a judge in his or her own cause.

[31] Mindful that the threshold for finding a reasonable apprehension of bias is high, in our view, applying the appropriate test, the circumstances that deprive the hearing of the motion of the appearance of evenhanded justice are that the motions judge was herself a party to an ongoing action against the Crown, arising out of her previous employment by it, involving issues broadly similar to those found in Mr. Benedict's claims arising out of his employment by the Crown. Both the motions judge and Mr. Benedict had asserted claims against the Crown which can be described generically as wrongful dismissal claims. Thus, in the context of a wrongful dismissal claim, the motions judge was hearing a motion brought by a party against whom she was actively asserting the same claim. Any decision she reached unfavourable to the Crown could have been perceived as advancing or vindicating her own claim. Applying the broad approach to self-interest discussed in Pinochet, the motions judge had an interest in the outcome of the motion.

[32] In our view, the motions judge should not have heard the motion. And later, when asked by the Crown to withdraw her decision, she should have done so. This is all that we are deciding in this appeal. In doing so, we are deciding the appeal by the application of the second proposition outlined earlier. We are not deciding that a judge who is a party to litigation against the Crown is per se disqualified from presiding in a case in which the Crown is a party. This is to be determined by whether or not the judge has an interest in the case. Nor are we deciding that before a judge must disqualify himself or herself from hearing a case in which a party is also a party in a case brought by the judge, that there must be an identity of a discrete issue, or issues, in each case. What we do decide, in what undoubtedly will be the rare case, is that a judge should not hear any case in which a party and the judge are engaged in ongoing litigation over a claim that is similar to the claim in the case before the judge for adjudication.

[33] Counsel for Mr. Benedict submitted that even if we were to find apparent bias we should, nevertheless, affirm the result reached by Molloy J. on the motion, or, in the alternative, permit counsel to argue the motion de novo. We declined counsel's request. For the reasons discussed in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CanLII 84 (SCC), [1992] 1 S.C.R. 623 at p. 625, 95 Nfld. & P.E.I.R. 271, if a reasonable apprehension of bias arises, it colours the entire proceedings and it cannot be cured by the affirmation of the underlying decision. As stated in *Pinochet* and in *Lannon*, where there is a reasonable apprehension of bias, the decision cannot stand.

[34] It is unfortunate that the motion will have to be reheard by another judge, given the delay, the inconvenience and the expense to the parties that this will occasion. This will probably have a more serious impact upon Mr. Benedict than upon the Crown. In the exercise of a relatively autonomous system of self-regulation, particularly where the public is to be reassured about the integrity of the courts, a judge is expected to disqualify himself or herself from hearing a case in certain circumstances -- particularly where it may be said that the judge has an interest in its outcome.

[35] In circumstances like this case, it is only the judge who knows the particulars that could give rise to apparent bias should the judge hear a case. Where a judge perceives a potential self-interest, especially where the circumstances may not be known to the litigants, he or she should withdraw from the case or should raise the potential problem and make full disclosure of all the relevant facts prior to, or at the outset of, the proceedings. Where any party takes the position that a reasonable apprehension of bias exists, the judge must carefully weigh that submission and when in doubt should disqualify himself or herself. Had Molloy J. followed that course in this case, another judge would have been assigned to the case through the normal administrative processes operating in the Metropolitan Toronto Region and the motion would have been heard and disposed of on its merits without delay or additional expense.

Conclusion

[36] For the foregoing reasons, the appeal is allowed and Molloy J.'s order of January 13, 2000, refusing to withdraw her decision of November 23, 1999, is set aside. In consequence of allowing the appeal, Molloy J.'s order of November 23, 1999 is also set aside and the Crown's motion to stay Mr. Benedict's application is remitted to the Superior Court for hearing by a different judge. In the circumstances, there will be no costs.

Order accordingly.

Tab 118

Donovan v. Waterloo (Police Services Board), 2022 ONCA 199 (CanLII)

Source: Court of Appeal for Ontario
Date: 2022-03-10
File number: C69467
Citation: Donovan v. Waterloo (Police Services Board), 2022 ONCA 199 (CanLII), <<https://canlii.ca/t/jn0t5>>, retrieved on 2026-03-23

COURT OF APPEAL FOR ONTARIO

CITATION: Donovan v. Waterloo (Police Services Board), 2022 ONCA 199
DATE: 20220310
DOCKET: C69467

Strathy C.J.O., Roberts and Sossin JJ.A.

BETWEEN

Kelly Lynn Donovan

Plaintiff/Responding Party (Appellant)

and

Waterloo Regional Police Services Board and Bryan Larkin

Defendants/Moving Parties (Respondents)

Kelly Lynn Donovan, acting in person

Donald B. Jarvis and Clifton Yiu, for the respondents

Heard: February 14, 2022 by video conference

On appeal from the order of Justice Thomas A. Bielby of the Superior Court of Justice, dated April 19, 2021, with reasons reported at [2021 ONSC 2885](#), and from the costs order, dated May 28, 2021.

REASONS FOR DECISION

[1] This is an appeal from the motion judge’s order pursuant to [r. 21.01\(3\)\(a\)](#) of the [Rules of Civil Procedure](#), R.R.O. 1990, Reg. 194, dismissing this action for lack of jurisdiction.

Background to the Appellant’s Resignation and this Action

[2] The appellant is a former police officer, employed by the respondent Waterloo Regional Police Services Board (the “Board”). Her employment was subject to the terms of a collective agreement. The respondent Bryan Larkin (“Larkin”) was the Chief of Police.

[3] The following is a brief summary of the events giving rise to these proceedings.

[4] In May 2016, the Board gave the appellant notice of an investigation under the [Police Services Act](#), R.S.O. 1990, c. P.15 (the “PSA”) related to her alleged disclosure of confidential information to the Board. On June 2, 2016, the appellant filed an application with the Human Rights Tribunal of Ontario (the “HRT”), alleging that that Board had discriminated against her on the basis of sex and marital status.

[5] In February 2017, the appellant took medical leave for post-traumatic stress disorder as a result of observing an accidental shooting while studying to become a police constable at the Ontario Police College in February 2011.

[6] On June 8, 2017, the appellant entered into an agreement (the “Resignation Agreement”) with the Board. The appellant’s bargaining agent, the Waterloo Regional Police Association, was a party to the Resignation Agreement. That agreement expressly recognized that the appellant and the Board had an employee-employer relationship and that the appellant had notified the Board that she would be resigning her employment effective June 25, 2017.

[7] The Resignation Agreement recited the parties’ desire to “fully resolve and settle” the outstanding matters between them, namely the appellant’s HRTO application and the Board’s investigation into the appellant and the potential charges she faced under the [PSA](#). It stated that the parties agreed upon “full and final settlement of all matters related to [the appellant’s] employment with or cessation of employment with the Board, and all other outstanding matters between them”. It was a term of the Resignation Agreement that the terms and existence of the agreement would be kept confidential except as required by law, disclosure to immediate family, or disclosure to professional persons providing advice. The parties also agreed to exchange releases and the appellant signed a full and final release that was appended to the Resignation Agreement.

[8] Although the Resignation Agreement is redacted, it is apparent that the appellant was paid some compensation in respect of her legal expenses incurred in connection with the HRTO proceedings and the potential [PSA](#) charges. She was also paid a lump sum payment, net of applicable deductions and remittances required by law, presumably as compensation for the termination of her employment.

[9] In May 2018, the appellant commenced this action, alleging a breach of the Resignation Agreement, seeking monetary damages and reinstatement to employment. She pleaded that Larkin had breached the Resignation Agreement because he had sworn an affidavit in defence of a class action against the Board,

in which he allegedly disclosed information capable of identifying her as having resigned from the police force. The affidavit was allegedly posted on a website maintained by plaintiffs' counsel in the class action.

[10] In June 2018, the Board filed an application for contravention of settlement with the HRTO, alleging that the appellant had repeatedly contravened the terms of the Resignation Agreement by stating that she had been constructively dismissed by the Board. The appellant filed a response and her own application for contravention of settlement in July 2018, alleging that Larkin breached the Resignation Agreement by swearing the affidavit in the class action.

[11] On February 1, 2019, Favreau J., as she then was, dismissed a motion brought by the appellant to dismiss the Board's application to the HRTO, finding that the Superior Court had no jurisdiction to do so: *Donovan v. (Waterloo) Police Services Board*, [2019 ONSC 818](#), 49 C.P.C. (8th) 141. At para. 56 of her reasons, Favreau J. observed that it would be open to the appellant to raise before the HRTO the issue of jurisdiction over the enforcement of the Resignation Agreement and to respond to the Board's position concerning the effect of that agreement:

... during the hearing of this motion, I sought assurances from the Board that it would not impede Ms. Donovan's ability to make substantive arguments before the Human Rights Tribunal despite the fact that she may have missed some deadlines. In response, the Board's counsel gave an undertaking in court not to take the position before the Tribunal that Ms. Donovan is out of time to raise substantive arguments in response to the application. Therefore, subject to the Tribunal's ability to control its own process, at the Tribunal hearing Ms. Donovan should be allowed to raise issues she may wish to address about the Tribunal's jurisdiction over enforcement of the Resignation Agreement and to fully respond to the Board's position that the Resignation Agreement precludes her from speaking publicly about the matters the Board claims are captured by the confidentiality provision of the agreement.

The Motions in the Superior Court of Justice

[12] The respondents originally brought a motion to strike this action on three grounds: (i) r. 21.01(1)(b) (no reasonable cause of action); (ii) r. 21.01(3)(a) (no jurisdiction over the subject matter); and (iii) r. 21.01(3)(d) (frivolous or vexatious or an abuse of process). Doi J. (the “original motion judge”) dismissed the action under r. 21.01(1)(b), without leave to amend. While the other two grounds were fully argued before the original motion judge, he did not rule on them.

[13] On October 25, 2019, this court allowed the appellant’s appeal from the order of the original motion judge, set aside the order dismissing the action and granted the appellant leave to amend her statement of claim as against Larkin: *Donovan v. Waterloo Regional Police Services Board*, [2019 ONCA 845](#). No issues had been raised before this court with respect to the grounds that were not addressed by the original motion judge and this court did not address those grounds.

[14] The statement of claim has gone through four iterations, the current being a Fresh as Amended Statement of Claim, discussed below. Pursuant to this court’s order, the appellant filed an Amended Amended Statement of Claim on January 29, 2020.

[15] Shortly thereafter, counsel for the respondents sought directions from the original motion judge concerning the two issues that had not been addressed by his order. He determined that a fresh motion should be brought before another judge, pursuant to [r. 59.06\(1\)](#) of the *Rules of Civil Procedure* (sometimes referred to as the “slip rule”).

[16] The appellant subsequently filed a Fresh as Amended Statement of Claim on November 23, 2020. The motion to dismiss the action for want of jurisdiction was heard by a different judge (the “second motion judge”) on February 23 and March 1, 2021. In reasons released April 19, 2021, the second motion judge dismissed the action on the ground that the essential character of the dispute involved the appellant’s employment, which had been covered by a collective agreement and

was subject to the dispute resolution and arbitration provisions of that agreement: referring to *Weber v. Ontario Hydro*, [1995 CanLII 108 \(SCC\)](#), [1995] 2 S.C.R. 929; and *Desgrosseillers v. North Bay General Hospital*, [2010 ONSC 142](#).

This Appeal

[17] The matter now comes to us on appeal.

[18] The issue of jurisdiction calls for us to consider the pleading in the Fresh as Amended Statement of Claim. In her claim for relief, the appellant claims against both respondents, jointly and severally, for breach of contract, misfeasance in public office and negligence. She also claims separately against Larkin for damages for misfeasance in public office.

[19] The appellant pleads that:

- she entered into a Resignation Agreement on June 8, 2017, which contained a non-disclosure and confidentiality clause, requiring the parties to keep the existence and terms of the agreement confidential;
- Larkin took retaliatory action against her as a result of her complaints to the respondent Board concerning his conduct;
- Larkin swore an affidavit in defence of a class action lawsuit against the respondents that claimed damages for systemic and institutional gender-based discrimination and harassment;
- attached to Larkin's affidavit was a chart listing HRTO complaints commenced by female employees of the Board within the preceding five years, including their status or resolution;
- the affidavit was published on the public website of the law firm advancing the class action lawsuit;
- although the affidavit did not identify the claimants, the chart contained sufficient information to enable the appellant to be identified as someone who had filed a human rights complaint and had voluntarily resigned from the Board;
- by swearing and delivering the affidavit, Larkin "used" her, "to attempt to stop the efforts of the [appellant's] female colleagues in their fight for justice";

- the class action was dismissed as a result of a motion that relied on Larkin's affidavit;
- Larkin was aware of the terms of the Resignation Agreement, including that it was confidential;
- by swearing the affidavit, Larkin deliberately involved her in the class action lawsuit and violated the terms of the Resignation Agreement, knowing that it would impede her recovery from post-traumatic stress disorder;
- in January 2018, the Board appealed a WSIB claim she had made. Although she does not explicitly plead it, she is presumably asserting that the Board breached the Resignation Agreement by engaging in further legal proceedings against her; and
- she "claims the relief as set out in paragraph 1 of the Statement of Claim for two distinct and separate breaches of the resignation agreement by the defendant Board and the individual defendant."

[20] The appellant raises five grounds of appeal, which we address in order.

(1) Improper Procedure

[21] The appellant submits that the motion was not properly before the second motion judge because it could have been addressed by way of a r. 59.06 motion brought before the original motion judge and prior to the appeal, by filing a cross-appeal to this court, or filing a r. 59.06 motion to this court.

[22] We do not accept this submission.

[23] As the issue of jurisdiction was not addressed by the original motion judge or by either party on the previous appeal to this court, there is no impediment to raising it on this appeal.

[24] The matter was properly before the second motion judge, although not pursuant to the "slip rule". Rather, a remedy was available under [r. 59.06\(1\)](#) of the [Rules of Civil Procedure](#), "to ... obtain other relief than that originally awarded". Alternatively, it was open to the respondents to bring a free-standing motion to raise the issue of the court's jurisdiction, given the delivery of the Fresh as Amended Statement of Claim.

(2) Jurisdiction

[25] The appellant submits the Superior Court of Justice has jurisdiction over her claims and that jurisdiction has not been removed by arbitral agreement. She relies on *Skof v. Bordeleau*, [2020 ONCA 729](#), 456 D.L.R. (4th) 236, leave to appeal refused, [2021] S.C.C.A. No. 17. She argues that there is nothing in the applicable collective agreement to oust the court's jurisdiction and that as a former member of the police force and no longer a member of the bargaining unit, she has no standing before the Ontario Police Arbitration Commission. She submits that, as in *Skof*, she is seeking a remedy for misfeasance in public office, which does not fall within the jurisdiction of an arbitrator. She submits that the principles in *Weber* and *St. Anne Nackawic Pulp & Paper v. CPU*, [1986 CanLII 71 \(SCC\)](#), [1986] 1 S.C.R. 704, have no application.

[26] *Skof* is plainly distinguishable because this court found, at para. 17, the dispute related to disciplinary proceedings in a regulatory context and did not fall within the collective agreement. This basis alone justified the second motion judge in distinguishing *Skof*.

[27] The second motion judge did precisely what the authorities require. He searched for the “essential character” of the dispute and found, at para. 80, that the Resignation Agreement was executed in the ambit of the collective agreement and took its essential character from the collective agreement. It was the product of a negotiated agreement of all outstanding employment matters between the parties. We see no error in this characterization.

[28] However, the motion judge did not grapple with the question of whether the appellant will be permitted, under the collective agreement or the Resignation Agreement, to invoke the grievance procedure now that she is no longer employed by the respondent. This affects the outcome.

[29] In *Skof*, explicit provisions of the memorandum of agreement unequivocally provided that the collective agreement did not apply to the appellant in that case, other than with respect to his salary and benefits, while he was on a leave of absence as the president of the Ottawa Police Association. As a result, there was no question that the grievance procedure under the collective agreement was not available to him.

[30] Here, there is no evidence that the appellant will be permitted to invoke the grievance procedure now that she is no longer an employee. The collective agreement is silent with respect to this issue. Moreover, the Resignation Agreement provides in para. 1 that upon her resignation, she ceases “to be an employee of the Board for any and all purposes at law whatsoever”.

[31] The record does not permit us to decide this issue. An arbitrator is best placed to interpret the collective agreement and the Resignation Agreement and determine whether the appellant is precluded from invoking the grievance procedure to pursue her remedies.

(3) Bad Faith

[32] The appellant submits that in pursuing this matter, the respondents are acting in bad faith by failing to raise the issue of jurisdiction in a timely way and that they are using the court process for an improper purpose. As we find the respondents were entitled to have the issue of jurisdiction determined, this submission fails.

(4) Apprehension of Bias

[33] In her factum, the appellant makes an allegation of reasonable apprehension of bias against the second motion judge.

[34] The motion occupied two days, February 23 and March 1, 2021. Due to the pandemic, the hearings were heard remotely. There was a “Zoom bombing” during the first hearing, when unknown persons viewing the hearing remotely displayed

what has been described as sexually explicit and racist imagery on the screens of all viewers.

[35] The appellant states that following the hearing, CBC news published an article that insinuated that she was to blame for the disruption, because she had shared the public Zoom link with her “followers”, presumably referring to her followers on social media. In her factum, she states that she had distributed the Zoom link and the court’s “Zoom User Guide for Remote Hearings” to her followers and pointed out to them the section that explains that court permission was required to share screens. She states that she believed her followers would only be able to observe the proceeding.

[36] Subsequently, prior to the March 1, 2021 hearing, the Regional Senior Judge gave directions that the Zoom details of the March 1, 2021 hearing were not to be published or distributed without the prior written order of the presiding judge or the Regional Senior Judge.

[37] On the basis of the foregoing, the appellant states that she “believes that she was wrongfully blamed for the ‘Zoom bombing’ incident”, and that this resulted in an apprehension of bias against her because the second motion judge decided in favour of the respondents, which was a “marked departure from established legal principles.”

[38] The appellant did not pursue this issue in oral submissions, possibly because she had reached the end of her time allocation. However, she did not expressly withdraw the submission. Asserting that a judge has departed from the law because of bias against a litigant is a very serious allegation. Although the appellant is self-represented, her written materials and oral submissions demonstrated a high level of sophistication. She clearly appreciates the meaning and consequences of her words. In this case, there was no evidentiary basis for

the allegation, and it can be described as “spurious”. Her submission therefore fails.

(5) Litigation Efficiency

[39] The appellant submits that the second motion judge erred in failing to convert the motion before him to a motion for judgment “as the best way to achieve the most just, most expeditious, and least expensive result”, in accordance with [r. 37.13\(2\)\(a\)](#) of the *Rules of Civil Procedure*.

[40] The short answer to this submission is that this was not fully argued before the second motion judge, and it would not have been appropriate for him to grant it in these circumstances, nor would it be appropriate to grant on this appeal: see *McCracken v. Canadian National Railway Company*, [2012 ONCA 445](#), 111 O.R. (3d) 745, at para. [141](#).

Conclusion

[41] For these reasons, we agree with the respondents’ submission that the appellant’s claims are subject to determination pursuant to the procedures set out in the collective agreement and the [PSA](#). To the extent that the claim seeks relief that is not available under the collective agreement or the *PSA*, it is subject to the jurisdiction of the HRTO, in which both parties have asserted claims that are currently outstanding.

[42] We therefore dismiss the appeal. In the particular circumstances of this case, however, we vary the order of the Superior Court by staying this action until such time as the appellant’s remedies under the collective agreement and in the HRTO have been exhausted.

[43] Only at that point will this court determine whether it should exercise any residual discretion it may have to grant relief that is not available under the statutory labour arbitration regime or in the HRTO.

[44] In her supplementary notice of appeal, the appellant indicates that she also wishes to appeal from the costs award below. In light of our disposition of the appeal and given that the appellant made no arguments to support this position separately, we see no basis to overturn the costs award below.

[45] We did not hear submissions on costs of the appeal. Costs may be addressed by written submissions. The respondents shall have 15 days within which to deliver their submissions. The appellant shall have 15 days after receipt of the respondents' submissions to reply. The costs submissions shall be limited to five pages in length, excluding costs outlines.

“G.R. Strathy C.J.O.”

“L.B. Roberts J.A.”

“L. Sossin J.A.”

Tab 119

Tab 120

Toronto Star v. AG Ontario, 2018 ONSC 2586 (CanLII)

Source:	Superior Court of Justice
Date:	2018-04-27
File number:	CV-17-569061
Other citations:	142 OR (3d) 266 — 421 DLR (4th) 687 — 291 ACWS (3d) 650 — 410 CRR (2d) 1 — [2018] CarswellOnt 6712 — [2018] OJ No 2256 (QL)
Citation:	Toronto Star v. AG Ontario, 2018 ONSC 2586 (CanLII), < https://canlii.ca/t/hrq6s >, retrieved on 2026-03-23
Most recent unfavourable mention	Fraser v. Canada (Public Safety and Emergency Preparedness) , 2021 FC 821 (CanLII) [...] I am not bound by Toronto Star 2018 and, in any event, it is distinguishable since it addressed the application of the FIPPA to tribunals that “preside over adversarial processes... and act judicially or quasi-judicially” (Toronto Star 2018, at para 2). [...]

Toronto Star Newspapers Ltd. v. Attorney General of Ontario; ARCH Disability Law Centre et al., Intervenor [Indexed as: Toronto Star Newspapers Ltd. v. Ontario (Attorney General)]

Ontario Reports

Ontario Superior Court of Justice

E.M. Morgan J.

April 27, 2018

142 O.R. (3d) 266 | 2018 ONSC 2586

Case Summary

Charter of Rights and Freedoms — Freedom of expression — Open court principle — Freedom of information — [Freedom of Information and Protection of Privacy Act](#) violating s. 2(b) of Charter substantively by presuming non-disclosure of adjudicative records held by administrative tribunals under "personal information" exemption and procedurally by

occasioning delay in accessing adjudicative records — Procedural infringement justified under s. 1 of Charter — Substantive infringement not justified under s. 1 — Canadian Charter of Rights and Freedoms, ss. 1, 2(b) — Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31.

The applicant brought an application challenging the constitutionality of certain provisions of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") insofar as those provisions apply to "adjudicative records" held by 13 administrative tribunals which hold adjudicative hearings. In particular, the applicant submitted that the presumption of non-disclosure of records under the "personal information" exemption in s. 21(1) of *FIPPA* violates the open court principle under s. 2(b) of the *Canadian Charter of Rights and Freedoms* when applied to adjudicative records held by those tribunals. "Adjudicative records", in the context of this application, meant records that are part of the actual record of the tribunal hearing, not documents that were part of the pre-hearing discovery but that did not get introduced at the hearing itself.

Held, the application should be allowed.

The applicant had public interest standing to bring this application, and was not required to mount its constitutional challenge by applying for judicial review of individual Information and Privacy Commission decisions.

Of the 13 tribunals identified by the applicant, eight did not use the *FIPPA* process at all. Unless and until the applicant's (or anyone else's) rights were infringed by those eight non-*FIPPA* applying tribunals, there was nothing further to analyze in respect of them.

The open court principle, which is inextricably tied to the rights guaranteed by s. 2(b) of the *Charter*, applies to administrative tribunals as well as to courts. *FIPPA* violates s. 2(b) of the *Charter* in two respects -- substantively by imposing a reverse onus on a request for adjudicative records to which the "personal information" exemption is said to apply; and procedurally by occasioning delay in accessing adjudicative records. The multiple objectives of *FIPPA* are sufficiently important to warrant overriding a *Charter*-protected right. There is a rational connection between those objectives and the inclusion of adjudicative tribunals in the Schedule to *FIPPA*. The substantive violation of s. 2(b) is not justified under s. 1 of the *Charter*. The reverse onus on requests for personal information does not minimally impair s. 2(b). The deleterious effects of the presumption against disclosure are real and substantial, and outweigh the purely speculative advantage of encouraging access to justice by individuals who might stop using the relevant tribunals if their identities were exposed to the public. A declaration of invalidity [page267] was granted. As for *FIPPA*'s procedural limitations on s. 2(b), the notice requirements, timelines, etc. minimally impair s. 2(b). While those procedural factors may be subject to extension and abuse in individual cases, they are, in their own terms, justifiable as minimal intrusions on the open court principle. That conclusion effectively rendered the proportionality analysis redundant: a minimal impairment of a *Charter* right is already proportionate to that right.

Ontario (Public Safety and Security) v. Criminal Lawyers' Assn., [2010] 1 S.C.R. 815, [2010] S.C.J. No. 23, 2010 SCC 23, 212 C.R.R. (2d) 300, 84 C.P.R. (4th) 81, 255 C.C.C. (3d) 545, 76 C.R. (6th) 283, 402 N.R. 350, 319 D.L.R. (4th) 385, EYB 2010-175469, 2010EXP-1990, 262 O.A.C. 258, J.E. 2010-1089, 1 Admin. L.R. (5th) 235, 88 W.C.B. (2d) 628, 189 A.C.W.S. (3d) 675, **consd**

Other cases referred to

Alberta v. Hutterian Brethren of Wilson Colony, [2009] 2 S.C.R. 567, [2009] S.C.J. No. 37, 2009 SCC 37, 310 D.L.R. (4th) 193, [2009] 9 W.W.R. 189, J.E. 2009-1407, EYB 2009-161892, 390 N.R. 202, 9 Alta. L.R. (5th) 1, 81 M.V.R. (5th) 1, 460 A.R. 1, 179 A.C.W.S. (3d) 327; *Alberta (Information*

and Privacy Commissioner) v. United Food and Commercial Workers, Local 401, [2013] 3 S.C.R. 733, [2013] S.C.J. No. 62, [2013 SCC 62](#), 451 N.R. 253, 2013EXP-3621, 2013EXPT-2096, J.E. 2013-1964, 239 L.A.C. (4th) 317, D.T.E. 2013T-775, EYB 2013-229254, 297 C.R.R. (2d) 71, 60 Admin. L.R. (5th) 173, 88 Alta. L.R. (5th) 1, [2014] CLLC Â210-003, 365 D.L.R. (4th) 257, [2014] 2 W.W.R. 1, 561 A.R. 359, 235 A.C.W.S. (3d) 375; *ARPA Canada v. Ontario* (2017), 138 O.R. (3d) 253, [2017] O.J. No. 2969, [2017 ONSC 3285](#), 383 C.R.R. (2d) 25 (S.C.J.); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999 CanLII 699 \(SCC\)](#), [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39, 174 D.L.R. (4th) 193, 243 N.R. 22, J.E. 99-1412, REJB 1999-13279, 14 Admin. L.R. (3d) 173, 1 Imm. L.R. (3d) 1, 89 A.C.W.S. (3d) 777; *Batty v. Toronto (City)* (2011), 108 O.R. (3d) 571, [2011] O.J. No. 5158, [2011 ONSC 6862](#), 248 C.R.R. (2d) 175, 12 R.P.R. (5th) 26, 90 M.P.L.R. (4th) 250, 342 D.L.R. (4th) 129, 209 A.C.W.S. (3d) 542 (S.C.J.); *Bell Canada v. Canadian Telephone Employees Assn.*, [2003] 1 S.C.R. 884, [2003] S.C.J. No. 36, [2003 SCC 36](#), [2003] 1 S.C.R. 884, 227 D.L.R. (4th) 193, 306 N.R. 34, [2004] 1 W.W.R. 1, J.E. 2003-1227, 3 Admin. L.R. (4th) 163, [2003] CLLC Â230-021, 109 C.R.R. (2d) 65, 123 A.C.W.S. (3d) 531, 46 C.H.R.R. D/495; *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, [2013] S.C.J. No. 72, [2013 SCC 72](#), 366 D.L.R. (4th) 237, 452 N.R. 1, 312 O.A.C. 53, 2014EXP-30, J.E. 2014-21, 303 C.C.C. (3d) 146, 7 C.R. (7th) 1, 297 C.R.R. (2d) 334, 110 W.C.B. (2d) 753; *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 S.C.R. 524, [2012] S.C.J. No. 45, [2012 SCC 45](#), 325 B.C.A.C. 1, 434 N.R. 257, 34 B.C.L.R. (5th) 1, 2012EXP-3353, J.E. 2012-1793, EYB 2012-211411, [2012] 10 W.W.R. 423, 95 C.R. (6th) 1, 267 C.R.R. (2d) 1, 290 C.C.C. (3d) 1, 352 D.L.R. (4th) 587, 220 A.C.W.S. (3d) 536, 103 W.C.B. (2d) 625; *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610, [2007] S.C.J. No. 30, [2007 SCC 30](#), 281 D.L.R. (4th) 589, 364 N.R. 89, J.E. 2007-1276, 158 C.R.R. (2d) 127, 158 A.C.W.S. (3d) 919, EYB 2007-121233; *Canadian Broadcasting Corp. v. Manitoba (Attorney General)*, [2008] M.J. No. 286, [2008 MBCA 94](#), [2008] 10 W.W.R. 19, 58 C.P.C. (6th) 5, 296 D.L.R. (4th) 724, 228 Man. R. (2d) 312, 168 A.C.W.S. (3d) 94; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996 CanLII 184 \(SCC\)](#), [1996] 3 S.C.R. 480, [1996] S.C.J. No. 38, 139 D.L.R. (4th) 385, 203 N.R. 169, 182 N.B.R. (2d) 81, 110 C.C.C. (3d) 193, 2 C.R. (5th) 1, 39 C.R.R. (2d) 189, EYB 1996-67336, J.E. 96-2090, 66 A.C.W.S. (3d) 444, 32 W.C.B. (2d) 273; *Canadian Broadcasting Corp. v. The Queen*, [2011] 1 S.C.R. 65, [2011] S.C.J. No. 3, [2011 SCC 3](#), 227 C.R.R. (2d) 121, 2011EXP-380, 411 N.R. 75, 264 C.C.C. (3d) 311, 328 D.L.R. (4th) 651, J.E. 2011-207, 199 A.C.W.S. (3d) 1161, 92 W.C.B. (2d) 791; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995 CanLII 145 \(SCC\)](#), [1995] 1 S.C.R. 3, [1995] S.C.J. No. 1, 122 [page268] D.L.R. (4th) 129, 177 N.R. 325, J.E. 95-232, 26 Admin. L.R. (2d) 1, [1995] 2 C.N.L.R. 92, 52 A.C.W.S. (3d) 1185; *C.B. Powell Ltd. v. Canada (Border Services Agency)*, [2010] F.C.J. No. 274, [2010 FCA 61](#), [2011] 2 F.C.R. 332, 400 N.R. 367, 2011EXP-3678, 185 A.C.W.S. (3d) 914; *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, [2005] S.C.J. No. 33, [2005 SCC 35](#), 254 D.L.R. (4th) 577, 335 N.R. 25, J.E. 2005-1144, 130 C.R.R. (2d) 99, 53 C.H.R.R. D/1, 139 A.C.W.S. (3d) 1080, EYB 2005-91328; *City of Toronto (Re)*, [2016 CanLII 31964](#) (Ont. IPC); *Cooper v. Canada (Canadian Human Rights Commission)*, [1996 CanLII 152 \(SCC\)](#), [1996] 3 S.C.R. 854, [1996] S.C.J. No. 115, 140 D.L.R. (4th) 193, 204 N.R. 1, J.E. 96-2213, 43 Admin. L.R. (2d) 155, 26 C.C.E.L. (2d) 1, 96 CLLC Â230-056, 40 C.R.R. (2d) 81, 27 C.H.R.R. D/173; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991 CanLII 57 \(SCC\)](#), [1991] 2 S.C.R. 5, [1991] S.C.J. No. 42, 81 D.L.R. (4th) 121, 122 N.R. 361, J.E. 91-935, 47 O.A.C. 271, 50 Admin. L.R. 44, [1991] OLRB Rep. June 790, 91 CLLC Â14,024 at 12217, 4 C.R.R. (2d) 1, 27 A.C.W.S. (3d) 35; *CUPE, Local 963 v. New Brunswick Liquor Corp.*, [1979 CanLII 23 \(SCC\)](#), [1979] 2 S.C.R. 227, [1979] S.C.J. No. 45, 97 D.L.R. (3d) 417, 26 N.R. 341, 25 N.B.R. (2d) 237, 79 CLLC Â14,209 at 111, [1979] 2 A.C.W.S. 108; *Dagenais v. Canadian Broadcasting Corp.*, [1994 CanLII 39 \(SCC\)](#), [1994] 3 S.C.R. 835, [1994] S.C.J. No. 104, 120 D.L.R. (4th) 12, 175 N.R. 1, J.E. 95-30, 76 O.A.C. 81, 94 C.C.C. (3d) 289, 34 C.R. (4th) 269, 25 C.R.R. (2d) 1, 51 A.C.W.S. (3d) 1045, 25 W.C.B. (2d) 304, EYB 1994-67668; *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, [2012] S.C.J. No. 12, [2012 SCC 12](#), 428 N.R. 146, 2012EXP-1231, J.E. 2012-672, EYB 2012-203967, 255 C.R.R. (2d) 289, 34 Admin. L.R. (5th) 1, 343 D.L.R. (4th) 193, 211 A.C.W.S.

(3d) 852; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, [2003] S.C.J. No. 63, [2003 SCC 62](#), 232 D.L.R. (4th) 577, 312 N.R. 1, J.E. 2003-2076, 218 N.S.R. (2d) 311, 45 C.P.C. (5th) 1, 112 C.R.R. (2d) 202; *Doyle v. Ontario (Ministry of Municipal Affairs)*, [2017 CanLII 52705](#) (Ont. PSGB); *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9, [2008 SCC 9](#), 329 N.B.R. (2d) 1, 64 C.C.E.L. (3d) 1, EYB 2008-130674, J.E. 2008-547, [2008] CLLC Â220-020, 170 L.A.C. (4th) 1, 372 N.R. 1, 69 Imm. L.R. (3d) 1, 291 D.L.R. (4th) 577, 69 Admin. L.R. (4th) 1, 95 L.C.R. 65, D.T.E. 2008T-223, 164 A.C.W.S. (3d) 727; *Edmonton Journal v. Alberta (Attorney General)*, [1989 CanLII 20 \(SCC\)](#), [1989] 2 S.C.R. 1326, [1989] S.C.J. No. 124, 64 D.L.R. (4th) 577, 102 N.R. 321, [1990] 1 W.W.R. 577, J.E. 90-47, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 41 C.P.C. (2d) 109, 45 C.R.R. 1, 18 A.C.W.S. (3d) 894, EYB 1989-66926; *Finlay v. Canada (Minister of Finance)*, [1986 CanLII 6 \(SCC\)](#), [1986] 2 S.C.R. 607, [1986] S.C.J. No. 73, 33 D.L.R. (4th) 321, 71 N.R. 338, [1987] 1 W.W.R. 603, J.E. 87-100, 23 Admin. L.R. 197, 17 C.P.C. (2d) 289, 2 A.C.W.S. (3d) 277, 8 C.H.R.R. D/3789; *Ford v. Quebec (Attorney General)*, [1988 CanLII 19 \(SCC\)](#), [1988] 2 S.C.R. 712, [1988] S.C.J. No. 88, 10 C.H.R.R. D/5559, 36 C.R.R. 1, 54 D.L.R. (4th) 577, 90 N.R. 84, 13 A.C.W.S. (3d) 7, 6 W.C.B. (2d) 186; *Gazette Printing Co. v. Shallow* (1909), [1909 CanLII 46 \(SCC\)](#), 41 S.C.R. 339, [1909] S.C.J. No. 7; *Guardian News v. Westminster Magistrates' Court*, [2012] EWCA Civ. 420; *H. (M.E.) v. Williams* (2012), 108 O.R. (3d) 321, [2012] O.J. No. 525, [2012 ONCA 35](#), 287 O.A.C. 133, 346 D.L.R. (4th) 668, 15 R.F.L. (7th) 37, 212 A.C.W.S. (3d) 735; *Hanif v. Ontario College of Pharmacists*, [2014] O.J. No. 2137, [2014 ONSC 2598 \(Div. Ct.\)](#); *Hill v. 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APPLICATION for a declaration of invalidity.

Paul Schabas, Iris Fischer and Jessica Lam, for applicant.

Daniel Guttman, Yashoda Ranganathan and Audra Ranalli, for respondent. [page272]

Niiti Simmonds, Mariam Shanouda and Marie Chen, for HIV and AIDS Legal Clinic Ontario, ARCH Disability Law Centre and Income Security Advocacy Centre.

Paul Cavalluzzo, Adrienne Telford and Tyler Boggs, for Laborers' International Union of North America and LIUNA Local 183.

William Challis, for Information and Privacy Commissioner of Ontario.

Julia Lefebvre and Abbas Kassam, for Canadian Journalists for Free Expression.

Linda Rothstein and Andrew Lokan, for Ontario Judicial Council.

Mary Birdsell and Jesse Mark, for Justice for Children and Youth.

E.M. MORGAN J.: —

I. The Constitutional Challenge

[1] This case challenges the application of the *Freedom of Information and Protection of Privacy Act* ("FIPPA")¹ to 13 administrative tribunals,² all of which are designated as "institutions" in the Schedule to the FIPPA General Regulation.³ The claim originally included the Workplace Safety and Insurance Appeals Tribunal ("WSIAT") as a named respondent, but the Toronto Star has abandoned its claim against WSIAT and the application against it is accordingly dismissed.

[2] Among other things, FIPPA sets out terms on which access is granted to documents held by government and wider public sector institutions. The Toronto Star contends that by applying to tribunals that preside over adversarial processes, adjudicate disputes and act judicially or quasi-judicially, FIPPA violates the open courts [page273] principle embedded in s. 2(b) of the *Canadian Charter of Rights and Freedoms* (the "Charter").⁴

[3] The venerability of the open courts, or openness principle is not in doubt. In the 13th century, *Magna Carta* confirmed the prohibition against selling writs, or admission tickets to trials, in favour of open public access to court proceedings.⁵ The openness principle was reiterated by Sir Matthew Hale in the 17th century, who noted that witnesses must be examined "in the open court, and in the presence of the parties, their attorneys, counsel and all bystanders".⁶ In the 18th century, William Blackstone understatedly observed that "the open examination of witnesses . . . is much more conducive to the clearing up of the truth".⁷

[4] The concept of open justice easily made the crossing from England; accordingly, Canadian courts have historically recognized that, "it is of vast importance to the public that the proceedings of courts of justice should be universally known".⁸ This has been reinforced in the post-*Charter* era, with the Supreme Court of Canada emphasizing that public access to legal proceedings includes access by the press:

Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.⁹

[5] The question in this application is whether and how this judicial principle applies to contemporary administrative law proceedings. In many ways the 13 tribunals at issue here are stand-ins for a large number of adjudicative tribunals across the province.¹⁰ As former Chief Justice McLachlin describes it, "vast and [page274] unlimited stretches of law and conduct that formerly fell under the jurisdiction of common law courts were swallowed up by these new schemes. . . . More and more, administrative tribunals regulated the problems created by modern society."¹¹

[6] All parties acknowledge that administrative hearings governed by the *Statutory Powers Procedure Act* ("SPPA") are required to be open to the public.¹² In principle, therefore, it is uncontroversial that "[t]he 'open court' principle" -- at least in *some* version -- "is a cornerstone of accountability for decision-making tribunals and courts".¹³

[7] The present controversy arises with respect to documents filed with administrative tribunals that hold adjudicative hearings. More specifically, the issue posed in this Application challenges the means by which such documents are accessed by the press outside of the adjudicative hearing itself.

[8] The application is restricted even further to those documents that qualify as records of tribunal proceedings. The *SPPA* contains a list of "records" for the purposes of hearings by tribunals covered by that Act. This list provides a ready definition of the documents to which the present application applies ("Adjudicative Records"). These include:

- (a) any application, complaint, reference or other document, if any, by which the proceeding was commenced;
- (b) the notice of any hearing;
- (c) any interlocutory orders made by the tribunal;
- (d) all documentary evidence filed with the tribunal, subject to any limitation expressly imposed by any other Act on the extent to or the purposes for which any such documents may be used in evidence in any proceeding;
- (e) the transcript, if any, of the oral evidence given at the hearing; and
- (f) the decision of the tribunal and the reasons therefor,

where reasons have been given.¹⁴

[9] To this definition I would add tribunal dockets or schedules of hearings and registers of actions or proceedings kept by the [page275] adjudicative tribunals. These are included in a similar list of Adjudicative Records published by the Canadian Judicial Council. That list is accompanied by an advisory, which is equally applicable here, as to a number of items that are not included as Adjudicative Records, as follows:

This definition does not include other records that might be maintained by court staff, but that are not connected with court proceedings, such as license and public land records. It does not include any information that merely pertains to management and administration of the court, such as judicial training programs, scheduling of judges and trials and statistics of judicial activity. Neither does it include any personal note, memorandum, draft and similar document or information that is prepared and used by judges, court officials and other court personnel.¹⁵

[10] I would also clarify that Adjudicative Records do not include documents exchanged between the parties to a hearing and filed with the tribunal in the pre-hearing stage of proceedings. Counsel for the Attorney General and a number of the intervenors advise that some adjudicative tribunals require parties to file with the tribunal all relevant documents in their possession prior to the hearing. In those situations, the tribunal's file in the given matter may resemble the full pre-trial documentary discovery in civil litigation.

[11] Counsel for the Toronto Star states that the challenge posed here is for access to Adjudicative Records that are part of the actual record of the tribunal hearing. It does not include documents that were part of pre-hearing discovery but that did not get introduced at the hearing itself. The open court principle includes access to "anything that has been made part of the record",¹⁶ but it does not cover documents that did not make it to open court.

[12] While most of the tribunals in issue hold open hearings and make their Adjudicative Records available for inspection during the hearing itself, the Toronto Star has documented the difficulties in obtaining access to tribunal schedules before the hearing has taken place and inspecting or copying Adjudicative Records after the hearing has ended. Many, although not all, of the tribunals in issue take the position that access to those documents is governed by *FIPPA*.

[13] The Toronto Star submits that *FIPPA*, which sets out statutory terms on which members of the press or public can obtain copies of all documents held by government, burdens the [page276] right of access and is thereby contrary to the requirement of open hearings. In response, the Attorney General submits that *FIPPA* is itself a tool to promote access to information held by public and administrative bodies, including tribunals, and in doing so thereby fosters openness.

[14] The Supreme Court of Canada has stated that "[a]ll law and law-makers that touch the people must conform to [the [Charter](#)]. Tribunals and commissions charged with deciding legal issues are no exception."¹⁷ What needs to be determined is the effect of *FIPPA* in this regard. Do its substantive terms that weigh access to documents against privacy protection, and its procedural regime by which documents are requested, vetted and withheld or produced, conform with or undermine the requirement of openness? As the English Court of Appeal has said in its inimitable way, "The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed?"¹⁸

II. *The FIPPA Process*

[15] In raising its constitutional challenge, the Toronto Star identifies a series of issues that are occasioned by the terms of *FIPPA* as applied to administrative tribunals. These include procedural issues which are alleged to lead to undue delay in obtaining Adjudicative Records, and substantive issues which are alleged to exempt many Adjudicative Records (or much of the information contained in Adjudicative Records) from production at all.

a) *Procedural issues in FIPPA*

[16] The *FIPPA* process is, as counsel for the Toronto Star describes it, a bureaucratic one. To make a relatively long piece of legislation short, under s. 24(1) a person seeking access to a record -- *i.e.*, a document or information, including an Adjudicative Record -- from an applicable institution must make a formal request, pay a minimal prescribed fee and provide sufficient information for the record to be identified.

[17] The head of the institution has authority to determine whether the request is frivolous (s. 24(1.1)), whether there is sufficient detail (s. 24(2)), forward the request to the relevant agency [page277] holding the record and give written notice thereof (s. 25). Further, the head of the institution is mandated to within 30 days advise the applicant whether or not the request will be granted, or to extend the 30-day time period if necessary (s. 27). Before making a decision, an institution head must give written notice to any person effected by the record requested (s. 28(1)) and give a copy of that notice to the requester (s. 28(4)), then allow representations to be made by each (s. 28(2)(c), 28(4) (b)), and within ten days make a decision about disclosing the record in issue (s. 28(4)(c)). Like all of the timelines under *FIPPA*, this period can also be extended as the head of the institution deems necessary (s. 28(8.1)).

[18] A person requesting the record or a person affected by the disclosure has a right of appeal to the Information and Privacy Commission ("IPC") (s. 50(1)). The IPC then provides notice of the appeal to the head of the institution from which the record was requested (s. 50(3)). There are time periods set aside for potential mediation of the dispute (s. 51) and the IPC may conduct a review of the head of institution's initial decision (s. 52). After that, the "person who requested access to the record, the head of the institution concerned and any other institution or person informed of the notice of appeal" has an opportunity to make submissions to the IPC (s. 52(13)). Finally, after

receiving all applicable submissions, the IPC is authorized to make a decision disposing of the issues on appeal (s. 54(1)) and provide notice of the decision to all relevant parties (s. 54(4)).

[19] The *FIPPA* process is a potentially lengthy one when played out in full. Although the above is a capsulized summary, counsel for the Toronto Star points out that in all there are some six different notice periods that can become relevant in a given record request, all of which add to the time that it takes for a request to be processed and answered. The evidence in the record of the Toronto Star's specific access requests to different administrative institutions varies from a few days to many months or even years, depending on the nature of the tribunal and the records being sought.

[20] Since the timelines vary greatly from request to request, it is possible to overstate both the expediency and the delay of the process. The Toronto Star understandably stresses the journalistic imperative of timely disclosure and the newsworthiness of the documents sought. It recounts the experiences of one of its reporters, who sought Adjudicative Records from the OLRB but who gave up his appeal to the IPC after eight months without a final decision on what would be produced. It also recounts experiences of its reporters with the CIBC, in which one request for Adjudicative Records took 12 weeks to be answered. [page278]

[21] The Attorney General stresses the need to accurately balance the competing imperatives of privacy rights and public access under *FIPPA*. It emphasizes the experience related by a Toronto Star reporter in which the HRTO responded to a disclosure request within 45 days of its submission. Other incidents narrated in the affidavit material filed before the court reveal a seven-week process for a reporter to obtain Adjudicative Records from the CIBC, 32 days from the PEHT and ten days for a reporter to be provided with Adjudicative Records from the LTB. Counsel for the Attorney General concedes that many disclosure packages come with notable redactions and withheld material, but contends that the time lines are generally significantly shorter than the more egregious delays cited by counsel for the Toronto Star.

[22] It is noteworthy that both sides agree that there are a number of tribunals included in this application whose process entails no delay at all. As discussed further below, these tend to be the institutions that have fashioned their own method of handling document requests outside of the *FIPPA* process. Thus, for example, the OSC posts its docket lists and its unredacted decisions on its website, and allows public access to Adjudicative Records without requiring any *FIPPA* request at all. The ERT and the OMB do the same, as do the FST and the OCPC except that the names of individuals are typically anonymized (with the exception of police officers, whose names are disclosed by the OCPC).

b) *Substantive issues in FIPPA*

[23] Separate from the cumbersome procedures, the other aspect of *FIPPA* emphasized by counsel for the Toronto Star is that it contains a presumption of non-disclosure of many records. That is, it protects privacy by placing the onus on the party seeking disclosure of records, including Adjudicative Records, to justify why they should be disclosed.

[24] The *FIPPA* regime commences on a premise that simultaneously embraces openness and closure. Section 10(1) provides that "every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless, (a) the record or the part of the record falls within one of the exemptions under sections 12 to 22 . . .". Although the provision is phrased in terms of transparency, the exemptions are anything but minor. Counsel for the Toronto Star identifies one exemption in particular that is so broad as to swallow up the initial mandate to disclose records upon request -- the personal privacy exemption: "A head shall refuse to disclose personal information to any person other than the individual to whom the information relates" (s. 21(1)). [page279]

[25] This prohibition on disclosure of personal information is repeated in Part III of the *FIPPA*, entitled "Protection of Individual Privacy". Under that general heading, s. 42(1) provides that "[a]n

institution shall not disclose personal information in its custody or under its control", except in accordance with a number of listed exceptions. It is fair to say that none of the exceptions to the non-disclosure of personal information exemption in s. 21(1) or s. 42(1), or any of their follow-up sections, pertain to access to Adjudicative Records as a general category.

[26] The trigger phrase "personal information" is described very broadly in s. 2(1) of *FIPPA*:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

[27] As indicated above, there are exceptions to the exemption from disclosure of any record containing "personal information"; and, again, an institution's head at first appears to maintain wide discretion to decide whether the sought-for document falls within the exceptions to the exemption. Section 21(1)(c) provides that the record can be disclosed where it contains "personal information collected and maintained specifically for the purpose of creating a record available to the general public", while s. 21(1) (f) provides more generally that the record may be disclosed "if the disclosure does not constitute an unjustified invasion of personal privacy". This discretion, however, is circumscribed by a further [page280] list of statutory presumptions that narrow the exceptions to the personal information exemption:

21(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;

(d) relates to employment or educational history;

(e) was obtained on a tax return or gathered for the purpose of collecting a tax;

(f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

(g) consists of personal recommendations or evaluations, character references or personnel evaluations; or

(h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

[28] The evidence collected by the Toronto Star and, indeed, the reported decisions by the IPC regarding production of records, suggests that the personal information exemption is so widely invoked that it has become the rule rather than an exemption to the rule. In effect, decisions about production of records under *FIPPA* start from the s. 21(1) premise of non-production rather than from the s. 10(1) premise of production.

[29] Adjudicative Records, in particular, are likely to fall within the definition of "personal information", since they almost inevitably contain personal information identifying the parties, were most often compiled in respect of an investigation into a regulatory breach or other violation of the law, and frequently relate to either welfare benefits, employment, education finances, race or sexuality, etc. Moreover, complaints to regulators, pleadings and other primary documents filed with tribunals invariably contain opinions by one person about the issue at hand or the opinion of one person about another, making them "personal information" under s. 2(1) (e) and (g). Differences of opinion are what adjudicated disputes are virtually always about, but their effect is to bring the Adjudicative Records into the s. 21 exemption.

[30] It is worth noting that one potentially important exception to the personal information exemption, s. 23 of *FIPPA*, appears to [page281] be rarely invoked. A typical comment in IPC decisions is to the effect that "[t]he appellant has not claimed that section 23 [the public interest override] applies in this case, and in my view, it would not apply in any event".¹⁹ That section provides that "[a]n exemption from disclosure of a record . . . does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption."

[31] Despite its seeming importance to the issues here, the IPC does not consider it to override the s. 21(1) exemption of personal information from disclosure. The reason for this, and presumably for the paucity of cases invoking it, is that s. 23 has been given a very strict reading and narrow ambit of operation. The Divisional Court has interpreted s. 23 as applying where the "public interest" is not only more important than the personal information found in the specific Adjudicative Record, but more important than the protection of personal information at all:

The two requirements contained in section 23 must be satisfied in order to invoke the application of the so-called "public interest override": there must be a *compelling* public interest in disclosure; and this compelling interest must *clearly* outweigh the *purpose* of the exemption, as distinct from the value of disclosure of the particular record in question.

(Emphasis in the original)²⁰

[32] As the IPC generally puts it, in order to fall within the s. 23 exception to the non-disclosure rule, the requester must establish that there is a "rousing strong interest and attention"²¹ in the record sought -- again, an interest that goes beyond an interest in reporting on a case before the administrative body but that "add[s] in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices".²² In other words, a requester must demonstrate to the IPC's satisfaction that there is a public interest in the Adjudicative Record not simply to inform the public about the particular case, but for the larger societal purpose of aiding the public in making political choices. [page282]

[33] Even in theory this would eliminate all but the largest and most politically prominent of cases from media access to Adjudicative Records and the details contained therein; in practice, it seems to have reduced the section to negligible use. The minimization of s. 23 is, of course, part and parcel of the expansion of s. 21 and its accompanying sections. Much like an expansive use of exclusionary rules in the law of evidence or deeming provisions in defining "constructive

liability", the "personal information" exemption stands as an adaptable device -- a "legal artifice" that "brand[s] as legally irrelevant, information that might otherwise figure significantly in determining a person's [right of access]".²³ With the contraction of s. 23, many decisions under *FIPPA* embody the idea that the public almost never has a compelling interest in the records, and all that is not already public is kept private.

[34] As a result of *FIPPA*'s aversion to allowing any "personal information" to be disclosed, the LTB (and its predecessor, the Ontario Rental Housing Tribunal),²⁴ the HRT²⁵ and other similar institutions either refuse to produce Adjudicative Records or heavily redact them. This includes dockets and other types of agendas that would help identify the cases in advance of their being heard.²⁶ Furthermore, the IPC has stated that the requester does not satisfied its onus of proving that the request falls within the s. 21(1)(c) exception for documents collected for the purpose of making them available to the public where "the personal information . . . is collected . . . from the [parties] filing the form for the purpose of adjudicating disputes".²⁷ Thus, Adjudicative Records do not fit within any exception to the personal information exemption by virtue of having been filed in a public hearing.

[35] In other words, the presumption of non-disclosure, or the reverse onus in respect of the production of the broadly framed definition of "personal information", presents a serious obstacle to disclosure of Adjudicative Records. As counsel for the IPC acknowledged at the hearing of this application, this statutory [page283] approach has led the HRT and certain other of the 13 tribunals in issue here to refuse most if not all requests for production of records filed with it, including Adjudicative Records, where those records have identifying information. All that is required for a requested record to fall into the non-disclosable category is that the decision maker - - either the head of the institution in the first instance or the IPC on appeal -- be satisfied that the record passes a test set at a rather low bar: "If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information."²⁸

III. *Application of FIPPA*

[36] *FIPPA* applies to all branches of provincial government and to all of the 182 public institutions listed in the Schedule thereto.²⁹ This includes, but is obviously not limited to, a great many adjudicative tribunals. Indeed, a cursory glance at the governing legislation and General Regulation thereunder reveals that *FIPPA* applies to an exceptionally diverse range of institutions. These span all government ministries, government service providers, universities, hospitals, agencies, boards, commissions, corporations and tribunals. Given the variety of functions carried out by these institutions, it is little wonder that the process established under *FIPPA* functions well with some and seems dysfunctional with others.

[37] As already discussed, it is important to note that the Toronto Star challenges access to Adjudicative Records only, and not to all documents held by the institutions to which *FIPPA* applies. This distinction, of course, eliminates Ontario's many non-adjudicative bodies from the ambit of the present analysis. In this application, the Toronto Star does not seek or challenge any records (or the process by which records can be obtained) from public institutions such as government ministries, hospitals, universities, etc. Its focus is strictly on those institutions that act in an adjudicative capacity.

[38] The very fact that on its face *FIPPA* does not distinguish between Adjudicative Records and non-adjudicative records is indicative of the difficulties inherent in fashioning an all-embracing disclosure regime. As suggested by the Canadian Judicial Council's qualification on the definition of Adjudicative Records set out earlier, there is a significant difference between [page284] granting access to documents introduced by parties to hearings and entered into the evidentiary record and granting access to a given institution's management records.

[39] To take a simple illustration, a media request for access to educational records filed by the parties in a professional negligence case must be analyzed one way, while a media request for access to the educational records of the judge presiding over that trial must be analyzed in an entirely different way. Both types of records may well be in the hands of the court or tribunal *qua* public institution, but one set of records are Adjudicative Records that form part of an open court record while the other are administrative or personnel records that ordinarily would play no role in the specific judicial process to which the request relates.

[40] This debate -- *i.e.*, whether administrative bodies are part and parcel of government and the information and documents they hold must be treated as part of government business, or are independent decision-makers and the information and documents they hold must be treated as Adjudicative Records -- highlights a dichotomy that lies at the core of the issues in the application. As the House of Lords put it some eight decades ago, openness to the public is the "authentic hallmark of judicial as distinct from administrative procedure".³⁰ A government personnel committee contemplating hiring a lawyer is not required by the open courts concept to meet in public; a Law Society discipline committee contemplating sanctions against a lawyer is.³¹ The former is a public institution conducting its business or administration, while the latter is a public institution conducting an adjudication.

[41] The duality of being an administrative arm of the executive and an independent adjudicative body characterizes many of the institutions at issue here and poses an interpretive problem in applying *FIPPA*. Counsel for the IPC, which, as noted above, is the body to which *FIPPA* disclosure decisions can be appealed, concedes that while *FIPPA* on its face does not address the different character traits of administrative institutions, there is an open question of interpretation as to how and where its privacy mandate applies. Thus, the IPC itself has yet to determine whether the privacy protections contained in Part III of *FIPPA* apply to Adjudicative Records. That said, institution heads and the IPC routinely apply the s. 21 exemption in response to specific applications for access. [page285]

[42] The Supreme Court of Canada has observed that "[administrative institutions] may be seen as spanning the constitutional divide between the executive and judicial branches of government".³² Thus, on one hand, it has been said that "[i]t is unrealistic to expect an administrative tribunal such as the [Ontario Labour Relations] Board to abide strictly by the rules applicable to courts of law."³³ On the other hand, it has been observed that the very same board -- the OLRB -- "does not carry on any business", but has the power to "exercise certain functions of a judicial nature".³⁴ Former Chief Justice Lamer has pointed out that characterizing administrative bodies depends on their function in the circumstances: "the principles for judicial independence . . . are applicable in the case of an administrative tribunal, where the tribunal is functioning as an adjudicative body settling disputes and determining the rights of parties".³⁵

[43] As indicated, the express terms of *FIPPA* draw no distinction between the administrative or "business" functions of governmental bodies and the adjudicative functions of administrative tribunals. Some institutions covered by *FIPPA* conceive of themselves as part of government and thus "lack [a] constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy".³⁶ Others conceive of themselves as adjudicators rather than administrators and adhere to the notion that they are "expressly created as independent bodies for the purpose of being an alternative to the judicial process".³⁷

[44] This distinction, then, translates into the varying approach to openness and other aspects of procedure that is discernable among the large array of institutions named in the schedule to *FIPPA*. The Supreme Court has indicated that this variety of procedures is an inevitable incident of administrative law: [page286]

Some administrative tribunals are closer to the executive end of the spectrum: their primary purpose is to develop, or supervise the implementation of, particular government policies. Such tribunals may require little by way of procedural protections. Other tribunals, however, are closer to the judicial end of the spectrum: their primary purpose is to adjudicate disputes through some form of hearing. Tribunals at this end of the spectrum may possess court-like powers and procedures. These powers may bring with them stringent requirements of procedural fairness, including a higher requirement of independence.³⁸

[45] Of the 13 institutions specifically put in issue by the Toronto Star, eight do not appear to use the *FIPPA* process at all.³⁹ That is, post-hearing requests for access to and copies of Adjudicative Records are handled directly by the tribunal itself without the mechanism of a *FIPPA* application. Those tribunals have devised their own methodology for assessing the requests. Counsel for the Attorney General and counsel for the IPC support this diversity of approaches. It is their view that *FIPPA* applies where a person has made an application thereunder, but it does not require any given institution to embrace it as the sole mechanism for access to documents.

[46] This view is similar to that taken by the Federal Court of Appeal, where the decision as to whether to apply the federal equivalent to *FIPPA*, the *Privacy Act*, has been left to the institution itself. As the court put it: "... once the Agency placed the documents ... on its Public Record ... those documents became Publicly Available. As such, the limitation on their disclosure, contained in subsection 8(1) of the *Privacy Act* was no longer applicable".⁴⁰ *FIPPA*, like the *Privacy Act*, does not explicitly state under what circumstances it applies to any given institution; the reason for this may well be that the answer eludes any overarching definition.

[47] Simply put, it is inherent to administrative law that procedures -- including the procedures for accessing documents -- invariably "depend upon the nature and the function of the particular tribunal".⁴¹ It is the administrative institution itself that is left to assess not only its own overall character, but the circumstances in which the request arises. [page287]

[48] Leaving it to the institutions to determine whether a *FIPPA* application for Adjudicative Records is necessary is viewed by the Attorney General and the IPC to be in compliance with *FIPPA*. Since many agencies "act[page288] in an administrative capacity, when carrying out its ... regulatory mandate, and in a quasi-judicial, or court-like capacity, when carrying out its adjudicative dispute resolution mandate",⁴² the procedures for documentary access may vary not only between institutions but within them, depending on the function at play. As former Chief Justice McLachlin stated in a speech to the Council of Canadian Administrative Tribunals: "We understand ... that the rule of law does not always call for one right answer in every case."⁴³

[49] Accordingly, to the extent that some of the institutions named in the Toronto Star's notice of application bypass the *FIPPA* regime, there is little more to be said about them here. It is certainly the case that their ability to fashion their own mechanism for public access to Adjudicative Records, and to make their own fine-tuned determinations of the correct balance between openness and privacy, fall within the power of those adjudicative institutions to control their own processes.⁴⁴ Like other requirements of natural justice implemented by administrative tribunals, these document access procedures attract deference. This deference arises not just as an acknowledgment of legislative authority,⁴⁵ but as an acknowledgment of the constitutionally different roles assigned to courts and administrative bodies.⁴⁶

[50] Of course, any tribunal implementing its own mechanism for access to Adjudicative Records may deny access in response to a request. In the event of a challenge, there would have to be a case-specific analysis of whether the openness principle and s. 2(b) of the *Charter* was breached and whether a remedy, whether under s. 24(1) of the *Charter* or otherwise, was applicable under the circumstances. However, the fact that a given tribunal ignores *FIPPA* in making such a decision on its own raises no larger issue.

[51] I note that counsel for the Attorney General makes the point that the Toronto Star's challenge is, in effect, moot with [page289] respect to the eight tribunals that require no formal application under *FIPPA* for a request for Adjudicative Records. It is the Attorney General's position that since no *FIPPA* application was made and denied, there is no evidentiary basis for the present application and the constitutional analysis it demands. Counsel for the Toronto Star, on the other hand, makes the point that the voluntary compliance of the eight tribunals in the face of *FIPPA*'s apparent applicability to those tribunals is not good enough to end the case against them. It is the Toronto Star's position that its constitutional rights, and the constitutional requirement of openness, cannot turn on the discretionary choice of those who administer the specific tribunals from time to time.

[52] Neither side has got it exactly right. The Attorney General states in its factum that with respect to the eight tribunals that bypass *FIPPA*, "the evidence demonstrates that access to the Adjudicative Records of these tribunals was readily granted to the applicant without a formal FOI [freedom of information] request". The record before me accordingly establishes not that the controversy with respect to those tribunals is moot in the sense that there are insufficient adjudicative facts to consider the issue, and not that the conduct of those tribunals is discretionary and subject to unprompted change; rather, it shows that those tribunals are in compliance with the openness principle.

[53] The Supreme Court of Canada has left little doubt that administrative tribunals are competent to interpret and implement constitutional norms -- "We do not have one *Charter* for courts and another for administrative tribunals".⁴⁷ Unless and until the Toronto Star's (or anyone else's) rights are infringed by the eight non-*FIPPA* applying tribunals, there is nothing further to analyze in respect of them. One can assume that they have taken it on themselves to implement procedures which comply with their view of what the *Charter* requires. While it remains to be determined below whether the other tribunals that do apply the *FIPPA* procedure for post-hearing access to Adjudicative Records are in compliance with their constitutional obligations, there is no evidence (and no real argument) that the ready access to documents that the eight tribunals offer amounts to a breach.

IV. Freedom of Expression

[54] "The open court principle is one of the hallmarks of a democratic society . . . [and] is inextricably tied to the rights [page290] guaranteed by s. 2(b) of the *Charter*."⁴⁸ The Supreme Court has declared that this principle includes "guaranteed access to the courts in order to gather information", and that "measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press".⁴⁹ Counsel for the Toronto Star correctly indicates that this includes the presumptive right to Adjudicative Records,⁵⁰ including exhibits entered into evidence,⁵¹ photocopies of all such records⁵² and the ability to disseminate those records by means of broadcast or other publication.⁵³

[55] As discussed earlier in these reasons, these principles apply to administrative tribunals as well as to courts. While the source of administrative tribunals' authority is their enabling statute, "[t]he legitimacy of such tribunals' authority . . . can be effected only if their proceedings are open to the public".⁵⁴ This open access, and concomitant protection of freedom of the press, is in keeping with those tribunals' obligation "in exercising their statutory functions . . . [to] act consistently with the *Charter* and its values".⁵⁵ This is not optional or discretionary on the part of administrative tribunals. As the Supreme Court has stated, "the protection of *Charter* guarantees is a fundamental and pervasive obligation, no matter which adjudicative forum is applying it".⁵⁶

[56] The evidence in the record, and even a perusal of the terms of the statute itself, establishes that *FIPPA* burdens freedom of the press. In coming to this conclusion, it is important to keep in

mind that freedom of expression "protects listeners as well as speakers".⁵⁷ By extension, the Supreme Court has specifically held that [page291] "[a]ccess to exhibits is a corollary to the open court principle."⁵⁸ By further logical extension, the Supreme Court has also observed that "the open court principle gains importance from its clear association with free expression . . . [and that] s. 2(b) [of the *Charter*] provides that the state must not interfere with an individual's ability to 'inspect and copy public records and documents'".⁵⁹ And finally, in case it wasn't already obvious, the Court of Appeal has emphasized that "the right to access exhibits includes the right to make copies".⁶⁰

a) *The reverse onus on "personal information"*

[57] The very structure of the process that *FIPPA* puts in place for obtaining records from its designated institutions impinges on the openness principle and s. 2(b) of the *Charter*, as elaborated by the courts. As reviewed earlier in these reasons, s. 2(1) of *FIPPA* defines "personal information" in the broadest possible terms, while s. 21(1) (which is reiterated in s. 42(1)) sets out a presumption of non-disclosure of personal information and imposes an onus on the requesting party to justify the disclosure of the record. The IPC in its rulings on disclosure has emphasized that, "In the case of information that qualifies as "personal information" under [*FIPPA*], there is a strong assumption against disclosure".⁶¹

[58] As also explained above, these provisions apply not only to records held by the listed institutions as a matter of the business or administration of the institutions but to Adjudicative Records as well -- including evidence filed before tribunals, complaints and other pleadings that form the originating processes before tribunals, dockets and schedules for hearings, transcripts of proceedings, etc. The upshot of these statutory provisions is that the openness principle does not apply as of right to the tribunals governed by the *FIPPA* process; rather, a person or the press that seeks access to Adjudicative Records bears the onus of establishing that an exception to the non-disclosure of personal information rule applies. Again, this is not an insubstantial onus.

[59] I pause here to note that it is the Attorney General's view that there is nothing inherently wrong with *FIPPA*'s stringent [page292] privacy protection and the reverse onus that ensures this protection. Counsel for the Attorney General submits that s. 2(b) of the *Charter* does not guarantee a general right of access to information; he observes that in *CLA*,⁶² which he posits as the leading case on point, the Supreme Court held that "s. 2(b) may require disclosure of documents in government hands where it is shown that, without the desired access, meaningful public discussion and criticism on matters of public interest would be substantially impeded".⁶³ The Attorney General cites a number of cases decided either in Superior Court⁶⁴ or by the IPC⁶⁵ that rely on *CLA* as demonstrating that the *CLA* test is now the accepted basis on which to measure government disclosure obligations.

[60] The cases cited by the Attorney General as following *CLA*, as well as *CLA* itself, illustrate that the Attorney General's position misses the mark here. In *CLA*, the records in question were not produced by the government due to a concern for, *inter alia*, personal privacy.⁶⁶ On the other hand, nothing in *CLA* contradicts the "general principle that the open court principle trumps desires for anonymity".⁶⁷ The key to unravelling this apparent contradiction is in the type of information being requested. As McLachlin C.J.C. described it in *CLA*, the Criminal Lawyers Association applied to obtain "a 318-page report looking into alleged police misconduct"⁶⁸ which contained "records prepared in the course of law enforcement investigations". The request was denied by the Minister of Public Safety and Security partly because the content of the document contained solicitor-client privileged material and partly because it was a law enforcement investigatory record.

[61] The *CLA* case, in other words, did not deal with Adjudicative Records such as those in issue here; and since the documents were investigative and were not part of a record before an adjudicative tribunal, the open court principle did not apply. The same is true of the other cases referred to by counsel for the Attorney [page293] General in this regard. One of those cases entails a request by a university employee for a psychological report contained in his personnel records held by the university;⁶⁹ another entails a request by a reporter for an Auditor General forensic report "directed at the detection of fraud, waste and wrongdoing involving city resources";⁷⁰ while a third entails a request for hospital records pertaining to the provision of abortion services.⁷¹ None of them entails a request for Adjudicative Records.

[62] As already indicated, *FIPPA* does not distinguish between Adjudicative Records and non-adjudicative records. But the open court principle in s. 2(b) of the *Charter* only applies to Adjudicative Records. This very point lies at the core of the Supreme Court's reasoning in *CLA*: "Access to documents in government hands is constitutionally protected only where it is . . . compatible with the function of the institution concerned."⁷² Government agencies and public administrative bodies that hold investigative reports, personnel records, business and accounting records, and the like other than in an Adjudicative Record, are not subject to the open court principle.⁷³ They are obliged under *CLA* to implement transparency only where disclosure of their records is necessary for democratic process.

[63] Adjudicative Records, on the other hand, like court records, are not only entirely compatible with transparency but require it for the sake of the integrity of the administration of justice.⁷⁴ The rationale for maintaining confidentiality over records accumulated by law enforcement and forensic examiners at the investigation stage of a complaint or dispute does not, absent some special circumstance, continue into the open hearing or post-hearing stage of proceedings.⁷⁵ Thus, while access to government business records, including the content of personnel and investigative audits, is granted or withheld subject to the *CLA* test of "meaningful public discussion", the question of access to [page294] documents filed in the Adjudicative Record before administrative tribunals must be answered in accordance with the *Charter*,⁷⁶ including s. 2(b) and the open court principle.

[64] Like most reverse onus provisions, one purpose and effect of s. 21(1) of *FIPPA* and the operation of the exceptions thereto is, simply put, to facilitate the government's case against the party arguing against it.⁷⁷ This obviously makes it more difficult for the press and other document requesters to exercise the rights which they otherwise have under the *Charter*.

[65] This statutory imposition of an onus on the requester to justify the disclosure of Adjudicative Records may or may not be justifiable, but it certainly amounts in the first instance to an infringement on the s. 2(b) *Charter* right of access to those documents. The Supreme Court has stated emphatically that when it comes to access of the press to Adjudicative Records, "covertiness is the exception and openness the rule".⁷⁸ In fashioning a regime that prohibits the disclosure of "personal information" unless the press can establish its justification, *FIPPA* has it the wrong way around.

b) *Delay in accessing Adjudicative Records*

[66] Counsel for the Toronto Star submits that newsgathering inherently requires timeliness. Any newspaper reader would find it difficult to refute this observation. In fact, it takes only the most cursory understanding of the media to comprehend the adage that "old news is no news".⁷⁹ Since time is of the essence to effective journalism, the publication of "stale news . . . cannot rank in importance with the dissemination of contemporary material".⁸⁰

[67] The Alberta Court of Appeal has observed that it is only "contemporaneous access" to relevant materials that "allows the media to fulfill their legitimate role as the eyes and ears of the public".⁸¹ Generally speaking, it is essential in a system that [page295] protects free expression and the press that "the media . . . should not have their right to report on proceedings . . . delayed for any greater period of time than a court believes is absolutely necessary".⁸² Just as justice delayed can be justice denied,⁸³ so reportage delayed can be reportage denied.

[68] The evidence adduced by the Toronto Star demonstrates varying amounts of delay in responding to requests for documents. As detailed earlier in these reasons, those tribunals who utilize the *FIPPA* process take from ten days to eight months and beyond to provide a requester with a final decision. The most typical time frame for the requests contained in the present evidentiary record are somewhere in the 30- to 45-day range. This is roughly in keeping with what one might expect from a review of the legislation itself, which allows for 30 days (with possible extensions) for a first decision by an institution head, with more time needed for an appeal to the IPC.

[69] Counsel for the Attorney General submits that there is no evidence that any of the delays (or redactions) actually impeded the writing of any stories or reporting on any of the cases mentioned in the record. However, it is the Toronto Star's evidence that for many of these incidents the newsworthiness of the reporter's story has faded by the time the documentary production was made by the given tribunal. In the more frequently litigated area of libel law, it is notoriously difficult to prove a negative such as libel chill or the number of articles *not* written,⁸⁴ and it stands to reason that the same applies with respect to delay. It may be difficult to calculate how many article ideas faded away as the days and weeks passed and the writer waited for a decision on whether an Adjudicative Record would be forthcoming.

[70] As Doherty J.A. has elsewhere put it, "The values promoted by s. 2(b) [of the *Charter*] are not served by publication when the speaker has lost his audience and the message to be conveyed has lost its purpose."⁸⁵ It must be the rare story that is still timely months after the event. Canadian readers, like Canadian voters, [page296] expect that "the most accurate and timely polls [and news reports] will be available".⁸⁶ Thus, even if a reporter were "ultimately successful in his challenge . . . the full exercise of his rights would have been compromised by the delay in publication while the challenge was being made".⁸⁷

[71] As with the presumption of non-disclosure in s. 21(1), the delay occasioned by *FIPPA* procedures may or may not be justifiable -- "[a]n unreasonable delay denies justice",⁸⁸ but not all delay is unreasonable. That said, it certainly burdens freedom of the press and amounts in the first instance to an infringement on the s. 2(b) *Charter* right of free expression.

V. Reasonable Limits on Openness and Expression

[72] When it comes to fundamental *Charter* guarantees such as the openness principle, freedom of the press and freedom of expression, "any encroachment upon the guarantees demand[s] justification by the state on a stringent basis".⁸⁹ Having found that *FIPPA* violates s. 2(b) of the *Charter* in two respects -- substantively by imposing a reverse onus on a request for Adjudicative Records, and procedurally by occasioning delay in accessing Adjudicative Records -- it is necessary to turn to s. 1 of the *Charter*. It is here that the analysis of *Charter* rights takes on "a more contextual approach and indicate[s] the harms that might be caused to other rights and interests".⁹⁰ These include, most notably, the privacy rights of litigants and the administration of justice in administrative tribunals.

[73] In considering whether *FIPPA*'s limits on freedom of expression are reasonable and justifiable in a free and democratic society, the analysis follows the *Oakes* test.⁹¹ It will therefore

consider whether the legislative objective is pressing and substantial, whether the means chosen by the legislature is rationally connected to the objective, whether the legislation minimally impairs [page297] the right of free expression, and whether it is proportional considering the deleterious and salutary effects on the right.

a) *Pressing and substantial objective*

[74] Counsel for the Toronto Star submits that the Attorney General has difficulty in articulating any objective for *FIPPA*, let alone a pressing and substantial one. To put it another way, the Toronto Star contends that if there is an identifiable objective to this legislation it is an illegitimate one in that it aims at overriding the openness principle. That is, it is specifically designed to place obstacles in the way of disclosing Adjudicative Records.

[75] In response, counsel for the Attorney General stresses the *FIPPA* objectives as they apply to administrative tribunals: "to provide a right of access to information while at the same time protecting the privacy of individuals". It is the Attorney General's position that the objective of providing individuals a measure of control over information that is personal to them is itself pressing and substantial. To put it another way, "[t]he ability of individuals to control their personal information is intimately connected to their individual autonomy, dignity and privacy. These are fundamental values that lie at the heart of a democracy."⁹²

[76] Courts in other contexts have indicated that contemporary legislation and other state action often exhibits multiple objectives. These objectives, in turn, often take the form of a policy balance between the particular *Charter* rights of the individual and the rights and interests of others with whom the individual may interact.

[77] As an example, counsel for Justice for Children and Youth makes the forceful point that criminal justice legislation aimed at young persons has long reflected multiple objectives: ensuring privacy and other accommodation measures for youths while fostering fair sentencing and other criminal process measures for the community at large. As a further example, in the context of s. 2(b) of the *Charter*, a demonstration in a public park may be curtailed with the objective of preserving some use of the public resource for other residents;⁹³ likewise, hate speech may attract criminal sanctions with the objective of preventing distress to [page298] other individuals and discord in society.⁹⁴ All of these combine a rights-oriented objective with a community-oriented objective.

[78] This thinking has been applied by the Supreme Court of Canada to *FIPPA* itself. In *CLA*, the court identified the dual objectives of *FIPPA* by identifying its purpose and effect: "Both openness and confidentiality are protected by Ontario's freedom of information legislation."⁹⁵ The Williams Commission Report, on which *FIPPA* was originally based, endorsed the application of a freedom of information regime, with its built-in balance of the openness principle with privacy concerns, to administrative tribunals, with specific reference to the latitude to be given each tribunal to fashion its own access policy.⁹⁶

[79] I have little hesitation in concluding that the multiple objectives of *FIPPA* are of sufficient importance, even considering that the law has the effect of infringing s. 2(b) of the *Charter*. The effort to prevent harm to some people is a pressing and substantial objective for a law that otherwise limits freedom of expression.⁹⁷

b) *Rational connection*

[80] Neither the Toronto Star nor the Attorney General make much of an argument with respect to the question of whether means chosen by the legislature -- the application of *FIPPA* to adjudicative tribunals -- is rationally connected to its objectives. Counsel for the Toronto Star is somewhat dismissive of this question, given that he has concluded that there is no valid objective

to the legislation. He tacitly concedes that there might be a rational connection between the means and the objective, but since the objective is seen to contradict authoritative case law identifying the openness principle as a constitutional imperative he contends that the rational connection question is of no import.

[81] Counsel for the Attorney General gives the question equally short shrift. He maintains that the inclusion of adjudicative tribunals in the *FIPPA* regime is rationally connected to the purpose of balancing a right of access against a concern for privacy. Since the Attorney General has submitted that this balancing is [page299] itself a pressing and substantial objective, he submits that all that needs to be demonstrated at this stage is that that objective is logically furthered by the legislation.

[82] I tend to agree with counsel for the Attorney General on this point. Since I have found there to be a valid objective to *FIPPA*, the only question for the next stage of the *Oakes* test is to ask a question not of policy but of logic. As it was put originally in *Oakes*: is there a "rational connection between the fact proved and the ultimate fact presumed"?⁹⁸ The question here manifests as an inquiry into whether one can logically perceive a connection between the inclusion of adjudicative tribunals in the Schedule to *FIPPA* and the balancing that the statute aims to engage. The question virtually answers itself; the rational connection test is met.

c) *Minimal impairment*

[83] Counsel for the Attorney General observes that the minimal impairment requirement is the heart of a s. 1 analysis; it is here that challenged legislation most often rises and falls. The test is a rather stringent one in the sense that the legislative measure that has already been determined to impair *Charter* rights must now be seen to impair them minimally. When it comes to legislative measures with multiple, competing objectives that are balanced against each other, the minimal impairment test becomes a difficult one to meet. "[A] particular legislative regime may have a number of goals, and impairing a right minimally in the furtherance of one particular goal may inhibit achieving another goal."⁹⁹

[84] As discussed earlier, the problem with *FIPPA* is twofold: it substantively infringes s. 2(b) by presuming non-disclosure of a broadly defined version of "personal information, and it procedurally infringes s. 2(b) by causing delay in accessing those Adjudicative Records that it does allow to be disclosed. Given the goal of balancing openness and access with privacy protection, the minimal impairment question must be asked in respect of both forms of rights violation. Does the reverse onus on producing personal information minimally impair the right, and do the timelines and wait periods built into the statute's access to information process minimally impair the right? [page300]

i) *Is there minimal impairment in substance?*

[85] Counsel for the Toronto Star submits that "[t]he exemptions in *FIPPA* and the broad definition of 'personal information' are often used to resist, and even prevent, disclosure of Tribunal Adjudicative Records." While this description may be accurate, it suggests that there is something improper about the way in which heads of institutions or the IPC are applying *FIPPA*. That, however, is not the case. The officials tasked with applying *FIPPA* are, on my reading of the statute, genuinely applying its terms as enacted. If there is a problem with the way records are disclosed by institutions to which *FIPPA* applies, the problem is with the statutory terms themselves and not with anyone's manipulation of them.

[86] By way of illustration, in 2005 the IPC had to consider a double request to the predecessor to the LTB for a schedule of "Cases in a Hearing Block". One of the pair of requests sought a pre-hearing schedule of upcoming cases, while the other sought a post-hearing list of cases that had been considered. For the pre-hearing schedule, the IPC cited privacy grounds in authorizing production of a list of cases with all identifying features -- names, addresses and unit numbers -- redacted. This, of course, made the disclosure meaningless in terms of knowing the actual

hearings on the upcoming schedule, although the IPC indicated that the identifying information would be available at the hearings themselves since they were required under s. 9(1) of the *SPPA* to be open to the public.¹⁰⁰

[87] The IPC then turned its attention to the request for post-hearing information, and again declined to make meaningful production of the tribunal's records. In a key passage of its ruling, the IPC found there to be no distinction between pre-hearing and post-hearing records, despite the fact that the post-hearing records had already been made public during the course of the hearing itself:

The appellant also argues that the record is not personal information because it is "public information". The fact that information may be contained in a document that is or was available to the public does not mean that it is not personal information. Rather, the issue of public availability arises in the analysis of whether any personal information the record may contain is exempt under section 21(1) of [*FIPPA*] ¹⁰¹ [page301]

[88] In other words, while the exemption for personal information was indeed invoked as a basis on which to refuse production of Adjudicative Records, the basis for the refusal was the operation of the statute itself. The presumption of non-disclosure, and the reverse onus on the requester to show that the request falls within an exception to the s. 21(1) personal information exemption, is a feature of *FIPPA* that must be confronted directly.

[89] In other, non-*FIPPA*-related contexts, the grounds for issuing a publication ban -- i.e., for overriding the open court principle on a case by case basis -- are contained in what has become known as the *Dagenais/ Mentuck* test.¹⁰² As the Supreme Court has explained, the openness principle is contained within s. 2(b) of the *Charter*, and so can only be limited in accordance with s. 1 of the *Charter*. Any test that seeks to limit a constitutionally entrenched principle must, therefore, incorporate the essential elements of the reasonable limits analysis within it.¹⁰³ The *Dagenais/Mentuck* test does this in a way that "mirror[s] the minimal impairment and proportionality steps in the s. 1 analysis set out in *R. v. Oakes*".¹⁰⁴ Under *Dagenais/Mentuck*, a publication ban may be issued if the following conditions are met:

- (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.¹⁰⁵

[90] As the test states, the reasons for overriding the openness principle must pose a serious risk, and not just an inconvenience to the parties or the adjudicative body. That said, although the *Dagenais/Mentuck* analysis has been characterized as a "stringent test", it has also been observed that it should not be "applied mechanistically".¹⁰⁶ As it applies to judicial proceedings, the test has been [page302] "tailored . . . to fit a variety of discretionary actions, such as confidentiality orders, judicial investigative hearings and Crown-initiated applications for publication bans".¹⁰⁷ Thus, the names of police informants can be expunged from public accessibility,¹⁰⁸ and information contained in search warrants and other investigative instruments can be withheld from publication,¹⁰⁹ but only where the specific circumstances show that "the public interest in effective law enforcement and privacy" outweighs the principle of "accountability and the transparency of the legal system".¹¹⁰

[91] What is clear from the case law is that it is the openness of the system, and not the privacy or other concerns of law enforcement, regulators, or innocent parties, that takes primacy in this

balance. This, then, impacts directly on the onus of proof. In order for an adjudicative system to comply with s. 2(b) of the *Charter*, "The burden of displacing the general rule of openness lies on the party making the application."¹¹¹ As other courts across the country have stated, publicity is the order of things and "any exceptions" -- including those specifically provided by statute -- "must be substantiated on a case by case basis".¹¹² This onus is necessary "in light of the . . . *Charter* principles which inform the [*Dagenais/Mentuck*] test".¹¹³

[92] I acknowledge, as any court must, that the openness principle and the analysis that accompanies a request to override it, must "tak[e] into account the particular characteristics and circumstances of the . . . proceedings".¹¹⁴ The judicial considerations of the *Dagenais/Mentuck* test have tended to arise in the course of criminal prosecutions, which raise unique factors that may not apply to the regulatory contexts of most administrative tribunals. [page303]

[93] A decision about a revealing a police informant's identity in a record supporting a search warrant will obviously entail very different considerations than a decision about revealing a tenant's identity in a record filed in evidence in LTB hearing. The decision-maker contemplating a limitation on the openness principle must take the differing contexts and the statutory objectives of the particular administrative body into account.¹¹⁵ The particular institution and circumstances of the particular case may require the most stringent application of the *Dagenais/Mentuck* test or a modified and more relaxed version of the test. There is no "one size fits all" application of the openness principle.

[94] Varied though the contexts and considerations may be, however, the decision must always be a constitutionally justifiable one. That is, it "must be exercised in accordance with the *Charter*, whether it arises under the common law, as is the case with a publication ban . . . ; is authorized by statute . . . ; or under [civil] rules of court, for example, a confidentiality order".¹¹⁶ This *Charter* requirement applies equally to "statutory tribunals exercising judicial or quasi-judicial functions involving adversarial type processes",¹¹⁷ since "it is a basic principle that proceedings of . . . [such] administrative tribunals should be open to the public, with the ability to be . . . reported on".¹¹⁸ It is therefore applicable to each of the adjudicative tribunals at issue in this application.

[95] An across-the-board presumption such as that embodied in s. 21 of *FIPPA*, in which privacy and non-disclosure rather than openness and disclosure is the presumptive rule, cannot qualify as a minimum impairment of s. 2(b) of the *Charter*. The open court principle is the fundamental one and the personal information and privacy concerns are secondary to it.¹¹⁹ That principle directs administrative tribunals to protect confidentiality only where a party seeking it establishes that it is necessary to protect important interests.¹²⁰ Although the decision-maker may be exercising a statutory discretion taking into account the context on [page304] a case-by-case basis, the onus must remain on the party seeking to keep the information from the public rather than the other way around.

ii) *Is there minimal impairment in procedure?*

[96] As discussed earlier, the delay and bureaucracy inherent in the *FIPPA* regime also burdens the exercise of s. 2(b) *Charter* rights. As noted, freedom of the press is only operational when the press has timely enough access to information to publish to an audience. Untimely disclosure that loses the audience is akin to no disclosure at all.

[97] The question of whether *FIPPA* minimally impairs the right in this respect is a more difficult one. The *Toronto Star* contends that the statutory notice and other time periods, and the arrangement in which it is administrative personnel and the IPC rather than tribunal members make the disclosure decisions, violate the right to openness in an unjustifiable way. Counsel for the *Toronto Star* submits that the tribunals themselves can and often do make disclosure

decisions, and that this alternative is a more workable and minimally impairing one than the decision-making regime established by *FIPPA*.

[98] The Attorney General, on the other hand, views *FIPPA* as establishing a system that allows administrative tribunals to achieve the appropriate balance between openness and privacy in a manner that fully takes into account each tribunal's mandate and function. Counsel for the Attorney General indicates that administrative tribunals work differently from courts and operate in diverse socio-economic contexts -- specifically, they are less formal in their procedures, often collect large amounts of personal material from litigants in the pre-hearing stage of proceedings, tend to be sparsely staffed and under-resourced, and frequently deal with unrepresented and highly vulnerable litigants. It is the Attorney General's submission that *FIPPA*'s delegation of disclosure decisions to the head of each institution and to the IPC allows this reality to be taken into account.

[99] Moreover, counsel for the Attorney General argues that the result of the Toronto Star's proposal of unregulated access to tribunal records (except directly by each adjudicator) would result in an unwieldy burden on adjudicators. Since the Toronto Star's position closely analogizes adjudicative tribunals to courts, adjudicators in the tribunal system would have to add each disclosure application to their case load. *FIPPA*'s delegation of the task to institution heads and the IPC effectively relieves this pressure. It is the Attorney General's view that *FIPPA*'s structure is workable and sound, and that it establishes a decision-making expertise [page305] that deserves deference as a result of the accumulated knowledge about the privacy considerations at stake and the logistical support it provides to administrative tribunals.

[100] In terms of the expertise of the institution heads and, in particular, the IPC, it is fair to say that the jury is still out. Reading IPC decisions makes one keenly aware that *FIPPA* does not mandate the IPC to take s. 2(b) of the *Charter* into account in making disclosure decisions. Thus, one finds decisions made in review of the HRTO that opine: "While the Tribunal makes the argument that there is a compelling public interest in disclosure of the records, it goes on to recognize that this office has not accepted the 'open court principle' as a basis for overriding the exemption in section 21".¹²¹ Similarly, IPC decisions in review of LTB rulings on disclosure tend to circle back onto the statutory requirements rather than to weigh them against a principle of openness:

Although the appellant's analogy between open court processes and the transparent conduct of hearings by tribunals covered by the *SPPA* has some merit, they are not identical. For example, section 65(4) of the Act excludes documents prepared and filed for the purposes of proceedings before the Courts from coverage under Ontario's freedom of Information regime; while administrative tribunals, including the Tribunal, are subject to the Act and bound by its access and privacy requirements. Accordingly, while the Tribunal's hearings and procedures must comply with the *SPPA*, decisions regarding disclosure of personal information contained in records outside of the actual hearings process must be determined in accordance with the requirements of the Act.¹²²

[101] I do agree, of course, that institution heads and the IPC have developed a sensitivity to the privacy concerns of litigants before adjudicative tribunals. They have certainly been adept at applying the existing statutory presumption against disclosure of any personal information to the end of protecting their privacy. Indeed, I would say that they have been fully committed to *FIPPA*'s policy of ensuring total privacy, holding back not only pleadings and evidentiary documents from public access, but even schedules of cases making those tribunals inscrutable by the press.

[102] It remains to be seen how this will be tempered once institution heads and the IPC turn their minds more fully to the paramount consideration of openness that the *Charter* requires. The legislature has delegated the decision-making task to them, but their decisions now must start taking the applicable *Charter* principles into account. "Deference as respect" may be a formula [page306] embraced by the courts,¹²³ but this posture must not be driven by ideology.¹²⁴ Properly

understood, the point is to pay "respectful attention to the reasons offered or which could be offered in support of a decision".¹²⁵ Thus, it is equally accurate to say that "[d]eference is earned; it is not a birthright."¹²⁶

[103] With all of that, I am mindful of the submission made at the hearing of this application by counsel for the Ontario Judicial Council. That institution is, of course, well versed in both the open court principle and the privacy interests that can be vested in sensitive adjudicative tribunal proceedings. Counsel admonished the court to be cognizant of the complex task of fashioning a disclosure system for a very diverse body of administrative institutions. Some of these institutions have full-time members that sit in formal hearings dealing with substantial commercial matters (e.g., OSC, FST, OMLC, OMB), others sit in more informal proceedings dealing with highly sensitive matters going to personal autonomy of the participating individuals (e.g., HRTO, CICB, OCPC), while still others hold hearings on social justice and welfare issues for unrepresented and often unsophisticated litigants (e.g., LTB, WSIAT).

[104] In view of this complex and diverse picture, counsel for the Ontario Judicial Council warned me to pay heed to "the law of unintended consequences". That, I must say, is sage advice. Under the circumstances, the Toronto Star's proposal -- that the court strike down *FIPPA* insofar as it pertains to Adjudicative Records held by the listed quasi-judicial tribunals and replace it with direct access to the tribunals themselves -- might minimally impair the right of openness enshrined in s. 2(b) of the *Charter*. But I do not know how much collateral damage will be done to the tribunal system in the process. An under-resourced tribunal staffed with part-time adjudicators and little in the way of administrative assistance may find itself overwhelmed in a suddenly *FIPPA*-free procedural environment. [page307]

[105] Moreover, there is a sense that the Toronto Star is perhaps frustrated by having to deal with a cumbersome, bureaucratic system which can sometimes seem neither user-friendly nor prone to make document requests easy. I sympathize with the desire of journalists and others who make *FIPPA* applications on a regular basis to cut through the "red tape", as it were. But bureaucracy in and of itself is not a *Charter* violation. It's just annoying. Legal commentators in the United States have pointed out that, "We have to accept that there's a difference between laws that embody bad policy and laws that a state legislature lacks the power to enact. A law can be bad . . . without being unconstitutional."¹²⁷ That message is an apt one under Canada's constitutional system as well.

[106] In any case, the various timelines built into the *FIPPA* system appear designed to make the system operate fairly. One cannot act judicially in making an access determination without giving notice to affected parties and providing some amount of time for a response. The specific notice and other time periods provided for in *FIPPA* may or may not be ideal, but there is little evidence that the problems are with *FIPPA*'s terms on their face. Where the evidence in the record shows that there have been inordinate delays, the source of the problems may lie more with the particular administrators or decision makers who extend the *FIPPA* timelines than with the statutory system itself. Once the reverse onus on personal information is removed, those human delay factors will hopefully be reduced.

[107] The *Charter* requires public access to Adjudicative Records, which may be tempered on a case-by-case basis by other considerations -- integrity of the administration of justice, safety and security of informants and other third parties, privacy for complainants and other litigants, etc. For an unconstitutional law, "the usual remedy lies under s. 52(1), which provides that the law is of no force or effect to the extent that it is inconsistent with the *Charter*. . . .Section 24(1), by contrast, is generally used as a remedy, not for unconstitutional laws, but for unconstitutional government acts".¹²⁸

[108] To the extent that an applicant for Adjudicative Records has its rights undermined by an institution head or the IPC excessively extending the *FIPPA* timelines, the appropriate course of

action is not to declare the statute (or any of its provisions) of no [page308] force and effect under s. 52(1). Rather, the Superior Court retains jurisdiction to fashion an "appropriate and just" remedy for the aggrieved rights holder under s. 24(1) of the *Charter*,¹²⁹ or to impose an administrative law remedy.

[109] All of this is to say that much as *FIPPA*'s various notice periods, times for submissions, and potential extensions of those times burden the exercise of s. 2(b) rights when it comes to access to Adjudicative Records, on a systemic basis the impairment is minimal. While there may be individual cases of unjustifiable delay and impairment of rights which could lead to an individual remedy, those cases are left for another day.

d) *Proportionality*

[110] The final step in the *Oakes* analysis is to determine whether there is proportionality between the deleterious and the salutary effects of *FIPPA*'s infringing measures.

[111] The deleterious effects of the presumption against disclosure in s. 21(1) and related provisions of *FIPPA* are real and substantial. As counsel for the Toronto Star points out, emphasizing privacy over openness not only has a negative impact on the press but also affects other stakeholders. Regulators have no way of identifying chronic offenders, reference checks on tenants and others who come before the various tribunals are impossible to carry out. Problematic landlords, police and other actors, including repeat human rights offenders, vexatious litigants and the like cannot be discovered by members of the public who have to engage with them. The public cannot know about upcoming hearings for a number of the tribunals, and the media are unable to engage public debate about cases which they do not know are forthcoming and so do not attend or cover.

[112] In the seminal press freedom case under the *Charter*, Wilson J. noted that "we cannot ignore the fact that for every litigant concerned about the adverse impact of publicity upon his or her image in the community, there may be another equally concerned about public vindication and community support."¹³⁰ As indicated, eight of the tribunals in issue bypass the *FIPPA* process altogether, and make their documents presumptively available to the public. Other tribunals invoke *FIPPA* and make documents presumptively unavailable even in the face of parties who may not object to publication. [page309]

[113] Counsel for the Attorney General identifies a number of salutary effects of the reverse onus on disclosing personal information. These include the strong protection of privacy, the support for informality and efficiency by dispensing with the need for lawyers, and the encouragement of use of the administrative tribunal system by vulnerable individuals. While one can certainly appreciate the pragmatic advantages of the system as identified by the Attorney General, these must be seen as outweighed by a process that embodies substantial rather than minimal impairment.

[114] This is especially the case given that speech rights can be characterized as non-instrumental. McLachlin J. (as she then was) has made this point in reviewing the philosophical underpinnings of s. 2(b) of the *Charter*, to the effect that "freedom of expression may be viewed as more than a means to other ends. Many assert that free expression is an end in itself, a value essential to the sort of society we wish to preserve."¹³¹ Where the *Charter* right "respect[s] each and every person as an end", it cannot be contested or measured by a law that "merely manipulate[es] them, or some of them, as means".¹³² If there is no sociological goal or end to weigh against the salutary features of the impugned legislation, the contest between the deleterious effects and those salutary benefits is really no contest at all.

[115] Moreover, there is no real evidence to support the Attorney General's most strenuous point -- that tenants, human rights plaintiffs, complainants against medical professionals, etc. will likely cease using the relevant tribunals if their identities are exposed to the public. While there is affidavit evidence demonstrating that tribunal litigants are concerned about protecting their privacy,

there is little to establish that a change in the s. 21(1) presumption against disclosure would have a chilling effect on tribunal applications.

[116] As already indicated, in matters touching on free expression chilling effects are notoriously difficult to prove. Even taking this difficulty into account, however, it is not possible for me to conclude that the statute's infringement of the openness principle is somehow more than counterbalanced by its potential, if speculative support for access to justice. On the record before me, the salutary effects of the presumption of non-disclosure of personal information in s. 21 of *FIPPA* do not outweigh the deleterious effects of that measure on the *Charter* right to openness. [page310]

[117] As for *FIPPA*'s procedural limitations on s. 2(b), I have already found that the notice requirements, timelines and designation of institution heads and the IPC as decision-makers minimally impair the right. While these procedural factors may be subject to extension and abuse in individual cases, they are in their own terms justifiable as minimal intrusions on the openness principle.

[118] Professor Hogg states in his textbook, and the Supreme Court has confirmed, that this effectively renders the proportionality analysis redundant.¹³³ That is not to deny the overall importance of proportionality, which embodies an analytic approach that has made Canadian law "a global constitutional reference point".¹³⁴ But as a general matter, proportionality determines the conditions which make a limitation on a constitutional right justified and therefore permissible.¹³⁵ A minimal impairment of a *Charter* right is already proportionate to that right and is justifiable on those terms.

VI. *Standing and Factual Basis for the Application*

[119] As a final matter (or, perhaps, as a preliminary, threshold matter), counsel for the Attorney General submits that the Toronto Star has no standing to bring this application and that, in any case, the application should have proceeded by way of judicial review of an IPC decision. Both of these arguments mischaracterize the proceeding; they treat it as a challenge to a particular administrative decision rather than a challenge to a statutory regime authorizing all document access decisions in respect of 13 named tribunals. In my view, this approach has no merit.

[120] As it turns out, this application was really a challenge to the constitutionality of certain provisions of *FIPPA*. It was not a challenge to the constitutionality of any particular decision or set of decisions by administrative decision-makers implementing *FIPPA*. Accordingly, no applicant would be in a better position than the Toronto Star -- a newspaper with vast and ongoing [page311] experience in making access to information applications -- to bring the challenge. "[I]t would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication."¹³⁶

[121] Under current standing rules, the Toronto Star has public interest standing to bring this constitutional application. In considering this question, "the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts".¹³⁷ The Toronto Star easily passes all three steps in the analysis. It raises serious *Charter* issues, it has a real stake in that it is a constant user of the *FIPPA* process for the tribunals in issue and, for that matter, any number of other tribunals across Ontario. The present application is a convenient way to bring issues before the court that pertain to multiple administrative tribunals all authorized by the same piece of legislation.

[122] The Attorney General takes the position that the challenge to the 13 tribunals should be treated like 13 distinct applications, and the Toronto Star must prove that it has standing to

challenge each one. Thus, counsel for the Attorney General argues that the case against several of the tribunals be dismissed, since there is no evidence in the record that a Toronto Star reporter submitted a request to them under *FIPPA*. Counsel for the Toronto Star responds with the observation that requiring 13 different applications, with 13 records of evidence, would be "wasteful, unnecessary, and unproductive and not in the interests of justice to these litigants or the public".¹³⁸ It is hard to disagree with that common-sense proposition.

[123] Furthermore, the Toronto Star is a representative applicant for the entire public -- it is the public's right of access to Adjudicative Records that is in issue. In addition, the 13 named tribunals are, in effect, representatives for a large number of tribunals listed in the Schedule to *FIPPA* that act judicially. Whether at this moment the Toronto Star is seeking documents [page312] from the HRTO, the OLRB, the FST, or the HPARB (the last two of which the Attorney General argues should not be here due to a paucity of evidence) is immaterial. *FIPPA* applies to many tribunals that act judicially, and they all will be impacted by the present ruling with respect to the s. 21(1) reverse onus on personal information.

[124] By way of brief illustration of the type of standing that the Toronto Star enjoys, a doctor and his patient challenged the prohibition in *Quebec's Health Insurance Act*, C.Q.L.R., c. A-29 and *Hospital Insurance Act*, C.Q.L.R., c. A-28 on doctors billing their patients for private services. The Supreme Court of Canada described the standing of the two of them to bring the constitutional challenge, as follows:

The validity of the prohibition is contested by the appellants, George Zeliotis and Jacques Chaoulli. Over the years, Mr. Zeliotis has experienced a number of health problems and has used medical services that were available in the public system, including heart surgery and a number of operations on his hip . . . Mr. Chaoulli is a physician who has tried unsuccessfully to have his home-delivered medical activities recognized and to obtain a licence to operate an independent private hospital. Mr. Zeliotis and Mr. Chaoulli joined forces to apply to the court by way of motion for a declaration that s. 15 *HEIA* and s. 11 *HOIA* are unconstitutional and invalid.¹³⁹

[125] Neither the doctor nor the patient had a current request for private service pending, although both had a history of making such requests. Likewise, the remedy sought by them did not pertain just to them; it pertained to all doctors and all patients seeking payment for private medical services. The Toronto Star and the 13 named tribunals are in parallel positions. The newspaper has a history of doing what it seeks to do with a number of the listed tribunals, and in any case the tribunals are representatives of all of the other similarly situated tribunals. Additionally, the Toronto Star itself is a representative applicant in the sense that its remedy will be every other similarly situated party's remedy.

[126] The Toronto Star may not, right at this moment, have a direct personal interest in obtaining specific Adjudicative Records from all 13 of the tribunals listed in its application (or, for that matter, from all 185 administrative agencies listed in the Schedule to *FIPPA*). But as a major news outlet, it is certainly not a "mere busybody" that needs to be screened out for the sake of judicial efficiency.¹⁴⁰ It has standing to bring this application. [page313]

[127] Along similar lines, counsel for the Attorney General also contends that the present constitutional challenge should have proceeded as a judicial review application. He submits that in failing to do so, the Toronto Star seeks to bypass the IPC. It is the Attorney General's submission that proceeding in this way violates the rule that parties must exhaust all administrative remedies before moving for a remedy in court.¹⁴¹ Counsel argues that "only when the administrative process [*i.e.*, the IPC appeal process] has finished or when the administrative process affords no effective remedy can they proceed to court".¹⁴²

[128] There is, in fact, no administrative process that is relevant here. The Toronto Star commenced its application in the way that it did because its challenge goes well beyond any one request for documents. Moreover, no administrative remedy could be forthcoming in this type of constitutional challenge. The Toronto Star seeks to invoke under s. 52(1) of the *Constitution Act, 1982* to strike down *FIPPA* as the enabling legislation under which the institutional heads and the IPC operate. Administrative decision-makers generally have power to apply the *Charter* and to implement *Charter* remedies under s. 24(1), depending upon whether they are expressly or impliedly authorized to do so by their governing legislation.¹⁴³ But striking down their own enabling statute, or part thereof, is another matter.

[129] There is no reason for the Toronto Star to have proceeded by way of judicial review. That would have been appropriate had the Toronto Star wished to challenge a decision with respect to any one tribunal's Adjudicative Records. A Superior Court application like the present one is the appropriate way to bring a challenge to the provisions of *FIPPA* itself.

VII. Remedy

[130] *FIPPA* infringes s. 2(b) of the *Charter* in two respects: (a) substantively in terms of s. 21 and related sections that contain the presumption of non-disclosure for producing Adjudicative Records containing "personal information" as defined in s. 2(1); and (b) procedurally in terms of the notice provisions, timelines, and authorization for institution heads and the IPC to make [page314] decisions about access to Adjudicative Records. The Attorney General bears the onus under s. 1 of the *Charter* to justify these infringements.¹⁴⁴ It has met this onus with respect to the procedural infringements, but has failed to meet the onus of justification with respect to the substantive breach.

[131] As the Supreme Court has long pointed out, the key to a *Charter* remedy is for the court to address the constitutional violation but to "refrain from intruding into the legislative sphere beyond what is necessary".¹⁴⁵ Given my finding that the presumption of non-disclosure, or reverse onus in s. 21 of *FIPPA* is unconstitutional insofar as it applies to requests for production of Adjudicative Records, *FIPPA*'s application to such requests from adjudicative tribunals is rendered inoperative under s. 52(1) of the *Constitution Act, 1982*. This raises several follow-on questions, as set out by the Supreme Court:

Section 52 is engaged when a law is itself held to be unconstitutional, as opposed to simply a particular action taken under it. Once s. 52 is engaged, three questions must be answered. First, what is the extent of the inconsistency? Second, can that inconsistency be dealt with alone, by way of severance or reading in, or are other parts of the legislation inextricably linked to it? Third, should the declaration of invalidity be temporarily suspended?¹⁴⁶

[132] As indicated, the extent of the inconsistency is limited within the overall scheme of *FIPPA*. The legislation, with its stringent protections of privacy built into s. 21 and other related sections, applies to government records of all sorts and to institutions that serve the public other than in an adjudicative function. This ruling does not apply to non-adjudicative institutions or to records held by adjudicative tribunals that are not within the definition of Adjudicative Records used throughout these reasons for judgment. The present ruling applies only to requests for Adjudicative Records from the 13 institutions named in this application and, by extension, any other analogous institution listed in the Schedule to *FIPPA* that operates in an adjudicative capacity and that holds Adjudicative Records.

[133] Since eight of the listed tribunals apparently answer requests for Adjudicative Records directly and do not require requesters to engage the *FIPPA* process, little or no change is needed for them. Each must examine its procedures to ensure [page315] that the presumption of openness and disclosure required by s. 2(b) of the *Charter* is adhered to in responding to requests to inspect or copy Adjudicative Records, but nothing about their procedures is otherwise impugned

by this ruling. Other tribunals may follow this model and bypass the *FIPPA* process altogether by dealing with requests for Adjudicative Records directly and in conformity with the openness that the *Charter* requires.

[134] Counsel for the Toronto Star has argued throughout that the *Dagenais/Mentuck* test is the appropriate one for any tribunal to apply when a request for Adjudicative Records is submitted to it. Counsel for the Attorney General has responded throughout that *Dagenais/Mentuck* is too high a test and that while it is appropriate for court records it does not take the varying contexts of administrative tribunals sufficiently into account. The case law demonstrates, however, that there is not just one level of analysis applied under that test, and that *Dagenais/Mentuck* is indeed flexible enough to be adapted by the various adjudicative tribunals to their own particular contexts and needs. In the *Mentuck* case itself, Iacobucci J. acknowledged this flexibility. He specifically admonished that in applying the test "the purposes and effects invoked by the parties must be taken into account in a case-specific manner", and went on to comment that, "This test exists to ground the exercise of discretion in a constitutionally sound manner, not to command the same result in every case."¹⁴⁷

[135] As an example, the Manitoba Court of Appeal has held that the *Dagenais/Mentuck* test is flexible enough to protect certain Adjudicative Records in a coroner's inquest whose confidentiality was made necessary due to the child protection imperatives of the inquest.¹⁴⁸ The test likewise does not require production of Adjudicative Records submitted at any stage of a proceeding that fall under a category of privilege,¹⁴⁹ and can be applied in modification to "ensure certainty and timeliness, to conserve resources, and to avert the disclosure of untested prejudicial information" that may impact on further proceedings.¹⁵⁰ These concerns to protect the vulnerable, conserve scarce resources, make efficient and timely decisions, enforce privilege and ensure the fairness of [page316] all adjudicative hearings, are all relevant to adjudicative tribunals. Each can adapt the *Dagenais/ Mentuck* test to its own particular needs in respect of these concerns.

[136] For those tribunals that adhere to the *FIPPA* regime, the ruling here leaves intact the procedural system established under that legislation. That is, the decision-making authority of the institution heads and, on appeal, the IPC, is not rendered inoperative. Likewise, the various notice provisions and timelines contained in the legislation are upheld, provided they are not unduly extended for any given decision (which, as indicated earlier, would have to be challenged on a case-by-case basis). Once the legislature has the opportunity to re-work *FIPPA*'s substantive grounds for making disclosure decisions so that there is a presumption of openness rather than a presumption of confidentiality, the *FIPPA* procedures can be utilized.

[137] I would emphasize here what must be obvious to anyone perusing *FIPPA*: the statute is not a paragon of clarity. I say this not to disparage the drafters, but to point out that it contains numerous interrelated provisions scattered across its several parts, and that the privacy concerns that touch on the production of Adjudicative Records are not conveniently gathered in one provision. They can be found up front in the definition section, in Part II dealing with access to information applications, exemptions from access, and exceptions to the exemptions, and in Part III dealing with the protection of individual privacy. Reversing the s. 21(1) onus with respect to the disclosure of personal information in Adjudicative Records may require some revisiting of large portions of the entire statute.

[138] Again, as a brief example, s. 21(1) contains the basic reverse onus that exempts personal information from the information that an institution head is authorized to disclose. It is followed by a list of specific exceptions to the general exemption in s. 21(1)(a) to (f), which is in turn followed by a list of "criteria re invasion of privacy" in s. 21(2)(a) to (i), which is in turn followed by a list of specific instances in s. 21(3)(a) to (h) where disclosure of personal information is "presumed to constitute an unjustifiable invasion of privacy". Some of these would doubtless survive a [s. 2\(b\) Charter](#) analysis and others would not. Thus, the concern for protecting the very vulnerable and for

ensuring less formal and more efficient hearing processes where health matters -- and especially mental health matters -- are at stake would arguably justify the non-publication rule contained in s. 21(3) (a) (information that "relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation"); similarly, the concern to safeguard pre-hearing investigative procedures would [page317] likely justify the non-publication rule contained in s. 21(3) (b) (information that "was compiled and is identifiable as part of an investigation into a possible violation of law").

[139] Other factors listed in s. 21(3) -- including the presumption against disclosing anything containing education and employment history (s. 21(3)(d)), personal finances (s. 21(3)(f)), personal recommendations and evaluations (s. 21(3)(g)), etc. -- appear more geared toward saving a person from embarrassment than furthering the objectives of the particular legal process.

These would not survive a *Charter* analysis.¹⁵¹ It is up to the legislature to re-work any statutory prohibitions on publication in a way that complies with the Supreme Court's analysis of the criteria for statutory publication bans. This will likely have to be done in a way which allows for tribunal-specific determinations of how the openness principle is balanced against privacy concerns. After all, "[t]he analysis under s. 1 of the *Charter* . . . can only be accomplished by canvassing the nature of the social problem which [a given measure] addresses".¹⁵² In the Supreme Court's words, "Context is the key to understanding the scope and impact of a limit on a *Charter* right."¹⁵³

[140] For those adjudicative tribunals that rely on the *FIPPA* process to determine access to Adjudicative Records, the need to revamp a relatively complex piece of legislation in order to make it *Charter* compliant presents practical difficulties. In effect, it leaves a procedural system intact but with a substantive void to be filled in on the fly by institution heads and the IPC. Requests for Adjudicative Records can continue to be dealt with procedurally in the way they have been until now, except that each institution head in the first instance, and the IPC on appeal, must make their decisions by applying the *Dagenais/ Mentuck* test in whatever modification the particular tribunal in the particular context of a given request requires.

[141] The concern is that this may put a difficult burden on decision makers to adapt overnight to a new task without substantive statutory guidance. As has been described in other legislative contexts, "moving abruptly from a situation where [the disclosure [page318] process] is regulated to a situation where it is entirely unregulated would be a matter of great concern".¹⁵⁴ The courts should be reluctant to place administrative decision-makers in that situation.

[142] This case therefore calls for some time period in which the invalidity of *FIPPA*'s application to Adjudicative Records is suspended. During oral submissions, counsel for the Attorney General suggested one year. That seems to me to be an appropriate length of time for the relevant portions of *FIPPA* to be re-worked should the legislature choose to do so. Alternatively, it will provide time for institution heads and the IPC to establish a principled, tribunal-specific and context-specific basis for adapting and implementing the *Dagenais/Mentuck* test in response to requests under *FIPPA* for access to Adjudicative Records.

VIII. *Disposition*

[143] There shall be a declaration that the application of s. 21(1) to (3) and related sections of *FIPPA* pertaining to the presumption of non-disclosure of "personal information" to Adjudicative Records held by the remaining institutions named in the notice of application infringes s. 2(b) of the *Charter* and is not justified under s. 1. It is therefore of no force or effect.

[144] The declaration of invalidity of this aspect of *FIPPA* is suspended for 12 months from the date of this judgment.

Notes

- 1 R.S.O. 1990, c. F.31.
- 2 The tribunals named in the notice of application are Ontario Securities Commission ("OSC"), Environmental Review Tribunal ("ERT"), Ontario Civilian Police Commission ("OCPD"), Human Rights Tribunal of Ontario ("HRTO"), Ontario Municipal Board ("OMB"), Financial Services Tribunal ("FST"), Health Professions Appeal and Review Board ("HPARB"), Landlord and Tenant Board ("LTB"), Criminal Injuries Compensation Board ("CICB"), License Appeal Tribunal ("LAT"), Ontario Energy Board ("OEB"), Workplace Safety and Insurance Appeals Tribunal ("WSIAT"), Ontario Mining and Lands Commissioner ("OMLC"), Ontario Labour Relations Board ("OLRB") and Pay Equity Hearings Tribunal ("PEHT").
- 3 R.R.O. 1990, Reg. 460.
- 4 Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
- 5 William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John*, 2nd ed. (Glasgow: James Maclehose and Sons, 1914), 395 (citing *Magna Carta*, 1215, ch. 40).
- 6 Matthew Hale, *The History of the Common Law of England* (Charles M. Gray, ed., Univ. Chicago Press 1971) (1670), ch. 12.
- 7 William Blackstone, *Commentaries on the Laws of England* 396.
- 8 *Gazette Printing Co. v. Shallow* (1909), 1909 CanLII 46 (SCC), 41 S.C.R. 339, [1909] S.C.J. No. 7, at p. 359 S.C.R.
- 9 *Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326, [1989] S.C.J. No. 124, para. 10.
- 10 Ministry of the Attorney General, "Guidelines for Administrative Tribunals" (October 29, 2015), online: https://www.attorneygeneral.jus.gov.on.ca/english/justice-ont/french/language/services/services/administrative_tribunals.php.
- 11 Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, "Administrative Tribunals and the Courts: An Evolutionary Relationship", available at <https://www.scc-csc.ca/judges-juges/spe-dis/bm-2013-05-27-eng.aspx>.
- 12 R.S.O. 1990, c. S.22, s. 9(1).
- 13 *Stepanova v. Ontario (Human Rights Tribunal)*, [2017] O.J. No. 2689, 2017 ONSC 2386 (Div. Ct.), para. 36.
- 14 SPPA, s. 20.
- 15 Model Policy for Access to Court Records in Canada, Judges Technology Advisory Committee, Canadian Judicial Council, September 2005.
- 16 *R. v. Canadian Broadcast Corp.* (2010), 102 O.R. (3d) 673, [2010] O.J. No. 4615, 2010 ONCA 726, para. 44.
- 17 *Cooper v. Canada (Canadian Human Rights Commission)*, 1996 CanLII 152 (SCC), [1996] 3 S.C.R. 854, [1996] S.C.J. No. 115, para. 70 (McLachlin J., dissenting), adopted by majority in *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 (CanLII), [2003] 2 S.C.R. 504, [2003] S.C.J. No. 54, para. 29.
- 18 *Guardian News v. Westminster Magistrates' Court*, [2012] EWCA Civ. 420, para. 1.
- 19 Human Rights Tribunal of Ontario, Information and Privacy Commission of Ontario, Order PO-2359, Appeal PA40163-109-451 (January 6, 2005).
- 20 *John Doe v. Ontario (Information & Privacy Commissioner)* (1993), 1993 CanLII 3388 (ON SCDC), 13 O.R. (3d) 767, [1993] O.J. No. 1527 (Div. Ct.).
- 21 Ministry of the Attorney General, Information and Privacy Commission of Ontario, Order P-984, Appeal P-9400823, August 28, 1995, p. 4.
- 22 *Ibid.*
- 23 Simon Stern, "Legal Fictions and Exclusionary Rules" in Maksymilian Del Mar and William Twining, eds., *Legal Fictions in Theory and Practice* (New York: Springer International Publishing, 2015), 157-73.

- 24** See Ontario Rental Housing Tribunal, Information and Privacy Commission of Ontario, Order PO-2544, Appeal PA-040312-1 (January 24, 2007).
- 25** See Human Rights Tribunal of Ontario, Information and Privacy Commission of Ontario, Order PO-2923, Appeal PA09-451 (October 21, 2010).
- 26** See Ontario Rental Housing Tribunal, Information and Privacy Commission of Ontario, Order PO-2019, PA-020194-1 (February 7, 2003).
- 27** Ibid.
- 28** Ontario (Attorney General) v. Pascoe, [2002 CanLII 30891 \(ON CA\)](#), [2002] O.J. No 4300, 166 O.A.C. 88 (C.A.), paras. 2, 6.
- 29** FIPPA, General Regulation, [R.R.O. 1990, Reg. 460, s. 1\(1\)](#) and Schedule.
- 30** McPherson v. McPherson, [1935 CanLII 276 \(UK JCPC\)](#), [1936] A.C. 177.
- 31** Law Society of Upper Canada v. Xynnis, [2014] L.S.D.D. No. 38, 2014 ONLSAP 9.
- 32** Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing), [2001 SCC 52 \(CanLII\)](#), [2001] 2 S.C.R. 781, [2001] S.C.J. No. 17, para. 24.
- 33** International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd., [1990 CanLII 132 \(SCC\)](#), [1990] 1 S.C.R. 282, [1990] S.C.J. No. 20, para. 69.
- 34** Hollinger Bus Lines Ltd. v. Ontario Labour Relations Board, [1952 CanLII 16 \(ON CA\)](#), [1952] O.R. 366, [1952] O.J. No. 439, [1952] 3 D.L.R. 162 (C.A.), paras. 15-16.
- 35** Canadian Pacific Ltd. v. Matsqui Indian Band, [1995 CanLII 145 \(SCC\)](#), [1995] 1 S.C.R. 3, [1995] S.C.J. No. 1, para. 80.
- 36** Ocean Port, *supra*, para. 24.
- 37** Rasanen v. Rosemount Instruments Ltd. (1994), [1994 CanLII 608 \(ON CA\)](#), 17 O.R. (3d) 267, [1994] O.J. No. 200 (C.A.), para. 35.
- 38** Bell Canada v. Canadian Telephone Employees Assn., [2003 SCC 36 \(CanLII\)](#), [2003] 1 S.C.R. 884, [2003] S.C.J. No. 36, para. 21.
- 39** The eight tribunals that bypass the FIPPA process for post-hearing access to Adjudicative Records are OEB, ERT, OMB, OMLC, OCPC, LAT, FST and OSC. See, *supra*, note 2.
- 40** Lukacs v. Canada (Canadian Transportation Agency), [2015] F.C.J. No. 707, 2015 FCA 140, para. 80.
- 41** Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992 CanLII 84 \(SCC\)](#), [1992] 1 S.C.R. 623, [1992] S.C.J. No. 21, at p. 636 S.C.R.
- 42** Lukacs, *supra*, para. 49.
- 43** Remarks of the Right Honourable Beverley McLachlin, *supra*.
- 44** Doyle v. Ontario (Ministry of Municipal Affairs), 2017 CanLII 52705 (Ont. PSGB), para. 71.
- 45** CUPE, Local 963 v. New Brunswick Liquor Corp., [1979 CanLII 23 \(SCC\)](#), [1979] 2 S.C.R. 227, [1979] S.C.J. No. 45, at p. 236 S.C.R.
- 46** Dunsmuir v. New Brunswick, [2008 SCC 9 \(CanLII\)](#), [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9, para. 49.
- 47** R. v. Conway, [2010 SCC 22 \(CanLII\)](#), [2010] 1 S.C.R. 765, [2010] S.C.J. No. 22, para. 20.
- 48** Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996 CanLII 184 \(SCC\)](#), [1996] 3 S.C.R. 480, [1996] S.C.J. No. 38, headnote.
- 49** Ibid., at para. 26.
- 50** R. v. Canadian Broadcasting Corp., *supra*, para. 44.
- 51** Canadian Broadcasting Corp. v. The Queen, [2011 SCC 3 \(CanLII\)](#), [2011] 1 S.C.R. 65, [2011] S.C.J. No. 3, para. 12.
- 52** Edmonton Journal v. Alberta (Attorney General), *supra*, at p. 1338 S.C.R.
- 53** R. v. Canadian Broadcasting Corp., 2010, *supra*, para. 50.
- 54** Southam Inc. v. Canada (Minister of Employment and Immigration), [1987 CanLII 9001 \(FC\)](#), [1987] F.C.J. No. 658, [1987] 3 F.C. 329 (T.D.), para. 9.

- 55 Conway, *supra*, at headnote and para. 20.
- 56 Doré v. Barreau du Québec, [2012 SCC 12 \(CanLII\)](#), [2012] 1 S.C.R. 395, [2012] S.C.J. No. 12, para. 4.
- 57 Ford v. Quebec (Attorney General), [1988 CanLII 19 \(SCC\)](#), [1988] 2 S.C.R. 712, [1988] S.C.J. No. 88, para. 59.
- 58 Canadian Broadcasting Corp., 2011, *supra*, para. 12.
- 59 Named Person v. Vancouver Sun, [2007 SCC 43 \(CanLII\)](#), [2007] 3 S.C.R. 253, [2007] S.C.J. No. 43, para. 33, citing Edmonton Journal, *supra*, at p. 1338 S.C.R.
- 60 Canadian Broadcasting Corp., 2010, *supra*, para. 33.
- 61 Ontario Rental Housing Tribunal, Information and Privacy Commission of Ontario, Order PO-2265, Appeal PA-030192-1, April 28, 2004.
- 62 Ontario (Public Safety and Security) v. Criminal Lawyers' Assn., [2010 SCC 23 \(CanLII\)](#), [2010] 1 S.C.R. 815, [2010] S.C.J. No. 23 ("CLA").
- 63 *Ibid.*, para. 37.
- 64 ARPA Canada v. Ontario (2017), 138 O.R. (3d) 253, [2017] O.J. No. 2969, 2017 ONSC 3285 (S.C.J.).
- 65 University of Ottawa (Re), 2017 CanLII 2024 (Ont. IPC); City of Toronto (Re), 2016 CanLII 31964 (Ont. IPC).
- 66 CLA, *supra*, para. 13.
- 67 Stepanova, *supra*, para. 36.
- 68 CLA, *supra*, paras. 3-4.
- 69 University of Ottawa (Re), *supra*, paras. 1-2, 4.
- 70 City of Toronto (Re), *supra*, para. 2.
- 71 ARPA Canada v. Ontario, *supra*, paras. 8-9.
- 72 CLA, *supra*, para. 5.
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Tab 121

R. v. Teskey, 2007 SCC 25 (CanLII), [2007] 2 SCR 267

Source:	Supreme Court of Canada
Date:	2007-06-07
File number:	31544
Other citations:	280 DLR (4th) 486 — 364 NR 164 — [2007] 8 WWR 385 — 404 WAC 361 — 412 AR 361 — 74 Alta LR (4th) 1 — 220 CCC (3d) 1 — 47 CR (6th) 78 — 73 WCB (2d) 457 — EYB 2007-120453 — JE 2007-1147 — [2007] SCJ No 25 (QL) — [2007] ACS no 25
Citation:	R. v. Teskey, 2007 SCC 25 (CanLII), [2007] 2 SCR 267, < https://canlii.ca/t/1rq5q >, retrieved on 2026-03-24
Most recent unfavourable mention	CZ v RB , 2019 ABCA 445 (CanLII) [...] [38] Contrary to the mother's arguments, this case is distinguishable from Teskey . [...]

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SUPREME COURT OF CANADA

CITATION: R. v. Teskey, [2007] 2 S.C.R. 267, 2007 SCC 25

DATE: 20070607

DOCKET: 31544

BETWEEN:

Leo Matthew Teskey
Appellant
and
Her Majesty The Queen
Respondent

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

REASONS FOR JUDGMENT: Charron J. (McLachlin C.J. and Binnie, LeBel, Fish and Rothstein JJ. concurring)
(paras. 1 to 24)

DISSENTING REASONS: Abella J. (Bastarache and Deschamps JJ. concurring)
(paras. 25 to 52)

r. v. teskey

Leo Matthew Teskey

Appellant

v.

Her Majesty The Queen

Respondent

Indexed as: R. v. Teskey

Neutral citation: 2007 SCC 25.

File No.: 31544.

2007: February 22; 2007: June 7.

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

on appeal from the court of appeal of alberta

*Criminal law — Trial — Judgments — Trial judge delivering extensive written reasons
11 months after guilty verdicts rendered — Whether Court of Appeal erred in considering written*

reasons when deciding accused's appeal from convictions — Whether reasonable person would apprehend that trial judge's written reasons did not reflect real basis for convictions.

The accused was charged with aggravated assault, break and enter, and possession of stolen property. The evidence given during the five-day trial was complex, almost entirely circumstantial and contained some contradictions. The trial judge reserved his decision and, four months later, after repeated adjournments, convicted the accused on all charges, in each case essentially saying only that the Crown had proved all the essential elements of the offence beyond a reasonable doubt. The trial judge also mentioned his intention to issue written reasons, which were eventually delivered, more than 11 months after the verdicts and long after the accused's notice of appeal had been filed. The Court of Appeal found that the oral reasons did not pass the test of sufficiency, but a majority applied the presumption of regularity, considered the extensive written reasons and upheld the convictions. The dissenting judge would not have considered the written reasons. The accused appealed to this Court as of right and the only issue was whether the Court of Appeal should have considered the trial judge's written reasons.

Held (Bastarache, Deschamps and Abella JJ. dissenting): The appeal should be allowed, the convictions set aside and a new trial ordered.

Per McLachlin C.J. and Binnie, LeBel, Fish, **Charron** and Rothstein JJ.: Although not precluded from announcing a verdict with “reasons to follow”, a trial judge in all cases should be mindful of the importance that justice not only be done but also that it appear to be done. Reasons rendered long after a verdict, particularly where it is apparent that they were crafted after the announcement of the verdict, may cause a reasonable person to apprehend that the trial judge engaged in result-driven reasoning. The necessary link between the verdict and the reasons will not be broken, however, on every occasion where there is a delay in rendering reasons after the announcement of the verdict. Since trial judges benefit from a presumption of integrity, which in turn encompasses the notion of impartiality, the reasons are presumed to reflect the reasoning

underlying the decision. Fairness and impartiality must not only be subjectively present but must also be objectively demonstrated to the informed and reasonable observer. While the presumption can be displaced, the onus is on the appellant to present cogent evidence showing that, in all the circumstances, a reasonable person would apprehend that the reasons constitute an after-the-fact justification of the verdict rather than an articulation of the reasoning that led to it. Here, the written reasons should not have been considered by the Court of Appeal. While the written reasons do not appear to have been crafted to answer points raised in the appeal, in the particular circumstances of this case, a reasonable person would apprehend that these reasons, delivered more than 11 months after the verdict was rendered, did not reflect the real basis for the convictions. Without this requisite link, the written reasons provide no opportunity for meaningful appellate review of the correctness of the decision. However, the delay in rendering reasons, in and of itself, does not give rise to this apprehension. In this case, it is the combination of several factors that constitutes cogent evidence sufficient to rebut the presumption of integrity and impartiality. [2] [17-23]

Per Bastarache, Deschamps and **Abella** JJ. (dissenting): The presumption of judicial integrity acknowledges that judges are bound by their judicial oaths and will carry out the duties they have sworn to uphold. This includes not only a presumption of impartiality, but also of legal knowledge. The presumption of integrity is rebuttable only by cogent evidence. The threshold for displacing the presumption is high: it must be demonstrated that a reasonably informed person would be satisfied that there was a real likelihood that the trial judge had not complied with the judicial oath of office in the manner and timing of the issuance of the reasons. The presumption is not to insulate decisions from judicial review but to ensure that inappropriate assumptions, such as bias, are not idiosyncratically factored into the review. [28-29] [34] [40]

A delay, either in reaching a result or in explaining it, would not lead a reasonably informed observer to conclude that the judge had disregarded the oath of office and would not, without more, represent an error of law justifying ignoring either the result or the reasons. Issuing the reasons after a verdict does not mean that the verdict was not thought through before it was

delivered. Reasons explain what a judge has decided to do and should be accepted as being honest reflections of that decision, whether delivered with or after the result, unless their content reflects the absence of judicial integrity. Inordinate delay may result in critical comment by a reviewing court but should not result in a refusal even to consider the reasons. Such an approach would do a greater disservice to the public perception of the integrity of the system than an undesirable delay. Here, given the complexity of the case, the time taken to reach the verdicts and to articulate reasons for judgment, even when considered with the other surrounding factors identified by the majority, did not represent the level of cogency necessary to displace the presumption of integrity. The reasons were responsive to the facts and issues at trial and were entitled to be reviewed on their merits. [40] [44] [46] [47] [50] [51]

Cases Cited

By Charron J.

Referred to: *R. v. Sheppard*, [2002] 1 S.C.R. 869, [2002 SCC 26](#); *Crocker v. Sipus* (1992), [1992 CanLII 7466 \(ON CA\)](#), 57 O.A.C. 310; *R. v. S. (R.D.)*, [1997 CanLII 324 \(SCC\)](#), [1997] 3 S.C.R. 484.

By Abella J. (dissenting)

R. v. Sheppard, [2002] 1 S.C.R. 869, [2002 SCC 26](#); *Robbie the Pict v. Her Majesty's Advocate*, [2003] ScotHC 12; *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, [2003 SCC 45](#); *R. v. Elrick*, [1983] O.J. No. 515 (QL); *R. v. Smith & Whiteway Fisheries Ltd.* (1994), [1994 NSCA 130 \(CanLII\)](#), 133 N.S.R. (2d) 50; *R. v. Lin*, [1995] B.C.J. No. 982 (QL); *R. v. S. (R.D.)*, [1997 CanLII 324 \(SCC\)](#), [1997] 3 S.C.R. 484; *R. v. Burns*, [1994 CanLII 127 \(SCC\)](#), [1994] 1 S.C.R. 656.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, s. 726.

APPEAL from a judgment of the Alberta Court of Appeal (Hunt, Berger and Costigan JJ.A.) (2006), 60 Alta. L.R. (4th) 260, 391 A.R. 155, 377 W.A.C. 155, 210 C.C.C. (3d) 36, [2006] A.J. No. 723 (QL), [2006 ABCA 191](#), upholding the accused's convictions. Appeal allowed, Bastarache, Deschamps and Abella JJ. dissenting.

Deborah R. Hatch, for the appellant.

James A. Bowron, for the respondent.

The judgment of McLachlin C.J. and Binnie, LeBel, Fish, Charron and Rothstein JJ. was delivered by

CHARRON J. —

1. Overview

1 The sole question before this Court is whether, in deciding the appellant's appeal from his convictions, the Court of Appeal for Alberta should have considered the extensive written reasons of the trial judge, issued long after the verdicts had been announced and the Notice of Appeal had been filed. For joint reasons by Hunt and Costigan JJ.A., the court considered the trial judge's written reasons and dismissed the appeal. Berger J.A., dissenting, would not have considered the written reasons and accordingly would have allowed the appeal ((2006), [2006 ABCA 191 \(CanLII\)](#), 60 Alta. L.R. (4th) 260).

2 In the particular circumstances of this case, I conclude that a reasonable person would apprehend that the trial judge's written reasons, delivered more than 11 months after the verdict was rendered, did not reflect the real basis for the convictions. Without this requisite link between the verdict and the reasoning that led to that verdict, the reasons provide no opportunity for meaningful appellate review of the correctness of the decision. Hence, the written reasons should not have been considered on appeal. It is not disputed that the oral reasons rendered at the time of the verdict do not pass the test of sufficiency set out by this Court in *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26. I would therefore allow the appeal, set aside the convictions and order a new trial.

2. Background

3 Leo Matthew Teskey was charged with aggravated assault, break and enter, and possession of stolen property. Following a five-day trial ending on October 19, 2001, the trial judge reserved his decision and adjourned the case to November 9, 2001. Berger J.A., in his dissenting reasons, provides the following useful summary of the evidence and the trial judge's factual findings:

On the day of the assault, one Jason Adams, a resident of the apartment building, observed a man with a bicycle sleeping in the second floor hallway. He caught quick glimpses of the man on three occasions between 6.15 a.m. and 6.30 a.m. Shortly before 7.00 a.m., another resident observed the sleeping man and informed the victim. Between 7.00 a.m. and 7.30 a.m., Mr. Adams' wife overheard the victim talking with a male whose voice she did not recognize. She then heard a noise she believed to be a bicycle going down the flight of stairs. At approximately 10.30 a.m., the letter carrier found the victim at the bottom of the stairwell on the main floor of the apartment building. He had been badly beaten.

The sole identification evidence was that given by Mr. Adams. In a first photo line-up (November 28, 2000), he identified someone other than the Appellant as the person who resembled the man sleeping in the hallway (A.B. 29/35-30/5; E23-E25). A second photo line-up was prepared which included the photo of the Appellant (December 14, 2000), but did not include a photograph of the person previously identified. In addition, the Appellant's photograph was one of three that appeared in both the first and second line-up (A.B. E28-E30). The witness testified that the Appellant's face as depicted in the photo "looked similar to the face [he saw] in the stairwell. He added that "minus the bruise and the shorter hair . . . the face looks very familiar." (A.B. 31/27-32/15) The Appellant argued that the second photo line-up was flawed due to the manner in which the Appellant's photo stood out as compared to a

number of the surrounding pictures. In addition, Mr. Adams was unable to positively identify the Appellant in Court.

The trial judge recognized that the identification of the Appellant by Adams was “the cornerstone of the Crown’s case” (A.B. F29, para. 54). He found that there had been no deliberate attempt on the part of the police to compromise the photo identification. He observed, however, that the recited flaws did tend to reduce the reliability of the identification evidence. Nonetheless, he took Mr. Adams’ evidence into account and concluded that the Appellant was the man that Mr. Adams saw sleeping in the hallway.

The Appellant was in possession of or had pawned a number of items said to be missing from the victim’s apartment. The evidence relied upon by the Crown to identify the property was equivocal. The victim’s wife was unable to positively identify the property. By way of illustration, she explained that a Fuji camera which she was asked to identify “could have been” in the victim’s office. Her difficulty was, as she put it, “I’m afraid all cameras look the same to me.” Her testimony regarding a video recorder was equally uncertain. She was only able to say that “[s]ometimes Dougald used to mark the backs. There is no way that I can say positively that this is the one but there was one similar in the bedroom.” (A.B. 239/10-12) Clothing said to have been in the victim’s car was found in the Appellant’s residence. The victim’s wife did identify some clothing as belonging to her and her husband, but it had earlier been loaded into their car with the intention of giving it to the Salvation Army. She could not say if that had been done. (A.B. 224/44 - 226/9) The victim’s wife was asked to identify a number of cassettes said to belong to the victim. She could only say that her husband had a number of the same titles. (A.B. 238/4-41) The Appellant’s fingerprint was found on a jigsaw puzzle box which had been left unattended in the hallway of the building for about a week or two before this incident. (A.B. 22/28-41) No one could testify when the fingerprint came to be on the box, or how long it had been there.

Of critical importance, the position of the defence at trial was that the Appellant may have stolen the puzzle box, but was not the assailant.

4 As described by Hunt and Costigan JJ.A., “[t]he lengthy evidence was complex, almost entirely circumstantial and contained some contradictions. It cried out for analysis.” (para. 15) Transcripts were ordered and the trial judge received them during the week of November 5, 2001. On the scheduled return date of November 9, 2001, the trial judge adjourned the matter for decision to November 20, then to December 11, December 21, 2001, and January 25, 2002, indicating each time that he was reviewing the matter but had not yet been able to reach a decision. From comments that he made on each appearance it is clear that the trial judge was struggling with the verdicts: see the excerpts reproduced by Berger J.A., at paras. 58-60 of his reasons.

5 On February 22, 2002, the trial judge, in brief oral reasons, convicted the accused on all three charges, in each case essentially saying only that the Crown had proved all the essential elements of the offence beyond a reasonable doubt. Immediately after announcing the verdicts, the trial judge said the following:

I just realized that perhaps I did do something in error in that before I entered the conviction, Mr. Teskey, I did not ask you if you had anything to say to the court, and I will give you that opportunity now.

6 The trial judge then invited Mr. Teskey to address him, adding the following:

Mr. Teskey, clearly, on whatever you say, I will reconsider what I have just said and then advise you if I am going to change anything, so I welcome you to address the court.

7 Mr. Teskey had nothing to say to the court and the trial judge concluded by announcing his intention to issue written reasons “within a short period of time”. The Crown then advised the court that it was going to bring an application to have Mr. Teskey declared a dangerous offender.

8 I pause here to say that the trial judge, in asking Mr. Teskey if he had anything to say, appears to be mistakenly referring to [s. 726](#) of the *Criminal Code*, R.S.C. 1985, c. C-46, which requires a trial judge to ask an accused whether he has anything to say prior to the delivery of the sentence. In my view, this momentary lapse, in and of itself, is of no consequence. However, as I will explain, the trial judge’s expressed willingness to reconsider the verdict, immediately after it has been rendered, contributes to the overall appearance that the process of deliberation was still ongoing.

9 On March 22, 2002, Mr. Teskey filed a Notice of Appeal listing 11 grounds of appeal, including whether “the number of adjournments required by the trial judge to determine guilt demonstrates reasonable doubt”. Other grounds were concerned mainly with the insufficiency of the evidence and the question of reasonable doubt.

10 Extensive written reasons were eventually delivered (2003 CarswellAlta 2038), more than 11 months after the announcement of the verdicts, and within days of the Court of Appeal’s adjournment of the appeal from convictions and direction that the trial judge proceed to sentencing “with deliberate speed”. In the written reasons, the trial judge provided a detailed explanation for the repeated adjournments that preceded the announcement of the verdicts. He also referred at length to the various adjournments on the subsequent dangerous offender application, up to the release of his reasons on January 29, 2003. However, he made no mention of counsel’s repeated requests for his written reasons and offered no explanation for the post-verdict delay in releasing them.

11 Mr. Teskey’s appeal from convictions was heard by the Court of Appeal of Alberta on January 12, 2006. The court was unanimous in finding that the trial judge’s oral reasons did not pass the test of sufficiency, as set out by this Court in *Sheppard*. The justices on appeal were divided, however, on the question whether the court, in determining Mr. Teskey’s appeal from convictions, should consider the written reasons of the trial judge. Hunt and Costigan JJ.A. held that, viewed in their entirety, the reasons did not appear to be “written simply to answer points raised in the notice of appeal” (para. 36). On the question whether the circumstances surrounding their delivery gave rise to an apprehension of unfairness, the majority found the evidence, at best, to be equivocal. Applying the “presumption of regularity”, they concluded that “[t]he provision of written reasons was no more than the tardy performance of the trial judge’s declared intention to

provide reasons in compliance with the obligation imposed by *Sheppard*” (para. 40). The majority therefore considered the written reasons and dismissed the appeal from convictions.

12 Berger J.A., in dissent, would not have considered the written reasons. In his view, the appearance of fairness could not be maintained on the facts of this case. He found that the extreme delay in issuing reasons that had been promised “within a short period of time”, the relative brevity of the trial, the nature of the evidence, and the contents of the reasons in the face of an intervening appeal that had progressed to an initial hearing before the reasons were issued, all combined to create an apprehension that the reasons were meant to respond to some of the points raised on appeal. In addition, he held that the inordinate delay suggested result-driven reasoning and “that a reasonable person would perceive that the conclusions reached months earlier were not at that time supported by the reasons now proffered” (para. 74). Without the requisite link between the decision taken and the reasons that led to that decision, the accused’s right to a meaningful appeal was effectively thwarted. Berger J.A. would therefore have ordered a new trial.

13 Mr. Teskey appeals to this Court as of right.

3. Analysis

14 The discussion in *Sheppard* about the requirement and the purpose of giving reasons need not be repeated at length here. No one disputes that, in the circumstances of this case, it was incumbent upon the trial judge to give reasons to justify and explain the verdicts of guilt. This was particularly important given the relatively complex and circumstantial nature of the evidence presented against Mr. Teskey. Mr. Teskey was entitled to know why he was convicted. The reasons were also necessary to inform the grounds of his appeal from conviction properly. Interested members of the public were also entitled to see for themselves whether justice was done

here. Furthermore, in the particular context of the appeal, the reasons were necessary to provide a meaningful review of the correctness of the decision.

15 It is clear that the oral reasons given at the time of the verdicts do not meet the standard set out in *Sheppard*. It is equally clear that the extensive written reasons that followed do — provided that they reflect the reasoning that led the trial judge to the verdicts. Without that link, the purpose of giving reasons is defeated and their consideration do not contribute to a meaningful appellate review. The issue arises in this case because of the lack of concomitance between the announcement of the verdicts and the delivery of the written reasons. Had the verdicts been announced only at the time the written reasons were delivered, even — as here — more than 14 months after the conclusion of the evidence, the requisite link between the decision and reasons that led to it could not be questioned. Of course, inordinate delay in rendering a verdict can give rise to other concerns, but not to the issue which occupies us on this appeal.

16 A judge is not precluded from announcing a verdict with “reasons to follow”. In the context of a civil case, Arbour J.A. (as she then was) aptly stated the following in *Crocker v. Sipus* (1992), [1992 CanLII 7466 \(ON CA\)](#), 57 O.A.C. 310 (C.A.), at para. 15:

The needs of justice in a given case may be better served by an announcement of the disposition of the matter as soon as the deliberation process is completed but before full written reasons can be made available to the parties. The mere filing of a notice of appeal after the disposition has been announced does not bar the consideration on appeal of the reasons released subsequently.

17 The same principles apply in a criminal case. For example, it is often necessary in the interests of achieving trial efficiency for a trial judge to announce promptly the disposition on

an evidentiary ruling or on a *Charter* motion, with reasons to follow at a later date. In particular circumstances, there may also be good reason for announcing the verdict in a criminal case prior to delivering the reasons that led to it. For example, the prompt delivery of a verdict of acquittal may allow an accused to be immediately released from custody. Or it may be desirable to announce a verdict of guilty at the conclusion of the hearing so as to secure an earlier date in the court's schedule for the subsequent sentence proceedings. However, in all cases, a trial judge should be mindful of the importance that justice not only be done but that it *appear* to be done. The circumstances of this case exemplify the kind of issues that can arise when the announcement of the verdict is divorced from the delivery of the reasons that led to it.

18 Reasons rendered long after a verdict, particularly where it is apparent that they were entirely crafted after the announcement of the verdict, may cause a reasonable person to apprehend that the trial judge may not have reviewed and considered the evidence with an open mind as he or she is duty-bound to do but, rather, that the judge has engaged in result-driven reasoning. In other words, having already announced the verdict, particularly a verdict of guilt, a question arises whether the post-decision review and analysis of the evidence was done, even subconsciously, with the view of defending the verdict rather than arriving at it. It is most important in a criminal case to guard against any result-driven consideration of the evidence because the accused is presumed innocent and entitled to the benefit of any reasonable doubt. A reasonable doubt is not always obvious. Its presence may be far more subtle and only discernible through the eyes of the person who keeps an open mind. It is in this sense that the trial judge who appears to have already committed to a verdict of guilt before completing the necessary analysis of the evidence may cause a reasonable person to apprehend that he or she has not kept an open mind. Further, if an appeal from the verdict has been launched, as here, and the reasons deal with certain issues raised on appeal, this may create the appearance that the trial judge is advocating a particular result rather than articulating the reasons that led him or her to the decision.

I am not suggesting that the necessary link between the verdict and the reasons that led to it will be broken whenever there is a delay in rendering reasons after the announcement of the verdict. Trial judges benefit from a presumption of integrity, which in turn encompasses the notion of impartiality. (I take it from reading their reasons as a whole that this is what the majority of the Court of Appeal had in mind when they referred to the presumption of “regularity”, the latter applying rather to procedural or administrative matters.) Hence, the reasons proffered by the trial judge in support of his decision are presumed to reflect the reasoning that led him to his decision.

The notion of judicial integrity was discussed at length by this Court in *R. v. S. (R.D.)*, [1997 CanLII 324 \(SCC\)](#), [1997] 3 S.C.R. 484. It encompasses the expectation that judges will strive to overcome personal bias and partiality and carry out the oath of their office to the best of their ability. Impartiality was described as follows by Cory J. (at paras. 104-5):

. . . impartiality can be described — perhaps somewhat inexactly — as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions.

In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues.

The judge’s impartiality is essential to achieve trial fairness.

As reiterated in *S. (R.D.)*, fairness and impartiality must not only be subjectively present but must also be objectively demonstrated to the informed and reasonable observer. Even though there is a presumption that judges will carry out the duties they have sworn to uphold, the presumption can be displaced. The onus is therefore on the appellant to present cogent evidence showing that, in all the circumstances, a reasonable person would apprehend that the reasons constitute an after-the-fact justification of the verdict rather than an articulation of the reasoning that led to it.

22

In this case, I agree with the majority of the Court of Appeal that the reasons do not appear to have been crafted to answer points raised in the appeal, either in whole or in part. The reasons do not address one of the four grounds of appeal raised in the factum. While the trial judge's reasons respond generally to the accused's other arguments on appeal about whether there were grounds for a reasonable doubt or whether the verdicts were unreasonable, as noted by Hunt and Costigan JJ.A., given the nature of the case almost any reasons would have had this effect.

23

However, the fact that the reasons do not appear written in answer to the accused's appeal does not answer the broader question whether a reasonable person would apprehend that the written reasons are in effect an after-the-fact justification for the verdicts rather than the articulation of the reasoning that led to the decision. This question was not considered by the majority. On this issue, I agree with the conclusion reached by Berger J.A., in dissent, that the court could not reasonably be confident that the written reasons, delivered more than 11 months after the announcement of the verdicts of guilt, reflected the reasoning that led the trial judge to his decision. However, unlike Berger J.A., I am of the view that delay in rendering reasons, in and of itself, does not give rise to this apprehension. With respect, Abella J.'s analysis also appears entirely focused on the timing of the reasons. If the only factor in this case were the delay in the post-verdict delivery of the reasons, I would take no issue with her conclusion. In this case, however, it is the combination of the following factors that constitutes cogent evidence sufficient to rebut the presumption of integrity and impartiality and which amply supports Berger J.A.'s conclusion:

- the trial judge's obvious difficulty in arriving at a verdict in the months following the completion of the evidence;
- the absolutely bare declaration of guilt without any indication of the underlying reasoning;

- the trial judge's expressed willingness to reconsider the verdicts immediately after their announcement;
- the nature of the evidence that called for a detailed consideration and analysis before any verdict could be reached;
- the failure of the trial judge to respond to repeated requests from counsel to give reasons;
- the contents of the reasons referring to events long after the announcement of the verdict suggesting that they were crafted post-decision;
- the inordinate delay in delivering the reasons coupled with the absence of any indication that his reasons were ready at any time during the 11 months that followed or that the trial judge had purposely deferred their issuance pending disposition of the dangerous offender application.

4. Disposition

24 For these reasons, I would allow the appeal, set aside the convictions and order a new trial.

The reasons of Bastarache, Deschamps and Abella JJ. were delivered by

25 ABELLA J. — After a five-day trial involving over a dozen witnesses, Leo Matthew Teskey was convicted of aggravated assault, break and enter and possession of stolen property on February 22, 2002. On January 29, 2003, the trial judge issued written reasons (2003 CarswellAlta 2038), and, on February 28, 2003, found Teskey to be a dangerous offender.

The novel issue in this appeal is whether a trial judge's written reasons ought to be disregarded in circumstances which, in my view, amount essentially to extensive delay. I am, with great respect, concerned that this case, although it is being decided by the majority on its own facts, may set a regrettable precedent that will not only inhibit judges from a common practice of giving a result with reasons to follow, but also introduce uncertainty about how long a particular delay needs to be before it can be said that those reasons have lost the right to be reviewed. For the reasons that follow, the trial judge's reasons in this case were, it seems to me, entitled to appellate review and not, by virtue of their timing, unworthy of substantive scrutiny.

I agree with Charron J. in many respects. In particular, I agree with her conclusions that:

- the trial judge's attempted correction of what he perceived to be an error in finding Teskey guilty before giving him an opportunity to make a statement, was a "momentary lapse, in and of itself, . . . of no consequence";
- the extensive written reasons meet the standard in *R. v. Sheppard*, 2002 SCC 26 (CanLII), [2002] 1 S.C.R. 869, if "they reflect the reasoning that led the trial judge to the verdicts";
- a judge is not precluded from announcing a verdict with "reasons to follow";
- the trial judge's reasons were not specifically crafted to respond to the Notice of Appeal; and
- trial judges benefit from a presumption of integrity and impartiality.

28 Of utmost importance to the resolution of this appeal, in my view, is the existence of a presumption of integrity, rebuttable only by cogent evidence. The high threshold for displacing the presumption that a judge is acting with integrity and in accordance with his or her oath of office, seeks to balance two significant public interests, both related to maintaining confidence in the administration of justice: the right of judges to be presumed to be acting with integrity and the right of litigants to challenge judges when their conduct gives rise to a reasonable apprehension of impropriety.

29 The presumption of integrity acknowledges that judges are bound by their judicial oaths and will carry out the duties they have sworn to uphold. This includes not only a presumption — and duty — of impartiality but also of legal knowledge. This aspect of the presumption, namely, that judges are presumed to know and act in accordance with their legal responsibilities, is of particular significance in this appeal.

30 The foundation for the presumption was summarized in *Robbie the Pict v. Her Majesty's Advocate*, [2003] ScotHC 12, as follows at para. 8:

Every judge is bound, both by his judicial oath and by the ethical obligation incumbent on anyone who exercises a judicial function, to behave honourably, sincerely and impartially towards litigants and those who represent them. These obligations are the cornerstones of judicial integrity. A litigant is entitled to expect integrity of the judge; but he in turn must give the judge his trust. That is the only basis on which litigation can be conducted in an atmosphere of confidence rather than suspicion.

31 The presumption has most frequently been discussed in the context of allegations of bias. In *Wewaykum Indian Band v. Canada*, 2003 SCC 45 (CanLII), [2003] 2 S.C.R. 259, 2003 SCC 445, McLachlin C.J. stressed its significance in that context as follows:

An allegation that a judgment may be tainted by bias or by a reasonable apprehension of bias is most serious. That allegation calls into question the impartiality of the Court and its members and raises doubt on the public's perception of the Court's ability to render justice according to law. [para. 2]

...

... “(i)mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary” (Canadian Judicial Council, *Ethical Principles for Judges* (1998), at p. 30). It is the key to our judicial process, and must be presumed. As was noted by L’Heureux-Dubé J. and McLachlin J. (as she was then) in *S. (R.D.)*, *supra*, at para. 32, the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. [Emphasis added; para. 59.]

(See also *R. v. Elrick*, [1983] O.J. No. 515 (H.C.); *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 1994 NSCA 130 (CanLII), 133 N.S.R. (2d) 50 (C.A.); *R. v. Lin*, [1995] B.C.J. No. 982 (S.C.); *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484, at para 117.)

32 In *R.D.S.*, Cory J. also noted at para. 113 that the threshold for establishing a reasonable apprehension of bias is a high one because it calls into question not only the integrity of the presiding judge, but of the administration of justice itself. In other words, as Cory J. concluded at para. 112, “a real likelihood or probability of bias must be demonstrated ... mere suspicion is not enough”.

33 The test for displacing the presumption, therefore, requires that the apprehension of bias be reasonable in the eyes of someone who is reasonably informed about all the relevant circumstances. Those circumstances include “the traditions of integrity ... and ... the fact that impartiality is one of the duties the judges swear to uphold”. As previously noted, the presumption that judges will carry out their sworn duties also includes a presumption of legal knowledge. McLachlin J. confirmed in *R. v. Burns*, 1994 CanLII 127 (SCC), [1994] 1 S.C.R. 656, at p. 664, that “Trial judges are presumed to know the law with which they work day in and day out”.

34 The issue in this appeal is, therefore, whether the presumption of integrity has been displaced by “cogent evidence”, that is, would a reasonably informed person be satisfied that there is a “real likelihood” that the trial judge in this case has not complied with his oath of office in the manner and timing of the issuance of his reasons.

35 The trial judge’s conduct must be assessed against the strong presumption that he is acting in accordance with his oath. Charron J. is careful to point to a number of factors that cause her to conclude that in this case the reasons are unacceptable. They include the trial judge’s difficulty for four months in arriving at the verdicts; his bare declaration of guilt without any indication of his underlying reasoning; and his failure to respond to repeated requests from counsel to issue his reasons. At heart, these are criticisms about what she refers to as the “inordinate delay” in delivering the reasons after the verdicts. In my view, there may be many explanations for the judge’s conduct in this case.

36 It is true that the trial judge deliberated for four months before giving his verdicts, and delivered his written reasons 11 months after that. We cannot know why this particular — and acceptable — practice of delivering the result separately from the reasons was used in this case but the fact that it was should not detract from the presumption that the resulting reasons were, as all reasons are presumed to be, honest explanations for the conclusion the judge had reached. The content of those reasons may not survive judicial scrutiny, but that scrutiny is nonetheless something to which those reasons, and the judge who took the trouble to prepare them, are entitled.

37 In *R. v. Sheppard*, [2002] 1 S.C.R. 869, [2002 SCC 26](#), Binnie J. explained not only the purpose of reasons but also the appellate function in assessing them. Significantly, he confirmed that unless there are deficiencies in the reasons that prevent meaningful appellate review

of the correctness of a trial judge's decision, an appellate court ought not to conclude that the "serious remedy" of a new trial is justified:

Reasons for judgment are the primary mechanism by which judges account to the parties and to the public for the decisions they render. (para. 15)

...

Few would argue, however, that failure to discharge this jurisprudential function necessarily gives rise to appellate intervention. New trials are ordered to address the potential need for correction of the outcome of a particular case. Poor reasons may coincide with a just result. Serious remedies such as a new trial require serious justification. (para. 22)

On a more specific level, within the confines of a particular case, it is widely recognized that having to give reasons itself concentrates the judicial mind on the difficulties that are presented. ... The absence of reasons, however, does not necessarily indicate an absence of such concentration. We are speaking here of the *articulation* of the reasons rather than of the reasoning process itself. The challenge for appellate courts is to ensure that the latter has occurred despite the absence, or inadequacy, of the former. (para. 23)

...

... the purpose ... is to preserve and enhance meaningful appellate review of the correctness of the decision (which embraces both errors of law and palpable overriding errors of fact). If deficiencies in the reasons do not, in a particular case, foreclose meaningful appellate review, but allow for its full exercise, the deficiency will not justify intervention under s. 686 of the *Criminal Code*. That provision limits the power of the appellate court to intervene to situations where it is of the opinion that (i) the verdict is unreasonable, (ii) the judgment is vitiated by an error of law and it cannot be said that no substantial wrong or miscarriage of justice has occurred, or (iii) on any ground where there has been a miscarriage of justice. (para. 25)

The appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself. (para. 26)

...

It is neither necessary nor appropriate to limit circumstances in which an appellate court may consider itself unable to exercise appellate review in a meaningful way. The mandate of the appellate court is to determine the correctness of the trial decision, and a functional test requires that the trial judge's reasons be sufficient for that purpose. The appeal court itself is in the best position to make that determination. The threshold is clearly reached ... where the appeal court considers itself unable to determine whether the decision is vitiated by error. ... The simple underlying rule is that if, in the opinion of the appeal court, the deficiencies in the reasons prevent meaningful appellate review of the correctness of the decision, then an error of law has been committed. (para. 28)

The argument by Berger J.A. that there should be a refusal to consider written reasons in this case seems to me to be an argument urging a refusal to engage in *any* appellate review, let alone a meaningful one, in circumstances where, in essence, the reasons are unduly delayed.

This is, with respect, an entirely novel and puzzling basis for discrediting a judge's reasons. As Binnie J. stated in *Sheppard*, at para. 28, the “mandate of the appellate court is to determine the correctness of the trial decision” , and the purpose of a trial judge's reasons is to enable the reviewing court to make that assessment. Reasons show the public, the litigants, and a reviewing court the result of the judicial thought process. With respect, I cannot see how a reviewing court can refuse even to consider the reasons just because they have come late in the piece. It would be inconsistent with the presumption of integrity and with this Court's cases establishing the high threshold that must be met before such a presumption is displaced, for judges — and litigants — to be told that the reasons came too late to be meaningfully reviewed, regardless of their quality.

The purpose of the presumption of integrity is not, as Mr. Teskey's counsel argued, to insulate decisions from judicial review. It is to ensure that inappropriate assumptions, such as bias, are not idiosyncratically factored into the review. Reasons should be reviewed as if the judge's integrity exists, subject to a determination, from examining the reasons, that it does not. A delay, either in reaching a result or in explaining it, both of which occurred in this case, would not, it seems to me, lead a reasonably informed observer to conclude that the judge has disregarded his or her oath of office. The failure to provide timely verdicts or reasons should not be encouraged. But it does not, without more, represent an error of law justifying ignoring either.

41 Charron J. accepts that the reasons in this case were not inappropriately tailored to respond to the Notice of Appeal. Charron J. also acknowledges that there is nothing inherently wrong with the practice of rendering a verdict with reasons to follow, but cautions against any such reasons being written or delivered so as to give rise to the perception that they are “result-oriented reasons”, or an “after-the-fact justification” for the result, rather than a reflection of the reasoning that led to it.

42 This is not an easy theory to implement. In practice, it seems to me to be extremely difficult, if not impossible, to determine what the substantive difference would be between reasons representing an after-the-fact justification and those reflecting thoughts preceding the result. All reasons are explanations — or justifications — of the result, regardless of whether any time has elapsed between the result and the articulated reasons for it.

43 It is not clear to me at what point the trial judge’s reasons in this case lost the benefit of the presumption of integrity. When did he cross the line of propriety from acceptable delay to after-the-fact justification? What is an acceptable delay in the ordinary case? Unless some guidance is provided on the question of “how long is too long”, judges will be left with a great deal of uncertainty about when their reasons will be deemed to be “too late”.

44 The fact that reasons come after a verdict does not mean that the verdict was not thought through before it was delivered. Judges should be presumed to know the law and the nature of their judicial duties, including the duty to arrive at a verdict only after careful deliberation. As was noted in *Sheppard*, at para. 51:

... the presumption that judges know the law and deal properly with the facts presupposes that whatever time is required to adjudicate the issues has in fact been taken. While ... the act of formulating reasons may further focus and concentrate the judge’s mind, and demands an additional effort of self-expression, the requirement

of reasons as such is directed only to having the trial judge articulate the thinking process that it is presumed has already occurred in a fashion sufficient to satisfy the demand of appellate review. [Emphasis added]

45 Judges should have available to them mechanisms to protect the effectiveness and fairness of a proceeding. This includes the ability to decide that it is best to disclose a result earlier than the reasons — a practice, in my view, that they should not be discouraged from engaging in. Judges who give their decision and then undertake to support it with fuller reasons should be free to do so without worrying that an interval between result and rationale will impugn the integrity of both. To get through their lists, trial judges are frequently called upon to make multiple decisions on a daily basis. To run their courtrooms effectively, this may involve stating a result right away with the explanation for the result to follow when the judge has the time to craft the explanation properly, knowing that both the losing party and a reviewing court are likely to scrutinize it with care.

46 Reasons explain what a judge has decided to do. They should be accepted as being honest reflections of that decision, whether delivered with or after the result, unless their *content* reflects the absence of judicial integrity. Trial judges are entitled to the presumption that they are, in their reasons, articulating “the thinking process that it is presumed has already occurred” (*Sheppard*, at para. 51). The reasoning that leads a trial judge to a verdict, therefore, should be presumed to be reflected in the reasons. That is why *this* trial judge is entitled to the presumption that what was reflected in the written reasons was a fuller articulation of his thinking process prior to reaching the result, notwithstanding the delay and other circumstances delineated by Charron J.

47 The presumption of integrity exists to protect the judicial role from undue perceptual assault. Suggesting that the judge’s reasons are “after-the-fact justifications” or “result-oriented” involves the very second-guessing of a judge’s thought processes that the presumption was

designed to avoid. Where the delay is inordinate, the judge may be the recipient of critical comment by a reviewing court. But refusing even to consider the merits of the reasons — to assess their compliance with the record, the arguments and the law — does a greater disservice to the public perception of the integrity of the system, not to mention the perception of the litigants who are forced to undergo a new trial, than does the fact of undesirable delay.

48 The main grounds of appeal from the trial judge’s decision concerned issues of the sufficiency of evidence and reasonable doubt. The *content* of the trial judge’s reasons is more than sufficient to permit meaningful appellate review on these issues. As the majority in the Court of Appeal observed:

The written reasons consist of 91 paragraphs and Schedule A, which is a 151 paragraph summary of the trial evidence. They make fact findings, assess credibility, prefer some evidence over other evidence, and explain the rejection of certain arguments. (para. 35)

49 All members of the Court of Appeal acknowledged that this case was one of highly complex and circumstantial evidence — one that, as the majority in the Court of Appeal wrote, “cried out for analysis”. Teskey was accused of causing injuries which included: basil skull fracture, right orbital fracture, brain bruising, brain bleeding, fractured ribs, multiple contusions and a torn right ear. The victim has been in a waking coma ever since. Teskey was also facing a dangerous offender application, raising the possibility of an indeterminate sentence.

50 Given this complexity, it was not surprising that the trial judge took more time both in reaching the verdicts and in articulating the thought process that went into reaching them. It is clear from the trial judge’s written reasons that he subjected the evidence to painstaking analysis

and examination. A gap of 11 months in this case, even with the surrounding factors delineated by Charron J., does not represent the level of cogency necessary to displace the presumption that the trial judge behaved honourably and in accordance with his judicial duties in preparing his reasons.

51 His reasons were responsive to the facts and issues at trial. They were, accordingly, entitled to be reviewed on their merits.

52 I would dismiss the appeal.

Appeal allowed, BASTARACHE, DESCHAMPS *and* ABELLA JJ. *dissenting*.

Solicitors for the appellant: Royal McCrum Duckett Glancy & Hatch, Edmonton.

Solicitor for the respondent: Attorney General of Alberta, Edmonton.

Tab 122

Galambos v. Perez, 2009 SCC 48 (CanLII), [2009] 3 SCR 247

Source: Supreme Court of Canada

Date: 2009-10-23

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Other citations: 312 DLR (4th) 220 — 394 NR 209 — 182 ACWS (3d) 488 — [2009] 12 WWR 193 — 97 BCLR (4th) 1 — 276 BCAC 272 — 70 CCLT (3d) 167 — EYB 2009-165240 — JE 2009-1938 — [2009] SCJ No 48 (QL)

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SUPREME COURT OF CANADA

CITATION: Galambos v. Perez, 2009 SCC 48, [2009] 3 S.C.R. 247

DATE: 20091023
DOCKET: 32586

BETWEEN:

Michael Z. Galambos and Michael Z. Galambos Law Corporation, both carrying on business as “Galambos & Company” and the said Galambos & Company
Appellants
and
Estela Perez
Respondent

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: Cromwell J. (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. concurring)

Galambos v. Perez, 2009 SCC 48, [2009] 3 S.C.R. 247

Michael Z. Galambos and Michael Z. Galambos Law Corporation, both carrying on business as “Galambos & Company” and the said Galambos & Company

Appellants

v.

Estela Perez

Respondent

Indexed as: Galambos v. Perez

Neutral citation: 2009 SCC 48.

File No.: 32586.

2009: April 15; 2009: October 23.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Torts — Negligence — Fiduciary duty — Bookkeeper making unsolicited and voluntary cash advances to employer law firm which was experiencing financial difficulties — Law firm acting on bookkeeper’s behalf in preparing two wills and in handling two mortgage transactions while she was working for it — Law firm going bankrupt and bookkeeper finding herself unsecured creditor — Whether duty of care under negligence principles or per se fiduciary

obligations arose within solicitor-client relationship — Whether ad hoc fiduciary duties arose from power dependency relationship existing between bookkeeper and lawyer — Whether in such relationships, fiduciary duties may arise simply on basis of reasonable expectations of weaker party and without any mutual understanding of both parties that one must act in interests of the other — Whether fiduciary duties may arise although fiduciary has no discretionary power to affect other party's legal or important practical interests.

P made voluntary sizeable advances of cash — some \$200,000 in total — to her employer, a law firm founded by G, often without informing G beforehand. Although P was hired as the firm's part-time bookkeeper she effectively became the office manager, overseeing the firm's income, expenses and accounting and had unlimited signing authority on the firm's non-trust bank accounts. Initially, to resolve a cash flow problem, P obtained a personal loan and deposited \$40,000 into the firm's bank account. G did not ask her to advance this money and he did not even know about the advance until several days later. G instructed P to reimburse herself with interest, an instruction she did not follow other than by repaying herself \$15,000. As the firm's financial situation deteriorated, P made several more deposits of her own funds into the firm's account and covered some firm expenses with her personal credit card. The firm, during the time she worked for it, handled the preparation and execution of new wills for P and her husband as well as two mortgage transactions. The firm did not expect to be and was not paid for these services. When the firm was placed in receivership and G went bankrupt, P found herself an unsecured creditor. She recovered nothing. P then sued G and the defunct firm for negligence, breach of contract and breach of fiduciary duty.

The trial judge dismissed P's claims, finding that her rights were those of a creditor and nothing more. The Court of Appeal set aside that decision and granted P judgment for \$200,000. The court concluded that P was entitled to equity's protection because there were *ad hoc* fiduciary duties owed to her by G and his law firm in relation to the cash advances, which they had breached. It held that: there was a power-dependency relationship between P and G; it is not necessary that there be any mutual understanding that G had relinquished his self-interest in favour

of P's for the duty to arise; P was vulnerable; and, the evidence overwhelmingly supported the conclusion that G took advantage of her trust.

Held: The appeal should be allowed and the trial judgment should be restored except that, if the parties cannot agree, the question as to whether P is entitled to a judgment in debt against the law firm and, if so, whether there is any impact on the costs ordered at trial or on appeal to the Court of Appeal flowing from that judgment, should be remanded to the Court of Appeal.

The Court of Appeal exceeded the limits of appellate review and unduly extended the scope of fiduciary obligations. Absent an error of law or a palpable and overriding error of fact, of which there is none, the trial judge's findings of fact and conclusion that a fiduciary duty did not exist must be upheld on appeal. In this case, the Court of Appeal retried the case on the basis of the written record and substituted its view of the facts and their significance for that of the trial judge. [3] [49] [53]

In holding that the relationship between P and G and his firm gave rise to an *ad hoc* fiduciary duty, the Court of Appeal erred in three respects. First, the conclusion that G was in a position of power and influence relative to P is directly at odds with the clear findings of fact at trial. The trial judge found that P was not vulnerable in terms of her relationship with G, that she probably had more knowledge of the state of G's financial affairs than he did, that she had not relinquished her decision-making power with respect to the loans and that G had no discretion over her interests that he was able to exercise unilaterally or otherwise. The trial judge specifically rejected P's contention that due to the power dynamics of their relationship she was simply unable to refuse requests for loans. There was no evidence accepted by the trial judge of any express requests for loans, which makes it illogical to conclude that P was unable to refuse requests when there were in fact none. [48] [51-55] [57]

Second, not all power-dependency relationships are fiduciary in nature, and identifying a power-dependency relationship does not, on its own, materially assist in deciding whether the relationship is fiduciary or not. It follows that there are not, and should not be, special rules for recognition of fiduciary duties in the case of power-dependency relationships. Here, the Court of Appeal erred when it held that, in the case of a power-dependency relationship, a fiduciary duty may arise even in the absence of a mutual understanding that one party would act only in the interests of the other provided there is proof of an expectation on the part of the plaintiff, which is reasonable in all of the circumstances, that the defendant would act in his or her best interests. The Court of Appeal found P to have such a reasonable expectation. While a mutual understanding may not always be necessary — a point that need not be decided here — it is fundamental to all *ad hoc* fiduciary duties that there be an undertaking by the fiduciary, which may be either express or implied, that the fiduciary will act in the best interests of the other party, in accordance with the duty of loyalty reposed on him or her. The fiduciary's undertaking may be the result of the exercise of statutory powers, the express or implied terms of an agreement or, perhaps, simply an undertaking to act in this way. In cases of *per se* fiduciary relationships, this undertaking will be found in the nature of the category of relationship in issue. The critical point is that in both *per se* and *ad hoc* fiduciary relationships, there will be some undertaking on the part of the fiduciary to act with loyalty. The Court of Appeal's analysis went wrong when it found a fiduciary duty without finding an undertaking, express or implied, on the part of G that he would act in relation to the loans only in P's interests, and based its conclusion that a fiduciary duty existed on P's expectations alone. [63-64] [66] [74-75] [77] [80]

The third error arises by implication because the Court of Appeal appears to have accepted the proposition that a fiduciary duty may arise even though the fiduciary has no discretionary power to affect the other party's legal or important practical interests. The nature of this discretionary power to affect the beneficiary's legal or practical interests may, depending on the circumstances, be quite broadly defined. It may arise from power conferred by statute, agreement, perhaps from a unilateral undertaking or, in particular situations by the beneficiary's entrusting the fiduciary with information or seeking advice in circumstances that confer a source of

power. While what is sufficient to constitute power in the hands of the fiduciary may be controversial in some cases, the requirement for the existence of such power in the fiduciary's hands is not. The presence of this sort of power will not necessarily on its own support the existence of an *ad hoc* fiduciary duty; its absence, however, negates the existence of such a duty. The findings of the trial judge that the evidence did not establish that P relinquished her decision-making power with respect to the loans to G, and that G had no discretionary power over P's interests that he was able to exercise unilaterally or otherwise, with which the Court of Appeal did not disagree, are fatal to P's claim that there was an *ad hoc* fiduciary duty on G's part to act solely in her interests in relation to these cash advances. [50] [84-86]

Moreover, given the limited nature of the retainers and the unusual nature of the advances, the trial judge did not err in finding that G and the law firm did not breach their duty of care arising from the solicitor-client relationship between them and P. There was no actual conflict of interest between the firm's duties to her in connection with the limited retainers and its interest in receiving the advances. Similarly, there could not be in these unusual facts any reasonable apprehension of conflict. Given the very limited nature of those retainers and the manner in which the advances were made — unsolicited and frequently without advance notice — there was no duty on the firm under negligence principles to give P advice about those advances or to insist that she obtain independent legal advice about them. [33]

With respect to P's contractual claims against the law firm, out of an abundance of caution and if the parties cannot agree, the question of whether a judgment in debt in P's favour against the firm should issue and, if so, its impact, if any, on the costs ordered at trial and on the appeal to the Court of Appeal should be remanded to the Court of Appeal. [46]

Cases Cited

Referred to: *Hodgkinson v. Simms*, [1994 CanLII 70 \(SCC\)](#), [1994] 3 S.C.R. 377; *MacDonald Estate v. Martin*, [1990 CanLII 32 \(SCC\)](#), [1990] 3 S.C.R. 1235; *Meadwell Enterprises*

Ltd. v. Clay and Co. (1983), [1982 CanLII 657 \(BC SC\)](#), 44 B.C.L.R. 188; *R. v. Neil*, [2002 SCC 70](#), [2002] 3 S.C.R. 631; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989 CanLII 34 \(SCC\)](#), [1989] 2 S.C.R. 574; *Strother v. 3464920 Canada Inc.*, [2007 SCC 24](#), [2007] 2 S.C.R. 177; *Shafron v. KRG Insurance Brokers (Western) Inc.*, [2009 SCC 6](#), [2009] 1 S.C.R. 157; *Norberg v. Wynrib*, [1992 CanLII 65 \(SCC\)](#), [1992] 2 S.C.R. 226; *Mustaji v. Tjin* (1995), 24 C.C.L.T. (2d) 191, aff'd (1996), [1996 CanLII 1907 \(BC CA\)](#), 25 B.C.L.R. (3d) 220; *Guerin v. The Queen*, [1984 CanLII 25 \(SCC\)](#), [1984] 2 S.C.R. 335; *Frame v. Smith*, [1987 CanLII 74 \(SCC\)](#), [1987] 2 S.C.R. 99.

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APPEAL from a judgment of the British Columbia Court of Appeal (Rowles, Levine and Thackray JJ.A.), [2008 BCCA 91](#), 78 B.C.L.R. (4th) 268, 253 B.C.A.C. 149, 425 W.A.C. 149,

291 D.L.R. (4th) 537, [2008] 7 W.W.R. 39, 55 C.C.L.T. (3d) 243, [2008] B.C.J. No. 309 (QL), 2008 CarswellBC 339, setting aside a decision of Rice J., [2006 BCSC 899](#), [2006] B.C.J. No. 1396 (QL), 2006 CarswellBC 1523. Appeal allowed.

George K. Macintosh, Q.C., and Tim Dickson, for the appellants.

Robert D. Holmes and John W. Bilawich, for the respondent.

The judgment of the Court was delivered by

CROMWELL J. —

I. Introduction

[1] This appeal arises out of the developing jurisprudence about fiduciary obligations. The facts are unusual, if not unique. At the centre of the case are sizeable advances of cash — some \$200,000 in total — made by Ms. Perez to her employer, the appellant law firm founded by Mr. Galambos. Ms. Perez made these advances voluntarily, much on her initiative and often without informing Mr. Galambos beforehand. When the firm was placed in receivership and Mr. Galambos went bankrupt, she found herself an unsecured creditor. She recovered nothing. With the necessary leave of the court (under [s. 69.4](#) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3), she sued Mr. Galambos and the defunct firm for negligence, breach of contract and breach of fiduciary duty, no doubt in the hope that, as the trial judge observed, success in these claims might allow her to recover from the appellants' professional liability insurance.

[2] Ms. Perez's claims failed at trial where the judge found that her rights were those of a creditor and nothing more ([2006 BCSC 899](#), [2006] B.C.J. No. 1396 (QL)). The Court of Appeal, however, set aside that decision ([2008 BCCA 91](#), 78 B.C.L.R. (4th) 268). It concluded

that Ms. Perez was entitled to equity's protection because there were fiduciary duties owed to her by the appellants which they had breached. The appellants now appeal to this Court. Although there are several issues, the main question is whether the Court of Appeal was correct to find the appellants owed and breached fiduciary duties to Ms. Perez.

[3] In my respectful view, the Court of Appeal exceeded the limits of appellate review and unduly extended the scope of fiduciary obligations. The trial judge was right to dismiss Ms. Perez's claims and the Court of Appeal erred in law by reversing that decision.

II. Issues

[4] The focus of the appeal is the appellants' contention that the Court of Appeal wrongly found that they were Ms. Perez's fiduciaries in relation to the cash advances which she made. Ms. Perez, in responding to the appeal, not only defends the Court of Appeal's decision, but also renews other arguments which she advanced unsuccessfully at trial. She submits that the appellants acted throughout as her lawyers and in the course of doing so, breached fiduciary duties inherent to the solicitor-client relationship, acted negligently and in breach of contract. She also raises arguments based on her employment contract and her claim in debt against the firm.

[5] I find it more convenient to address Ms. Perez's submissions on these points first and then turn to what I view as the heart of the appeal, the appellants' challenge to the Court of Appeal's decision. A brief overview of the facts, claims and proceedings will set the stage.

III. Overview of Facts, Claims and Proceedings

A. *Facts*

[6] Ms. Perez was hired in May 2001 as the firm's part-time bookkeeper. She did excellent work and in October 2001 she started to work full-time, effectively becoming the office manager. As part of her duties, she oversaw all of the firm's income, expenses and accounting and had unlimited signing authority on the firm's bank accounts, except trust accounts.

[7] In January 2002 the firm experienced a cash flow problem. To resolve it, Ms. Perez obtained a personal loan and deposited \$40,000 into the firm's account. The trial judge found that Mr. Galambos did not ask her to advance this money and that he did not even know about the advance until several days later (para. 61). It is common ground that Mr. Galambos instructed Ms. Perez to reimburse herself with interest, an instruction she did not follow other than by repaying herself \$15,000.

[8] During and after 2002, the firm's financial situation deteriorated. Ms. Perez made several more deposits of her own funds into the firm's account and covered some firm expenses with her personal credit card. The trial judge found that Ms. Perez made several of the advances without informing Mr. Galambos beforehand and that she extended the loans voluntarily, much on her own initiative and without undue influence by Mr. Galambos (paras. 62-63). The trial judge described what happened this way:

As the [financial] decline continued, Mrs. Perez began to deposit more monies of her own into the general account of the firm. On February 12 and 21, 2003, she deposited cheques for \$10,000 and \$22,000. She testified that she would observe that the funds were needed and inform Mr. Galambos. According to her, he would simply ask her to "do something". She would then, without necessarily telling him first, deposit more funds of her own into the firm's account.

In addition to these deposits, Mrs. Perez frequently paid for the firm's supplies with her own credit card and then reimbursed herself for those expenses. She even used her card to make certain personal purchases for Mr. Galambos, such as two suits when she accompanied him once to Harry Rosen's and a down payment when she

accompanied him once to sign a lease for a Mercedes. Mr. Galambos was aware that this was her practice. He said she volunteered to use her personal credit card in this way so that she could pick up frequent flyer points as a perquisite.

All the while, throughout 2003 and early 2004, the decline in the firm's fortunes continued, and clearly so. The DOJ work, which had made up most of the firm's revenue, continued to drop. The firm laid off staff. The bank overdraft was constantly at its limit and beyond. The plaintiff kept advancing money, asserting several times in her testimony that she did so in reliance on Mr. Galambos's promises that the firm's fortunes would improve and that he would pay her back. According to Mrs. Perez, he told her that there were one or two files soon to be completed with high contingency fees and that he was on the verge of obtaining lucrative new legal work. He even took her to meet the new client. By March 2004, the firm owed Mrs. Perez approximately \$200,000. [paras. 17-19]

[9] During the time she worked for the firm, it handled the preparation and execution of new wills for Ms. Perez and her husband as well as two mortgage transactions, with respect to at least one of which the firm also acted for the lender. The firm did not expect to be and was not paid for these services.

B. *Claims*

[10] Ms. Perez claimed that there was an ongoing solicitor-client relationship between her and Mr. Galambos's firm because free legal services were part of her employment contract. She submitted that Mr. Galambos and the firm breached an implied term of the retainer and their fiduciary duties to her by failing to provide her with the legal advice she required in connection with her loans to the firm and by acting for her while in a conflict of interest. She also asserted that Mr. Galambos and the firm were fiduciaries even apart from the solicitor-client relationship and that they had breached their obligations to her. She made other claims in contract and negligence.

C. *Proceedings*

[11] At trial, all of Ms. Perez's claims were dismissed. The trial judge, Rice J., found that there were no fiduciary duties in relation to the cash advances. He rejected Ms. Perez's contention that there was any ongoing, general solicitor-client relationship; he found, contrary to her position, that free legal services were not a term of her employment. He concluded that the retainers for the wills and mortgages were each distinct and limited to the services requested and that the loans were outside the ambit of the limited solicitor-client relationship which existed between the parties (paras. 24-40). He also found that there was no fiduciary relationship apart from these retainers since Ms. Perez was not vulnerable and had not relinquished any decision-making power to Mr. Galambos (paras. 41-46). As for Ms. Perez's negligence claim, the trial judge concluded that Mr. Galambos had not been negligent in his conduct of his business, that he owed no special duty to Ms. Perez in that regard in any case, that she did not rely on Mr. Galambos's expressions of hope that things would turn around and that it would have been unreasonable for her to do so, given her detailed knowledge of the firm's finances. Finally, the judge firmly rejected Ms. Perez's allegations of coercion and undue influence by Mr. Galambos (paras. 54-55).

[12] Writing for the Court of Appeal, Rowles J.A. agreed with the trial judge that it was not a term of Ms. Perez's employment that the firm would provide free legal services on all matters or act as her lawyer generally. Also in apparent agreement with the trial judge, the court doubted that the limited solicitor-client relationships that did exist between Ms. Perez and the firm provided a basis for finding any breach of the *per se* fiduciary obligations arising from the relationship of solicitor and client. However, the court concluded that Mr. Galambos had breached an *ad hoc* fiduciary duty which arose in all of the circumstances, even though Ms. Perez did not specifically submit before the Court of Appeal that there was a duty arising that way. The court held that there was a "power-dependency" relationship between Ms. Perez and Mr. Galambos; it is

not necessary for the duty to arise that there be any mutual understanding that Mr. Galambos had relinquished his self-interest in favour of hers; Ms. Perez was vulnerable; and the evidence “overwhelmingly” supported the conclusion that Mr. Galambos took advantage of her trust (paras. 16 and 50-56). The Court of Appeal therefore allowed the appeal and granted Ms. Perez judgment for \$200,000.

IV. Analysis

A. *Respondent's Issues*

[13] Ms. Perez submits that the appellants acted throughout as her lawyers and that, in doing so, they acted negligently, in breach of contract and in breach of a fiduciary duty flowing from that solicitor-client relationship. She also makes brief submissions with respect to her contract of employment and her claim in debt against the now-defunct firm.

[14] Except in one aspect, I am not persuaded that these points have merit. I will first address the submissions arising from the solicitor-client relationship and then turn to the other claims.

1. Claims Arising From the Solicitor-Client Relationship

a. *Negligence*

[15] At trial, Ms. Perez submitted that the appellants had a duty of care towards her under negligence principles, both within the solicitor-client relationship and apart from that

relationship. In this Court, her submissions about negligence are limited to breaches of duty within the solicitor-client relationship.

[16] In June of 2002, a Galambos & Co. lawyer handled the preparation and execution of new wills for Ms. Perez and her husband. The firm also handled mortgage transactions in January and September of 2003.

[17] The foundation of Ms. Perez's negligence submission is that there was a general and ongoing solicitor-client relationship between the appellants and herself. She maintains that this relationship existed throughout her employment and covered all necessary legal work during that time including, of course, the period during which she advanced funds to the firm. Ms. Perez submits that the appellants breached the duty of care which was inherent in this solicitor-client relationship, saying that they were negligent by placing themselves in a position of conflict of interest with her, failing to advise her in connection with the cash advances and failing to require or suggest that she seek independent legal advice before making the cash advances to the firm.

[18] In the particular and admittedly unusual facts of this case, these submissions cannot be accepted. Given the strong findings of fact by the trial judge, the particular nature of the appellants' retainers and the nature of the advances themselves, I see no reviewable error in Rice J.'s rejection of these claims.

[19] The trial judge made three especially important factual findings which in my view cannot be disturbed on appeal.

[20] The first is that, contrary to Ms. Perez's contentions, there was no ongoing, general solicitor-client relationship. While Ms. Perez claimed that she had been promised free legal work as a condition of her employment, the judge concluded that this was not a term of her employment and that the firm had not undertaken to be her lawyer generally or to provide her with any specific legal service (para. 27). This was a finding of fact made by the judge after consideration of conflicting evidence and no basis has been made out for setting it aside. It follows that an important factual element of Ms. Perez's claims does not exist.

[21] The judge's second finding related to the legal work undertaken by the firm on Ms. Perez's behalf. He found that each retainer was limited to the specific services requested and was unrelated to the advances she made to the firm. While the judge did make a factual mistake in his discussion of this issue as I shall describe, I see no proper basis to interfere with his conclusions about the nature of the retainers.

[22] With respect to the wills, the trial judge noted that Ms. Perez herself acknowledged that this legal work had nothing to do with the previous or subsequent advances of funds that she made to the firm (para. 29).

[23] With respect to the mortgages, the judge found that these retainers were unrelated to the cash advances and were limited to the particular services requested. He put it this way, at paras. 36-37:

On the whole, the evidence indicates that Mrs. Perez retained Galambos & Company for three specific legal purposes: to obtain a new will and to complete two mortgage transactions. Aside from those, Mrs. Perez's only relationship with the firm was as an employee and a creditor. There was, at the time these services were performed, no commitment of the firm to provide Mrs. Perez with any legal service in the future. There is no evidence that Mrs. Perez consulted anyone in the firm for legal advice on any matter outside the confines of the three specific transactions. In

particular, there is no evidence that she ever asked Mr. Galambos or another lawyer at the firm to advise her about the loans or about her financial circumstances generally. On the contrary, she made some advances on her own initiative without telling Mr. Galambos beforehand.

In the circumstances, I find that each retainer was separate, distinct, and limited to the specific services Mrs. Perez requested. [Emphasis added.]

[24] The judge's third finding was that Ms. Perez did not ask for or receive advice about the advances, that she did not rely on anything Mr. Galambos told her when she decided to make the advances and that, even if she had so relied, that reliance would have been unreasonable in the particular circumstances of the case (paras. 47-53).

[25] In light of these findings, Ms. Perez's submissions about negligence cannot succeed. The solicitor-client relationship between Ms. Perez and the appellants was very limited and there is no plausible suggestion that the firm's preparation of the wills and the mortgages breached the standard of care owed to her. As the trial judge put it, "Mrs. Perez has no complaint relating to any of the legal services or advice that the firm provided. Those transactions did not leave her disadvantaged in any way" (para. 40).

[26] Was there a breach of any duty owed in relation to the cash advances? Ms. Perez argues that it is illogical to say that the subject matters of the legal services were distinct from the loans because drawing up a will involves knowing the state of a client's assets and liabilities and that "the relation of the two mortgage transactions to the loans is obvious" (Factum, at para. 66). She submits that the proceeds were used to provide the advances. However, the trial judge found as a fact that the mortgages had nothing to do with her advances to the firm and rejected as inconclusive the only piece of evidence which could have supported the theory that Mr. Galambos helped her obtain one of the loans by attesting to her employment status (paras. 29 and 56-61). Ms. Perez has pointed to no proper basis for appellate interference with these findings.

[27] That said, Ms. Perez correctly submits that the judge was wrong to find that there was no solicitor-client relationship between her and the firm at the time of any of her cash advances. The record discloses that Ms. Perez did make some advances to the firm while there were open files for some of the matters in which the firm acted for her. During these periods, Ms. Perez advanced Galambos & Co. amounts which are difficult to calculate precisely from the record, but which were at least in the tens of thousands of dollars. The judge erred, therefore, in saying, at para. 37, that she was not a client at any of the times when she made loans to the firm. However, this factual mistake does not in my view invalidate the judge's critical finding that the retainers were distinct, limited and had no bearing on these advances.

[28] I would not wish to be thought as saying that the firm complied with all of the applicable rules of professional conduct. The fact that these advances were made outside the confines of this particular solicitor-client relationship does not circumvent the nearly absolute professional standard not to borrow from clients. As provided in rule 4 of Chapter 7 of the Law Society of British Columbia *Professional Conduct Handbook* (1993): "Unless the transaction is of a routine nature to and in the ordinary course of business of the client, a lawyer must not borrow money or obtain credit from a client of the lawyer's firm, or obtain a benefit from any security or guarantee given by such a client."

[29] However, two points must be made with respect to this rule of conduct. The first is that there is an important distinction between the rules of professional conduct and the law of negligence. Breach of one does not necessarily involve breach of the other. Conduct may be negligent but not breach rules of professional conduct, and breaching the rules of professional conduct is not necessarily negligence. Codes of professional conduct, while they are important statements of public policy with respect to the conduct of lawyers, are designed to serve as a guide to lawyers and are typically enforced in disciplinary proceedings. They are of importance in

determining the nature and extent of duties flowing from a professional relationship: *Hodgkinson v. Simms*, 1994 CanLII 70 (SCC), [1994] 3 S.C.R. 377, at p. 425. They are not, however, binding on the courts and do not necessarily describe the applicable duty or standard of care in negligence: see, e.g., *MacDonald Estate v. Martin*, 1990 CanLII 32 (SCC), [1990] 3 S.C.R. 1235, at pp. 1244-45; *Meadwell Enterprises Ltd. v. Clay and Co.* (1983), 1982 CanLII 657 (BC SC), 44 B.C.L.R. 188 (S.C.); S. M. Grant and L. R. Rothstein, *Lawyers' Professional Liability* (2nd ed. 1998), at pp. 8-10.

[30] The second point relates to the concerns underlying the rules of conduct in relation to borrowing from clients. The rule is a specific application of the general rules about conflict of interest. There is concern that a lawyer's legal skill and training, coupled with the relationship of trust that arises between a solicitor and a client, creates the possibility of overreaching by the lawyer. A further concern is that the lawyer is in a position to arrange the form of the transaction and may therefore further his or her own interests instead of those of the client: see *Restatement (Third) of the Law Governing Lawyers* — 126 cmt. b (2000). However, given the trial judge's factual findings in this unusual case, the concerns giving rise to the rule are not in play here.

[31] A situation of conflict of interest occurs when there is a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person": *Restatement (Third) of the Law Governing Lawyers* § 121, cited with approval in *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, at para. 31. On this point, Rice J. effectively found that there was no risk that the firm's representation of Ms. Perez in connection with the wills or mortgages could be affected by the firm's interest in receiving the cash advances from her. Similarly, the trial judge found no reliance and therefore certainly no overreaching and no effort on the part of the lawyers to structure the advances to their advantage. As the trial judge found, at para. 62: "... although it

is truly strange, [Ms. Perez] appears to have extended the loans voluntarily and much on her own initiative.” He concluded that there was “no evidence of undue influence, or unconscionability” (para. 63).

[32] I cannot fault the judge for reaching this conclusion on the admittedly unusual facts which confronted him. These were routine legal services, wholly unrelated, as the judge found, to the advances and they were provided without fee to an employee. The cash advances were unusual and far removed from the sorts of loans from clients envisaged by the professional conduct rule. The advances were not requested by the firm or Mr. Galambos, they were sometimes made without Ms. Perez advising the firm that they had been. Ms. Perez, the bookkeeper and employee of the firm, did not obey her employer’s instructions to repay the advances even when the firm’s finances would have permitted it and she did not provide an accounting to the firm of what it owed to her. This situation is as about as far removed as one can imagine from the typical case of a lawyer improperly borrowing money from a client. In short, there was no conflict between the firm’s duties to her in connection with the wills and mortgages and the advances, and the firm did not in any way trade upon its position as her lawyer to obtain them.

[33] I conclude that, given the limited nature of the retainers and the unusual nature of the advances, the trial judge did not err in finding that the appellants did not breach their duty of care arising from the solicitor-client relationship between them and Ms. Perez. There was no actual conflict of interest between the firm’s duties to her in connection with the limited retainers and its interest in receiving the advances. Similarly, there could not be in these unusual facts any reasonable apprehension of conflict. Given the very limited nature of those retainers and the manner in which the advances were made — unsolicited and frequently without advance notice — there was no duty on the firm under negligence principles to give Ms. Perez advice about those advances or to insist that she obtain independent legal advice about them.

b. *Contract for Legal Services*

[34] The claim that the solicitor-client contract was breached is essentially a differently labelled repetition of the claim in negligence, and this contractual claim falls with it.

c. *Per se Fiduciary Duty*

[35] Ms. Perez submits that the appellants breached the fiduciary obligations owed by lawyers to clients. In my view, this contention fails for much the same reason as Ms. Perez's claims in negligence.

[36] Certain categories of relationships are considered to give rise to fiduciary obligations because of their inherent purpose or their presumed factual or legal incidents: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, 1989 CanLII 34 (SCC), [1989] 2 S.C.R. 574, *per* La Forest J., at p. 646. These categories are sometimes called *per se* fiduciary relationships. There is no doubt that the solicitor-client relationship is an example. It is important to remember, however, that not every legal claim arising out of a *per se* fiduciary relationship, such as that between a solicitor and client, will give rise to a claim for a breach of fiduciary duty.

[37] A claim for breach of fiduciary duty may only be founded on breaches of the specific obligations imposed because the relationship is one characterized as fiduciary: *Lac Minerals*, at p. 647. This point is important here because not all lawyers' duties towards their clients are fiduciary in nature. Sopinka and McLachlin JJ. (as the latter then was) underlined this in dissent (but not on this point) in *Hodgkinson*, at pp. 463-64, noting that while the solicitor-client relationship has fiduciary aspects, many of the tasks undertaken in the course of the solicitor-client

relationship do not attract a fiduciary obligation. Binnie J. made the same point in *Strother v. 3464920 Canada Inc.*, [2007 SCC 24](#), [2007] 2 S.C.R. 177, at para. 34: “Not every breach of the contract of retainer is a breach of a fiduciary duty.” The point was also put nicely by Rupert M. Jackson and John L. Powell, *Jackson & Powell on Professional Liability* (6th ed. 2007), at para. 2-130, when they said that any breach of any duty by a fiduciary is not necessarily a breach of fiduciary duty.

[38] The launching pad for Ms. Perez’s submissions based on the solicitor-client relationship is that there was a general solicitor-client relationship between her and the firm for all necessary legal work during the time that she advanced funds to the firm. As noted earlier, the judge made a finding against her on this point: he found, on conflicting evidence, that it was not a term of Ms. Perez’s employment that the firm would provide her with all necessary legal services and that the cash advances were not within the terms of any of the specific and limited retainers which the firm undertook on her behalf. The Court of Appeal agreed. It concluded that whatever fiduciary obligations arose from the limited solicitor-client relationship, they did not extend to the cash advances. As the Court of Appeal put it:

While a solicitor-client relationship existed between the parties at certain times and for certain purposes, I question whether that aspect of their relationship, standing alone, would provide a foundation for imposing fiduciary obligations in this case. Unlike the situation in *3464920 Canada Inc. v. Strother*, [2007 SCC 24](#), [2007] 2 S.C.R. 177 (S.C.C.), (a case which both parties rely on as authority for the extent of the duties of lawyers to their clients where there is a conflict of interest), it appears to me that the nature of the relationship between Mr. Galambos and Ms. Perez and the trust and confidence that formed between them cannot be fully encompassed or explained by their interactions as solicitor and client. I agree with the trial judge that although it was reasonable for [Ms. Perez] to expect the firm to offer its services for certain discrete transactions, it was not implicit as a term of her employment that the firm would

provide free legal services on all matters or act as her lawyer generally. Even if this were the case, I question whether that alone would constitute a sufficient basis on which to impose fiduciary obligations. As the trial judge noted, it is common practice for law firms to act for their employees on discrete, simple matters. Generally speaking, acting on such discrete matters would not alone found a fiduciary relationship giving rise to fiduciary obligations in all dealings with all such employees. [para. 48]

[39] I am not persuaded that there is any basis to interfere with the trial judge's conclusion, endorsed by the Court of Appeal, that the retainers were unrelated to the cash advances and that no obligation arose on the part of Mr. Galambos and his firm to act solely in Ms. Perez's interest in relation to the advances. I conclude that the judge did not err in finding that there had been no breach of the *per se* fiduciary obligations that arose from the solicitor-client relationship.

d. *Conclusion on Solicitor-Client Issues*

[40] In my view, the trial judge did not err by dismissing Ms. Perez's claims in negligence, contract and breach of fiduciary duty arising from the solicitor-client relationship between her and the firm.

2. Other Contractual Claims

[41] Two paragraphs of Ms. Perez's factum are devoted to two other contractual claims: the first relating to an alleged breach of employment contract and the second to an alleged breach of a "covenant to repay" the advances. I will address each in turn.

a. *Employment Contract*

[42] While Ms. Perez's submissions on this point are not easy to follow, the point appears to be that the firm breached an implied obligation under Ms. Perez's employment contract not to undermine the trust and confidence of the employment relationship. The question of whether there was an obligation of trust and confidence arising in the particular circumstances of the parties' relationship will be addressed in the next section of my reasons. I do not discern in Ms. Perez's submissions any other independent alleged breach of the employment contract.

b. *Covenant to Repay*

[43] Ms. Perez submits that she is entitled to, but did not receive, a judgment in debt against the appellant law corporation. While Mr. Galambos is personally shielded from any action in debt under the *Bankruptcy and Insolvency Act*, she submits that a judgment in debt should issue against the firm, which, so far as may be ascertained from the record in this Court, has not obtained the same protection.

[44] The fact of the debt is not disputed and it appears that the Amended Statement of Claim includes language which may be broad enough to include this claim (Appellants' Record, p. 80, at para. 12). While the law corporation, we are told, is defunct and without assets, Ms. Perez's counsel mentioned during oral argument that a judgment against the firm might have some impact on the question of costs.

[45] This issue is mentioned in neither of the judgments below; the trial judge's order dismissed all claims and awarded scale 3 costs to April 24, 2006 and double scale 3 costs thereafter, and the Court of Appeal set aside this order, gave Ms. Perez judgment for \$200,000,

prejudgment interest and costs of the trial and the appeal. It was, therefore, not necessary for it to consider the debt claim or the trial judge's costs award.

[46] There is at least some basis to think, therefore, that Ms. Perez may be entitled to the judgment she seeks against the firm for debt and that such a judgment might have some practical value to her. However, the question has not been addressed below and the record and arguments in this Court are too sparse to allow me to resolve the matter confidently. As there appears to be no dispute about the existence of the debt to the corporation, it may well be that the parties can sort out for themselves what, if any, costs consequences should flow from it. However, if they cannot, I would, out of an abundance of caution, remand, pursuant to [s. 46.1](#) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, to the British Columbia Court of Appeal the questions of whether a judgment in debt in Ms. Perez's favour should issue and, if so, its impact, if any, on the costs ordered at trial and on the appeal to the Court of Appeal now that her appeal in all other respects has been dismissed in this Court.

3. Summary of Conclusions With Respect to the Respondent's Issues

[47] I conclude that Ms. Perez's claims fail with respect to alleged breaches within the solicitor-client relationship and her contract of employment. Subject to any agreement among the parties, I would remand to the Court of Appeal the questions of whether she ought to have judgment in debt against the Michael Z. Galambos Law Corporation and, if so, whether that judgment has any impact on the disposition of costs in the courts below.

B. *Appellants' Issues*

[48] The appellants' issues address the holding of the Court of Appeal. As noted, it held, reversing the trial judge, that the particular circumstances of the relationship between Ms. Perez and Mr. Galambos and his firm gave rise to what may be called an *ad hoc* fiduciary duty. This means that apart from the categories of relationships to which fiduciary obligations are innate, such obligations may arise as a matter of fact out of the specific circumstances of a particular relationship: see, e.g., *Lac Minerals*, at p. 648; *Hodgkinson*, at p. 409. The existence of the fiduciary obligation is thus primarily a question of fact to be determined by examining the specific facts and circumstances: *Lac Minerals*, at p. 648.

[49] This is an important point in relation to the standard of appellate review. Absent an error of law or a palpable and overriding error of fact, the trial judge's conclusion that a fiduciary duty did not exist must be upheld on appeal: *Shafroon v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157, at para. 13; *Hodgkinson*, at pp. 425-26. As La Forest J. put it in *Hodgkinson*, at p. 426, this principle of non-intervention on appeal "is not merely cautionary; it is a rule of law. Failing a manifest error, an appellate court simply has no jurisdiction to interfere with the findings and conclusions of fact of a trial judge."

[50] The core of the Court of Appeal's reasoning consists of three points, two of which are expressly set out and the third of which is implied. The explicit points are, first, that a "power-dependency" relationship existed between Ms. Perez and Mr. Galambos and second, that in such relationships, fiduciary duties may arise simply on the basis of the reasonable expectations of the weaker party and without any mutual understanding of both parties that one must act in the interests of the other. The third point arises by implication because the court appears to have accepted the proposition, without expressly stating it, that a fiduciary duty may arise even though the fiduciary has no discretionary power to affect the other party's legal or important practical interests.

[51] The appellants challenge each of these points. For reasons which I will develop, I agree that the Court of Appeal erred in these three respects.

1. Was There a Power-Dependency Relationship?

[52] The Court of Appeal found that the parties' relationship in this case was similar in nature to the "power-dependency" relationship found in *Norberg v. Wynrib*, 1992 CanLII 65 (SCC), [1992] 2 S.C.R. 226. By the term "power-dependency" relationship, I understand the Court of Appeal to have meant that Mr. Galambos had gained a position of overriding power or influence over Ms. Perez: see *Hodgkinson*, at p. 411; *Mustaji v. Tjin* (1995), 24 C.C.L.T. (2d) 191 (B.C.S.C.), aff'd (1996), 1996 CanLII 1907 (BC CA), 25 B.C.L.R. (3d) 220 (C.A.). As the Court of Appeal put it, at para. 50: "As [Ms. Perez's] employer, [Mr. Galambos] was in a position of power and influence relative to [Ms. Perez]. It is clear from the circumstances that [Ms. Perez] looked up to Mr. Galambos and expected that he would look out for her best interests as a result of the nature of their relationship."

[53] This conclusion is directly at odds with the clear findings of fact at trial. In effect, the Court of Appeal retried the case on the basis of the written record and substituted its view of the facts and their significance for that of the trial judge. This, respectfully, was not the court's function on appeal and it erred in law by doing so.

[54] The trial judge found that Ms. Perez was not vulnerable in terms of her relationship with Mr. Galambos, that she had not relinquished her decision-making power with respect to the loans to Mr. Galambos and that he had no discretion over her interests that he was able to exercise unilaterally or otherwise (paras. 45-46). He found (at paras. 45-46, 54 and 63) that:

- Ms. Perez was well educated and well experienced in dealing with successful, busy lawyers;
- she was as knowledgeable and probably more knowledgeable than Mr. Galambos about most aspects of the firm's financial affairs;
- she was not, as a result of their relative position or her respect for Mr. Galambos, vulnerable to him;
- the evidence did not establish that Ms. Perez relinquished her decision-making power with respect to the loans to Mr. Galambos;
- Mr. Galambos had no discretion over her interests that he was able to exercise unilaterally or otherwise;
- aside from the limited retainers for routine legal services, their relationship was one of friendship between employer and employee which gave rise to a creditor-debtor relationship;
- there was never any suggestion that Ms. Perez's employment evaluations or prospects would be affected in any way by the loans or by any refusal to make them;
- there was no evidence that Mr. Galambos made any efforts to impose his will on Ms. Perez or to convince her to act against her wishes, to appeal to her sympathy or to cultivate hero-worship or subservience on her part.

[55] The trial judge specifically rejected Ms. Perez's contention that due to the power dynamics of their relationship she was simply unable to refuse requests for loans. There was no evidence accepted by the trial judge of any express requests for loans, which makes it illogical to

conclude that Ms. Perez was unable to refuse requests when there were in fact none. Moreover, the trial judge was not persuaded on the balance of probabilities that Mr. Galambos's instructions to "do something" when advised of cash flow problems were, or could reasonably have been understood by Ms. Perez as pressure on her to loan her personal funds, a course she frequently took without any solicitation or, in some instances, any knowledge on Mr. Galambos's part (para. 54).

[56] The trial judge's findings do not support the existence of the parallel that the Court of Appeal found between this case and power-dependency cases such as *Norberg* and *Mustaji*. *Norberg* involved an aging physician extorting sex for drugs from a young woman addicted to prescription drugs. *Mustaji* involved a claim by a nanny brought to Canada under the Foreign Domestic Movement Program. There were findings of fact that the defendants had taken over her affairs concerning her immigration and employment in Canada, that they had the opportunity to exercise power or discretion over her, were capable of using that power or discretion without her knowledge or consent so as to affect her legal and practical interests and that she was especially vulnerable to that exercise of discretion and control: see reasons of Vickers J., at para. 27, and reasons of the Court of Appeal, at para. 12. The trial judge in the present case found nothing of this sort.

[57] The trial judge addressed Ms. Perez's argument that she advanced funds relying on and trusting Mr. Galambos's assurances that the firm's finances would turn around and that there were some major files coming to him. As noted earlier, the trial judge found as facts that she did not rely on these alleged statements, that she knew that the financial circumstances of the firm were not improving, that the influx of new legal work was speculative and that the potential for large amounts of contingency fees was exaggerated. As the judge put it, "both Mr. Galambos and [Ms.] Perez shared a hope for better times to come and blinded themselves to the true situation" (para. 53). Moreover, the judge also found that even if Ms. Perez had in fact relied on Mr.

Galambos's general statements to the effect that things would turn around, her reliance was not reasonable. As the judge put it, "[a] reasonable person in [Ms. Perez's] position would not have relied on [these statements], given especially her personal knowledge of the state of Mr. Galambos's financial affairs. She probably had more knowledge than he" (para. 52).

[58] The Court of Appeal, however, found that the judge's finding of fact that Ms. Perez was not vulnerable to Mr. Galambos was unreasonable. The court based its reversal of the trial judge on this point on the facts that Mr. Galambos had superior legal knowledge and experience, that he understood when professional advice was needed with respect to his financial affairs, that Ms. Perez looked up to and trusted him, that there was a power imbalance in their relationship and that Ms. Perez's conduct could not be explained on the basis of simple friendship (paras. 50 and 64-65).

[59] Respectfully, the reasons of the Court of Appeal disclose no basis for appellate intervention. The most that may be said is that the considerations identified by the Court of Appeal could plausibly sustain more than one conclusion about Ms. Perez's vulnerability. The Court of Appeal identified no finding of fact relevant to the judge's conclusion on this point that was both clearly wrong and determinative of the result. Rather, the Court of Appeal simply drew different inferences from the evidence than the ones drawn by the trial judge. This was not a proper basis for appellate reversal of his findings. The Court of Appeal ought not to have interfered with the judge's finding that Ms. Perez was not vulnerable to Mr. Galambos.

[60] The Court of Appeal also found that the judge erred by concluding that any reliance by Ms. Perez on Mr. Galambos's statements that things would turn around was unreasonable. The court reasoned that Mr. Galambos was in the best position to assess the prospects of the firm and that Ms. Perez had no means of knowing whether the flow of work from

the Department of Justice would again increase. On this basis, the court found the judge's conclusion to be "plainly wrong" (para. 61) and this error was part of the justification for appellate intervention. However, there are two difficulties with the Court of Appeal's approach to this issue.

[61] First, the trial judge found as a fact that Ms. Perez did not rely on these statements (para. 53) and the Court of Appeal did not directly take issue with this finding. This makes hypothetical and irrelevant the question of whether such reliance, had it occurred, would have been reasonable; any error by the judge on this hypothetical question provides no basis for interfering with his decision. Second, even if an error on this point were pertinent to the result, the reasons of the Court of Appeal disclose no clear and determinative error in the judge's holding to the effect that any reliance would have been unreasonable. Once again, the Court of Appeal in my respectful view substituted its reading of the record for the trial judge's findings. This was not its role.

[62] In summary, the trial judge's findings of fact should not have been disturbed on appeal and those findings do not support the Court of Appeal's conclusion that there was a "power-dependency" relationship between Ms. Perez and Mr. Galambos.

2. Mutual Understanding or Undertaking by the Fiduciary

[63] The Court of Appeal held that, in the case of a "power-dependency" relationship, a fiduciary duty may arise even in the absence of a mutual understanding that one party would act only in the interests of the other. Respectfully, I do not agree.

[64] Relying on *Hodgkinson*, the trial judge held that in order to find an *ad hoc* fiduciary duty, there must be a mutual understanding between the fiduciary and the beneficiary that

the fiduciary party has relinquished his or her own self-interest and agreed to act solely on behalf of the beneficiary (para. 43). The judge concluded that there was no such mutual understanding here (para. 46). The Court of Appeal, on the other hand, held that as the relationship between Mr. Galambos and Ms. Perez was one of “power-dependency”, there need not be a mutual understanding that one party has relinquished his or her own self-interest and undertaken to act in the interests of the other (para. 43). According to the Court of Appeal, what is required in the case of power-dependency relationships is proof of an expectation on the part of the plaintiff, which is reasonable in all of the circumstances, that the defendant would act in his or her best interests (para. 43). It found Ms. Perez to have such a reasonable expectation (paras. 60-65).

[65] The appellants challenge this conclusion, submitting that one party’s reasonable expectation is not sufficient and that there must be a mutual understanding that the fiduciary has undertaken to act only in the interests of the other party. Ms. Perez seeks to uphold the Court of Appeal’s decision, arguing that equity is inherently flexible and that a reasonable expectation is enough in a power-dependency relationship.

[66] In my view, while a mutual understanding may not always be necessary (a point we need not decide here), it is fundamental to *ad hoc* fiduciary duties that there be an undertaking by the fiduciary, which may be either express or implied, that the fiduciary will act in the best interests of the other party. In other words, while it may not be necessary for the beneficiary in all cases to consent to this undertaking, it is clearly settled that the undertaking itself is fundamental to the existence of an *ad hoc* fiduciary relationship. To explain why I have reached this conclusion, I need to go back to some basic principles of fiduciary law.

a. *Some Basic Principles*

[67] An important focus of fiduciary law is the protection of one party against abuse of power by another in certain types of relationships or in particular circumstances. However, to assert that the protection of the vulnerable is the role of fiduciary law puts the matter too broadly. The law seeks to protect the vulnerable in many contexts and through many different doctrines. As La Forest J. noted in *Hodgkinson*, at p. 406: “[W]hereas undue influence focuses on the sufficiency of consent and unconscionability looks at the reasonableness of a given transaction, the fiduciary principle monitors the abuse of a loyalty reposed” (emphasis added). This brief sentence makes two important points which help sharpen the focus on the role of fiduciary law.

[68] The first is that fiduciary law is more concerned with the position of the parties that *results from* the relationship which gives rise to the fiduciary duty than with the respective positions of the parties *before* they enter into the relationship. La Forest J. in *Hodgkinson*, at p. 406, made this clear by approving these words of Professor Ernest J. Weinrib: “It cannot be the *sine qua non* of a fiduciary obligation that the parties have disparate bargaining strength. . . . In contrast to notions of conscionability, the fiduciary relation looks to the relative position of the parties that results from the agreement rather than the relative position that precedes the agreement” (“The Fiduciary Obligation” (1975), 25 *U.T.L.J.* 1, at p. 6). Thus, while vulnerability in the broad sense resulting from factors external to the relationship is a relevant consideration, a more important one is the extent to which vulnerability arises from the relationship: *Hodgkinson*, at p. 406.

[69] The second is that a critical aspect of a fiduciary relationship is an undertaking of loyalty: the fiduciary undertakes to act in the interests of the other party. This was put succinctly by McLachlin J. in *Norberg*, at p. 273, when she said that “fiduciary relationships ... are always dependent on the fiduciary’s undertaking to act in the beneficiary’s interests”. See also *Hodgkinson*, *per* La Forest J., at pp. 404-7.

[70] Underpinning all of this is the focus of fiduciary law on relationships. As Dickson J. (as he then was) put it in *Guerin v. The Queen*, [1984 CanLII 25 \(SCC\)](#), [1984] 2 S.C.R. 335, at p. 384: “It is the nature of the relationship . . . that gives rise to the fiduciary duty. . . .” The underlying purpose of fiduciary law may be seen as protecting and reinforcing “the integrity of social institutions and enterprises”, recognizing that “not all relationships are characterized by a dynamic of mutual autonomy, and that the marketplace cannot always set the rules”: *Hodgkinson*, at p. 422 (*per* La Forest J.). The particular relationships on which fiduciary law focusses are those in which one party is given a discretionary power to affect the legal or vital practical interests of the other: see, e.g., *Frame v. Smith*, [1987 CanLII 74 \(SCC\)](#), [1987] 2 S.C.R. 99, *per* Wilson J., at pp. 136-37; *Norberg*, *per* McLachlin J., at p. 272; Weinrib, at p. 4, quoted with approval in *Guerin*, at p. 384.

[71] I return to the Court of Appeal’s holding that a fiduciary duty may arise in “power-dependency” relationships without any express or implied undertaking by the fiduciary to act in the best interests of the other party. I respectfully disagree with this approach, for two reasons: “power-dependency” relationships are not a special category of fiduciary relationships and the law is, in my view, clear that fiduciary duties will only be imposed on those who have expressly or impliedly undertaken them.

b. *Power-Dependency Relationships as a Special Category*

[72] As noted by the Court of Appeal, La Forest J. used the term “power-dependency” relationships in *Norberg* and in *Hodgkinson*. In the latter case he wrote, at p. 411:

I employed this notion, developed in an article by Professor [Phyllis] Coleman [“Sex in Power Dependency Relationships: Taking Unfair Advantage of the ‘Fair’ Sex” (1988), 53 *Alb. L. Rev.* 95], to capture the dynamic of abuse in *Norberg v. Wynrib*, *supra*, at p. 255. *Norberg* concerned an aging physician who extorted sexual favours

from a young female patient in exchange for feeding an addiction she had previously developed to the pain-killer Fiorinal. The difficulty in *Norberg* was that the sexual contact between the doctor and patient had the appearance of consent. However, when the pernicious effects of the situational power imbalance were considered, it was clear that true consent was absent. While the concept of a “power-dependency” relationship was there applied to an instance of sexual assault, in my view the concept accurately describes any situation where one party, by statute, agreement, a particular course of conduct, or by unilateral undertaking, gains a position of overriding power or influence over another party. [Emphasis added.]

[73] It is clear from these comments that La Forest J. was describing certain relationships which may also be fiduciary, but was not creating a separate category of *ad hoc* fiduciary relationships. In other words, this concept borrowed from academic writing may be useful to describe certain relationships, but it has not been and should not be used as a tool for categorization. Fiduciary relationships, he explained, are “simply a species of a broader family of relationships that may be termed ‘power-dependency’ relationships” (p. 411). The law’s approach to the situation of vulnerable people “gives rise to a variety of often overlapping duties” and “the precise legal or equitable duties the law will enforce in any given relationship are tailored to the legal and practical incidents of a particular relationship” (pp. 412-13).

[74] In short, not all power-dependency relationships are fiduciary in nature, and identifying a power-dependency relationship does not, on its own, materially assist in deciding whether the relationship is fiduciary or not. It follows, in my view, that there are not and should not be special rules for recognition of fiduciary duties in the case of “power-dependency” relationships. I am therefore of the view that the Court of Appeal erred in this respect.

c. *Mutual Understanding and Undertaking by the Fiduciary*

[75] The appellants fault the Court of Appeal for holding that fiduciary duties may arise only on the basis of the reasonable expectations of one party. The appellants say that there must be a mutual understanding that the fiduciary will act only in the interests of the other party. While I agree with the appellants that the Court of Appeal erred by basing a fiduciary obligation on Ms. Perez's reasonable expectation, it is not necessary in order to resolve this appeal to go so far as to say that a mutual understanding is necessary in all cases. It is sufficient to say here that what is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her.

[76] I note that in *Hodgkinson*, this Court considered competing bases for the imposition of *ad hoc* fiduciary duties, opposing to a certain extent mutual understanding and reasonable expectations of the alleged beneficiary. While the seven judges sitting on the case were not fully unanimous in this respect, they all agreed that *ad hoc* fiduciary obligations may be imposed when there is a mutual understanding to this effect, and, following the example of Dickson J. in *Guerin*, at p. 384, left the door open to such an obligation arising from a unilateral undertaking by the fiduciary (see on this point Professor Lionel Smith's insightful comment on *Hodgkinson*, "Fiduciary Relationships — Arising in Commercial Contexts — Investment Advisors: *Hodgkinson v. Simms*" (1995), 74 *Can. Bar Rev.* 714). Thus, what is required in all cases of *ad hoc* fiduciary obligations is that there be an undertaking on the part of the fiduciary to exercise a discretionary power in the interests of that other party. To repeat what was said by McLachlin J. in *Norberg*, "fiduciary relationships . . . are always dependent on the fiduciary's undertaking to act in the beneficiary's interests" (p. 273). As Dickson J. put it in *Guerin*, fiduciary duties may arise where "by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another" (p. 384).

[77] The fiduciary's undertaking may be the result of the exercise of statutory powers, the express or implied terms of an agreement or, perhaps, simply an undertaking to act in this way.

In cases of *per se* fiduciary relationships, this undertaking will be found in the nature of the category of relationship in issue. The critical point is that in both *per se* and *ad hoc* fiduciary relationships, there will be some undertaking on the part of the fiduciary to act with loyalty.

[78] Commentators support this view. In his seminal work, *Fiduciary Obligations* (1977), Professor P. D. Finn writes at para. 15:

For a person to be a fiduciary he must first and foremost have bound himself in some way to protect and/or to advance the interests of another. This is perhaps the most obvious of the characteristics of the fiduciary office for Equity will only oblige a person to act in what he believes to be another's interests if he himself has assumed a position which requires him to act for or on behalf of that other in some particular matter. [Emphasis added.]

To the same effect, Professor Smith writes in his comment on *Hodgkinson*, at p. 717 (echoing Dickson J.'s comments in *Guerin*, at p. 384, and Austin W. Scott, "The Fiduciary Principle" (1949), 37 *Cal. L. Rev.* 539, at p. 540):

The fiduciary must *relinquish* self-interest; that is an act which the fiduciary does, not an act which is done to the fiduciary. This was put slightly differently by Austin Scott, who said that "a fiduciary is a person who *undertakes* to act in the interest of another person." [Emphasis in original.]

[79] This does not mean, however, that an express undertaking is required. Rather, the fiduciary's undertaking may be implied in the particular circumstances of the parties' relationship. Relevant to the enquiry of whether there is such an implied undertaking are considerations such as

professional norms, industry or other common practices and whether the alleged fiduciary induced the other party into relying on the fiduciary's loyalty.

[80] In my respectful view, the Court of Appeal's analysis went wrong on this point. It found a fiduciary duty without finding an undertaking, express or implied, on the part of Mr. Galambos that he would act in relation to the loans only in Ms. Perez's interests. The court's reasoning is premised on the fact that there was no such undertaking; otherwise, there would have been no need to base the conclusion that a fiduciary duty existed on Ms. Perez's expectations alone.

[81] It is clear from the evidence that there was no explicit undertaking that Mr. Galambos was to act in Ms. Perez's best interest in relation to the cash advances; she does not even allege as much. Moreover, it would be inconsistent with the judge's findings to conclude that any such undertaking should be implied on the facts of this case. The trial judge found that Mr. Galambos never explicitly requested a loan and that his requests that Ms. Perez "do something" to solve the cashflow problem referred to contacting the bank to extend the firm's line of credit, which had been done several times in the past (paras. 54-55). Having never requested the advances, it is difficult to see how there was any implied undertaking to act only in Ms. Perez's interests with respect to them. The judge also found that if Ms. Perez formed any expectation that Mr. Galambos was to act as her fiduciary, it was unreasonable. Rice J. found that if there was a disparity in knowledge of the firm's finances, it was Ms. Perez who was more knowledgeable (para. 52). In such circumstances, any reasonable person would have understood that he or she assumed the position of a precarious unsecured creditor, not that of a protected beneficiary.

[82] In summary, my view is that the Court of Appeal erred in holding that in the case of power-dependency relationships, a fiduciary duty may arise absent some undertaking on the part

of the fiduciary to act in the interests of the other party. The Court of Appeal did not suggest that there was any such undertaking here and in any event, it would be inconsistent with the judge's factual findings to conclude that any such undertaking should be implied.

3. Transfer of Discretionary Power

[83] It is fundamental to the existence of any fiduciary obligation that the fiduciary has a discretionary power to affect the other party's legal or practical interests. In *Guerin*, Dickson J. spoke of this discretionary power as "the hallmark of any fiduciary relationship" (p. 387) and, while making no comment on whether it was broad enough to embrace all fiduciary obligations, he endorsed Professor Weinrib's description of a fiduciary relationship as one in which "the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him" (p. 384). The influential guidelines set out by Wilson J. in *Frame*, at p. 136, for identifying new categories of fiduciary relationships included that the fiduciary have scope for the exercise of some discretion or power, the exercise of which affects the beneficiary's legal or practical interests. In *Norberg*, McLachlin J. noted that a fiduciary must be entrusted with such power in order to perform his or her functions (p. 275).

[84] The nature of this discretionary power to affect the beneficiary's legal or practical interests may, depending on the circumstances, be quite broadly defined. It may arise from power conferred by statute, agreement, perhaps from a unilateral undertaking or, in particular situations such as the professional advisory relationship addressed in *Hodgkinson*, by the beneficiary entrusting the fiduciary with information or seeking advice in circumstances that confer a source of power: see, e.g., *Lac Minerals* and *Hodgkinson*. While what is sufficient to constitute power in the hands of the fiduciary may be controversial in some cases, the requirement for the existence of such power in the fiduciary's hands is not. The presence of this sort of power will not necessarily

on its own support the existence of an *ad hoc* fiduciary duty; its absence, however, negates the existence of such a duty.

[85] As noted, the trial judge held that the evidence did not establish that Ms. Perez relinquished her decision-making power with respect to the loans to Mr. Galambos or that there was any discretion over her interests that he was able to exercise unilaterally or otherwise (para. 46). The Court of Appeal did not disagree with these conclusions and no basis for doing so has been suggested.

[86] In my respectful view, the finding of the trial judge that Mr. Galambos had no discretionary power over Ms. Perez's interests that he was able to exercise unilaterally or otherwise is fatal to her claim that there was an *ad hoc* fiduciary duty on Mr. Galambos's part to act solely in her interests in relation to these cash advances.

4. Conclusion With Respect to Appellants' Issues

[87] I conclude that the Court of Appeal erred in finding that Mr. Galambos and his firm had an *ad hoc* fiduciary obligation towards Ms. Perez with respect to the cash advances.

V. Disposition

[88] I would allow the appeal and restore the trial judgment, except that, if the parties are not able to agree about whether Ms. Perez is entitled to a judgment in debt against the law corporation and the costs consequences if any flowing from it, I would remand to the Court of Appeal the question of whether Ms. Perez is entitled to a judgment in debt against the Michael Z.

Galambos Law Corporation and, if so, whether that judgment should have any impact on the question of costs in the courts below. Subject to any adjustment resulting from an agreement between the parties or from the remand, the appellants are entitled to their costs throughout if demanded.

Appeal allowed with costs.

Solicitors for the appellants: Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the respondent: Holmes & King, Vancouver.

Tab 123

Le Soleil Hospitality Inc. v. Louie, 2010 BCSC 1183 (CanLII)

Source: Supreme Court of British Columbia
Date: 2010-08-23
File number: S056026; S067300
Other citation: [2010] BCJ No 1648 (QL)
Citation: Le Soleil Hospitality Inc. v. Louie, 2010 BCSC 1183 (CanLII),
<<https://canlii.ca/t/2c4k8>>, retrieved on 2026-03-23

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Le Soleil Hospitality Inc. v. Louie*,
2010 BCSC 1183

Date: 20100823
Docket: S056026
Registry: Vancouver

Between:

**Le Soleil Hospitality Inc.
And Le Soleil Restaurant Inc.**

Plaintiffs

And:

**Andrew Louie, 668706 B.C. Ltd., 688571 B.C. Ltd., 708583 B.C. Ltd.,
716642 B.C. Ltd., 716648 B.C. Ltd., 700439 B.C. Ltd., 587019 B.C. Ltd.,
And 585503 British Columbia Ltd.**

Defendants

And:

567 Hornby Apartment Ltd.

Defendant by Counterclaim

- and -

Docket: S067300
Registry: Vancouver

Between:

567 Hornby Apartment Ltd.

Plaintiff

And:

Le Soleil Hospitality Inc., Le Soleil Restaurant Inc., Andrew Louie, 668706 British Columbia Ltd., 688571 British Columbia Ltd., 708583 B.C. Ltd., 716642 B.C. Ltd., 716648 B.C. Ltd., 700439 B.C. Ltd., and 587019 B.C. Ltd.

Defendants

And:

567 Hornby Apartment Ltd. and Syed Nomani aka Jewel Nomani

Defendants By Counterclaim

Before: The Honourable Madam Justice Dickson

Reasons for Judgment

Counsel for Le Soleil Hospitality Inc. and Le Soleil Restaurant Inc. in both actions:

R. Sewell, Q.C.,
S. Griffin
J. Walker
A. Pilliar

Counsel for Andrew Louie and all numbered companies in both actions:

A. Rees-Thomas

Counsel for 567 Hornby Apartment Ltd.:

R. Hatch
S. Nomani as agent

Appearing on his own behalf:

S. Nomani

Place and Date of Trial:

Vancouver, B.C.
October 27-31;
November 3-7, 17-21, 2008;
January 8, 12-15, 19-23, 28-29; February 23-26;
March 2-6;
September 30, 2009

Place and Date of Judgment:

Vancouver, B.C.
August 23, 2010

INTRODUCTION AND OVERVIEW

[1] In *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, [2009 BCSC 1303](#), I gave judgment in two of many actions that concern the troubled Le Soleil Hotel (the “Hotel”). These actions, heard together, are two more.

[2] The Hotel is a boutique strata title development in Vancouver, British Columbia. Constructed in 1999, it consists of 128 residential strata lots, two commercial strata lots,

common areas and an underground parking lot. It is an exceptionally elegant hotel and currently enjoys a four-Diamond rating.

[3] Since 2002 the Hotel has been at the center of a storm of litigation. The focus of the various court proceedings, in the main, has been a battle between competing factions for control of strata lots and leases required for effective operation of the Hotel. Like many others, these actions relate to that underlying contest.

[4] The Hotel is located within the Owners, Strata Plan LMS 3837 (the "Strata Corporation") and operated at 567 Hornby Street by Le Soleil Hospitality Inc. ("Hospitality"). Hospitality is a joint venture of Le Soleil Hotel and Suites Ltd. ("LSHS") and a subsidiary of Executive Inn Inc. ("Executive"). It has operated the Hotel since March 2003 when it took over operations from LSHS. Most, but not all, of the residential strata lots, together with the common areas, are included in the Hotel's operation.

[5] Prior to Hospitality's formation, LSHS and Executive were competitors in the battle for control of the Hotel. Executive and the other principal combatant, the Le Soleil Owners Group ("LSOG"), were allied. LSOG is a group of individual strata lot owners who purchased their units from the Hotel's developer, American Corporate Suites (Canada) Inc. ("ACS"), and leased them back to enable Hotel operations. When ACS encountered financial difficulties, the LSOG owners banded together and, with Executive, attempted to gain control of the Hotel.

[6] After Hospitality took over Hotel operations LSOG continued its efforts to gain control by various means, including litigation. It did not succeed. Challenges to the common area leases were dismissed and their funding by the LSOG-dominated Strata Council was found to be improperly authorised. In *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, LSHS and Executive were the successful plaintiffs and the LSOG owners were the unsuccessful defendants.

[7] Since December 2003 Le Soleil Restaurant Inc. ("Restaurant") has operated a restaurant within the two commercial strata lots in the Strata Corporation. Restaurant leases the two commercial strata lots from 585503 British Columbia Ltd. ("585"), a company owned by Dr. Andrew Louie (the "Restaurant Lease").

[8] Dr. Louie is a medical doctor and businessperson. By the summer of 2005, in addition to the two commercial strata lots in the Strata Corporation, Dr. Louie controlled 30 residential strata lots (the "Louie Group Strata Lots"). In combination, the Louie Group Strata Lots represented a power bloc and held the balance of power in the conduct of Hotel affairs.

[9] Dr. Louie was initially supportive of Hospitality as the Hotel's operator. In the summer of 2004, however, he fell out with its principals and his units were removed from

the Hotel rental pool. Thereafter, Dr. Louie supported the efforts of Hospitality's adversary, LSOG, in the ongoing battle for control of the Hotel.

[10] Syed (Jewel) Nomani is Dr. Louie's business advisor. He is also the president of 567 Hornby Apartment Ltd. ("567"), a company owned by Meridian Hotel Ltd., which he owns. Since 2003 Mr. Nomani has acted as a consultant to Dr. Louie in connection with Hotel matters. In 2005 he began, through 567, to use the Louie Group Strata Lots to operate a competing hotel operation within the Hotel on behalf of Dr. Louie.

[11] In 2003 Mr. Nomani had acted as Hospitality's agent in negotiations between Restaurant and 585 with respect to the Restaurant Lease. Hospitality was unaware of Mr. Nomani's consulting relationship with Dr. Louie at the time. In 2004 Hospitality concluded that Mr. Nomani and Dr. Louie were working together to oppose Hospitality and support LSOG in the ongoing battle for control of the Hotel. As a result, Hospitality and Restaurant commenced an action against them (the "Fiduciary Action").

[12] Hospitality brought an injunction application in the Fiduciary Action to restrain Dr. Louie from acting against its interests, supporting legal proceedings against them or breaching the terms of the Restaurant Lease (the "Injunction Application"). The Injunction Application was scheduled for hearing on October 21, 2005. Prior to the hearing, however, the parties engaged in settlement negotiations. In the early morning hours of October 21, 2005 a settlement between Hospitality, Restaurant and Dr. Louie was reached (the "LOI").

[13] The LOI provided for the lease of the Louie Group Strata Lots to Hospitality, as well as an option to purchase them (the "Option to Purchase"). It also provided for modification of the Restaurant Lease, a covenant to refrain from supporting litigation contrary to Hospitality's interests and the discontinuance of litigation between the parties. Its primary purpose, from Hospitality's perspective, was to bring stability to the operation of the Hotel.

[14] Shortly after the LOI was concluded, however, Dr. Louie had a change of heart. After speaking with Mr. Nomani, he decided he had made a bad deal and could get a better price for the Louie Group Strata Lots. As a result, he claimed the LOI was produced under conditions of duress and was not binding or enforceable. Thereafter, he declined to follow through with its terms. In response, Hospitality and Restaurant commenced Action No. S056026 against Dr. Louie and the numbered companies (the "Louie Group Defendants") seeking to enforce the LOI (the "Hospitality Action").

[15] In *Le Soleil Hospitality Inc. et. al. v. Louie et. al.*, [2006 BCSC 1920](#), Pitfield J. declared, in the Hospitality Action, that the LOI constitutes a binding and enforceable agreement. In *Le Soleil Hospitality Inc. et. al. v. Louie et. al.*, [2007 BCSC 595](#), he held

that the Louie Group Defendants had breached the LOI and the plaintiffs could pursue the remedies of specific performance or damages of an amount to be assessed. In *Le Soleil Hospitality Inc. v. Louie*, 2008 BCCA 206, Pitfield J.'s judgments were upheld on appeal.

[16] The focus of the trial conducted before me in the Hospitality Action was the appropriate remedy for the Louie Group Defendants' breaches of the LOI. 567 was granted party status because it claimed to hold leases and rights of first refusal with respect to the Louie Group Strata Lots (the "RFRs"). According to 567 the RFRs were granted in June 2005 before the LOI was concluded. 567 opposed Hospitality's claim for specific performance based on the alleged existence of the RFRs.

[17] 567 also commenced Action No. S067300 (the "567 Action"), in which it sought, amongst other things, a declaration that the RFRs are valid and unaffected by the LOI. In response, Hospitality and Restaurant filed a counterclaim claiming that 567, Mr. Nomani and the Louie Group Defendants conspired to defeat their rights under the LOI and fabricated documents purportedly evidencing the RFRs (the "Alleged June Agreements"). Given the common issues for determination, the Hospitality Action and 567 Action were tried together at the same time.

[18] In the course of the joint trial several unusual events transpired. Dr. Louie admitted, mid-trial, that he had perjured himself in his earlier testimony, reversed his position and consented to an order for specific performance of the LOI. As the trial unfolded, new evidence was uncovered that revealed the Alleged June Agreements were fabricated and Dr. Louie had been funding litigation against Hospitality. Near the end of the trial, 567 discharged its counsel, who was later called as a witness. While denying any wrongdoing, Mr. Nomani announced that he no longer sought to rely upon the RFRs.

[19] For the reasons that follow, judgment was granted on September 30, 2009 in favour of Hospitality and Restaurant in the Hospitality Action and awards of specific performance, damages and special costs were made. In addition, 567's claim in the 567 Action was dismissed and damages and special costs were awarded to Hospitality and Restaurant on the counterclaim.

THE ISSUES

[20] The main issues for determination in the Hospitality Action are:

- a) Is Hospitality entitled to an order for specific performance of the Option to Purchase contained in paragraph 4 of the LOI?
- b) If so, what is the proper calculation of the purchase price of the Louie Group Strata Lots?
- c) Is Hospitality entitled to an order for specific performance of the Lease Modification Agreement contemplated in paragraph 3 of the LOI?

- d) What damages were caused to Hospitality by the Louie Group Defendants' breaches of paragraphs 4 and 5 of the LOI?
- e) Should the damages and costs awarded be set off against the purchase price of the Louie Group Strata Lots?

[21] The main issues for determination in the 567 Action and the Counterclaim are:

- a) Are the Alleged June Agreements authentic or fraudulent?
- b) Did the Louie Group grant the RFRs to 567 in June 2005, or at all?
- c) Is 567's claim moot or is it necessary to decide whether any agreements give priority to 567 over Hospitality's rights under the LOI? If such instruments or agreements have been established, did Hospitality induce Dr. Louie to breach them?
- d) Did Mr. Nomani induce Dr. Louie to breach the LOI?
- e) Did Mr. Nomani and Dr. Louie conspire to defeat the LOI?
- f) Should punitive damages be awarded and, if so, against whom and in what amount?

[22] In both actions, the appropriate order for costs must also be determined. The following issues arise with respect to costs:

- a) Should special costs be awarded and, if so, against whom and in what amount?
- b) Should leave be granted to Hospitality to seek an order of costs payable by other parties?

CREDIBILITY

[23] A key factor in my determination of the issues is the credibility of the principal witnesses: Zul Somani, Sharookh Daroowala, Dr. Louie and Mr. Nomani. It is appropriate, therefore, to comment on my assessment of their credibility at the outset. In so doing, I am mindful of the guidance of the Court of Appeal in *Faryna v. Chorney*, [1951 CanLII 252 \(BC CA\)](#), [1952] 2 D.L.R. 354 and *Brethour v. Law Society of British Columbia*, [1950 CanLII 346 \(BC CA\)](#), [1951] 2 D.L.R. 138, that, in making this assessment, I am to consider the preponderance of probabilities evident in the surrounding circumstances. I am also to consider the evidence as a whole.

[24] Zul Somani is a principal of Hospitality. He is an experienced, highly skilled hotelier. He is also a sophisticated individual who testified in a clear, direct and balanced manner. His testimony was internally consistent and in accordance with other reliable evidence. In sum, Mr. Somani was a strong, credible witness upon whose evidence I rely.

[25] Sharookh Daroowala is also a principal of Hospitality. Like his colleague, he was highly credible. Mr. Daroowala gave careful testimony that was consistent with the contemporaneous documents. He was responsive, fair and thorough in his answers to the questions posed on direct and cross-examination. I accept his evidence and rely upon it in making the factual findings outlined below.

[26] Throughout his testimony, Dr. Louie repeatedly described himself as a naive, foolish businessperson with poor judgment. Although seemingly self-deprecating, these comments were, in context, disingenuous and self-serving. They did, however, accurately describe Dr. Louie's performance as a witness.

[27] Dr. Louie testified in a rambling, vague and unresponsive manner. He often answered questions with argument and his evidence sometimes included obvious and troubling inconsistencies. For example, Dr. Louie deposed in an affidavit that he first learned of Mr. Nomani's business relationship with Hospitality in November 2004 after the Fiduciary Action was commenced against him. He conceded on cross-examination, however, that he signed a letter in October 2004 stating he was fully aware of the relationship. These two statements cannot both be true.

[28] Near the end of the trial Dr. Louie admitted that he had perjured himself earlier on the question of when the Alleged June Agreements were executed. He also admitted that he had counselled his son, Jonathon, to commit perjury. Dr. Louie apologized for this "error in judgment" and, in a long, strange soliloquy, attempted to minimize his responsibility and shift blame to his advisors and adversaries. By the end of this remarkable performance it was clear that Dr. Louie believed his actions were justified because he was attempting to protect his commercial position.

[29] It was also clear that Dr. Louie's admission was prompted by the strength of the evidence proving the Alleged June Agreements were not created in June 2005, as he had previously testified. Taking into account these factors, I conclude that Dr. Louie's admission and apology amounted to no more than an attempt at damage control.

[30] The foregoing are but two examples of the deficiencies in Dr. Louie's evidence. Considered as whole, they compel the conclusion that he was a thoroughly unreliable witness. Unless independently corroborated by other reliable evidence, I accord his testimony no weight.

[31] I reach the same conclusion regarding Mr. Nomani. If anything, he was an even less credible witness than Dr. Louie. His testimony and closing statements were often glib, evasive and inconsistent, both internally and with other reliable evidence. At times they were illogical and difficult to comprehend. Examples abound. For present purposes, the following two are illustrative.

[32] Mr. Nomani claimed throughout the trial that the Alleged June Agreements were created and executed in June 2005. He conceded, however, that between October 21, 2005 and November 7, 2005 he did not tell counsel or the Court about them when it would have been in his interest to have done so. When asked to explain these curious omissions, he spoke many words but they did not congeal into meaningful sentences. At no point did a rational explanation emerge.

[33] Mr. Nomani also failed to explain rationally why he worked on his computer on an electronic document identical to the Alleged June Agreements for 28 minutes on November 7, 2005. He claimed his purpose in so doing was to recreate the existing agreement so that he could email it to Dr. Louie to refresh his memory regarding the document he had previously signed. Mr. Nomani failed, however, to explain why he did not scan the hard copy he claimed to possess or recreate only the portion of particular interest to Dr. Louie. Simply put, his testimony was utterly unbelievable.

[34] There were many other deficiencies in Mr. Nomani's evidence. As with Dr. Louie, considered as whole they compel the conclusion that he was an unreliable witness. Unless independently corroborated by other reliable evidence, I accord no weight to Mr. Nomani's testimony.

THE FACTS

Background

[35] The Hotel was developed by ACS in 1999 when the Strata Corporation was created. ACS sold the individual strata lots to investors and leased them back to enable operation of the Hotel as an integrated enterprise. ACS and its affiliate also held leases over the Hotel's lobby and parking areas for the same purpose (the "Leases").

[36] Many of the individual strata lot owners reside overseas. Shortly after they purchased their units, ACS encountered financial difficulties and stopped meeting its rental obligations. In response, the owners formed LSOG in an effort to protect their investment.

[37] LSOG was led by a prominent Malaysian businessperson known as Dato Chee, together with others from Singapore and Malaysia. By early 2002, 93 Hotel units and their owners were associated with LSOG.

[38] The Hotel also had a smaller bloc of 31 individual strata lots (the "Interval Units"). The Interval Units were initially controlled by the principals of ACS. Dr. Louie acted as a lender for some of the Interval Units and eventually acquired them. He also invested heavily in the Hotel's restaurant.

[39] In January 2002 ACS was bankrupted. The trustee disclaimed the individual strata lot leases, but the Leases were not disclaimed. A receiver appointed by a secured creditor offered the Leases and ACS's other assets for sale at a receiver's auction (the "Receiver's Auction"). The Receiver's Auction took place on March 15, 2002.

[40] Prior to the Receiver's Auction, LSOG's leaders did not appreciate the operational significance of the Leases. In February 2002 LSOG entered into a written agreement with Executive with respect to the Hotel's management (the "Management Agreement"), although it did not control the common areas. When it became clear that the Leases were required for effective Hotel operation, however, LSOG authorised Executive to place a bid at the Receiver's Auction in an effort to acquire them. Executive did so, but LSOG was outbid.

[41] The successful bidder at the Receiver's Auction was Sunbelt Hotel Management Services Ltd. ("Sunbelt"): a company owned by Mr. Somani. In addition to the Leases, Sunbelt acquired chattels, a telephone system, and ACS's other operational assets (the "ACS Assets"). Sunbelt permitted LSHS to use the ACS Assets in order to operate the Hotel.

The Struggle for Control Begins

[42] Following the Receiver's Auction, a struggle for control of the Hotel developed between Sunbelt and LSHS, on one hand, and LSOG and Executive, on the other. By the end of March 2002 Sunbelt had entered into leases of 23 Interval Units and had an informal arrangement for use of the remaining eight. Because Sunbelt controlled the common areas LSHS was able to operate the Hotel, but with only 31 units in its rental pool. Because LSOG and Executive did not control the common areas they could not operate the Hotel, although LSOG members owned most of the individual units.

[43] On April 6, 2002 LSOG leaders met with Messrs. Somani and Daroowala in Singapore to discuss the prospect of LSHS entering into 17-year leases of the LSOG units. At the meeting's conclusion, the 93 LSOG units were transferred into LSHS's possession and LSHS claimed a binding oral agreement to lease them had been reached (the "April 6 Agreement").

[44] Shortly after the meeting, however, LSOG's leaders had a change of heart and asserted that the April 6 Agreement was not binding or enforceable. In response, in May 2002 LSHS commenced an action against the LSOG owners to enforce its performance (the "LSHS Action"). In their counterclaim, the LSOG owners sought return of their units and an accounting of profits and damages. Sometime later, Executive also commenced an action against the LSOG owners claiming damages for breach of the Management

Agreement (the “Executive Action”). In response, the LSOG owners filed another counterclaim.

[45] After the LSHS Action was commenced, a consent order was entered pursuant to which the LSOG units remained in the possession of LSHS pending trial (the “Monitor’s Order”). A Monitor was put in place to supervise the units in the Hotel rental pool, and a formula for payment of rent was devised and later adjusted by order of the Court.

[46] In May 2002 several representatives of LSOG were elected to the Strata Council. Given their number, they were able to assume control of its affairs. The LSOG representatives increased the Strata Corporation’s operating budget to support a legal challenge brought by an owner to set aside the Leases (the “Betty Ang Proceeding”). Dr. Louie, who then owned one residential unit, supported LSHS and opposed the LSOG-supported legal challenge.

[47] In November 2002 the Betty Ang Proceeding was dismissed by the Court.

[48] In February 2003 Dr. Louie and Mr. Daroowala were elected to the Strata Council as representatives of the Hotel’s commercial section. The other Strata Council positions were filled by LSOG representatives. The LSOG council members remained hostile toward LSHS and authorised funding for further legal challenges to the Leases.

Hospitality is Formed

[49] The cost and disruption caused by the battle for control was unacceptable to many Hotel stakeholders. As a result, several owners and other participants decided to try to resolve their differences amicably. Hospitality was formed in response to these efforts.

[50] In March 2003 LSHS and Executive’s subsidiary, 640647 B.C. Ltd. formed Hospitality to operate the Hotel together by way of joint venture. Some, but not all, LSOG owners were immediately supportive. After the first round of negotiations, however, a division developed within LSOG. Members of the first faction entered into agreements with Hospitality regarding their strata units. Members of the second faction did not.

[51] Dato Chee was the leader of the second faction of LSOG owners. They conducted further negotiations with Hospitality after the first round failed. Some progress was made at a meeting in Bangkok in October 2003 as a result of these efforts. Final agreement for Hospitality to use all remaining LSOG units in its Hotel operation was, however, not achieved.

[52] The number of owners affiliated with LSOG decreased after the October 2003 Bangkok meeting. As the LSHS and Executive Actions proceeded, several owners

settled with Hospitality or abandoned the litigation. Eventually, less than 30 owners maintained their affiliation with LSOG.

The Restaurant Lease

[53] The Hotel's restaurant was not part of the ACS bankruptcy. Originally operated by the principals of ACS and subsidized by Dr. Louie, it was unprofitable but important for the Hotel's successful overall operation. It was, therefore, necessary for Hospitality and Restaurant to conclude a long-term restaurant lease with the owner of the commercial strata lots.

[54] Mr. Nomani worked with the ACS principals as a bookkeeper. He became acquainted with several members of LSOG as a result of this association. He also became acquainted with Dr. Louie and Messrs. Somani and Daroowala.

[55] Dr. Louie was unhappy with the way the ACS principals operated the restaurant. In early 2003 Mr. Nomani assisted him in his attempts to gain control, with considerable success. As a result, Dr. Louie developed confidence in Mr. Nomani's business judgment and abilities. Thereafter, Mr. Nomani also began to assist Dr. Louie in acquiring additional strata lots.

[56] Dr. Louie was extremely busy with his medical practice. In August 2003 he and Mr. Nomani signed a consultancy agreement pursuant to which Dr. Louie agreed to pay for Mr. Nomani's services on a monthly basis (the "585 Consulting Agreement"). Dr. Louie testified, and I find, that he relied heavily on Mr. Nomani's assistance and advice in matters related to the Hotel.

[57] At approximately the same time the 585 Consulting Agreement was signed, Mr. Nomani also approached Mr. Somani and offered to help Hospitality obtain a restaurant lease with 585. Mr. Somani responded positively to Mr. Nomani's approach and referred him to Salim Sayani, another Hospitality principal.

[58] In August 2003 Hospitality engaged Mr. Nomani to assist in lease negotiations with Dr. Louie with regard to the restaurant. Mr. Sayani and Mr. Nomani signed a consulting agreement in which Hospitality agreed to pay a commission for his services (the "Hospitality Consulting Agreement"). Messrs. Somani and Daroowala testified, and I accept, that Hospitality was unaware of the existence of the 585 Consulting Agreement at the time.

[59] The Restaurant Lease was concluded in December 2003 with Mr. Nomani's assistance. Pursuant to its terms, the parties agreed that the Landlord, 585, would not do any act that may interfere with the ability of Restaurant's affiliates to operate the Hotel.

They also agreed that the common property was subject to the Lease and both parties were bound by its provisions.

[60] The Restaurant Lease included a provision pertaining to the liquor licence held for the premises (the “Liquor Licence”). When it was signed, the Liquor Licence was controlled by the receiver of the previous tenant. Pursuant to the Restaurant Lease, the parties agreed that Restaurant, in cooperation with 585, would make its best efforts to arrange for transfer of the Liquor Licence or acquire its own liquor licence. They also agreed that a non-disturbance agreement and estoppel certificate would be obtained.

The Falling Out

[61] When the Hospitality Consulting Agreement was concluded Mr. Nomani and Hospitality’s principals discussed other possible assistance he might provide with respect to Hotel matters. In the course of these discussions, Mr. Nomani agreed to help Hospitality obtain leases of strata lots controlled by LSOG members, Dr. Louie and Christian Franiek.

[62] Mr. Franiek is a lender who had an interest in several lots in the Strata Corporation. He had foreclosed on some of the Interval Units and was renting them out independently through a property manager, Jeff Narod. According to Dr. Louie, Mr. Franiek is a loan shark who charges exorbitant rates to his borrowers and “loans to own”. As the battle for control of the Hotel progressed and litigation costs escalated, Dr. Louie borrowed substantial sums from Mr. Franiek. As outlined below, he used these funds to provide financing for litigation that was contrary to Hospitality’s interests.

[63] Dr. Louie was a lender on six of the Interval Units. In March 2004 he acquired them by voluntary transfer to 587019 B.C. Ltd. (the “587 Lots”). At the time of the acquisition, the 587 Lots were in Hospitality’s possession by virtue of an arrangement with Interval and its receiver. After the acquisition, Hospitality wished to retain the 587 Lots in the Hotel rental pool.

[64] In April 2004 Mr. Nomani told Hospitality’s principals that Dr. Louie’s son, Jonathon Louie, wished to rent out the 587 Lots independently. He proposed that Hospitality agree to rent them on a nightly basis if they were not otherwise rented. Not surprisingly, this proposal was unsatisfactory from Hospitality’s perspective. As a result, a lease agreement between 587 and Hospitality regarding the 587 Lots was not reached.

[65] At trial, Dr. Louie acknowledged that Jonathon Louie acted at his direction in matters relating to the Louie Group Strata Lots. Jonathon Louie described himself as “a puppet” in this regard. I accept that this was an accurate description and conclude that, from the outset, it was Dr. Louie and Mr. Nomani who wished to develop and operate a hotel within the Hotel.

[66] In May 2004 the 587 Lots were removed from the Hotel rental pool at Dr. Louie's direction. In response, Hospitality removed its chattels and equipment from the units. This step made Dr. Louie very angry.

[67] Dr. Louie was also angry with Hospitality because of a disagreement that developed regarding transfer of the Liquor Licence. He testified that, as a landlord, he was unwilling to surrender the Liquor Licence because he might not get it back if the tenant was to change. Further disagreement developed over the form of proposed non-disturbance agreement and Hospitality's unwillingness to provide an estoppel certificate until the outstanding issues were resolved between the parties. At trial, Dr. Louie conceded that these matters amounted to no more than ordinary disagreements between businesspeople.

[68] Counsel for Dr. Louie described Hospitality's actions in removing its chattels from the 587 Lot units in May 2004 as despicable. Dr. Louie acknowledged, however, that what was taken did not, in fact, belong to him. Nevertheless, he complained bitterly that Hospitality was uncooperative and, therefore, at fault for the deterioration in their business relationship. Although I do not agree with his perception of where fault lies, it is plain that by May 2004 the business relationship had deteriorated seriously.

[69] It is also plain from various emails that by May 2004 Mr. Nomani was communicating regularly with LSOG leaders. His actions were inconsistent with his assurances to Hospitality's principals that he was acting on their behalf in matters related to the Hotel. I accept that, as Mr. Daroowala testified, Mr. Nomani tried throughout early 2004 to persuade Hospitality to increase his role in Hotel operations and thus to increase his income. When he was unsuccessful, I find that Mr. Nomani decided to assist Hospitality's adversary, LSOG, in the battle for control of the Hotel.

[70] In an email to Lye Eam Tan and Dato Chee dated May 9, 2004, Mr. Nomani described the deteriorating situation between Dr. Louie and Hospitality as one in which "the gloves are coming off". It is apparent from his actions thereafter that Mr. Nomani decided to exploit the growing hostility to his own advantage. I am satisfied that his goal in so doing was to ensure his continued participation in the development and operation of a hotel within a hotel.

The Conflict Intensifies

[71] On June 1, 2004, a Strata Council meeting was conducted. Dr. Louie, Dato Chee, Mr. Somani and others were in attendance. At the meeting, Dr. Louie proposed that the Strata Council re-investigate the validity of the Leases because, he said, he was concerned about the revenue being received by Hospitality.

[72] Restaurant complained about Dr. Louie's conduct at the Strata Council meeting and asserted that it breached the terms of the Restaurant Lease. Dr. Louie responded with an aggressive and largely incomprehensible letter written by Mr. Nomani. Its gist was that Dr. Louie's actions at the meeting were unrelated to the restaurant.

[73] On June 29, 2004, Mr. Nomani attended the next Strata Council meeting. At this meeting, the LSOG-dominated Strata Council passed several resolutions that were contrary to Hospitality's interests. There was also discussion regarding another legal challenge to the Leases, which was subsequently brought without proper authorisation (the "Unauthorised Action").

The July 2004 Confrontation

[74] By July 2004 Hospitality's principals were becoming concerned about Mr. Nomani's loyalties. In May 2004, for example, when he was pressing for an expanded role with Hospitality, he told Mr. Daroowala "If I can't make money from my friends, I have to make money from my friends' enemies". Nevertheless, Hospitality accepted Mr. Nomani's repeated assurances of loyalty and continued to work with him. In so doing, its principals provided Mr. Nomani with confidential information regarding the Hotel.

[75] In mid-July 2004, however, Mr. Somani discovered, through a misdirected email, that Mr. Nomani was assisting Alfred Tan, an LSOG leader. On July 16, 2004, he and Messrs. Daroowala, Sayani and Mawji were having lunch at the Hotel when Mr. Nomani happened to pass by. Mr. Somani and his colleagues invited Mr. Nomani to join them. When he did, Mr. Somani confronted him and asked if he was working with Mr. Tan.

[76] Messrs. Somani and Daroowala, on one hand, and Mr. Nomani, on the other, provided very different descriptions of what occurred following Mr. Somani's question. Taking into account their respective levels of credibility, I accept the evidence of Messrs. Somani and Daroowala and reject that of Mr. Nomani.

[77] Mr. Nomani responded to Mr. Somani's question with a flat denial. He claimed that he did not even know Mr. Tan. Mr. Somani challenged him, remarked the email and expressed distress at Mr. Nomani's apparent duplicity. Mr. Nomani then stormed off, called the police, and falsely claimed that Mr. Somani had threatened to have him followed. The police spoke with Mr. Somani about Mr. Nomani's complaint, but took no further steps.

[78] After the July 2004 confrontation Hospitality's principals lost all trust in Mr. Nomani. They sensibly decided to have no further business dealings with him.

The Dockside Proceeding and The Fiduciary Action

[79] The Unauthorised Action was commenced in August 2004. In response, two strata lot owners filed an action in October 2004 challenging the propriety of the Strata Council's approval of funding to challenge the Leases (the "Dockside Proceeding").

[80] In *Dockside Brewing Co. Ltd. et. al. v. The Owners Strata Plan LMS 3837 et. al.*, [2005 BCSC 1209](#), Edwards J. concluded that the funding was improperly authorised by the LSOG-dominated Strata Council. He ordered that \$190,000, plus interest, be repaid to the Strata Corporation. In *Dockside Brewing Co. Ltd. et. al. v. The Owners Strata Plan LMS 3837 et. al.*, [2007 BCCA 183](#), Edwards J.'s decision was upheld on appeal.

[81] In November 2004 Hospitality and Restaurant commenced the Fiduciary Action. In it, they alleged that Mr. Nomani, Dr. Louie and his companies breached their duties and conspired to defeat Hospitality and Restaurant's interests with respect to the Hotel.

Acquisition of the Louie Group Strata Lots

[82] Over time, Dr. Louie had acquired control of several residential strata lots with Mr. Nomani's assistance. By the summer of 2005 he owned or controlled all 30 Louie Group Strata Lots. The Louie Group Strata Lots include a penthouse, deluxe suites and three meeting rooms located on the second floor.

[83] Dr. Louie purchased the Louie Group Strata Units because he believed the prices were reasonable and they were a good investment. Some were acquired through foreclosure; others through introductions to LSOG owners made by Mr. Nomani. Twelve were in Hospitality's possession and subject to the Monitor's Order when they were acquired; eighteen were not.

[84] In so far as possible, Dr. Louie planned to rent out the Louie Group Strata Units independently rather than lease them to Hospitality. Until June 2005 he retained Mr. Narod as his property manager for this purpose. After June 2005 he retained Mr. Nomani, through 567.

[85] The Louie Group Strata Lots represent approximately 23% of the total number of strata lots in the Strata Corporation. Pursuant to its bylaws, only those present in person or by proxy are permitted to vote at general meetings. A full turn out of owners at such meetings is unusual. For this reason, the party who controls the votes attached to the Louie Group Strata Lots wields considerable power within the Strata Corporation because they hold an effective veto over three-quarter resolutions.

The January 31, 2005 AGM

[86] The LSOG-dominated Strata Council did not call an Annual General Meeting of the Strata Corporation in 2004. An AGM was scheduled, however, for January 31, 2005. Competing slates for election to Strata Council were put forward. One slate represented supporters of LSOG and Dr. Louie; the other slate represented supporters of Hospitality.

[87] Hospitality was concerned about the risk that further funding might be improperly authorised by the Strata Council. As a result, it applied for an injunction and the Strata Council was restrained from proposing substantial funding for legal fees in the absence of a three-quarter vote of members (the “Groberman J. Injunction”).

[88] Mr. Nomani was able to participate in the January 31, 2005 AGM because Dr. Louie caused one of his companies to transfer title to a strata lot to him. Despite the existence of the Groberman J. Injunction, Mr. Nomani proposed a substantial increase to the budget for legal fees, but his motion was defeated. A motion to discontinue the Unauthorised Action was approved.

[89] A new Strata Council was elected at the January 31, 2005 AGM. Its members representing the residential section supported Hospitality. Dr. Louie nominated Mr. Nomani to represent 585 for the commercial section.

After the January 31, 2005 AGM

[90] Shortly after the January 31, 2005 AGM Mr. Nomani commenced a proceeding seeking the appointment of an administrator (the “Administrator Proceeding”). At trial, he testified that he took this step in an effort to bring stability to the Strata Corporation. I reject this explanation. Rather, I am satisfied Mr. Nomani’s purpose in commencing the Administrator Proceeding was to ensure that the legal challenge to the Leases would proceed.

[91] When the Administrator Proceeding was filed Mr. Nomani obtained an *ex parte* injunction preventing the Strata Corporation from dismissing the Unauthorised Action. He was later ordered to pay special costs because Wedge J. found the injunction was obtained on the basis of material nondisclosure and misrepresentations to the Court. At trial, Mr. Nomani attempted to explain away his misconduct as mere technical breaches or misunderstandings. As is apparent from Wedge J.’s Reasons for Judgment, it was nothing of the kind.

[92] On March 9, 2005, Mr. Nomani’s counsel delivered a letter to the Strata Corporation requiring a special general meeting (the “SGM”). Its purpose was to require a vote on a resolution to proceed with the Unauthorised Action. The letter was signed by LSOG members and by Dr. Louie. The SGM was scheduled for November 4, 2005.

The Alleged June Agreements

[93] 567 was incorporated in April 2005. In June 2005 it took over management of the 18 Louie Group Strata Lots that were not subject to the Monitor's Order.

[94] According to Mr. Nomani, on June 10 and 11, 2005 the Alleged June Agreements were concluded between 567 and the Louie Group Defendants. He claimed that they evidence the RFRs in written form and were created and printed from a template on his computer. He also claimed that electronic versions were not individually saved.

[95] Mr. Nomani testified that Dr. Louie signed seven of the Alleged June Agreements on June 10, 2005 and Jonathon Louie signed the eighth on June 11, 2005. Jonathon Louie testified to similar effect.

[96] Early in the trial Dr. Louie also testified that he signed the Alleged June Agreements on June 10, 2005. After Hospitality presented strong evidence to the contrary, however, he returned to the witness stand and admitted that, in fact, he signed them on November 8, 2005. He also admitted that he counselled his son, Jonathon, to perjure himself regarding the date of his signature. Dr. Louie went on to admit that his purpose in signing the Alleged June Agreements was to improve the position of 567 and help to defeat the LOI.

[97] Mr. Nomani submits that Dr. Louie's admission of perjury was contradictory, equivocal and made as a result of overwhelming pressure. He urged me to find that it was involuntary and unworthy of weight. He also emphasized that, under cross-examination, Dr. Louie expressed doubt as to precisely when the Alleged June Agreements were signed.

[98] As with Dr. Louie's other testimony, standing alone I would not rely on his assertion that he signed the Alleged June Agreements on November 8, 2005 or on any other date. Taking into account the other evidence, however, I am satisfied that he spoke the truth when he admitted lying earlier as to the date on which they were signed. It follows that I conclude Mr. Nomani also perjured himself regarding the creation and execution of the Alleged June Agreements. I find that Mr. Nomani created the Alleged June Agreements on November 7 and 8, 2005, Dr. Louie signed seven of them on November 8, 2005, and Jonathon Louie signed the eighth on a later unknown date.

[99] The evidence in support of this conclusion is multifaceted and overwhelming. Much of it is summarised below.

[100] When Dr. Louie admitted his perjury, he went on to say that the Alleged June Agreements reflect the terms of his verbal agreement with Mr. Nomani and 567. He also stated that he and 567 had an informal, short-term arrangement for the rental of the Louis

Group Strata Lots. No independent evidence was presented, however, regarding the nature and terms of the verbal agreement that existed between them. Although I accept that they must have had one, in the absence of independent evidence I am unable to make factual findings as to its precise nature and terms.

[101] Mr. Nomani submitted that Hospitality had notice of the agreement in place between 567 and the Louie Group Defendants. I do not accept this submission. Although Hospitality's principals were generally aware of the existence of an informal arrangement of some sort between Mr. Nomani and Dr. Louie with regard to the Louie Group Strata Lots, they did not know of its nature and terms.

The Injunction Application

[102] On April 29, 2005 Hospitality and Restaurant delivered the Injunction Application to Dr. Louie, Mr. Nomani and the other defendants in the Fiduciary Application. In it, they sought an order restraining Dr. Louie from financing or supporting legal proceedings against them, voting in favour of resolutions challenging the Leases or breaching the terms of the Restaurant Lease. They also sought an order restraining Dr. Louie from using the services of Mr. Nomani, and an order to similar effect against Mr. Nomani.

[103] Dr. Louie swore an affidavit in response to the Injunction Application. He deposed that it would be inconvenient and damaging to his business interests if Mr. Nomani was not permitted to continue assisting him. When cross-examined on the affidavit, Dr. Louie did not mention the Alleged June Agreements. On the contrary, he swore that he had no written agreements with Mr. Nomani.

[104] Dr. Louie and Mr. Nomani did not produce the Alleged June Agreements in the Fiduciary Action. In August 2005, however, Mr. Nomani did produce a short-term rental management agreement between 567 and Parmasvary Retty-Cannon (the "Retty-Cannon Agreement"), an LSOG owner who resided in Chicago. He created the Retty-Cannon Agreement on his computer on August 11, 2005 after counsel for Hospitality learned that he was managing her unit and asked for production of their agreement. After so doing, he faxed the agreement to Ms. Retty-Cannon, asked her to back-date it and purported, falsely, to witness her signature.

Settlement Discussions Begin

[105] By the summer of 2005 Dr. Louie was becoming concerned about the costs and risks associated with the Fiduciary Action. He was also concerned about other costs that were mounting in connection with the Louie Group Strata Lots. As a result, he began to consider leasing or selling his units.

[106] On July 21, 2005 Dr. Louie met with Mr. Daroowala to discuss settling the Fiduciary Action. Mr. Nomani participated in follow up settlement discussions with Hospitality. On August 24, 2005 he and Mr. Sayani signed a non-binding letter of intent pursuant to which the Louie Group Strata Lots would be leased to Executive's subsidiary (the "August Draft LOI"). One of its terms was that Mr. Nomani would be paid \$50,000 per annum and maintain an office at the Hotel.

[107] The August Draft LOI was negotiated subject to Mr. Somani and LSOG's agreement. Not surprisingly, given their history, Mr. Somani refused to agree to any settlement that included Mr. Nomani's involvement with the Hotel. As a result, the August Draft LOI was not finalized.

[108] In September 2005 Dr. Louie and Mr. Nomani began to explore other options for selling or leasing the Louie Group Strata Lots. They met with Mr. Bhatia of Days Inn in this regard. According to Dr. Louie their discussions were interesting, but inconclusive. As a result, a follow up meeting was scheduled.

The Injunction Application Hearing

[109] The Injunction Application hearing commenced before Ballance J. on September 15 and 16, 2005. It did not complete and was adjourned to October 20 and 21, 2005.

[110] On October 7, 2005, Dr. Louie's counsel, Mr. Epstein, wrote to Hospitality's counsel, Mr. Harbottle, and proposed a resumption of settlement discussions. Hospitality agreed and on October 20, 2005, the Injunction Application hearing was adjourned to the following day.

The LOI is Negotiated

[111] Mr. Epstein was assisted by his colleague, Mr. Jakubec. On October 20, 2005, Mr. Jakubec invited Mr. Daroowala to attend a meeting at their offices to discuss settlement with the Louie Group Defendants. Mr. Daroowala accepted.

[112] Mr. Daroowala and Mr. Mawji arrived at Mr. Epstein's office at 4:00 p.m. on October 20, 2005. Settlement discussions proceeded thereafter and lasted until approximately 6:30 a.m. on October 21, 2005. At various times throughout this period Dr. Louie, Mr. Epstein, Mr. Jakubec, Mr. Daroowala and Mr. Mawji were present at the meeting. Mr. Somani and Mr. Nomani were not.

[113] When the meeting began, Mr. Daroowala asked Dr. Louie to confirm that any settlement they reached would be binding. He did so. Mr. Daroowala also stated that Hospitality did not want Mr. Nomani to be involved in leasing the units. Dr. Louie responded that his arrangements with Mr. Nomani and 567 were not an obstacle to

settlement. He later remarked that Mr. Nomani may be upset by the settlement, but he would have to move on.

[114] The parties discussed several topics at the negotiating session. Although Mr. Nomani was not present, he spoke with Dr. Louie on the telephone two or three times as negotiations progressed. In the course of these conversations they discussed Dr. Louie's negotiating strategies and settlement goals.

[115] The issue of unit price on a sale was the subject of considerable negotiation. Hospitality started at a price of \$160,000 per unit and Dr. Louie started at a price of \$195,000 per unit. Near the end of the negotiating session, Dr. Louie had come down to an asking price of \$173,000 per unit and Hospitality had come up to \$170,000 per unit. Eventually, Mr. Epstein suggested that they split the difference and the parties agreed that Hospitality would pay up to \$171,500 per unit, but if Dr. Louie's average cost of all the units was less than that amount Hospitality would pay the average cost.

[116] The issue of voting rights was another key point for negotiation. The November 4, 2005 SGM was fast approaching and Hospitality wanted the Louie Group Strata Lot votes in advance. For this reason, the parties agreed that leases would be signed by no later than November 3, 2005 and the landlord would assign its voting rights for certain matters to the tenant. They also agreed to a January 15, 2006 closing date for the sale to allow Dr. Louie to terminate his arrangements with Mr. Nomani and obtain vacant possession of the Louie Group Strata Lots.

[117] At approximately 6:30 a.m. on October 21, 2005 Dr. Louie, Mr. Daroowala and Mr. Mawji signed the final form of the LOI. A copy is attached to these Reasons for Judgment as Appendix 1.

[118] Throughout the negotiating session, Dr. Louie felt pressured by the looming court appearance on the Injunction Application. By the time the session ended, he was exhausted and spent. In deciding to enter into the LOI, he accepted the advice of his lawyers in an effort to protect his own self-interest. After speaking with Mr. Nomani later that morning, however, Dr. Louie regretted having agreed to a purchase price of no more than \$171,500 per unit.

The October 21, 2005 Court Appearance

[119] Dr. Louie went to work at his medical office after the settlement meeting. Mr. Epstein attended court on his behalf. When the Injunction Application hearing resumed Mr. Epstein advised Ballance J. that a settlement had been reached between Dr. Louie and Hospitality and, therefore, the application did not proceed against him. It did proceed, however, against Mr. Nomani.

[120] Mr. Epstein told Ballance J. that Dr. Louie did not oppose an injunction being granted against Mr. Nomani. He went on to say that Hospitality and Dr. Louie agreed if such relief was ordered it should be suspended for a period of 60 days. He explained that this period would allow Dr. Louie to benefit from Mr. Nomani's knowledge in effecting the LOI and the sale of the Louie Group Strata Lots.

[121] Mr. Nomani opposed Hospitality's Injunction Application. He argued that he would be prejudiced financially if the injunction sought were to be granted. On a break in the proceedings he called Dr. Louie and expressed surprise about the settlement. He also told Dr. Louie that he had made a bad deal and encouraged him to change his mind.

[122] Dr. Louie was heavily influenced by Mr. Nomani's advice and persuasion. By the end of their conversation, he expressed regret at having left him out of the settlement. He also expressed willingness to reverse the LOI.

[123] When Mr. Nomani returned to court he told Ballance J. that Dr. Louie was willing to reverse the deal he had reached with Hospitality. In response to her questions, he claimed, amongst other things, that he was helping LSOG owners in dealing with Hotel matters without any compensation. This statement was seriously misleading. In fact, Mr. Nomani was receiving sales commissions from LSOG owners, Mr. Franiek and Dr. Louie when agreements regarding LSOG units were reached.

[124] At the conclusion of Mr. Nomani's submissions, Ballance J. allowed him an opportunity to file a supplementary affidavit outlining the prejudice he would suffer if the injunction sought by Hospitality was granted. On October 25, 2005 he filed a supplementary affidavit. He did not mention the Alleged June Agreements.

After the October 21, 2005 Court Appearance

[125] The LOI required both parties to pay a \$10,000 bond to secure its performance. On October 21, 2005 Mr. Jakubec collected a \$10,000 cheque from Dr. Louie's office for this purpose and Mr. Epstein wrote to confirm its receipt. Mr. Harbottle responded that he had also received a \$10,000 cheque from Hospitality.

[126] Dr. Louie spoke with Mr. Nomani about the settlement repeatedly throughout his workday on October 21, 2005. At its conclusion, he faxed a letter to Messrs. Epstein and Jakubec in which he claimed the LOI was produced under duress and stated he considered the LOI to be void (the "Duress Fax").

[127] According to Dr. Louie, he decided independently that the LOI was not in his best interests. He claimed his decision to send the Duress Fax to Mr. Epstein was his and his alone. Although I accept that Dr. Louie made the final decision to disavow the LOI, I do

not accept that he acted independently in reaching this decision. On the contrary, I find that his decision was based primarily upon Mr. Nomani's advice and persuasion.

[128] Dr. Louie also discussed the LOI with Mr. Franiek. At Mr. Franiek's suggestion, he directed a stop payment on the \$10,000 performance bond cheque provided earlier to Mr. Jakubec. He admitted at trial that his intention in so doing was to invalidate the LOI.

The October 24, 2005 Meeting with Messrs. Epstein and Jakubec

[129] On October 24, 2005, Dr. Louie and Mr. Nomani met with Messrs. Epstein and Jakubec to discuss the way forward. Dr. Louie told them that he was unsatisfied with the purchase price agreed upon in the LOI. He and Mr. Nomani went on to say that they had other, higher offers for the Louie Group Strata Lots. That being so, they saw no reason to accept the lower price included in the LOI.

[130] Mr. Epstein was distressed by Dr. Louie's sharp turn around. He told him that he would no longer act as his counsel if Dr. Louie decided to back out of the LOI. He and Mr. Jakubec provided Dr. Louie with a written opinion letter. In it they advised that if Dr. Louie backed out he would lose the \$10,000 performance bond, the Injunction Application would be rescheduled and Hospitality would be unlikely to engage in further settlement discussions. They also advised that backing out of the LOI could result in devastating financial losses to Dr. Louie personally.

[131] Dr. Louie testified that he was still wavering on whether to follow through with the LOI when the meeting with Messrs. Epstein and Jakubec concluded. I reject his testimony on this point. Taking into account his conduct, including the Duress Fax and the stop-payment direction, I am satisfied that, by October 24, 2005 Dr. Louie had decided to back out of the LOI.

[132] As noted, I find that Dr. Louie's decision to back out of the LOI was based on Mr. Nomani's advice and persuasion. I conclude that he made it primarily because he was unsatisfied with the purchase price agreed upon and because he felt guilty for leaving Mr. Nomani out of the settlement.

Dr. Louie Retains New Counsel

[133] Dr. Louie asked Mr. Nomani to find another lawyer to represent him. On October 27, 2005, Mr. Nomani retained Ryan Berger on Dr. Louie's behalf.

[134] In the course of the trial, an application was made for production of Mr. Berger's file based on the principles in *Pax Management Ltd. v. C.I.B.C.*, [1987 CanLII 153 \(BC CA\)](#), 14 B.C.L.R. (2d) 257 (C.A.). In considering whether a claim of fraudulent

misrepresentation vitiated solicitor-client privilege, the court in *Pax Management* stated at ¶ 64:

It is well established law that one cannot claim the protection of the solicitor-client privilege where the solicitor himself has been a party to a fraud, or where the communications were made by the client for the furthering of fraudulent conduct, ie., such as obtaining advice for the purpose of perpetrating a fraud.

Where fraud is a genuine issue, privilege will be displaced on the basis that the benefits of its maintenance are outweighed by the benefits of full disclosure of all circumstances relevant to resolving the issue of fraud.

[135] I granted the *Pax Management* application because, as the trial unfolded and new documents surfaced, it became plain that fraud was a genuine issue. Although there was no suggestion that Mr. Berger was a party to any fraudulent conduct, the documents gave colour to the allegation that his advice was sought in furtherance of the fraud. As a result of the production order, much of the correspondence between Mr. Berger, Dr. Louie and Mr. Nomani was placed in evidence at trial.

[136] When Mr. Berger was retained, Mr. Nomani told him that Dr. Louie would not have entered into the LOI had he understood its implications. Mr. Berger asked Mr. Nomani to list the reasons that this was so. In response, Mr. Nomani sent an email in which he listed several purported reasons (the “Oct. 27 Email”). The first was that Dr. Louie was not in a position to negotiate the LOI without Mr. Nomani’s assistance.

[137] Mr. Nomani claimed at trial that Dr. Louie drafted the Oct. 27 Email. I do not accept this claim. I am satisfied that, as Dr. Louie testified, the Oct. 27 Email was drafted by Mr. Nomani. The Alleged June Agreements are not mentioned as a reason that Dr. Louie would not have entered into the LOI.

[138] Dr. Louie and Mr. Nomani met again with Mr. Bhatia of Days Inn on October 27, 2005. Dr. Louie testified that, given the LOI’s existence, he did not offer to sell the Louie Group Strata Lots to Mr. Bhatia, although he sounded him out regarding a possible sale.

[139] Mr. Bhatia later sent an email to Hospitality indicating that Dr. Louie did offer to sell him the Louie Group Strata Lots. Mr. Bhatia was not called as a witness at trial, however, and Dr. Louie’s testimony is unreliable. In the circumstances, I decline to make any findings as to what transpired at their meeting on October 27, 2005.

Hospitality Attempts to Implement the LOI

[140] Hospitality decided to exercise the Option to Purchase shortly after the LOI was concluded. On October 25, 2005, \$200,000 was placed in trust to cover the deposit. Mr. Bryant and Mr. Daroowala telephoned Mr Epstein to advise him that the Option to Purchase would be exercised. Amongst other things, they asked that Dr. Louie provide

his acquisition cost information so that the sale price for the units could be determined. Mr. Daroowala made the same request directly to Dr. Louie.

[141] Dr. Louie did not supply the acquisition cost information to Hospitality, despite repeated requests that he do so.

[142] On October 28, 2005, Mr. Nomani wrote to Hospitality's counsel. He claimed that the LOI was obtained by blackmail and Dr. Louie had been induced to break his contracts with 567. In the days that followed, Mr. Nomani frequently repeated these allegations. He also informed Hospitality that Dr. Louie had retained new counsel.

[143] On November 1, 2005, Mr. Harbottle provided Mr. Jakubec with the \$200,000 deposit cheque. He noted Mr. Nomani's advice regarding new counsel and asked for clarification. He went on to emphasize that the SGM was fast approaching and Hospitality needed the leases and proxies by November 3, 2005. Later that day, Mr. Bryant sent a draft lease to Messrs. Epstein and Jakubec and faxed a copy to Dr. Louie.

[144] On November 2, 2005, Mr. Jakubec returned the \$200,000 deposit cheque to Mr. Harbottle. He confirmed that his firm no longer represented Dr. Louie.

Mr. Berger Takes Over

[145] On November 2, 2005 Mr. Berger contacted Mr. Bryant to notify him of his retainer. He requested a copy of the leases proposed by Hospitality, which were provided immediately. He also delivered a Notice of Change of Solicitor in the Fiduciary Action and stated that he may need time to get up to speed on the file.

[146] Mr. Harbottle sent the \$200,000 deposit cheque to Mr. Berger. In a follow-up letter he emphasized the importance of finalizing the leases by November 3, 2005.

[147] Mr. Berger provided Dr. Louie with a preliminary opinion on November 2, 2005. He expressed the view that the LOI was valid and enforceable and warned that Dr. Louie could experience severe consequences if he proceeded on the basis that it was not. Despite this advice, Dr. Louie instructed Mr. Berger to assert that the LOI was not binding and to pursue further negotiations in an effort to reach a better deal.

[148] Mr. Berger followed Dr. Louie's instructions. On November 3, 2005, he wrote to Mr. Bryant and asserted that the LOI was not enforceable. He went on to say that he would review the draft lease, but would not be able to provide his position on it until November 8, 2005.

[149] Mr. Harbottle responded promptly to Mr. Berger's letter. He challenged the claim that the LOI was unenforceable and asked if the Louie Group would provide proxies for

the SGM if an extension to November 8, 2005 was granted regarding the draft lease. Dr. Louie refused.

[150] Dr. Louie testified that he did not sign the draft lease because he and his new lawyers did not have enough time to review it. I reject this testimony. As noted, I am satisfied that Dr. Louie had decided not to follow through with the LOI before he retained Mr. Berger. It follows that I am satisfied his decision had nothing to do with needing time to review the draft provided. I am also satisfied that the alleged need for time was a delaying tactic designed to enhance Dr. Louie's negotiating position.

The November 4, 2005 SGM

[151] The SGM proceeded on November 4, 2005 as scheduled. Jonathon Louie attended with 30 proxies for the Louie Group Strata Lots and 8.1 proxies for 585. Dr. Louie knew that, if the LOI was binding, he was obliged to refrain from supporting litigation contrary to Hospitality's interests. Nevertheless, he instructed his son to vote in favour of Mr. Nomani's resolution to proceed with the Unauthorised Action ("Resolution A"). Resolution A was contrary to the interests of Hospitality.

[152] Jonathon Louie followed his father's instructions. Resolution A was defeated, despite his support.

[153] Jonathon Louie also voted against a resolution to take legal action to recover on the judgment from the Dockside Proceeding ("Resolution E"). Resolution E was in Hospitality's interests, as well as those of the Strata Corporation. Resolution E was also defeated. Had Jonathon Louie voted in its favour, it would have passed.

[154] Resolution E was passed at a subsequent AGM, after the Louie Group Defendants were ordered by the Court not to oppose it. As a result, the judgment from the Dockside Proceeding was eventually recovered by the Strata Corporation. It was not paid, however, by the defendant LSOG Strata Council members. Rather, it was paid by Dr. Louie, after proceedings were brought to sell the defendants' units. Dr. Louie also paid the \$150,000 special costs awarded.

The November 7, 2005 Meeting with Mr. Berger

[155] On November 7, 2005, Mr. Berger met with Dr. Louie and Mr. Nomani. He repeated his opinion that the LOI was valid and enforceable. Nevertheless, Dr. Louie maintained that he wished to treat the LOI as unenforceable. He also told Mr. Berger that he would prefer to proceed without counsel to save costs and obtain procedural leniency. He expressed the view that this would favour his strategy of delay and create favourable circumstances in which to negotiate a better deal.

[156] When the meeting ended, Dr. Louie terminated Mr. Berger's retainer. At trial, he claimed that, when he did so, he intended to retain other counsel. I reject this claim. In my view, it is inherently improbable that Dr. Louie would decide to retain other counsel when, as he acknowledged, he was satisfied with the quality of Mr. Berger's representation. It is also apparent from Mr. Berger's letter that one aspect of Dr. Louie's strategy was to proceed without professional representation.

[157] Mr. Berger returned the deposit cheque to Mr. Harbottle after his retainer was terminated.

Creation of the Alleged June Agreements

[158] As Dr. Louie acknowledged, he and Mr. Nomani wanted to defeat the LOI and improve 567's position. In furtherance of this purpose, they decided to register Form C documents with respect to the RFRs at the Land Titles Office. The day after Mr. Berger's retainer was terminated they agreed to attend at the office of Mr. Visram to have the Form Cs, with attached Alleged June Agreements, executed. Mr. Visram is a lawyer known to Mr. Nomani.

[159] On the evening of November 7, 2005 Mr. Nomani created a document on his computer entitled "Suite rental Agreement – Dr. Louie Group.doc" (the "Louie Group.doc"). Forensic evidence presented by Hospitality revealed that the Louie Group.doc took approximately one half-hour to create. Its content, including several errors, is identical to the Alleged June Agreements produced by Mr. Nomani in hard copy form in this litigation. It shares many distinctive characteristics with the Retty-Cannon Agreement.

[160] At trial, Mr. Nomani testified that he created and emailed the Louie Group.doc to Dr. Louie on November 7, 2005 to remind him of the Alleged June Agreements' content. He claimed that he did not have an electronic version of the Alleged June Agreements available, but did have the signed copies in his possession. Mr. Nomani went on to claim that he did not fax or email a copy of these documents to Dr. Louie because there were problems with his computer. On cross-examination, however, he changed his story when counsel pointed out that he had sent a scanned document from the computer earlier the same day. According to his revised testimony, Mr. Nomani thought only of faxing the Alleged June Agreements, but his fax machine did not work.

[161] Mr. Nomani also worked on a version of the Louie Group.doc on November 8, 2005. The forensic evidence revealed that, in so doing, he changed the name of the landlord from the November 7, 2005 version and added a schedule. When asked at trial to explain why he was working on this electronic document if, as he claimed, the Alleged June Agreements were executed in June 2005, Mr. Nomani responded that he had no

recollection of so doing. Faced with the uncontroverted expert evidence that such work was performed, he was unable to offer an explanation.

[162] I reject Mr. Nomani's testimony, which shifted on cross-examination and is inherently improbable. I do not believe that he spent one half-hour on November 7, 2005 recreating an electronic version of a document that already existed in hard copy form and worked on the same document on November 8, 2005 for no identified purpose.

[163] I conclude that Mr. Nomani created the eight Alleged June Agreements on November 7 and 8, 2005 from various iterations of the Louie Group.doc. He did so by opening and copying the Retty-Cannon Agreement on his computer, altering it to the form and content of the Louie Group.doc, and repeatedly editing the Louie Group.doc and printing hard copies in the name of each of the members of the Louie Group. I also conclude that Mr. Nomani presented seven of the newly created Alleged June Agreements to Dr. Louie for his signature on November 8, 2005 at Mr. Visram's office. Dr. Louie signed them and they were attached to the Form Cs, which were executed shortly thereafter before Mr. Visram.

[164] I reach the foregoing conclusions based several factors. They include: Dr. Louie's revised testimony; Dr. Louie's decision to back out of the LOI almost immediately after it was signed; Dr. Louie and Mr. Nomani's failure to disclose the Alleged June Agreements prior to November 8, 2005; the forensic evidence; Mr. Nomani's inherently improbable explanation for his computer use on November 7 and 8, 2005; and, Mr. Nomani's attempts to hide, alter and manufacture electronic evidence in the course of the litigation. Most of these factors are described above. The final factor requires further comment.

[165] Mr. Nomani and 567 did not list the Louie Group.doc electronic document in the ordinary course of the litigation. Rather, it came to light only after Master Donaldson made an order on November 2, 2007 for independent expert examination of all computer hard drives used by 567 (the "November 2 Order"). Although Mr. Nomani did not turn over all such hard drives, the appointed expert, Mr. Iverson, found a November 7, 2005 email from Mr. Nomani to Dr. Louie in the "Sent box" of the computer that Mr. Nomani did provide (the "November 7 Email"). The Louie Group.doc was attached to the November 7 Email.

[166] Mr. Nomani and 567 also did not list the November 7 Email in the ordinary course of the litigation. Dr. Louie did not do so either. By way of explanation, Mr. Nomani claimed his computer crashed in April 2007 and Dr. Louie claimed he recycled his computer in August 2007. These explanations are unsatisfactory and unsettling, given Hospitality's appropriately assertive prior pursuit of all relevant documents, including emails.

[167] Even more unsettling, however, is Mr. Nomani's conduct in response to Master Donaldson's earlier order for production of electronic documents. On July 6, 2007 Master Donaldson ordered that 567 retain a computer expert to provide a list of all files on the hard drives of its computers (the "July 6 Order") and Mr. Nomani, assisted by 567's counsel, Mr. Hatch, retained Maple Oak Computer Solutions ("Maple Oak") for this purpose. Messrs. Nomani and Hatch delivered Mr. Nomani's HP and Compaq computers, together with new hard drives, for examination, copying and listing by Maple Oak.

[168] The HP was provided to Maple Oak on July 13, 2007 and the Compaq was provided on July 16, 2007. Maple Oak personnel copied both onto the new hard drives, listed their contents, and returned them to Mr. Nomani on July 16, 2007. The Compaq list that was prepared by Maple Oak included several obviously relevant electronic documents, including a November 8, 2005 version of the Louie Group.doc (the "First Compaq List"). The Louie Group.doc was not included on the HP list.

[169] On July 20, 2007, Mr. Nomani instructed Mr. Hatch to resubmit the Compaq to Maple Oak and have them create a new list of its contents. He insisted this occur because there was a problem and he wanted to put an end to "conspiracy theories". Mr. Nomani gave the Compaq back to Mr. Hatch, who delivered it again to Maple Oak for re-examination. Mr. Nomani also retrieved the First Compaq List from Mr. Hatch's office and instructed him to disregard its contents. He did so, he claimed, because he wanted to avoid confusion in connection with the Maple Oak lists.

[170] Maple Oak prepared a second list of electronic documents on the resubmitted Compaq (the "Second Compaq List"). The Second Compaq List included fewer electronic documents than the First Compaq List and, notably, did not include the Louie Group.doc. The List of Documents created following the Maple Oak examination of 567's computers was based upon the Second Compaq List. As a result, the Louie Group.doc was not listed and produced at the time.

[171] Taking into account all of the foregoing, I am satisfied that between July 16 and 20, 2007 Mr. Nomani "scrubbed" the Compaq hard drive and removed relevant documents, including the Louie Group.doc, in an effort to hide them. He also copied the original Compaq version onto the HP, but did not provide it to Mr. Iverson pursuant to the November 2 Order. For this reason, Mr. Iverson did not find the November 8, 2005 version of the Louie Group.doc when he conducted his independent examination. As noted, however, he did find the November 7, 2005 version attached to the November 7 Email.

[172] Hospitality retained its own forensic computer expert, Mr. Joyce, to analyse the electronic data. After Mr. Iverson located the Louie Group.doc, Mr. Joyce prepared an

expert report in which he explained how the Alleged June Agreements could have been created from the Louie Group.doc. (the “Joyce Report”).

[173] On August 8, 2007, the Joyce Report was delivered to opposing counsel. On August 22, 2007, Mr. Nomani provided Mr. Hatch’s office with a memory card containing an electronic document entitled “Suite rental Agreement – template.doc”, dated in June 2005 (the “Alleged Template”). He claimed to have found the memory card very recently. The Alleged Template that was on it matched the content of the Alleged June Agreements.

[174] Mr. Nomani gave shifting versions of the circumstances in which he allegedly found the memory card. In addition, the forensic evidence established that the Alleged Template could not have been created in 2005 because it was created with Word 2007 Version 12. It also established that the times and dates shown on electronic documents can be easily manipulated.

[175] I conclude that Mr. Nomani created and misdated the Alleged Template on the memory card on an unknown date between August 8 and 22, 2007. His purpose in so doing was to overcome the theory advanced in the Joyce Report and support his claim that the Alleged June Agreements were created in June, 2005.

[176] Much of the foregoing came to light while the trial was ongoing. Various production orders were made and Mr. Hatch, who had been discharged by 567, was called as a witness. Considered in combination with the other evidence, I find that Mr. Nomani’s attempts to hide, alter and manufacture electronic evidence support the conclusion that the Alleged June Agreements were created on November 7 and 8, 2005. They also support the conclusion that Mr. Nomani attempted repeatedly, consciously, and shamelessly to deceive the Court.

Execution of the Alleged June Agreements

[177] On November 8, 2005, Dr. Louie and Mr. Nomani attended at Mr. Visram’s office. I accept Dr. Louie’s revised testimony that Mr. Nomani presented him with seven of the Alleged June Agreements and he signed them just prior to signing the Form Cs before Mr. Visram. I am unable to make a finding as to when Jonathon Louie signed the eighth Alleged June Agreement. I accept, however, that, as Dr. Louie testified, it was after November 8, 2005.

[178] Mr. Nomani attempted to register the Form Cs and Alleged June Agreements at the Land Titles Office. He was unsuccessful.

The Hospitality Action and the First 567 Action

[179] On November 9, 2005, Dr. Louie sent a letter to Mr. Harbottle enclosing a Notice of Intention to Act in Person in the Fiduciary Action. In it, he advised that he would be retaining other counsel, but asked that, in the interim, correspondence regarding the LOI be directed to Mr. Nomani. He also suggested that negotiations between Hospitality and the Louie Group Defendants should continue.

[180] On November 10, 2005, Hospitality commenced the Hospitality Action in response to Dr. Louie's conduct in disavowing the LOI. The same day, Russell J. granted an order restraining the Louie Group Defendants from selling, encumbering or otherwise dealing with the Louie Group Strata Lots or the shares of the Louie Group companies.

[181] On November 15, 2005, Hospitality registered Certificates of Pending Litigation against the Louie Group Strata Lots. Sufficient funds to complete the purchase were placed on deposit by Mr. Somani's family company.

[182] Hospitality and Restaurant first learned of the Alleged June Agreements on November 15, 2005 when 567 commenced an action against them (the "First 567 Action"). In the First 567 Action, 567 alleged that Hospitality and Restaurant wrongfully induced the Louie Group Defendants to commit breaches of the Alleged June Agreements.

Hospitality Exercises the Option to Purchase

[183] On November 16, 2005, Hospitality formally exercised the Option to Purchase. The same day, Mr. Nomani sent an email to Hospitality's counsel asserting that Hospitality was wrongfully interfering with the Alleged June Agreements by purporting to take this step. He repeated this assertion many times in the years that followed.

[184] On November 18, 2005, Hospitality demanded that 567 produce the Alleged June Agreements. Mr. Nomani initially refused. He later produced six of them after being ordered to do so by the Court.

[185] On November 21, 2005, the Louie Group Defendants retained Greg Palm as their counsel in the Hospitality Action. Hospitality's new counsel delivered the \$200,000 deposit cheque to Mr. Palm, who promptly returned it.

[186] On December 8, 2005, counsel for Hospitality formally tendered the \$200,000 deposit to Mr. Palm pursuant to its exercise of the Option to Purchase. Again, Mr. Palm returned the cheque. Thereafter, the deposit sum was placed in trust by Hospitality's counsel, where it remained available to the Louie Group Defendants upon request.

The Telephone Action

[187] Mr. Nomani used suite 205 as a business office. On January 19, 2006, 587 commenced proceedings against the Strata Corporation seeking telephone access for suite 205 to facilitate his operation of a hotel within a hotel (the “Telephone Action”). In the Telephone Action, 587 alleged that the Strata Corporation had unfairly refused access to the Hotel’s telephone room.

The Non Disturbance Agreement, Liquor Licence and Estoppel Certificate

[188] Paragraph 3 of the LOI concerns extension of the Restaurant Lease. Amongst other things, it refers to provision of the non disturbance agreement, estoppel certificate and Liquor Licence. Over time, disagreements developed between Hospitality and Dr. Louie with respect to all three of these matters.

[189] In February 2006, 585 provided a draft non disturbance agreement to Restaurant (the “585 Non Disturbance Agreement”). From Restaurant’s perspective, the 585 Non Disturbance Agreement was inaccurate and unacceptable. As a result, Restaurant refused to sign the 585 Non Disturbance Agreement or provide an estoppel certificate. This refusal angered Dr. Louie.

[190] The 585 Non Disturbance Agreement included a term to the effect that the Restaurant Lease had not been amended and there were no claims under the Restaurant Lease. In fact, the Restaurant Lease was amended by the LOI and there were ongoing disagreements regarding transfer of the Liquor Licence and the validity of the Leases.

[191] In December 2006 the Liquor Licence disagreement came to a head when provincial authorities suspended the existing licence. Given the time of year, a financial crisis loomed as a result. In its face, Dr. Louie relented and the Liquor Licence was transferred into Restaurant’s name.

[192] I am satisfied that Restaurant’s perspective regarding these matters was reasonable. I am also satisfied that Dr. Louie’s angry, intransigent response contributed to the escalating conflict between the parties.

The Voting Injunction Application

[193] The Strata Corporation’s Annual General Meeting was scheduled for February 24, 2006. Hospitality delivered an application in advance seeking to restrain the Louie Group Defendants from voting contrary to its directions and restraining 585 from nominating Mr. Nomani as its representative on the Strata Council (the “Voting Injunction Application”).

[194] After the Voting Injunction Application materials were served on Mr. Palm, he arranged a meeting between Dr. Louie and representatives of Hospitality. Following the

meeting, Dr. Louie instructed Mr. Palm to agree to a consent injunction. Mr. Palm advised Hospitality's counsel of these instructions (the "Voting Injunction Agreement").

[195] Dr. Louie spoke with Mr. Nomani about the Voting Injunction Agreement after providing Mr. Palm with his instructions. Again, Mr. Nomani persuaded Dr. Louie that he had made a bad deal. Again, Dr. Louie changed his mind based on Mr. Nomani's advice and resiled from his agreement. Again, Dr. Louie's counsel warned him of the dire consequences of so doing, but he ignored his counsel's advice. Again, Dr. Louie's counsel withdrew.

[196] The Voting Injunction Application came on for hearing on February 23, 2006. Dr. Louie appeared in person, as did Mr. Nomani. Groberman J. (as he then was) found that an agreement had been reached and granted an injunction with respect to voting at the February 24, 2006 AGM.

[197] A summary trial in the Hospitality Action was scheduled for November 29 and 30, 2006 (the "Summary Trial - Part 1"). Its purpose was to determine whether the LOI was valid and binding. The next AGM was, however, scheduled for November 27, 2006. Not surprisingly, Hospitality wanted the voting injunction in place pending determination of the Hospitality Action. As a result, Hospitality rescheduled the Voting Injunction Application and attempted, through Dr. Louie's new counsel, Mr. Lithwick, to obtain his consent.

[198] Correspondence was exchanged between Hospitality's counsel and Mr. Lithwick regarding a possible consent injunction. Eventually, it appeared that Dr. Louie's consent to the injunction would be forthcoming. In November 2006, however, Mr. Lithwick asserted such consent was impossible because, in April 2006, Dr. Louie had assigned the voting rights for the Louie Group Strata Lots to 567 (the "Assignment Agreement"). I find that Dr. Louie and Mr. Nomani entered the Assignment Agreement in an attempt to frustrate the proposed voting injunction.

[199] The Voting Injunction Application proceeded on November 14, 2006. The Court granted an order similar to that granted in February 2006 with respect to the November 2006 AGM.

The Pace of Litigation Increases

[200] The LSHS and Executive Actions were commenced in 2002 and 2004 respectively. They progressed slowly thereafter until January 2006 when Master Donaldson conducted a case management conference for all Hotel-related litigation. From that point forward, the pace of the litigation picked up considerably. Several case management conferences were conducted and many interlocutory applications were heard and determined.

[201] It is unnecessary to review every step taken in all of the Hotel-related litigation. Some of the key developments are, however, summarised below. It is also unnecessary to determine whether Dr. Louie was aware of each and every development as it unfolded. It is clear on all of the evidence, however, that Mr. Nomani kept Dr. Louie generally apprised.

[202] In March 2006, 567 applied to be added as a defendant in the Hospitality Action. The application was based on 567's purported rights under the Alleged June Agreements. In October 2006 Master Donaldson dismissed the application. 567 appealed, but Josephson J. adjourned the appeal pending determination of the Summary Trial. The appeal was eventually dismissed, except that 567 was added as a defendant on the Hospitality Action trial with respect to remedy.

[203] In July 2006 Dr. Louie advanced funds to Mr. Nomani to permit strata lot 123 to be registered in his name. Strata lot 123 was subject to Certificates of Pending Litigation in favour of Hospitality and Executive with respect to the LSHS Action and Executive Action. After taking title, Mr. Nomani applied to be added as a defendant in the LSHS Action. In August 2007 I dismissed his application. In October 2007 his application for leave to appeal was denied.

[204] On November 9, 2006, 567 commenced the 567 Action against Hospitality and the Louie Group Defendants. He relied upon the Alleged June Agreements in the 567 Action and, on November 10, 2006 filed Certificates of Pending Litigation over the Louie Group Strata Lots. In response, Hospitality pleaded, amongst other things, that the Alleged June Agreements were not genuine. It also filed a counterclaim alleging that Mr. Nomani, 567 and the Louie Group Defendants entered into a conspiracy to defeat its rights under the LOI.

The Summary Trial - Parts 1 and 2

[205] On November 29 and 30, 2006, the Summary Trial - Part 1 proceeded before Pitfield J. Prior to its commencement, 567 sought standing to participate. It did not succeed.

[206] As noted, on December 27, 2006, in *Le Soleil Hospitality Inc. et. al. v. Louie et. al.*, [2006 BCSC 1920](#), Pitfield J. ruled that the LOI was a binding and enforceable agreement. In *Le Soleil Hospitality Inc. et. al. v. Louie et. al.*, [2008 BCCA 206](#), Pitfield J.'s decision was upheld on appeal.

[207] On April 11, 2007, a summary trial regarding the limitation of liability clause in section 8 of the LOI proceeded before Pitfield J. (the "Summary Trial - Part 2"). On May 2, 2007, in *Le Soleil Hospitality Inc. et. al. v. Louie et. al.*, [2007 BCSC 595](#), he ruled that the Louie Group Defendants had breached the LOI and the plaintiffs could pursue the

remedies of specific performance or damages. In *Le Soleil Hospitality Inc. v. Louie*, 2008 BCCA 206, Pitfield J.'s decision was upheld on appeal.

The Litigation Storm Continues

[208] By 2007 about one-third of the LSOG members named in the LSHS and Executive Actions had settled with Hospitality. A typical settlement was by way of a lease at 29% of revenue for a term expiring when the Leases expired. In some cases, the lease was terminable by an annual deadline.

[209] Over time, another one-third of the LSOG members named in the LSHS and Executive Actions stopped participating in the litigation. Hospitality obtained default judgments against these individuals.

[210] The remaining one-third of the LSOG members continued their participation in the LSHS and Executive Actions. Throughout 2007 various interlocutory applications were brought in the actions. By October 2007 several examinations for discovery were conducted in Singapore and preparation for trial, then scheduled to commence in early 2008 was well underway.

[211] On February 28, 2007, in *Nomani v. The Owners, Strata Plan LMS 3837*, 2007 BCSC 276, Blair J. dismissed the Administrator Proceedings. He also ordered Mr. Nomani to pay special costs for misleading the Court. In *Nomani v. The Owners, Strata Plan LMS 3837*, 2008 BCCA 236, Blair J.'s decision was upheld on appeal.

[212] On March 27, 2007, Action No. S072096 was commenced in the names of 567, Mr. Nomani and the LSOG owners of 18 strata lots (the "Peh Proceedings"). The petitioners sought an order setting aside the Leases. Mr. Nomani provided copies of the petition and his supporting affidavit to Dr. Louie.

[213] On May 18, 2007, Hospitality applied for appointment of a receiver with respect to the 18 Louie Group Strata Lots in 567's possession. 567 opposed the application based on its rights under the Alleged June Agreements and Dr. Louie supported 567's opposition. Pitfield J. dismissed Hospitality's application.

[214] In May and June 2007 a trial in Action Nos. S054232 and L052841 was conducted before Butler J. (the "Kasahara Proceedings"). The trial concerned whether the Kasaharas' strata lot should be included in the Hotel or was available to be managed by 567. The Kasaharas were members of LSOG. They were represented at trial by Dr. Louie's lawyer, Mr. Lithwick, who was instructed by Mr. Nomani. Mr. Nomani kept Dr. Louie apprised of developments.

[215] On September 14, 2007, in *Le Soleil Hospitality Inc. v. Kasahara*, [2007 BCSC 1372](#), Butler J. held that the Kasaharas were entitled to possession of their strata lot. He also held that they had breached their lease with Hospitality.

[216] The Peh Proceedings were brought on for hearing on October 19, 2007. On October 31, 2007, Sigurdson J. referred the petition to the trial list. On March 3, 2008, in *Peh v. The Owners, Strata Plan LMS 3837*, [2008 BCSC 291](#), he granted a stay of proceedings pending determination of the LSHS Action, Executive Action, Hospitality Action and 567 Action.

[217] Two of Dr. Louie's companies, 688571 B.C. Ltd. and 0700439 B.C. Ltd., were defendants in the Executive Action. Given the terms of the LOI, in February 2008 counsel for Executive informed Dr. Louie's counsel of his intention to discontinue against those companies, without costs. Given the stage of the proceedings, an application to discontinue was required before the action could be formally discontinued. Dr. Louie's counsel initially indicated that his consent to the application would be forthcoming. By March 4, 2008, however, it became clear that it would not.

[218] In March 2008 a mediation and examinations for discovery were conducted in the LSHS and Executive Actions in Singapore. Although he had been served with an appointment to be cross-examined on his affidavit at the same time, Mr. Nomani ignored the appointment and attended the mediation as Dr. Louie's representative. The mediation failed.

[219] I make no findings regarding the reasons for the mediation's failure. It was conducted in private and, in my view, it would be inappropriate to speculate about what transpired and why. Taking into account Dr. Louie's refusal to consent to discontinuance of the Executive Action against his companies and Mr. Nomani's participation in the mediation, however, I am satisfied that Dr. Louie was keenly interested in its outcome.

[220] After the LOI was signed, Hospitality remained concerned that Dr. Louie was supporting litigation contrary to its interests. As a result, Hospitality applied for an injunction restraining such conduct in respect of Hotel litigation other than the 567 Action. The Louie Group Defendants opposed the application. On May 8, 2008, I granted the injunction sought with respect to the LSHS Action, the Executive Action, and the Peh Proceedings (the "May 2008 Injunction").

[221] The trial in the LSHS and Executive Actions commenced on May 12, 2008. It carried on for several months and I gave judgment in favour of the plaintiffs on September 23, 2009. Although approximately 20 LSOG members remained as defendants in the actions to the date of judgment, only three travelled to Canada and testified at the trial.

[222] The trial in these actions was scheduled to commence on July 15, 2008. Given the demands facing its counsel in the other trial, however, 567 applied for an adjournment. On June 23, 2008, I granted 567's application (the "Adjournment Order"). It was a term of the Adjournment Order that 567 deliver to Hospitality possession of the 18 Louie Group Strata Lots that were under its control.

Litigation Funding

[223] Mr. Nomani maintained close contact with LSOG's leaders regarding the ongoing Hotel litigation. In February 2006 he met with Dr. Louie and Mr. Franiek to discuss litigation funding needs. In an email sent the day before the meeting, Mr. Nomani listed the legal costs for several lawsuits as an agenda item. Shortly thereafter, Dr. Louie caused his children's company to loan approximately \$122,000 to LSOG owners.

[224] The evidence reveals that, between 2006 and 2008, Dr. Louie raised and advanced substantial funding to support litigation that was contrary to Hospitality's interests. Dr. Louie and Mr. Nomani testified that this funding was advanced to LSOG members by way of loans. Dr. Louie, or companies he controlled, acquired the funds largely through loans obtained from Mr. Franiek (the "Franiek Loans"). The Franiek Loans were supported by Dr. Louie's covenant and secured by his companies' property.

[225] Dr. Louie arranged for deposit of funds borrowed from Mr. Franiek into the trust account of a law firm, Pihl and Company. From there, most of the borrowed funds went into a Scotiabank trust account maintained by Mr. Nomani (the "Scotiabank Trust Account"). Mr. Nomani used funds from the Scotiabank Trust Account to pay lawyers acting against Hospitality in the LSHS Action, Executive Action, Kasahara Proceedings and Peh Proceedings (together, the "Prohibited Actions"). Some of the same lawyers were also paid by Dr. Louie through Pihl and Company.

[226] It is unnecessary to review the detail of every payment made on Dr. Louie's behalf to lawyers with respect to the Prohibited Actions. In summary, the following amounts were paid for legal fees, taxes and disbursements for the Prohibited Actions from funds that were controlled by Dr. Louie:

To Hammerberg Altman for the LSHS Action and Executive Action:

2006	\$ 13,862.02
2007	\$ 46,677.42
2008	\$155,000.00

To Devlin Jensen for the LSHA Action and Executive Action:

2007	\$ 87,500.00
2008	\$385,000.00

To Holmes & King for the Peh Action and LSHS Action:

2006	\$ 1,000.00 for the Peh Action

2007	\$ 7,711.98 for the LSHS Action
	\$ 47,603.04 for the Peh Action
2008	\$ 20,000.00 for the Peh Action

To Kahn Zach for the Kasahara Action:

2006	\$ 10,000.00
2007	\$ 75,000.00

[227] Dr. Louie and his companies were not the only ones to deposit funds in the Scotiabank Trust Account. To a limited extent, the Kasaharas did so as well. The legal fees paid out of the Scotiabank Trust Account with respect to the Kasahara Proceedings, however, exceeded the Kasaharas' own contribution.

[228] As noted, the LSHS and Executive Actions were commenced in 2002 and 2004 but little progress was made until after Master Donaldson took over case management responsibilities. Although Dr. Louie made some payments to lawyers in 2006 in the LSHS and Executive Actions, the most active funding support commenced in the fall of 2007 and continued thereafter. This is not surprising, given that most major litigation steps, such as examinations for discovery and trial preparation, were undertaken from that point onward.

[229] Dr. Louie did not monitor the precise manner in which Mr. Nomani disbursed funds on deposit in the Scotiabank Trust Account. As he acknowledged at trial, however, he well knew the funds were being used to support litigation that was contrary to Hospitality's interests. As he also acknowledged, Dr. Louie knew the litigation would not continue without such funding because the LSOG defendants would not pay their lawyers to continue and Mr. Franiek would not advance the Franiek Loans without his guarantee and security. As he further acknowledged, the funding was advanced at his direction in deliberate breach of the LOI.

[230] I conclude that Dr. Louie was correct in all of the foregoing acknowledgments. Most LSOG members had settled or abandoned the Hotel litigation and I infer that, by October 1, 2007, those who continued on would also have settled if they had been required to pay substantial legal fees. This inference is based on all of the relevant evidence, including the fact that: the available settlement option was reasonable; some LSOG members had failed to pay previous legal accounts; by October 1, 2007 costly litigation steps were being undertaken; by April 2008 Mr. Lunny of Devlin Jensen was advising his LSOG clients that he would withdraw unless his outstanding account was satisfied and, in response, Dr. Louie obtained substantial sums "to get the job done"; and the judgment and costs awarded in the *Dockside Proceedings* were paid by Dr. Louie, not by the LSOG defendants.

[231] I also conclude that Dr. Louie funded the Prohibited Actions to enhance his ability to develop a competing hotel operation. Mr. Nomani maintained close ties with the LSOG defendants throughout and, if they prevailed, their units would become available for management by 567. Together, the Louie Group Strata Lots and LSOG units would number approximately 50. In the result, Dr. Louie, with Mr. Nomani's assistance, would be able to operate a substantial hotel operation if Hospitality would not agree to better terms for the Louie Group Strata Lots.

[232] I further conclude that, as with his perjury, Dr. Louie remains unrepentant regarding his conduct. Rather, he feels justified because, in his view, Hospitality also behaved badly toward him. Dr. Louie's attitude is exemplified by the following exchange with counsel, which took place in the course of cross-examination:

Q: I didn't ask you about the amount, sir, you knew that some of the funds were going to be used to pay Devlin Jensen?

A: Yes, you're saying that I breached – yes, I breached that covenant but also the hotel also breached their covenant to grant the estoppel certificate and grant the third-party transfer of the liquor licence, and they also failed to grant the – do the lease process, so if I've breached, then they've also breached, so in essence we say both sides breached.

Q: So you acknowledge that you deliberately breached the covenant in the LOI when you gave your guarantee and put up your security for that loan?

A: Yes, and I also acknowledge that the hotel breached their covenant to not give the -- not give me the estoppel certificate and grant the third-party transfer.

[233] Hospitality was alive to Dr. Louie's attitude of entitlement and indifference to his legal obligations. As noted, its principals were concerned throughout that he was supporting litigation adverse to its interests, despite his covenant not to do so. Its counsel expressed this concern repeatedly in correspondence to counsel for Dr. Louie. For example, in January 2007 two letters were sent to Mr. Lithwick remarking Dr. Louie's covenant and warning that its breach could increase Hospitality's damages. Similar concerns and warnings were expressed many times in other correspondence as well.

[234] Although Hospitality's warnings did not stop Dr. Louie from supporting litigation that was adverse to its interests, they did have an impact. In February 2007, after receiving one such warning, Dr. Louie expressed concern about it to Mr. Nomani, who passed on his concern to Mr. Franiek. In response, Mr. Franiek changed certain commitment letters from showing Dr. Louie as the borrower, with his company 365776 B.C. Ltd. ("365") as the guarantor, to 365 as the borrower and Dr. Louie as the guarantor. 365 was a defendant in the Fiduciary Action. It also held the disputed Liquor Licence.

[235] After February 2007 the Franiek Loans were arranged indirectly, through Dr. Louie's companies or Meridian. They were, however, ultimately supported by Dr. Louie personally. The funds were disbursed periodically to advance the Prohibited

Actions. Some of the funds were advanced after the May 2008 Injunction was granted, in direct violation of its terms.

[236] Dr. Louie's attempts to mask his role in connection with the Franiek Loans extended beyond obtaining them indirectly. He, 567 and Mr. Nomani failed to produce documents regarding the Franiek Loans, and their use, throughout the course of the litigation. Indeed, the nature and extent of the funding provided by Dr. Louie to support the Prohibited Actions came to light as the trial unfolded. It did so only after several mid-trial production orders were made and Mr. Franiek was compelled to testify pursuant to a subpoena.

DISCUSSION

THE HOSPITALITY ACTION

Is Hospitality entitled to an order for specific performance of the Option to Purchase contained in paragraph 4 of the LOI?

[237] Hospitality seeks an order for specific performance of the Option to Purchase contained in paragraph 4 of the LOI. The Louie Group Defendants consent to an order for specific performance but submit that the purchase price must be determined before the Option to Purchase can be specifically performed.

[238] Paragraph 4 of the LOI provides, in part:

4. **Option to Purchase:** The Louie Group will grant to Hospitality or its nominee (for clarity, references in this section to Hospitality includes its nominee) referred to jointly in this section an option to purchase all, but not less than all of the Strata Units, except for the Penthouse Unit, on the following terms:
 - (a) Hospitality may exercise its option to purchase all of the Strata Units except the Penthouse Unit but it may not exercise its option to purchase on the Penthouse alone. For clarity, if Hospitality exercises its option to purchase the Penthouse Unit, it must exercise its option to purchase all of the Strata Units;
 - (b) the purchase price for each of the Strata Units available for purchase shall be the lesser of:
 - (i) \$171,500, or
 - (ii) the average cost to the Louie Group for each of the Strata Units,

excluding the Penthouse Unit, such calculation to include the purchase prices, any legal fees and disbursements incurred as a result of the purchase (including the costs of any foreclosure actions, share purchase agreements or corporate transfer arrangements), Land Title Office, Corporate Registry and filing agent fees, Property Transfer Tax paid, and any other fees or expenses reasonably incurred for the purpose of acquiring the Strata Units or the companies that own the Strata Units, but specifically excluding any finder's fees or real estate commissions;

- (c) the purchase price for the Penthouse Unit will be \$340,000;
- (d) Hospitality must exercise its options by no later than December 15, 2005 and, if it exercises its options, it must pay to the Louie Group's solicitors a deposit in the amount of \$200,000 (the "Deposit") by no later than December 15, 2005, such amount to be held in trust and credit it to the purchase prices of the Strata Units on closing;
- ...
- (f) The Closing Date for any transfers will be no later than January 15, 2006; ...

[239] The applicable legal principles are not contentious. The appropriate remedy for breach of a contract for the disposition of land may be an order for specific performance, damages or both. Specific performance may be granted where the property in question is unique, an appropriate substitute is not readily available and damages would not be an adequate remedy: *Semelhago v. Paramadevan*, [1996 CanLII 209 \(SCC\)](#), [1996] 2 S.C.R. 415 at ¶ [21-22](#).

[240] In assessing the uniqueness of a property, the court should consider both objective and subjective factors. A single feature or many in combination may render a property unique. The court's task is to determine objectively whether the property has distinctive characteristics that make an award of damages inadequate, taking into account the plaintiff's subjective perspective at the time of contracting: *Ali v. 656527 B.C. Ltd.* (2004), [2004 BCCA 350 \(CanLII\)](#), 29 B.C.L.R. (4th) 206 at ¶ [29](#) (C.A.); *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* (2001), [2001 CanLII 28012 \(ON SC\)](#), 56 O.R. (3d) 341 at ¶ [59-60](#).

[241] The party seeking specific performance must be ready, willing and able to complete the contemplated transaction on the date fixed for completion and when the order is granted: *Norfolk v. Aikens*, [1989 CanLII 245 \(BC CA\)](#), [1989] B.C.J. No. 2256 at p. 13 (C.A.). If the party against whom the order is granted and to whom payment is due has committed breaches of the contract, the party claiming performance may be ordered to pay the contract price less the amount due for the antecedent breaches: *Eider v. Winser*, [1999] B.C.J. No. 1132 at ¶ [43](#) (C.A.); *Tanu v. Ray*, [1981] B.C.J. No. 86 at ¶ [7](#) (S.C.).

[242] In this case, I am satisfied that an order for specific performance is appropriate. At all material times Hospitality has been ready, willing and able to exercise the Option to Purchase and has taken all necessary steps to enable the purchase to occur: *Norfolk*. In particular, Hospitality repeatedly advised the Louie Group Defendants of its decision to exercise the Option to Purchase and attempted to deliver the necessary deposit. The funds required for the purchase price and legal fees to complete the purchase have been in a bank account since late October 2005.

[243] Given the unique importance of the Louie Group Strata Lots to the Hotel's orderly operation, damages would not be an adequate remedy for the Louie Group Defendants' contractual breaches. Amongst other things, they include meeting rooms and a variety of suites. Further, and importantly, control of the votes associated with the Louie Group Strata Lots will provide Hospitality with a greater say in the Strata Corporation. In all of the circumstances, an order for specific performance is required to achieve remedial adequacy: *Semelhago*.

If so, what is the proper calculation of the purchase price of the Louie Group Strata Lots?

[244] Paragraphs 4(b) and 4(c) of the LOI provide for calculation of the purchase price Hospitality must pay to the Louie Group Defendants. "Purchase price" is not, however, a defined term. It is used in the LOI in two different senses: the purchase price to be paid for the units by Hospitality and their cost when they were acquired by the Louie Group. Paragraph 4(b)(ii) refers to the "average cost to the Louie Group for each of the Strata Units" with respect to the latter. The meaning of "cost" in the context of the voluntary transfer is not specifically defined or otherwise explained.

[245] The parties agree on the purchase prices paid by the Louie Group for 23 of the Louie Group Strata Lots. Their average cost was \$164,547.42. The purchase price for the penthouse is fixed in the LOI at \$340,000.

[246] The parties do not agree, however, on the "cost to the Louie Group" or "purchase price" of the six 587 Lots acquired by voluntary transfer. The issue that divides them is whether the Louie Group Defendants should be given credit for the mortgages taken over at the time of transfer for purposes of calculating the purchase price to be paid by Hospitality.

[247] At the time of the transfers, 587 was a mortgagee on the 587 Lots. The Form A Transfers in respect of each 587 Lot provide that the consideration is "\$1.00 and other good and valuable consideration" and give a "market value" of each in a stated amount. No cash passed between vendor and purchaser, however, when the transactions took place.

[248] The liabilities registered on title at the time of the transfers were substantial. They include a mortgage held by 587325 B.C. Ltd. ("587325") and transferred to 587. They also include a mortgage for monies lent by 451182 B.C. Ltd. ("451182") and additionally secured against other strata lots. 587325 and 451182 are not members of the Louie Group.

[249] Prior to trial, the Louie Group Defendants were ordered to produce documents that would show how their acquisition of the 587 Lots was accounted for tax purposes.

Despite the Court's order, they did not produce these documents. It is, therefore, impossible on the available evidence to account for any losses on the loans in determining the actual overall cost of the 587 Lots to the Louie Group Defendants.

[250] The Louie Group Defendants submit the "purchase price" of the 587 Lots is comprised of the liabilities registered on title at the time of transfer. On this analysis, the average cost of all the Louie Group Strata Lots, excluding the penthouse, would exceed the \$171,500 unit ceiling price set in the LOI. Accordingly, in their submission, the total purchase price Hospitality must pay for the Louie Group Strata Lots is \$5,313,500. This sum is comprised of 29 units at an average cost of \$171,500 plus \$340,000 for the penthouse.

[251] Hospitality submits the fair market value of the 587 Lots should be considered as their "cost" and "purchase price" for purposes of calculation, given the nature of the mortgages assumed and the absence of necessary accounting information. On this analysis, the average cost to the Louie Group of the 587 Lots is \$131,737.

[252] In Hospitality's submission, the amount of the mortgage held by 587325 was not a true cost to the Louie Group Defendants because 587325 was not the purchaser. The same applies to amounts relating to 451182, which mortgage was also secured against other property. In addition, losses on the loans would have to be considered in any form of purchase price analysis and that information was not produced by the Louie Group Defendants.

[253] In interpreting the LOI, I must give the words used their plain, literal and ordinary meaning, unless absurdity would result, and construe it in context and as a whole. The genesis and aim of the transaction is part of the relevant context. If the parties' intent is not clear from the words used I may consider extrinsic evidence to interpret or explain it. If necessary, I may imply a term to give the LOI business efficacy if so doing would not rewrite it or contradict its other terms: *A.L. Sott Financial (FIR) Inc. v. PDF Training Inc.*, 2004 BCSC 1646 at ¶ 105-107; *Catalyst Paper Corp. v. Companhia de Navegação Norsul*, 2008 BCCA 336 at ¶ 27; *Alpine Veneers Ltd. v. Reed Lumber Co. Ltd.*, [1983] B.C.J. 2289 (C.A.) at ¶ 33-34.

[254] In my view, the parties' intent is not entirely clear from the words "purchase price" and "cost" as they relate to the Louie Group's acquisition of the Louie Group Strata Lots. That being so, I consider the extrinsic evidence recited above in relation to its negotiation for purposes of interpretation. I also consider the genesis and aim of the LOI as part of the relevant context.

[255] The LOI had several aims. One was to establish the purchase price to be paid by Hospitality for the Louie Group Strata Lots based on the costs expended or otherwise

experienced by the Louie Group in acquiring them. I conclude the “purchase price” and “cost” of the Louie Group Strata Lots was intended to mean either the amount paid for a unit or the actual net cost of acquisition to the Louie Group. In the context of a voluntary transfer, the actual net cost would include any losses on the loans.

[256] If, as occurred with the 587 Lots, the Louie Group failed or refused to establish its actual net costs of acquisition another method to determine the purchase price is required to give the LOI business efficacy. In order to do so, I imply a term that the unit’s fair market value is to be used for calculation purposes if and when the necessary accounting information is not produced by the Louie Group upon request. In my view, such an implied term is most consistent with the aim of the LOI and the entirety of the contract. It also prevents the Louie Group from depriving Hospitality of the bargained objective by refusing to provide evidence of its actual net costs of acquisition: *Schluessel v. Maier*, 2001 BCSC 60.

[257] In addition, I agree with Hospitality that the amounts of the mortgages held by 587325 and 451182 cannot properly be considered costs to the Louie Group Defendants. 587325 and 451182 are separate entities and not part of the Louie Group.

[258] Taking into account the foregoing, I find that the total purchase price for the Louie Group Strata Lots is \$4,915,021.66. This sum is comprised of 23 units at an average cost of \$164,547.42, the six 587 Lots at an average cost of \$131,737, plus \$340,000 for the penthouse.

Is Hospitality entitled to an order for specific performance of the Lease Modification Agreement contemplated in paragraph 3 of the LOI?

[259] Hospitality seeks an order for specific performance of the Lease Modification Agreement contemplated in paragraph 3 of the LOI (the “Lease Modification Agreement”). The Louie Group Defendants consent to an order for specific performance in this regard. They submit, however, that they require an opportunity to consult with a solicitor regarding the terms proposed by Hospitality before formulating their position. In the event that agreement cannot be reached, they say liberty should be granted to apply to the court or the registrar to settle its terms. They also say that once the Lease Modification Agreement is executed Restaurant should sign the estoppel certificate referenced in paragraph 3 of the LOI.

[260] Paragraph 3 of the LOI provides as follows:

3. **Extension of Restaurant Lease:** Dr. Louie will cause 585503 British Columbia Ltd. (“585503”) to enter into a lease modification agreement with Restaurant with the following terms and conditions:

- (a) 585503 will grant Restaurant two additional renewal terms of five years each, such renewals to be at Restaurant’s option provided that Restaurant

is in good standing in all material terms under the terms of the restaurant lease;

- (b) by December 31, 2006, 585503 will, with respect to the calculation of base rent payable in the second and third renewal terms, elect to either maintain the same rental arrangement currently in place for any first renewal term or have rent in the second and third renewal terms negotiated between the parties, failing which the rent will be determined through commercial arbitration and subject to submissions as to the fair market rent for these strata lots;
- (c) Restaurant will, for any year (or portion thereof) that the Penthouse Unit is owned by the Louie Group and remains a part of the Hotel rental pool, pay an additional sum of \$5,000 per year (prorated to the number of days in the year that the Penthouse Unit is in the Hotel rental pool) under the restaurant lease, such sum to be paid in equal quarterly instalments commencing on November 1, 2005. This sum will not be included as rent in the event of that commercial arbitration is required to set rent in either a second or third renewal term. As such, the amount payable by Restaurant under the lease will be any rent determined under arbitration will be that sum plus \$5,000 per year;
- (d) 585503 and Restaurant will resolve outstanding issues involving the Liquor Licence, specifically whether the existing licence should be transferred to Restaurant or 585503 and Restaurant will jointly complete an application for a Third Party Operator relationship;
- (e) 585503 will take reasonable commercial steps to obtain a Non-disturbance Agreement from HSBC Bank Canada. The parties acknowledge that as Restaurant is registered in priority to the HSBC Mortgage the Non-disturbance agreement, while desired, is not necessary under the terms of the Lease; and
- (f) upon resolution of paragraph (d) and (e), Restaurant will provide an Estoppel Certificate to 585503 in a form provided by solicitors for 585503 and confirming that the lease is in good standing and there are no extant claims of Restaurant.

[261] In the course of the trial Hospitality tendered a proposed form of Lease Modification Agreement, which was filed as an exhibit. At the end of the trial, counsel for the Louie Group Defendants stated that he was not an expert on leases and had not consulted with a solicitor on the terms presently proposed. As a result, he advised that Dr. Louie was unable to provide the Court or Hospitality with his position on the form of Lease Modification Agreement that should be executed pursuant to an order for specific performance.

[262] Hospitality submits that the issue of the Lease Modification Agreement has been outstanding for several years and no further delay should be permitted. In the circumstances, it says the Court should review the tendered exhibit and, if satisfied it is consistent with paragraph 3 of the LOI, declare that 585503 should sign a Lease Modification Agreement in those terms.

[263] I accept that an order for specific performance of the Lease Modification Agreement contemplated in paragraph 3 of the LOI is appropriate. I find, however, that its terms should be negotiated by the parties and, if possible, agreed upon rather than

imposed by the Court. In my view, that is the process contemplated by paragraph 3. It should, therefore, be undertaken. If it fails, an application can be made for the Court to resolve the contentious issues that crystallise in the negotiation process.

[264] It is unfortunate that Dr. Louie did not consult with a solicitor on this matter prior to the trial's conclusion. It is desirable for him to do so, however, and, if necessary, present the Court with his position on any issues that cannot be resolved by agreement.

Accordingly, on September 30, 2009 I granted the order for specific performance of the Lease Modification Agreement contemplated in paragraph 3 of the LOI in a form agreed by the parties by no later than October 15, 2009, with liberty to apply to the Court on two clear days notice to settle the terms if agreement is not reached. Pursuant to paragraph 3(f) of the LOI, the estoppel certificate is to be signed when the requirements of paragraphs 3(d) and (e) have been met or the Court has ordered otherwise.

What damages were caused to Hospitality by the Louie Group Defendants' breaches of paragraphs 4 and 5 of the LOI?

[265] Paragraph 4 of the LOI, set out above, deals with the Option to Purchase. Paragraph 5 of the LOI deals with Dr. Louie's covenant to refrain from supporting litigation that is contrary to Hospitality's interests. It provides:

5. **Dr. Louie's Covenants:** Hospitality has requested and Dr. Louie has agreed that, from the date of this Letter of Intent, Dr. Louie will cause the Louie Group to refrain from the date of this Letter of Intent:
- (a) entering into lease arrangements with respect to the Strata Units;
 - (b) purchasing any other strata units at the Hotel; and
 - (c) supporting any litigation that is contrary to the interests of Hospitality or Restaurant in relation to the operations of the Hotel.

[266] Hospitality submits that it suffered substantial losses as a result of the Louie Group Defendants' breaches of paragraphs 4 and 5 of the LOI.

Positions of the Parties on Damages

[267] In addition to an order for specific performance, Hospitality seeks awards of damages calculated on the following basis:

- i) a loss of net income for Hotel operations from December 2005 to July 2008 of \$1,479,036 (the "Operational Loss") and a loss of net rental income for the Louie Group Strata Lots for the period December 2005 to September 2008 of \$774,561 (the "Ownership Loss"), for a combined sum of \$2,253,597;
- ii) reduced by the amount of interest earned by Hospitality on the capital sum on deposit for the purchase of the Louie Group Strata Lots;
- iii) increased by pre-judgment interest calculated as though the income had been received over time, monthly;
- iv) further increased by an amount equal to the loss of rental income received by the Louie Group Defendants from October, 2008 to the date of judgment;

- v) and further increased by prejudgment interest on all amounts, less any additional interest earned by Hospitality on the purchase funds on deposit; as well as
- vi) an award for Hospitality's legal fees incurred in connection with the Prohibited Actions or assessed as reasonable by the Registrar.

[268] According to Hospitality, it would have earned significantly greater profits if the eighteen Louie Group Strata Lots it did not control until July 2008 had been made available from the outset. The units in question included three strategically important meeting rooms (the "Meeting Rooms"), as well as business suites, deluxe suites and a penthouse. Had the LOI been performed, Hospitality would have profited from the use of a total of 113 rooms, rather than 95 rooms, in its Hotel operation. In addition, Hospitality would have received rental income as owner of all of the Louie Group Strata Lots.

[269] In support of its submission Hospitality relied upon the expert evidence of Charles Suddaby, a hotel industry consultant. Mr. Suddaby calculated the Operational Loss claimed on the assumption that a 113-room Hotel would have enjoyed the same overall occupancy levels actually experienced by the 95-room Hotel: 87%. In so doing he took into account the Hotel's high demand pattern and "turn-away" business, as well as the value of the Meeting Rooms for group bookings and Mr. Somani's exceptional skill as an hotelier. Mr. Suddaby treated the Meeting Rooms as sleeping rooms in his calculations on the assumption that they would have generated at least the same amount of revenue.

[270] As to expenses, in projecting for the larger Hotel Mr. Suddaby took into account economies of scale in performing his calculations. He noted that fixed expenses would not change and applied the ratio of variable expenses for the smaller hotel to the larger inventory of rooms. The Operational Loss was calculated, based on unit entitlement, in terms of the incremental revenues and costs attributable to the missing eighteen Louie Group Strata Lots. The \$1,479,036 figure claimed represents the difference between the adjusted net income of \$3,036,999 for a 113-room Hotel and \$1,557,963 for the 95-room Hotel for the period December 2005 to July 2008.

[271] Mr. Suddaby arrived at the Ownership Loss claimed by calculating the rents payable on the Louie Group Strata Lots and deducting any ownership costs Hospitality would have incurred, such as strata fees and property taxes. The \$774,561 figure claimed represents the sum of \$326,651 as the net rental income for the twelve Louie Group Strata Lots in Hospitality's possession pursuant to the Monitor's Order and \$447,910 as the net rental income for the eighteen Louie Group Strata Lots for the period December 2005 to September 2008.

[272] Hospitality goes on to submit that the combined sum of \$2,253,597 must be adjusted in order to place it in the position it would have occupied had the LOI been performed properly. In particular, it should be reduced by the interest earned on the

capital sum for the purchase price, increased by prejudgment interest calculated as though the income would have been received monthly, increased by an amount equal to the loss of rental income received by Dr. Louie until the date of judgment, and further increased by a final prejudgment interest calculation on all amounts, less any additional interest on the capital sum.

[273] Hospitality further submits that it suffered significant losses due to Dr. Louie's breaches of his covenant not to support adverse litigation. According to Hospitality, it would not have been forced to incur any, or at least most, of the legal fees paid in connection with the Prohibited Actions but for Dr. Louie's extensive funding. Rather, given the reasonable settlement option available to the LSOG defendants, the LSHS and Executive Actions would have ended by no later than the fall of 2007. In addition, the Peh Proceedings and the Kasahara Proceedings would have ended earlier or would not have been conducted at all.

[274] Hospitality says that the funds acquired and advanced through the Franiek Loans, as well as use of money and security belonging to the Louie Group, fall squarely within the covenant. Dr. Louie personally supported the litigation by borrowing or covenanting to pay the Franiek Loans. He also personally participated in the acts of his companies involved in giving security by signing the necessary documentation. In addition, in Hospitality's submission, Dr. Louie must not be permitted to do indirectly, through his companies, that which he cannot do directly as a result of his personal covenant.

[275] The Louie Group Defendants respond that some of Mr. Suddaby's assumptions are flawed and, therefore, his loss calculations are inflated. They submit that much lower awards than those sought are justified on the evidence placed before the Court. In support of their submission, the Louie Group Defendants rely on the expert evidence of Stewart Instance, an hotelier and consultant.

[276] Like Mr. Suddaby, Mr. Instance calculated an Operational Loss to Hospitality associated with the missing eighteen Louie Group Strata Lots. The figures they reached, however, contrasted sharply; for example, Mr. Instance calculated a loss of \$197,153 for the period ended March 2008 whereas Mr. Suddaby calculated a loss of \$1,251,392 for the same period.

[277] Mr. Instance calculated the Operational Loss based on lower occupancy rates and higher expenses for the Louie Group Strata Lots in question. He disagreed with Mr. Suddaby's foundational assumption that a 113-room Hotel would have enjoyed the same overall 87% occupancy level as the 95-room Hotel actually did. In support of his position, Mr. Instance focused on the recent downturn in the hotel market and lack of significant difference in Hotel profit actually earned after July 2008, when the 18 units came into Hospitality's possession. In performing his calculations he assumed the additional 18

rooms would have permitted an average of seven additional room nights whenever the Hotel had occupancy that exceeded 87%. He also assumed the Meeting Rooms would not have generated any revenue and calculated an increase in the ratio of departmental expenses for the 18 new rooms from 11% to 18.8%.

[278] Mr. Instance also disagreed with Mr. Suddaby in connection with Hospitality's claimed Ownership Loss for the Louie Group Strata Lots. He suggested that Mr. Suddaby underestimated their ownership cost because higher property taxes would have been payable as the units would likely have been reclassified "commercial", rather than "residential". He went on to suggest that an Operational Loss and Ownership Loss should not both be claimed because, as owner and operator, Hospitality would be paying itself rent.

[279] The Louie Group Defendants further submit that the award for lost profits should be based on net, rather than gross, profits. This is necessary, they say, to avoid overcompensating Hospitality. Accordingly, they say the effect of corporate taxes that would have been payable on the lost profit claimed must be considered. No evidence was presented, however, regarding this matter.

[280] As to the breach of covenant, the Louie Group Defendants submit that Hospitality has not proven whether the legal fees incurred in connection with the Prohibited Actions were reasonable or would have been incurred regardless of the impugned funding. They say it would be unfair to impose upon them the full burden of legal costs that were wholly within Hospitality's choice and control. They also say the damages claimed are too remote and were not foreseeable when the LOI was concluded.

[281] According to the Louie Group Defendants, there is no evidence that the Prohibited Actions would have ended at a particular point but for the provision of Dr. Louie's funding. On the contrary, they say the LSOG defendants in the LSHS and Executive Actions may have obtained funding elsewhere and proceeded forward on their own behalf. In their submission, it would be speculative for me to conclude otherwise. In addition, it is impossible to know whether the mediation in Singapore would have produced a settlement had Mr. Nomani not attended and it is unclear to what extent Dr. Louie's contribution enabled the Kasahara Proceedings to continue. The Louie Group Defendants also emphasize that they were not parties in the Peh Proceedings.

[282] In the alternative, the Louie Group Defendants submit there should be a 25% reduction applied to the sums paid by Hospitality for the Prohibited Actions to account for further "clean up" costs that would have been incurred after the actions were discontinued.

Applicable Legal Principles

[283] The purpose of contract damages is to put the innocent party as nearly as possible in the position that party would have occupied had the contract been performed properly. In awarding such damages the court's goal is to assess fair compensation for the plaintiff's proven loss: *Asamera Oil Corp. Ltd. v. Sea Oil and General Corp. and Baud Corp. N.V.*, [1978 CanLII 16 \(SCC\)](#), [1979] 1 S.C.R. 633.

[284] When specific performance is ordered, damages for delay in completion may also be awarded: *Van Dyk v. Duorno*, [2005] B.C.J. No. 1052 at ¶ 81-82 (S.C.); *Baker v. Sockman*, [1979] B.C.J. No. 965 at ¶ 2, 14-16 (S.C.); *B. Zar Enterprises Corp. v. Hitchen*, [1982] B.C.J. No. 1502 at ¶ 26 (S.C.). In keeping with the *restitutio in integrum* principle, however, such an award should be reduced by the amount of interest earned on the unpaid purchase funds: S.M. Waddams, *The Law of Damages* (Looseleaf Edition) (Toronto: Canada Law Book, 2008), at ¶1.1120-1.1180).

[285] A defendant will not be held liable for damages that were not reasonably foreseeable at the time of contracting. The requisite knowledge may be actual or imputed. The question for determination as to foreseeability is "whether reasonable parties would have contemplated the type of loss that actually occurred had they put their minds to the effect of a breach of contract in the circumstances": Harvin D. Pitch and Ronald M. Snyder, *Damages for Breach of Contract*, 2nd edition (looseleaf), (Toronto: Thompson Carswell, 2008 update) at p. 7-23.

[286] The burden of proving a compensable loss rests upon the plaintiff. In some cases, however, the defendant's wrongdoing renders it unusually difficult for this burden to be discharged. In such circumstances, although the burden does not shift from one party to the other it may be met by application of a presumption of adverse facts against the wrongdoer: *D. Fogell Associates Ltd. v. Esprit de Corp (1980)/Esprit de Corp (1980) Ltee.*, 1997 CarswellBC 1131 at ¶ 55 (S.C.); *Mark James Ltd. v. Collins* (1994), 96 B.C.L.R. (2d) 87 at ¶ 37-40 (S.C.).

[287] The principle that adverse facts will be presumed where the defendant's wrongful conduct prevents a relevant fact from being established stems from the decision in *Armory v. Delamirie* (1722), 1 Strange 504. In *Last Chance Mining Co. v. American Boy Mining Co.*, 1904 CarswellBC 10 at ¶ 11-13 (S.C.), Martin J. applied the principle in a case in which the defendant mixed his ores with those of the plaintiff and could not satisfactorily identify and distinguish between the two. In the course of his analysis, Martin J. quoted from *Armory*, as follows:

11 The consequences are really but the natural result of the application to mining operations of well known principles long ago enunciated in *Armory v. Delamirie* (1722), 1 Strange, 504, wherein it is laid down: --

When the nature of a wrongful act is such that it not only inflicts an injury, but takes away the means of proving the nature and extent of a loss, the law will aid a recovery against the wrongdoer and supply the deficiency of

proof caused by his misconduct by making every reasonable intendment against him and in favour of the party injured... A man who wilfully places the property of others in a situation where it cannot be recovered, or its true amount or value ascertained, by mixing it with his own, or in any other manner, will consequently be compelled to bear all the inconvenience of the uncertainty or confusion which he has produced, even to the extent of surrendering the whole, if the parts cannot be discriminated, or responding in damages for the highest value at which the property can reasonably be estimated.

[288] It is trite law that individuals and corporations have separate legal personality: *Salomon v. Salomon & Co. Ltd.*, [1897] A.C. 22. In certain circumstances, however, the corporate veil may be lifted or pierced. In particular, where a corporation is used by a controlling individual to commit fraudulent or improper conduct the court will reach through the corporate persona to prevent the individual from doing indirectly that which cannot be directly done.

[289] In *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, 1996 CanLII 7979 (ON SC), [1996] O.J. No. 1568 at p. 7 (Gen. Div.)(QL), aff'd [1997] O.J. No. 3754 (C.A.), Sharpe J. (as he then was) described the circumstances in which the corporate veil may be pierced to prevent a fraud from being perpetrated. He stated:

... the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct...

[290] In *Halpern Investments Ltd. v. Sovereign General Insurance Company*, 2004 ABQB 865, Clark J. reviewed several cases in which the corporate veil was pierced because of fraud or other improper conduct. He went on to pierce the corporate veil to prevent an individual who was the guiding hand behind two corporate entities from benefiting from an admitted fraud; see also *B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Holdings Limited* (1989), 1989 CanLII 230 (BC CA), 37 B.C.L.R. (2d) 258 (C.A.)

[291] The plaintiff is obliged to mitigate damages caused by a contractual breach when he or she learns of it by taking all reasonable steps to prevent further loss. Where such steps are undertaken, the plaintiff can recover for the loss and all reasonable expenses incurred in mitigation of that loss: *Asamera Oil Corp. Ltd.*

[292] Once the plaintiff has proven damages on a reasonable preponderance of credible evidence, the burden lies on the defendant to raise and establish a failure to mitigate. In order to discharge the burden and limit the award of damages, the defendant must lead adequate proof of the alleged failure to the same standard of proof required of the plaintiff: *Peerzan v. Cameron*, 1982 CarswellBC 2113 (S.C.) at ¶ 7; *Red Deer College v. Michaels*, 1975 CanLII 15 (SCC), [1976] 2 S.C.R. 324 at 331; *Graham v. Rogers*, 2001 BCCA 432 at ¶ 85.

[293] The duty to mitigate does not require the plaintiff to act perfectly in response to the defendant's breaches of contract. Although the defendant is entitled to expect that only reasonable remedial costs will be expended, the court will not take an overly critical view taking into account the exigencies of the situation faced by the plaintiff: *Addco Drywall Ltd. v. White Rock Manor Joint Venture*, 1991 CarswellBC 831 (S.C.) at ¶ 105.

Application of Legal Principles to the Facts

[294] I agree with Hospitality's analysis regarding its Operational and Ownership Losses. In my view, Mr. Suddaby's calculations and underlying assumptions are logical, reasonable and fair. In particular, I am satisfied that the overall occupancy level of the 113-room Hotel skilfully operated by Mr. Somani would probably have been the same as that achieved for the 95-room Hotel throughout the relevant period. I am also satisfied that economies of scale of the sort Mr. Suddaby identified would have been enjoyed.

[295] I do not accept Mr. Instance's criticisms of Mr. Suddaby's Operational Loss analysis. Given the lead-time required for reservations and other absorption adjustments, the lack of increased profit after July 2008 is unsurprising and the summer downturn of 2008 is of negligible effect. In addition, Mr. Instance's own analysis suffered from several deficiencies. For example, it was unreasonable for him to assume that the Meeting Rooms would generate no revenue and the expense ratio per room would increase rather than decrease.

[296] I also accept Mr. Suddaby's Ownership Loss analysis and reject that of Mr. Instance. In my view, Mr. Instance's suggestion that property tax rates would likely have increased when the Louie Group Strata Lots were conveyed is inconsistent with the evidence and speculative at best. In addition, his view that Operational and Ownership Losses cannot both be properly claimed is untenable. If Hospitality did not choose to pay itself rent for the Louie Group Strata Lots, its operational profit would have increased by the same amount. Accordingly, from a loss perspective the result would be the same.

[297] In so far as the evidence of Mr. Instance conflicts with that of Mr. Suddaby, I prefer the evidence of Mr. Suddaby.

[298] I also am satisfied that the adjustments proposed by Hospitality are required to achieve full and fair compensation. I also find there is no basis for adjusting the damages awarded with respect to taxation. That is a matter for the parties.

[299] As to the breaches of Dr. Louie's covenant, again I generally agree with Hospitality's analysis. Dr. Louie acted personally, intentionally and in direct violation of his covenant by providing substantial funding for the Prohibited Actions. In so far as he also acted indirectly, through his companies, it is appropriate to pierce the corporate veil in order to prevent these entities from being used as a shield for such improper conduct.

[300] I do not accept that Hospitality's damages for Dr. Louie's breach of covenant were unforeseeable or remote, as submitted by the Louie Group Defendants. On the contrary, one of the central purposes of the LOI was to end the need for either party to engage in litigation that was adverse to Hospitality's interests. When the litigation storm continued, due in part to Dr. Louie's breaches of covenant, this contemplated purpose was defeated. The foreseeable result was that further legal fees were incurred.

[301] I also do not accept that the Prohibited Actions could well have proceeded in the absence of the impugned funding. I have found that the LSHS and Executive Actions would have ended by October 1, 2007 because the remaining LSOG defendants would have settled by then if the litigation had not been funded by Dr. Louie. I also find that the Peh Proceedings would not have been conducted and, at most, one-half of the fees incurred would have been required to conclude the Kasahara Proceedings if the Kasaharas alone had been paying their lawyer. In so far as it is necessary to do so, I resolve any uncertainty on these matters in favour of Hospitality based on the *Armory* principle.

[302] There is no basis in the evidence to support a finding that 25% of the fees incurred would have expended for "clean up" costs in the absence of Dr. Louie's breach of covenant. Accordingly, I decline to make such a finding in favour of the Louie Group Defendants.

[303] I do accept, however, that Hospitality is entitled to recover only those legal fees, disbursements and taxes that were reasonably incurred in responding to the Prohibited Actions: *Asamera Oil Corp. Ltd.* Although there is no suggestion in the evidence that any of the fees, disbursements or taxes actually incurred were unreasonable, a detailed analysis on this issue was not undertaken at trial. For this reason, I conclude this task should be performed by the Registrar.

[304] Taking into account the foregoing, I conclude that Hospitality is entitled to damages calculated as follows:

Hotel Operations and Rental Income

With respect to loss of net income for hotel operations from December 2005 to July 2008, the sum of \$1,479,036; and

With respect to the loss of net rental income for the Louie Group Strata Lots for the period December 25 to September 2008, the sum of \$774,561;

From which combined sum of \$2,253,597 is to be deducted the sum of interest on the unpaid capital sum payable for the Louie Group Strata Lots,

With pre-judgment interest payable on this adjusted sum calculated as though the lost income was received over time, monthly;

With respect to loss of net rental income for the Louie Group Strata Lots from October 2008 to September 2009, an amount equal to the net rental income received by the Louie Group defendants during this period;

Together with pre-judgment interest, less additional interest;

With leave to make further submissions in writing or in person in the event agreement as to calculation is not reached.

Support of Prohibited Actions

With respect to the LSHS Action and the Executive Action: all legal fees and disbursements reasonably incurred by Hospitality from and after October 1, 2007, as assessed by the Registrar;

With respect to the Kasahara Proceedings, 50% of all legal fees and disbursements reasonably incurred by Hospitality as assessed by the Registrar;

With respect to the Peh Proceedings, all legal fees and disbursements reasonably incurred by Hospitality as assessed by the Registrar.

[305] I also award special costs against the Louie Group Defendants and 567 on a full indemnity basis, with joint and several liability for the special costs, on the basis outlined below.

Should the damages and costs awarded be set off against the purchase price of the Louie Group Strata Lots?

[306] I have awarded damages and costs against the Louie Group Defendants in addition to ordering specific performance. Hospitality seeks a term of the order permitting damages and costs to set off against the purchase price of the Louie Group Strata Lots.

[307] The damages and costs awards are based on and arise out of the Louie Group Defendants' breaches of the LOI. It is, therefore, appropriate for Hospitality to pay the purchase price of the Louie Group Strata Lots less the amount due for damages and costs: *Eider, Tanu*.

THE 567 ACTION AND THE COUNTERCLAIM

Are the Alleged June Agreements authentic or fraudulent?

[308] I have concluded that Mr. Nomani created the Alleged June Agreements on November 7 and 8, 2005, not in June 2005 as he claimed. I have also concluded that Dr. Louie signed seven of them on November 8, 2005 at Mr. Visram's office and Jonathon

Louie signed the eighth some time thereafter. As noted, this conclusion is based on the following factors:

- i) Dr. Louie's revised testimony in which he admitted signing the Alleged June Agreements on November 8, 2005 at Mr. Visram's office;
- ii) Dr. Louie's admission that he committed perjury on this issue and counselled his son, Jonathon, to do the same;
- iii) Dr. Louie's decision to back out of the LOI almost immediately after it was concluded;
- iv) Dr. Louie and Mr. Nomani's failure to disclose the Alleged June Agreements to the Court, Dr. Louie's counsel, opposing counsel or Hospitality prior to November 8, 2005, although they were obliged to do so or disclosure was in Dr. Louie's interest;
- v) the forensic evidence regarding use of Mr. Nomani's computer on November 7 and 8, 2005, together with Mr. Nomani's inherently improbable explanation for that use; and
- vi) Mr. Nomani's attempts to hide, alter and manufacture electronic documents related to the Alleged June Agreements.

[309] Hospitality submits that the Alleged June Agreements were created for the fraudulent purpose of asserting a pre-existing right to the Louie Group Strata Lots in order to defeat its rights under the LOI. According to Hospitality, immediately after the LOI was concluded Mr. Nomani persuaded Dr. Louie that he had made a bad deal and they could negotiate better terms. In furtherance of this goal, on November 7 and 8, 2005 Mr. Nomani created and Dr. Louie executed the Alleged June Agreements. Thereafter, both relied on them in various litigation contexts at great cost to Hospitality.

[310] Dr. Louie concedes that he signed the Alleged June Agreements on November 8, 2005, after the LOI was concluded. He also concedes that Mr. Nomani "lacks credibility" with respect to the Alleged June Agreements. He submits, however, that the alleged fraud was of no consequence because the RFRs were never exercised and Hospitality's priority status with respect to the Louie Group Strata Lots was never truly endangered. In essence, his position is that the alleged fraud was so poorly designed and executed that it caused no real damage.

[311] Mr. Nomani maintains that the Alleged June Agreements were created and executed in June, 2005. He vehemently denies committing any fraudulent act and

accuses Hospitality of engaging in “a propaganda campaign to color the main facts and issues”. He goes on to describe its theory as “circumstantial and anecdotal”.

[312] Fraud is amongst the most serious forms of civil action: *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1990 CanLII 819 \(BC CA\)](#), [1990] B.C.J. No. 672 (C.A.). Sometimes called the tort of deceit or fraudulent misrepresentation, it may be committed in a wide variety of ways. Its essential elements are:

- i) a false representation of fact by the defendant;
- ii) made with knowledge of its falsity or, alternatively, recklessly as to its truth;
- iii) made with the intention that the plaintiff would be deceived and act upon it, which occurred; and
- iv) the plaintiff suffered damage as a result:

Derry v. Peek (1889), 14 App. Cas. 337 (H.L.); *Han v. Cho* [2009 BCSC 458](#) at ¶ 79; *BG Checo*.

[313] An intention to defraud may be established by direct or circumstantial evidence. In many cases, the court will analyse so-called “badges of fraud” to make the necessary determination. In the context of an allegedly fraudulent transfer of property, such badges or indicia may include:

- i) the relationship between the parties to the transfer;
- ii) the effect of the transfer on the assets of the debtor;
- iii) evidence of haste in making the transfer;
- iv) the timing of the transfer relative to claims against the debtor;
- v) secrecy; and
- vi) the effect of the transfer on the creditor:

Frimer v. Lercher, [1984] B.C.J. No. 728 at ¶ 12 (S.C.); *Wilson v. Gill* (1995), [1995 CanLII 1215 \(BC SC\)](#), 33 C.B.R. (3d) 21 at ¶ 25 (B.C.S.C.).

[314] In a civil proceeding, fraud must be established on a balance of probabilities: *F.H. v. McDougall*, [2008 SCC 53](#) at ¶ 49.

[315] In this case, Dr. Louie and Mr. Nomani were determined to defeat the LOI within hours of its conclusion. They maintained their determination in the days that followed,

despite receiving legal advice from Messrs. Epstein, Jakubec and Berger that the LOI was binding and enforceable. I conclude that, faced with this unwelcome advice, they decided to create the Alleged June Agreements for the fraudulent purpose of advancing their goal.

[316] For over three years, Dr. Louie and Mr. Nomani falsely represented that the Alleged June Agreements were created and signed in June 2005, before the LOI was concluded. Based on this false representation, they claimed that 567 had a pre-existing right to the Louie Group Strata Lots and, therefore, Hospitality's rights under the LOI were superseded. Their intention in so doing was to deceive Hospitality, persuade it to negotiate better terms for the Louie Group Strata Lots, and improve 567's position. They also intended to deceive the Court in an effort to prevail in the litigation.

[317] Hospitality did not accept that the Alleged June Agreements were authentic. In consequence, Dr. Louie and Mr. Nomani's fraudulent purpose was never fully achieved. Hospitality was obliged, however, to respond to the fraudulent misrepresentation, and did so by refuting the false claim and seeking to enforce its rights under the LOI. Although ultimately successful, Hospitality suffered considerable damage in connection with costs and delay incurred in the hotly contested litigation.

[318] I am satisfied the essential elements of fraud have been established. The Alleged June Agreements are fraudulent. Dr. Louie and Mr. Nomani are both parties to the fraud.

Did the Louie Group grant the RFRs to 567 in June 2005, or at all?

[319] Given the absence of independent evidence, I have been unable to make findings regarding the nature and terms of any verbal agreement that existed between the Louie Group Defendants and 567. That being so, 567 has failed to discharge the requisite onus of proof and I answer this question in the negative.

Is 567's claim moot or is it necessary to decide whether any instruments or agreements give priority to 567 over Hospitality's rights under the LOI? If such instruments or agreements have been established, did Hospitality induce Dr. Louie to breach them?

[320] I have concluded that no instruments or agreements giving priority to 567 over Hospitality's rights under the LOI have been established on the evidence. If I am wrong, however, and the evidence supports such a finding, it is prudent to go on and consider whether 567 is entitled to a declaration to this effect.

[321] Throughout the course of the trial, 567 maintained that the Alleged June Agreements were executed in June 2005, before the LOI was concluded. It also maintained that, in any event, they evidence the parties' verbal agreement with respect to the RFRs. At the trial's conclusion, Mr. Nomani announced that 567 no longer sought to

rely upon the RFRs. Nevertheless, he asked me to declare that the RFRs give priority to 567 over Hospitality's rights under the LOI and Hospitality induced Dr. Louie to breach them.

[322] Courts generally decline to decide cases which raise merely hypothetical questions. Occasionally, however, a court may exercise its discretion to address an issue that is moot. For example, if an important question arises recurrently, but only briefly, the court may decide to answer it even though there is no longer a live controversy in the case: *Borowski v. Canada (Attorney General)*, [1989 CanLII 123 \(SCC\)](#), [1989] 1 S.C.R. 342 at 358-363.

[323] Although moot issues may be addressed in certain circumstances, the court's discretion will not be exercised if no practical purpose would be served by so doing. In particular, it has been repeatedly held that declaratory relief should not be granted where the declaration sought would be without practical effect: *Gardner v. City of Williams Lake*, [2005 BCSC 706](#) at ¶ 97-99; *Haldorson v. Coquitlam (City)* (2000), 3 C.P.C. 225 at ¶ 12 (B.C.C.A.).

[324] From the parties' perspective, no practical purpose would be served by granting the declaratory relief sought by 567. In addition, the existence or non-existence of the RFRs is not a matter of general importance. In the circumstances, I am satisfied the claim is moot and no further analysis is appropriate or required: *Borowski*; *Gardner*; *Haldorson*.

[325] I am also satisfied that even if the evidence establishes a verbal agreement between Dr. Louie and 567, Hospitality did not induce Dr. Louie to breach it.

[326] The tort of inducing breach of contract is committed where the defendant induces a breach of contract between the plaintiff and a third party and, as a result, the plaintiff suffers damage: *Slade and Stewart Ltd. v. Haynes*, [1969] B.C.J. No. 439 at ¶ 10 (S.C.). The essential elements are:

- i) the defendant had knowledge of the contract;
- ii) the defendant intended to bring about, induce or procure the breach of the contract;
- iii) the defendant persuaded or otherwise prevailed upon one party to a contract to break it, thereby causing loss to the plaintiff, the other contracting party or the defendant induces the contract breaker to enter into a contract with him or her that is inconsistent with the existing contract of the plaintiff; and

iv) the plaintiff suffers damages as a consequence of the defendant's conduct.

Fabbi v. Jones (1972), 1972 CanLII 127 (SCC), 28 D.L.R. (3d) 224 at 232 (S.C.C.); *Posluns v. Toronto Stock Exchange and Gardiner* (1964), 1964 CanLII 199 (ON SC), 46 D.L.R. (2d) 210 at 261 (Ont. H.C.); affirmed (1965), 1965 CanLII 32 (ON CA), 53 D.L.R. (2d) 193 (Ont. C.A.); affirmed (1968), 1968 CanLII 6 (SCC), 67 D.L.R. (2d) 165 (S.C.C.); G.H.L. Fridman, *The Law of Torts in Canada*, 2nd Edition (Toronto: Carswell, 2002) at pp. 794-5, 798-9.

[327] In this case, Hospitality knew there was an agreement of some sort in place between Dr. Louie, 567 and Mr. Nomani regarding the Louie Group Strata Lots. As noted, however, at the LOI negotiating session, when specifically asked about their arrangements, Dr. Louie assured its principals that they did not present an obstacle to settlement. He also remarked that Mr. Nomani may be upset by the settlement, but would have to move on.

[328] Hospitality was entitled to rely upon Dr. Louie's assurances, and did so. Given what he told its principals, I find that no intention to bring about, induce or procure a breach of the agreement between Dr. Louie, 567 and Mr. Nomani was formed by Hospitality. On the contrary, Hospitality took reasonable steps to ensure that the LOI would not interfere with any such arrangements that may have existed. It follows that Hospitality did not commit the tort of inducing breach of contract.

Did Mr. Nomani induce Dr. Louie to breach the LOI?

[329] Hospitality submits that, from October 21, 2005 to the time of trial, Mr. Nomani induced Dr. Louie to breach the LOI by refusing to follow through with its performance. His motive in so doing was to protect and enhance 567's position by maintaining its ability to operate a hotel within a hotel.

[330] According to Hospitality, within hours of the LOI's conclusion Mr. Nomani persuaded Dr. Louie that he had made a bad deal by following the advice of his lawyers. Dr. Louie was persuaded and, as a result, he decided to disavow the LOI. Thereafter, Mr. Nomani and Dr. Louie took the steps discussed in the conspiracy section below together. Those steps caused great loss to Hospitality.

[331] Mr. Nomani responds that Dr. Louie made his own decisions concerning the LOI's non-performance. Although he admits to being consulted, Mr. Nomani denies engaging in any acts of persuasion. On the contrary, Mr. Nomani claims that Dr. Louie decided on his own to send the Duress Fax and stop payment on the performance bond cheque immediately following the LOI negotiating session. Thereafter, according to Mr. Nomani, Dr. Louie acted independently, based on a sincere belief that the LOI was unfair and invalid.

[332] I do not accept Mr. Nomani's submission. Dr. Louie trusted him and relied heavily on his advice and persuasion in all matters related to the Louie Group Strata Lots. In my view, this reliance exemplifies Dr. Louie's admittedly poor business judgment and extraordinary naivety.

[333] From the outset, Mr. Nomani did all that he could to enhance his own position in connection with Hotel matters. For example, in 2003 and 2004 he acted as a consultant to both Dr. Louie and Hospitality concurrently and told Mr. Daroowala "If I can't make money from my friends, I have to make money from my friends' enemies". He also took sales commissions from LSOG owners, Mr. Franiek and Dr. Louie for agreements regarding LSOG units. I infer that this long-standing pattern of self-serving action was at the heart of his efforts to persuade Dr. Louie to disavow the LOI.

[334] As noted, the August Draft LOI included a term that Mr. Nomani would be paid \$50,000 per annum and be allowed to maintain a Hotel office. Mr. Somani wisely refused to agree. For that reason, the LOI did not provide for Mr. Nomani's continued participation in Hotel operations. When he learned of its terms, Mr. Nomani immediately called Dr. Louie and prevailed upon him to change his mind.

[335] Dr. Louie was persuaded for two primary reasons: he was unsatisfied with the purchase price agreed upon and felt guilty for leaving Mr. Nomani out of the settlement. Mr. Nomani's intention in persuading him was to procure the breach of the LOI by ensuring its non-performance. Although he no doubt hoped Dr. Louie could get a better price for his units, I conclude that Mr. Nomani's primary motive was to enhance his own commercial position.

[336] As discussed below, Mr. Nomani prevailed upon Dr. Louie to breach the LOI from October 21, 2005 onward. By November 7, 2005 he knew from the lawyers that it was probably valid. By December 27, 2006 he knew from the Court that it was undeniably so. As a result of Mr. Nomani's persuasive efforts, Hospitality suffered loss and damage. It follows that the essential elements of the tort of inducing breach of contract have been made out.

Did Mr. Nomani and Dr. Louie conspire to defeat the LOI?

[337] Hospitality submits that, from October 21, 2005 to the time of trial, Mr. Nomani conspired with Dr. Louie and the other Louie Group Defendants unlawfully to undermine the LOI and to injure Hospitality. According to Hospitality, together they pursued an aggressive "scorched earth" policy aimed at robbing Hospitality of its rights and thereby destroying it, regardless of the cost to anyone concerned.

[338] In summary, Hospitality says the agreement was reached when Mr. Nomani spoke with Dr. Louie during the morning court break on October 21, 2005 and Dr. Louie

expressed his willingness to reverse the LOI. Thereafter, they worked together to achieve this goal, which they knew to be unlawful, by, amongst other things: drafting and sending the Duress Fax; arranging to stop payment of the performance bond cheque and returning the deposit; creating and relying upon the Alleged June Agreements; and raising and disbursing massive sums on litigation contrary to Hospitality's interests. They also worked together to hide many of their actions and, in so doing, repeatedly breached court orders and their litigation obligations. According to Hospitality, in conspiring to carry out these acts, Mr. Nomani and Dr. Louie intended to injure Hospitality and knew that injury would result, or acted for the predominant purpose of injuring Hospitality.

[339] The Louie Group Defendants and Mr. Nomani respond that their sole motivation was to protect their own commercial self-interest. In their submission, they did so within their legal rights, albeit with a measure of distrust and hostility borne of the soured business relationship with Hospitality. According to both, this attitude was understandable given Hospitality's substantial financial power, unreasonable conduct in connection with the disputed issues and aggressive pursuit of its own commercial self-interest. So, too, was their ultimately incorrect, but sincerely held, belief that the Louie Group Defendants should not be bound by the LOI because it was unfair.

[340] The Louie Group Defendants also emphasize that Dr. Louie was extremely busy with his medical practice. In their submission, he had no time or inclination to enter into nefarious agreements with Mr. Nomani regarding Hotel matters and did not do so. Rather, he left everything to Mr. Nomani, who was his agent, and trusted that Mr. Nomani would act appropriately. At most, Dr. Louie had knowledge of some of his agent's actions and acquiesced; he did not agree. Accordingly, they say the tort of conspiracy has not been made out.

[341] In *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.*, [1993] B.C.J. No. 2958 (C.A.), McEachern C.J.B.C. described the essential elements of the tort of conspiracy. He stated at ¶ 5:

- 5 Accordingly, the following elements must be proved:
 1. an agreement between two or more persons;
 2. concerted action taken pursuant to the agreement;
 3. (i) if the action is lawful, there must be evidence that the conspirators intended to cause damage to the plaintiff;
(ii) if the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e., constructive intent);
 4. actual damage suffered by the plaintiff.

[342] There are two types of civil conspiracy in Canada: i) conspiracy to injure; and ii) conspiracy to use unlawful means. For the first type it is necessary to prove that the

conspiracy was undertaken for the predominant purpose of injuring the plaintiff. For the second, regardless of the conspiracy's predominant purpose, it is necessary to prove that the defendants should have known that injury to the plaintiff would ensue: *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, 1983 CanLII 23 (SCC), [1983] 1 S.C.R. 452 at 471-472.

[343] For both types of conspiracy an agreement between the defendant and one or more others must be established either directly or by inference. The agreement need not be contractual. Rather, the plaintiff must show that a defendant combined or conspired with others to carry out a common design or a means of achieving a common objective, which, when implemented, injured the plaintiff: *Golden Capital Securities Ltd. v. Rempel*, 2004 BCCA 565 at ¶ 47.

[344] As in all civil cases, the standard of proof for civil conspiracy is proof on a balance of probabilities: *F.H.* at ¶ 49. Once an agreement has been established the statements of one co-conspirator are admissible against all others if they were made while the conspiracy was ongoing in furtherance of the common object: Sopinka and Lederman, *The Law of Evidence in Civil Cases* (Butterworth & Co., Toronto: 1974) at p. 149.

[345] A defendant who conspires with another to commit unlawful acts may be liable for the consequences even though some acts are instigated by a single co-conspirator. In particular, liability will be imposed if the defendant knew or should have known that such acts were a probable consequence of the common objective being carried out: *Golden Capital Securities Ltd.* at ¶ 74.

[346] A range of unlawful actions have been held to support a finding of civil conspiracy. For example, in *Meehan v. Tremblett*, [1994] N.B.J. No. 502 (Q.B.) the court based a conspiracy finding on the preparation of a false incident report in an employment context. In addition, inducing breach of contract and fraud have both been found to constitute unlawful action in connection with findings of civil conspiracy: *Cotter v. Osborne*, 1909 CarswellMan 28 (C.A.); *Seaboard Owners Ltd. v. Cross*, 1949 CarswellBC 65 (S.C.); *Royal Bank v. Holoboff*, [1999] A.J. No. 380 (Q.B.).

[347] I conclude that Dr. Louie and Mr. Nomani entered into an agreement that Dr. Louie would disavow the LOI and refuse to follow through with its performance. The agreement was first reached on October 21, 2005 and maintained thereafter until Dr. Louie consented, mid-trial, to an order for specific performance. The agreement is established directly on Dr. Louie's and Mr. Nomani's own testimony. It is also established by inference from their conduct.

[348] Dr. Louie and Mr. Nomani shared a common objective in disavowing the LOI: to obtain a better price for the Louie Group Strata Lots, if possible, and to enhance 567's

position. In furtherance of this objective, they took many concerted actions, some of which were unlawful. The most obvious such action was the creation, execution and reliance upon the fraudulent Alleged June Agreements. They also worked together to raise and disburse funds in breach of Dr. Louie's covenant and the May 2008 Injunction, and unlawfully hid this conduct by swearing false affidavits in connection with document production.

[349] Although Dr. Louie was not involved in the day-to-day minutiae of all of the foregoing, he was kept apprised by Mr. Nomani. Importantly, he did not merely acquiesce; he actively agreed. Dr. Louie personally signed the fraudulent Alleged June Agreements created by Mr. Nomani and perjured himself regarding the date of his signature. He also arranged for deposit of the funds raised through the Franiek Loans in the Scotiabank Trust Account knowing that Mr. Nomani would use them to pay legal fees for the Prohibited Actions.

[350] I reject Dr. Louie's submission that, as a matter of law, he and Mr. Nomani could not engage in a civil conspiracy because Mr. Nomani was employed as his agent. In summary, he argues that, in these circumstances, he was merely agreeing with an extension of himself, which cannot be done. No case authority was cited in support of this unusual proposition and, in my view, it is untenable. Regardless of the hierarchy created by a contractual or employment relationship, independent actors are capable of entering agreements with one another to take joint action. If the joint action is intended to cause damage or is unlawful, it may form the basis of a finding of civil conspiracy.

[351] I accept that Dr. Louie and Mr. Nomani may have believed the LOI was unfair and hoped it was invalid when they first agreed upon its disavowal. By November 7, 2005, however, they had received clear legal advice that the LOI was binding and enforceable. By December 27, 2006, Pitfield J. had confirmed that this was so. Nevertheless, Dr. Louie and Mr. Nomani remained determined to undermine the LOI, regardless of its validity, and attempted to do so at great cost to Hospitality.

[352] I also accept that Dr. Louie's and Mr. Nomani's predominant purpose throughout was to advance their own commercial self-interest. Although Dr. Louie felt very hostile toward Hospitality, his primary focus was always the effect of his actions upon himself. The same was true of Mr. Nomani. The injurious effect of their joint action upon Hospitality was, however, entirely foreseeable and in that sense intentional. In addition, regardless of their predominant purpose Dr. Louie and Mr. Nomani engaged in unlawful means to achieve their common objective.

[353] The unlawful means Dr. Louie and Mr. Nomani agreed upon and implemented in pursuit of their common objective included fraud, perjury and the breach of court orders. These acts predictably caused injury to Hospitality.

[354] Taking into account the foregoing, I conclude that the essential elements of civil conspiracy have been made out.

Should punitive damages be awarded and, if so, against whom and in what amount?

[355] Hospitality seeks punitive damages of at least \$500,000 against the Louie Group Defendants, 567 and Mr. Nomani. In summary, it says their misconduct from and after October 21, 2005 amounted to a malicious, sustained, secretive attack on Hospitality's interests intended to cause it as much harm as possible and, in so doing, to abuse the process of the court. Misconduct of this magnitude and complexity is, in Hospitality's submission, virtually unprecedented in the courts of British Columbia and severe punishment is required. According to Hospitality, unless high punitive damages are awarded the objective of deterrence will not be adequately achieved.

[356] Hospitality submits that the defendants' egregious misconduct far exceeded Dr. Louie's failure to perform his obligation to sell the 30 Louie Group Strata Lots. Acting jointly, Dr. Louie and Mr. Nomani also immediately conspired to defeat the LOI. Thereafter they secretly supported litigation contrary to Hospitality's interests; breached injunctions; created the Alleged June Agreements; abused the Court's process by making false claims against Hospitality, commencing frivolous actions and filing CPLs in the Land Title Office; and manufactured and introduced false evidence throughout the course of the proceedings.

[357] In Hospitality's submission, some of these actionable wrongs will not be the subject of awards for compensatory damages. In combination, they dramatically increased the time, cost and difficulty associated with achieving a just resolution to the parties' dispute. Such misconduct must be soundly denounced.

[358] The Louie Group Defendants respond that the conduct complained of occurred in the context of a commercial relationship. Hospitality was far from vulnerable and, as might be expected, they pursued their own commercial interests aggressively. They submit that before Pitfield J. declared the LOI to be binding Dr. Louie believed it was invalid and, therefore, his actions were justifiable. Thereafter, his actions amounted to no more than vigorous pursuit of litigation. In the Louie Group Defendants' submission, such actions might properly result in substantial compensatory damages and a punitive costs award, but they do not justify an additional award of punitive damages.

[359] The Louie Group Defendants go on to say that their support of litigation contrary to the interests of Hospitality did not amount to an independent actionable wrong within the meaning of *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at ¶¶ 36-40. They also say that the Alleged June Agreements were not "true" forgeries because a verbal agreement had

been reached in June, 2005. In the alternative, the Louie Group Defendants submit that, if awarded, punitive damages should be in the range of \$30,000 to \$50,000.

[360] Mr. Nomani and 567 deny any wrongdoing whatsoever. Accordingly, they submit no award for punitive damages should be made.

[361] As noted, the primary objective of civil law is just compensation. In exceptional circumstances, however, punishment is also a legitimate, socially valuable goal. In such cases, the plaintiff acts as a public interest enforcer as well as a private interest claimant and the defendant is punished for conduct that offends the court's sense of decency: *Whiten*.

[362] An award of punitive damages is designed to punish, deter and denounce reprehensible misconduct that departs markedly from ordinary standards of decent behaviour. It can be made in any category of case where there is an independent actionable wrong: *Whiten* at ¶¶ 67-83; *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130 at ¶ 196.

[363] Although available in principle in all categories of cases punitive damages are exceptionally rare in cases involving commercial contracts, even where there is fraud. In cases of fraudulent misconduct punitive damages will be awarded, however, if, but only if, compensatory damages do not adequately achieve the objectives of retribution, deterrence and denunciation: *Performance Industries Inc. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, at ¶¶ 77-92; *Insurance Corp. of British Columbia v. Husseinian*, 2008 BCSC 241, at ¶¶ 161-180.

[364] To be justified, a punitive damages award must be rationally connected to the facts and the law's objectives. It must also be imposed with restraint. The focus of analysis is the defendant's misconduct, not the loss of the plaintiff. The quantum awarded should be proportionate to the degree of misconduct, the harm caused, the plaintiff's vulnerability and any advantage wrongfully gained. Factors such as the punitive effect of the overall award and other penalties imposed should also be taken into account: *Whiten* at ¶¶ 67-76 and ¶ 94; *Husseinian* at ¶¶ 161-163.

[365] The degree of blameworthiness at issue may involve several elements. These include, amongst others: whether the misconduct was planned and deliberate; the defendant's motive and awareness that the misconduct was wrong; the period over which the misconduct persisted; attempts at concealment; and whether the interest violated was deeply personal to the plaintiff or irreplaceable: *Whiten* at ¶ 113; *Louis Vuitton Malletier S.A. v. 486353 B.C. Ltd.*, 2008 BCSC 799 at ¶ 85.

[366] In *Husseinian*, Gerow J. awarded punitive damages ranging from \$3,500 to \$75,000 against several defendants who had defrauded their motor vehicle insurer. In so

doing, she identified the financial means of the defendant, whether the defendant required the plaintiff to prove its claim, whether the defendant abused the court's process, whether there was planned and deliberate fraud, and whether there were multiple acts as relevant factors to be taken into account: *Husseinian* at ¶ 163.

[367] The Supreme Court of Canada recently considered awards of punitive damages imposed in cases involving commercial contracts in *Whiten* and *Performance Industries*. In *Whiten* a punitive damages award of \$1,000,000 was upheld where an insurer acted exceptionally reprehensibly in denying a legitimate fire loss claim made by a policy holder. In contrast, in *Performance Industries*, a punitive damages award of \$200,000 was set aside where one businessman attempted to gain a commercial advantage by relying on a written document that he knew misstated the oral agreement actually reached.

[368] The power imbalance between the plaintiff and defendant, and the plaintiff's consequent vulnerability, was a significant factor in the Supreme Court's analysis in *Whiten*. As Binnie J. noted, this factor is rarely present in cases involving commercial contracts. At ¶ 115, he stated:

I add two cautionary notes on the issue of vulnerability. First, this factor militates against the award of punitive damages in most commercial situations, particularly where the cause of action is contractual and the problem for the court is to sort out the bargain the parties have made. Most participants enter the marketplace knowing it is fuelled by the aggressive pursuit of self-interest. Here, on the other hand, we are dealing with a homeowner's "peace of mind" contract.

[369] Binnie J. also commented on power imbalance and vulnerability as they relate to punitive damages at ¶ 88 in *Performance Industries*. He stated:

This was a commercial relationship between two businessmen. One tried to pull a fast one on the other. There was no abuse of a dominant position. O'Connor's misconduct was planned and deliberate and he persisted in it over a period of four and a half years, but in the end the courts did their work and Bell obtained full compensation plus costs on a solicitor-client basis, all of which undoubtedly had a punitive effect on O'Connor. In addition, O'Connor is stigmatized with a judicial finding (now upheld by two appellate courts) that he acted in a way that was "fraudulent, dishonest and deceitful". His conduct has been soundly denounced and he has been required personally to pay a large amount of money in compensation. The respondent is unable to identify any aggravating circumstances that would not be present in almost any case of business fraud except that O'Connor was found to have behaved abominably in the conduct of the litigation. However, as stated, the trial judge excluded this consideration from the award of punitive damages because he identified it as the basis for his award of solicitor-client costs.

[370] Each case is, of course, unique and fact specific. Some examples of punitive damages awarded in recent years, in addition to those awarded in *Whiten*, *Performance Industries*, and *Husseinian* include: *Evocation Publishing v. Hamilton*, 2002 BCSC 1797 - \$200,000 against certain defendants, \$300,000 against another; *Louis Vuitton Malletier*

S.A. - \$100,000 against certain defendants, \$200,000 against another; *Golden Capital Sec. Ltd. v. Holmes et. al.*, [2003 BCSC 1265](#) - \$200,000; *1 Ramjit Inc. v. 3 for 1 Pizza & Wings (Canada) Inc.*, 2004 CarswellOnt 6402 (Sup.Ct.) - \$150,000; *Canavan v. Feldman*, [2004 CanLII 4787 \(ON SC\)](#), 2004 CarswellOnt 3157 (Sup.Ct.) - \$100,000; and *Taylor & Associates Ltd. v. Louis Bull Tribe No. 439*, [2006 ABQB 698](#) - \$100,000.

[371] In this case, I find that Dr. Louie and Mr. Nomani behaved utterly outrageously. Their planned, deliberate, persistent fraud went far beyond the sort of “fast one” pulled in *Performance Industries*. Within hours of the LOI’s conclusion, they conspired to undermine it. After they were told it was valid and enforceable, they created, executed and relied upon the fraudulent Alleged June Agreements in a variety of litigation contexts for a period of over three years. In so doing, they repeatedly abused the court process and required Hospitality to prove its claim.

[372] I reject the Louie Group Defendants’ submission that the Alleged June Agreements were not “true” forgeries. They most assuredly were. Whatever the terms of the informal verbal agreement with 567 may have been, they were not reduced to writing and formally executed, as falsely represented by the Alleged June Agreements. Dr. Louie’s lack of insight into his misconduct is reflected in this misguided submission. Mr. Nomani’s lack of shame for his own is reflected in his persistent denials.

[373] I also reject the Louie Group Defendants’ submission that their support of the Prohibited Actions did not amount to an independent actionable wrong. In addition to breaching the LOI, Dr. Louie breached the May 2008 Injunction when he continued to fund the LSHS and Executive Actions.

[374] It is true that Hospitality was not a vulnerable adversary. Like Dr. Louie, it enjoys the benefit of very considerable means. It is also true that all concerned pursued their commercial interests with determination and a measure of aggression. The crucial difference is that Hospitality did so honestly. Dr. Louie and Mr. Nomani did not.

[375] Hospitality was able to prevail, in part, because it was not financially vulnerable. It expended vast amounts of money, time and energy in the litigation and was thus able to uncover much of the hidden truth. While most of its losses are recoverable in damages, it will never be fully compensated. For example, the impact of the competing hotel within a hotel operation cannot be fully measured and redressed; nor can the loss of time, energy and focus Hospitality suffered as the litigation storm raged on.

[376] It is important to remember that the LOI was not an ordinary commercial contract. It was a settlement agreement. Its purpose was to end potentially expensive, disruptive court proceedings and restore productive, predictable commercial peace. In my view, there was a real and substantial public, as well as private, cost associated with its

ongoing violation. There is also public value in the role played by Hospitality in exposing such conduct and pressing for its denunciation, deterrence and punishment.

[377] The awards for compensatory damages and special costs are undeniably substantial. Standing alone, they will have a significant salutary effect. Nevertheless, such awards will not address fully all of Dr. Louie's and Mr. Nomani's wrongful conduct, including, for example, their repeated disruption of proper Strata Corporation functioning and reliance upon the Alleged June Agreements in other litigation such as the First 567 Action and the Telephone Action. In addition, they will not express fully the Court's condemnation of such a conscious, costly, fraudulent attempt to undermine a binding settlement.

[378] I conclude that this is one of the exceptionally rare commercial cases in which punitive damages are appropriate. Taking into account the case authorities and the need to exercise restraint, I award \$100,000 in punitive damages against the Louie Group Defendants and \$100,000 in punitive damages against 567 and Mr. Nomani. In making these awards, I exclude from my consideration their conduct in the litigation itself in order to avoid imposing a double penalty, given the special costs awarded below.

COSTS

Should special costs be awarded and, if so, against whom and in what amount?

[379] Hospitality seeks special costs against the Louie Group Defendants, 567 and Mr. Nomani in both actions, jointly and severally, on a full indemnity basis. In summary, it submits that their conduct during the litigation was extremely reprehensible. Hospitality emphasizes that the defendants repeatedly failed to produce relevant documents, breached court orders, swore false affidavits and committed acts of perjury in these proceedings. All of these acts were undertaken with deliberate dishonesty in furtherance of the conspiracy to defeat Hospitality's rights and with utter disregard for the authority of the Court.

[380] The Louie Group Defendants submit that special costs are unjustified in the Hospitality Action. In their submission, summary judgment was secured promptly on two important issues and assessment of damages was addressed appropriately at trial. In so far as the 567 Action focused on issues of conspiracy and fraud, they say special costs, if any, should be awarded solely in that action and divided proportionally between the defendants according to their relative degree of fault.

[381] Dr. Louie acknowledges that he is not faultless in his conduct of the litigation. He emphasizes, however, that he did not participate in Mr. Nomani's computer manipulations and eventually admitted his prior misleading testimony regarding the Alleged June

Agreements. He submits that considerable trial time was spent addressing the computer manipulation issues and this was misconduct in which he did not actually participate. In addition, in his submission the Alleged June Agreements were ineffective and thus did not actually endanger Hospitality's position.

[382] In Dr. Louie's submission, his contribution to any reprehensible misconduct pales in comparison to that of Mr. Nomani. Accordingly, his proportionate share of any special costs awarded should be relatively modest.

[383] Special costs may be awarded where a party has engaged in reprehensible misconduct. Such misconduct includes scandalous or outrageous acts, as well as milder forms of misconduct deserving of rebuke: *Garcia v. Crestbrook Forest Industries Ltd.*, [1994 CanLII 2570 \(BC CA\)](#), [1994] B.C.J. No. 2486 (C.A.) at ¶ 17.

[384] As a general rule, the type of misconduct that justifies an award of special costs will relate to the course of the litigation and not to pre-litigation misconduct. This is so because reprehensible pre-litigation misconduct giving rise to a cause of action is typically addressed by an award of punitive damages. In some cases, however, reprehensible misconduct may have originated prior to litigation but continued throughout the litigation process. In these circumstances, special costs may be ordered in addition to punitive damages without double punishment being imposed: *Golden Capital Sec. Ltd.* at ¶ 161-176.

[385] Perjury is reprehensible misconduct, as is fraud and conspiracy. Such misconduct cannot be condoned by the court. On the contrary, it should be denounced and deterred, both specifically and generally. For these reasons, acts of perjury, fraud and conspiracy often attract an award of special costs. Such awards may be made on the basis of full indemnity: *Fullerton v. Matsqui (District)*, [1992 CanLII 5985 \(BC CA\)](#), [1992] B.C.J. No. 2969 (C.A.) at ¶ 17; *Insurance Corporation of British Columbia v. Phung*, [2003 BCSC 1619](#) at ¶ 8 & 11.

[386] Dr. Louie and Mr. Nomani both committed fraud and perjury. Although Dr. Louie eventually recanted, he did so for self-serving reasons in an attempt at damage control. Their conduct in relying upon the fraudulent Alleged June Agreements for over three years and perjuring themselves was reprehensible. Standing alone, this conduct would justify awards for special costs. It does not, however, stand alone.

[387] Dr. Louie and Mr. Nomani also failed repeatedly to produce relevant documents throughout the course of the litigation. They went on to swear false affidavits and breach court orders in this regard. Their purpose in so doing was to hide Dr. Louie's massive funding of the Prohibited Actions and their fraudulent conduct with respect to the Alleged

June Agreements. But for Hospitality's extraordinary tenacity, they may have achieved at least a measure of success.

[388] Although I accept that Mr. Nomani was primarily responsible for the computer manipulations, he and Dr. Louie acted in general concert throughout the proceedings. In my view, there is no reason to distinguish between them from a costs perspective, particularly given Dr. Louie's key role as owner and financier. In addition, the Hospitality and 567 Actions were inextricably linked and the acts of perjury and fraud were relevant in both contexts. In all of the circumstances, I award special costs in both actions against the Louie Group Defendants, 567 and Mr. Nomani on a full indemnity basis, with joint and several liability for the special costs.

Should leave be granted to Hospitality to seek an order of costs payable by other parties?

[389] Hospitality seeks leave to apply for an order for costs against Mr. Hatch, Jonathon Louie and Mr. Franiek. In summary, Hospitality submits that Mr. Hatch's conduct in connection with 567's inadequate electronic document production justifies a costs award being sought against him personally, as does Jonathon Louie's perjury and Mr. Franiek's role in the conspiracy.

[390] I agree that 567's electronic document listing and production was woefully inadequate. I am, however, not satisfied that Mr. Hatch's contribution to that inadequacy, although unsettling, particularly in failing clearly to list the Louie Group.doc, was sufficient to justify a costs award against him personally. Given Jonathon Louie's role as a "puppet" for his father, and his potential exposure to other consequences for his perjury, I also decline to grant leave for a costs order to be sought against him.

[391] I am satisfied, however, that such leave should be granted with respect to Mr. Franiek. The evidence presented at trial supports the conclusion that he was an active, conscious participant in the secretive funding of litigation contrary to Hospitality's interests, in breach of the LOI. Accordingly, leave is granted to Hospitality to seek an order for costs against Mr. Franiek.

CONCLUSION

[392] The plaintiffs in the Hospitality Action are entitled to judgment and:

1. a declaration that Hospitality has validly exercised the Option to Purchase the Louie Group Strata Lots contained in para. 4 of the LOI;
2. an order for specific performance of the Option to Purchase by conveying the Louie Group Strata Lots to Hospitality in accordance with the terms of

the LOI and doing all such further acts which are within their lawful power that may be reasonably required by Hospitality to permit the Louie Group Strata Lots to be transferred to Hospitality;

3. a declaration that the purchase price for the Louie Group Strata Lots contemplated in para. 4 of the LOI is \$4,915,012.66;
4. an order for specific performance of the Lease Modification Agreement contemplated in para. 3 of the LOI in a form agreed by the parties, with liberty to apply to the Court on two clear days' notice to settle the terms if agreement is not reached; and
5. an order for damages calculated on the basis set out in these Reasons for Judgment.

[393] Damages and costs may be set off against the purchase price of the Louie Group Strata Lots.

[394] The plaintiff's claim in the 567 Action is dismissed.

[395] The plaintiffs by counterclaim in the 567 Action are entitled to judgment on the counterclaim and:

1. an award of \$100,000 in punitive damages against the Louie Group Defendants; and
2. an award of \$100,000 in punitive damages against 567 and Mr. Nomani.

[396] The plaintiffs in the Hospitality Action and the plaintiffs by counterclaim in the 567 Action are awarded special costs against the Louie Group Defendants, 567 and Mr. Nomani on a full indemnity basis, with joint and several liability for the special costs. Leave is granted to Hospitality to seek an order for costs against Mr. Franiek.

"DICKSON J."

APPENDIX 1

LETTER OF INTENT

Date: October 21, 2005

Between:

Le Soleil Hospitality Inc. and Le Soleil Restaurant Inc.

And:

Andrew Louie

This Letter of intent sets out the general terms upon which Le Soleil Hospitality Inc., ("Hospitality") is prepared to lease from Dr. Andrew Louie, the companies that he owns or controls and 587019 B.C. Ltd., owned by Dr. Louie's children (the "Louie Group"), all the strata units owned by the Louie Group, except for strata lots 128 and 130, which are already subject to a lease (the "Strata Units") in the Le Soleil Hotel ("Hotel").

The parties to this Letter of Intent intend that the terms of this Letter of Intent be binding upon them and have agreed upon terms as follows:

1. **Lease of Strata Units:** The Strata Units will be leased under formal leases to be negotiated by counsel for the Louie Group and Hospitality and will contain the following terms:
 - (a) the tenant will be Hospitality or its nominee (where applicable to the circumstances, references to Hospitality include its nominee);
 - (b) each lease will be for an initial term of five (5) years, with two renewal options: the first for a five-year term and the second for a six-year term;
 - (c) the renewal terms may be exercised by the tenant provided at the time of renewal Hospitality is in good standing in all material aspects with respect to the lease;
 - (d) except for the Strata Units known as units #202, #203 and #205 (the "Meeting Rooms") whose leases will commence starting on December 1, 2005, each lease will commence on the date that the landlord is able to make the vacant Strata Unit available to the tenant, which the Louie Group believes should be possible by January 15, 2006;
 - (e) each lease will be in a registerable form;
 - (f) each lease will be negotiated and signed by no later than November 3rd, 2005, notwithstanding that the commencement date may be after that date;
 - (g) except for fundamental breaches, any disputes under the lease will be resolved by commercial arbitration;
 - (h) if there are fundamental breaches of the lease, which will include:
 - (i) basing rental payments on fraudulent financial statements,
 - (ii) failing to pay rent which is not cured within a reasonable period set out in the lease, and
 - (iii) if the Strata Council at the Hotel misuses its authority through expenditures that are outside of the usual repair and maintenance requirements of a Strata Corporation or for the benefit of the operator of the Hotel, not the Strata owners, including the Louie Group, except where those out-of-the ordinary course expenditures are recommended by the Strata Corporation Property Manager, acting reasonably.
- the landlord will be able to terminate the lease immediately on written notice. Upon receipt of such notice, the tenant will peaceably return possession of the Strata Unit to the landlord;
- (i) the lease will contain a standard force majeure clause;
 - (j) the landlord will affirm the Common Area Leases for the Hotel;

- (k) the landlord will not object to the placement of a internationally recognized franchise tag at the Hotel;
- (l) the Lease will provide that Syed (Jewel) Nornani will not be directly involved in the dealings between Hospitality and the Louie Group.
- (m) during the term of the leases of the Strata Units, the tenant shall have a right of first refusal to match any bona fide arm's length offers to purchase for which all subject conditions have been removed. In consideration of the grant of a right of first refusal, the tenant agrees to pay the purchase price in the contract plus an additional \$2,000. The tenant shall have five (5) days from receipt of notice of the contract of purchase and sale to accept the offer, failing which the landlord will be free to complete the contract of purchase and sale with the third party;
- (n) the landlord will assign its voting rights with respect to the Strata Corporation to the tenant, provided the tenant is in good standing in all material terms under the lease (failing which all voting rights are retained), for the following votes:
 - (i) for ordinary resolutions of the Strata Corporation;
 - (ii) for elections for Strata Council members; and
 - (iii) for special or extraordinary resolutions that relate to existing contracts of the Strata Corporation or the lease agreement.

The landlord does not assign its voting rights with respect to votes for special or extraordinary resolutions that relate to new contracts or non-lease related subject matters.

2. **Rent Payable under Lease:** Hospitality will pay monthly rent on the Strata Units as follows:

- (a) based on each Strata Unit's entitlement for participating in the pool, the landlord's share of 31% of gross room revenue for the Hotel ("GRR") with respect to the first \$5,500,000 in annual GRR. For clarity, GRR does not include other non-room revenues of the Hotel derived from parking, telephone and mini-bar services;
- (b) based on each Strata Unit's entitlement for participating in the pool, the landlord's share of 34% of GRR with respect to any GRR in excess of \$5,500,000. Such payments at the 34% threshold will commence in the month after the GRR exceeds in annual \$5,500,000;
- (c) Hospitality will be retaining 2% of total GRR for an FF&E account held in a separate account for all participating Strata Owners, including the Louie Group. The pro rata shares payable to this FF&E account on account of the Strata Units will be deducted prior to the distribution of the rent payable in paragraphs (a) and (b);
- (d) payments will be made by no later than 10th day of each month for the previous months' rent;
- (e) any adjustments to the total annual rent paid will be calculated and paid in the month following the end of the 12 month period for each lease;
- (f) in addition to the rent payable pursuant to paragraphs (a) and (b), with respect to the Meeting Rooms, there will be an additional rent paid in aggregate with respect to all of the Meeting Rooms in the amount of \$2,500 per month; and
- (g) in addition to the rent payable pursuant to paragraphs (a) and (b), in consideration for renting strata lot 121 (the "Penthouse Unit") at the same rate as the other Strata Units and in consideration for extending the lease of strata lots 128 and 130 as set out herein, Hospitality will cause Le Soleil Restaurant Inc. ("Restaurant") to pay an additional \$5,000 per year (or portion thereof as the case may be) under that lease for any period that the Penthouse Unit remains leased to the tenant.

3. **Extension of Restaurant Lease:** Dr. Louie will cause 585503 British Columbia Ltd. ("585503") to enter into a lease modification agreement with Restaurant with the following terms and conditions:
- (a) 585503 will grant Restaurant two additional renewal terms of five years each, such renewals to be at Restaurant's option provided that Restaurant is in good standing in all material terms under the terms of the restaurant lease;
 - (b) by December 31, 2006, 585503 will, with respect to the calculation of base rent payable in the second and third renewal terms, elect to either maintain the same rental arrangement currently in plans for any first renewal term or have rent in the second and third renewal terms negotiated between the parties, failing which the rent will be determined through commercial arbitration and subject to submissions as to the fair market rent for these strata lots;
 - (c) Restaurant will, for any year (or portion thereof) that the Penthouse Unit is owned by the Louie Group and remains a part of the Hotel rental pool, pay an additional sum of \$5,000 per year (prorated to the number of days in the year that the Penthouse Unit is in the Hotel rental pool) under the restaurant lease, such sum to be paid in equal quarterly instalments commencing on November 1, 2005. This sum will not be included as rent in the event of that commercial arbitration is required to set rent in either a second or third renewal term. As such, the amount payable by Restaurant under the lease will be any rent determined under arbitration will be that sum plus \$5,000 per year;
 - (d) 585503 and Restaurant will resolve outstanding issues involving the Liquor Licence, specifically whether the existing licence should be transferred to Restaurant or 585503 and Restaurant will jointly complete an application for a Third Party Operator relationship;
 - (e) 585503 will take reasonable commercial steps to obtain a Non-disturbance Agreement from HSBC Bank Canada. The parties acknowledge that as Restaurant is registered in priority to the HSBC Mortgage the Non-disturbance agreement, while desired, is not necessary under the terms of the Lease; and
 - (f) upon resolution of paragraph (d) and (e), Restaurant will provide an Estoppel Certificate to 585503 in a form provided by solicitors for 585503 and confirming that the lease is in good standing and there are no extant claims of Restaurant.
4. **Option to Purchase:** The Louie Group will grant to Hospitality or its nominee (for clarity, references in this section to Hospitality includes its nominee) referred to jointly in this section an option to purchase all, but not less than all of the Strata Units, except for the Penthouse Unit, on the following terms:
- (a) Hospitality may exercise its option to purchase all of the Strata Units except the Penthouse Unit but it may not exercise its option to purchase on the Penthouse Unit alone. For clarity, if Hospitality exercises its option to purchase the Penthouse Unit, it must exercise its option to purchase all of the Strata Units;
 - (b) the purchase price for each of the Strata Units available for purchase shall be the lesser of:
 - (i) \$171,500, or
 - (ii) the average cost to the Louie Group of each of the Strata Units, excluding the Penthouse Unit, such calculation to include the purchase prices, any legal fees and disbursements incurred as a result of the purchase (including the costs of any foreclosure actions, share purchase agreements or corporate transfer arrangements), Land Title Office, Corporate Registry and filing agent fees, Property Transfer Tax paid, and any other fees or expenses reasonably incurred for the purpose of acquiring the Strata Units or the companies that own the Strata Units, but specifically excluding any finder's fees or real estate commissions;
 - (c) the purchase price for the Penthouse Unit will be \$340,000;

- (d) Hospitality must exercise its options by no later than December 15, 2005 and, if it exercises its options, it must pay to the Louie Group's solicitors a deposit in the amount of \$200,000 (the "Deposit") by no later than December 15, 2005, such amount to be held in trust and credited to the purchase prices of the Strata Units on closing.
 - (e) The Deposit will be fully refundable if Hospitality pays the Deposit prior to December 15, 2005 but does not exercise its options. The Deposit will be non-refundable if Hospitality pays the Deposit, exercises the options but does not complete due to no fault of the vendor, for whatever reason, by the Closing Date set out herein;
 - (f) the Closing Date for any transfers will be no later than January 15, 2006;
 - (g) Hospitality will have the option of acquiring the Strata Units through a real estate purchase or, where the Strata Units are owned by a company, by way of a share purchase. In the event of a share purchase, Dr. Louie, as a condition in the share purchase agreement negotiated by counsel, will personally indemnify Hospitality with respect to any previous liabilities or claims against the corporation purchased; and
 - (h) The purchase price shall include all furniture and chattels belonging to the landlord and any outstanding issues regarding ownership shall be the subject of good faith negotiations.
5. **Dr. Louie's Covenants:** Hospitality has requested and Dr. Louie has agreed that, from the date of this Letter of Intent, Dr. Louie will cause the Louie Group to refrain from the date of this Letter of Intent:
- (a) entering into lease arrangements with respect to the Strata Units;
 - (b) purchasing any other strata units at the Hotel; and
 - (c) supporting any litigation that is contrary to the interests of Hospitality or Restaurant in relation to the operations of the Hotel.
6. **Settle All Litigation or Existing Claims:** The parties will enter into a formal mutual release and consent dismissal order relating to all current litigation, as well as any and all claims each may have against each other for matters existing prior to the date of this Letter of Intent, including all matters subject of Vancouver Registry No. S046317. Each of the parties will bear their own legal costs.
7. **Adjournment of Injunction Application:** The Plaintiffs in Vancouver Registry No. S046317 will adjourn generally all action relating to the injunction application and furtherance of the action as same pertains to any member of the Louie Group.
8. **Bond:** Hospitality/Restaurant and Dr. Louie will each pay to their respective solicitor's the sum of \$10,000 by no later than October 21, 2005. The solicitors will hold these amounts in trust to secure the performance of the terms of this Letter of Intent until such time as formal lease agreements and a formal settlement agreement can be finalized and executed. If either Hospitality, Restaurant or both fail to abide by the terms of this Letter of Intent, the \$10,000 will be forfeited to Dr. Louie. If Dr. Louie fails to abide by the terms of this Letter of Intent, the \$10,000 will be forfeited to Hospitality/Restaurant.
9. **Further Assurances:** Each of the parties herein will execute or cause to be executed such further documents and instruments and do such acts and things as may be reasonably required by another party to carry out the intent and meaning of this Letter of Intent.

Agreed to this 21st day of October, 2005 by the undersigned:

Le Soleil Hospitality Inc. and Le Soleil Restaurant Inc.

Per:

"Sharookh Daroowala"

"Hanif Mawji"

"Andrew Louie"

Tab 124

Le Soleil Hospitality Inc. v. Louie, 2010 BCSC 1183 (CanLII)

Source: Supreme Court of British Columbia
Date: 2010-08-23
File number: S056026; S067300
Other citation: [2010] BCJ No 1648 (QL)
Citation: Le Soleil Hospitality Inc. v. Louie, 2010 BCSC 1183 (CanLII),
<<https://canlii.ca/t/2c4k8>>, retrieved on 2026-03-23

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Le Soleil Hospitality Inc. v. Louie*,
2010 BCSC 1183

Date: 20100823
Docket: S056026
Registry: Vancouver

Between:

**Le Soleil Hospitality Inc.
And Le Soleil Restaurant Inc.**

Plaintiffs

And:

**Andrew Louie, 668706 B.C. Ltd., 688571 B.C. Ltd., 708583 B.C. Ltd.,
716642 B.C. Ltd., 716648 B.C. Ltd., 700439 B.C. Ltd., 587019 B.C. Ltd.,
And 585503 British Columbia Ltd.**

Defendants

And:

567 Hornby Apartment Ltd.

Defendant by Counterclaim

- and -

Docket: S067300
Registry: Vancouver

Between:

567 Hornby Apartment Ltd.

Plaintiff

And:

Le Soleil Hospitality Inc., Le Soleil Restaurant Inc., Andrew Louie, 668706 British Columbia Ltd., 688571 British Columbia Ltd., 708583 B.C. Ltd., 716642 B.C. Ltd., 716648 B.C. Ltd., 700439 B.C. Ltd., and 587019 B.C. Ltd.

Defendants

And:

567 Hornby Apartment Ltd. and Syed Nomani aka Jewel Nomani

Defendants By Counterclaim

Before: The Honourable Madam Justice Dickson

Reasons for Judgment

Counsel for Le Soleil Hospitality Inc. and Le Soleil Restaurant Inc. in both actions:

R. Sewell, Q.C.,
S. Griffin
J. Walker
A. Pilliar

Counsel for Andrew Louie and all numbered companies in both actions:

A. Rees-Thomas

Counsel for 567 Hornby Apartment Ltd.:

R. Hatch
S. Nomani as agent

Appearing on his own behalf:

S. Nomani

Place and Date of Trial:

Vancouver, B.C.
October 27-31;
November 3-7, 17-21, 2008;
January 8, 12-15, 19-23, 28-29; February 23-26;
March 2-6;
September 30, 2009

Place and Date of Judgment:

Vancouver, B.C.
August 23, 2010

INTRODUCTION AND OVERVIEW

[1] In *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, [2009 BCSC 1303](#), I gave judgment in two of many actions that concern the troubled Le Soleil Hotel (the “Hotel”). These actions, heard together, are two more.

[2] The Hotel is a boutique strata title development in Vancouver, British Columbia. Constructed in 1999, it consists of 128 residential strata lots, two commercial strata lots,

common areas and an underground parking lot. It is an exceptionally elegant hotel and currently enjoys a four-Diamond rating.

[3] Since 2002 the Hotel has been at the center of a storm of litigation. The focus of the various court proceedings, in the main, has been a battle between competing factions for control of strata lots and leases required for effective operation of the Hotel. Like many others, these actions relate to that underlying contest.

[4] The Hotel is located within the Owners, Strata Plan LMS 3837 (the “Strata Corporation”) and operated at 567 Hornby Street by Le Soleil Hospitality Inc. (“Hospitality”). Hospitality is a joint venture of Le Soleil Hotel and Suites Ltd. (“LSHS”) and a subsidiary of Executive Inn Inc. (“Executive”). It has operated the Hotel since March 2003 when it took over operations from LSHS. Most, but not all, of the residential strata lots, together with the common areas, are included in the Hotel’s operation.

[5] Prior to Hospitality’s formation, LSHS and Executive were competitors in the battle for control of the Hotel. Executive and the other principal combatant, the Le Soleil Owners Group (“LSOG”), were allied. LSOG is a group of individual strata lot owners who purchased their units from the Hotel’s developer, American Corporate Suites (Canada) Inc. (“ACS”), and leased them back to enable Hotel operations. When ACS encountered financial difficulties, the LSOG owners banded together and, with Executive, attempted to gain control of the Hotel.

[6] After Hospitality took over Hotel operations LSOG continued its efforts to gain control by various means, including litigation. It did not succeed. Challenges to the common area leases were dismissed and their funding by the LSOG-dominated Strata Council was found to be improperly authorised. In *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, LSHS and Executive were the successful plaintiffs and the LSOG owners were the unsuccessful defendants.

[7] Since December 2003 Le Soleil Restaurant Inc. (“Restaurant”) has operated a restaurant within the two commercial strata lots in the Strata Corporation. Restaurant leases the two commercial strata lots from 585503 British Columbia Ltd. (“585”), a company owned by Dr. Andrew Louie (the “Restaurant Lease”).

[8] Dr. Louie is a medical doctor and businessperson. By the summer of 2005, in addition to the two commercial strata lots in the Strata Corporation, Dr. Louie controlled 30 residential strata lots (the “Louie Group Strata Lots”). In combination, the Louie Group Strata Lots represented a power bloc and held the balance of power in the conduct of Hotel affairs.

[9] Dr. Louie was initially supportive of Hospitality as the Hotel’s operator. In the summer of 2004, however, he fell out with its principals and his units were removed from

the Hotel rental pool. Thereafter, Dr. Louie supported the efforts of Hospitality's adversary, LSOG, in the ongoing battle for control of the Hotel.

[10] Syed (Jewel) Nomani is Dr. Louie's business advisor. He is also the president of 567 Hornby Apartment Ltd. ("567"), a company owned by Meridian Hotel Ltd., which he owns. Since 2003 Mr. Nomani has acted as a consultant to Dr. Louie in connection with Hotel matters. In 2005 he began, through 567, to use the Louie Group Strata Lots to operate a competing hotel operation within the Hotel on behalf of Dr. Louie.

[11] In 2003 Mr. Nomani had acted as Hospitality's agent in negotiations between Restaurant and 585 with respect to the Restaurant Lease. Hospitality was unaware of Mr. Nomani's consulting relationship with Dr. Louie at the time. In 2004 Hospitality concluded that Mr. Nomani and Dr. Louie were working together to oppose Hospitality and support LSOG in the ongoing battle for control of the Hotel. As a result, Hospitality and Restaurant commenced an action against them (the "Fiduciary Action").

[12] Hospitality brought an injunction application in the Fiduciary Action to restrain Dr. Louie from acting against its interests, supporting legal proceedings against them or breaching the terms of the Restaurant Lease (the "Injunction Application"). The Injunction Application was scheduled for hearing on October 21, 2005. Prior to the hearing, however, the parties engaged in settlement negotiations. In the early morning hours of October 21, 2005 a settlement between Hospitality, Restaurant and Dr. Louie was reached (the "LOI").

[13] The LOI provided for the lease of the Louie Group Strata Lots to Hospitality, as well as an option to purchase them (the "Option to Purchase"). It also provided for modification of the Restaurant Lease, a covenant to refrain from supporting litigation contrary to Hospitality's interests and the discontinuance of litigation between the parties. Its primary purpose, from Hospitality's perspective, was to bring stability to the operation of the Hotel.

[14] Shortly after the LOI was concluded, however, Dr. Louie had a change of heart. After speaking with Mr. Nomani, he decided he had made a bad deal and could get a better price for the Louie Group Strata Lots. As a result, he claimed the LOI was produced under conditions of duress and was not binding or enforceable. Thereafter, he declined to follow through with its terms. In response, Hospitality and Restaurant commenced Action No. S056026 against Dr. Louie and the numbered companies (the "Louie Group Defendants") seeking to enforce the LOI (the "Hospitality Action").

[15] In *Le Soleil Hospitality Inc. et. al. v. Louie et. al.*, [2006 BCSC 1920](#), Pitfield J. declared, in the Hospitality Action, that the LOI constitutes a binding and enforceable agreement. In *Le Soleil Hospitality Inc. et. al. v. Louie et. al.*, [2007 BCSC 595](#), he held

that the Louie Group Defendants had breached the LOI and the plaintiffs could pursue the remedies of specific performance or damages of an amount to be assessed. In *Le Soleil Hospitality Inc. v. Louie*, 2008 BCCA 206, Pitfield J.'s judgments were upheld on appeal.

[16] The focus of the trial conducted before me in the Hospitality Action was the appropriate remedy for the Louie Group Defendants' breaches of the LOI. 567 was granted party status because it claimed to hold leases and rights of first refusal with respect to the Louie Group Strata Lots (the "RFRs"). According to 567 the RFRs were granted in June 2005 before the LOI was concluded. 567 opposed Hospitality's claim for specific performance based on the alleged existence of the RFRs.

[17] 567 also commenced Action No. S067300 (the "567 Action"), in which it sought, amongst other things, a declaration that the RFRs are valid and unaffected by the LOI. In response, Hospitality and Restaurant filed a counterclaim claiming that 567, Mr. Nomani and the Louie Group Defendants conspired to defeat their rights under the LOI and fabricated documents purportedly evidencing the RFRs (the "Alleged June Agreements"). Given the common issues for determination, the Hospitality Action and 567 Action were tried together at the same time.

[18] In the course of the joint trial several unusual events transpired. Dr. Louie admitted, mid-trial, that he had perjured himself in his earlier testimony, reversed his position and consented to an order for specific performance of the LOI. As the trial unfolded, new evidence was uncovered that revealed the Alleged June Agreements were fabricated and Dr. Louie had been funding litigation against Hospitality. Near the end of the trial, 567 discharged its counsel, who was later called as a witness. While denying any wrongdoing, Mr. Nomani announced that he no longer sought to rely upon the RFRs.

[19] For the reasons that follow, judgment was granted on September 30, 2009 in favour of Hospitality and Restaurant in the Hospitality Action and awards of specific performance, damages and special costs were made. In addition, 567's claim in the 567 Action was dismissed and damages and special costs were awarded to Hospitality and Restaurant on the counterclaim.

THE ISSUES

[20] The main issues for determination in the Hospitality Action are:

- a) Is Hospitality entitled to an order for specific performance of the Option to Purchase contained in paragraph 4 of the LOI?
- b) If so, what is the proper calculation of the purchase price of the Louie Group Strata Lots?
- c) Is Hospitality entitled to an order for specific performance of the Lease Modification Agreement contemplated in paragraph 3 of the LOI?

- d) What damages were caused to Hospitality by the Louie Group Defendants' breaches of paragraphs 4 and 5 of the LOI?
- e) Should the damages and costs awarded be set off against the purchase price of the Louie Group Strata Lots?

[21] The main issues for determination in the 567 Action and the Counterclaim are:

- a) Are the Alleged June Agreements authentic or fraudulent?
- b) Did the Louie Group grant the RFRs to 567 in June 2005, or at all?
- c) Is 567's claim moot or is it necessary to decide whether any agreements give priority to 567 over Hospitality's rights under the LOI? If such instruments or agreements have been established, did Hospitality induce Dr. Louie to breach them?
- d) Did Mr. Nomani induce Dr. Louie to breach the LOI?
- e) Did Mr. Nomani and Dr. Louie conspire to defeat the LOI?
- f) Should punitive damages be awarded and, if so, against whom and in what amount?

[22] In both actions, the appropriate order for costs must also be determined. The following issues arise with respect to costs:

- a) Should special costs be awarded and, if so, against whom and in what amount?
- b) Should leave be granted to Hospitality to seek an order of costs payable by other parties?

CREDIBILITY

[23] A key factor in my determination of the issues is the credibility of the principal witnesses: Zul Somani, Sharookh Daroowala, Dr. Louie and Mr. Nomani. It is appropriate, therefore, to comment on my assessment of their credibility at the outset. In so doing, I am mindful of the guidance of the Court of Appeal in *Faryna v. Chorney*, [1951 CanLII 252 \(BC CA\)](#), [1952] 2 D.L.R. 354 and *Brethour v. Law Society of British Columbia*, [1950 CanLII 346 \(BC CA\)](#), [1951] 2 D.L.R. 138, that, in making this assessment, I am to consider the preponderance of probabilities evident in the surrounding circumstances. I am also to consider the evidence as a whole.

[24] Zul Somani is a principal of Hospitality. He is an experienced, highly skilled hotelier. He is also a sophisticated individual who testified in a clear, direct and balanced manner. His testimony was internally consistent and in accordance with other reliable evidence. In sum, Mr. Somani was a strong, credible witness upon whose evidence I rely.

[25] Sharookh Daroowala is also a principal of Hospitality. Like his colleague, he was highly credible. Mr. Daroowala gave careful testimony that was consistent with the contemporaneous documents. He was responsive, fair and thorough in his answers to the questions posed on direct and cross-examination. I accept his evidence and rely upon it in making the factual findings outlined below.

[26] Throughout his testimony, Dr. Louie repeatedly described himself as a naive, foolish businessperson with poor judgment. Although seemingly self-deprecating, these comments were, in context, disingenuous and self-serving. They did, however, accurately describe Dr. Louie's performance as a witness.

[27] Dr. Louie testified in a rambling, vague and unresponsive manner. He often answered questions with argument and his evidence sometimes included obvious and troubling inconsistencies. For example, Dr. Louie deposed in an affidavit that he first learned of Mr. Nomani's business relationship with Hospitality in November 2004 after the Fiduciary Action was commenced against him. He conceded on cross-examination, however, that he signed a letter in October 2004 stating he was fully aware of the relationship. These two statements cannot both be true.

[28] Near the end of the trial Dr. Louie admitted that he had perjured himself earlier on the question of when the Alleged June Agreements were executed. He also admitted that he had counselled his son, Jonathon, to commit perjury. Dr. Louie apologized for this "error in judgment" and, in a long, strange soliloquy, attempted to minimize his responsibility and shift blame to his advisors and adversaries. By the end of this remarkable performance it was clear that Dr. Louie believed his actions were justified because he was attempting to protect his commercial position.

[29] It was also clear that Dr. Louie's admission was prompted by the strength of the evidence proving the Alleged June Agreements were not created in June 2005, as he had previously testified. Taking into account these factors, I conclude that Dr. Louie's admission and apology amounted to no more than an attempt at damage control.

[30] The foregoing are but two examples of the deficiencies in Dr. Louie's evidence. Considered as whole, they compel the conclusion that he was a thoroughly unreliable witness. Unless independently corroborated by other reliable evidence, I accord his testimony no weight.

[31] I reach the same conclusion regarding Mr. Nomani. If anything, he was an even less credible witness than Dr. Louie. His testimony and closing statements were often glib, evasive and inconsistent, both internally and with other reliable evidence. At times they were illogical and difficult to comprehend. Examples abound. For present purposes, the following two are illustrative.

[32] Mr. Nomani claimed throughout the trial that the Alleged June Agreements were created and executed in June 2005. He conceded, however, that between October 21, 2005 and November 7, 2005 he did not tell counsel or the Court about them when it would have been in his interest to have done so. When asked to explain these curious omissions, he spoke many words but they did not congeal into meaningful sentences. At no point did a rational explanation emerge.

[33] Mr. Nomani also failed to explain rationally why he worked on his computer on an electronic document identical to the Alleged June Agreements for 28 minutes on November 7, 2005. He claimed his purpose in so doing was to recreate the existing agreement so that he could email it to Dr. Louie to refresh his memory regarding the document he had previously signed. Mr. Nomani failed, however, to explain why he did not scan the hard copy he claimed to possess or recreate only the portion of particular interest to Dr. Louie. Simply put, his testimony was utterly unbelievable.

[34] There were many other deficiencies in Mr. Nomani's evidence. As with Dr. Louie, considered as whole they compel the conclusion that he was an unreliable witness. Unless independently corroborated by other reliable evidence, I accord no weight to Mr. Nomani's testimony.

THE FACTS

Background

[35] The Hotel was developed by ACS in 1999 when the Strata Corporation was created. ACS sold the individual strata lots to investors and leased them back to enable operation of the Hotel as an integrated enterprise. ACS and its affiliate also held leases over the Hotel's lobby and parking areas for the same purpose (the "Leases").

[36] Many of the individual strata lot owners reside overseas. Shortly after they purchased their units, ACS encountered financial difficulties and stopped meeting its rental obligations. In response, the owners formed LSOG in an effort to protect their investment.

[37] LSOG was led by a prominent Malaysian businessperson known as Dato Chee, together with others from Singapore and Malaysia. By early 2002, 93 Hotel units and their owners were associated with LSOG.

[38] The Hotel also had a smaller bloc of 31 individual strata lots (the "Interval Units"). The Interval Units were initially controlled by the principals of ACS. Dr. Louie acted as a lender for some of the Interval Units and eventually acquired them. He also invested heavily in the Hotel's restaurant.

[39] In January 2002 ACS was bankrupted. The trustee disclaimed the individual strata lot leases, but the Leases were not disclaimed. A receiver appointed by a secured creditor offered the Leases and ACS's other assets for sale at a receiver's auction (the "Receiver's Auction"). The Receiver's Auction took place on March 15, 2002.

[40] Prior to the Receiver's Auction, LSOG's leaders did not appreciate the operational significance of the Leases. In February 2002 LSOG entered into a written agreement with Executive with respect to the Hotel's management (the "Management Agreement"), although it did not control the common areas. When it became clear that the Leases were required for effective Hotel operation, however, LSOG authorised Executive to place a bid at the Receiver's Auction in an effort to acquire them. Executive did so, but LSOG was outbid.

[41] The successful bidder at the Receiver's Auction was Sunbelt Hotel Management Services Ltd. ("Sunbelt"): a company owned by Mr. Somani. In addition to the Leases, Sunbelt acquired chattels, a telephone system, and ACS's other operational assets (the "ACS Assets"). Sunbelt permitted LSHS to use the ACS Assets in order to operate the Hotel.

The Struggle for Control Begins

[42] Following the Receiver's Auction, a struggle for control of the Hotel developed between Sunbelt and LSHS, on one hand, and LSOG and Executive, on the other. By the end of March 2002 Sunbelt had entered into leases of 23 Interval Units and had an informal arrangement for use of the remaining eight. Because Sunbelt controlled the common areas LSHS was able to operate the Hotel, but with only 31 units in its rental pool. Because LSOG and Executive did not control the common areas they could not operate the Hotel, although LSOG members owned most of the individual units.

[43] On April 6, 2002 LSOG leaders met with Messrs. Somani and Daroowala in Singapore to discuss the prospect of LSHS entering into 17-year leases of the LSOG units. At the meeting's conclusion, the 93 LSOG units were transferred into LSHS's possession and LSHS claimed a binding oral agreement to lease them had been reached (the "April 6 Agreement").

[44] Shortly after the meeting, however, LSOG's leaders had a change of heart and asserted that the April 6 Agreement was not binding or enforceable. In response, in May 2002 LSHS commenced an action against the LSOG owners to enforce its performance (the "LSHS Action"). In their counterclaim, the LSOG owners sought return of their units and an accounting of profits and damages. Sometime later, Executive also commenced an action against the LSOG owners claiming damages for breach of the Management

Agreement (the “Executive Action”). In response, the LSOG owners filed another counterclaim.

[45] After the LSHS Action was commenced, a consent order was entered pursuant to which the LSOG units remained in the possession of LSHS pending trial (the “Monitor’s Order”). A Monitor was put in place to supervise the units in the Hotel rental pool, and a formula for payment of rent was devised and later adjusted by order of the Court.

[46] In May 2002 several representatives of LSOG were elected to the Strata Council. Given their number, they were able to assume control of its affairs. The LSOG representatives increased the Strata Corporation’s operating budget to support a legal challenge brought by an owner to set aside the Leases (the “Betty Ang Proceeding”). Dr. Louie, who then owned one residential unit, supported LSHS and opposed the LSOG-supported legal challenge.

[47] In November 2002 the Betty Ang Proceeding was dismissed by the Court.

[48] In February 2003 Dr. Louie and Mr. Daroowala were elected to the Strata Council as representatives of the Hotel’s commercial section. The other Strata Council positions were filled by LSOG representatives. The LSOG council members remained hostile toward LSHS and authorised funding for further legal challenges to the Leases.

Hospitality is Formed

[49] The cost and disruption caused by the battle for control was unacceptable to many Hotel stakeholders. As a result, several owners and other participants decided to try to resolve their differences amicably. Hospitality was formed in response to these efforts.

[50] In March 2003 LSHS and Executive’s subsidiary, 640647 B.C. Ltd. formed Hospitality to operate the Hotel together by way of joint venture. Some, but not all, LSOG owners were immediately supportive. After the first round of negotiations, however, a division developed within LSOG. Members of the first faction entered into agreements with Hospitality regarding their strata units. Members of the second faction did not.

[51] Dato Chee was the leader of the second faction of LSOG owners. They conducted further negotiations with Hospitality after the first round failed. Some progress was made at a meeting in Bangkok in October 2003 as a result of these efforts. Final agreement for Hospitality to use all remaining LSOG units in its Hotel operation was, however, not achieved.

[52] The number of owners affiliated with LSOG decreased after the October 2003 Bangkok meeting. As the LSHS and Executive Actions proceeded, several owners

settled with Hospitality or abandoned the litigation. Eventually, less than 30 owners maintained their affiliation with LSOG.

The Restaurant Lease

[53] The Hotel's restaurant was not part of the ACS bankruptcy. Originally operated by the principals of ACS and subsidized by Dr. Louie, it was unprofitable but important for the Hotel's successful overall operation. It was, therefore, necessary for Hospitality and Restaurant to conclude a long-term restaurant lease with the owner of the commercial strata lots.

[54] Mr. Nomani worked with the ACS principals as a bookkeeper. He became acquainted with several members of LSOG as a result of this association. He also became acquainted with Dr. Louie and Messrs. Somani and Daroowala.

[55] Dr. Louie was unhappy with the way the ACS principals operated the restaurant. In early 2003 Mr. Nomani assisted him in his attempts to gain control, with considerable success. As a result, Dr. Louie developed confidence in Mr. Nomani's business judgment and abilities. Thereafter, Mr. Nomani also began to assist Dr. Louie in acquiring additional strata lots.

[56] Dr. Louie was extremely busy with his medical practice. In August 2003 he and Mr. Nomani signed a consultancy agreement pursuant to which Dr. Louie agreed to pay for Mr. Nomani's services on a monthly basis (the "585 Consulting Agreement"). Dr. Louie testified, and I find, that he relied heavily on Mr. Nomani's assistance and advice in matters related to the Hotel.

[57] At approximately the same time the 585 Consulting Agreement was signed, Mr. Nomani also approached Mr. Somani and offered to help Hospitality obtain a restaurant lease with 585. Mr. Somani responded positively to Mr. Nomani's approach and referred him to Salim Sayani, another Hospitality principal.

[58] In August 2003 Hospitality engaged Mr. Nomani to assist in lease negotiations with Dr. Louie with regard to the restaurant. Mr. Sayani and Mr. Nomani signed a consulting agreement in which Hospitality agreed to pay a commission for his services (the "Hospitality Consulting Agreement"). Messrs. Somani and Daroowala testified, and I accept, that Hospitality was unaware of the existence of the 585 Consulting Agreement at the time.

[59] The Restaurant Lease was concluded in December 2003 with Mr. Nomani's assistance. Pursuant to its terms, the parties agreed that the Landlord, 585, would not do any act that may interfere with the ability of Restaurant's affiliates to operate the Hotel.

They also agreed that the common property was subject to the Lease and both parties were bound by its provisions.

[60] The Restaurant Lease included a provision pertaining to the liquor licence held for the premises (the “Liquor Licence”). When it was signed, the Liquor Licence was controlled by the receiver of the previous tenant. Pursuant to the Restaurant Lease, the parties agreed that Restaurant, in cooperation with 585, would make its best efforts to arrange for transfer of the Liquor Licence or acquire its own liquor licence. They also agreed that a non-disturbance agreement and estoppel certificate would be obtained.

The Falling Out

[61] When the Hospitality Consulting Agreement was concluded Mr. Nomani and Hospitality’s principals discussed other possible assistance he might provide with respect to Hotel matters. In the course of these discussions, Mr. Nomani agreed to help Hospitality obtain leases of strata lots controlled by LSOG members, Dr. Louie and Christian Franiek.

[62] Mr. Franiek is a lender who had an interest in several lots in the Strata Corporation. He had foreclosed on some of the Interval Units and was renting them out independently through a property manager, Jeff Narod. According to Dr. Louie, Mr. Franiek is a loan shark who charges exorbitant rates to his borrowers and “loans to own”. As the battle for control of the Hotel progressed and litigation costs escalated, Dr. Louie borrowed substantial sums from Mr. Franiek. As outlined below, he used these funds to provide financing for litigation that was contrary to Hospitality’s interests.

[63] Dr. Louie was a lender on six of the Interval Units. In March 2004 he acquired them by voluntary transfer to 587019 B.C. Ltd. (the “587 Lots”). At the time of the acquisition, the 587 Lots were in Hospitality’s possession by virtue of an arrangement with Interval and its receiver. After the acquisition, Hospitality wished to retain the 587 Lots in the Hotel rental pool.

[64] In April 2004 Mr. Nomani told Hospitality’s principals that Dr. Louie’s son, Jonathon Louie, wished to rent out the 587 Lots independently. He proposed that Hospitality agree to rent them on a nightly basis if they were not otherwise rented. Not surprisingly, this proposal was unsatisfactory from Hospitality’s perspective. As a result, a lease agreement between 587 and Hospitality regarding the 587 Lots was not reached.

[65] At trial, Dr. Louie acknowledged that Jonathon Louie acted at his direction in matters relating to the Louie Group Strata Lots. Jonathon Louie described himself as “a puppet” in this regard. I accept that this was an accurate description and conclude that, from the outset, it was Dr. Louie and Mr. Nomani who wished to develop and operate a hotel within the Hotel.

[66] In May 2004 the 587 Lots were removed from the Hotel rental pool at Dr. Louie's direction. In response, Hospitality removed its chattels and equipment from the units. This step made Dr. Louie very angry.

[67] Dr. Louie was also angry with Hospitality because of a disagreement that developed regarding transfer of the Liquor Licence. He testified that, as a landlord, he was unwilling to surrender the Liquor Licence because he might not get it back if the tenant was to change. Further disagreement developed over the form of proposed non-disturbance agreement and Hospitality's unwillingness to provide an estoppel certificate until the outstanding issues were resolved between the parties. At trial, Dr. Louie conceded that these matters amounted to no more than ordinary disagreements between businesspeople.

[68] Counsel for Dr. Louie described Hospitality's actions in removing its chattels from the 587 Lot units in May 2004 as despicable. Dr. Louie acknowledged, however, that what was taken did not, in fact, belong to him. Nevertheless, he complained bitterly that Hospitality was uncooperative and, therefore, at fault for the deterioration in their business relationship. Although I do not agree with his perception of where fault lies, it is plain that by May 2004 the business relationship had deteriorated seriously.

[69] It is also plain from various emails that by May 2004 Mr. Nomani was communicating regularly with LSOG leaders. His actions were inconsistent with his assurances to Hospitality's principals that he was acting on their behalf in matters related to the Hotel. I accept that, as Mr. Daroowala testified, Mr. Nomani tried throughout early 2004 to persuade Hospitality to increase his role in Hotel operations and thus to increase his income. When he was unsuccessful, I find that Mr. Nomani decided to assist Hospitality's adversary, LSOG, in the battle for control of the Hotel.

[70] In an email to Lye Eam Tan and Dato Chee dated May 9, 2004, Mr. Nomani described the deteriorating situation between Dr. Louie and Hospitality as one in which "the gloves are coming off". It is apparent from his actions thereafter that Mr. Nomani decided to exploit the growing hostility to his own advantage. I am satisfied that his goal in so doing was to ensure his continued participation in the development and operation of a hotel within a hotel.

The Conflict Intensifies

[71] On June 1, 2004, a Strata Council meeting was conducted. Dr. Louie, Dato Chee, Mr. Somani and others were in attendance. At the meeting, Dr. Louie proposed that the Strata Council re-investigate the validity of the Leases because, he said, he was concerned about the revenue being received by Hospitality.

[72] Restaurant complained about Dr. Louie's conduct at the Strata Council meeting and asserted that it breached the terms of the Restaurant Lease. Dr. Louie responded with an aggressive and largely incomprehensible letter written by Mr. Nomani. Its gist was that Dr. Louie's actions at the meeting were unrelated to the restaurant.

[73] On June 29, 2004, Mr. Nomani attended the next Strata Council meeting. At this meeting, the LSOG-dominated Strata Council passed several resolutions that were contrary to Hospitality's interests. There was also discussion regarding another legal challenge to the Leases, which was subsequently brought without proper authorisation (the "Unauthorised Action").

The July 2004 Confrontation

[74] By July 2004 Hospitality's principals were becoming concerned about Mr. Nomani's loyalties. In May 2004, for example, when he was pressing for an expanded role with Hospitality, he told Mr. Daroowala "If I can't make money from my friends, I have to make money from my friends' enemies". Nevertheless, Hospitality accepted Mr. Nomani's repeated assurances of loyalty and continued to work with him. In so doing, its principals provided Mr. Nomani with confidential information regarding the Hotel.

[75] In mid-July 2004, however, Mr. Somani discovered, through a misdirected email, that Mr. Nomani was assisting Alfred Tan, an LSOG leader. On July 16, 2004, he and Messrs. Daroowala, Sayani and Mawji were having lunch at the Hotel when Mr. Nomani happened to pass by. Mr. Somani and his colleagues invited Mr. Nomani to join them. When he did, Mr. Somani confronted him and asked if he was working with Mr. Tan.

[76] Messrs. Somani and Daroowala, on one hand, and Mr. Nomani, on the other, provided very different descriptions of what occurred following Mr. Somani's question. Taking into account their respective levels of credibility, I accept the evidence of Messrs. Somani and Daroowala and reject that of Mr. Nomani.

[77] Mr. Nomani responded to Mr. Somani's question with a flat denial. He claimed that he did not even know Mr. Tan. Mr. Somani challenged him, remarked the email and expressed distress at Mr. Nomani's apparent duplicity. Mr. Nomani then stormed off, called the police, and falsely claimed that Mr. Somani had threatened to have him followed. The police spoke with Mr. Somani about Mr. Nomani's complaint, but took no further steps.

[78] After the July 2004 confrontation Hospitality's principals lost all trust in Mr. Nomani. They sensibly decided to have no further business dealings with him.

The Dockside Proceeding and The Fiduciary Action

[79] The Unauthorised Action was commenced in August 2004. In response, two strata lot owners filed an action in October 2004 challenging the propriety of the Strata Council's approval of funding to challenge the Leases (the "Dockside Proceeding").

[80] In *Dockside Brewing Co. Ltd. et. al. v. The Owners Strata Plan LMS 3837 et. al.*, [2005 BCSC 1209](#), Edwards J. concluded that the funding was improperly authorised by the LSOG-dominated Strata Council. He ordered that \$190,000, plus interest, be repaid to the Strata Corporation. In *Dockside Brewing Co. Ltd. et. al. v. The Owners Strata Plan LMS 3837 et. al.*, [2007 BCCA 183](#), Edwards J.'s decision was upheld on appeal.

[81] In November 2004 Hospitality and Restaurant commenced the Fiduciary Action. In it, they alleged that Mr. Nomani, Dr. Louie and his companies breached their duties and conspired to defeat Hospitality and Restaurant's interests with respect to the Hotel.

Acquisition of the Louie Group Strata Lots

[82] Over time, Dr. Louie had acquired control of several residential strata lots with Mr. Nomani's assistance. By the summer of 2005 he owned or controlled all 30 Louie Group Strata Lots. The Louie Group Strata Lots include a penthouse, deluxe suites and three meeting rooms located on the second floor.

[83] Dr. Louie purchased the Louie Group Strata Units because he believed the prices were reasonable and they were a good investment. Some were acquired through foreclosure; others through introductions to LSOG owners made by Mr. Nomani. Twelve were in Hospitality's possession and subject to the Monitor's Order when they were acquired; eighteen were not.

[84] In so far as possible, Dr. Louie planned to rent out the Louie Group Strata Units independently rather than lease them to Hospitality. Until June 2005 he retained Mr. Narod as his property manager for this purpose. After June 2005 he retained Mr. Nomani, through 567.

[85] The Louie Group Strata Lots represent approximately 23% of the total number of strata lots in the Strata Corporation. Pursuant to its bylaws, only those present in person or by proxy are permitted to vote at general meetings. A full turn out of owners at such meetings is unusual. For this reason, the party who controls the votes attached to the Louie Group Strata Lots wields considerable power within the Strata Corporation because they hold an effective veto over three-quarter resolutions.

The January 31, 2005 AGM

[86] The LSOG-dominated Strata Council did not call an Annual General Meeting of the Strata Corporation in 2004. An AGM was scheduled, however, for January 31, 2005. Competing slates for election to Strata Council were put forward. One slate represented supporters of LSOG and Dr. Louie; the other slate represented supporters of Hospitality.

[87] Hospitality was concerned about the risk that further funding might be improperly authorised by the Strata Council. As a result, it applied for an injunction and the Strata Council was restrained from proposing substantial funding for legal fees in the absence of a three-quarter vote of members (the “Groberman J. Injunction”).

[88] Mr. Nomani was able to participate in the January 31, 2005 AGM because Dr. Louie caused one of his companies to transfer title to a strata lot to him. Despite the existence of the Groberman J. Injunction, Mr. Nomani proposed a substantial increase to the budget for legal fees, but his motion was defeated. A motion to discontinue the Unauthorised Action was approved.

[89] A new Strata Council was elected at the January 31, 2005 AGM. Its members representing the residential section supported Hospitality. Dr. Louie nominated Mr. Nomani to represent 585 for the commercial section.

After the January 31, 2005 AGM

[90] Shortly after the January 31, 2005 AGM Mr. Nomani commenced a proceeding seeking the appointment of an administrator (the “Administrator Proceeding”). At trial, he testified that he took this step in an effort to bring stability to the Strata Corporation. I reject this explanation. Rather, I am satisfied Mr. Nomani’s purpose in commencing the Administrator Proceeding was to ensure that the legal challenge to the Leases would proceed.

[91] When the Administrator Proceeding was filed Mr. Nomani obtained an *ex parte* injunction preventing the Strata Corporation from dismissing the Unauthorised Action. He was later ordered to pay special costs because Wedge J. found the injunction was obtained on the basis of material nondisclosure and misrepresentations to the Court. At trial, Mr. Nomani attempted to explain away his misconduct as mere technical breaches or misunderstandings. As is apparent from Wedge J.’s Reasons for Judgment, it was nothing of the kind.

[92] On March 9, 2005, Mr. Nomani’s counsel delivered a letter to the Strata Corporation requiring a special general meeting (the “SGM”). Its purpose was to require a vote on a resolution to proceed with the Unauthorised Action. The letter was signed by LSOG members and by Dr. Louie. The SGM was scheduled for November 4, 2005.

The Alleged June Agreements

[93] 567 was incorporated in April 2005. In June 2005 it took over management of the 18 Louie Group Strata Lots that were not subject to the Monitor's Order.

[94] According to Mr. Nomani, on June 10 and 11, 2005 the Alleged June Agreements were concluded between 567 and the Louie Group Defendants. He claimed that they evidence the RFRs in written form and were created and printed from a template on his computer. He also claimed that electronic versions were not individually saved.

[95] Mr. Nomani testified that Dr. Louie signed seven of the Alleged June Agreements on June 10, 2005 and Jonathon Louie signed the eighth on June 11, 2005. Jonathon Louie testified to similar effect.

[96] Early in the trial Dr. Louie also testified that he signed the Alleged June Agreements on June 10, 2005. After Hospitality presented strong evidence to the contrary, however, he returned to the witness stand and admitted that, in fact, he signed them on November 8, 2005. He also admitted that he counselled his son, Jonathon, to perjure himself regarding the date of his signature. Dr. Louie went on to admit that his purpose in signing the Alleged June Agreements was to improve the position of 567 and help to defeat the LOI.

[97] Mr. Nomani submits that Dr. Louie's admission of perjury was contradictory, equivocal and made as a result of overwhelming pressure. He urged me to find that it was involuntary and unworthy of weight. He also emphasized that, under cross-examination, Dr. Louie expressed doubt as to precisely when the Alleged June Agreements were signed.

[98] As with Dr. Louie's other testimony, standing alone I would not rely on his assertion that he signed the Alleged June Agreements on November 8, 2005 or on any other date. Taking into account the other evidence, however, I am satisfied that he spoke the truth when he admitted lying earlier as to the date on which they were signed. It follows that I conclude Mr. Nomani also perjured himself regarding the creation and execution of the Alleged June Agreements. I find that Mr. Nomani created the Alleged June Agreements on November 7 and 8, 2005, Dr. Louie signed seven of them on November 8, 2005, and Jonathon Louie signed the eighth on a later unknown date.

[99] The evidence in support of this conclusion is multifaceted and overwhelming. Much of it is summarised below.

[100] When Dr. Louie admitted his perjury, he went on to say that the Alleged June Agreements reflect the terms of his verbal agreement with Mr. Nomani and 567. He also stated that he and 567 had an informal, short-term arrangement for the rental of the Louis

Group Strata Lots. No independent evidence was presented, however, regarding the nature and terms of the verbal agreement that existed between them. Although I accept that they must have had one, in the absence of independent evidence I am unable to make factual findings as to its precise nature and terms.

[101] Mr. Nomani submitted that Hospitality had notice of the agreement in place between 567 and the Louie Group Defendants. I do not accept this submission. Although Hospitality's principals were generally aware of the existence of an informal arrangement of some sort between Mr. Nomani and Dr. Louie with regard to the Louie Group Strata Lots, they did not know of its nature and terms.

The Injunction Application

[102] On April 29, 2005 Hospitality and Restaurant delivered the Injunction Application to Dr. Louie, Mr. Nomani and the other defendants in the Fiduciary Application. In it, they sought an order restraining Dr. Louie from financing or supporting legal proceedings against them, voting in favour of resolutions challenging the Leases or breaching the terms of the Restaurant Lease. They also sought an order restraining Dr. Louie from using the services of Mr. Nomani, and an order to similar effect against Mr. Nomani.

[103] Dr. Louie swore an affidavit in response to the Injunction Application. He deposed that it would be inconvenient and damaging to his business interests if Mr. Nomani was not permitted to continue assisting him. When cross-examined on the affidavit, Dr. Louie did not mention the Alleged June Agreements. On the contrary, he swore that he had no written agreements with Mr. Nomani.

[104] Dr. Louie and Mr. Nomani did not produce the Alleged June Agreements in the Fiduciary Action. In August 2005, however, Mr. Nomani did produce a short-term rental management agreement between 567 and Parmasvary Retty-Cannon (the "Retty-Cannon Agreement"), an LSOG owner who resided in Chicago. He created the Retty-Cannon Agreement on his computer on August 11, 2005 after counsel for Hospitality learned that he was managing her unit and asked for production of their agreement. After so doing, he faxed the agreement to Ms. Retty-Cannon, asked her to back-date it and purported, falsely, to witness her signature.

Settlement Discussions Begin

[105] By the summer of 2005 Dr. Louie was becoming concerned about the costs and risks associated with the Fiduciary Action. He was also concerned about other costs that were mounting in connection with the Louie Group Strata Lots. As a result, he began to consider leasing or selling his units.

[106] On July 21, 2005 Dr. Louie met with Mr. Daroowala to discuss settling the Fiduciary Action. Mr. Nomani participated in follow up settlement discussions with Hospitality. On August 24, 2005 he and Mr. Sayani signed a non-binding letter of intent pursuant to which the Louie Group Strata Lots would be leased to Executive's subsidiary (the "August Draft LOI"). One of its terms was that Mr. Nomani would be paid \$50,000 per annum and maintain an office at the Hotel.

[107] The August Draft LOI was negotiated subject to Mr. Somani and LSOG's agreement. Not surprisingly, given their history, Mr. Somani refused to agree to any settlement that included Mr. Nomani's involvement with the Hotel. As a result, the August Draft LOI was not finalized.

[108] In September 2005 Dr. Louie and Mr. Nomani began to explore other options for selling or leasing the Louie Group Strata Lots. They met with Mr. Bhatia of Days Inn in this regard. According to Dr. Louie their discussions were interesting, but inconclusive. As a result, a follow up meeting was scheduled.

The Injunction Application Hearing

[109] The Injunction Application hearing commenced before Ballance J. on September 15 and 16, 2005. It did not complete and was adjourned to October 20 and 21, 2005.

[110] On October 7, 2005, Dr. Louie's counsel, Mr. Epstein, wrote to Hospitality's counsel, Mr. Harbottle, and proposed a resumption of settlement discussions. Hospitality agreed and on October 20, 2005, the Injunction Application hearing was adjourned to the following day.

The LOI is Negotiated

[111] Mr. Epstein was assisted by his colleague, Mr. Jakubec. On October 20, 2005, Mr. Jakubec invited Mr. Daroowala to attend a meeting at their offices to discuss settlement with the Louie Group Defendants. Mr. Daroowala accepted.

[112] Mr. Daroowala and Mr. Mawji arrived at Mr. Epstein's office at 4:00 p.m. on October 20, 2005. Settlement discussions proceeded thereafter and lasted until approximately 6:30 a.m. on October 21, 2005. At various times throughout this period Dr. Louie, Mr. Epstein, Mr. Jakubec, Mr. Daroowala and Mr. Mawji were present at the meeting. Mr. Somani and Mr. Nomani were not.

[113] When the meeting began, Mr. Daroowala asked Dr. Louie to confirm that any settlement they reached would be binding. He did so. Mr. Daroowala also stated that Hospitality did not want Mr. Nomani to be involved in leasing the units. Dr. Louie responded that his arrangements with Mr. Nomani and 567 were not an obstacle to

settlement. He later remarked that Mr. Nomani may be upset by the settlement, but he would have to move on.

[114] The parties discussed several topics at the negotiating session. Although Mr. Nomani was not present, he spoke with Dr. Louie on the telephone two or three times as negotiations progressed. In the course of these conversations they discussed Dr. Louie's negotiating strategies and settlement goals.

[115] The issue of unit price on a sale was the subject of considerable negotiation. Hospitality started at a price of \$160,000 per unit and Dr. Louie started at a price of \$195,000 per unit. Near the end of the negotiating session, Dr. Louie had come down to an asking price of \$173,000 per unit and Hospitality had come up to \$170,000 per unit. Eventually, Mr. Epstein suggested that they split the difference and the parties agreed that Hospitality would pay up to \$171,500 per unit, but if Dr. Louie's average cost of all the units was less than that amount Hospitality would pay the average cost.

[116] The issue of voting rights was another key point for negotiation. The November 4, 2005 SGM was fast approaching and Hospitality wanted the Louie Group Strata Lot votes in advance. For this reason, the parties agreed that leases would be signed by no later than November 3, 2005 and the landlord would assign its voting rights for certain matters to the tenant. They also agreed to a January 15, 2006 closing date for the sale to allow Dr. Louie to terminate his arrangements with Mr. Nomani and obtain vacant possession of the Louie Group Strata Lots.

[117] At approximately 6:30 a.m. on October 21, 2005 Dr. Louie, Mr. Daroowala and Mr. Mawji signed the final form of the LOI. A copy is attached to these Reasons for Judgment as Appendix 1.

[118] Throughout the negotiating session, Dr. Louie felt pressured by the looming court appearance on the Injunction Application. By the time the session ended, he was exhausted and spent. In deciding to enter into the LOI, he accepted the advice of his lawyers in an effort to protect his own self-interest. After speaking with Mr. Nomani later that morning, however, Dr. Louie regretted having agreed to a purchase price of no more than \$171,500 per unit.

The October 21, 2005 Court Appearance

[119] Dr. Louie went to work at his medical office after the settlement meeting. Mr. Epstein attended court on his behalf. When the Injunction Application hearing resumed Mr. Epstein advised Ballance J. that a settlement had been reached between Dr. Louie and Hospitality and, therefore, the application did not proceed against him. It did proceed, however, against Mr. Nomani.

[120] Mr. Epstein told Ballance J. that Dr. Louie did not oppose an injunction being granted against Mr. Nomani. He went on to say that Hospitality and Dr. Louie agreed if such relief was ordered it should be suspended for a period of 60 days. He explained that this period would allow Dr. Louie to benefit from Mr. Nomani's knowledge in effecting the LOI and the sale of the Louie Group Strata Lots.

[121] Mr. Nomani opposed Hospitality's Injunction Application. He argued that he would be prejudiced financially if the injunction sought were to be granted. On a break in the proceedings he called Dr. Louie and expressed surprise about the settlement. He also told Dr. Louie that he had made a bad deal and encouraged him to change his mind.

[122] Dr. Louie was heavily influenced by Mr. Nomani's advice and persuasion. By the end of their conversation, he expressed regret at having left him out of the settlement. He also expressed willingness to reverse the LOI.

[123] When Mr. Nomani returned to court he told Ballance J. that Dr. Louie was willing to reverse the deal he had reached with Hospitality. In response to her questions, he claimed, amongst other things, that he was helping LSOG owners in dealing with Hotel matters without any compensation. This statement was seriously misleading. In fact, Mr. Nomani was receiving sales commissions from LSOG owners, Mr. Franiek and Dr. Louie when agreements regarding LSOG units were reached.

[124] At the conclusion of Mr. Nomani's submissions, Ballance J. allowed him an opportunity to file a supplementary affidavit outlining the prejudice he would suffer if the injunction sought by Hospitality was granted. On October 25, 2005 he filed a supplementary affidavit. He did not mention the Alleged June Agreements.

After the October 21, 2005 Court Appearance

[125] The LOI required both parties to pay a \$10,000 bond to secure its performance. On October 21, 2005 Mr. Jakubec collected a \$10,000 cheque from Dr. Louie's office for this purpose and Mr. Epstein wrote to confirm its receipt. Mr. Harbottle responded that he had also received a \$10,000 cheque from Hospitality.

[126] Dr. Louie spoke with Mr. Nomani about the settlement repeatedly throughout his workday on October 21, 2005. At its conclusion, he faxed a letter to Messrs. Epstein and Jakubec in which he claimed the LOI was produced under duress and stated he considered the LOI to be void (the "Duress Fax").

[127] According to Dr. Louie, he decided independently that the LOI was not in his best interests. He claimed his decision to send the Duress Fax to Mr. Epstein was his and his alone. Although I accept that Dr. Louie made the final decision to disavow the LOI, I do

not accept that he acted independently in reaching this decision. On the contrary, I find that his decision was based primarily upon Mr. Nomani's advice and persuasion.

[128] Dr. Louie also discussed the LOI with Mr. Franiek. At Mr. Franiek's suggestion, he directed a stop payment on the \$10,000 performance bond cheque provided earlier to Mr. Jakubec. He admitted at trial that his intention in so doing was to invalidate the LOI.

The October 24, 2005 Meeting with Messrs. Epstein and Jakubec

[129] On October 24, 2005, Dr. Louie and Mr. Nomani met with Messrs. Epstein and Jakubec to discuss the way forward. Dr. Louie told them that he was unsatisfied with the purchase price agreed upon in the LOI. He and Mr. Nomani went on to say that they had other, higher offers for the Louie Group Strata Lots. That being so, they saw no reason to accept the lower price included in the LOI.

[130] Mr. Epstein was distressed by Dr. Louie's sharp turn around. He told him that he would no longer act as his counsel if Dr. Louie decided to back out of the LOI. He and Mr. Jakubec provided Dr. Louie with a written opinion letter. In it they advised that if Dr. Louie backed out he would lose the \$10,000 performance bond, the Injunction Application would be rescheduled and Hospitality would be unlikely to engage in further settlement discussions. They also advised that backing out of the LOI could result in devastating financial losses to Dr. Louie personally.

[131] Dr. Louie testified that he was still wavering on whether to follow through with the LOI when the meeting with Messrs. Epstein and Jakubec concluded. I reject his testimony on this point. Taking into account his conduct, including the Duress Fax and the stop-payment direction, I am satisfied that, by October 24, 2005 Dr. Louie had decided to back out of the LOI.

[132] As noted, I find that Dr. Louie's decision to back out of the LOI was based on Mr. Nomani's advice and persuasion. I conclude that he made it primarily because he was unsatisfied with the purchase price agreed upon and because he felt guilty for leaving Mr. Nomani out of the settlement.

Dr. Louie Retains New Counsel

[133] Dr. Louie asked Mr. Nomani to find another lawyer to represent him. On October 27, 2005, Mr. Nomani retained Ryan Berger on Dr. Louie's behalf.

[134] In the course of the trial, an application was made for production of Mr. Berger's file based on the principles in *Pax Management Ltd. v. C.I.B.C.*, [1987 CanLII 153 \(BC CA\)](#), 14 B.C.L.R. (2d) 257 (C.A.). In considering whether a claim of fraudulent

misrepresentation vitiated solicitor-client privilege, the court in *Pax Management* stated at ¶ 64:

It is well established law that one cannot claim the protection of the solicitor-client privilege where the solicitor himself has been a party to a fraud, or where the communications were made by the client for the furthering of fraudulent conduct, ie., such as obtaining advice for the purpose of perpetrating a fraud.

Where fraud is a genuine issue, privilege will be displaced on the basis that the benefits of its maintenance are outweighed by the benefits of full disclosure of all circumstances relevant to resolving the issue of fraud.

[135] I granted the *Pax Management* application because, as the trial unfolded and new documents surfaced, it became plain that fraud was a genuine issue. Although there was no suggestion that Mr. Berger was a party to any fraudulent conduct, the documents gave colour to the allegation that his advice was sought in furtherance of the fraud. As a result of the production order, much of the correspondence between Mr. Berger, Dr. Louie and Mr. Nomani was placed in evidence at trial.

[136] When Mr. Berger was retained, Mr. Nomani told him that Dr. Louie would not have entered into the LOI had he understood its implications. Mr. Berger asked Mr. Nomani to list the reasons that this was so. In response, Mr. Nomani sent an email in which he listed several purported reasons (the “Oct. 27 Email”). The first was that Dr. Louie was not in a position to negotiate the LOI without Mr. Nomani’s assistance.

[137] Mr. Nomani claimed at trial that Dr. Louie drafted the Oct. 27 Email. I do not accept this claim. I am satisfied that, as Dr. Louie testified, the Oct. 27 Email was drafted by Mr. Nomani. The Alleged June Agreements are not mentioned as a reason that Dr. Louie would not have entered into the LOI.

[138] Dr. Louie and Mr. Nomani met again with Mr. Bhatia of Days Inn on October 27, 2005. Dr. Louie testified that, given the LOI’s existence, he did not offer to sell the Louie Group Strata Lots to Mr. Bhatia, although he sounded him out regarding a possible sale.

[139] Mr. Bhatia later sent an email to Hospitality indicating that Dr. Louie did offer to sell him the Louie Group Strata Lots. Mr. Bhatia was not called as a witness at trial, however, and Dr. Louie’s testimony is unreliable. In the circumstances, I decline to make any findings as to what transpired at their meeting on October 27, 2005.

Hospitality Attempts to Implement the LOI

[140] Hospitality decided to exercise the Option to Purchase shortly after the LOI was concluded. On October 25, 2005, \$200,000 was placed in trust to cover the deposit. Mr. Bryant and Mr. Daroowala telephoned Mr Epstein to advise him that the Option to Purchase would be exercised. Amongst other things, they asked that Dr. Louie provide

his acquisition cost information so that the sale price for the units could be determined. Mr. Daroowala made the same request directly to Dr. Louie.

[141] Dr. Louie did not supply the acquisition cost information to Hospitality, despite repeated requests that he do so.

[142] On October 28, 2005, Mr. Nomani wrote to Hospitality's counsel. He claimed that the LOI was obtained by blackmail and Dr. Louie had been induced to break his contracts with 567. In the days that followed, Mr. Nomani frequently repeated these allegations. He also informed Hospitality that Dr. Louie had retained new counsel.

[143] On November 1, 2005, Mr. Harbottle provided Mr. Jakubec with the \$200,000 deposit cheque. He noted Mr. Nomani's advice regarding new counsel and asked for clarification. He went on to emphasize that the SGM was fast approaching and Hospitality needed the leases and proxies by November 3, 2005. Later that day, Mr. Bryant sent a draft lease to Messrs. Epstein and Jakubec and faxed a copy to Dr. Louie.

[144] On November 2, 2005, Mr. Jakubec returned the \$200,000 deposit cheque to Mr. Harbottle. He confirmed that his firm no longer represented Dr. Louie.

Mr. Berger Takes Over

[145] On November 2, 2005 Mr. Berger contacted Mr. Bryant to notify him of his retainer. He requested a copy of the leases proposed by Hospitality, which were provided immediately. He also delivered a Notice of Change of Solicitor in the Fiduciary Action and stated that he may need time to get up to speed on the file.

[146] Mr. Harbottle sent the \$200,000 deposit cheque to Mr. Berger. In a follow-up letter he emphasized the importance of finalizing the leases by November 3, 2005.

[147] Mr. Berger provided Dr. Louie with a preliminary opinion on November 2, 2005. He expressed the view that the LOI was valid and enforceable and warned that Dr. Louie could experience severe consequences if he proceeded on the basis that it was not. Despite this advice, Dr. Louie instructed Mr. Berger to assert that the LOI was not binding and to pursue further negotiations in an effort to reach a better deal.

[148] Mr. Berger followed Dr. Louie's instructions. On November 3, 2005, he wrote to Mr. Bryant and asserted that the LOI was not enforceable. He went on to say that he would review the draft lease, but would not be able to provide his position on it until November 8, 2005.

[149] Mr. Harbottle responded promptly to Mr. Berger's letter. He challenged the claim that the LOI was unenforceable and asked if the Louie Group would provide proxies for

the SGM if an extension to November 8, 2005 was granted regarding the draft lease. Dr. Louie refused.

[150] Dr. Louie testified that he did not sign the draft lease because he and his new lawyers did not have enough time to review it. I reject this testimony. As noted, I am satisfied that Dr. Louie had decided not to follow through with the LOI before he retained Mr. Berger. It follows that I am satisfied his decision had nothing to do with needing time to review the draft provided. I am also satisfied that the alleged need for time was a delaying tactic designed to enhance Dr. Louie's negotiating position.

The November 4, 2005 SGM

[151] The SGM proceeded on November 4, 2005 as scheduled. Jonathon Louie attended with 30 proxies for the Louie Group Strata Lots and 8.1 proxies for 585. Dr. Louie knew that, if the LOI was binding, he was obliged to refrain from supporting litigation contrary to Hospitality's interests. Nevertheless, he instructed his son to vote in favour of Mr. Nomani's resolution to proceed with the Unauthorised Action ("Resolution A"). Resolution A was contrary to the interests of Hospitality.

[152] Jonathon Louie followed his father's instructions. Resolution A was defeated, despite his support.

[153] Jonathon Louie also voted against a resolution to take legal action to recover on the judgment from the Dockside Proceeding ("Resolution E"). Resolution E was in Hospitality's interests, as well as those of the Strata Corporation. Resolution E was also defeated. Had Jonathon Louie voted in its favour, it would have passed.

[154] Resolution E was passed at a subsequent AGM, after the Louie Group Defendants were ordered by the Court not to oppose it. As a result, the judgment from the Dockside Proceeding was eventually recovered by the Strata Corporation. It was not paid, however, by the defendant LSOG Strata Council members. Rather, it was paid by Dr. Louie, after proceedings were brought to sell the defendants' units. Dr. Louie also paid the \$150,000 special costs awarded.

The November 7, 2005 Meeting with Mr. Berger

[155] On November 7, 2005, Mr. Berger met with Dr. Louie and Mr. Nomani. He repeated his opinion that the LOI was valid and enforceable. Nevertheless, Dr. Louie maintained that he wished to treat the LOI as unenforceable. He also told Mr. Berger that he would prefer to proceed without counsel to save costs and obtain procedural leniency. He expressed the view that this would favour his strategy of delay and create favourable circumstances in which to negotiate a better deal.

[156] When the meeting ended, Dr. Louie terminated Mr. Berger's retainer. At trial, he claimed that, when he did so, he intended to retain other counsel. I reject this claim. In my view, it is inherently improbable that Dr. Louie would decide to retain other counsel when, as he acknowledged, he was satisfied with the quality of Mr. Berger's representation. It is also apparent from Mr. Berger's letter that one aspect of Dr. Louie's strategy was to proceed without professional representation.

[157] Mr. Berger returned the deposit cheque to Mr. Harbottle after his retainer was terminated.

Creation of the Alleged June Agreements

[158] As Dr. Louie acknowledged, he and Mr. Nomani wanted to defeat the LOI and improve 567's position. In furtherance of this purpose, they decided to register Form C documents with respect to the RFRs at the Land Titles Office. The day after Mr. Berger's retainer was terminated they agreed to attend at the office of Mr. Visram to have the Form Cs, with attached Alleged June Agreements, executed. Mr. Visram is a lawyer known to Mr. Nomani.

[159] On the evening of November 7, 2005 Mr. Nomani created a document on his computer entitled "Suite rental Agreement – Dr. Louie Group.doc" (the "Louie Group.doc"). Forensic evidence presented by Hospitality revealed that the Louie Group.doc took approximately one half-hour to create. Its content, including several errors, is identical to the Alleged June Agreements produced by Mr. Nomani in hard copy form in this litigation. It shares many distinctive characteristics with the Retty-Cannon Agreement.

[160] At trial, Mr. Nomani testified that he created and emailed the Louie Group.doc to Dr. Louie on November 7, 2005 to remind him of the Alleged June Agreements' content. He claimed that he did not have an electronic version of the Alleged June Agreements available, but did have the signed copies in his possession. Mr. Nomani went on to claim that he did not fax or email a copy of these documents to Dr. Louie because there were problems with his computer. On cross-examination, however, he changed his story when counsel pointed out that he had sent a scanned document from the computer earlier the same day. According to his revised testimony, Mr. Nomani thought only of faxing the Alleged June Agreements, but his fax machine did not work.

[161] Mr. Nomani also worked on a version of the Louie Group.doc on November 8, 2005. The forensic evidence revealed that, in so doing, he changed the name of the landlord from the November 7, 2005 version and added a schedule. When asked at trial to explain why he was working on this electronic document if, as he claimed, the Alleged June Agreements were executed in June 2005, Mr. Nomani responded that he had no

recollection of so doing. Faced with the uncontroverted expert evidence that such work was performed, he was unable to offer an explanation.

[162] I reject Mr. Nomani's testimony, which shifted on cross-examination and is inherently improbable. I do not believe that he spent one half-hour on November 7, 2005 recreating an electronic version of a document that already existed in hard copy form and worked on the same document on November 8, 2005 for no identified purpose.

[163] I conclude that Mr. Nomani created the eight Alleged June Agreements on November 7 and 8, 2005 from various iterations of the Louie Group.doc. He did so by opening and copying the Retty-Cannon Agreement on his computer, altering it to the form and content of the Louie Group.doc, and repeatedly editing the Louie Group.doc and printing hard copies in the name of each of the members of the Louie Group. I also conclude that Mr. Nomani presented seven of the newly created Alleged June Agreements to Dr. Louie for his signature on November 8, 2005 at Mr. Visram's office. Dr. Louie signed them and they were attached to the Form Cs, which were executed shortly thereafter before Mr. Visram.

[164] I reach the foregoing conclusions based several factors. They include: Dr. Louie's revised testimony; Dr. Louie's decision to back out of the LOI almost immediately after it was signed; Dr. Louie and Mr. Nomani's failure to disclose the Alleged June Agreements prior to November 8, 2005; the forensic evidence; Mr. Nomani's inherently improbable explanation for his computer use on November 7 and 8, 2005; and, Mr. Nomani's attempts to hide, alter and manufacture electronic evidence in the course of the litigation. Most of these factors are described above. The final factor requires further comment.

[165] Mr. Nomani and 567 did not list the Louie Group.doc electronic document in the ordinary course of the litigation. Rather, it came to light only after Master Donaldson made an order on November 2, 2007 for independent expert examination of all computer hard drives used by 567 (the "November 2 Order"). Although Mr. Nomani did not turn over all such hard drives, the appointed expert, Mr. Iverson, found a November 7, 2005 email from Mr. Nomani to Dr. Louie in the "Sent box" of the computer that Mr. Nomani did provide (the "November 7 Email"). The Louie Group.doc was attached to the November 7 Email.

[166] Mr. Nomani and 567 also did not list the November 7 Email in the ordinary course of the litigation. Dr. Louie did not do so either. By way of explanation, Mr. Nomani claimed his computer crashed in April 2007 and Dr. Louie claimed he recycled his computer in August 2007. These explanations are unsatisfactory and unsettling, given Hospitality's appropriately assertive prior pursuit of all relevant documents, including emails.

[167] Even more unsettling, however, is Mr. Nomani's conduct in response to Master Donaldson's earlier order for production of electronic documents. On July 6, 2007 Master Donaldson ordered that 567 retain a computer expert to provide a list of all files on the hard drives of its computers (the "July 6 Order") and Mr. Nomani, assisted by 567's counsel, Mr. Hatch, retained Maple Oak Computer Solutions ("Maple Oak") for this purpose. Messrs. Nomani and Hatch delivered Mr. Nomani's HP and Compaq computers, together with new hard drives, for examination, copying and listing by Maple Oak.

[168] The HP was provided to Maple Oak on July 13, 2007 and the Compaq was provided on July 16, 2007. Maple Oak personnel copied both onto the new hard drives, listed their contents, and returned them to Mr. Nomani on July 16, 2007. The Compaq list that was prepared by Maple Oak included several obviously relevant electronic documents, including a November 8, 2005 version of the Louie Group.doc (the "First Compaq List"). The Louie Group.doc was not included on the HP list.

[169] On July 20, 2007, Mr. Nomani instructed Mr. Hatch to resubmit the Compaq to Maple Oak and have them create a new list of its contents. He insisted this occur because there was a problem and he wanted to put an end to "conspiracy theories". Mr. Nomani gave the Compaq back to Mr. Hatch, who delivered it again to Maple Oak for re-examination. Mr. Nomani also retrieved the First Compaq List from Mr. Hatch's office and instructed him to disregard its contents. He did so, he claimed, because he wanted to avoid confusion in connection with the Maple Oak lists.

[170] Maple Oak prepared a second list of electronic documents on the resubmitted Compaq (the "Second Compaq List"). The Second Compaq List included fewer electronic documents than the First Compaq List and, notably, did not include the Louie Group.doc. The List of Documents created following the Maple Oak examination of 567's computers was based upon the Second Compaq List. As a result, the Louie Group.doc was not listed and produced at the time.

[171] Taking into account all of the foregoing, I am satisfied that between July 16 and 20, 2007 Mr. Nomani "scrubbed" the Compaq hard drive and removed relevant documents, including the Louie Group.doc, in an effort to hide them. He also copied the original Compaq version onto the HP, but did not provide it to Mr. Iverson pursuant to the November 2 Order. For this reason, Mr. Iverson did not find the November 8, 2005 version of the Louie Group.doc when he conducted his independent examination. As noted, however, he did find the November 7, 2005 version attached to the November 7 Email.

[172] Hospitality retained its own forensic computer expert, Mr. Joyce, to analyse the electronic data. After Mr. Iverson located the Louie Group.doc, Mr. Joyce prepared an

expert report in which he explained how the Alleged June Agreements could have been created from the Louie Group.doc. (the “Joyce Report”).

[173] On August 8, 2007, the Joyce Report was delivered to opposing counsel. On August 22, 2007, Mr. Nomani provided Mr. Hatch’s office with a memory card containing an electronic document entitled “Suite rental Agreement – template.doc”, dated in June 2005 (the “Alleged Template”). He claimed to have found the memory card very recently. The Alleged Template that was on it matched the content of the Alleged June Agreements.

[174] Mr. Nomani gave shifting versions of the circumstances in which he allegedly found the memory card. In addition, the forensic evidence established that the Alleged Template could not have been created in 2005 because it was created with Word 2007 Version 12. It also established that the times and dates shown on electronic documents can be easily manipulated.

[175] I conclude that Mr. Nomani created and misdated the Alleged Template on the memory card on an unknown date between August 8 and 22, 2007. His purpose in so doing was to overcome the theory advanced in the Joyce Report and support his claim that the Alleged June Agreements were created in June, 2005.

[176] Much of the foregoing came to light while the trial was ongoing. Various production orders were made and Mr. Hatch, who had been discharged by 567, was called as a witness. Considered in combination with the other evidence, I find that Mr. Nomani’s attempts to hide, alter and manufacture electronic evidence support the conclusion that the Alleged June Agreements were created on November 7 and 8, 2005. They also support the conclusion that Mr. Nomani attempted repeatedly, consciously, and shamelessly to deceive the Court.

Execution of the Alleged June Agreements

[177] On November 8, 2005, Dr. Louie and Mr. Nomani attended at Mr. Visram’s office. I accept Dr. Louie’s revised testimony that Mr. Nomani presented him with seven of the Alleged June Agreements and he signed them just prior to signing the Form Cs before Mr. Visram. I am unable to make a finding as to when Jonathon Louie signed the eighth Alleged June Agreement. I accept, however, that, as Dr. Louie testified, it was after November 8, 2005.

[178] Mr. Nomani attempted to register the Form Cs and Alleged June Agreements at the Land Titles Office. He was unsuccessful.

The Hospitality Action and the First 567 Action

[179] On November 9, 2005, Dr. Louie sent a letter to Mr. Harbottle enclosing a Notice of Intention to Act in Person in the Fiduciary Action. In it, he advised that he would be retaining other counsel, but asked that, in the interim, correspondence regarding the LOI be directed to Mr. Nomani. He also suggested that negotiations between Hospitality and the Louie Group Defendants should continue.

[180] On November 10, 2005, Hospitality commenced the Hospitality Action in response to Dr. Louie's conduct in disavowing the LOI. The same day, Russell J. granted an order restraining the Louie Group Defendants from selling, encumbering or otherwise dealing with the Louie Group Strata Lots or the shares of the Louie Group companies.

[181] On November 15, 2005, Hospitality registered Certificates of Pending Litigation against the Louie Group Strata Lots. Sufficient funds to complete the purchase were placed on deposit by Mr. Somani's family company.

[182] Hospitality and Restaurant first learned of the Alleged June Agreements on November 15, 2005 when 567 commenced an action against them (the "First 567 Action"). In the First 567 Action, 567 alleged that Hospitality and Restaurant wrongfully induced the Louie Group Defendants to commit breaches of the Alleged June Agreements.

Hospitality Exercises the Option to Purchase

[183] On November 16, 2005, Hospitality formally exercised the Option to Purchase. The same day, Mr. Nomani sent an email to Hospitality's counsel asserting that Hospitality was wrongfully interfering with the Alleged June Agreements by purporting to take this step. He repeated this assertion many times in the years that followed.

[184] On November 18, 2005, Hospitality demanded that 567 produce the Alleged June Agreements. Mr. Nomani initially refused. He later produced six of them after being ordered to do so by the Court.

[185] On November 21, 2005, the Louie Group Defendants retained Greg Palm as their counsel in the Hospitality Action. Hospitality's new counsel delivered the \$200,000 deposit cheque to Mr. Palm, who promptly returned it.

[186] On December 8, 2005, counsel for Hospitality formally tendered the \$200,000 deposit to Mr. Palm pursuant to its exercise of the Option to Purchase. Again, Mr. Palm returned the cheque. Thereafter, the deposit sum was placed in trust by Hospitality's counsel, where it remained available to the Louie Group Defendants upon request.

The Telephone Action

[187] Mr. Nomani used suite 205 as a business office. On January 19, 2006, 587 commenced proceedings against the Strata Corporation seeking telephone access for suite 205 to facilitate his operation of a hotel within a hotel (the “Telephone Action”). In the Telephone Action, 587 alleged that the Strata Corporation had unfairly refused access to the Hotel’s telephone room.

The Non Disturbance Agreement, Liquor Licence and Estoppel Certificate

[188] Paragraph 3 of the LOI concerns extension of the Restaurant Lease. Amongst other things, it refers to provision of the non disturbance agreement, estoppel certificate and Liquor Licence. Over time, disagreements developed between Hospitality and Dr. Louie with respect to all three of these matters.

[189] In February 2006, 585 provided a draft non disturbance agreement to Restaurant (the “585 Non Disturbance Agreement”). From Restaurant’s perspective, the 585 Non Disturbance Agreement was inaccurate and unacceptable. As a result, Restaurant refused to sign the 585 Non Disturbance Agreement or provide an estoppel certificate. This refusal angered Dr. Louie.

[190] The 585 Non Disturbance Agreement included a term to the effect that the Restaurant Lease had not been amended and there were no claims under the Restaurant Lease. In fact, the Restaurant Lease was amended by the LOI and there were ongoing disagreements regarding transfer of the Liquor Licence and the validity of the Leases.

[191] In December 2006 the Liquor Licence disagreement came to a head when provincial authorities suspended the existing licence. Given the time of year, a financial crisis loomed as a result. In its face, Dr. Louie relented and the Liquor Licence was transferred into Restaurant’s name.

[192] I am satisfied that Restaurant’s perspective regarding these matters was reasonable. I am also satisfied that Dr. Louie’s angry, intransigent response contributed to the escalating conflict between the parties.

The Voting Injunction Application

[193] The Strata Corporation’s Annual General Meeting was scheduled for February 24, 2006. Hospitality delivered an application in advance seeking to restrain the Louie Group Defendants from voting contrary to its directions and restraining 585 from nominating Mr. Nomani as its representative on the Strata Council (the “Voting Injunction Application”).

[194] After the Voting Injunction Application materials were served on Mr. Palm, he arranged a meeting between Dr. Louie and representatives of Hospitality. Following the

meeting, Dr. Louie instructed Mr. Palm to agree to a consent injunction. Mr. Palm advised Hospitality's counsel of these instructions (the "Voting Injunction Agreement").

[195] Dr. Louie spoke with Mr. Nomani about the Voting Injunction Agreement after providing Mr. Palm with his instructions. Again, Mr. Nomani persuaded Dr. Louie that he had made a bad deal. Again, Dr. Louie changed his mind based on Mr. Nomani's advice and resiled from his agreement. Again, Dr. Louie's counsel warned him of the dire consequences of so doing, but he ignored his counsel's advice. Again, Dr. Louie's counsel withdrew.

[196] The Voting Injunction Application came on for hearing on February 23, 2006. Dr. Louie appeared in person, as did Mr. Nomani. Groberman J. (as he then was) found that an agreement had been reached and granted an injunction with respect to voting at the February 24, 2006 AGM.

[197] A summary trial in the Hospitality Action was scheduled for November 29 and 30, 2006 (the "Summary Trial - Part 1"). Its purpose was to determine whether the LOI was valid and binding. The next AGM was, however, scheduled for November 27, 2006. Not surprisingly, Hospitality wanted the voting injunction in place pending determination of the Hospitality Action. As a result, Hospitality rescheduled the Voting Injunction Application and attempted, through Dr. Louie's new counsel, Mr. Lithwick, to obtain his consent.

[198] Correspondence was exchanged between Hospitality's counsel and Mr. Lithwick regarding a possible consent injunction. Eventually, it appeared that Dr. Louie's consent to the injunction would be forthcoming. In November 2006, however, Mr. Lithwick asserted such consent was impossible because, in April 2006, Dr. Louie had assigned the voting rights for the Louie Group Strata Lots to 567 (the "Assignment Agreement"). I find that Dr. Louie and Mr. Nomani entered the Assignment Agreement in an attempt to frustrate the proposed voting injunction.

[199] The Voting Injunction Application proceeded on November 14, 2006. The Court granted an order similar to that granted in February 2006 with respect to the November 2006 AGM.

The Pace of Litigation Increases

[200] The LSHS and Executive Actions were commenced in 2002 and 2004 respectively. They progressed slowly thereafter until January 2006 when Master Donaldson conducted a case management conference for all Hotel-related litigation. From that point forward, the pace of the litigation picked up considerably. Several case management conferences were conducted and many interlocutory applications were heard and determined.

[201] It is unnecessary to review every step taken in all of the Hotel-related litigation. Some of the key developments are, however, summarised below. It is also unnecessary to determine whether Dr. Louie was aware of each and every development as it unfolded. It is clear on all of the evidence, however, that Mr. Nomani kept Dr. Louie generally apprised.

[202] In March 2006, 567 applied to be added as a defendant in the Hospitality Action. The application was based on 567's purported rights under the Alleged June Agreements. In October 2006 Master Donaldson dismissed the application. 567 appealed, but Josephson J. adjourned the appeal pending determination of the Summary Trial. The appeal was eventually dismissed, except that 567 was added as a defendant on the Hospitality Action trial with respect to remedy.

[203] In July 2006 Dr. Louie advanced funds to Mr. Nomani to permit strata lot 123 to be registered in his name. Strata lot 123 was subject to Certificates of Pending Litigation in favour of Hospitality and Executive with respect to the LSHS Action and Executive Action. After taking title, Mr. Nomani applied to be added as a defendant in the LSHS Action. In August 2007 I dismissed his application. In October 2007 his application for leave to appeal was denied.

[204] On November 9, 2006, 567 commenced the 567 Action against Hospitality and the Louie Group Defendants. He relied upon the Alleged June Agreements in the 567 Action and, on November 10, 2006 filed Certificates of Pending Litigation over the Louie Group Strata Lots. In response, Hospitality pleaded, amongst other things, that the Alleged June Agreements were not genuine. It also filed a counterclaim alleging that Mr. Nomani, 567 and the Louie Group Defendants entered into a conspiracy to defeat its rights under the LOI.

The Summary Trial - Parts 1 and 2

[205] On November 29 and 30, 2006, the Summary Trial - Part 1 proceeded before Pitfield J. Prior to its commencement, 567 sought standing to participate. It did not succeed.

[206] As noted, on December 27, 2006, in *Le Soleil Hospitality Inc. et. al. v. Louie et. al.*, [2006 BCSC 1920](#), Pitfield J. ruled that the LOI was a binding and enforceable agreement. In *Le Soleil Hospitality Inc. et. al. v. Louie et. al.*, [2008 BCCA 206](#), Pitfield J.'s decision was upheld on appeal.

[207] On April 11, 2007, a summary trial regarding the limitation of liability clause in section 8 of the LOI proceeded before Pitfield J. (the "Summary Trial - Part 2"). On May 2, 2007, in *Le Soleil Hospitality Inc. et. al. v. Louie et. al.*, [2007 BCSC 595](#), he ruled that the Louie Group Defendants had breached the LOI and the plaintiffs could pursue the

remedies of specific performance or damages. In *Le Soleil Hospitality Inc. v. Louie*, 2008 BCCA 206, Pitfield J.'s decision was upheld on appeal.

The Litigation Storm Continues

[208] By 2007 about one-third of the LSOG members named in the LSHS and Executive Actions had settled with Hospitality. A typical settlement was by way of a lease at 29% of revenue for a term expiring when the Leases expired. In some cases, the lease was terminable by an annual deadline.

[209] Over time, another one-third of the LSOG members named in the LSHS and Executive Actions stopped participating in the litigation. Hospitality obtained default judgments against these individuals.

[210] The remaining one-third of the LSOG members continued their participation in the LSHS and Executive Actions. Throughout 2007 various interlocutory applications were brought in the actions. By October 2007 several examinations for discovery were conducted in Singapore and preparation for trial, then scheduled to commence in early 2008 was well underway.

[211] On February 28, 2007, in *Nomani v. The Owners, Strata Plan LMS 3837*, 2007 BCSC 276, Blair J. dismissed the Administrator Proceedings. He also ordered Mr. Nomani to pay special costs for misleading the Court. In *Nomani v. The Owners, Strata Plan LMS 3837*, 2008 BCCA 236, Blair J.'s decision was upheld on appeal.

[212] On March 27, 2007, Action No. S072096 was commenced in the names of 567, Mr. Nomani and the LSOG owners of 18 strata lots (the "Peh Proceedings"). The petitioners sought an order setting aside the Leases. Mr. Nomani provided copies of the petition and his supporting affidavit to Dr. Louie.

[213] On May 18, 2007, Hospitality applied for appointment of a receiver with respect to the 18 Louie Group Strata Lots in 567's possession. 567 opposed the application based on its rights under the Alleged June Agreements and Dr. Louie supported 567's opposition. Pitfield J. dismissed Hospitality's application.

[214] In May and June 2007 a trial in Action Nos. S054232 and L052841 was conducted before Butler J. (the "Kasahara Proceedings"). The trial concerned whether the Kasaharas' strata lot should be included in the Hotel or was available to be managed by 567. The Kasaharas were members of LSOG. They were represented at trial by Dr. Louie's lawyer, Mr. Lithwick, who was instructed by Mr. Nomani. Mr. Nomani kept Dr. Louie apprised of developments.

[215] On September 14, 2007, in *Le Soleil Hospitality Inc. v. Kasahara*, [2007 BCSC 1372](#), Butler J. held that the Kasaharas were entitled to possession of their strata lot. He also held that they had breached their lease with Hospitality.

[216] The Peh Proceedings were brought on for hearing on October 19, 2007. On October 31, 2007, Sigurdson J. referred the petition to the trial list. On March 3, 2008, in *Peh v. The Owners, Strata Plan LMS 3837*, [2008 BCSC 291](#), he granted a stay of proceedings pending determination of the LSHS Action, Executive Action, Hospitality Action and 567 Action.

[217] Two of Dr. Louie's companies, 688571 B.C. Ltd. and 0700439 B.C. Ltd., were defendants in the Executive Action. Given the terms of the LOI, in February 2008 counsel for Executive informed Dr. Louie's counsel of his intention to discontinue against those companies, without costs. Given the stage of the proceedings, an application to discontinue was required before the action could be formally discontinued. Dr. Louie's counsel initially indicated that his consent to the application would be forthcoming. By March 4, 2008, however, it became clear that it would not.

[218] In March 2008 a mediation and examinations for discovery were conducted in the LSHS and Executive Actions in Singapore. Although he had been served with an appointment to be cross-examined on his affidavit at the same time, Mr. Nomani ignored the appointment and attended the mediation as Dr. Louie's representative. The mediation failed.

[219] I make no findings regarding the reasons for the mediation's failure. It was conducted in private and, in my view, it would be inappropriate to speculate about what transpired and why. Taking into account Dr. Louie's refusal to consent to discontinuance of the Executive Action against his companies and Mr. Nomani's participation in the mediation, however, I am satisfied that Dr. Louie was keenly interested in its outcome.

[220] After the LOI was signed, Hospitality remained concerned that Dr. Louie was supporting litigation contrary to its interests. As a result, Hospitality applied for an injunction restraining such conduct in respect of Hotel litigation other than the 567 Action. The Louie Group Defendants opposed the application. On May 8, 2008, I granted the injunction sought with respect to the LSHS Action, the Executive Action, and the Peh Proceedings (the "May 2008 Injunction").

[221] The trial in the LSHS and Executive Actions commenced on May 12, 2008. It carried on for several months and I gave judgment in favour of the plaintiffs on September 23, 2009. Although approximately 20 LSOG members remained as defendants in the actions to the date of judgment, only three travelled to Canada and testified at the trial.

[222] The trial in these actions was scheduled to commence on July 15, 2008. Given the demands facing its counsel in the other trial, however, 567 applied for an adjournment. On June 23, 2008, I granted 567's application (the "Adjournment Order"). It was a term of the Adjournment Order that 567 deliver to Hospitality possession of the 18 Louie Group Strata Lots that were under its control.

Litigation Funding

[223] Mr. Nomani maintained close contact with LSOG's leaders regarding the ongoing Hotel litigation. In February 2006 he met with Dr. Louie and Mr. Franiek to discuss litigation funding needs. In an email sent the day before the meeting, Mr. Nomani listed the legal costs for several lawsuits as an agenda item. Shortly thereafter, Dr. Louie caused his children's company to loan approximately \$122,000 to LSOG owners.

[224] The evidence reveals that, between 2006 and 2008, Dr. Louie raised and advanced substantial funding to support litigation that was contrary to Hospitality's interests. Dr. Louie and Mr. Nomani testified that this funding was advanced to LSOG members by way of loans. Dr. Louie, or companies he controlled, acquired the funds largely through loans obtained from Mr. Franiek (the "Franiek Loans"). The Franiek Loans were supported by Dr. Louie's covenant and secured by his companies' property.

[225] Dr. Louie arranged for deposit of funds borrowed from Mr. Franiek into the trust account of a law firm, Pihl and Company. From there, most of the borrowed funds went into a Scotiabank trust account maintained by Mr. Nomani (the "Scotiabank Trust Account"). Mr. Nomani used funds from the Scotiabank Trust Account to pay lawyers acting against Hospitality in the LSHS Action, Executive Action, Kasahara Proceedings and Peh Proceedings (together, the "Prohibited Actions"). Some of the same lawyers were also paid by Dr. Louie through Pihl and Company.

[226] It is unnecessary to review the detail of every payment made on Dr. Louie's behalf to lawyers with respect to the Prohibited Actions. In summary, the following amounts were paid for legal fees, taxes and disbursements for the Prohibited Actions from funds that were controlled by Dr. Louie:

To Hammerberg Altman for the LSHS Action and Executive Action:

2006	\$ 13,862.02
2007	\$ 46,677.42
2008	\$155,000.00

To Devlin Jensen for the LSHA Action and Executive Action:

2007	\$ 87,500.00
2008	\$385,000.00

To Holmes & King for the Peh Action and LSHS Action:

2006	\$ 1,000.00 for the Peh Action

2007	\$ 7,711.98 for the LSHS Action
	\$ 47,603.04 for the Peh Action
2008	\$ 20,000.00 for the Peh Action

To Kahn Zach for the Kasahara Action:

2006	\$ 10,000.00
2007	\$ 75,000.00

[227] Dr. Louie and his companies were not the only ones to deposit funds in the Scotiabank Trust Account. To a limited extent, the Kasaharas did so as well. The legal fees paid out of the Scotiabank Trust Account with respect to the Kasahara Proceedings, however, exceeded the Kasaharas' own contribution.

[228] As noted, the LSHS and Executive Actions were commenced in 2002 and 2004 but little progress was made until after Master Donaldson took over case management responsibilities. Although Dr. Louie made some payments to lawyers in 2006 in the LSHS and Executive Actions, the most active funding support commenced in the fall of 2007 and continued thereafter. This is not surprising, given that most major litigation steps, such as examinations for discovery and trial preparation, were undertaken from that point onward.

[229] Dr. Louie did not monitor the precise manner in which Mr. Nomani disbursed funds on deposit in the Scotiabank Trust Account. As he acknowledged at trial, however, he well knew the funds were being used to support litigation that was contrary to Hospitality's interests. As he also acknowledged, Dr. Louie knew the litigation would not continue without such funding because the LSOG defendants would not pay their lawyers to continue and Mr. Franiek would not advance the Franiek Loans without his guarantee and security. As he further acknowledged, the funding was advanced at his direction in deliberate breach of the LOI.

[230] I conclude that Dr. Louie was correct in all of the foregoing acknowledgments. Most LSOG members had settled or abandoned the Hotel litigation and I infer that, by October 1, 2007, those who continued on would also have settled if they had been required to pay substantial legal fees. This inference is based on all of the relevant evidence, including the fact that: the available settlement option was reasonable; some LSOG members had failed to pay previous legal accounts; by October 1, 2007 costly litigation steps were being undertaken; by April 2008 Mr. Lunny of Devlin Jensen was advising his LSOG clients that he would withdraw unless his outstanding account was satisfied and, in response, Dr. Louie obtained substantial sums "to get the job done"; and the judgment and costs awarded in the *Dockside Proceedings* were paid by Dr. Louie, not by the LSOG defendants.

[231] I also conclude that Dr. Louie funded the Prohibited Actions to enhance his ability to develop a competing hotel operation. Mr. Nomani maintained close ties with the LSOG defendants throughout and, if they prevailed, their units would become available for management by 567. Together, the Louie Group Strata Lots and LSOG units would number approximately 50. In the result, Dr. Louie, with Mr. Nomani's assistance, would be able to operate a substantial hotel operation if Hospitality would not agree to better terms for the Louie Group Strata Lots.

[232] I further conclude that, as with his perjury, Dr. Louie remains unrepentant regarding his conduct. Rather, he feels justified because, in his view, Hospitality also behaved badly toward him. Dr. Louie's attitude is exemplified by the following exchange with counsel, which took place in the course of cross-examination:

Q: I didn't ask you about the amount, sir, you knew that some of the funds were going to be used to pay Devlin Jensen?

A: Yes, you're saying that I breached – yes, I breached that covenant but also the hotel also breached their covenant to grant the estoppel certificate and grant the third-party transfer of the liquor licence, and they also failed to grant the – do the lease process, so if I've breached, then they've also breached, so in essence we say both sides breached.

Q: So you acknowledge that you deliberately breached the covenant in the LOI when you gave your guarantee and put up your security for that loan?

A: Yes, and I also acknowledge that the hotel breached their covenant to not give the -- not give me the estoppel certificate and grant the third-party transfer.

[233] Hospitality was alive to Dr. Louie's attitude of entitlement and indifference to his legal obligations. As noted, its principals were concerned throughout that he was supporting litigation adverse to its interests, despite his covenant not to do so. Its counsel expressed this concern repeatedly in correspondence to counsel for Dr. Louie. For example, in January 2007 two letters were sent to Mr. Lithwick remarking Dr. Louie's covenant and warning that its breach could increase Hospitality's damages. Similar concerns and warnings were expressed many times in other correspondence as well.

[234] Although Hospitality's warnings did not stop Dr. Louie from supporting litigation that was adverse to its interests, they did have an impact. In February 2007, after receiving one such warning, Dr. Louie expressed concern about it to Mr. Nomani, who passed on his concern to Mr. Franiek. In response, Mr. Franiek changed certain commitment letters from showing Dr. Louie as the borrower, with his company 365776 B.C. Ltd. ("365") as the guarantor, to 365 as the borrower and Dr. Louie as the guarantor. 365 was a defendant in the Fiduciary Action. It also held the disputed Liquor Licence.

[235] After February 2007 the Franiek Loans were arranged indirectly, through Dr. Louie's companies or Meridian. They were, however, ultimately supported by Dr. Louie personally. The funds were disbursed periodically to advance the Prohibited

Actions. Some of the funds were advanced after the May 2008 Injunction was granted, in direct violation of its terms.

[236] Dr. Louie's attempts to mask his role in connection with the Franiek Loans extended beyond obtaining them indirectly. He, 567 and Mr. Nomani failed to produce documents regarding the Franiek Loans, and their use, throughout the course of the litigation. Indeed, the nature and extent of the funding provided by Dr. Louie to support the Prohibited Actions came to light as the trial unfolded. It did so only after several mid-trial production orders were made and Mr. Franiek was compelled to testify pursuant to a subpoena.

DISCUSSION

THE HOSPITALITY ACTION

Is Hospitality entitled to an order for specific performance of the Option to Purchase contained in paragraph 4 of the LOI?

[237] Hospitality seeks an order for specific performance of the Option to Purchase contained in paragraph 4 of the LOI. The Louie Group Defendants consent to an order for specific performance but submit that the purchase price must be determined before the Option to Purchase can be specifically performed.

[238] Paragraph 4 of the LOI provides, in part:

4. **Option to Purchase:** The Louie Group will grant to Hospitality or its nominee (for clarity, references in this section to Hospitality includes its nominee) referred to jointly in this section an option to purchase all, but not less than all of the Strata Units, except for the Penthouse Unit, on the following terms:
 - (a) Hospitality may exercise its option to purchase all of the Strata Units except the Penthouse Unit but it may not exercise its option to purchase on the Penthouse alone. For clarity, if Hospitality exercises its option to purchase the Penthouse Unit, it must exercise its option to purchase all of the Strata Units;
 - (b) the purchase price for each of the Strata Units available for purchase shall be the lesser of:
 - (i) \$171,500, or
 - (ii) the average cost to the Louie Group for each of the Strata Units,

excluding the Penthouse Unit, such calculation to include the purchase prices, any legal fees and disbursements incurred as a result of the purchase (including the costs of any foreclosure actions, share purchase agreements or corporate transfer arrangements), Land Title Office, Corporate Registry and filing agent fees, Property Transfer Tax paid, and any other fees or expenses reasonably incurred for the purpose of acquiring the Strata Units or the companies that own the Strata Units, but specifically excluding any finder's fees or real estate commissions;

- (c) the purchase price for the Penthouse Unit will be \$340,000;
- (d) Hospitality must exercise its options by no later than December 15, 2005 and, if it exercises its options, it must pay to the Louie Group's solicitors a deposit in the amount of \$200,000 (the "Deposit") by no later than December 15, 2005, such amount to be held in trust and credit it to the purchase prices of the Strata Units on closing;
- ...
- (f) The Closing Date for any transfers will be no later than January 15, 2006; ...

[239] The applicable legal principles are not contentious. The appropriate remedy for breach of a contract for the disposition of land may be an order for specific performance, damages or both. Specific performance may be granted where the property in question is unique, an appropriate substitute is not readily available and damages would not be an adequate remedy: *Semelhago v. Paramadevan*, [1996 CanLII 209 \(SCC\)](#), [1996] 2 S.C.R. 415 at ¶ 21-22.

[240] In assessing the uniqueness of a property, the court should consider both objective and subjective factors. A single feature or many in combination may render a property unique. The court's task is to determine objectively whether the property has distinctive characteristics that make an award of damages inadequate, taking into account the plaintiff's subjective perspective at the time of contracting: *Ali v. 656527 B.C. Ltd.* (2004), [2004 BCCA 350 \(CanLII\)](#), 29 B.C.L.R. (4th) 206 at ¶ 29 (C.A.); *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* (2001), [2001 CanLII 28012 \(ON SC\)](#), 56 O.R. (3d) 341 at ¶ 59-60.

[241] The party seeking specific performance must be ready, willing and able to complete the contemplated transaction on the date fixed for completion and when the order is granted: *Norfolk v. Aikens*, [1989 CanLII 245 \(BC CA\)](#), [1989] B.C.J. No. 2256 at p. 13 (C.A.). If the party against whom the order is granted and to whom payment is due has committed breaches of the contract, the party claiming performance may be ordered to pay the contract price less the amount due for the antecedent breaches: *Eider v. Winser*, [1999] B.C.J. No. 1132 at ¶ 43 (C.A.); *Tanu v. Ray*, [1981] B.C.J. No. 86 at ¶ 7 (S.C.).

[242] In this case, I am satisfied that an order for specific performance is appropriate. At all material times Hospitality has been ready, willing and able to exercise the Option to Purchase and has taken all necessary steps to enable the purchase to occur: *Norfolk*. In particular, Hospitality repeatedly advised the Louie Group Defendants of its decision to exercise the Option to Purchase and attempted to deliver the necessary deposit. The funds required for the purchase price and legal fees to complete the purchase have been in a bank account since late October 2005.

[243] Given the unique importance of the Louie Group Strata Lots to the Hotel's orderly operation, damages would not be an adequate remedy for the Louie Group Defendants' contractual breaches. Amongst other things, they include meeting rooms and a variety of suites. Further, and importantly, control of the votes associated with the Louie Group Strata Lots will provide Hospitality with a greater say in the Strata Corporation. In all of the circumstances, an order for specific performance is required to achieve remedial adequacy: *Semelhago*.

If so, what is the proper calculation of the purchase price of the Louie Group Strata Lots?

[244] Paragraphs 4(b) and 4(c) of the LOI provide for calculation of the purchase price Hospitality must pay to the Louie Group Defendants. "Purchase price" is not, however, a defined term. It is used in the LOI in two different senses: the purchase price to be paid for the units by Hospitality and their cost when they were acquired by the Louie Group. Paragraph 4(b)(ii) refers to the "average cost to the Louie Group for each of the Strata Units" with respect to the latter. The meaning of "cost" in the context of the voluntary transfer is not specifically defined or otherwise explained.

[245] The parties agree on the purchase prices paid by the Louie Group for 23 of the Louie Group Strata Lots. Their average cost was \$164,547.42. The purchase price for the penthouse is fixed in the LOI at \$340,000.

[246] The parties do not agree, however, on the "cost to the Louie Group" or "purchase price" of the six 587 Lots acquired by voluntary transfer. The issue that divides them is whether the Louie Group Defendants should be given credit for the mortgages taken over at the time of transfer for purposes of calculating the purchase price to be paid by Hospitality.

[247] At the time of the transfers, 587 was a mortgagee on the 587 Lots. The Form A Transfers in respect of each 587 Lot provide that the consideration is "\$1.00 and other good and valuable consideration" and give a "market value" of each in a stated amount. No cash passed between vendor and purchaser, however, when the transactions took place.

[248] The liabilities registered on title at the time of the transfers were substantial. They include a mortgage held by 587325 B.C. Ltd. ("587325") and transferred to 587. They also include a mortgage for monies lent by 451182 B.C. Ltd. ("451182") and additionally secured against other strata lots. 587325 and 451182 are not members of the Louie Group.

[249] Prior to trial, the Louie Group Defendants were ordered to produce documents that would show how their acquisition of the 587 Lots was accounted for tax purposes.

Despite the Court's order, they did not produce these documents. It is, therefore, impossible on the available evidence to account for any losses on the loans in determining the actual overall cost of the 587 Lots to the Louie Group Defendants.

[250] The Louie Group Defendants submit the "purchase price" of the 587 Lots is comprised of the liabilities registered on title at the time of transfer. On this analysis, the average cost of all the Louie Group Strata Lots, excluding the penthouse, would exceed the \$171,500 unit ceiling price set in the LOI. Accordingly, in their submission, the total purchase price Hospitality must pay for the Louie Group Strata Lots is \$5,313,500. This sum is comprised of 29 units at an average cost of \$171,500 plus \$340,000 for the penthouse.

[251] Hospitality submits the fair market value of the 587 Lots should be considered as their "cost" and "purchase price" for purposes of calculation, given the nature of the mortgages assumed and the absence of necessary accounting information. On this analysis, the average cost to the Louie Group of the 587 Lots is \$131,737.

[252] In Hospitality's submission, the amount of the mortgage held by 587325 was not a true cost to the Louie Group Defendants because 587325 was not the purchaser. The same applies to amounts relating to 451182, which mortgage was also secured against other property. In addition, losses on the loans would have to be considered in any form of purchase price analysis and that information was not produced by the Louie Group Defendants.

[253] In interpreting the LOI, I must give the words used their plain, literal and ordinary meaning, unless absurdity would result, and construe it in context and as a whole. The genesis and aim of the transaction is part of the relevant context. If the parties' intent is not clear from the words used I may consider extrinsic evidence to interpret or explain it. If necessary, I may imply a term to give the LOI business efficacy if so doing would not rewrite it or contradict its other terms: *A.L. Sott Financial (FIR) Inc. v. PDF Training Inc.*, 2004 BCSC 1646 at ¶ 105-107; *Catalyst Paper Corp. v. Companhia de Navegação Norsul*, 2008 BCCA 336 at ¶ 27; *Alpine Veneers Ltd. v. Reed Lumber Co. Ltd.*, [1983] B.C.J. 2289 (C.A.) at ¶ 33-34.

[254] In my view, the parties' intent is not entirely clear from the words "purchase price" and "cost" as they relate to the Louie Group's acquisition of the Louie Group Strata Lots. That being so, I consider the extrinsic evidence recited above in relation to its negotiation for purposes of interpretation. I also consider the genesis and aim of the LOI as part of the relevant context.

[255] The LOI had several aims. One was to establish the purchase price to be paid by Hospitality for the Louie Group Strata Lots based on the costs expended or otherwise

experienced by the Louie Group in acquiring them. I conclude the “purchase price” and “cost” of the Louie Group Strata Lots was intended to mean either the amount paid for a unit or the actual net cost of acquisition to the Louie Group. In the context of a voluntary transfer, the actual net cost would include any losses on the loans.

[256] If, as occurred with the 587 Lots, the Louie Group failed or refused to establish its actual net costs of acquisition another method to determine the purchase price is required to give the LOI business efficacy. In order to do so, I imply a term that the unit’s fair market value is to be used for calculation purposes if and when the necessary accounting information is not produced by the Louie Group upon request. In my view, such an implied term is most consistent with the aim of the LOI and the entirety of the contract. It also prevents the Louie Group from depriving Hospitality of the bargained objective by refusing to provide evidence of its actual net costs of acquisition: *Schluessel v. Maier*, 2001 BCSC 60.

[257] In addition, I agree with Hospitality that the amounts of the mortgages held by 587325 and 451182 cannot properly be considered costs to the Louie Group Defendants. 587325 and 451182 are separate entities and not part of the Louie Group.

[258] Taking into account the foregoing, I find that the total purchase price for the Louie Group Strata Lots is \$4,915,021.66. This sum is comprised of 23 units at an average cost of \$164,547.42, the six 587 Lots at an average cost of \$131,737, plus \$340,000 for the penthouse.

Is Hospitality entitled to an order for specific performance of the Lease Modification Agreement contemplated in paragraph 3 of the LOI?

[259] Hospitality seeks an order for specific performance of the Lease Modification Agreement contemplated in paragraph 3 of the LOI (the “Lease Modification Agreement”). The Louie Group Defendants consent to an order for specific performance in this regard. They submit, however, that they require an opportunity to consult with a solicitor regarding the terms proposed by Hospitality before formulating their position. In the event that agreement cannot be reached, they say liberty should be granted to apply to the court or the registrar to settle its terms. They also say that once the Lease Modification Agreement is executed Restaurant should sign the estoppel certificate referenced in paragraph 3 of the LOI.

[260] Paragraph 3 of the LOI provides as follows:

3. **Extension of Restaurant Lease:** Dr. Louie will cause 585503 British Columbia Ltd. (“585503”) to enter into a lease modification agreement with Restaurant with the following terms and conditions:

- (a) 585503 will grant Restaurant two additional renewal terms of five years each, such renewals to be at Restaurant’s option provided that Restaurant

is in good standing in all material terms under the terms of the restaurant lease;

- (b) by December 31, 2006, 585503 will, with respect to the calculation of base rent payable in the second and third renewal terms, elect to either maintain the same rental arrangement currently in place for any first renewal term or have rent in the second and third renewal terms negotiated between the parties, failing which the rent will be determined through commercial arbitration and subject to submissions as to the fair market rent for these strata lots;
- (c) Restaurant will, for any year (or portion thereof) that the Penthouse Unit is owned by the Louie Group and remains a part of the Hotel rental pool, pay an additional sum of \$5,000 per year (prorated to the number of days in the year that the Penthouse Unit is in the Hotel rental pool) under the restaurant lease, such sum to be paid in equal quarterly instalments commencing on November 1, 2005. This sum will not be included as rent in the event of that commercial arbitration is required to set rent in either a second or third renewal term. As such, the amount payable by Restaurant under the lease will be any rent determined under arbitration will be that sum plus \$5,000 per year;
- (d) 585503 and Restaurant will resolve outstanding issues involving the Liquor Licence, specifically whether the existing licence should be transferred to Restaurant or 585503 and Restaurant will jointly complete an application for a Third Party Operator relationship;
- (e) 585503 will take reasonable commercial steps to obtain a Non-disturbance Agreement from HSBC Bank Canada. The parties acknowledge that as Restaurant is registered in priority to the HSBC Mortgage the Non-disturbance agreement, while desired, is not necessary under the terms of the Lease; and
- (f) upon resolution of paragraph (d) and (e), Restaurant will provide an Estoppel Certificate to 585503 in a form provided by solicitors for 585503 and confirming that the lease is in good standing and there are no extant claims of Restaurant.

[261] In the course of the trial Hospitality tendered a proposed form of Lease Modification Agreement, which was filed as an exhibit. At the end of the trial, counsel for the Louie Group Defendants stated that he was not an expert on leases and had not consulted with a solicitor on the terms presently proposed. As a result, he advised that Dr. Louie was unable to provide the Court or Hospitality with his position on the form of Lease Modification Agreement that should be executed pursuant to an order for specific performance.

[262] Hospitality submits that the issue of the Lease Modification Agreement has been outstanding for several years and no further delay should be permitted. In the circumstances, it says the Court should review the tendered exhibit and, if satisfied it is consistent with paragraph 3 of the LOI, declare that 585503 should sign a Lease Modification Agreement in those terms.

[263] I accept that an order for specific performance of the Lease Modification Agreement contemplated in paragraph 3 of the LOI is appropriate. I find, however, that its terms should be negotiated by the parties and, if possible, agreed upon rather than

imposed by the Court. In my view, that is the process contemplated by paragraph 3. It should, therefore, be undertaken. If it fails, an application can be made for the Court to resolve the contentious issues that crystallise in the negotiation process.

[264] It is unfortunate that Dr. Louie did not consult with a solicitor on this matter prior to the trial's conclusion. It is desirable for him to do so, however, and, if necessary, present the Court with his position on any issues that cannot be resolved by agreement.

Accordingly, on September 30, 2009 I granted the order for specific performance of the Lease Modification Agreement contemplated in paragraph 3 of the LOI in a form agreed by the parties by no later than October 15, 2009, with liberty to apply to the Court on two clear days notice to settle the terms if agreement is not reached. Pursuant to paragraph 3(f) of the LOI, the estoppel certificate is to be signed when the requirements of paragraphs 3(d) and (e) have been met or the Court has ordered otherwise.

What damages were caused to Hospitality by the Louie Group Defendants' breaches of paragraphs 4 and 5 of the LOI?

[265] Paragraph 4 of the LOI, set out above, deals with the Option to Purchase. Paragraph 5 of the LOI deals with Dr. Louie's covenant to refrain from supporting litigation that is contrary to Hospitality's interests. It provides:

5. **Dr. Louie's Covenants:** Hospitality has requested and Dr. Louie has agreed that, from the date of this Letter of Intent, Dr. Louie will cause the Louie Group to refrain from the date of this Letter of Intent:
- (a) entering into lease arrangements with respect to the Strata Units;
 - (b) purchasing any other strata units at the Hotel; and
 - (c) supporting any litigation that is contrary to the interests of Hospitality or Restaurant in relation to the operations of the Hotel.

[266] Hospitality submits that it suffered substantial losses as a result of the Louie Group Defendants' breaches of paragraphs 4 and 5 of the LOI.

Positions of the Parties on Damages

[267] In addition to an order for specific performance, Hospitality seeks awards of damages calculated on the following basis:

- i) a loss of net income for Hotel operations from December 2005 to July 2008 of \$1,479,036 (the "Operational Loss") and a loss of net rental income for the Louie Group Strata Lots for the period December 2005 to September 2008 of \$774,561 (the "Ownership Loss"), for a combined sum of \$2,253,597;
- ii) reduced by the amount of interest earned by Hospitality on the capital sum on deposit for the purchase of the Louie Group Strata Lots;
- iii) increased by pre-judgment interest calculated as though the income had been received over time, monthly;
- iv) further increased by an amount equal to the loss of rental income received by the Louie Group Defendants from October, 2008 to the date of judgment;

- v) and further increased by prejudgment interest on all amounts, less any additional interest earned by Hospitality on the purchase funds on deposit; as well as
- vi) an award for Hospitality's legal fees incurred in connection with the Prohibited Actions or assessed as reasonable by the Registrar.

[268] According to Hospitality, it would have earned significantly greater profits if the eighteen Louie Group Strata Lots it did not control until July 2008 had been made available from the outset. The units in question included three strategically important meeting rooms (the "Meeting Rooms"), as well as business suites, deluxe suites and a penthouse. Had the LOI been performed, Hospitality would have profited from the use of a total of 113 rooms, rather than 95 rooms, in its Hotel operation. In addition, Hospitality would have received rental income as owner of all of the Louie Group Strata Lots.

[269] In support of its submission Hospitality relied upon the expert evidence of Charles Suddaby, a hotel industry consultant. Mr. Suddaby calculated the Operational Loss claimed on the assumption that a 113-room Hotel would have enjoyed the same overall occupancy levels actually experienced by the 95-room Hotel: 87%. In so doing he took into account the Hotel's high demand pattern and "turn-away" business, as well as the value of the Meeting Rooms for group bookings and Mr. Somani's exceptional skill as an hotelier. Mr. Suddaby treated the Meeting Rooms as sleeping rooms in his calculations on the assumption that they would have generated at least the same amount of revenue.

[270] As to expenses, in projecting for the larger Hotel Mr. Suddaby took into account economies of scale in performing his calculations. He noted that fixed expenses would not change and applied the ratio of variable expenses for the smaller hotel to the larger inventory of rooms. The Operational Loss was calculated, based on unit entitlement, in terms of the incremental revenues and costs attributable to the missing eighteen Louie Group Strata Lots. The \$1,479,036 figure claimed represents the difference between the adjusted net income of \$3,036,999 for a 113-room Hotel and \$1,557,963 for the 95-room Hotel for the period December 2005 to July 2008.

[271] Mr. Suddaby arrived at the Ownership Loss claimed by calculating the rents payable on the Louie Group Strata Lots and deducting any ownership costs Hospitality would have incurred, such as strata fees and property taxes. The \$774,561 figure claimed represents the sum of \$326,651 as the net rental income for the twelve Louie Group Strata Lots in Hospitality's possession pursuant to the Monitor's Order and \$447,910 as the net rental income for the eighteen Louie Group Strata Lots for the period December 2005 to September 2008.

[272] Hospitality goes on to submit that the combined sum of \$2,253,597 must be adjusted in order to place it in the position it would have occupied had the LOI been performed properly. In particular, it should be reduced by the interest earned on the

capital sum for the purchase price, increased by prejudgment interest calculated as though the income would have been received monthly, increased by an amount equal to the loss of rental income received by Dr. Louie until the date of judgment, and further increased by a final prejudgment interest calculation on all amounts, less any additional interest on the capital sum.

[273] Hospitality further submits that it suffered significant losses due to Dr. Louie's breaches of his covenant not to support adverse litigation. According to Hospitality, it would not have been forced to incur any, or at least most, of the legal fees paid in connection with the Prohibited Actions but for Dr. Louie's extensive funding. Rather, given the reasonable settlement option available to the LSOG defendants, the LSHS and Executive Actions would have ended by no later than the fall of 2007. In addition, the Peh Proceedings and the Kasahara Proceedings would have ended earlier or would not have been conducted at all.

[274] Hospitality says that the funds acquired and advanced through the Franiek Loans, as well as use of money and security belonging to the Louie Group, fall squarely within the covenant. Dr. Louie personally supported the litigation by borrowing or covenanting to pay the Franiek Loans. He also personally participated in the acts of his companies involved in giving security by signing the necessary documentation. In addition, in Hospitality's submission, Dr. Louie must not be permitted to do indirectly, through his companies, that which he cannot do directly as a result of his personal covenant.

[275] The Louie Group Defendants respond that some of Mr. Suddaby's assumptions are flawed and, therefore, his loss calculations are inflated. They submit that much lower awards than those sought are justified on the evidence placed before the Court. In support of their submission, the Louie Group Defendants rely on the expert evidence of Stewart Instance, an hotelier and consultant.

[276] Like Mr. Suddaby, Mr. Instance calculated an Operational Loss to Hospitality associated with the missing eighteen Louie Group Strata Lots. The figures they reached, however, contrasted sharply; for example, Mr. Instance calculated a loss of \$197,153 for the period ended March 2008 whereas Mr. Suddaby calculated a loss of \$1,251,392 for the same period.

[277] Mr. Instance calculated the Operational Loss based on lower occupancy rates and higher expenses for the Louie Group Strata Lots in question. He disagreed with Mr. Suddaby's foundational assumption that a 113-room Hotel would have enjoyed the same overall 87% occupancy level as the 95-room Hotel actually did. In support of his position, Mr. Instance focused on the recent downturn in the hotel market and lack of significant difference in Hotel profit actually earned after July 2008, when the 18 units came into Hospitality's possession. In performing his calculations he assumed the additional 18

rooms would have permitted an average of seven additional room nights whenever the Hotel had occupancy that exceeded 87%. He also assumed the Meeting Rooms would not have generated any revenue and calculated an increase in the ratio of departmental expenses for the 18 new rooms from 11% to 18.8%.

[278] Mr. Instance also disagreed with Mr. Suddaby in connection with Hospitality's claimed Ownership Loss for the Louie Group Strata Lots. He suggested that Mr. Suddaby underestimated their ownership cost because higher property taxes would have been payable as the units would likely have been reclassified "commercial", rather than "residential". He went on to suggest that an Operational Loss and Ownership Loss should not both be claimed because, as owner and operator, Hospitality would be paying itself rent.

[279] The Louie Group Defendants further submit that the award for lost profits should be based on net, rather than gross, profits. This is necessary, they say, to avoid overcompensating Hospitality. Accordingly, they say the effect of corporate taxes that would have been payable on the lost profit claimed must be considered. No evidence was presented, however, regarding this matter.

[280] As to the breach of covenant, the Louie Group Defendants submit that Hospitality has not proven whether the legal fees incurred in connection with the Prohibited Actions were reasonable or would have been incurred regardless of the impugned funding. They say it would be unfair to impose upon them the full burden of legal costs that were wholly within Hospitality's choice and control. They also say the damages claimed are too remote and were not foreseeable when the LOI was concluded.

[281] According to the Louie Group Defendants, there is no evidence that the Prohibited Actions would have ended at a particular point but for the provision of Dr. Louie's funding. On the contrary, they say the LSOG defendants in the LSHS and Executive Actions may have obtained funding elsewhere and proceeded forward on their own behalf. In their submission, it would be speculative for me to conclude otherwise. In addition, it is impossible to know whether the mediation in Singapore would have produced a settlement had Mr. Nomani not attended and it is unclear to what extent Dr. Louie's contribution enabled the Kasahara Proceedings to continue. The Louie Group Defendants also emphasize that they were not parties in the Peh Proceedings.

[282] In the alternative, the Louie Group Defendants submit there should be a 25% reduction applied to the sums paid by Hospitality for the Prohibited Actions to account for further "clean up" costs that would have been incurred after the actions were discontinued.

Applicable Legal Principles

[283] The purpose of contract damages is to put the innocent party as nearly as possible in the position that party would have occupied had the contract been performed properly. In awarding such damages the court's goal is to assess fair compensation for the plaintiff's proven loss: *Asamera Oil Corp. Ltd. v. Sea Oil and General Corp. and Baud Corp. N.V.*, [1978 CanLII 16 \(SCC\)](#), [1979] 1 S.C.R. 633.

[284] When specific performance is ordered, damages for delay in completion may also be awarded: *Van Dyk v. Duorno*, [2005] B.C.J. No. 1052 at ¶ 81-82 (S.C.); *Baker v. Sockman*, [1979] B.C.J. No. 965 at ¶ 2, 14-16 (S.C.); *B. Zar Enterprises Corp. v. Hitchen*, [1982] B.C.J. No. 1502 at ¶ 26 (S.C.). In keeping with the *restitutio in integrum* principle, however, such an award should be reduced by the amount of interest earned on the unpaid purchase funds: S.M. Waddams, *The Law of Damages* (Looseleaf Edition) (Toronto: Canada Law Book, 2008), at ¶1.1120-1.1180).

[285] A defendant will not be held liable for damages that were not reasonably foreseeable at the time of contracting. The requisite knowledge may be actual or imputed. The question for determination as to foreseeability is "whether reasonable parties would have contemplated the type of loss that actually occurred had they put their minds to the effect of a breach of contract in the circumstances": Harvin D. Pitch and Ronald M. Snyder, *Damages for Breach of Contract*, 2nd edition (looseleaf), (Toronto: Thompson Carswell, 2008 update) at p. 7-23.

[286] The burden of proving a compensable loss rests upon the plaintiff. In some cases, however, the defendant's wrongdoing renders it unusually difficult for this burden to be discharged. In such circumstances, although the burden does not shift from one party to the other it may be met by application of a presumption of adverse facts against the wrongdoer: *D. Fogell Associates Ltd. v. Esprit de Corp (1980)/Esprit de Corp (1980) Ltee.*, 1997 CarswellBC 1131 at ¶ 55 (S.C.); *Mark James Ltd. v. Collins* (1994), 96 B.C.L.R. (2d) 87 at ¶ 37-40 (S.C.).

[287] The principle that adverse facts will be presumed where the defendant's wrongful conduct prevents a relevant fact from being established stems from the decision in *Armory v. Delamirie* (1722), 1 Strange 504. In *Last Chance Mining Co. v. American Boy Mining Co.*, 1904 CarswellBC 10 at ¶ 11-13 (S.C.), Martin J. applied the principle in a case in which the defendant mixed his ores with those of the plaintiff and could not satisfactorily identify and distinguish between the two. In the course of his analysis, Martin J. quoted from *Armory*, as follows:

11 The consequences are really but the natural result of the application to mining operations of well known principles long ago enunciated in *Armory v. Delamirie* (1722), 1 Strange, 504, wherein it is laid down: --

When the nature of a wrongful act is such that it not only inflicts an injury, but takes away the means of proving the nature and extent of a loss, the law will aid a recovery against the wrongdoer and supply the deficiency of

proof caused by his misconduct by making every reasonable intendment against him and in favour of the party injured... A man who wilfully places the property of others in a situation where it cannot be recovered, or its true amount or value ascertained, by mixing it with his own, or in any other manner, will consequently be compelled to bear all the inconvenience of the uncertainty or confusion which he has produced, even to the extent of surrendering the whole, if the parts cannot be discriminated, or responding in damages for the highest value at which the property can reasonably be estimated.

[288] It is trite law that individuals and corporations have separate legal personality: *Salomon v. Salomon & Co. Ltd.*, [1897] A.C. 22. In certain circumstances, however, the corporate veil may be lifted or pierced. In particular, where a corporation is used by a controlling individual to commit fraudulent or improper conduct the court will reach through the corporate persona to prevent the individual from doing indirectly that which cannot be directly done.

[289] In *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, 1996 CanLII 7979 (ON SC), [1996] O.J. No. 1568 at p. 7 (Gen. Div.)(QL), aff'd [1997] O.J. No. 3754 (C.A.), Sharpe J. (as he then was) described the circumstances in which the corporate veil may be pierced to prevent a fraud from being perpetrated. He stated:

... the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct...

[290] In *Halpern Investments Ltd. v. Sovereign General Insurance Company*, 2004 ABQB 865, Clark J. reviewed several cases in which the corporate veil was pierced because of fraud or other improper conduct. He went on to pierce the corporate veil to prevent an individual who was the guiding hand behind two corporate entities from benefiting from an admitted fraud; see also *B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Holdings Limited* (1989), 1989 CanLII 230 (BC CA), 37 B.C.L.R. (2d) 258 (C.A.)

[291] The plaintiff is obliged to mitigate damages caused by a contractual breach when he or she learns of it by taking all reasonable steps to prevent further loss. Where such steps are undertaken, the plaintiff can recover for the loss and all reasonable expenses incurred in mitigation of that loss: *Asamera Oil Corp. Ltd.*

[292] Once the plaintiff has proven damages on a reasonable preponderance of credible evidence, the burden lies on the defendant to raise and establish a failure to mitigate. In order to discharge the burden and limit the award of damages, the defendant must lead adequate proof of the alleged failure to the same standard of proof required of the plaintiff: *Peerzan v. Cameron*, 1982 CarswellBC 2113 (S.C.) at ¶ 7; *Red Deer College v. Michaels*, 1975 CanLII 15 (SCC), [1976] 2 S.C.R. 324 at 331; *Graham v. Rogers*, 2001 BCCA 432 at ¶ 85.

[293] The duty to mitigate does not require the plaintiff to act perfectly in response to the defendant's breaches of contract. Although the defendant is entitled to expect that only reasonable remedial costs will be expended, the court will not take an overly critical view taking into account the exigencies of the situation faced by the plaintiff: *Addco Drywall Ltd. v. White Rock Manor Joint Venture*, 1991 CarswellBC 831 (S.C.) at ¶ 105.

Application of Legal Principles to the Facts

[294] I agree with Hospitality's analysis regarding its Operational and Ownership Losses. In my view, Mr. Suddaby's calculations and underlying assumptions are logical, reasonable and fair. In particular, I am satisfied that the overall occupancy level of the 113-room Hotel skilfully operated by Mr. Somani would probably have been the same as that achieved for the 95-room Hotel throughout the relevant period. I am also satisfied that economies of scale of the sort Mr. Suddaby identified would have been enjoyed.

[295] I do not accept Mr. Instance's criticisms of Mr. Suddaby's Operational Loss analysis. Given the lead-time required for reservations and other absorption adjustments, the lack of increased profit after July 2008 is unsurprising and the summer downturn of 2008 is of negligible effect. In addition, Mr. Instance's own analysis suffered from several deficiencies. For example, it was unreasonable for him to assume that the Meeting Rooms would generate no revenue and the expense ratio per room would increase rather than decrease.

[296] I also accept Mr. Suddaby's Ownership Loss analysis and reject that of Mr. Instance. In my view, Mr. Instance's suggestion that property tax rates would likely have increased when the Louie Group Strata Lots were conveyed is inconsistent with the evidence and speculative at best. In addition, his view that Operational and Ownership Losses cannot both be properly claimed is untenable. If Hospitality did not choose to pay itself rent for the Louie Group Strata Lots, its operational profit would have increased by the same amount. Accordingly, from a loss perspective the result would be the same.

[297] In so far as the evidence of Mr. Instance conflicts with that of Mr. Suddaby, I prefer the evidence of Mr. Suddaby.

[298] I also am satisfied that the adjustments proposed by Hospitality are required to achieve full and fair compensation. I also find there is no basis for adjusting the damages awarded with respect to taxation. That is a matter for the parties.

[299] As to the breaches of Dr. Louie's covenant, again I generally agree with Hospitality's analysis. Dr. Louie acted personally, intentionally and in direct violation of his covenant by providing substantial funding for the Prohibited Actions. In so far as he also acted indirectly, through his companies, it is appropriate to pierce the corporate veil in order to prevent these entities from being used as a shield for such improper conduct.

[300] I do not accept that Hospitality's damages for Dr. Louie's breach of covenant were unforeseeable or remote, as submitted by the Louie Group Defendants. On the contrary, one of the central purposes of the LOI was to end the need for either party to engage in litigation that was adverse to Hospitality's interests. When the litigation storm continued, due in part to Dr. Louie's breaches of covenant, this contemplated purpose was defeated. The foreseeable result was that further legal fees were incurred.

[301] I also do not accept that the Prohibited Actions could well have proceeded in the absence of the impugned funding. I have found that the LSHS and Executive Actions would have ended by October 1, 2007 because the remaining LSOG defendants would have settled by then if the litigation had not been funded by Dr. Louie. I also find that the Peh Proceedings would not have been conducted and, at most, one-half of the fees incurred would have been required to conclude the Kasahara Proceedings if the Kasaharas alone had been paying their lawyer. In so far as it is necessary to do so, I resolve any uncertainty on these matters in favour of Hospitality based on the *Armory* principle.

[302] There is no basis in the evidence to support a finding that 25% of the fees incurred would have expended for "clean up" costs in the absence of Dr. Louie's breach of covenant. Accordingly, I decline to make such a finding in favour of the Louie Group Defendants.

[303] I do accept, however, that Hospitality is entitled to recover only those legal fees, disbursements and taxes that were reasonably incurred in responding to the Prohibited Actions: *Asamera Oil Corp. Ltd.* Although there is no suggestion in the evidence that any of the fees, disbursements or taxes actually incurred were unreasonable, a detailed analysis on this issue was not undertaken at trial. For this reason, I conclude this task should be performed by the Registrar.

[304] Taking into account the foregoing, I conclude that Hospitality is entitled to damages calculated as follows:

Hotel Operations and Rental Income

With respect to loss of net income for hotel operations from December 2005 to July 2008, the sum of \$1,479,036; and

With respect to the loss of net rental income for the Louie Group Strata Lots for the period December 25 to September 2008, the sum of \$774,561;

From which combined sum of \$2,253,597 is to be deducted the sum of interest on the unpaid capital sum payable for the Louie Group Strata Lots,

With pre-judgment interest payable on this adjusted sum calculated as though the lost income was received over time, monthly;

With respect to loss of net rental income for the Louie Group Strata Lots from October 2008 to September 2009, an amount equal to the net rental income received by the Louie Group defendants during this period;

Together with pre-judgment interest, less additional interest;

With leave to make further submissions in writing or in person in the event agreement as to calculation is not reached.

Support of Prohibited Actions

With respect to the LSHS Action and the Executive Action: all legal fees and disbursements reasonably incurred by Hospitality from and after October 1, 2007, as assessed by the Registrar;

With respect to the Kasahara Proceedings, 50% of all legal fees and disbursements reasonably incurred by Hospitality as assessed by the Registrar;

With respect to the Peh Proceedings, all legal fees and disbursements reasonably incurred by Hospitality as assessed by the Registrar.

[305] I also award special costs against the Louie Group Defendants and 567 on a full indemnity basis, with joint and several liability for the special costs, on the basis outlined below.

Should the damages and costs awarded be set off against the purchase price of the Louie Group Strata Lots?

[306] I have awarded damages and costs against the Louie Group Defendants in addition to ordering specific performance. Hospitality seeks a term of the order permitting damages and costs to set off against the purchase price of the Louie Group Strata Lots.

[307] The damages and costs awards are based on and arise out of the Louie Group Defendants' breaches of the LOI. It is, therefore, appropriate for Hospitality to pay the purchase price of the Louie Group Strata Lots less the amount due for damages and costs: *Eider, Tanu*.

THE 567 ACTION AND THE COUNTERCLAIM

Are the Alleged June Agreements authentic or fraudulent?

[308] I have concluded that Mr. Nomani created the Alleged June Agreements on November 7 and 8, 2005, not in June 2005 as he claimed. I have also concluded that Dr. Louie signed seven of them on November 8, 2005 at Mr. Visram's office and Jonathon

Louie signed the eighth some time thereafter. As noted, this conclusion is based on the following factors:

- i) Dr. Louie's revised testimony in which he admitted signing the Alleged June Agreements on November 8, 2005 at Mr. Visram's office;
- ii) Dr. Louie's admission that he committed perjury on this issue and counselled his son, Jonathon, to do the same;
- iii) Dr. Louie's decision to back out of the LOI almost immediately after it was concluded;
- iv) Dr. Louie and Mr. Nomani's failure to disclose the Alleged June Agreements to the Court, Dr. Louie's counsel, opposing counsel or Hospitality prior to November 8, 2005, although they were obliged to do so or disclosure was in Dr. Louie's interest;
- v) the forensic evidence regarding use of Mr. Nomani's computer on November 7 and 8, 2005, together with Mr. Nomani's inherently improbable explanation for that use; and
- vi) Mr. Nomani's attempts to hide, alter and manufacture electronic documents related to the Alleged June Agreements.

[309] Hospitality submits that the Alleged June Agreements were created for the fraudulent purpose of asserting a pre-existing right to the Louie Group Strata Lots in order to defeat its rights under the LOI. According to Hospitality, immediately after the LOI was concluded Mr. Nomani persuaded Dr. Louie that he had made a bad deal and they could negotiate better terms. In furtherance of this goal, on November 7 and 8, 2005 Mr. Nomani created and Dr. Louie executed the Alleged June Agreements. Thereafter, both relied on them in various litigation contexts at great cost to Hospitality.

[310] Dr. Louie concedes that he signed the Alleged June Agreements on November 8, 2005, after the LOI was concluded. He also concedes that Mr. Nomani "lacks credibility" with respect to the Alleged June Agreements. He submits, however, that the alleged fraud was of no consequence because the RFRs were never exercised and Hospitality's priority status with respect to the Louie Group Strata Lots was never truly endangered. In essence, his position is that the alleged fraud was so poorly designed and executed that it caused no real damage.

[311] Mr. Nomani maintains that the Alleged June Agreements were created and executed in June, 2005. He vehemently denies committing any fraudulent act and

accuses Hospitality of engaging in “a propaganda campaign to color the main facts and issues”. He goes on to describe its theory as “circumstantial and anecdotal”.

[312] Fraud is amongst the most serious forms of civil action: *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1990 CanLII 819 \(BC CA\)](#), [1990] B.C.J. No. 672 (C.A.). Sometimes called the tort of deceit or fraudulent misrepresentation, it may be committed in a wide variety of ways. Its essential elements are:

- i) a false representation of fact by the defendant;
- ii) made with knowledge of its falsity or, alternatively, recklessly as to its truth;
- iii) made with the intention that the plaintiff would be deceived and act upon it, which occurred; and
- iv) the plaintiff suffered damage as a result:

Derry v. Peek (1889), 14 App. Cas. 337 (H.L.); *Han v. Cho* [2009 BCSC 458](#) at ¶ 79; *BG Checo*.

[313] An intention to defraud may be established by direct or circumstantial evidence. In many cases, the court will analyse so-called “badges of fraud” to make the necessary determination. In the context of an allegedly fraudulent transfer of property, such badges or indicia may include:

- i) the relationship between the parties to the transfer;
- ii) the effect of the transfer on the assets of the debtor;
- iii) evidence of haste in making the transfer;
- iv) the timing of the transfer relative to claims against the debtor;
- v) secrecy; and
- vi) the effect of the transfer on the creditor:

Frimer v. Lercher, [1984] B.C.J. No. 728 at ¶ 12 (S.C.); *Wilson v. Gill* (1995), [1995 CanLII 1215 \(BC SC\)](#), 33 C.B.R. (3d) 21 at ¶ 25 (B.C.S.C.).

[314] In a civil proceeding, fraud must be established on a balance of probabilities: *F.H. v. McDougall*, [2008 SCC 53](#) at ¶ 49.

[315] In this case, Dr. Louie and Mr. Nomani were determined to defeat the LOI within hours of its conclusion. They maintained their determination in the days that followed,

despite receiving legal advice from Messrs. Epstein, Jakubec and Berger that the LOI was binding and enforceable. I conclude that, faced with this unwelcome advice, they decided to create the Alleged June Agreements for the fraudulent purpose of advancing their goal.

[316] For over three years, Dr. Louie and Mr. Nomani falsely represented that the Alleged June Agreements were created and signed in June 2005, before the LOI was concluded. Based on this false representation, they claimed that 567 had a pre-existing right to the Louie Group Strata Lots and, therefore, Hospitality's rights under the LOI were superseded. Their intention in so doing was to deceive Hospitality, persuade it to negotiate better terms for the Louie Group Strata Lots, and improve 567's position. They also intended to deceive the Court in an effort to prevail in the litigation.

[317] Hospitality did not accept that the Alleged June Agreements were authentic. In consequence, Dr. Louie and Mr. Nomani's fraudulent purpose was never fully achieved. Hospitality was obliged, however, to respond to the fraudulent misrepresentation, and did so by refuting the false claim and seeking to enforce its rights under the LOI. Although ultimately successful, Hospitality suffered considerable damage in connection with costs and delay incurred in the hotly contested litigation.

[318] I am satisfied the essential elements of fraud have been established. The Alleged June Agreements are fraudulent. Dr. Louie and Mr. Nomani are both parties to the fraud.

Did the Louie Group grant the RFRs to 567 in June 2005, or at all?

[319] Given the absence of independent evidence, I have been unable to make findings regarding the nature and terms of any verbal agreement that existed between the Louie Group Defendants and 567. That being so, 567 has failed to discharge the requisite onus of proof and I answer this question in the negative.

Is 567's claim moot or is it necessary to decide whether any instruments or agreements give priority to 567 over Hospitality's rights under the LOI? If such instruments or agreements have been established, did Hospitality induce Dr. Louie to breach them?

[320] I have concluded that no instruments or agreements giving priority to 567 over Hospitality's rights under the LOI have been established on the evidence. If I am wrong, however, and the evidence supports such a finding, it is prudent to go on and consider whether 567 is entitled to a declaration to this effect.

[321] Throughout the course of the trial, 567 maintained that the Alleged June Agreements were executed in June 2005, before the LOI was concluded. It also maintained that, in any event, they evidence the parties' verbal agreement with respect to the RFRs. At the trial's conclusion, Mr. Nomani announced that 567 no longer sought to

rely upon the RFRs. Nevertheless, he asked me to declare that the RFRs give priority to 567 over Hospitality's rights under the LOI and Hospitality induced Dr. Louie to breach them.

[322] Courts generally decline to decide cases which raise merely hypothetical questions. Occasionally, however, a court may exercise its discretion to address an issue that is moot. For example, if an important question arises recurrently, but only briefly, the court may decide to answer it even though there is no longer a live controversy in the case: *Borowski v. Canada (Attorney General)*, [1989 CanLII 123 \(SCC\)](#), [1989] 1 S.C.R. 342 at 358-363.

[323] Although moot issues may be addressed in certain circumstances, the court's discretion will not be exercised if no practical purpose would be served by so doing. In particular, it has been repeatedly held that declaratory relief should not be granted where the declaration sought would be without practical effect: *Gardner v. City of Williams Lake*, [2005 BCSC 706](#) at ¶ 97-99; *Haldorson v. Coquitlam (City)* (2000), 3 C.P.C. 225 at ¶ 12 (B.C.C.A.).

[324] From the parties' perspective, no practical purpose would be served by granting the declaratory relief sought by 567. In addition, the existence or non-existence of the RFRs is not a matter of general importance. In the circumstances, I am satisfied the claim is moot and no further analysis is appropriate or required: *Borowski*; *Gardner*; *Haldorson*.

[325] I am also satisfied that even if the evidence establishes a verbal agreement between Dr. Louie and 567, Hospitality did not induce Dr. Louie to breach it.

[326] The tort of inducing breach of contract is committed where the defendant induces a breach of contract between the plaintiff and a third party and, as a result, the plaintiff suffers damage: *Slade and Stewart Ltd. v. Haynes*, [1969] B.C.J. No. 439 at ¶ 10 (S.C.). The essential elements are:

- i) the defendant had knowledge of the contract;
- ii) the defendant intended to bring about, induce or procure the breach of the contract;
- iii) the defendant persuaded or otherwise prevailed upon one party to a contract to break it, thereby causing loss to the plaintiff, the other contracting party or the defendant induces the contract breaker to enter into a contract with him or her that is inconsistent with the existing contract of the plaintiff; and

iv) the plaintiff suffers damages as a consequence of the defendant's conduct.

Fabbi v. Jones (1972), 1972 CanLII 127 (SCC), 28 D.L.R. (3d) 224 at 232 (S.C.C.); *Posluns v. Toronto Stock Exchange and Gardiner* (1964), 1964 CanLII 199 (ON SC), 46 D.L.R. (2d) 210 at 261 (Ont. H.C.); affirmed (1965), 1965 CanLII 32 (ON CA), 53 D.L.R. (2d) 193 (Ont. C.A.); affirmed (1968), 1968 CanLII 6 (SCC), 67 D.L.R. (2d) 165 (S.C.C.); G.H.L. Fridman, *The Law of Torts in Canada*, 2nd Edition (Toronto: Carswell, 2002) at pp. 794-5, 798-9.

[327] In this case, Hospitality knew there was an agreement of some sort in place between Dr. Louie, 567 and Mr. Nomani regarding the Louie Group Strata Lots. As noted, however, at the LOI negotiating session, when specifically asked about their arrangements, Dr. Louie assured its principals that they did not present an obstacle to settlement. He also remarked that Mr. Nomani may be upset by the settlement, but would have to move on.

[328] Hospitality was entitled to rely upon Dr. Louie's assurances, and did so. Given what he told its principals, I find that no intention to bring about, induce or procure a breach of the agreement between Dr. Louie, 567 and Mr. Nomani was formed by Hospitality. On the contrary, Hospitality took reasonable steps to ensure that the LOI would not interfere with any such arrangements that may have existed. It follows that Hospitality did not commit the tort of inducing breach of contract.

Did Mr. Nomani induce Dr. Louie to breach the LOI?

[329] Hospitality submits that, from October 21, 2005 to the time of trial, Mr. Nomani induced Dr. Louie to breach the LOI by refusing to follow through with its performance. His motive in so doing was to protect and enhance 567's position by maintaining its ability to operate a hotel within a hotel.

[330] According to Hospitality, within hours of the LOI's conclusion Mr. Nomani persuaded Dr. Louie that he had made a bad deal by following the advice of his lawyers. Dr. Louie was persuaded and, as a result, he decided to disavow the LOI. Thereafter, Mr. Nomani and Dr. Louie took the steps discussed in the conspiracy section below together. Those steps caused great loss to Hospitality.

[331] Mr. Nomani responds that Dr. Louie made his own decisions concerning the LOI's non-performance. Although he admits to being consulted, Mr. Nomani denies engaging in any acts of persuasion. On the contrary, Mr. Nomani claims that Dr. Louie decided on his own to send the Duress Fax and stop payment on the performance bond cheque immediately following the LOI negotiating session. Thereafter, according to Mr. Nomani, Dr. Louie acted independently, based on a sincere belief that the LOI was unfair and invalid.

[332] I do not accept Mr. Nomani's submission. Dr. Louie trusted him and relied heavily on his advice and persuasion in all matters related to the Louie Group Strata Lots. In my view, this reliance exemplifies Dr. Louie's admittedly poor business judgment and extraordinary naivety.

[333] From the outset, Mr. Nomani did all that he could to enhance his own position in connection with Hotel matters. For example, in 2003 and 2004 he acted as a consultant to both Dr. Louie and Hospitality concurrently and told Mr. Daroowala "If I can't make money from my friends, I have to make money from my friends' enemies". He also took sales commissions from LSOG owners, Mr. Franiek and Dr. Louie for agreements regarding LSOG units. I infer that this long-standing pattern of self-serving action was at the heart of his efforts to persuade Dr. Louie to disavow the LOI.

[334] As noted, the August Draft LOI included a term that Mr. Nomani would be paid \$50,000 per annum and be allowed to maintain a Hotel office. Mr. Somani wisely refused to agree. For that reason, the LOI did not provide for Mr. Nomani's continued participation in Hotel operations. When he learned of its terms, Mr. Nomani immediately called Dr. Louie and prevailed upon him to change his mind.

[335] Dr. Louie was persuaded for two primary reasons: he was unsatisfied with the purchase price agreed upon and felt guilty for leaving Mr. Nomani out of the settlement. Mr. Nomani's intention in persuading him was to procure the breach of the LOI by ensuring its non-performance. Although he no doubt hoped Dr. Louie could get a better price for his units, I conclude that Mr. Nomani's primary motive was to enhance his own commercial position.

[336] As discussed below, Mr. Nomani prevailed upon Dr. Louie to breach the LOI from October 21, 2005 onward. By November 7, 2005 he knew from the lawyers that it was probably valid. By December 27, 2006 he knew from the Court that it was undeniably so. As a result of Mr. Nomani's persuasive efforts, Hospitality suffered loss and damage. It follows that the essential elements of the tort of inducing breach of contract have been made out.

Did Mr. Nomani and Dr. Louie conspire to defeat the LOI?

[337] Hospitality submits that, from October 21, 2005 to the time of trial, Mr. Nomani conspired with Dr. Louie and the other Louie Group Defendants unlawfully to undermine the LOI and to injure Hospitality. According to Hospitality, together they pursued an aggressive "scorched earth" policy aimed at robbing Hospitality of its rights and thereby destroying it, regardless of the cost to anyone concerned.

[338] In summary, Hospitality says the agreement was reached when Mr. Nomani spoke with Dr. Louie during the morning court break on October 21, 2005 and Dr. Louie

expressed his willingness to reverse the LOI. Thereafter, they worked together to achieve this goal, which they knew to be unlawful, by, amongst other things: drafting and sending the Duress Fax; arranging to stop payment of the performance bond cheque and returning the deposit; creating and relying upon the Alleged June Agreements; and raising and disbursing massive sums on litigation contrary to Hospitality's interests. They also worked together to hide many of their actions and, in so doing, repeatedly breached court orders and their litigation obligations. According to Hospitality, in conspiring to carry out these acts, Mr. Nomani and Dr. Louie intended to injure Hospitality and knew that injury would result, or acted for the predominant purpose of injuring Hospitality.

[339] The Louie Group Defendants and Mr. Nomani respond that their sole motivation was to protect their own commercial self-interest. In their submission, they did so within their legal rights, albeit with a measure of distrust and hostility borne of the soured business relationship with Hospitality. According to both, this attitude was understandable given Hospitality's substantial financial power, unreasonable conduct in connection with the disputed issues and aggressive pursuit of its own commercial self-interest. So, too, was their ultimately incorrect, but sincerely held, belief that the Louie Group Defendants should not be bound by the LOI because it was unfair.

[340] The Louie Group Defendants also emphasize that Dr. Louie was extremely busy with his medical practice. In their submission, he had no time or inclination to enter into nefarious agreements with Mr. Nomani regarding Hotel matters and did not do so. Rather, he left everything to Mr. Nomani, who was his agent, and trusted that Mr. Nomani would act appropriately. At most, Dr. Louie had knowledge of some of his agent's actions and acquiesced; he did not agree. Accordingly, they say the tort of conspiracy has not been made out.

[341] In *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.*, [1993] B.C.J. No. 2958 (C.A.), McEachern C.J.B.C. described the essential elements of the tort of conspiracy. He stated at ¶ 5:

- 5 Accordingly, the following elements must be proved:
 1. an agreement between two or more persons;
 2. concerted action taken pursuant to the agreement;
 3. (i) if the action is lawful, there must be evidence that the conspirators intended to cause damage to the plaintiff;
(ii) if the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e., constructive intent);
 4. actual damage suffered by the plaintiff.

[342] There are two types of civil conspiracy in Canada: i) conspiracy to injure; and ii) conspiracy to use unlawful means. For the first type it is necessary to prove that the

conspiracy was undertaken for the predominant purpose of injuring the plaintiff. For the second, regardless of the conspiracy's predominant purpose, it is necessary to prove that the defendants should have known that injury to the plaintiff would ensue: *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, 1983 CanLII 23 (SCC), [1983] 1 S.C.R. 452 at 471-472.

[343] For both types of conspiracy an agreement between the defendant and one or more others must be established either directly or by inference. The agreement need not be contractual. Rather, the plaintiff must show that a defendant combined or conspired with others to carry out a common design or a means of achieving a common objective, which, when implemented, injured the plaintiff: *Golden Capital Securities Ltd. v. Rempel*, 2004 BCCA 565 at ¶ 47.

[344] As in all civil cases, the standard of proof for civil conspiracy is proof on a balance of probabilities: *F.H.* at ¶ 49. Once an agreement has been established the statements of one co-conspirator are admissible against all others if they were made while the conspiracy was ongoing in furtherance of the common object: Sopinka and Lederman, *The Law of Evidence in Civil Cases* (Butterworth & Co., Toronto: 1974) at p. 149.

[345] A defendant who conspires with another to commit unlawful acts may be liable for the consequences even though some acts are instigated by a single co-conspirator. In particular, liability will be imposed if the defendant knew or should have known that such acts were a probable consequence of the common objective being carried out: *Golden Capital Securities Ltd.* at ¶ 74.

[346] A range of unlawful actions have been held to support a finding of civil conspiracy. For example, in *Meehan v. Tremblett*, [1994] N.B.J. No. 502 (Q.B.) the court based a conspiracy finding on the preparation of a false incident report in an employment context. In addition, inducing breach of contract and fraud have both been found to constitute unlawful action in connection with findings of civil conspiracy: *Cotter v. Osborne*, 1909 CarswellMan 28 (C.A.); *Seaboard Owners Ltd. v. Cross*, 1949 CarswellBC 65 (S.C.); *Royal Bank v. Holoboff*, [1999] A.J. No. 380 (Q.B.).

[347] I conclude that Dr. Louie and Mr. Nomani entered into an agreement that Dr. Louie would disavow the LOI and refuse to follow through with its performance. The agreement was first reached on October 21, 2005 and maintained thereafter until Dr. Louie consented, mid-trial, to an order for specific performance. The agreement is established directly on Dr. Louie's and Mr. Nomani's own testimony. It is also established by inference from their conduct.

[348] Dr. Louie and Mr. Nomani shared a common objective in disavowing the LOI: to obtain a better price for the Louie Group Strata Lots, if possible, and to enhance 567's

position. In furtherance of this objective, they took many concerted actions, some of which were unlawful. The most obvious such action was the creation, execution and reliance upon the fraudulent Alleged June Agreements. They also worked together to raise and disburse funds in breach of Dr. Louie's covenant and the May 2008 Injunction, and unlawfully hid this conduct by swearing false affidavits in connection with document production.

[349] Although Dr. Louie was not involved in the day-to-day minutiae of all of the foregoing, he was kept apprised by Mr. Nomani. Importantly, he did not merely acquiesce; he actively agreed. Dr. Louie personally signed the fraudulent Alleged June Agreements created by Mr. Nomani and perjured himself regarding the date of his signature. He also arranged for deposit of the funds raised through the Franiek Loans in the Scotiabank Trust Account knowing that Mr. Nomani would use them to pay legal fees for the Prohibited Actions.

[350] I reject Dr. Louie's submission that, as a matter of law, he and Mr. Nomani could not engage in a civil conspiracy because Mr. Nomani was employed as his agent. In summary, he argues that, in these circumstances, he was merely agreeing with an extension of himself, which cannot be done. No case authority was cited in support of this unusual proposition and, in my view, it is untenable. Regardless of the hierarchy created by a contractual or employment relationship, independent actors are capable of entering agreements with one another to take joint action. If the joint action is intended to cause damage or is unlawful, it may form the basis of a finding of civil conspiracy.

[351] I accept that Dr. Louie and Mr. Nomani may have believed the LOI was unfair and hoped it was invalid when they first agreed upon its disavowal. By November 7, 2005, however, they had received clear legal advice that the LOI was binding and enforceable. By December 27, 2006, Pitfield J. had confirmed that this was so. Nevertheless, Dr. Louie and Mr. Nomani remained determined to undermine the LOI, regardless of its validity, and attempted to do so at great cost to Hospitality.

[352] I also accept that Dr. Louie's and Mr. Nomani's predominant purpose throughout was to advance their own commercial self-interest. Although Dr. Louie felt very hostile toward Hospitality, his primary focus was always the effect of his actions upon himself. The same was true of Mr. Nomani. The injurious effect of their joint action upon Hospitality was, however, entirely foreseeable and in that sense intentional. In addition, regardless of their predominant purpose Dr. Louie and Mr. Nomani engaged in unlawful means to achieve their common objective.

[353] The unlawful means Dr. Louie and Mr. Nomani agreed upon and implemented in pursuit of their common objective included fraud, perjury and the breach of court orders. These acts predictably caused injury to Hospitality.

[354] Taking into account the foregoing, I conclude that the essential elements of civil conspiracy have been made out.

Should punitive damages be awarded and, if so, against whom and in what amount?

[355] Hospitality seeks punitive damages of at least \$500,000 against the Louie Group Defendants, 567 and Mr. Nomani. In summary, it says their misconduct from and after October 21, 2005 amounted to a malicious, sustained, secretive attack on Hospitality's interests intended to cause it as much harm as possible and, in so doing, to abuse the process of the court. Misconduct of this magnitude and complexity is, in Hospitality's submission, virtually unprecedented in the courts of British Columbia and severe punishment is required. According to Hospitality, unless high punitive damages are awarded the objective of deterrence will not be adequately achieved.

[356] Hospitality submits that the defendants' egregious misconduct far exceeded Dr. Louie's failure to perform his obligation to sell the 30 Louie Group Strata Lots. Acting jointly, Dr. Louie and Mr. Nomani also immediately conspired to defeat the LOI. Thereafter they secretly supported litigation contrary to Hospitality's interests; breached injunctions; created the Alleged June Agreements; abused the Court's process by making false claims against Hospitality, commencing frivolous actions and filing CPLs in the Land Title Office; and manufactured and introduced false evidence throughout the course of the proceedings.

[357] In Hospitality's submission, some of these actionable wrongs will not be the subject of awards for compensatory damages. In combination, they dramatically increased the time, cost and difficulty associated with achieving a just resolution to the parties' dispute. Such misconduct must be soundly denounced.

[358] The Louie Group Defendants respond that the conduct complained of occurred in the context of a commercial relationship. Hospitality was far from vulnerable and, as might be expected, they pursued their own commercial interests aggressively. They submit that before Pitfield J. declared the LOI to be binding Dr. Louie believed it was invalid and, therefore, his actions were justifiable. Thereafter, his actions amounted to no more than vigorous pursuit of litigation. In the Louie Group Defendants' submission, such actions might properly result in substantial compensatory damages and a punitive costs award, but they do not justify an additional award of punitive damages.

[359] The Louie Group Defendants go on to say that their support of litigation contrary to the interests of Hospitality did not amount to an independent actionable wrong within the meaning of *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at ¶¶ 36-40. They also say that the Alleged June Agreements were not "true" forgeries because a verbal agreement had

been reached in June, 2005. In the alternative, the Louie Group Defendants submit that, if awarded, punitive damages should be in the range of \$30,000 to \$50,000.

[360] Mr. Nomani and 567 deny any wrongdoing whatsoever. Accordingly, they submit no award for punitive damages should be made.

[361] As noted, the primary objective of civil law is just compensation. In exceptional circumstances, however, punishment is also a legitimate, socially valuable goal. In such cases, the plaintiff acts as a public interest enforcer as well as a private interest claimant and the defendant is punished for conduct that offends the court's sense of decency: *Whiten*.

[362] An award of punitive damages is designed to punish, deter and denounce reprehensible misconduct that departs markedly from ordinary standards of decent behaviour. It can be made in any category of case where there is an independent actionable wrong: *Whiten* at ¶¶ 67-83; *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130 at ¶ 196.

[363] Although available in principle in all categories of cases punitive damages are exceptionally rare in cases involving commercial contracts, even where there is fraud. In cases of fraudulent misconduct punitive damages will be awarded, however, if, but only if, compensatory damages do not adequately achieve the objectives of retribution, deterrence and denunciation: *Performance Industries Inc. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, at ¶¶ 77-92; *Insurance Corp. of British Columbia v. Husseinian*, 2008 BCSC 241, at ¶¶ 161-180.

[364] To be justified, a punitive damages award must be rationally connected to the facts and the law's objectives. It must also be imposed with restraint. The focus of analysis is the defendant's misconduct, not the loss of the plaintiff. The quantum awarded should be proportionate to the degree of misconduct, the harm caused, the plaintiff's vulnerability and any advantage wrongfully gained. Factors such as the punitive effect of the overall award and other penalties imposed should also be taken into account: *Whiten* at ¶¶ 67-76 and ¶ 94; *Husseinian* at ¶¶ 161-163.

[365] The degree of blameworthiness at issue may involve several elements. These include, amongst others: whether the misconduct was planned and deliberate; the defendant's motive and awareness that the misconduct was wrong; the period over which the misconduct persisted; attempts at concealment; and whether the interest violated was deeply personal to the plaintiff or irreplaceable: *Whiten* at ¶ 113; *Louis Vuitton Malletier S.A. v. 486353 B.C. Ltd.*, 2008 BCSC 799 at ¶ 85.

[366] In *Husseinian*, Gerow J. awarded punitive damages ranging from \$3,500 to \$75,000 against several defendants who had defrauded their motor vehicle insurer. In so

doing, she identified the financial means of the defendant, whether the defendant required the plaintiff to prove its claim, whether the defendant abused the court's process, whether there was planned and deliberate fraud, and whether there were multiple acts as relevant factors to be taken into account: *Husseinian* at ¶ 163.

[367] The Supreme Court of Canada recently considered awards of punitive damages imposed in cases involving commercial contracts in *Whiten* and *Performance Industries*. In *Whiten* a punitive damages award of \$1,000,000 was upheld where an insurer acted exceptionally reprehensibly in denying a legitimate fire loss claim made by a policy holder. In contrast, in *Performance Industries*, a punitive damages award of \$200,000 was set aside where one businessman attempted to gain a commercial advantage by relying on a written document that he knew misstated the oral agreement actually reached.

[368] The power imbalance between the plaintiff and defendant, and the plaintiff's consequent vulnerability, was a significant factor in the Supreme Court's analysis in *Whiten*. As Binnie J. noted, this factor is rarely present in cases involving commercial contracts. At ¶ 115, he stated:

I add two cautionary notes on the issue of vulnerability. First, this factor militates against the award of punitive damages in most commercial situations, particularly where the cause of action is contractual and the problem for the court is to sort out the bargain the parties have made. Most participants enter the marketplace knowing it is fuelled by the aggressive pursuit of self-interest. Here, on the other hand, we are dealing with a homeowner's "peace of mind" contract.

[369] Binnie J. also commented on power imbalance and vulnerability as they relate to punitive damages at ¶ 88 in *Performance Industries*. He stated:

This was a commercial relationship between two businessmen. One tried to pull a fast one on the other. There was no abuse of a dominant position. O'Connor's misconduct was planned and deliberate and he persisted in it over a period of four and a half years, but in the end the courts did their work and Bell obtained full compensation plus costs on a solicitor-client basis, all of which undoubtedly had a punitive effect on O'Connor. In addition, O'Connor is stigmatized with a judicial finding (now upheld by two appellate courts) that he acted in a way that was "fraudulent, dishonest and deceitful". His conduct has been soundly denounced and he has been required personally to pay a large amount of money in compensation. The respondent is unable to identify any aggravating circumstances that would not be present in almost any case of business fraud except that O'Connor was found to have behaved abominably in the conduct of the litigation. However, as stated, the trial judge excluded this consideration from the award of punitive damages because he identified it as the basis for his award of solicitor-client costs.

[370] Each case is, of course, unique and fact specific. Some examples of punitive damages awarded in recent years, in addition to those awarded in *Whiten*, *Performance Industries*, and *Husseinian* include: *Evocation Publishing v. Hamilton*, 2002 BCSC 1797 - \$200,000 against certain defendants, \$300,000 against another; *Louis Vuitton Malletier*

S.A. - \$100,000 against certain defendants, \$200,000 against another; *Golden Capital Sec. Ltd. v. Holmes et. al.*, [2003 BCSC 1265](#) - \$200,000; *1 Ramjit Inc. v. 3 for 1 Pizza & Wings (Canada) Inc.*, 2004 CarswellOnt 6402 (Sup.Ct.) - \$150,000; *Canavan v. Feldman*, [2004 CanLII 4787 \(ON SC\)](#), 2004 CarswellOnt 3157 (Sup.Ct.) - \$100,000; and *Taylor & Associates Ltd. v. Louis Bull Tribe No. 439*, [2006 ABQB 698](#) - \$100,000.

[371] In this case, I find that Dr. Louie and Mr. Nomani behaved utterly outrageously. Their planned, deliberate, persistent fraud went far beyond the sort of “fast one” pulled in *Performance Industries*. Within hours of the LOI’s conclusion, they conspired to undermine it. After they were told it was valid and enforceable, they created, executed and relied upon the fraudulent Alleged June Agreements in a variety of litigation contexts for a period of over three years. In so doing, they repeatedly abused the court process and required Hospitality to prove its claim.

[372] I reject the Louie Group Defendants’ submission that the Alleged June Agreements were not “true” forgeries. They most assuredly were. Whatever the terms of the informal verbal agreement with 567 may have been, they were not reduced to writing and formally executed, as falsely represented by the Alleged June Agreements. Dr. Louie’s lack of insight into his misconduct is reflected in this misguided submission. Mr. Nomani’s lack of shame for his own is reflected in his persistent denials.

[373] I also reject the Louie Group Defendants’ submission that their support of the Prohibited Actions did not amount to an independent actionable wrong. In addition to breaching the LOI, Dr. Louie breached the May 2008 Injunction when he continued to fund the LSHS and Executive Actions.

[374] It is true that Hospitality was not a vulnerable adversary. Like Dr. Louie, it enjoys the benefit of very considerable means. It is also true that all concerned pursued their commercial interests with determination and a measure of aggression. The crucial difference is that Hospitality did so honestly. Dr. Louie and Mr. Nomani did not.

[375] Hospitality was able to prevail, in part, because it was not financially vulnerable. It expended vast amounts of money, time and energy in the litigation and was thus able to uncover much of the hidden truth. While most of its losses are recoverable in damages, it will never be fully compensated. For example, the impact of the competing hotel within a hotel operation cannot be fully measured and redressed; nor can the loss of time, energy and focus Hospitality suffered as the litigation storm raged on.

[376] It is important to remember that the LOI was not an ordinary commercial contract. It was a settlement agreement. Its purpose was to end potentially expensive, disruptive court proceedings and restore productive, predictable commercial peace. In my view, there was a real and substantial public, as well as private, cost associated with its

ongoing violation. There is also public value in the role played by Hospitality in exposing such conduct and pressing for its denunciation, deterrence and punishment.

[377] The awards for compensatory damages and special costs are undeniably substantial. Standing alone, they will have a significant salutary effect. Nevertheless, such awards will not address fully all of Dr. Louie's and Mr. Nomani's wrongful conduct, including, for example, their repeated disruption of proper Strata Corporation functioning and reliance upon the Alleged June Agreements in other litigation such as the First 567 Action and the Telephone Action. In addition, they will not express fully the Court's condemnation of such a conscious, costly, fraudulent attempt to undermine a binding settlement.

[378] I conclude that this is one of the exceptionally rare commercial cases in which punitive damages are appropriate. Taking into account the case authorities and the need to exercise restraint, I award \$100,000 in punitive damages against the Louie Group Defendants and \$100,000 in punitive damages against 567 and Mr. Nomani. In making these awards, I exclude from my consideration their conduct in the litigation itself in order to avoid imposing a double penalty, given the special costs awarded below.

COSTS

Should special costs be awarded and, if so, against whom and in what amount?

[379] Hospitality seeks special costs against the Louie Group Defendants, 567 and Mr. Nomani in both actions, jointly and severally, on a full indemnity basis. In summary, it submits that their conduct during the litigation was extremely reprehensible. Hospitality emphasizes that the defendants repeatedly failed to produce relevant documents, breached court orders, swore false affidavits and committed acts of perjury in these proceedings. All of these acts were undertaken with deliberate dishonesty in furtherance of the conspiracy to defeat Hospitality's rights and with utter disregard for the authority of the Court.

[380] The Louie Group Defendants submit that special costs are unjustified in the Hospitality Action. In their submission, summary judgment was secured promptly on two important issues and assessment of damages was addressed appropriately at trial. In so far as the 567 Action focused on issues of conspiracy and fraud, they say special costs, if any, should be awarded solely in that action and divided proportionally between the defendants according to their relative degree of fault.

[381] Dr. Louie acknowledges that he is not faultless in his conduct of the litigation. He emphasizes, however, that he did not participate in Mr. Nomani's computer manipulations and eventually admitted his prior misleading testimony regarding the Alleged June

Agreements. He submits that considerable trial time was spent addressing the computer manipulation issues and this was misconduct in which he did not actually participate. In addition, in his submission the Alleged June Agreements were ineffective and thus did not actually endanger Hospitality's position.

[382] In Dr. Louie's submission, his contribution to any reprehensible misconduct pales in comparison to that of Mr. Nomani. Accordingly, his proportionate share of any special costs awarded should be relatively modest.

[383] Special costs may be awarded where a party has engaged in reprehensible misconduct. Such misconduct includes scandalous or outrageous acts, as well as milder forms of misconduct deserving of rebuke: *Garcia v. Crestbrook Forest Industries Ltd.*, [1994 CanLII 2570 \(BC CA\)](#), [1994] B.C.J. No. 2486 (C.A.) at ¶ 17.

[384] As a general rule, the type of misconduct that justifies an award of special costs will relate to the course of the litigation and not to pre-litigation misconduct. This is so because reprehensible pre-litigation misconduct giving rise to a cause of action is typically addressed by an award of punitive damages. In some cases, however, reprehensible misconduct may have originated prior to litigation but continued throughout the litigation process. In these circumstances, special costs may be ordered in addition to punitive damages without double punishment being imposed: *Golden Capital Sec. Ltd.* at ¶ 161-176.

[385] Perjury is reprehensible misconduct, as is fraud and conspiracy. Such misconduct cannot be condoned by the court. On the contrary, it should be denounced and deterred, both specifically and generally. For these reasons, acts of perjury, fraud and conspiracy often attract an award of special costs. Such awards may be made on the basis of full indemnity: *Fullerton v. Matsqui (District)*, [1992 CanLII 5985 \(BC CA\)](#), [1992] B.C.J. No. 2969 (C.A.) at ¶ 17; *Insurance Corporation of British Columbia v. Phung*, [2003 BCSC 1619](#) at ¶ 8 & 11.

[386] Dr. Louie and Mr. Nomani both committed fraud and perjury. Although Dr. Louie eventually recanted, he did so for self-serving reasons in an attempt at damage control. Their conduct in relying upon the fraudulent Alleged June Agreements for over three years and perjuring themselves was reprehensible. Standing alone, this conduct would justify awards for special costs. It does not, however, stand alone.

[387] Dr. Louie and Mr. Nomani also failed repeatedly to produce relevant documents throughout the course of the litigation. They went on to swear false affidavits and breach court orders in this regard. Their purpose in so doing was to hide Dr. Louie's massive funding of the Prohibited Actions and their fraudulent conduct with respect to the Alleged

June Agreements. But for Hospitality's extraordinary tenacity, they may have achieved at least a measure of success.

[388] Although I accept that Mr. Nomani was primarily responsible for the computer manipulations, he and Dr. Louie acted in general concert throughout the proceedings. In my view, there is no reason to distinguish between them from a costs perspective, particularly given Dr. Louie's key role as owner and financier. In addition, the Hospitality and 567 Actions were inextricably linked and the acts of perjury and fraud were relevant in both contexts. In all of the circumstances, I award special costs in both actions against the Louie Group Defendants, 567 and Mr. Nomani on a full indemnity basis, with joint and several liability for the special costs.

Should leave be granted to Hospitality to seek an order of costs payable by other parties?

[389] Hospitality seeks leave to apply for an order for costs against Mr. Hatch, Jonathon Louie and Mr. Franiek. In summary, Hospitality submits that Mr. Hatch's conduct in connection with 567's inadequate electronic document production justifies a costs award being sought against him personally, as does Jonathon Louie's perjury and Mr. Franiek's role in the conspiracy.

[390] I agree that 567's electronic document listing and production was woefully inadequate. I am, however, not satisfied that Mr. Hatch's contribution to that inadequacy, although unsettling, particularly in failing clearly to list the Louie Group.doc, was sufficient to justify a costs award against him personally. Given Jonathon Louie's role as a "puppet" for his father, and his potential exposure to other consequences for his perjury, I also decline to grant leave for a costs order to be sought against him.

[391] I am satisfied, however, that such leave should be granted with respect to Mr. Franiek. The evidence presented at trial supports the conclusion that he was an active, conscious participant in the secretive funding of litigation contrary to Hospitality's interests, in breach of the LOI. Accordingly, leave is granted to Hospitality to seek an order for costs against Mr. Franiek.

CONCLUSION

[392] The plaintiffs in the Hospitality Action are entitled to judgment and:

1. a declaration that Hospitality has validly exercised the Option to Purchase the Louie Group Strata Lots contained in para. 4 of the LOI;
2. an order for specific performance of the Option to Purchase by conveying the Louie Group Strata Lots to Hospitality in accordance with the terms of

the LOI and doing all such further acts which are within their lawful power that may be reasonably required by Hospitality to permit the Louie Group Strata Lots to be transferred to Hospitality;

3. a declaration that the purchase price for the Louie Group Strata Lots contemplated in para. 4 of the LOI is \$4,915,012.66;
4. an order for specific performance of the Lease Modification Agreement contemplated in para. 3 of the LOI in a form agreed by the parties, with liberty to apply to the Court on two clear days' notice to settle the terms if agreement is not reached; and
5. an order for damages calculated on the basis set out in these Reasons for Judgment.

[393] Damages and costs may be set off against the purchase price of the Louie Group Strata Lots.

[394] The plaintiff's claim in the 567 Action is dismissed.

[395] The plaintiffs by counterclaim in the 567 Action are entitled to judgment on the counterclaim and:

1. an award of \$100,000 in punitive damages against the Louie Group Defendants; and
2. an award of \$100,000 in punitive damages against 567 and Mr. Nomani.

[396] The plaintiffs in the Hospitality Action and the plaintiffs by counterclaim in the 567 Action are awarded special costs against the Louie Group Defendants, 567 and Mr. Nomani on a full indemnity basis, with joint and several liability for the special costs. Leave is granted to Hospitality to seek an order for costs against Mr. Franiek.

"DICKSON J."

APPENDIX 1

LETTER OF INTENT

Date: October 21, 2005

Between:

Le Soleil Hospitality Inc. and Le Soleil Restaurant Inc.

And:

Andrew Louie

This Letter of intent sets out the general terms upon which Le Soleil Hospitality Inc., ("Hospitality") is prepared to lease from Dr. Andrew Louie, the companies that he owns or controls and 587019 B.C. Ltd., owned by Dr. Louie's children (the "Louie Group"), all the strata units owned by the Louie Group, except for strata lots 128 and 130, which are already subject to a lease (the "Strata Units") in the Le Soleil Hotel ("Hotel").

The parties to this Letter of Intent intend that the terms of this Letter of Intent be binding upon them and have agreed upon terms as follows:

1. **Lease of Strata Units:** The Strata Units will be leased under formal leases to be negotiated by counsel for the Louie Group and Hospitality and will contain the following terms:
 - (a) the tenant will be Hospitality or its nominee (where applicable to the circumstances, references to Hospitality include its nominee);
 - (b) each lease will be for an initial term of five (5) years, with two renewal options: the first for a five-year term and the second for a six-year term;
 - (c) the renewal terms may be exercised by the tenant provided at the time of renewal Hospitality is in good standing in all material aspects with respect to the lease;
 - (d) except for the Strata Units known as units #202, #203 and #205 (the "Meeting Rooms") whose leases will commence starting on December 1, 2005, each lease will commence on the date that the landlord is able to make the vacant Strata Unit available to the tenant, which the Louie Group believes should be possible by January 15, 2006;
 - (e) each lease will be in a registerable form;
 - (f) each lease will be negotiated and signed by no later than November 3rd, 2005, notwithstanding that the commencement date may be after that date;
 - (g) except for fundamental breaches, any disputes under the lease will be resolved by commercial arbitration;
 - (h) if there are fundamental breaches of the lease, which will include:
 - (i) basing rental payments on fraudulent financial statements,
 - (ii) failing to pay rent which is not cured within a reasonable period set out in the lease, and
 - (iii) if the Strata Council at the Hotel misuses its authority through expenditures that are outside of the usual repair and maintenance requirements of a Strata Corporation or for the benefit of the operator of the Hotel, not the Strata owners, including the Louie Group, except where those out-of-the ordinary course expenditures are recommended by the Strata Corporation Property Manager, acting reasonably.
- the landlord will be able to terminate the lease immediately on written notice. Upon receipt of such notice, the tenant will peaceably return possession of the Strata Unit to the landlord;
- (i) the lease will contain a standard force majeure clause;
 - (j) the landlord will affirm the Common Area Leases for the Hotel;

- (k) the landlord will not object to the placement of a internationally recognized franchise tag at the Hotel;
- (l) the Lease will provide that Syed (Jewel) Nornani will not be directly involved in the dealings between Hospitality and the Louie Group.
- (m) during the term of the leases of the Strata Units, the tenant shall have a right of first refusal to match any bona fide arm's length offers to purchase for which all subject conditions have been removed. In consideration of the grant of a right of first refusal, the tenant agrees to pay the purchase price in the contract plus an additional \$2,000. The tenant shall have five (5) days from receipt of notice of the contract of purchase and sale to accept the offer, failing which the landlord will be free to complete the contract of purchase and sale with the third party;
- (n) the landlord will assign its voting rights with respect to the Strata Corporation to the tenant, provided the tenant is in good standing in all material terms under the lease (failing which all voting rights are retained), for the following votes:
 - (i) for ordinary resolutions of the Strata Corporation;
 - (ii) for elections for Strata Council members; and
 - (iii) for special or extraordinary resolutions that relate to existing contracts of the Strata Corporation or the lease agreement.

The landlord does not assign its voting rights with respect to votes for special or extraordinary resolutions that relate to new contracts or non-lease related subject matters.

2. **Rent Payable under Lease:** Hospitality will pay monthly rent on the Strata Units as follows:

- (a) based on each Strata Unit's entitlement for participating in the pool, the landlord's share of 31% of gross room revenue for the Hotel ("GRR") with respect to the first \$5,500,000 in annual GRR. For clarity, GRR does not include other non-room revenues of the Hotel derived from parking, telephone and mini-bar services;
- (b) based on each Strata Unit's entitlement for participating in the pool, the landlord's share of 34% of GRR with respect to any GRR in excess of \$5,500,000. Such payments at the 34% threshold will commence in the month after the GRR exceeds in annual \$5,500,000;
- (c) Hospitality will be retaining 2% of total GRR for an FF&E account held in a separate account for all participating Strata Owners, including the Louie Group. The pro rata shares payable to this FF&E account on account of the Strata Units will be deducted prior to the distribution of the rent payable in paragraphs (a) and (b);
- (d) payments will be made by no later than 10th day of each month for the previous months' rent;
- (e) any adjustments to the total annual rent paid will be calculated and paid in the month following the end of the 12 month period for each lease;
- (f) in addition to the rent payable pursuant to paragraphs (a) and (b), with respect to the Meeting Rooms, there will be an additional rent paid in aggregate with respect to all of the Meeting Rooms in the amount of \$2,500 per month; and
- (g) in addition to the rent payable pursuant to paragraphs (a) and (b), in consideration for renting strata lot 121 (the "Penthouse Unit") at the same rate as the other Strata Units and in consideration for extending the lease of strata lots 128 and 130 as set out herein, Hospitality will cause Le Soleil Restaurant Inc. ("Restaurant") to pay an additional \$5,000 per year (or portion thereof as the case may be) under that lease for any period that the Penthouse Unit remains leased to the tenant.

3. **Extension of Restaurant Lease:** Dr. Louie will cause 585503 British Columbia Ltd. ("585503") to enter into a lease modification agreement with Restaurant with the following terms and conditions:
- (a) 585503 will grant Restaurant two additional renewal terms of five years each, such renewals to be at Restaurant's option provided that Restaurant is in good standing in all material terms under the terms of the restaurant lease;
 - (b) by December 31, 2006, 585503 will, with respect to the calculation of base rent payable in the second and third renewal terms, elect to either maintain the same rental arrangement currently in plans for any first renewal term or have rent in the second and third renewal terms negotiated between the parties, failing which the rent will be determined through commercial arbitration and subject to submissions as to the fair market rent for these strata lots;
 - (c) Restaurant will, for any year (or portion thereof) that the Penthouse Unit is owned by the Louie Group and remains a part of the Hotel rental pool, pay an additional sum of \$5,000 per year (prorated to the number of days in the year that the Penthouse Unit is in the Hotel rental pool) under the restaurant lease, such sum to be paid in equal quarterly instalments commencing on November 1, 2005. This sum will not be included as rent in the event of that commercial arbitration is required to set rent in either a second or third renewal term. As such, the amount payable by Restaurant under the lease will be any rent determined under arbitration will be that sum plus \$5,000 per year;
 - (d) 585503 and Restaurant will resolve outstanding issues involving the Liquor Licence, specifically whether the existing licence should be transferred to Restaurant or 585503 and Restaurant will jointly complete an application for a Third Party Operator relationship;
 - (e) 585503 will take reasonable commercial steps to obtain a Non-disturbance Agreement from HSBC Bank Canada. The parties acknowledge that as Restaurant is registered in priority to the HSBC Mortgage the Non-disturbance agreement, while desired, is not necessary under the terms of the Lease; and
 - (f) upon resolution of paragraph (d) and (e), Restaurant will provide an Estoppel Certificate to 585503 in a form provided by solicitors for 585503 and confirming that the lease is in good standing and there are no extant claims of Restaurant.
4. **Option to Purchase:** The Louie Group will grant to Hospitality or its nominee (for clarity, references in this section to Hospitality includes its nominee) referred to jointly in this section an option to purchase all, but not less than all of the Strata Units, except for the Penthouse Unit, on the following terms:
- (a) Hospitality may exercise its option to purchase all of the Strata Units except the Penthouse Unit but it may not exercise its option to purchase on the Penthouse Unit alone. For clarity, if Hospitality exercises its option to purchase the Penthouse Unit, it must exercise its option to purchase all of the Strata Units;
 - (b) the purchase price for each of the Strata Units available for purchase shall be the lesser of:
 - (i) \$171,500, or
 - (ii) the average cost to the Louie Group of each of the Strata Units, excluding the Penthouse Unit, such calculation to include the purchase prices, any legal fees and disbursements incurred as a result of the purchase (including the costs of any foreclosure actions, share purchase agreements or corporate transfer arrangements), Land Title Office, Corporate Registry and filing agent fees, Property Transfer Tax paid, and any other fees or expenses reasonably incurred for the purpose of acquiring the Strata Units or the companies that own the Strata Units, but specifically excluding any finder's fees or real estate commissions;
 - (c) the purchase price for the Penthouse Unit will be \$340,000;

- (d) Hospitality must exercise its options by no later than December 15, 2005 and, if it exercises its options, it must pay to the Louie Group's solicitors a deposit in the amount of \$200,000 (the "Deposit") by no later than December 15, 2005, such amount to be held in trust and credited to the purchase prices of the Strata Units on closing.
 - (e) The Deposit will be fully refundable if Hospitality pays the Deposit prior to December 15, 2005 but does not exercise its options. The Deposit will be non-refundable if Hospitality pays the Deposit, exercises the options but does not complete due to no fault of the vendor, for whatever reason, by the Closing Date set out herein;
 - (f) the Closing Date for any transfers will be no later than January 15, 2006;
 - (g) Hospitality will have the option of acquiring the Strata Units through a real estate purchase or, where the Strata Units are owned by a company, by way of a share purchase. In the event of a share purchase, Dr. Louie, as a condition in the share purchase agreement negotiated by counsel, will personally indemnify Hospitality with respect to any previous liabilities or claims against the corporation purchased; and
 - (h) The purchase price shall include all furniture and chattels belonging to the landlord and any outstanding issues regarding ownership shall be the subject of good faith negotiations.
5. **Dr. Louie's Covenants:** Hospitality has requested and Dr. Louie has agreed that, from the date of this Letter of Intent, Dr. Louie will cause the Louie Group to refrain from the date of this Letter of Intent:
- (a) entering into lease arrangements with respect to the Strata Units;
 - (b) purchasing any other strata units at the Hotel; and
 - (c) supporting any litigation that is contrary to the interests of Hospitality or Restaurant in relation to the operations of the Hotel.
6. **Settle All Litigation or Existing Claims:** The parties will enter into a formal mutual release and consent dismissal order relating to all current litigation, as well as any and all claims each may have against each other for matters existing prior to the date of this Letter of Intent, including all matters subject of Vancouver Registry No. S046317. Each of the parties will bear their own legal costs.
7. **Adjournment of Injunction Application:** The Plaintiffs in Vancouver Registry No. S046317 will adjourn generally all action relating to the injunction application and furtherance of the action as same pertains to any member of the Louie Group.
8. **Bond:** Hospitality/Restaurant and Dr. Louie will each pay to their respective solicitor's the sum of \$10,000 by no later than October 21, 2005. The solicitors will hold these amounts in trust to secure the performance of the terms of this Letter of Intent until such time as formal lease agreements and a formal settlement agreement can be finalized and executed. If either Hospitality, Restaurant or both fail to abide by the terms of this Letter of Intent, the \$10,000 will be forfeited to Dr. Louie. If Dr. Louie fails to abide by the terms of this Letter of Intent, the \$10,000 will be forfeited to Hospitality/Restaurant.
9. **Further Assurances:** Each of the parties herein will execute or cause to be executed such further documents and instruments and do such acts and things as may be reasonably required by another party to carry out the intent and meaning of this Letter of Intent.

Agreed to this 21st day of October, 2005 by the undersigned:

Le Soleil Hospitality Inc. and Le Soleil Restaurant Inc.

Per:

"Sharookh Daroowala"

"Hanif Mawji"

"Andrew Louie"

Tab 125

JUDICIAL CONDUCT
Ottawa, May 21 2021

Canadian Judicial Council completes its review of the matter involving the Honourable D.E. Spiro

CANADIAN JUDICIAL COUNCIL



A Judicial Conduct Review Panel, constituted by the Canadian Judicial Council to review a matter involving the Honourable David E. Spiro, has concluded that while the judge made serious mistakes, these were not serious enough to warrant a recommendation for his removal from office.

The Review Panel was constituted at the direction of the Honourable Kenneth Nielsen, Associate Chief Justice of the Court of Queen's Bench of Alberta and Vice-Chair of the Judicial Conduct Committee, following complaints filed with the Council relating to Justice Spiro's alleged interference in the appointment of a Director of the International Human Rights Program (IHRP) of the Faculty of Law at the University of Toronto. The conduct of Justice Spiro was alleged to have put the integrity and impartiality of the Tax Court of Canada in jeopardy, and cause any

party or lawyer before the Court who is Palestinian, Arab, or Muslim to reasonably fear bias.

The Review Panel was comprised of Chief Justice Robert Bauman (Chairperson), Chief Justice Martel D. Popescul, Chief Justice Manon Savard, Justice Denis Jacques, and Dr. Jennifer N. Davis, Ph.D. In arriving at their [conclusions \(https://cjc-ccm.ca/sites/default/files/documents/2021/Report%20of%20the%20Review%20Panel%20Spiro.pdf\)](https://cjc-ccm.ca/sites/default/files/documents/2021/Report%20of%20the%20Review%20Panel%20Spiro.pdf)

, the Panel reviewed Justice Spiro's response to the complaints, various letters of support received, and the report produced by former Justice Thomas Cromwell for the University of Toronto.

The Panel noted that before his appointment to the judiciary, Justice Spiro was a member of the Board of Directors at the Centre for Israel and Jewish Affairs (CIJA). On September 3, 2020, Justice Spiro learned from a staff member of CIJA about the imminent appointment of a person as Director of IHRP, and of related concerns. Justice Spiro was asked whether he could approach the Dean of the Faculty to relay these concerns.

Justice Spiro specifically declined to approach the Dean of the Faculty as he found it to be inappropriate. He had made arrangements earlier for a general "telephone catch-up" on the following day with an official and friend from the University. During their conversation, Justice Spiro commented about the controversial nature of this appointment from the perspective of the Jewish community and the potential damage to the reputation of the University.

Throughout the years and before his appointment to the judiciary, Justice Spiro had been a very engaged alumnus who supported the Faculty financially and professionally. For the Review Panel, it was this background, as distinct from the

judge's judicial position, that prompted Justice Spiro's discussion with the official from the University. The Review Panel was of the view that Justice Spiro was voicing his concerns about the potential impact of the appointment and associated controversy on the University and the Faculty, as opposed to actively campaigning or lobbying against the appointment. Part of Justice Spiro's concern was whether the University had done its due diligence in its selection process.

Before his appointment to the judiciary, Justice Spiro devoted a great deal of time to enhance his understanding of the Israel-Palestine conflict and to build bridges between the parties and the faith communities involved. The Review Panel concluded that nothing in the career of Justice Spiro or his work supports the suggestion of perceived bias on his part against Palestinian, Arab or Muslim interests.

The Review Panel concluded that reasonable persons apprised in accurate terms of the conduct of Justice Spiro over his career and in relation to this matter could not conclude that the judge is biased against Palestinian, Arab or Muslim interests. The fear of bias on the part of Justice Spiro is based on misinformation and speculation that is inaccurate. Further, the Panel observed that any fear of bias in the future is not well-founded and cannot form the basis for directing the constitution of an Inquiry Committee.

The Review Panel did find, however, that it was an error for Justice Spiro to raise such concerns in the manner he did. The judge properly recognized the mistakes he made and expressed remorse. The Review Panel found this error serious but that it did not warrant removal of Justice Spiro from office.

Associate Chief Justice Nielsen considered all the circumstances of this case, including Justice Spiro's remorse and acknowledgment that his conduct raised questions about his commitment to impartiality toward all litigants and counsel who appear before him.

Judges should strive to ensure that their conduct, both in and out of Court, will sustain and contribute to public respect and confidence in their integrity, impartiality and judgment, and thereby contribute to confidence in the administration of justice. It was a serious error for Justice Spiro to discuss the appointment of the Director of IHRP, one that he regrets and one from which he states he has learned.

Associate Chief Justice Nielsen has expressed concerns to Justice Spiro as to his conduct in this matter. In view of all of the circumstances, Associate Chief Justice Nielsen is satisfied that Justice Spiro is acutely aware of his duty to the public, as a judge, to not only ensure he is impartial, but to be seen as being impartial. In light of the above, Associate Chief Justice Nielsen directed that the matter be closed.

Contact:

Johanna Laporte

Director of Communications

info@cjc-ccm.ca

Latest news

Ottawa, December 3 2025

[Canadian Judicial Council notes with sadness the passing of the Honourable J.J. Michel Robert \(/en/news/canadian-judicial-council-notes-sadness-](/en/news/canadian-judicial-council-notes-sadness-j.j.-michel-robert)

passing-honourable-jj-michel-robert)

Ottawa, December 3, 2025 – Members of the Canadian Judicial Council were saddened to hear of the passing of their former colleague, the Honourable J.J. Michel Robert, who was a valued member of the ...

Ottawa, October 28 2025

Reduced Hearing Panel established in matter involving the Honourable Andrew J. Goodman (/en/news/reduced-hearing-panel-established-matter-involving-honourable-andrew-j-goodman)

Ottawa, October 28, 2025 – A reduced hearing panel has been established by the Canadian Judicial Council (Council) in the matter of the Honourable Andrew J. Goodman.

Ottawa, October 16 2025

Canadian Judicial Council publishes independent review of financial provisions related to the judicial conduct regime (/en/news/canadian-judicial-council-publishes-independent-review-financial-provisions-related-judicial)

Ottawa, October 16, 2025 – The Canadian Judicial Council (Council) has published an independent review of financial provisions related to the judicial conduct regime, in keeping with the requirements ...

**See all news
(/news)**

Tab 126



**DECISION OF THE REVIEW PANEL
IN THE MATTER OF:
THE HONOURABLE ANDREW J. GOODMAN
OF THE SUPERIOR COURT OF JUSTICE OF ONTARIO
CJC Files: 24-0799 and 24-0818**

**Review Panel Members:
The Honourable Shane I. Perlmutter
The Honourable John S. Little
Mr. Curtis Kleisinger**

Background

[1] On August 12, 2024, just before the scheduled sentence appeal of Mr. Peter Khill, the Honourable Andrew Goodman of the Superior Court of Justice of Ontario wrote to the Associate Chief Justice of the Ontario Court of Appeal. Justice Goodman explained that in imposing sentence on Mr. Khill on June 6, 2023, Justice Goodman used the wrong version of his reasons, which, in “a momentary lapse of judgment”, led to him reading out a custodial sentence of eight years for Mr. Khill’s conviction for manslaughter when he had intended to impose a sentence of six years. As Justice Goodman explained in his letter, following the delivery of his sentencing decision and after consulting judicial colleagues, he concluded that he was *functus officio*, having formally finalized the judicial task at hand. In other words, Justice Goodman believed that his jurisdiction over the matter was exhausted, such that, until his August 12, 2024 letter (14 months after the pronouncement of sentence), he took no steps to address his error as to the length of sentence imposed.

[2] Two separate complaints were submitted to the Canadian Judicial Council (CJC). In addition to complaining about Justice Goodman reading the wrong version of his sentencing decision, the complainants allege that Justice Goodman was aware of his error but failed to make it known for more than a year. One of the two complaints also alleges that it was improper for Justice Goodman to have consulted with judicial colleagues about how to address his error as this “reeks of some type of conspiracy to obstruct justice by all of the parties”. This complainant requests that these judicial colleagues also be disciplined.

[3] Following a review of these complaints and after having received the related and responding comments of Justice Goodman and the Honourable Geoffrey Morawetz, the Chief Justice of the Superior Court of Justice, pursuant to s. 7.11(b) of the *Canadian Judicial Council Procedures for the Review of Complaints or Allegations About Federally Appointed Judges (Review Procedures (2023))*, the Chair of the Judicial Conduct Committee, as the reviewing member in this matter, referred these complaints to a Review Panel to be established by the Council under s. 8.1(1) of the *Review Procedures (2023)*.

Review Panel Role

[4] The role of the Review Panel is set out in section 8.9 of the *Review Procedures (2023)*, which provides:

8.9(1) In accordance with s. 101 of the Act, where a review panel determines that the judge’s removal from office could be justified, it shall refer the complaint to the Council for the establishment of a full hearing panel.

(2) In accordance with s. 102 of the Act, where the review panel determines that the judge’s removal from office could not be justified, it may either dismiss the complaint or take one of the following actions if it considers it appropriate to do so in the circumstances:

(a) issue a private or public expression of concern;

- (b) issue a private or public warning;
- (c) issue a private or public reprimand;
- (d) order the judge to apologize, either privately or publicly, by whatever means the panel considers appropriate in the circumstances;
- (e) order the judge to take specific measures, including attending counselling or a continuing education course;
- (f) take any action that the panel considers to be equivalent to any of the actions referred to in paragraphs (a) to (e);
- (g) with the consent of the judge, take any other action that the panel considers appropriate in the circumstances.

8.9(3) In the case of an action under paragraphs 102(a), (b) and (c) and for greater certainty, the ranking of severity for these three actions, from the least severe to the most severe, is as follows: - an expression of concern; - a warning; - a reprimand;

Record

[5] For the purpose of making its decision, the Review Panel reviewed the initial complaints file communicated by the Chair of the Conduct Committee, which included the two complaints, comments received by Justice Goodman, and comments from Chief Justice Morawetz. On April 21, 2025, Justice Goodman's counsel provided his response to the Review Panel. As well, on May 2, 2025, Chief Justice Morawetz provided additional comments.

[6] While not part of the record, we note that on February 27, 2025, the Ontario Court of Appeal rendered its decision in *R. v. Khill*, 2025 ONCA 146, in which it imposed the six-year custodial sentence that Justice Goodman had intended to impose. In doing so (and having received Justice Goodman's August 12, 2024 letter), the Court of Appeal decision included the following:

134 The appellant and the respondent accept that the trial judge intended to impose a sentence of six years' imprisonment, and that his letter does not suggest that he had changed his mind about the appropriate sentence after the fact. In these circumstances, the trial judge would not have been *functus officio*, neither in the moment when he realized his mistake, nor "in the immediate wake of that sentencing" when he consulted with his colleagues. The parties take this position notwithstanding the trial judge's delay, which they variously describe as "most unfortunate" and "extreme and concerning".

135 We agree with these characterizations of the delay in this case. We also agree with the parties' submissions that the trial judge was not *functus officio*. He could have, and should have, corrected his mistake, either in the moment or shortly afterwards. The trial judge attributes his inaction to the advice he received from judicial colleagues. That he was "dissuaded" from taking further action at the time suggests that he considered his initial instincts were correct and, but for the advice of his colleagues, he would have acted differently.

136 Consultation among colleagues is an important, necessary, and rewarding facet of judicial life. The advice or guidance of a trusted judicial colleague can be a lifeline for a judge who is grappling with a thorny legal issue, or for a judge who needs a sounding board while navigating

difficult terrain on the path to achieving justice for the parties. There is nothing inappropriate about this type of consultation. But for a trial judge, it can be no more than that - it is a consultation, not a collaboration. At the end of the day, it is the presiding judge who decides the case, and it is that judge who must "own" their decision.

137 It was the responsibility of the trial judge, and his alone, to determine whether he was *functus officio*, and whether any further action was required. It was not the responsibility of his judicial colleagues. Unlike the trial judge, his colleagues have no voice in these proceedings.

138 Whether or not the trial judge believed he was *functus officio*, doing nothing was not a reasonable option in the circumstances, especially when he imposed a penitentiary sentence that was 1/3 (i.e., two years) longer than the one he had intended to impose. He should have promptly requested that the parties attend before him, in open court, to address the matter.

139 Had he done so, counsel would have been able to provide assistance to the trial judge on whether he was in fact *functus officio*. They could have brought the authorities discussed above to the trial judge's attention. The submissions of counsel may have caused the trial judge to see things in a different light and correct his mistake at that time. But even if the trial judge was not convinced that he could make the correction, addressing the situation with counsel in open court would have resulted in the creation of a proper record for this court to review; instead, we are left to resolve the issue based on a letter from the trial judge written over a year after the sentence was imposed.

140 Fundamentally, there is considerable intrinsic value in airing such matters in open court. It permits the parties and the public to know what has happened, and to witness first-hand the steps being taken to rectify a judicial error. This type of openness and accountability enhances the integrity of the administration of justice; inaction does not.

[7] While the complaints at hand are to now be read in light of the foregoing comments by the Court of Appeal, the task of this Review Panel is not to revisit the critical comments of the Court of Appeal, which are grounded in legal principles. Rather, the considerations for this Review Panel are grounded in principles of judicial conduct. In other words, even if there may be in this case obvious overlap in the commentary of the Court of Appeal and this Review Panel's normative discussion as to what Justice Goodman should have done given his judicial role and the ethical and legal responsibilities that accompany it, this Review Panel will not in any further detail address the Court of Appeal's disposition in the *Khill* matter.

Justice Goodman's Position

[8] With respect to the complaint about misreading the sentence, Justice Goodman indicates that he misspoke and has apologized unreservedly for his mistake. With respect to the allegation that Justice Goodman's delay in correcting the sentence was not just inappropriate conduct but, in fact, judicial misconduct, it is Justice Goodman's position that because he considered himself to be *functus officio*, he was prevented from correcting the error in the period immediately following sentencing. As such, he proceeded on the basis that the only time at which his error could be corrected was when the appeal was about to be heard. Justice Goodman submits that, while his error did not result in Mr. Khill serving any additional time in custody since he was on release pending the appeal, he understands the criticism of the length of time it took him to figure out a formal way to address the error. He sincerely apologizes for any negative impact his delay

caused. Justice Goodman’s counsel submits on his behalf that had it not been for Justice Goodman’s decision to disclose his error, whether the Court of Appeal would have reduced Mr. Khill’s sentence is open to question. Lastly, it is Justice Goodman’s position that the consultation undertaken by him with other colleagues was part of the candid exchange of ideas and expertise that is often invaluable in judicial decision-making.

Applicable Test

[9] The test to be applied in determining whether the judge’s removal from office could be justified was set out in the *Report to the Canadian Judicial Council of the Inquiry Committee in Marshall*, August 27, 1990, at p. 27 (see also, *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11). That test (the *Marshall* test) can be expressed in the form of the following question:

Is the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?

[10] The Review Panel notes that it does not make ultimate findings of fact and is constrained by its role and the nature of the record placed before it. What the Review Panel will and must do is weigh the available evidence to determine whether the conduct meets the “judge’s removal from office could be justified” standard in subsection 8.9(1) of the *Review Procedures (2023)*.

Ethical Principles for Judges

[11] It is well accepted that the CJC’s publication *Ethical Principles for Judges* is not a code of conduct and that it ought not to be used as such. That important publication and the principles and commentaries contained therein are, however, a highly useful reference point for, among other things, identifying how and where a judge’s conduct may fall short of a necessarily applicable ethical principle formulated and endorsed so as to ensure a requisite respect and public confidence. That ongoing respect and public confidence is not only necessary for any individual judge, but also for the institution of the judiciary itself whose independence is so inextricably tied to a public belief that a judge’s conduct will be ethical and judicious. Indeed, a consideration of the applicable principles will often identify or assist in recognizing what informs judiciousness and what might be the most judicious choice. In examining the alleged conduct in the context of the present complaints, of particular relevance are the principles discussed below taken from the *Ethical Principles for Judges*:

2.A.1 Public confidence in the judiciary is essential to an effective judicial system and, ultimately, the rule of law. Within that system, judges hold positions of significant trust, confidence and responsibility. Conduct, in and out of court, that exhibits integrity ensures public respect for and confidence in the individual judge and, more significantly, contributes to public confidence in the judiciary and the judicial system as a whole. Judges should therefore act with a high degree of decorum, propriety and humanity.

3.A.1 Diligence is concerned with the performance of judicial duties in a skillful, careful, attentive and timely way.

3.A.2 Judges should exhibit diligence and competence in the performance of all their judicial duties, including adjudication, case management, pre-trial or settlement conferences and participation in court administration.

[12] Even though the *Ethical Principles for Judges* and its commentaries are not a code of conduct, as mentioned, the above principles and commentary underscore both the practical and theoretical importance of what is discussed in the Analysis section of these reasons.

Analysis

Delivery of the Wrong Sentence

[13] The referral from the Chair of the Judicial Conduct Committee raises for consideration Justice Goodman's alleged lack of diligence in the performance of judicial duties by not rendering a sentencing judgment in a careful and attentive way. Justice Goodman had prepared several drafts of his decision and inadvertently read the wrong one at the sentencing hearing. Justice Goodman has unreservedly apologized for his mistake. As pointed out by Justice Goodman's counsel, judges are human and make mistakes like anyone else. The Review Panel accepts that this error (as admitted by Justice Goodman), in light of Justice Goodman's apology, does not irreparably compromise his ability to discharge his duties of office and thus does not suggest that his removal from office could be justified.

Consulting Judicial Colleagues

[14] One of the two complaints raises the question of whether it was appropriate for Justice Goodman to consult his judicial colleagues about how he could rectify the error he committed in delivering the wrong sentence. It was this consultation that Justice Goodman, in part, attributes to his delay in disclosing his error (which delay is further discussed below).

[15] The Ontario Court of Appeal addressed the question of consultation among judicial colleagues in their comments quoted above from paragraphs 136 and 137 of *Khill*. As discussed by the Ontario Court of Appeal, there is nothing inappropriate about consultation among judicial colleagues. Such judicial colleagues can provide useful and valuable advice and guidance or simply act as a trusted sounding board when a judge is considering the path towards achieving justice for the parties. However, as expressly stated by the Ontario Court of Appeal, "[a]t the end of the day, it is the presiding judge who decides the case, and it is that judge who must 'own' their decision". Here, Justice Goodman has always been clear that it was his decision *alone* not to act at the time he realized his error in the length of the sentence he delivered.

[16] The Review Panel has nothing further to add to the comments and conclusions of the Court of Appeal on the appropriateness of consultation among judicial colleagues other than to suggest that the transparency expected of a federally appointed judge (in his reply to these complaints Justice Goodman indicates his commitment to transparency) would generally require immediate reporting to his or her Chief Justice of circumstances like these which could potentially undermine public confidence (in both the judge and the court). Indeed, such prompt reporting

may have led to Justice Goodman quickly addressing this situation in the manner ultimately prescribed by the Court of Appeal (as detailed above).

In these circumstances, the Review Panel will not be pursuing this issue any further.

Delay in Correcting the Sentence

[17] The Review Panel shares the concerns of the Chair of the Judicial Conduct Committee, who, in his referral of this matter, noted that Justice Goodman minimizes the consequences of his mistaken sentence by indicating Mr. Khill was released on bail and, ultimately, he did correct his error by sending his August 12, 2024 letter to the Associate Chief Justice of the Ontario Court of Appeal. The submission of his counsel to the Review Panel indicates that Justice Goodman thought the lack of any immediate prejudice to Mr. Khill's liberty interest allowed him time to consider in a more deliberative manner the most appropriate way to ensure that Mr. Khill's appeal proceeded to a correct understanding of the sentence he intended. In their submissions, his counsel also notes that Justice Goodman apologizes for any negative impact this delay caused. Despite the above explanation by his counsel, the Review Panel remains concerned that Justice Goodman still fails to fully appreciate how the delay in correcting his error affects public confidence in the judiciary.

[18] As noted in the *Ethical Principles for Judges*, judges hold positions of significant trust. Conduct that exhibits integrity ensures public respect for, and confidence in, the judiciary and the judicial system as a whole. From the public's perspective, it may be reasonably expected that in order to ensure that justice was delivered, immediately upon realizing his mistake, Justice Goodman would have acted judiciously by taking prompt steps to correct it. By not doing so, others who may appear before Justice Goodman may be concerned about similar injudicious treatment should Justice Goodman again realize he has committed an error. They themselves may question whether Justice Goodman fully appreciates the need to act judiciously by acting promptly to address and correct any mistake.

[19] As indicated by the Ontario Court of Appeal, Justice Goodman could have, and should have, corrected his mistake, either in the moment or shortly afterwards. As noted by the Ontario Court of Appeal, whether he believed he was *functus officio*, doing nothing was not a reasonable option. A member of the public, who is aware of Justice Goodman's delayed efforts to correct his mistake in the case at hand, may properly question whether Justice Goodman appreciates the importance of openness and accountability in promptly identifying any error that may have been committed by him, not only for purposes of transparency, but also to rectify the error. Not doing so risks undermining the confidence of the public in the judiciary.

[20] Similarly, the Review Panel is concerned that Justice Goodman does not fully appreciate how his errors affected Mr. Khill and his counsel. While Justice Goodman suggests a lack of prejudice to Mr. Khill (as he was released on bail and ultimately the sentence imposed by the Court of Appeal reflects the sentence Justice Goodman intended to impose), Mr. Khill, his counsel, and Crown counsel would have been adversely affected by this delay. Mr. Khill, for a significant time, remained under the belief that he was sentenced to a substantially lengthier sentence. It may very well have been that if Justice Goodman's error as to the length of sentence had been immediately

corrected, there would not have been any appeal. Presumably, the need for the appeal would have come at some cost and certainly additional effort on the part of both Crown and defence counsel.

[21] This Review Panel wishes to be clear in stating that Justice Goodman's inaction in this case should not be rationalized or reduced to the inaction that follows from a mere legal misapprehension. Instead, Justice Goodman's inaction constitutes a serious ethical lapse and a failure as discussed in the Court of Appeal's decision (at paragraphs 134-140) to act in a manner that would have more reasonably and promptly provided the requisite notice and transparency to not only the parties, but also the broader public whose own understanding is critical to maintaining public confidence in the administration of justice.

This leads to the question of disposition.

[22] Albeit in a completely different factual situation, the Ontario Judicial Council (OJC) in *Re Zabel*, (OJC, September 11, 2017), at paragraph 41, adopted the following list of factors as identified in *Re Chisvin*, (OJC, November 26, 2012) as relevant to the assessment of the appropriate sanction for judicial misconduct:

- i. Whether the misconduct is an isolated incident or evidenced a pattern of misconduct;
- ii. The nature, extent and frequency of occurrence of the acts of misconduct;
- iii. Whether the misconduct occurred in or out of the courtroom;
- iv. Whether the misconduct occurred in the judge's official capacity or in his private life;
- v. Whether the judge has acknowledged or recognized that the acts occurred;
- vi. Whether the judge has evidenced an effort to change or modify his conduct;
- vii. The length of service on the bench;
- viii. Whether there have been prior complaints about this judge;
- ix. The effect the misconduct has upon the integrity of and respect for the judiciary; and
- x. The extent to which the judge exploited his position to satisfy his personal desires.

[23] We find it helpful to assess this complaint in light of certain of those factors applicable to the conduct that gave rise to the complaints.

[24] This was an isolated incident, which occurred in the courtroom. Justice Goodman has clearly acknowledged the incident and has offered an unreserved apology to this Panel, though not to those most directly affected. To our knowledge, he has no history of substantiated complaints. There was no exploitation for personal gain.

[25] Nowhere in his response to the complaint or in his counsel's submissions to this Panel does Justice Goodman explain what steps he might take to ensure that this type of conduct does not happen again. We are satisfied that the precise conduct, namely reading the wrong judgment, will not occur again. But Justice Goodman could and should have taken more proactive steps following his recognition of his mistake, such as consulting with legal counsel for the Court, consulting with the Crown and defence counsel, and consulting with his Chief Justice. His fear of embarrassment and personal angst are greatly outweighed by the consequences of his inaction or delayed action on the public's perception of the administration of justice.

[26] As to the effect of his conduct on the integrity of and respect for the judicial office, Justice Goodman's initial inaction and failure to act in a way more consistent with the "correcting" of an error undermines the openness and accountability that is required to assist in enhancing the integrity of the administration of justice. To that extent, his conduct reflects poorly on the integrity of and respect for the judicial office.

[27] Notwithstanding those serious concerns, Justice Goodman has had a long and distinguished legal and judicial career. Chief Justice Morawetz notes that since being appointed a judge 15 years ago, Justice Goodman has demonstrated his commitment to serving the public interest through his expertise in criminal law and going above and beyond by frequently presiding through non-sit and vacation weeks to ensure that cases are heard in a timely way.

[28] We accept as well Justice Goodman's counsel's submission that there is no evidence that at any time Justice Goodman was acting in bad faith, though that is just one factor for consideration for constituting a Hearing Panel. Albeit after an inappropriately lengthy delay, Justice Goodman, on his own accord, acted so as to identify his error for the Ontario Court of Appeal.

[29] Despite our obvious and stated concerns, the Review Panel has determined that Justice Goodman's removal from office cannot be justified. The Review Panel has come to that determination given that Justice Goodman's conduct is not so manifestly and profoundly destructive of the concept of the impartiality, integrity, and independence of the judicial role that public confidence would be sufficiently undermined to render him incapable of executing the judicial office.

[30] Ideally, judicial conduct proceedings are meant to be, where possible, when removal is not required, both remedial and restorative of public confidence.

[31] While the Review Panel has determined that Justice Goodman's removal from office cannot be justified, given the Review Panel's concerns about Justice Goodman's conduct as outlined above, the Review Panel considers it appropriate in the circumstances to take action under s. 8.9(2) of the *Review Procedures (2023)*.

[32] In the *Decision of the Review Panel in the Matter of: The Honourable Diana Piccoli of the Superior Court of Justice of Ontario CJC File 23-0399*, Chief Justice Wood, writing for the Review Panel, discussed some of what must be the relevant considerations in deciding whether an expression of concern, warning, or reprimand is appropriate (as an available action under s. 102 of

the *Judges Act*, R.S.C., 1985, c. J-1, as reflected in s. 8.9(2)(a), (b), and (c) of the *Review Procedures* (2023)):

Subsections (a) to (c) of section 102 set out the alternative actions of an expression of concern, warning or reprimand. We find these are hierarchical in nature with an expression of concern being the least serious. In choosing the appropriate sanction we must consider the circumstances, including: a) The seriousness of the conduct, b) The need for deterrence, c) The amelioration of any harm to the administration of justice or the reputation of the judiciary, d) The self reporting and subsequent training in relation to ethical issues for judges, e) The reputation of Justice Piccoli in the legal community.

[33] It is the Review Panel's view that an expression of concern is to be considered as an appropriate action when it is less apparent that there has been an ethical lapse. That is not the case here.

[34] A warning may be appropriate where there is a concern about possible future ethical lapses.¹ With these reasons and the acknowledgements by Justice Goodman as described above, the Review Panel has no concern that in the future Justice Goodman will fall into a similar ethical lapse.

[35] However, the seriousness of this breach suggests on the part of this Review Panel a need for a denunciatory expression signaling a message that needs to be sent, not just to Justice Goodman, but to all members of the judiciary and the public at large.

[36] In the case at hand, the Review Panel considers it appropriate to issue a reprimand to Justice Goodman because of the Review Panel's view that Justice Goodman's delay in disclosing his error could only have adversely affected public confidence in the judiciary for the reasons set out above. In addition, as indicated, the Review Panel remains concerned that Justice Goodman's lack of apology to Mr. Khill and to Crown and defence counsel reveals that he does not fully appreciate how his conduct has adversely affected them. It is the Review Panel's view that this conduct is particularly serious and the amelioration of the reputation of the judiciary requires that the public see a clear and strong message of condemnation of Justice Goodman's injudicious conduct. In so doing, the Review Panel notes that in circumstances like those at hand a reprimand is the most severe sanction available short of a recommendation for removal. For these same reasons and for the purpose of transparency, the Review Panel has also determined that this be considered a public (rather than a private) reprimand.

[37] In addition, given the Review Panel's concern that Justice Goodman has still not fully addressed how his conduct has impacted Mr. Khill as well as Crown and defence counsel, in accordance with its jurisdiction under s. 8.9(2)(d) of the *Review Procedures* (2023), the Review

¹ This gradation of gravity and the respective distinct purposes of those measures were recently discussed in the power point presentation "Intermediate Discipline Sanctions for Judges: A Missed Opportunity to Develop Guidelines" and lecture of Professor Stephen G.A. Pitel of Western University in March 2025 (expected to be accessible in a forthcoming article).

Panel orders that Justice Goodman issue an apology in a form that addresses the foregoing concerns.

Conclusion

[38] In conclusion, the Review Panel has determined that Justice Goodman's removal from office cannot be justified. However, in accordance with its jurisdiction under subsections 8.9(2)(c) and (d) of the *Review Procedures (2023)*, by these reasons, the Review Panel now issues a public reprimand to Justice Goodman for his injudicious conduct and orders that within 30 days, he apologize to Crown counsel and counsel for Mr. Khill, with Mr. Khill's counsel to relay this apology to Mr. Khill in a manner they consider appropriate.

Dated this 23rd day of June, 2025

Original signed

The Honourable Shane I. Perlmutter

Original signed

The Honourable John S. Little

Original signed

Mr. Curtis Kleisinger

DECISION OF THE REVIEW PANEL

IN THE MATTER OF:

THE HONOURABLE CHARLES C. CHANG
OF THE SUPERIOR COURT OF JUSTICE OF ONTARIO
CJC File 23-0488

Review Panel Members:

The Honourable Associate Chief Justice Kenneth G. Nielsen
The Honourable Justice Johanna Price
Ms. Julia Pavlenko

Background

[1] In a complaint filed with the Canadian Judicial Council (Council) on September 12, 2023, the complainant alleged that Justice Chang behaved inappropriately during a family law hearing. Justice Chang was seized of an urgent motion for temporary orders respecting decision-making responsibility, parenting time and the children’s attendance at school and daycare.

[2] The complainant stated that Justice Chang was verbally abusive and intimidating during the hearing.

[3] Pursuant to s. 89 of the *Judges Act*, R.S.C., 1985, c. J-1 (*Act*), the complaint was referred to a Screening Officer.

[4] Pursuant to section 91 of the *Act*, and further to the review of the complaint, the Screening Officer referred the complaint for the designation of a reviewing member.

[5] In accordance with section 93 of the *Act* and section 7.3 of the “*Canadian Judicial Council Procedures for the Review of Complaints or Allegations About Federally Appointed Judges*” (*Review Procedures (2023)*), the reviewing member sought Justice Chang’s submissions as well as those of the Honourable Geoffrey B. Morawetz, Chief Justice of the Superior Court of Justice of Ontario.

[6] Further to the review of Justice Chang’s file, the reviewing member referred the complaint to the Council for the establishment of a review panel. The reviewing member did not believe the conduct of Justice Chang justified his removal from judicial office but did believe that an action under section 102 of the *Act* could be appropriate.

Ethical Principles for Judges

[7] The most current version of the Ethical Principles for Judges was adopted by Council in 2021 (*Ethical Principles 2021*).

[8] The relevant Ethical Principles in the present matter provide as follows:

2.C.1 A hallmark of judicial proceedings is that all participants, including judges, will conduct themselves in a manner that preserves the honour and dignity of both the individual proceedings and the administration of justice more generally. Judges should endeavour to treat all participants in the judicial process with civility and respect.

2.C.3 The circumstances of some cases and the conduct of counsel and parties sometimes require judges to act with an appropriate measure of firmness and to emphasize decisiveness, promptness, the prevention of abuse of process or improper treatment of participants in the adjudicative process. Maintaining civility and respect requires judges to ensure a proper balance between upholding the right of parties to be heard and ensuring the efficiency of the process.

[9] The *Ethical Principles 2021* are not a code of conduct. They provide aspirational guidance to federally appointed judges in relation to ethical issues.

Council's Judicial Complaint Review Procedure Legal Framework

[10] The conduct review process for federally appointed judges is set out in sections 79 to 140 of the *Act*. It is supplemented by the *Review Procedures (2023)*.

[11] The first stage of review for a complaint related to judicial conduct is carried out by a screening officer. The jurisdiction of a screening officer to dismiss a complaint is found in section 90(1) of the *Act*:

90 (1) Subject to subsection (2), a screening officer may dismiss a complaint if they are of the opinion that it

(a) is frivolous, vexatious or made for an improper purpose or is an abuse of process;

(b) was not made for a reason referred to in paragraphs 80(a) to (d);
or

(c) does not meet the other screening criteria specified by the Council.

[12] Where the screening officer does not dismiss a complaint, it is referred to the second stage of the process and Council will designate a “reviewing member” who is a member of the Judicial Conduct Committee to review the complaint. The reviewing member is required to give the judge who is the subject of the complaint an opportunity to make written submissions. Section 94(1) of the *Act* sets out the jurisdiction of the reviewing member to dismiss the complaint:

94 (1) The reviewing member shall dismiss the complaint if they are of the opinion that it should be dismissed for any reason set out in paragraphs 90(1)(a) to (c) or that it is wholly without merit.

[13] If the reviewing member does not dismiss the complaint, they shall refer it to the third stage of the process for the establishment of a review panel and provide the panel with their observations and any recommendation about how the complaint should be resolved.

[14] A review panel is established under section 98(1) of the *Act*. It is required to give the judge who is the subject of the complaint as well as their chief justice an opportunity to provide written submissions. Section 101 of the *Act* sets out the circumstances when a review panel shall refer the matter to Council for establishment of a full hearing panel:

101 The review panel shall refer the complaint to the Council for the establishment of a full hearing panel if it determines that the judge's removal from office could be justified.

[15] If the matter is not referred to a full hearing panel, the options available to the review panel are set out in section 102 of the *Act*:

102 If the review panel does not refer the complaint to the Council under section 101, it may dismiss the complaint or take one or more of the following actions if it considers it appropriate to do so in the circumstances:

- (a) issue a private or public expression of concern;
- (b) issue a private or public warning;
- (c) issue a private or public reprimand;
- (d) order the judge to apologize, either privately or publicly, by whatever means the panel considers appropriate in the circumstances;
- (e) order the judge to take specific measures, including attending counselling or a continuing education course;
- (f) take any action that the panel considers to be equivalent to any of the actions referred to in paragraphs (a) to (e);
- (g) with the consent of the judge, take any other action that the panel considers appropriate in the circumstances.

First Stage of the Judicial Conduct Review Process in this Matter

[16] On December 21, 2023, the screening officer appointed to review the complaint referred it to Council for designation of a reviewing member. The reasons for doing so stated in part that the conduct of Justice Chang could be interpreted as demonstrating disrespect for the parties, their counsel, and the hearing process. The screening officer referred to many interventions by Justice Chang that were of concern and could have been

interpreted as disrespectful or even involved yelling. The screening officer noted that the judge frequently interrupted counsel and raised his voice in an intimidating manner, as if he was asserting the power of his position over those in a subordinate position to him.

[17] Referring to the Ethical Principles 2.C.1 and 2.C.3, the screening officer concluded that Justice Chang repeatedly expressed his dissatisfaction with the fact that this was a “he said/she said” scenario with little or no neutral, external evidence to support the parties’ assertions.

[18] As a result, the screening officer recommended that the complaint be referred to the Council for the designation of a reviewing member pursuant to section 91 of the *Judges Act*.

The Second Stage of the Judicial Conduct Review Process in this Matter

[19] As required by the *Act* and the *Review Procedures (2023)*, the reviewing member sought submissions from Justice Chang and the Chief Justice of the Superior Court of Justice of Ontario, the Honourable Geoffrey B. Morawetz. Justice Chang’s counsel provided submissions on his behalf on April 12, 2024.

[20] Justice Chang’s counsel submitted that the context of the hearing ought to be considered in assessing whether the comments identified by the screening officer as raising concerns amounted to judicial misconduct.

[21] Justice Chang’s counsel submitted that this hearing was not a typical day in court as Justice Chang was informed that the Milton Courthouse, where the matter before Justice Chang was being heard, was to be closed indefinitely due to substance contamination in the building. Justice Chang’s counsel wrote that Justice Chang was “very distressed” about this development as this was the second time in the recent past that the Milton Courthouse was subject to closure as a result of issues related to the physical plant.

[22] Referring to the comments identified by the screening officer as raising concerns, Justice Chang’s counsel submitted that they were Justice Chang’s colloquial and direct way of expressing the concerns he had as the judge dealing with an application that he considered to have been poorly prepared and ill-considered.

[23] Justice Chang expressed the view that parties less familiar with the day-to-day ‘cut and thrust’ of a judicial colloquy might interpret his ‘firmness’ as crossing the line into actual disrespect. While that was never Justice Chang’s intent, he indicated that he has

reflected on this issue and sought out the assistance of a retired judicial colleague as a mentor on this area.

[24] Justice Chang's counsel submitted that, in the context of Principle 2.C.1, the comments were not made for the purpose or intent of intimidating or insulting counsel, nor were they intended to be uncivil when properly considered in the circumstances of the hearing. He explained that the identified comments were an effort by Justice Chang to engage the authority recognized by Principle 2.C.3 that recognizes the need for judges to have resort to "an appropriate level of firmness" in certain cases. Justice Chang's comments were made for the purpose of controlling and focusing the conduct and submissions of counsel in his courtroom in an urgent, contested application involving "extreme, extreme, extreme" allegations of abuse.

[25] In this regard, Justice Chang's counsel explained that Justice Chang would ask the reviewing member to consider whether the complaint could be dismissed pursuant to section 6.7(2) of the *Review Procedures (2023)* because, while the conduct is concerning, it does not rise to the level of judicial misconduct requiring discipline when the comments are considered in context.

[26] In his letter to the reviewing member, Justice Chang apologized to the complainant if she left the hearing feeling that she had been verbally abused and intimidated. Referring to the context of the hearing and indicating that counsel for both parties were not assisting the court, Justice Chang recognized that at times his words and tone were not appropriate. He wrote that he is mindful that all of a jurist's words during a court hearing not only impact participants, but may also affect the dignity and solemnity of the hearing itself and regretted that his approach may have caused any diminution of the public's respect for the court.

[27] The reviewing member considered the file and decided to refer the matter to a review panel.

[28] In relation to the closing of the Milton Courthouse, the reviewing member was of the opinion that while obviously causing a lot of rearrangement, reassignments and uncertainty, the closing of the courthouse cannot be given the emphasis that Justice Chang's counsel and Justice Chang put on this to justify the judge's interventions and tone in court. When called to preside over a case, a judge must be able to put aside the frustrations of the day, whether professional or personal, otherwise it becomes impossible to carry out their functions in compliance with Ethical Principle 2.C.1.

[29] In relation to the nature of the case to be decided, the reviewing member expressed that urgent family law matters can be a stressful situation for the parties involved and perhaps, at times, for the judges. However, these situations are not so unique and rare, especially in the family law context, that a judge is not able to deal with them, no doubt with a certain firmness, as recognized in Principle 2.C.3, but still with civility.

[30] In relation to the submission that there was lack of cooperation by counsel, the reviewing member stated that there is no doubt that without the cooperation of counsel, it becomes very difficult and frustrating for a judge to decide a matter, particularly in the family law context, as the decision can have serious consequences for the parties and their children. However, cases where there is limited proof and that contain “he says – she says” evidence are not so unique and rare that judges cannot get to the crux of the parties’ submissions by asking them, in a firm but appropriate way, the questions that may assist them in their decision-making. Judges must also keep in mind that counsel work with what is being provided to them by the parties, which can be minimal in some circumstances.

[31] The submissions from Justice Chang, while recognizing that the tone was not always appropriate, do not refer to the audio recording, but only to the transcript. If the whole context of the hearing is to be considered, the audio recording cannot be ignored and all interventions by Justice Chang must also be considered together.

[32] The reviewing member stated that when listening to the audio recording, it becomes apparent that Justice Chang was impatient and that his tone was inappropriate, abusive and intimidating at times, even more so towards the end of the hearing. His interventions go beyond what is usually considered the exercise of proper firmness, as recognized in Principle 2.C.3. His interventions did not preserve the honour and dignity of both the individual proceedings and the administration of justice more generally, as indicated in Principle 2.C.1. The fact that Justice Chang’s counsel submitted that Justice Chang’s many interventions were not directed towards the complainant cannot serve as a justification of his overall behaviour. Maintaining civility and respect requires judges to ensure a proper balance between upholding the right of parties to be heard and ensuring the efficiency of the process. Justice Chang’s interventions did not have the effect of maintaining such a proper balance.

[33] The fact that Justice Chang indicated that he sought the assistance of a retired judicial colleague as a mentor is certainly a step in the right direction. What is not clear, however, is who he consulted and whether this was a one-time request for assistance or whether it is meant to be on-going for a certain time.

[34] The matter is not trivial, Justice Chang is at the beginning of his judicial career and the Council cannot simply hope that this won’t happen again if Justice Chang faces yet

another urgent matter where counsel are ill-prepared, and if meaning is to be given to the Ethical Principles for Judges 2.C.1 and 2.C.3.

[35] The reviewing member recommended that the review panel use a remedy available under section 102 of the Act along with the encouragement to Justice Chang to get the proper mentoring from current or retired members of the court.

Third Stage of the Judicial Conduct Review Process: Review Panel

[36] As required by the section 99 of the *Act* and the *Review Procedures (2023)*, the review panel received all the materials provided to the reviewing member. In addition, we invited submissions from Chief Justice Morawetz and Justice Chang.

[37] In a letter dated May 28, 2024, Chief Justice Morawetz wrote that Justice Chang was known to be a very hard-working judge and always accepts all cases without complaint or hesitation, even last-minute assignments. That Justice Chang is well liked and respected by all his judicial colleagues. He added that Justice Chang has a strong sense of justice and common sense that he applies to all cases. By reputation, although he can be outspoken, he is always frank and clear to all parties and counsel — a quality appreciated by most counsel and indeed significantly praised by the Bar in Halton where he presides.

[38] Chief Justice Morawetz had no doubt that Justice Chang sincerely accepted the complaint as a lesson learned — a reminder that his commitment to fairness and access to justice must be tempered with patience and the dignity and solemnity of the court process.

[39] In a letter dated June 10, 2024, Justice Chang wrote that he accepted the reviewing member's evaluation of the circumstances and his assessment of the record and added that his original submissions were not intended to suggest that he did not accept those concerns identified by the reviewing member.

Decision of the Review Panel

[40] The review panel first considered whether the matter should be referred to Council for the establishment of a full hearing panel or, alternatively, dismissed.

[41] The criteria for recommending removal are onerous. They are encompassed in what is referred to as the *Marshall* test which can be found in many judicial conduct decisions, including *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11. It requires:

Conduct which is so manifestly and profoundly destructive of the concept of the impartially, integrity and independence of the judicial role, that

public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office.

[42] The review panel agreed that removal from office is not justified in the circumstances. Therefore, the review panel concludes there was no basis to recommend appointment of a full hearing panel, which should only happen if it was determined that removal from office could be justified.

[43] The review panel also concluded the complaint should not be dismissed and agrees with and adopts the reviewing member's reasons explained above. The Council has an important role in maintaining the confidence of the public in the administration of justice. More specifically, the review panel believes that actions under section 102 of the Act are required:

- To remind Justice Chang of the importance of conducting himself in a manner that preserves the honour and dignity of both the individual proceedings and the administration of justice more generally. The words, vocabulary and tone of voice used in a hearing may have a detrimental impact on both the litigants and the confidence of the public in the administration of justice.
- To remind Justice Chang that maintaining civility and respect requires him to ensure a proper balance between upholding the right of the parties to be heard and ensuring the efficiency of the process. The nature of the case to be decided and what a judge may consider to be a lack of cooperation by counsel are no justification to brush aside principles of civility and respect.
- Justice Chang ought to have been aware that his behaviour during the hearing was contrary to the standards established in the *Ethical Principles 2021*.

[44] As stated by the reviewing member, this matter is not trivial. Justice Chang is at the beginning of his judicial career and the Council cannot simply hope that this will not happen again if Justice Chang faces yet another urgent matter with similar challenges, and if meaning is to be given to the *Ethical Principles 2021* 2.C.1 and 2.C.3.

[45] In choosing the appropriate action, we have considered the following circumstances:

1. The tone and interventions from Justice Chang at the hearing;
2. The need to reinforce the principles of respect and civility in court and in the administration of justice generally to foster public confidence;

3. The fact that Justice Chang recognizes that his tone and vocabulary were at times inappropriate;
4. The fact that Justice Chang wishes to apologize to the complainant;
5. The fact that Justice Chang agrees with the recommendation of the reviewing member;
6. The willingness of Justice Chang to receive coaching from a senior judge.

[46] We have considered all of the above and conclude that the removal of Justice Chang from office could not be justified. In the result, the complaint is not referred to the Council for the establishment of a full hearing panel pursuant to section 101 of the Act. However, we have determined that the complaint should not be dismissed. Pursuant to subsection 102(a) of the Act, the review panel will take an action of a private nature and also, pursuant to subsection 102(f), the review panel orders that Justice Chang engage in more coaching with a senior judge for a duration and frequency that is considered appropriate by his Chief Justice. We conclude that this outcome adequately reflects the nature of the misconduct as well as the role of the Council in maintaining the public confidence in the administration of the justice.

Dated this 4th day of September, 2024.

Original signed

The Honourable Associate Chief Justice Kenneth G. Nielsen

Original signed

The Honourable Justice Johanna Price

Original signed

Ms. Julia Pavlenko

Tab 128



DECISION OF THE REVIEW PANEL
IN THE MATTER OF:
THE HONOURABLE ARTHUR DOYLE
OF THE COURT OF KING'S BENCH OF NEW BRUNSWICK
CJC FILE 24-0144

Review Panel Members:
The Honourable Associate Chief Justice Rosalie McGrath
The Honourable Justice Bernette Ho
Mr. Curtis Kleisinger

Background

[1] Justice Arthur Doyle was appointed to the Court of King's Bench of New Brunswick in June of 2019 where he has presided as a judge in Saint John.

[2] On 2 February 2024, the Canadian Judicial Council (Council) received a complaint concerning Justice Doyle jointly submitted by Steven Filshie and Joan E. Zed. The complaint related to a settlement conference over which Justice Doyle presided on 21 December 2023. The conference was held in an attempt to settle a dispute over the estate of Joan Zed's late husband, Kevin Zed. Steven Filshie agreed to help Joan Zed in closing her late husband's estate. Joan Zed's brother-in-law, Peter Zed, Sr., who was a partner with Cox & Palmer in their Saint John office, filed a Caveat concerning the estate and then an Application for Letters of Probate. Peter Zed, Sr.'s son, Peter Zed, Jr., who was a partner with Cox & Palmer in Nova Scotia, also filed a Caveat.

[3] The complainants alleged that, unbeknownst to them at the time, Justice Doyle had worked in the same Cox & Palmer Saint John office as Peter Zed, Sr. and in the same areas of law for many years, until his 2019 judicial appointment. For the complainants, Justice Doyle's professional relationship with Peter Zed, Sr. was an obvious yet undisclosed conflict of interest. In addition, the complainants alleged that Justice Doyle implied that he did not know much about Peter Zed, Sr. and feigned ignorance that Peter Zed, Sr.'s son, Peter Zed, Jr., who also filed a Caveat, worked with Cox & Palmer in Nova Scotia. The complainants allege Justice Doyle "volunteered" to preside at the settlement conference, knowing that his former law partner was in jeopardy of being exposed for extensive wrongdoing; in their view, this is evidence of collusion with Peter Zed, Sr. to defeat justice.

[4] In the complainants' view, the conflict of interest they noted raised a reasonable apprehension of bias. It also ran contrary to case law holding that not only must justice be done, it must be seen to be done. In this instance, the complainants alleged that Justice Doyle's biased conduct undermined public confidence in the judiciary and the justice system.

Ethical Principles for Judges

[5] The latest version of the *Ethical Principles for Judges* was adopted by the Council in 2021. The Principles are not a code of conduct. They provide aspirational guidance to federally appointed judges in relation to ethical issues. With respect to impartiality and potential conflicts of interest, the *Ethical Principles* state the following:

5.A.2 Impartiality requires not only the absence of bias and prejudgment, but also the absence of any appearance of partiality. This dual aspect of impartiality is captured in the oft-repeated words that justice must not only be done, but manifestly be seen to be done. The test is whether a reasonable and informed person with knowledge of all relevant

circumstances, viewing the matter realistically and practically, would apprehend a lack of impartiality in the judge.

5.A.8 Judges have a responsibility to promote opportunities for all persons to understand the judicial process and to meaningfully present their case, whether or not they have legal representation. Self-represented persons may sometimes be uninformed about their rights and about the consequences of the options they choose. Judges should take appropriate and reasonable measures to provide a fair and impartial process and prevent an unfair disadvantage to self-represented persons. Such measures are consistent with impartiality provided that they are fair to other parties.

5.C.3 Conflicts of interest may arise from: a pecuniary or non-pecuniary interest in the outcome; a close family, personal or professional relationship with a litigant, counsel or witness; or the judge having expressed views evidencing bias regarding a litigant or an issue that is before the court.

5.C.10 In certain situations, it may be appropriate for a judge to make disclosure of a potential conflict and invite submissions from the parties. However, judges, not the parties or their counsel, bear the burden of ensuring respect for the principle of judicial impartiality. Neither disclosure of a conflict of interest nor the consent of the parties necessarily justifies judges ignoring circumstances which reasonably call into question their ability to hear a case and decide impartially.

CJC Complaint Review Procedure

[6] The conduct review process for federally appointed judges is set out in sections 79 to 140 of the *Judges Act*, R.S.C. 1985, c. J-1 (“the Act”). It is supplemented by the procedures adopted by the Council in June 2023, which are entitled *Canadian Judicial Council Procedures for the Review of Complaints or Allegations About Federally Appointed Judges (Review Procedures (2023))*.

[7] The first stage of review for a complaint related to judicial conduct is carried out by a screening officer. The jurisdiction of a screening officer to dismiss a complaint is found in section 90(1) of the Act: 90 (1). Subject to subsection (2), a screening officer may dismiss a complaint if they are of the opinion that it (a) is frivolous, vexatious or made for an improper purpose or is an abuse of process; (b) was not made for a reason referred to in paragraphs 80(a) to (d); or (c) does not meet the other screening criteria specified by the Council.

[8] Where the screening officer does not dismiss a complaint, it is referred to the Council for the designation of a “reviewing member” who is a member of the Council. The reviewing member is required to give the judge who is the subject of the complaint an opportunity to make written submissions. Section 94(1) of the Act sets out the jurisdiction of the reviewing member to dismiss the complaint: 94 (1). The reviewing

member shall dismiss the complaint if they are of the opinion that it should be dismissed for any reason set out in paragraphs 90(1)(a) to (c) or that it is wholly without merit.

[9] If the reviewing member does not dismiss the complaint, they shall refer it to the Council for the establishment of a review panel.

[10] After a review panel is established, section 97 of the Act requires the reviewing member to provide the panel with every document in their possession related to the complaint. They may also provide the panel with their observations about the complaint and any recommendations about how it should be resolved.

[11] A review panel is established under section 98(1) of the Act. It is required to give the judge who is the subject of the complaint as well as their chief justice an opportunity to provide written submissions. Section 101 of the Act sets out the circumstances when a review panel shall refer the matter to the Council for the establishment of a full hearing panel: 101. The review panel shall refer the complaint to the Council for the establishment of a full hearing panel if it determines that the judge's removal from office could be justified.

[12] If the matter is not referred to a full hearing panel, the options available to the review panel are set out in section 102 of the Act: 102. If the review panel does not refer the complaint to the Council under section 101, it may dismiss the complaint or take one or more of the following actions if it considers it appropriate to do so in the circumstances: (a) issue a private or public expression of concern; (b) issue a private or public warning; (c) issue a private or public reprimand; (d) order the judge to apologize, either privately or publicly, by whatever means the panel considers appropriate in the circumstances; (e) order the judge to take specific measures, including attending counselling or a continuing education course; (f) take any action that the panel considers to be equivalent to any of the actions referred to in paragraphs (a) to (e); (g) with the consent of the judge, take any other action that the panel considers appropriate in the circumstances.

Decisions of the Screening Officer and Reviewing Member Concerning Justice Doyle

[13] On 20 March 2024, the screening officer appointed to review the complaint referred it to the Council for the designation of a reviewing member pursuant to section 91 of the Act. The screening officer concluded that it may have been incumbent upon Justice Doyle to declare his past professional relationship with one of the parties to the settlement conference in order to ensure that there were no reasonable grounds for a perception of bias.

[14] As required by the Act and the *Review Procedures (2023)*, the reviewing member sought submissions from Justice Doyle and the Chief Justice of the Court of King's Bench of New Brunswick, The Honourable Tracey DeWare.

[15] Chief Justice DeWare provided a letter dated 20 June 2024, in which she noted that it was difficult to find a judge to conduct the settlement conference. She was pleased that Justice Doyle was available and that the matter had been resolved. Chief Justice DeWare said she did not register any potential conflict at the time of the conference with Peter Zed, Sr. being a party. While in retrospect it would have been better for Justice Doyle to have disclosed his connection with Peter Zed, Sr., she is confident that Justice Doyle's intentions were solely to assist the parties in achieving a collaborative resolution to their issues. She is certain that Justice Doyle would be on the lookout for real and perceived conflicts of interest in the future.

[16] Justice Doyle provided a letter dated 21 June 2024, in which he stated that Peter Zed, Sr. became his law partner in January, 2013, while Peter Zed, Jr. became a partner in the Nova Scotia office of Cox & Palmer in 2017. He wrote that he did not work on any legal files together with Peter Zed, Sr., and they were not (and are not) close acquaintances. He did occasional legal work with Peter Zed, Jr., but again they never socialized. When he was appointed to the bench, Justice Doyle advised that he was told not to have dealings in his court with lawyers from his former law firm or former clients for a period of three years. He was also advised that he could never hear matters where his friends were counsel. He limited his contact with his "friends" to one person and identified them on his conflict list. When he agreed to conduct the settlement conference, he did so thinking about Peter Zed, Sr. as a former law partner appearing before him in general and not as a party to a dispute where a higher onus regarding disclosure may have been applicable, particularly where Ms. Zed was self-represented. Justice Doyle wrote that he did not believe he had a conflict of interest or any need to disclose his previous association with Peter Zed, Sr. or his son, Peter Zed, Jr., because they were not, and are not, close acquaintances, he never worked on legal matters with Peter Zed, Sr. and rarely did so with Peter Zed, Jr., and he had been a judge for four-and-a-half years when he presided over the settlement conference, well past the three-year ban on dealing with cases involving lawyers from his former law firm. While confident that he acted impartially, in retrospect Justice Doyle recognized the difference between Peter Zed, Sr. being a party and not simply counsel, said it was not his intention to conceal any relationship, and that he simply did not identify the potential conflict in the situation. He now recognizes, however, that the complainants could have perceived the situation differently.

[17] In a decision dated 28 August 2024, the reviewing member concluded that the conduct of Justice Doyle was not such as to justify removal from judicial office, but an action under section 102 of the Act would be appropriate. He referred the matter to a review panel, firstly, in reference to the following in the *Ethical Principles for Judges*:

I.C. Judges exhibit and promote high standards of judicial conduct so as to reinforce public confidence in the independence of the judiciary.

V.A. Judges ensure that their conduct at all times maintains and enhances confidence in their impartiality and that of the judiciary.

5.C.2. The potential for a conflict of interest arises when the personal interest of the judge (or of those close to the judge) conflicts with the judge's duty to adjudicate impartially. Judicial impartiality is concerned with impartiality in fact and in the perception of a reasonable and informed person. As a result, judges should be attentive to both actual conflicts between their self-interest and their duty of impartial adjudication, and to circumstances in which a reasonable and informed person would reasonably apprehend a conflict.

5.C.3 Conflicts of interest may arise from: a pecuniary or non-pecuniary interest in the outcome; a close family, personal or professional relationship with a litigant, counsel or witness; or the judge having expressed views evidencing bias regarding a litigant or an issue that is before the court.

5.C.10 In certain situations, it may be appropriate for a judge to make disclosure of a potential conflict and invite submissions from the parties. However, judges, not the parties or their counsel, bear the burden of ensuring respect for the principle of judicial impartiality. Neither disclosure of a conflict of interest nor the consent of the parties necessarily justifies judges ignoring circumstances which reasonably call into question their ability to hear a case and decide impartially.

[18] The decision to refer the matter to a review panel was also based, in part, on the Report of the Review Panel Constituted by the Canadian Judicial Council Regarding the Honourable Kelly A. Gorman, dated 3 May 2023. The reviewing member found that the following ethical principles applied to both this case and the Gorman case:

1. Judges should strive to ensure that their conduct, both in and out of Court, maintains and enhances confidence in their impartiality and that of the judiciary.
2. The appearance of impartiality is to be assessed from the perspective of a reasonable, fair minded and informed person.
3. Judges should disqualify themselves in any case in which they believe that a reasonable, fair minded and informed person would have a reasoned suspicion of conflict between a judge's personal interest (or that of a judge's immediate family or close friends or associates) and a judge's duty.

In light of these principles, the reviewing member concluded that Justice Doyle should have disclosed his past connection with Peter Zed, Sr. and Peter Zed, Jr. as lawyers working in the same law firm prior to his judicial appointment. In doing so, this situation could have been prevented and would have enhanced confidence in the judiciary. This is particularly so given that one of the parties to the settlement conference was self-representing.

[19] The reviewing member's decision to refer this matter to a review panel was also based, in part, on Justice Doyle's comments to the Council. Justice Doyle wrote that he agreed to preside at the settlement conference thinking of Peter Zed, Sr. as a former law partner of his appearing in general, as opposed to a former law partner of his appearing in the specific capacity as a party to a dispute, in which a higher onus regarding disclosure may or may not have been applicable, particularly as Joan Zed was representing herself. The reviewing member found this reasoning to be flawed as Justice Doyle should have disclosed his past affiliation with the opposing party whether he viewed the opposing party as a former law partner appearing in general or as a party to a dispute. Furthermore, Justice Doyle wrote that he acted completely impartially in the context of the settlement conference, but recognized that the complainants could have perceived the situation differently. It is precisely because of his previous affiliation with one party that he should have raised that they had worked at the same firm even though they had no real close relationship.

[20] The reviewing member referred this matter to the Council for the establishment of a review panel pursuant to section 95 of the Act, and section 7.11 (b) of the *Review Procedures (2023)*. In addition, and in accordance with section 97 of the Act, he observed that the complaint would not justify the removal of Justice Doyle from office. He recommended that the complaint should not be dismissed and an action of a private nature should be issued to Justice Doyle pursuant to section 102 of the Act.

Review Panel Procedure and Disposition

[21] As required by the Act and the *Review Procedures (2023)*, the review panel received all the materials provided to the reviewing member. In addition, we invited submissions from Chief Justice DeWare and Justice Doyle. Chief Justice DeWare and Justice Doyle both referred to their earlier submissions to the reviewing member.

[22] The review panel first considered whether the matter should be referred to the Council for the establishment of a full hearing panel or, alternatively, dismissed. We concluded there was no basis to recommend appointment of a full hearing panel, which should only happen if we were to determine that removal from office could be justified. The criteria for recommending removal are onerous. They are encompassed in what is referred to as the Marshall test, which can be found in many judicial conduct decisions, including *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11. It requires conduct which is so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office.

[23] The review panel agreed there was no basis on which Justice Doyle's removal from office could be justified in the circumstances. He thought there was no need to disclose that Peter Zed, Sr. had worked at the same firm after considering that the three-year

window for not hearing from lawyers from his previous firm had passed. It was an honest mistake.

[24] The review panel did not accept that Justice Doyle intentionally concealed knowing Peter Zed, Sr. or that Justice Doyle reached any conclusion about whether Peter Zed, Sr. was engaged in wrongdoing. We concluded, nonetheless, that the complaint should not be dismissed. The factors which led us to this decision include:

- the *Ethical Principles for Judges* make it clear that impartiality requires not only the absence of bias and prejudgment, but also the absence of any appearance of partiality. This is a case where a reasonable and informed person with knowledge of all relevant circumstances could apprehend a lack of impartiality in Justice Doyle, given his past professional relationship with one of the parties;
- this was a situation where it was appropriate for a judge to make disclosure of a past working relationship, even if minor, and invite submissions from the parties. However, as the *Ethical Principles for Judges* makes clear, it was Justice Doyle who bore the burden of ensuring respect for the principle of judicial impartiality;
- the obligation on Justice Doyle to notify the parties that there was a previous working relationship was heightened by the fact that one of the parties was self-represented; and
- Justice Doyle was mistaken about the appearance of a conflict of interest at the settlement conference. It did not matter whether Peter Zed, Sr. was a party or counsel at the conference – the appearance of partiality would be present in either case. Disclosing the previous working relationship at the outset of the hearing was required and any appearance of partiality could not be addressed solely by acting in a strictly impartial fashion at the settlement conference.

[25] While this complaint should not be dismissed, we find that there are a number of factors that should mitigate any sanction imposed upon Justice Doyle. Those mitigating factors include:

- at no time did Justice Doyle have an intention to mislead. He did not think that there was a conflict of interest and that is why he did not disclose his previous professional relationship with Peter Zed, Sr.;
- Justice Doyle had every intention to conduct a fair proceeding for the benefit of all parties by helping them resolve their differences without the need for costly and time-consuming litigation;
- Justice Doyle acknowledges that while he did not identify the previous working relationship, the complainants could have perceived the situation differently. This realization should help Justice Doyle in the future; and
- the settlement conference took place outside of a large, urban centre. In such a setting, it can be difficult to find judges, counsel, and parties who have had no previous dealings with each other. Such circumstances may require participants

who know each other to nevertheless engage in judicial proceedings more frequently than is the case in large cities.

[26] In choosing an appropriate sanction we must consider the circumstances, including: a) the seriousness of the conduct, b) the need for deterrence, c) the amelioration of any harm to the administration of justice or the reputation of the judiciary, d) the mitigating factors, and e) the reputation of Justice Doyle in the legal community.

[27] We have considered all the above and conclude that a private measure pursuant to section 102 of the *Judges Act* is the appropriate sanction. This recognizes the nature of the honest mistake on the part of Justice Doyle and the potential impact on public confidence in the impartiality of the judiciary, along with the mitigating circumstances described above.

Dated this 12th day of November 2024.

Original signed

The Honourable Associate Chief Justice Rosalie McGrath

Original signed

The Honourable Justice Bernette Ho

Original signed

Mr. Curtis Kleisinger

Tab 129



DECISION OF THE REVIEW PANEL
IN THE MATTER OF
THE HONOURABLE MARC ST-PIERRE
OF THE SUPERIOR COURT OF QUÉBEC
FILE 24-0784

The text of this decision has been translated from the original decision in French.

Review Panel Members:
The Honourable Larry Landry
The Honourable Miriam Maisonville
Ms. Julia Pavlenko

Background

[1] Justice Marc St-Pierre was appointed to the Superior Court of Québec in June 2008 and sits in the Montréal region.

[2] On April 9, 2024, the Canadian Judicial Council (the Council) received a complaint about Justice St-Pierre from Me Mathieu Decelles, who works as counsel for the Société d'assurance automobile du Québec (SAAQ). The complainant had appeared as an individual before Justice St-Pierre in a judicial review case against the City of Montréal. Justice St-Pierre's decision, handed down in January 2022, went against him, and the Québec Court of Appeal refused him permission to appeal.

[3] On January 8, 2024, a colleague of the complainant, also counsel for the SAAQ, appeared before Justice St-Pierre in a judicial review case against the City of Montréal, a case completely independent of the first one. During the hearing, the colleague in question submitted as case law a decision in which the complainant had acted as counsel. Justice St-Pierre interrupted the colleague and made remarks about the complainant, which are the subject of the complaint lodged with the Council.

[4] The following is a free transcription by Mathieu Decelles of the exchange among Justice St-Pierre, counsel for the City of Montréal, and the complainant's colleague:
(from 46 minutes 25 seconds).

Justice St-Pierre to the parties:

"Hey, don't tell me, wait a second. Hmm (little laugh)."

Justice St-Pierre to counsel for the City of Montréal:

"You don't do zoning, do you?"

Counsel for the City of Montréal:

"No?"

Justice St-Pierre:

"Don't you know Mathieu Decelles?"

Counsel for the City of Montréal:

"Excuse me?"

Justice St-Pierre:

"Don't you know Mathieu Decelles?"

Counsel for the City of Montréal:

"No, I don't know him?"

SAAQ counsel:

"He is my colleague."

Justice St-Pierre:

“I know he’s your colleague, I know him well. You’ll talk to him about me, but don’t get too close because... you risk...”

SAAQ counsel:

“In all transparency I don’t know what you are referring to.”

Justice St-Pierre:

“It’s public, it’s a judgment of, it’s Decelles against the City of Montréal. A zoning issue, he wanted to modify his vehicle, his building.”

“And it took a long, long time, because every time that you know, I did what I’m doing with you, then he was always adding other things, Maître Decelles, he even had the investigation reopened, reamended, amended, he did everything, unfortunately for him he didn’t win.”

This transcription is faithful to the recording of the hearing to which we have listened.

[5] The complainant alleges that it is not a matter of commenting on a judgment rendered in connection with the hearing, but rather of commenting on a party itself, overstepping a judge’s duty of reserve and disrupting the professional calm that any lawyer is entitled to expect from the Court. The complainant further alleges that Justice Marc St-Pierre’s comments were directed personally against him, the complainant.

[6] The complainant alleges that the judge’s actions tainted his impartiality with regard to all cases in which the complainant would be a party, both personally and professionally as a lawyer, since Justice St-Pierre had himself made personal comments about him in another case.

[7] The complainant alleges that these comments call into question Justice St-Pierre’s judicial impartiality and neutrality, especially with regard to the complainant, and that the personalization of Justice Marc St-Pierre’s comments during the hearing on January 8, 2024, in no way meets the standards of judicial conduct for a judge.

Council procedure for review of complaints

[8] Before addressing the allegation made against Justice St-Pierre, an overview of the review process and the principles of judicial ethics is necessary to understand the framework of this process, the mandate and powers of the review panel, and the foundations of the judicial conduct considered by the review panel.

[9] The conduct review process for federally appointed judges is set out in sections 79 to 140 of the *Judges Act*, R.S.C., 1985, c. J-1 (the “Act”). It is supplemented by the procedures adopted by the Council in 2023 and recently amended in 2025, which are entitled *Canadian Judicial Procedures for the Review of Complaints or Allegations About Federally Appointed Judges* (“Review Procedures (2025)”).

[10] The first step in investigating a complaint about a judge's conduct is carried out by a screening officer. The screening officer's authority to dismiss a complaint is set out in subsection 90(1) of the *Act*:

90(1) Subject to subsection (2), a screening officer may dismiss a complaint if they are of the opinion that it (a) is frivolous, vexatious or made for an improper purpose or is an abuse of process; (b) was not made for a reason referred to in paragraphs 80(a) to (d); or (c) does not meet the other screening criteria specified by the Council.

[11] When the screening officer decides that the complaint should proceed, it is referred to the Council for the designation of a "reviewing member," who is a member of the Council. The reviewing member shall give the judge who is the subject of the complaint an opportunity to provide written observations. Section 94(1) of the *Act* defines the reviewing member's authority to dismiss a complaint:

94(1) The reviewing member shall dismiss the complaint if they are of the opinion that it should be dismissed for any reason set out in paragraphs 90(1)(a) to (c) or that it is wholly without merit.

[12] If the complaint is not dismissed, the reviewing member shall refer it to the Council for the establishment of a review panel. A review panel is made up of three people: a member of the Council, a puisne judge (who is not a member of the Council) and a lay person.

[13] Once the review panel has been established, section 97 of the *Act* requires the reviewing member to provide it with the documents in their possession relating to the complaint. The reviewing member may also provide their observations about the complaint and their recommendations about how it should be resolved.

[14] A review panel is established under subsection 98(1) of the *Act*. This panel is required to give the judge who is the subject of the complaint, as well as their chief justice, an opportunity to provide written submissions. The review panel shall make its decision only on the basis of the substance of the complaint, the information provided to it by the reviewing member, the written submissions provided by the judge in question and the chief justice and any other document that it considers relevant (section 100 of the *Act*).

[15] In examining a complaint, a review panel takes into account the *Ethical Principles for Judges* developed by the Council. Each ethical principle is structured around a statement that expresses a fundamental value or theme of judicial ethics. The principles set out the elements that follow from the statement and describe ideal conduct for a judge, but they are not a code of conduct. The principles are followed by commentaries that serve to explain them and put them into context. For the purposes of this case, the review panel considered the following principles and comments:

V. Judges are impartial and appear to be impartial in the performance of their judicial duties.

V.B. Judges avoid conduct which could reasonably cause others to question their impartiality.

5.A.5 Judges should avoid using words or conduct, in and out of court, that might give rise to a reasonable perception of bias. The expectations of litigants are high. Disappointed litigants will sometimes perceive bias when neither actual bias nor a reasonable apprehension of bias exists. A judge's remarks or tone may diminish the judge's perceived impartiality. An unjustified reprimand of counsel, an improper remark about a litigant or a witness or a statement evidencing prejudgment or intemperate and impatient behaviour may undermine the appearance of impartiality. Casual conversations or familiarity with counsel or participants in the proceedings may be perceived by others as a form of exclusion. Therefore, judges should ensure that their comments or conduct do not provide reasonable grounds for a perception of bias.

II.C. Judges treat everyone with civility and respect in the performance of their judicial duties.

2.C.1 A hallmark of judicial proceedings is that all participants, including judges, will conduct themselves in a manner that preserves the honour and dignity of both the individual proceedings and the administration of justice more generally. Judges should endeavor to treat all participants in the judicial process with civility and respect.

[16] Finally, under sections 101 and 102 of the Act, the review panel may either refer the complaint to the Council, dismiss it or take certain measures set out in the Act. Sections 101 and 102 read as follows:

101 The review panel shall refer the complaint to the Council for the establishment of a full hearing panel if it determines that the judge's removal from office could be justified.

102 If the review panel does not refer the complaint to the Council under section 101, it may dismiss the complaint or take one or more of the following actions if it considers it appropriate to do so in the circumstances:

- a) issue a private or public expression of concern;*
- b) issue a private or public warning;*
- c) issue a private or public reprimand;*
- d) order the judge to apologize, either privately or publicly, by whatever means the panel considers appropriate in the circumstances;*
- e) order the judge to take specific measures, including attending counselling or a continuing education;*
- f) take any action that the panel considers to be equivalent to any of the actions referred to in paragraphs (a) to (e);*
- g) with the consent of the judge, take any other action that the panel considers appropriate in the circumstances.*

Decisions of the screening officer and reviewing member concerning Justice St-Pierre

[17] On October 29, 2024, the screening officer appointed to examine the complaint referred it to the Council for the appointment of a reviewing member, in accordance with section 91 of the Act. The screening officer concluded that the complaint could not be dismissed.

[18] As required by the *Act* and the *Review Procedures (2023)* in effect at the time, the reviewing member asked Justice St-Pierre and the Chief Justice of the Superior Court of Québec, the Honourable Marie-Anne Paquette, to provide written comments.

[19] Chief Justice Paquette responded by e-mail dated January 7, 2025, in which she noted that Justice St-Pierre had acknowledged that his comments were inappropriate in the circumstances. In addition, she noted that Justice St-Pierre had demonstrated a genuine and concrete commitment to doing whatever was necessary to ensure that such an incident did not reoccur, hence his commitment to attend a bias training seminar in the near future.

[20] Justice St-Pierre provided a letter dated January 7, 2025, in which he acknowledged that he had failed in his duty of reserve and that he was sorry for this. He asked the Council to convey his apologies to the complainant. He wrote that his reflections following the communication of the complaint had given him a new awareness of the impact and reception of a magistrate's comments on the bench. He assured the Council that he would retain the conclusions and lessons in the performance of his duties. In addition, he wrote that he had registered for a seminar on cognitive bias and prejudice organized by the Canadian Institute for the Administration of Justice on February 27, 2025, which could help him to be more circumspect.

[21] Although the reviewing member agreed with Justice St-Pierre that his conduct fell short of the high standards set out in the *Ethical Principles for Judges*, these standards articulate an ideal, and failure to meet them does not, in all cases, constitute misconduct. In a decision dated January 20, 2025, the reviewing member concluded that he would dismiss this complaint if it were within his power to do so, or, if the complaint were accepted, he would suggest that a measure under section 102 of the *Act* be adopted.

Procedure and decision of the review panel

[22] As required by the *Act* and the *Review Procedures (2023)*, the review panel received all the documents relating to the complaint in the reviewing member's possession. We also invited Chief Justice Paquette and Justice St-Pierre to share their observations with us.

[23] In his letter, Justice St-Pierre referred to the observations made to the attention of the reviewing member in his letter of January 7, 2025. This letter reflects his perception of events. Furthermore, in his letter of March 31, 2025, Justice St-Pierre noted that he had nothing new to add other than that he had read the decision of the reviewing member and had taken due note of its contents. Justice St-Pierre also noted that on February 27, 2025, he took the training referred to in his response of January 7, 2025, namely the seminar on cognitive bias and prejudice, and that this training was useful in pursuing and deepening his reflection on people's reactions to his remarks in the courtroom.

[24] In her e-mail, the Chief Justice emphasized that she had nothing to add to what she had already stated in her e-mail of January 7, 2025.

[25] The review panel examined Justice St-Pierre's comments in light of the *Ethical Principles for Judges*. We agree with the reviewing member that the principles are not a code of conduct. They are recommendations intended (i) to describe the exemplary conduct that judges strive to

observe; (ii) to help judges resolve the thorny ethical and professional issues they face; and (iii) to help members of the public better understand the judicial function.

[26] The *Ethical Principles for Judges* represent an ideal, offering guidance rather than prescribing a code of conduct. Every judge should endeavour to treat those who appear before them with civility and respect.

[27] There is no doubt that Justice St-Pierre's comments did not meet the high ethical standards set out in the *Ethical Principles for Judges*. The crucial question, however, is whether the judge's behaviour rises to the level of misconduct found in section 80 of the *Judges Act*. Taken in isolation, it may. Justice St-Pierre himself seems to recognize this possibility. Nevertheless, any assessment of the impugned conduct must, in our view, take into account the entire context, including the judge's response to the complaint. In this case, Justice St-Pierre has acknowledged that his comments fell short of the ethical standards expected of judges and offered his sincere apologies.

[28] The review panel first considered whether the matter should be referred to the Council for the establishment of a full hearing panel or, alternatively, dismissed.

[29] We concluded there was no basis to recommend the appointment of a full hearing panel, which should only happen if we were to determine that removal from office could be justified. The criteria for recommending removal are onerous. They are encompassed in what is referred to as the *Marshall* test which can be found in many judicial conduct decisions, including *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11. It requires:

Conduct which is so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office.

[30] The review panel agreed there was no possible basis on which Justice St-Pierre's removal from office could be justified in these circumstances.

[31] We also concluded that the complaint should not be dismissed. The factors which led us to this decision include:

- Justice St-Pierre's words are contrary to the standards set out in the *Ethical Principles for Judges*, particularly those concerning courtesy and respect;
- Justice St-Pierre acknowledged that he had breached his duty of reserve;
- Justice St-Pierre sincerely apologized for having breached his duty of reserve;
- He took action to ensure that this discrepancy would not reoccur when he attended a seminar on bias;
- Nevertheless, we reiterate the importance of courtesy and respect. A judge must also preserve honour and dignity in each matter and in the administration of justice in general.

[32] The review panel believes that action under section 102 of the *Act* is necessary for the following reasons:

- the need for deterrence;
- the amelioration of any harm to the administration of justice or the reputation of the judiciary.

[33] Section 102 sets out the various measures that the panel can take. Some may be public, others private. To choose the appropriate sanction, we must take into account the circumstances, including:

- a) the seriousness of the conduct;
- b) the need for deterrence;
- c) the amelioration of any harm to the administration of justice or the reputation of the judiciary;
- d) Justice St-Pierre's apology and subsequent training on bias;
- e) Justice St-Pierre's reputation in the legal community.

[34] We have examined all the above elements and have concluded that two private actions under section 102 are appropriate.

[35] We conclude that the imposition of these measures adequately reflects the impact of Justice St-Pierre's remarks and is appropriate in this case, in light of the mitigating circumstances raised in Justice St-Pierre's favour.

Dated this 27th day of May, 2025.

Original signed

The Honourable Larry Landry

Original signed

The Honourable Miriam Maisonville

Original signed

Ms. Julia Pavlenko

Tab 130

Ethical Principles for Judges

Principes de déontologie judiciaire



Canadian
Judicial Council

Conseil canadien
de la magistrature

Foreword

As the Canadian Judicial Council marks its 50th anniversary of service to Canadians, it is timely that we have revised and modernized *Ethical Principles for Judges*. From their first publication in 1998, these principles have laid out the ethical frame of reference to which all judges aspire: judicial independence, integrity and respect, diligence and competence, equality and impartiality.

Canada is fortunate to be served by a highly competent and skilled judiciary. Judges can face ethical questions as we go about our personal and professional lives. While the 1998 document served us well, and indeed was the model on which other judicial systems around the world relied, we understand that ethical considerations evolve and need to keep pace with society's expectations.

When I was appointed Chief Justice of Canada, I was pleased to learn that the Canadian Judicial Council had embarked on a public consultation exercise to hear firsthand from Canadians and our valued partners, what they expect of our judges. From those extensive consultations, and the tireless work of the Council's Judicial Independence and Appointment Process Committee, co-chaired by Chief Justice Martel D. Popescul and Chief Justice Deborah K. Smith, a new and refreshed document emerged.

Préface

L'édition revue et actualisée des *Principes de déontologie* judiciaire arrive à point nommé, alors que le Conseil canadien de la magistrature célèbre 50 ans de service à la population canadienne. Depuis la parution de la première édition en 1998, ces principes constituent le cadre de référence déontologique auquel tous les juges aspirent : l'indépendance judiciaire, l'intégrité et le respect, la diligence et la compétence, l'égalité et l'impartialité.

Le Canada a la chance d'être servi par une magistrature hautement compétente et qualifiée. Les juges sont parfois confrontés à des questions déontologiques dans leur vie personnelle et professionnelle. Bien que l'édition de 1998 nous ait bien servi, et qu'elle ait été prise pour modèle par d'autres systèmes judiciaires du monde entier, nous comprenons que les considérations d'ordre déontologique évoluent et qu'elles doivent s'adapter aux attentes de la société.

Lorsque j'ai été nommé juge en chef du Canada, j'ai été heureux d'apprendre que le Conseil canadien de la magistrature avait amorcé un processus de consultation publique pour entendre directement ce que la population canadienne et nos partenaires estimés attendent de nos juges. À la suite de ces vastes consultations et du travail inlassable du Comité sur l'indépendance judiciaire et le processus de nomination du Conseil, coprésidé par le juge en chef Martel D. Popescul et la juge en chef Deborah K. Smith, un nouveau document actualisé a pris forme. Je sais que le comité a examiné attentivement tous les commentaires qu'il a reçus, et je remercie personnellement toutes les personnes qui ont fait connaître leurs points de vue.

I know that the Committee carefully considered every comment received and I personally extend my thanks to every person who provided his or her views.

The revised *Ethical Principles* build on the original publication, and explore new and emerging issues relevant to our modern times: case management and settlement conferences, social media, interacting with self-represented litigants, professional development and the post-judicial role. While these principles are intended to assist judges with the ethical and professional questions they may confront, they are also written to provide the public with a better understanding of the judicial role.

I am proud of this document and proud of the dedication of those who developed it. It is my sincere hope that *Ethical Principles* will be consulted regularly by judges for years to come.

Sincerely,

**The Right Honourable
Richard Wagner, P.C.**

Chief Justice of Canada and
Chairperson of the Canadian
Judicial Council

Cette version révisée des *Principes de déontologie judiciaire* s'appuie sur l'édition originale et traite de questions nouvelles et naissantes qui ont rapport à nos temps modernes : la gestion des instances et les conférences de règlement, les médias sociaux, l'interaction avec les parties non représentées par un avocat, le perfectionnement professionnel, et le rôle des juges après leur départ de la magistrature. Ces principes visent à aider les juges à trouver réponse aux questions déontologiques et professionnelles qui peuvent se poser à la magistrature, mais ils sont aussi rédigés pour permettre au public de mieux comprendre le rôle des juges.

Je suis fier de ce document et fier du dévouement des personnes qui y ont travaillé. J'espère sincèrement que les juges consulteront régulièrement les *Principes de déontologie judiciaire* dans les années à venir.

Je vous offre mes meilleures salutations.

**Le très honorable
Richard Wagner, c.p.**

Juge en chef du Canada et
Président du Conseil canadien
de la magistrature

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Introduction

Introduction

Purpose

1. *Ethical Principles for Judges [Ethical Principles]* provides ethical guidance for federally appointed judges. In doing so, it expresses a vision of what it means to be a judge. Taken together, the principles of independence, integrity and respect, diligence and competence, equality and impartiality define the judicial role. *Ethical Principles* was drafted with confidence that it would be read by judges and the public as an expression of the judiciary's highest ethical aspirations in the service of justice and the rule of law.

2. An independent and impartial judiciary is the right of all and constitutes a fundamental pillar of democratic governance, the rule of law and justice in Canada. Everyone needs and deserves impartial, competent, and respectful judges. All members of the judiciary commit to perform their role in such a manner so as to maintain the confidence of the public. The guidance that follows describes the high ethical standards that all judges strive to maintain in their professional and personal lives. While the overarching principles that guide the judiciary are largely immutable, evolving expectations of the public, societal developments and new understandings of issues relevant to the judiciary will serve to constantly inform the interpretation of *Ethical Principles* in the future.

Objet

1. Les *Principes de déontologie judiciaire [Principes de déontologie]* offrent des conseils d'ordre déontologique aux juges de nomination fédérale. Ce faisant, ils expriment une vision de ce que cela représente que d'être un juge. Le rôle des juges est défini par les principes d'indépendance, d'intégrité et de respect, de diligence et de compétence, d'égalité et d'impartialité. Les Principes de déontologie se veulent l'expression des idéaux d'ordre déontologique les plus élevés auxquels aspirent les juges, au service de la justice et de la primauté du droit; c'est l'intention que devraient y lire les juges et le public.

2. Piliers fondamentaux de la gouvernance démocratique, de la primauté du droit et de la justice, l'indépendance et l'impartialité de la magistrature sont des droits reconnus à chacun. Toute personne doit et mérite d'être entendue par des juges impartiaux, compétents et respectueux. Tous les membres de la magistrature s'engagent à exercer leur charge de manière à préserver la confiance du public. Les recommandations qui suivent exposent les normes d'ordre déontologique élevées que les juges s'efforcent d'observer dans leurs fonctions professionnelles et dans leur vie personnelle. Si les grands principes qui guident les juges demeurent largement immuables, en revanche les attentes du public, la société elle-même et notre compréhension des questions qui touchent la fonction judiciaire évoluent, et cette évolution éclairera de façon constante l'interprétation des *Principes de déontologie* à l'avenir.

3. A judge must be and be seen to be free to decide honestly and impartially on the basis of the law and the evidence, without external pressure or influence and without fear of interference from anyone. Nothing in *Ethical Principles* can or is intended to limit or restrict this judicial independence in any manner. Judges have the duty to uphold and defend judicial independence, not as a privilege of judicial office but as the constitutionally guaranteed right of everyone to have their disputes heard and decided in a fair way by impartial and independent judges.

4. The ethical principles articulated in this document are aspirational. They are not intended to be a code of conduct that sets minimum standards. They are advisory in nature and are designed to (i) describe exemplary behaviour which all judges strive to maintain; (ii) assist judges with the difficult ethical and professional issues that confront them; and (iii) help members of the public better understand the judicial role. The guidance provided in *Ethical Principles* does not preclude reasonable disagreements about their application in particular cases or imply that any departure from them necessarily warrants disapproval. The ethical principles are intended to be applied in light of all of the relevant circumstances and consistently with the requirements of judicial independence and the law. They should not be viewed as an exhaustive expression of the ethical considerations that judges may face in their professional or personal lives.

3. Les juges doivent être libres et paraître libres de juger avec intégrité et impartialité sur le seul fondement du droit et de la preuve présentée, sans pressions ni influences extérieures et sans crainte d'ingérence de la part de qui que ce soit. Les *Principes de déontologie* ne sauraient limiter ou restreindre en aucune façon cette indépendance de la magistrature et ils ne visent pas à le faire. Les juges sont tenus de soutenir et de défendre l'indépendance de la magistrature, non parce qu'elle constitue un privilège rattaché à leur charge, mais parce que la Constitution garantit à quiconque le droit de voir son litige entendu et tranché de façon équitable par des juges impartiaux et indépendants.

4. Les principes d'ordre déontologique exposés dans ce document articulent un idéal à atteindre. Ils ne constituent pas un code de conduite imposant des normes minimales à suivre. Ce sont des recommandations ayant pour objectif (i) de décrire la conduite exemplaire que les juges s'efforcent d'observer; (ii) d'aider les juges à résoudre les épineuses questions d'ordre déontologique et professionnel auxquelles ils sont confrontés; et (iii) d'aider les membres du public à mieux comprendre la fonction judiciaire. Il n'est pas exclu que les recommandations énoncées dans les *Principes de déontologie* puissent faire l'objet d'interprétations divergentes raisonnables quant à leur application dans un cas donné; de plus, le fait d'énoncer ces recommandations n'implique pas qu'il y aurait nécessairement matière à réprobation si on s'en écartait. Les principes de déontologie doivent être appliqués au regard de toutes les circonstances pertinentes ainsi qu'en conformité avec le principe de l'indépendance de la magistrature et avec le droit. On ne saurait y voir l'énumération complète des questions éthiques auxquelles les juges peuvent faire face dans l'exercice de leurs fonctions ou dans leur vie personnelle.

Context

5. The Canadian Judicial Council [the CJC] has been attentive to judicial ethics for decades. It published *Commentaries on Judicial Conduct* in 1991. This was followed by *Ethical Principles for Judges* [Ethical Principles 1998]. It provided ethical guidance to judges aligned with a set of central principles and better informed the public about the high ideals which judges embrace and toward which they strive. While drawing heavily on existing resources, *Ethical Principles 1998* was the most comprehensive treatment of the subject at that time in Canada. Further, it was uniquely the work of Canadian judges. An extensive process of consultation within the judiciary and beyond ensured that *Ethical Principles 1998* was the subject of painstaking examination and vigorous debate. The intention was that Canadian judges would accept *Ethical Principles 1998* as reflective of their high ethical aspirations and would find it worthy of respect and deserving of careful consideration when facing ethical issues

Contexte

5. Le Conseil canadien de la magistrature [le Conseil] s'intéresse aux questions de déontologie judiciaire depuis des décennies. En 1991, il a publié des *Commentaires sur la conduite des juges*. Puis, a suivi les *Principes de déontologie judiciaire* [Principes de déontologie de 1998] qui a proposé un ensemble de principes fondamentaux pour guider les juges sur des questions d'ordre déontologique et mieux renseigner le public sur les normes élevées auxquelles les juges adhèrent et qu'ils s'efforcent d'observer. Les *Principes de déontologie de 1998*, qui puisaient abondamment aux sources existantes, représentaient néanmoins l'exposé le plus complet en cette matière jamais publié au Canada. De plus, ils étaient entièrement le fruit du travail de juges canadiens. De vastes consultations menées auprès de la magistrature et du public avaient permis de soumettre les *Principes de déontologie de 1998* à un examen minutieux et à un débat vigoureux. Cette démarche avait pour but d'assurer que les juges du Canada verraient dans les *Principes de déontologie de 1998* le reflet de leurs aspirations élevées en matière de déontologie, qu'ils les considéreraient comme un document digne de respect et leur accorderaient une attention soutenue lorsqu'ils seraient confrontés à des questions d'ordre déontologique.

6. Over the past twenty years *Ethical Principles 1998* has provided valuable ethical guidance to federally appointed judges in a broad range of complex circumstances. It has become a crucial resource in the training provided to judges upon appointment, and forms part of ongoing discussions in professional development settings throughout a judge's career. In addition, the publication of *Ethical Principles 1998* coincided with the establishment of an Advisory Committee on Judicial Ethics [Advisory Committee] to which specific ethical questions have been submitted by judges. The Advisory Committee continues to respond to these queries with advisory opinions that contribute to the ongoing review and elaboration of the subjects dealt with in *Ethical Principles 1998*. These opinions may also identify new issues that this version of *Ethical Principles* does not directly address. The Advisory Committee continues to ensure that help is readily available to judges looking for guidance.

6. Depuis deux décennies, les *Principes de déontologie de 1998* ont fourni aux juges de nomination fédérale des conseils précieux en matière déontologique dans un éventail de situations complexes. Les *Principes de déontologie* sont au cœur de la formation offerte aux juges à la suite de leur nomination, et ils sont examinés et discutés dans les programmes de perfectionnement professionnel auxquels participent les juges tout au long de leur carrière. Par ailleurs, la publication des *Principes de déontologie de 1998* a coïncidé avec la création d'un comité consultatif sur la déontologie judiciaire [le Comité consultatif] auquel les juges soumettent depuis des questions précises touchant la déontologie. Les avis que le Comité consultatif fournit en réponse à ces demandes contribuent à l'examen et à l'approfondissement continus des questions traitées dans les *Principes de déontologie de 1998*. Ils peuvent également contribuer à mettre en lumière des problèmes qui ne sont pas abordés directement dans la présente version des *Principes de déontologie*. Le Comité consultatif continue de veiller à ce que les juges qui recherchent des conseils puissent aisément recevoir de l'aide.

7. A document of this nature can never be viewed as the “final word” on such an important and complex subject. After more than twenty years from its initial publication, *Ethical Principles 1998* needed modernization to address significant societal changes, changes in the role of the judiciary, and the social context in which judges serve. In 2016, the revision of *Ethical Principles 1998* was commenced by the Judicial Independence and Appointment Process Committee of the CJC [Independence Committee], with input from Chief Justices and puisne judges from across Canada. As was done in 1998, broad consultations were conducted within the judiciary and beyond to ensure that *Ethical Principles* is responsive to the needs of judges and takes community expectations into account. The consultations included an on-line survey of issues relevant to judicial ethics and a series of meetings and dialogue with organizations representing the judiciary and other interested parties. Once a draft document was prepared it was made public and judges, judges’ organizations, other professional organizations and members of the public were invited to provide comments and feedback. Throughout the project, the Independence Committee reviewed every submission and every proposed amendment, and incorporated into the final version of *Ethical Principles* many of the proposals and suggestions submitted to it.

7. De par sa nature, un document comme celui-ci ne saurait prétendre apporter une réponse définitive sur un sujet aussi important et complexe. Plus de vingt ans après leur publication, les *Principes de déontologie de 1998* étaient mûrs pour une mise à jour qui permette de traiter d’enjeux importants soulevés par l’évolution de la société, de la fonction judiciaire et du contexte social dans lequel les juges s’acquittent de leur charge. À partir de 2016, le Comité sur l’indépendance judiciaire et le processus de nomination du Conseil [Comité sur l’indépendance] s’est attelé à la tâche de réviser les *Principes de déontologie de 1998*, avec l’apport des juges en chef et des juges puînés de partout au Canada. Comme ce fut le cas en 1998, de vastes consultations ont été menées au sein de la magistrature et auprès du public afin que les *Principes de déontologie* répondent aux besoins des juges et tiennent compte des attentes du public. Ces consultations ont compris, entre autres, un sondage en ligne sur des questions de déontologie judiciaire, de même qu’une série de rencontres et d’échanges avec des organisations représentant la magistrature et d’autres parties intéressées. L’ébauche rédigée à la suite de ces consultations a été rendue publique, et les juges, les associations qui les représentent, des organismes professionnels et les membres du public ont été invités à présenter des commentaires. Tout au long du projet, le Comité sur l’indépendance s’est penché sur chacun des commentaires reçus et chacune des modifications proposées et a intégré dans la version définitive des *Principes de déontologie* bon nombre des propositions et suggestions qui lui avaient été soumises.

8. Today, judges' work includes case management, settlement conferences, judicial mediation, and frequent interaction with self-represented litigants. These responsibilities invite further consideration with respect to ethical guidance. In the same manner, the digital age, the phenomenon of social media, the importance of professional development for judges and the transition to post-judicial roles all raise ethical issues that were not fully considered twenty years ago. Judges are expected to be alert to the history, experience and circumstances of Canada's Indigenous peoples, and to the diversity of cultures and communities that make up this country. In this spirit, the judiciary is now more actively involved with the wider public, both to enhance public confidence and to expand its own knowledge of the diversity of human experiences in Canada today.

9. The format of *Ethical Principles 1998* is preserved. Each chapter is organized hierarchically, beginning with a Statement, followed by a set of Principles and then a series of Commentaries aligned with each Principle. At the highest level of abstraction, each Statement expresses a fundamental value or theme of judicial ethics. The Principles identify components of each Statement and articulate behaviours that would constitute the highest aspirations of an ethical judge with respect to that Principle. With occasional exceptions, the Statements and Principles are stated in 'declarative' language – essentially statements of what an ethical judge does or how an ethical judge acts, consistent with the goal of describing the attributes of an ethical judge. The Commentaries associated with each Principle provide explanations, context and further elucidation of the Principles, almost always in aspirational language, often using concrete examples.

8. De nos jours, les responsabilités des juges s'étendent à la gestion des instances ainsi qu'aux conférences de règlement et aux séances de médiation judiciaires. De plus, il arrive fréquemment que les juges doivent interagir avec des parties non représentées. Ces responsabilités appellent une nouvelle réflexion sur le soutien à apporter en matière déontologique. Parallèlement, d'autres phénomènes soulèvent des enjeux déontologiques qui n'avaient pas été pleinement considérés il y a vingt ans : l'arrivée de l'ère numérique, l'émergence des médias sociaux, l'importance du perfectionnement professionnel des juges et le passage de certains de ceux-ci à une autre carrière après leur départ de la magistrature. On attend des juges qu'ils soient sensibles et au fait de l'histoire, du vécu et de la réalité des peuples autochtones au Canada, ainsi que de la diversité des cultures et des communautés qui composent le pays. C'est dans cet esprit que la magistrature joue un rôle plus actif qu'auparavant auprès du public, aussi bien pour soutenir la confiance que le public accorde à la magistrature que pour approfondir sa connaissance de la diversité des expériences humaines au Canada.

9. L'organisation générale des matières établie dans les *Principes de déontologie de 1998* a été préservée. Structuré de façon hiérarchique, chaque chapitre commence par un Énoncé, suivi par des Principes auxquels succèdent une série de Commentaires liés à chacun des Principes. L'Énoncé exprime une valeur ou un thème fondamental de la déontologie judiciaire, à un niveau élevé d'abstraction. Les Principes exposent les éléments qui découlent de l'Énoncé et décrivent la conduite idéale vers laquelle tendrait le juge éthique au regard de ceux-ci. En règle générale, les Énoncés et les Principes sont rédigés de manière déclarative, énonçant essentiellement ce que fait un juge éthique ou comment il agit, l'objectif étant de décrire la conduite exemplaire d'un juge éthique. Quant aux Commentaires, ils servent à expliquer les Principes et à les mettre en contexte, presque toujours sous la forme de recommandations, et présentent souvent des exemples concrets.

10. When an ethical issue arises for a judge more than one principle may be relevant. The approach taken in *Ethical Principles* is to discuss the aspects of each Principle discretely, recognizing that multiple Principles and chapters of *Ethical Principles* may need to be considered in obtaining comprehensive guidance in the resolution of the ethical issue. The comprehensive Index, as well as links within electronic versions of *Ethical Principles*, will enable the reader to identify and access associated Principles and Commentaries.

11. The language adopted in this edition of *Ethical Principles* provides greater consistency of meaning between the English and French versions. *Ethical Principles* was co-drafted in English and French and each version is equally authoritative. As well, the document is written in gender-neutral language. Whenever pronouns are used, they are intended to be inclusive of all genders.

12. This edition of *Ethical Principles* also addresses circumstances associated with judges contemplating or undertaking post-judicial legal careers. In particular, it discusses unique ethical issues that may arise in the transition to post-judicial legal careers and those that continue after judges leave office. This guidance is provided to present and former judges for their benefit and with a view to maintaining public confidence in the judiciary.

10. Lorsqu'un juge fait face à une question d'ordre déontologique, il se peut que plus d'un principe entre en jeu. L'approche retenue dans les *Principes de déontologie* consiste à aborder de façon distincte les différents aspects de chaque principe; il est donc possible qu'il faille considérer plusieurs principes et consulter plus d'un chapitre des *Principes de déontologie* pour obtenir des conseils sur l'ensemble des éléments permettant de résoudre une question. L'index détaillé et les hyperliens insérés dans les versions électroniques des *Principes de déontologie* permettront au lecteur de repérer les principes pertinents et les commentaires qui s'y rapportent, et d'y accéder facilement.

11. La présente édition des *Principes de déontologie* assure une meilleure harmonisation des versions française et anglaise. Les *Principes de déontologie* ont fait l'objet d'une corédaction, et les versions anglaise et française ont la même valeur. De plus, le présent document est rédigé sans distinction de genre. L'utilisation d'un genre inclut tous les genres.

12. La présente édition des *Principes de déontologie* traite également de la situation des juges qui envisagent ou amorcent une nouvelle carrière après leur départ de la magistrature. Ainsi, elle examine certaines des questions particulières qui sont susceptibles de se poser sur le plan déontologique à l'occasion du passage à une nouvelle carrière, ainsi que les principes qui continuent de s'appliquer après le départ de la magistrature. Ces conseils s'adressent aussi bien aux juges en poste qu'aux anciens juges et visent à préserver la confiance du public envers la magistrature.

I. Judicial Independence

Statement

An independent judiciary is indispensable to impartial justice under law. Judges uphold and exemplify judicial independence in both its individual and institutional aspects.

Principles

- A.** Judges exercise their judicial functions independently and free of extraneous influence.
- B.** Judges firmly reject improper attempts to influence their decisions in any matter before the court.
- C.** Judges exhibit and promote high standards of judicial conduct so as to reinforce public confidence in the independence of the judiciary.
- D.** Judges encourage and uphold arrangements and safeguards to maintain and enhance the institutional and administrative independence of the judiciary.

I. Indépendance de la magistrature

Énoncé

L'indépendance de la magistrature est indispensable à l'exercice d'une justice impartiale sous un régime de droit. Les juges soutiennent l'indépendance de la magistrature et l'incarnent tant dans ses éléments individuels qu'institutionnels.

Principes

- A.** Les juges exercent leurs fonctions judiciaires de façon indépendante, à l'abri de toute influence extérieure.
- B.** Dans les affaires dont la cour est saisie, les juges repoussent fermement toute tentative inappropriée visant à influencer leur décision.
- C.** Les juges observent des normes élevées de conduite judiciaire et en favorisent l'application, afin de renforcer la confiance du public envers l'indépendance de la magistrature.
- D.** Les juges encouragent et soutiennent les mesures et les garanties qui visent à préserver et à accroître l'indépendance de la magistrature, tant sur le plan institutionnel qu'administratif.

Commentary

General

1.A.1 Judicial independence refers to the liberty and responsibility of judges to hear and decide cases that come before them in accordance with their conscience, without interference from others. The guarantee of judicial independence aims to make judges impervious to improper external intervention in the exercise of their functions. Judges are, and must reasonably be perceived to be, independent, both individually and institutionally. Judicial independence is not the private right of judges. It is the foundation of judicial impartiality and a constitutional right of all. The right to be tried by an independent and impartial tribunal is an integral principle of fundamental justice protected by the *Canadian Charter of Rights and Freedoms*.

1.A.2 Judges are called upon to resolve a wide array of disputes and generally to determine legal rights and obligations. Public confidence in the judiciary rests on the fact that their decisions are made according to law.

1.A.3 Judicial independence refers to a state of mind or attitude in the actual exercise of judicial functions. It also connotes a status or relationship with others, including the executive branch of government and other judges. Judicial independence is the foundation for impartial decision-making. The first qualification of a judge is the ability to make independent and impartial decisions. Judges apply the law without fear or favour and without regard to whether the decision is popular. This is a cornerstone of the rule of law, and it is secured through respect for the principle of judicial independence.

Commentaires

Général

1.A.1 L'indépendance judiciaire s'entend de la liberté et de la responsabilité du juge d'instruire et de trancher une affaire donnée selon sa conscience, sans l'intervention d'autres personnes. La garantie d'indépendance judiciaire vise à rendre les juges imperméables aux interventions extérieures indues dans l'exercice de leurs fonctions. Les juges sont indépendants et doivent être raisonnablement perçus comme tels, tant sur le plan individuel que sur le plan institutionnel. L'indépendance judiciaire n'est pas un droit qui appartient en propre à chaque juge. Elle constitue le fondement de l'impartialité judiciaire et est un droit constitutionnel qui appartient à chacun. Le droit d'être jugé par un tribunal indépendant et impartial est un principe essentiel de justice fondamentale garanti par la *Charte canadienne des droits et libertés de la personne*.

1.A.2 Il incombe aux juges de trancher une large gamme de litiges et, de manière générale, de déterminer les droits et obligations juridiques. La confiance du public envers la magistrature s'appuie sur le fait que les décisions des juges sont rendues en fonction du droit.

1.A.3 L'indépendance judiciaire désigne un état d'esprit ou une attitude dans l'exercice concret des fonctions judiciaires. Elle connote aussi un statut ou une relation à l'égard d'autrui, y compris le pouvoir exécutif et les autres juges. L'indépendance judiciaire est le fondement permettant la prise de décisions impartiales. La qualité première du juge réside dans sa capacité de rendre des décisions de manière indépendante et impartiale. Les juges appliquent la loi, sans crainte de représailles ni favoritisme, et indépendamment de l'accueil, favorable ou non, de leur décision. C'est là une des pierres angulaires de la primauté du droit, garantie par le respect du principe d'indépendance de la magistrature.

1.A.4 Judicial independence is fundamental to ensuring that decisions are made without external influence and to maintaining individual and public confidence in the administration of justice. Preserving the constituent elements of judicial independence is critical to the public's perception of the impartiality of judges. In that sense, judicial independence is an important means to a fundamental end. Judicial independence ensures that judges are impartial in fact, and also that they are perceived to be so.

1.A.5 Judges protect judicial independence not for their own benefit but for the benefits of all Canadians. Solely self-interested claims for judicial independence risk undermining public confidence in the judiciary.

1.A.6 Informing the public with respect to the role of the judiciary and judicial independence is an important judicial function. It is in the public interest for judges to take advantage of appropriate opportunities to enhance the public's understanding of the fundamental importance of judicial independence.

Avoiding and Rejecting Improper Influence

1.B.1 Judges should avoid all communications with anyone external to a case that might raise reasonable concerns about judicial independence. Judges must firmly reject improper attempts to influence their decisions. Communications intended to influence a specific judicial decision can only be received within the judicial process.

1.A.4 L'indépendance de la magistrature est fondamentale afin d'assurer que les décisions sont rendues sans influence extérieure et de soutenir la confiance individuelle et collective dans l'administration de la justice. Le maintien des conditions de l'indépendance de la magistrature est essentiel à la perception qu'a le public de l'impartialité des juges. En ce sens, l'indépendance de la magistrature constitue un moyen crucial d'atteindre cet objectif fondamental. L'indépendance de la magistrature garantit l'impartialité objective des juges et fait en sorte qu'ils soient perçus comme des personnes impartiales.

1.A.5 Les juges protègent l'indépendance de la magistrature dans l'intérêt de tous, et non par intérêt personnel. Revendiquer la protection de l'indépendance de la magistrature par pur intérêt personnel risquerait de miner la confiance du public à l'endroit des juges.

1.A.6 L'une des fonctions importantes des juges consiste à renseigner le public sur le rôle de la magistrature et sur son indépendance. Il est dans l'intérêt public que les juges profitent d'occasions appropriées pour aider le public à mieux comprendre l'importance fondamentale de l'indépendance de la magistrature.

Éviter et repousser les tentatives d'influence indue

1.B.1 Les juges devraient éviter toute communication – avec quiconque est étranger à l'affaire dont ils sont saisis – qui pourrait soulever des craintes raisonnables en ce qui concerne l'indépendance de la magistrature. Les juges doivent fermement repousser toute tentative inappropriée d'influencer leurs décisions. Les communications ayant pour objet d'influencer une décision dans une affaire donnée doivent s'inscrire dans le cadre du processus judiciaire.

1.B.2 Attempts to influence judges may come from many sources, including social media. Judges should be cautious in their communications on social media relating to matters that could come before the court. Also, their social media activities should be undertaken in ways that avoid compromising public confidence in the judiciary.

Public Confidence

1.C.1 Judicial independence and judicial ethics are interrelated. Judges should exemplify and promote high standards of judicial conduct as one element of assuring the independence of the judiciary. In turn, the independence and integrity of the judiciary preserves public confidence in the rule of law and acceptance of court decisions. Unethical conduct by judges erodes that confidence. Thus, judges share a collective responsibility to promote and observe high standards of conduct.

Institutional and Administrative Independence

1.D.1 Judicial independence is secured by institutional and operational structures that protect judges and courts from external influence so that judicial decisions are made according to law in a fair process. For example, judges have security of tenure and their remuneration is set through an independent process so that neither fear of sanction nor hope of reward stands in the way of rendering justice. For the same reasons, judges also have immunity from liability in relation to their decisions.

1.B.2 Les tentatives d'influencer les juges peuvent provenir de plusieurs sources, y compris les médias sociaux. Les juges devraient se garder de diffuser dans les médias sociaux des communications qui concernent des affaires dont la cour pourrait être saisie. De plus, l'activité des juges dans les médias sociaux ne devrait pas avoir pour effet d'affaiblir la confiance du public à l'endroit de la magistrature.

Confiance du public

1.C.1 L'indépendance judiciaire et le respect des principes déontologiques sont interdépendants. Les juges devraient observer des normes de conduite élevées contribuant à assurer l'indépendance de la magistrature et en favoriser l'application. En retour, l'indépendance et l'intégrité des juges préservent la confiance du public dans la primauté du droit et l'acceptation par celui-ci des décisions des tribunaux. Une conduite contraire à l'éthique de la part d'un juge mine cette confiance. C'est pourquoi les juges ont la responsabilité collective de favoriser et d'observer des normes de conduite élevées.

Indépendance institutionnelle et administrative

1.D.1 L'indépendance de la magistrature est garantie par des structures institutionnelles et opérationnelles qui protègent les juges et les tribunaux contre toute influence extérieure afin qu'ils puissent rendre leurs décisions judiciaires conformément au droit, dans le cadre d'un processus équitable. Ainsi, afin d'assurer que ni la crainte d'une sanction ni l'espoir d'un gain ne puissent nuire à l'application juste du droit, les juges sont inamovibles et leur rémunération est déterminée dans le cadre d'un processus indépendant. Pour les mêmes raisons, les juges jouissent d'une immunité contre les poursuites à l'égard des décisions qu'ils rendent.

1.D.2 In keeping with the principle of judicial independence, professional development for judges is organized, designed and delivered under the authority of the judiciary.

1.D.3 At an institutional level, courts require sufficient autonomy to guarantee that the administration of justice is free from any political or other improper influence.

1.D.4 The judiciary should remain vigilant with respect to any initiative that may have the effect of undermining its institutional or administrative independence. That said, not every proposed change in the administrative arrangements affecting the judiciary constitutes a threat to judicial independence.

1.D.2 Afin de préserver le principe de l'indépendance de la magistrature, les programmes de perfectionnement professionnel destinés aux juges sont organisés, élaborés et prodigués sous l'égide de la magistrature.

1.D.3 Au niveau institutionnel, les tribunaux ont besoin d'une autonomie suffisante pour garantir que l'administration de la justice est libre de toute influence indue, notamment politique.

1.D.4 La magistrature devrait rester à l'affût de toute tentative susceptible de miner son indépendance institutionnelle ou administrative. Cela dit, ce ne sont pas tous les changements qu'on propose d'apporter aux dispositions administratives affectant les juges qui constituent une menace pour l'indépendance judiciaire.

II. Integrity and Respect

Statement

Judges conduct themselves respectfully and with integrity so as to sustain and enhance public confidence in the judiciary.

Principles

- A. Judges comply with the law and conduct themselves both inside and outside the courtroom in a manner that is above reproach in the view of reasonable and informed persons.
- B. Judges are discreet and do not use or disclose confidential information acquired in their judicial capacity for any purpose not related to judicial duties.
- C. Judges treat everyone with civility and respect in the performance of their judicial duties.
- D. Judges foster access to justice for all. Judges carry out their duties with appropriate consideration for all the parties, whether or not they are represented, and ensure that they are treated fairly and respectfully, so as to provide them with reasonable access to court processes.
- E. Judges avoid all forms of harassment and abuse of authority or status.
- F. Judges do not allow their status or the prestige of judicial office to be used to advance a private interest.
- G. Judges encourage and support the observance of *Ethical Principles* by their judicial colleagues.

II. Intégrité et respect

Énoncé

Les juges font preuve, dans leur conduite, de respect et d'intégrité de façon à soutenir et à renforcer la confiance du public à l'endroit de la magistrature.

Principes

- A. Les juges se conforment au droit et adoptent, tant à l'intérieur qu'à l'extérieur de la salle d'audience, une conduite irréprochable aux yeux d'une personne raisonnable et bien renseignée.
- B. Les juges font preuve de discrétion et n'utilisent ni ne divulguent les renseignements confidentiels acquis dans l'exercice de leurs fonctions judiciaires, si ce n'est pour une fin liée à ces fonctions.
- C. Les juges traitent toutes les personnes avec courtoisie et respect dans l'exercice de leurs fonctions judiciaires.
- D. Les juges favorisent l'accès à la justice. Dans l'exercice de leurs fonctions, les juges accordent la considération appropriée à toutes les parties, représentées et non représentées, et veillent à ce qu'elles soient traitées avec équité et respect, afin de leur assurer un accès raisonnable aux processus judiciaires.
- E. Les juges évitent toute forme de harcèlement et d'abus d'autorité ou de statut.
- F. Les juges ne permettent pas que leur statut ou le prestige de la fonction judiciaire soit utilisé au profit d'un intérêt privé.
- G. Les juges encouragent et soutiennent le respect des *Principes de déontologie* par leurs collègues de la magistrature.

Commentary

General

2.A.1 Public confidence in the judiciary is essential to an effective judicial system and, ultimately, the rule of law. Within that system, judges hold positions of significant trust, confidence and responsibility. Conduct, in and out of court, that exhibits integrity ensures public respect for and confidence in the individual judge and, more significantly, contributes to public confidence in the judiciary and the judicial system as a whole. Judges should therefore act with a high degree of decorum, propriety and humanity.

2.A.2 Public expectations of the integrity of judges are understandably high. Behaviour considered acceptable if exhibited by some members of the public may not be appropriate for members of the judiciary. Judges should therefore be mindful of the ways in which their conduct would be perceived by reasonable and informed members of the community and whether that perception is likely to lessen respect for the judge or the judiciary as a whole. Behaviour that would diminish that respect in the minds of such persons should be avoided.

Behaviour in Private Life

2.A.3. Public expectations of judges are not limited to the actions of judges in their judicial capacities. Judges should exhibit respect for the law and act with integrity in their private lives and should avoid the appearance of impropriety.

Commentaires

Général

2.A.1 La confiance du public à l'endroit de la magistrature est essentielle au bon fonctionnement du système de justice et, en définitive, à la primauté du droit. Les juges occupent une position de grande confiance et de responsabilité au sein de ce système. Les juges qui adoptent, en salle d'audience ou ailleurs, une conduite empreinte d'intégrité s'assurent du respect et de la confiance du public et, surtout, contribuent à soutenir la confiance du public à l'endroit de la magistrature et du système de justice tout entier. Les juges devraient en conséquence se conduire avec decorum, décence et humanité.

2.A.2 Les attentes du public à l'égard de l'intégrité des juges sont bien entendu élevées. Les comportements qu'on jugerait acceptables pour un membre du public pourraient ne pas convenir à un membre de la magistrature. Les juges devraient donc être conscients de la perception que des personnes raisonnables et bien renseignées pourraient avoir de leur conduite et de la possibilité que cette perception diminue le respect dont jouissent les juges individuellement et la magistrature dans son ensemble. Tout comportement qui porterait atteinte à ce respect dans l'esprit de ces personnes est à proscrire.

Le comportement dans la vie privée

2.A.3 Les attentes du public à l'endroit des juges ne se limitent pas aux actes que ces derniers posent dans l'exercice de leur charge. Les juges devraient faire montre de leur respect pour la loi, agir avec intégrité dans leur vie personnelle et éviter toute apparence d'inconduite.

2.A.4 After appointment, judges are not required to withdraw from the world. They may lead a normal life in the community, while retaining a sense of the dignity of judicial office and realizing that the public expects virtually irreproachable conduct from judges.

2.A.5 A judge's conduct, in and out of court, may be the subject of public scrutiny and comment. At the same time, judges have private lives and are entitled to enjoy, as much as possible, the rights and freedoms generally available to all. Nevertheless, judges accept some restrictions on their activities — even activities that would not elicit adverse notice if carried out by other members of the community. For example, judges should exercise caution in their use of social media. Judges should strive to strike a balance between the expectations of judicial office and their personal lives. In finding this balance, judges should be guided by these *Ethical Principles*.

2.A.4 Les juges ne sont pas tenus de se tenir à l'écart du monde après leur nomination. Ils peuvent participer à la vie de leur collectivité, tout en gardant à l'esprit la dignité rattachée à leur charge et le fait que le public s'attend à une conduite quasi irréprochable de la part des juges.

2.A.5 La conduite des juges, en salle d'audience ou ailleurs, peut être soumise à l'examen attentif et à la critique du public. Par ailleurs, les juges ont aussi une vie privée et jouissent, dans toute la mesure du possible, des mêmes droits et libertés que ceux qui sont conférés aux autres personnes de manière générale. Néanmoins, les juges acceptent certaines restrictions à l'égard de leurs activités — même celles qui ne susciteraient aucune critique si elles étaient le fait d'autres membres de la collectivité. Par exemple, les juges devraient utiliser les médias sociaux avec prudence. Ils devraient s'efforcer de maintenir l'équilibre entre les attentes associées à leur charge et la conduite de leur vie personnelle. *Les Principes de déontologie* peuvent les guider à cet égard.

Confidentiality and Discretion'

2.B.1 Judges are entrusted with preserving confidentiality. The performance of judicial duties necessarily entails that judges receive or come into possession of confidential information. While justice is, in principle, transparent, open and public, some of the facts, documents, records and circumstances of a dispute may be subject to confidentiality orders, including the identity of one or more parties. Judges should not use or reveal confidential information except where, in the performance of their judicial duties, such disclosure is necessary, or done in accordance with relevant rules on archiving and disclosure. When judges work as a group, their internal discussions remain confidential.

2.B.2 Judges should be discreet when discussing their work, including in contexts in which what they say may be inadvertently overheard by others.

2.B.3 Confidentiality and discretion extend past a judge's departure from judicial office.

Civility and Respect

2.C.1 A hallmark of judicial proceedings is that all participants, including judges, will conduct themselves in a manner that preserves the honour and dignity of both the individual proceedings and the administration of justice more generally. Judges should endeavor to treat all participants in the judicial process with civility and respect.

1 Canadian Judicial Council, Use of Personal Information in Judgments and Recommended Protocol (2005)

Confidentialité et discrétion'

2.B.1 Les juges sont les gardiens de la confidentialité. L'exercice des fonctions judiciaires a pour conséquence que les juges, inévitablement, reçoivent des renseignements de nature confidentielle ou entrent en possession de tels renseignements. Même si, en principe, la justice est publique, ouverte et transparente, certains faits, documents, dossiers ou circonstances entourant un litige, y compris l'identité d'une ou de plusieurs parties, peuvent être assujettis à des ordonnances de confidentialité. Les juges ne devraient jamais utiliser ou révéler des renseignements de nature confidentielle, sauf lorsque cela est nécessaire dans l'exercice de leurs fonctions judiciaires, ou conformément aux règles applicables qui régissent l'archivage et la divulgation. Lorsqu'ils travaillent en groupe, leurs discussions demeurent confidentielles.

2.B.2 Les juges devraient faire preuve de discrétion lorsqu'ils discutent de leur travail, y compris dans des contextes où leurs propos peuvent être entendus par inadvertance.

2.B.3 La confidentialité et la discrétion demeurent importantes pour les juges même après leur départ de la magistrature.

Courtoisie et respect

2.C.1 L'une des caractéristiques du processus judiciaire est que toutes les personnes qui y participent, y compris les juges, se comportent de manière à préserver l'honneur et la dignité tant des instances individuelles que de l'administration de la justice en général. Les juges devraient s'efforcer de traiter chaque personne qui intervient dans le processus judiciaire avec courtoisie et respect.

1 Conseil canadien de la magistrature, L'usage de renseignements personnels dans les jugements et protocole recommandé (2005)

2.C.2 The commitment of judges to civility and respect is not limited to judicial proceedings. Judges should attempt, in all of their engagements with others, including their judicial colleagues, to act in accordance with these values. By showing dignified consideration for others, judges enhance public respect for and confidence in the judiciary as an institution.

2.C.3 The circumstances of some cases and the conduct of counsel and parties sometimes require judges to act with an appropriate measure of firmness and to emphasize decisiveness, promptness, the prevention of abuse of process or improper treatment of participants in the adjudicative process. Maintaining civility and respect requires judges to ensure a proper balance between upholding the right of parties to be heard and ensuring the efficiency of the process.

2.C.4 It is often necessary for judges in the adjudication process to make findings of credibility and to rule on the propriety of a person's conduct. That being said, in court proceedings or in their judgments, judges should not make inappropriate remarks about a person's conduct or motives. Furthermore, judges should not make comments about persons who are not before the court unless, in the judge's opinion, it is necessary for the proper disposition of the case.

2.C.5 Judges should be alert to the possibility that ill-considered, comical or facetious remarks, often made spontaneously and intended to be humorous, may give offence or diminish the dignity of the proceedings.

2.C.2 Cet engagement des juges envers la courtoisie et le respect ne se limite pas au processus judiciaire. Les juges devraient s'efforcer de respecter ces valeurs dans tous leurs rapports avec autrui, y compris les autres membres de la magistrature. Les juges contribuent au respect de la magistrature et à la confiance que le public lui accorde en tant qu'institution en se comportant de manière digne et respectueuse avec autrui.

2.C.3 Les aspects particuliers d'une affaire et la conduite des avocats et des parties peut parfois obliger les juges à utiliser une certaine fermeté et à privilégier l'efficacité dans la prise de décision, la célérité ainsi que la prévention des abus de procédure et des comportements répréhensibles envers les participants au processus judiciaire. Le maintien d'une attitude courtoise et respectueuse exige des juges qu'ils préservent un juste équilibre entre le droit des parties d'être entendues et l'efficacité du processus.

2.C.4 Il arrive souvent aux juges de devoir se prononcer sur la crédibilité ou la conduite de certaines personnes pour trancher un litige. Cela étant, les juges devraient s'abstenir, au cours du processus judiciaire ou dans leurs jugements, de formuler des commentaires inappropriés concernant la conduite d'une personne ou ses motivations. Les juges devraient aussi s'abstenir de formuler des commentaires concernant des personnes qui ne comparaissent pas devant le tribunal, à moins que cela ne soit nécessaire au règlement de l'affaire du point de vue du juge.

2.C.5 Les juges devraient être sensibles au fait que les commentaires inconsiderés, humoristiques ou facétieux, qui sont souvent formulés spontanément et se veulent drôles, peuvent être offensants et miner la dignité des procédures.

2.C.6 It is a delicate question whether and in what circumstances a judge should report, or cause to be reported, a lawyer's conduct to the lawyer's professional governing body. Taking such action may affect the ability of the judge to continue in the proceeding in which that lawyer is appearing, given that the judge's view of the lawyer's conduct may give rise to a reasonable apprehension of bias against the lawyer or the lawyer's client. On the other hand, a judge is in a special position to observe lawyers' conduct before the court. Judges should remain alert to the lawyer's legal and ethical duty of resolute advocacy on behalf of a client and commitment to the client's cause. A judge should take, or cause to be taken, appropriate action where the judge becomes aware of misconduct by a lawyer or incompetence that seriously compromises the interests of justice. Where a judge intends to take action, the judge should follow court protocols and consider whether the interests of justice require that such action await the end of the proceeding or whether the circumstances require earlier action.

Access to Justice and Self-Represented Litigants²

2.D.1 Judges have a responsibility to promote and foster access to justice. In fulfilling their role, judges should be aware of the different ways in which disputes can be resolved fairly and efficiently.

2.C.6 La question de savoir si les juges devraient signaler ou faire signaler certains agissements d'un avocat à l'ordre professionnel de celui-ci, et dans quelles circonstances ils devraient le faire, est délicate. Les juges qui prennent ce genre de mesures risquent de ne plus être aptes à entendre la cause dans laquelle agit l'avocat dénoncé, puisque l'opinion exprimée sur la conduite de l'avocat peut susciter une crainte raisonnable quant à l'existence d'un parti pris contre l'avocat ou son client. Il reste que les juges occupent une position privilégiée pour observer la conduite des avocats devant le tribunal. Les juges devraient demeurer attentifs au fait que les avocats ont une obligation déontologique et légale de représenter leur client avec vigueur et de se dévouer à sa cause. Lorsque des juges sont témoins de l'inconduite d'un avocat ou d'une incompétence qui porte gravement atteinte à l'intérêt de la justice, ils devraient prendre ou faire prendre les mesures qui s'imposent conformément aux protocoles en vigueur dans leur cour s'il en est. Avant de prendre de telles mesures, les juges devraient déterminer si l'intérêt de la justice commande d'attendre la fin de l'audience ou si des circonstances spéciales justifient une action immédiate.

L'accès à la justice et les parties non représentées²

2.D.1 Les juges ont la responsabilité de promouvoir et de favoriser l'accès à la justice. Ce rôle impose aux juges d'être sensibles aux différents processus qui permettent une résolution juste et efficace des différends.

2 Canadian Judicial Council Statement of Principles on Self-represented Litigants and Accused Persons (2006)

2 Conseil canadien de la magistrature, Énoncé de principes concernant les plaideurs et les accusés non représentés par un avocat (2006)

2.D.2 Passive neutrality and treating everyone in the same manner may not always be appropriate. Parties often appear before the court as self-represented litigants. Judges should provide information and reasonable assistance, proactively where appropriate, on procedural and evidentiary rules, while being alert not to compromise judicial impartiality and the fairness of the proceeding.

Conduct Towards Others

2.E.1 The conduct of judges towards others is an important aspect of their commitment to integrity and respect. Judges should be attentive to the ways in which offensive remarks, or conduct, or inappropriate behaviour may adversely affect or intimidate others, particularly those in subordinate positions to the judge. A judge's conduct in this respect affects their individual reputation and that of the judiciary as a whole.

2.E.2 A common concern in the modern workplace is the possibility that authority may be used in inappropriate ways. The workplace of the judiciary is no exception. Judges refrain from any form of harassment in the workplace. It is also important for judges to avoid relationships with others with whom they work or associate that could be reasonably perceived as the judge taking advantage of their position or authority.

2.D.2 Il se pourrait que la neutralité passive et le traitement identique de toutes les parties ne soit pas toujours approprié. Il arrive souvent que des parties agissent devant les tribunaux sans être représentées. Les juges devraient informer les parties non représentées et leur fournir une aide raisonnable, de manière proactive lorsque les circonstances s'y prêtent, en ce qui concerne les règles de preuve et de procédure, tout en se gardant de compromettre leur impartialité et l'équité des procédures.

Comportement à l'égard d'autrui

2.E.1 La conduite des juges à l'égard d'autrui est un aspect important de leur engagement envers l'intégrité et le respect. Les juges devraient se montrer sensibles aux propos désobligeants et aux comportements offensants ou inappropriés qui pourraient atteindre ou intimider les personnes qu'ils côtoient, en particulier celles sur lesquelles s'exerce leur autorité. La conduite des juges à cet égard est susceptible d'affecter tant leur réputation individuelle que celle de la magistrature dans son ensemble.

2.E.2 La possibilité que l'autorité soit utilisée à des fins inappropriées est souvent source de préoccupation dans les milieux de travail contemporains. Le milieu de travail où exercent les juges ne fait pas exception. Les juges s'abstiennent de toute forme de harcèlement au travail. Il est également important que les juges évitent les relations avec les personnes avec lesquelles ils travaillent ou qu'ils côtoient, lorsqu'une telle relation pourrait être raisonnablement perçue comme un abus de fonction ou d'autorité.

Use of Status or Authority

2.F.1 Judges should not use their status or authority, or the status of their office, to seek, for themselves or others, an advantage or benefit to which they would not otherwise be entitled.

Fundraising

2.F.2 Judges should not allow the prestige of judicial office to be used in aid of fundraising for particular causes, however worthy. They should not solicit funds (except from judicial colleagues or from family members) or lend the prestige of their judicial office to such solicitations.

Letters of Reference

2.F.3 Judges may be called upon to provide letters of reference. It is important that the prestige of judicial office not be used to advance another person's private interests or create an impression that certain persons stand in a particular position of influence or favour with the judge. Factors for the judge to consider include whether: (i) providing the reference will not compromise the integrity of judicial office; (ii) it is the judge's personal knowledge of the individual that is called for; and (iii) the judge has an important perspective about the individual to contribute such that it would be unfair to the individual were the judge to refuse. Judges should keep in mind that letters of reference may be made public. Such letters may also be rendered inappropriate or inaccurate by a subsequent change in circumstances, thereby having the potential to reflect adversely on the judge or the judiciary. Judges may assist judicial appointment advisory committees on a confidential basis.

Statut et pouvoir judiciaire

2.F.1 Les juges ne devraient pas utiliser leur statut ou leur pouvoir, ou le prestige de leur fonction, pour rechercher un avantage ou un bénéfice, pour eux-mêmes ou pour autrui, qui ne pourrait être obtenu autrement.

Collecte de fonds

2.F.2 Les juges ne devraient pas permettre que le prestige de la fonction judiciaire contribue à la collecte de fonds pour des causes particulières, si méritoires soient-elles. Ils ne devraient pas recueillir de dons (sauf auprès de collègues juges ou auprès de membres de leur famille), ni associer le prestige de leur fonction à de telles collectes.

Lettres de recommandation

2.F.3 On demande parfois aux juges de fournir des lettres de recommandation. Il est important que le prestige de la fonction judiciaire ne serve pas à promouvoir les intérêts privés d'un tiers ou à donner l'impression que certaines personnes jouissent auprès d'eux d'une influence ou de faveurs particulières. Les facteurs que les juges devraient prendre en considération comprennent, notamment, les suivants : (i) le fait de fournir la recommandation ne mettra pas en péril l'intégrité de la fonction judiciaire; (ii) c'est à leur connaissance de la personne concernée que l'on fait appel; et (iii) lorsqu'ils ont un point de vue important à exprimer sur la personne concernée, un refus de leur part ne serait pas équitable envers cette personne. Les juges devraient garder à l'esprit que les lettres de recommandation peuvent être rendues publiques, que leur contenu peut devenir mal adapté ou inexact par suite d'un changement de circonstances et qu'elles sont donc susceptibles de nuire à leur image ou à celle de la magistrature. Les juges peuvent aider les comités consultatifs sur la nomination des juges de manière confidentielle.

Collegial Support

2.G.1 Judges should encourage and support their judicial colleagues' observance of ethical principles. Judges may become aware of circumstances that indicate a strong likelihood of unethical conduct by a judicial colleague. In such instances, judges should act in a manner that best ensures that action is taken to preserve public confidence in the administration of justice. Depending on the circumstances, such action may include communication with the Chief Justice of the court.

Soutien collégial

2.G.1 Les juges devraient encourager leurs collègues de la magistrature à respecter les principes de déontologie et les appuyer dans cette démarche. Il peut arriver que des juges soient informés de circonstances signalant une forte probabilité que la conduite d'un juge comporte des lacunes d'ordre déontologique. Dans ces cas, les juges devraient agir de manière à s'assurer que des mesures sont prises pour préserver la confiance du public dans l'administration de la justice. Selon la situation, de telles mesures pourraient inclure la divulgation du problème au juge en chef de la cour.

III. Diligence and Competence

Statement

Judges perform their duties with diligence and competence.

Principles

A. Judges devote themselves to their judicial duties, broadly defined, which include presiding in court and making decisions, as well as those duties essential to court operations and to the administration of justice. Judges do not engage in activities incompatible with the diligent discharge of judicial duties.

B. Judges perform all judicial duties, including the delivery of reserved judgments, with punctuality and reasonable promptness, having due regard to the urgency of the matter and other special circumstances.

C. Judges maintain and enhance their knowledge, skills, sensitivity to social context and the personal qualities necessary to perform their judicial duties.

D. Judges strive to maintain their wellness to optimize the performance of judicial duties.

III. Diligence et compétence

Énoncé

Les juges exercent leurs fonctions avec diligence et compétence.

Principes

A. Les juges se consacrent à leurs fonctions judiciaires, entendues au sens large, lesquelles englobent le fait de présider les audiences et de rendre des décisions, ainsi que celles qui sont essentielles au bon fonctionnement de leur tribunal et de l'administration de la justice. Les juges s'abstiennent de toute activité incompatible avec l'exercice diligent de leurs fonctions judiciaires.

B. Les juges exercent toutes leurs fonctions judiciaires, et rendent les jugements mis en délibéré, de façon ponctuelle et avec une célérité raisonnable, compte tenu des circonstances propres à chaque affaire, y compris leur caractère urgent.

C. Les juges maintiennent et améliorent les connaissances, les compétences, la sensibilité au contexte social et les qualités personnelles qui sont nécessaires à l'exercice de leurs fonctions judiciaires.

D. Les juges s'efforcent de se maintenir en bonne santé afin d'exercer leurs fonctions judiciaires de manière optimale.

Commentary

General

3.A.1 Diligence is concerned with the performance of judicial duties in a skillful, careful, attentive and timely way.

3.A.2 Judges should exhibit diligence and competence in the performance of all their judicial duties, including adjudication, case management, pre-trial or settlement conferences and participation in court administration.

3.A.3 Section 55 of the *Judges Act*³ provides that: “No judge shall, either directly or indirectly, for himself or herself or others, engage in any occupation or business other than his or her judicial duties, but every judge shall devote himself or herself exclusively to those judicial duties”. Subject to the limitations imposed by the *Judges Act* and guided by these *Ethical Principles*, judges may participate in other activities that do not detract from the performance of judicial duties or compromise their independence or impartiality.

3.A.4 Upon appointment, judges should withdraw expeditiously from professional, commercial and business activities.

3.A.5 Generally speaking, a judge is entitled to have ‘passive’ investments that do not constitute ‘carrying on business’, provided that little active management is required and there is no interference with the diligent performance of judicial duties. For these reasons, judges should undertake a careful examination of their investments.

³ *Judges Act*, RSC 1985, c J-1

Commentaires

Général

3.A.1 On entend par diligence le fait d'exercer ses fonctions judiciaires de manière compétente, prudente et attentive, de même qu'avec une célérité raisonnable.

3.A.2 Les juges devraient faire preuve de diligence et de compétence dans l'exercice de toutes leurs fonctions judiciaires, y compris les fonctions décisionnelles, la gestion d'instance, les conférences préparatoires ou de règlement et la participation à l'administration de la justice.

3.A.3 L'article 55 de la *Loi sur les juges*³ prévoit que « Les juges se consacrent à leurs fonctions judiciaires à l'exclusion de toute autre activité, qu'elle soit exercée directement ou indirectement, pour leur compte ou celui d'autrui ». Sous réserve des restrictions imposées par la *Loi sur les juges* et des recommandations formulées dans les *Principes de déontologie*, les juges peuvent participer à d'autres activités qui ne nuisent pas à l'exercice de leurs fonctions judiciaires ou mettent en péril leur indépendance ou impartialité.

3.A.4 Après leur nomination, les juges devraient se retirer rapidement de leurs activités commerciales et professionnelles, ainsi que de leur intérêts d'affaires.

3.A.5 De manière générale, les juges peuvent avoir des placements « passifs » qui ne constituent pas la « poursuite d'une entreprise », exigent peu de gestion active et ne les empêchent pas d'exercer leurs fonctions judiciaires avec diligence. Pour cette raison, les juges devraient effectuer une analyse serrée de leurs placements.

³ *Loi sur les juges*, L.R.C. (1985), ch. J-1

3.A.6 On occasion, judges are asked by governments to serve on commissions, inquiries or in other public roles. In considering such a request, in addition to the limitations imposed by the *Judges Act* and the guidance provided by *Ethical Principles*, judges should consider all implications and discuss the matter with their Chief Justice to ensure that acceptance of an appointment will not unduly interfere with the effective functioning of the court. The terms of reference and other conditions such as time and resources should be examined carefully so as to assess their compatibility with the judicial function.⁴

3.A.7 Judges are uniquely placed to make a variety of contributions to the administration of justice. Subject to the limitations imposed by judicial office, judges are encouraged, for example, to take part in legal education programs for students, lawyers and judges, and in activities to make the law and the legal process more understandable and accessible to the public, such as giving lectures, participating in moot courts or through legal writing.

Timeliness

3.B.1 Judges should perform all assigned judicial duties in a timely manner.

3.A.6 Il arrive que les gouvernements demandent à des juges d'exercer des fonctions publiques, notamment au sein d'une commission ou à l'occasion d'une enquête. Avant de répondre à une telle demande, outre les restrictions imposées par la *Loi sur les juges* et les recommandations formulées dans les *Principes de déontologie*, les juges devraient prendre en considération l'ensemble des conséquences et en discuter avec leur juge en chef afin de s'assurer que l'acceptation de la charge proposée ne nuira pas indûment au bon fonctionnement du tribunal. Le mandat et d'autres facteurs tels que la durée et les ressources devraient entrer en ligne de compte lorsqu'il s'agit d'évaluer la compatibilité de la charge proposée avec les fonctions judiciaires.⁴

3.A.7 Les juges sont particulièrement bien placés pour contribuer de diverses manières à l'administration de la justice. Sous réserve des restrictions qui leur sont imposées par leur charge, les juges sont encouragés, par exemple, à prendre part à des programmes de formation juridique à l'intention des étudiants, des avocats et des juges, et à participer à des activités destinées à mieux faire comprendre le droit et la procédure judiciaire au grand public, notamment en donnant des conférences, en participant à un tribunal-école ou en rédigeant des articles ou des livres de droit.

Célérité

3.B.1 Les juges devraient exercer toutes les fonctions judiciaires qui leur sont assignées avec une célérité raisonnable.

4 Canadian Judicial Council Protocol on the Appointment of Judges to Commissions of Inquiry (2010)

4 Conseil canadien de la magistrature, Protocole sur la nomination de juges à des commissions d'enquête (2010)

3.B.2 The preparation of judgments is frequently difficult and time consuming. Judges are expected to produce their decisions and reasons for judgment as soon as reasonably possible, having regard to the urgency of the matter and the length or complexity of the case. In this respect, the CJC has resolved that reserved judgments should be delivered within a maximum of six months after hearings, except in special circumstances.⁵ Judges must also comply with legal requirements associated with timeliness of judgments applicable in their jurisdiction.

3.B.3 While judges strive to be diligent in the performance of their judicial duties, their ability to do so may be affected by various factors, including illness, exceptionally heavy burdens of work or the inadequacy of resources supporting their work.

Professional Development⁶

3.C.1 A well-educated and informed judiciary that adheres to high standards of competence is essential to preserving public confidence.

3.C.2 Judges should have and maintain knowledge of the law. Knowledge extends not only to substantive and procedural law but also to an understanding of the impact of the law on those it affects.

3.B.2 L'élaboration d'un jugement est souvent longue et ardue. Les juges sont censés prononcer leurs jugements et les motifs qui les accompagnent dès qu'il est raisonnablement possible de le faire, compte tenu de l'urgence de l'affaire, de sa longueur ou de sa complexité. En cette matière, le Conseil a, par voie de résolution, exprimé l'avis que, sauf s'il existe des circonstances particulières, les juges qui ont mis une affaire en délibéré devraient rendre leur jugement dans les six mois qui suivent l'audience.⁵ Les juges doivent aussi respecter les délais imposés par la loi dans leur juridiction, le cas échéant.

3.B.3 Bien que les juges s'efforcent d'agir avec diligence dans l'exercice de leurs fonctions judiciaires, il peut leur être difficile de le faire en raison de différents facteurs, comme la maladie, une charge de travail exceptionnellement lourde ou l'insuffisance des ressources qui appuient leur travail.

Perfectionnement professionnel⁶

3.C.1 Afin de préserver la confiance du public à l'endroit de la magistrature, il est essentiel que les juges adhèrent à des normes élevées en matière de formation et de compétence.

3.C.2 Les juges devraient connaître le droit et se tenir à jour à cet égard. Cette connaissance s'étend non seulement aux règles de fond et de procédure, mais également à leur compréhension de l'impact qu'elles ont sur les personnes touchées.

5 *Canadian Judicial Council Resolution on Reserved Judgments (1985)*

6 *Canadian Judicial Council Professional Development Policies and Guidelines (2018)*

5 *Résolution du Conseil canadien de la magistrature sur les jugements pris en délibéré (1985)*

6 *Conseil canadien de la magistrature, Politiques et lignes directrices sur le perfectionnement professionnel (2018)*

3.C.3 Judges are responsible for maintaining and enhancing their knowledge, skills and personal qualities necessary for effective judging. This important element of judicial diligence and competence involves participation in continuing professional development.

3.C.4 Professional development describes formal and informal learning activities that include education, training and private study. It also covers education on social context issues affecting the administration of justice. Social context encompasses knowledge and understanding of the realities of the lives of those who appear in court. This includes the history, heritage and laws related to Indigenous peoples, as well as matters of gender, race, ethnicity, religion, culture, sexual orientation, gender identity or expression, differing mental or physical abilities, age and socio-economic background.

3.C.5 Judges should develop and maintain proficiency with technology relevant to the nature and performance of their judicial duties.

3.C.6 As part of a judge's commitment to continuing professional development, judges should engage in self-assessment and self-development, taking responsibility for their standard of knowledge, skill and the development of personal qualities related to judicial duties.

3.C.3 Il incombe aux juges de maintenir et d'accroître les connaissances, les compétences et les qualités personnelles qui leur sont nécessaires pour bien juger. Cet important volet de la diligence et de la compétence des juges implique la participation à des programmes de perfectionnement professionnel continu.

3.C.4 Le perfectionnement professionnel s'entend des activités d'apprentissage, formelles ou informelles, qui visent l'amélioration des connaissances et des compétences et les études personnelles. Il s'étend aussi à la formation touchant le contexte social pertinent à l'administration de la justice, ce qui comprend la connaissance et la compréhension de la réalité vécue par les personnes qui comparaissent devant le tribunal, y compris l'histoire et le patrimoine des peuples autochtones, le droit relatif aux peuples autochtones, ainsi que les questions liées au genre, à la race, à l'origine ethnique, à la religion, à la culture, à l'orientation sexuelle, à l'identité ou à l'expression de genre, aux différences de capacités physiques ou mentales, à l'âge et à l'origine socio-économique.

3.C.5 Les juges devraient développer et maintenir les habiletés technologiques qui ont rapport à la nature et à l'exercice de leurs fonctions judiciaires.

3.C.6 En lien avec leur engagement envers le perfectionnement professionnel continu, les juges devraient évaluer leur niveau de connaissances et de compétences et les qualités individuelles qui leur permettent de s'acquitter de leurs fonctions judiciaires et s'engager dans un processus continu de perfectionnement professionnel.

3.C.7 To support judges' commitments to their continuing professional development, the CJC and National Judicial Institute, as well as other organizations, have developed relevant, comprehensive, quality educational programs. Judges should participate in these programs in their continuing commitment to acquire, maintain and strengthen their judicial knowledge and skills.

3.C.8 Consistent with their judicial duties, judges are encouraged to take advantage of opportunities to engage with and learn from the wider public, including communities with which the judge has little or no life experience.

Wellness

3.D.1 While judges should exhibit diligence in the performance of their judicial duties, the importance of judges' responsibilities to their families is also recognized.

3.D.2 Judges should set aside sufficient time and make a commitment to the maintenance of physical and mental wellness, and take advantage of judicial assistance programs as appropriate.⁷

3.C.7 Pour soutenir les juges dans cette démarche de perfectionnement professionnel continu, le Conseil et l'Institut national de la magistrature, de même que d'autres organismes, ont élaboré des programmes de formation pertinents, exhaustifs et de qualité. Les juges devraient participer à ces programmes afin de maintenir et d'améliorer leurs connaissances et leurs compétences judiciaires et d'en acquérir de nouvelles.

3.C.8 Lorsque cela est compatible avec leurs fonctions judiciaires, les juges sont encouragés à profiter des occasions de s'intéresser à la collectivité, notamment d'apprendre à mieux connaître les personnes issues de communautés dont l'expérience diffère de la leur.

Bien-être

3.D.1 Bien que les juges soient tenus de faire preuve de diligence dans l'exercice de leurs fonctions judiciaires, l'on reconnaît par ailleurs l'importance des responsabilités familiales des membres de la magistrature.

3.D.2 Les juges devraient réserver suffisamment de temps au maintien de leur bonne santé physique et mentale et se prévaloir, au besoin, des programmes d'aide qui leur sont offerts.⁷

⁷ *Judges Counselling Program – Confidential Assistance for Judges and their Families*

⁷ *Programme de counselling destiné aux juges – Soutien confidentiel aux juges et à leurs familles*

IV. Equality

Statement

Judges conduct themselves and the proceedings before them to ensure equality according to law.

Principles

- A.** Judges carry out their duties with respect for all persons, including parties, counsel, witnesses, court personnel and judicial colleagues, without discrimination or prejudice.
- B.** Judges refrain from discriminatory behaviour. They disassociate themselves from and disapprove of offensive or discriminatory comments or conduct by court staff, counsel or any other person involved in judicial proceedings.
- C.** Judges are sensitive to and are not influenced by attitudes based on stereotype, myth or prejudice. They make meaningful efforts to recognize and dissociate themselves from such attitudes.
- D.** Judges do not belong to any organization that engages in or countenances any form of discrimination that contravenes the law.

IV. Égalité

Énoncé

Les juges adoptent une conduite propre à assurer à tous un traitement égal conformément à la loi et ils conduisent les instances dont ils sont saisis dans ce même esprit.

Principes

- A.** Les juges exercent leurs fonctions en faisant preuve de respect à l'endroit de toutes les personnes, sans discrimination ni préjugés, qu'il s'agisse des parties, des avocats, des témoins, de membres du personnel de la cour ou d'autres juges.
- B.** Les juges s'abstiennent de comportements discriminatoires. Ils se dissocient de la conduite ou des propos offensants ou discriminatoires que pourraient avoir les membres du personnel de la cour, les avocats ou les autres personnes participant à une instance judiciaire et expriment leur désapprobation à cet égard.
- C.** Les juges sont sensibles aux attitudes fondées sur des stéréotypes, des mythes ou des préjugés et ne se laissent pas influencer par celles-ci. Les juges font des efforts concrets pour reconnaître ces attitudes et s'en dissocier.
- D.** Les juges n'adhèrent à aucun organisme qui pratique ou approuve une forme quelconque de discrimination prohibée par la loi.

Commentary

General

4.A.1 The Constitution and a variety of statutes guarantee equality before and under the law and equal protection and benefit of the law without discrimination. The law's commitment to substantive equality seeks to protect members of the community from both direct discrimination and from the impact of laws and policies that, though neutral on their face, produce adverse effects, or adverse impact, discrimination. This approach to equality seeks to acknowledge the equal worth and dignity of all persons and to ensure that discrimination is prevented and rectified as it affects individuals or groups experiencing disadvantage in our society, often on a systemic or structural basis. The law's strong societal commitment places concern for equality at the core of justice according to law.

4.A.2 Equality, according to law, is fundamental to justice and is strongly linked to judicial impartiality and to public confidence in the administration of justice. Accordingly, judges should ensure that their commitment to equality is unwavering and that their conduct is such that any reasonable and informed member of the public would have confidence in the judge's respect for and commitment to equality.

Commentaires

Général

4.A.1 La Constitution et de nombreuses lois garantissent l'égalité devant la loi et sous le régime de la loi, de même que l'égalité en matière de protection et de bénéfice de la loi, sans discrimination. Cet engagement du législateur envers l'égalité réelle vise à protéger les membres de la collectivité contre la discrimination directe et contre les lois et les politiques qui, en apparence neutres, entraînent de la discrimination par suite d'un effet préjudiciable. Cette approche vise à reconnaître une même valeur à tous les êtres humains et la dignité de toutes les personnes, de manière à prévenir la discrimination, souvent systémique ou structurelle, dont sont victimes les personnes ou les groupes défavorisés de notre société et à y remédier. Cet engagement ferme pris par le législateur au nom de la société place l'égalité au cœur de la justice sous le régime de la loi.

4.A.2 Fondamentale pour la justice, l'égalité sous le régime de la loi est aussi étroitement liée à l'impartialité judiciaire et à la confiance du public dans l'administration de la justice. Par conséquent, les juges devraient être inébranlables dans leur engagement envers l'égalité et s'assurer que leur conduite est telle qu'une personne raisonnable et bien renseignée y verrait la manifestation de leur respect pour le principe d'égalité et leur engagement à l'égard de celui-ci.

Equality in Proceedings

4.B.1 Judges should avoid comments, expressions, gestures or behaviour that may reasonably be interpreted as showing insensitivity to or disrespect for anyone. Examples include inappropriate comments based on stereotypes linked to gender, race, ethnicity, religion, culture, sexual orientation, gender identity or expression, differing mental or physical abilities, age and socio-economic background, or other conduct that may create the impression that persons before the court will not be afforded equal consideration and respect. Inappropriate statements by judges, in or out of court, have the potential to call into question their commitment to equality and their ability to be impartial.

4.B.2 Judges should avoid engaging in activities on social media that could reasonably reflect negatively on their commitment to equality.

4.B.3 In proceedings before them, judges should intervene when confronted with discriminatory comments or behaviour. The principle of equality does not, however, require that proper advocacy or admissible testimony be curtailed where, for example, matters of gender, race or other similar factors are properly before the court. The adversarial system gives the parties and their counsel considerable leeway, and the relevance and importance of evidence may be difficult to assess accurately as it is being presented. Judges are expected to listen impartially, but, when necessary, should assert control over the proceeding and act with appropriate firmness to maintain an atmosphere of dignity, equality and order in the courtroom. Judges should be alive to the issues before the court and, where appropriate, seek clarification and provide balanced rulings on the relevance of a given line of questioning.

L'égalité dans le processus judiciaire

4.B.1 Les juges devraient éviter les observations, les expressions, les gestes ou les comportements qui pourraient être raisonnablement interprétés comme un manque de sensibilité ou de respect à l'égard d'une autre personne. En sont des exemples les remarques inappropriées fondées sur des stéréotypes liés au genre, à la race, à l'origine ethnique, à la religion, à la culture, à l'orientation sexuelle, à l'identité ou à l'expression de genre, aux différences de capacités physiques ou mentales, à l'âge, et à l'origine socio-économique, et toute autre conduite qui pourrait laisser entendre que des personnes comparaissant devant le tribunal ne seront pas traitées de façon égale et respectueuse. Les commentaires inappropriés formulés par les juges, en salle d'audience ou ailleurs, peuvent soulever un doute quant à leur engagement envers l'égalité, ou quant à leur impartialité.

4.B.2 Les juges devraient éviter d'avoir, sur les réseaux sociaux, des activités qui sont raisonnablement susceptibles de discréditer leur engagement envers le principe d'égalité.

4.B.3 Dans le cadre des affaires dont ils sont saisis, les juges devraient intervenir lorsqu'ils font face à des propos ou à une conduite discriminatoires. Le principe d'égalité n'implique pas, cependant, que l'on doive interdire la défense légitime d'idées, ou empêcher la présentation de témoignages par ailleurs admissibles, lorsque, par exemple, des questions de genre, de race ou d'autres facteurs semblables sont légitimement soulevés devant la cour. Le système contradictoire donne beaucoup de latitude aux parties et à leurs avocats, et il peut être difficile d'évaluer avec justesse la pertinence et l'importance de la preuve au moment de sa présentation. Les juges sont censés écouter le débat en toute impartialité, mais devraient, si nécessaire, le contrôler fermement et faire preuve de toute la rigueur voulue pour maintenir un climat de dignité, d'égalité et d'ordre dans la salle d'audience. Les juges devraient être sensibles aux questions qui sont devant le tribunal et, lorsque cela est utile, obtenir des précisions sur la pertinence des questions posées par les avocats et rendre des décisions équilibrées sur celles-ci.

4.B.4 Judges should not permit court staff or others subject to their authority or control to engage in conduct that may: show disrespect toward others; constitute discrimination; or reasonably reflect negatively on their commitment to equality.

Avoidance of Stereotypes

4.C.1 Judges do not make assumptions based on general characterizations or attach labels to people that invite stereotypical assumptions about their behaviour or characteristics. Stereotypes are simplistic mental short cuts that generate misleading perceptions and cause mistakes and errors in fact and in law.

4.C.2 Reliance on stereotypes may arise for different reasons, often unintentionally. Judges may not properly appreciate that their reasoning is linked to stereotypical thinking. A judge may be unfamiliar with cultural traditions that would, if known, provide a greater understanding of a party's or a witness's appearance, mannerisms or behaviour.

4.C.3 Judges should educate themselves on the extent to which assumptions rest on stereotypical thinking and should become and remain informed about changing attitudes and values. They should take up opportunities to engage with cultures and communities that are different from their own life experiences to expand their knowledge and understanding. In doing this, judges should take care that these efforts enhance and do not detract from their independence and impartiality. In addition, judges should take advantage of educational opportunities and self-study that will assist them in this regard.

4.B.4 Les juges ne devraient pas laisser le personnel de la cour ou d'autres personnes agissant sous leur autorité ou leur contrôle manquer de respect à autrui, ou adopter des comportements qui peuvent constituer de la discrimination ou qui sont raisonnablement susceptibles de discréditer leur engagement envers le principe d'égalité.

La prévention des stéréotypes

4.C.1 Les juges s'abstiennent de formuler des hypothèses fondées sur des caractérisations générales et d'accoler des étiquettes susceptibles d'encourager la formulation d'hypothèses stéréotypées au sujet du comportement ou des caractéristiques de certaines personnes. Les stéréotypes sont des raccourcis dans le raisonnement qui nourrissent des perceptions trompeuses et conduisent à des erreurs de fait ou de droit.

4.C.2 Le recours aux stéréotypes peut résulter d'un ensemble de causes et n'est souvent pas intentionnel. Il est possible que des juges ne soient pas conscients que leur raisonnement est relié à un stéréotype. Il peut aussi arriver que des juges ne connaissent pas certaines traditions culturelles qui, s'ils les connaissaient, leur permettraient de mieux comprendre la façon de se présenter, d'agir et de se comporter d'une partie ou d'un témoin.

4.C.3 Les juges devraient être sensibilisés au fait que les hypothèses peuvent reposer sur des stéréotypes et prendre les moyens appropriés pour demeurer au fait des changements d'attitudes et de valeurs. Ils devraient s'intéresser aux cultures et aux communautés qui diffèrent de celles qu'ils côtoient de par leur expérience de vie, afin d'élargir leurs connaissances et leur compréhension. Toutefois, les juges devraient s'assurer que les efforts déployés en ce sens renforcent leur indépendance et leur impartialité plutôt que de leur nuire. De plus, les juges devraient profiter des activités de formation et des lectures qui permettent d'en apprendre plus sur ces questions.

Association with Discriminatory Organizations

4.D.1 Judges should conduct their personal lives honourably and in ways that would not reasonably be perceived as an endorsement of any invidious form of discrimination. Judges should avoid associations with organizations that engage in or countenance discrimination contrary to law. A judge's membership in such an organization has the potential to call into question the judge's commitment to equality and may erode public confidence in the judiciary. Judges should also be sensitive to the fact that some organizations' activities, policies and public positions, though not unlawful, may still be offensive to legitimate expectations of equality.

4.D.2 Neither the practice of religion nor membership in a religious organization is inconsistent with *Ethical Principles*.

Association avec des organismes ayant des pratiques discriminatoires

4.D.1 Les juges devraient se conduire de manière honorable dans leur vie personnelle et faire en sorte que leur comportement ne puisse donner à raisonnablement penser qu'ils appuient une quelconque forme de discrimination préjudiciable. Par conséquent, les juges devraient éviter toute association avec un organisme qui pratique ou approuve une forme de discrimination prohibée par la loi. L'adhésion à un tel organisme est susceptible de remettre en cause l'engagement des juges envers le principe d'égalité et de miner la confiance du public à l'endroit de la magistrature. Les juges devraient aussi être sensibles au fait que l'activité et les politiques de certains organismes ainsi que les opinions qu'ils expriment, quoique licites, peuvent porter atteinte aux attentes légitimes en matière d'égalité.

4.D.2 Ni la pratique d'une religion, ni l'appartenance à un organisme religieux ne sont incompatibles avec les *Principes de déontologie*.

V. Impartiality

Statement

Judges are impartial and appear to be impartial in the performance of their judicial duties.

Principles

- A.** Judges ensure that their conduct at all times maintains and enhances confidence in their impartiality and that of the judiciary.
- B.** Judges avoid conduct which could reasonably cause others to question their impartiality.
- C.** Judges conduct their affairs so as to avoid real or apparent conflicts of interest between their private interests and their judicial duties.
- D.** While preserving their impartiality, judges make meaningful efforts to inform and educate the public and the legal profession regarding the law, judicial independence, and the role of judges and the courts in the administration of justice.
- E.** Judges contemplating retirement and former judges avoid conduct that is likely to bring the judicial office into disrepute or put at risk public expectations of judicial independence, integrity and impartiality.

V. Impartialité

Énoncé

Les juges sont impartiaux et donnent l'apparence d'impartialité dans l'exercice de leurs fonctions judiciaires.

Principes

- A.** Les juges veillent en toutes circonstances à ce que leur conduite entretienne et accroisse la confiance dans leur impartialité et celle de la magistrature en général.
- B.** Les juges évitent les comportements pouvant raisonnablement amener autrui à mettre en doute leur impartialité.
- C.** Les juges mènent leurs affaires de manière à éviter tout conflit réel ou apparent entre leurs intérêts personnels et leurs fonctions judiciaires.
- D.** Tout en veillant à préserver leur impartialité, les juges s'efforcent d'éduquer le public et la profession juridique et de les informer sur le droit, l'indépendance judiciaire et le rôle des juges et des tribunaux dans l'administration de la justice.
- E.** Les juges qui songent à quitter ou qui ont quitté la magistrature évitent toute conduite susceptible de jeter le discrédit sur la fonction judiciaire ou de miner les attentes du public quant à l'indépendance, à l'intégrité et à l'impartialité de la magistrature.

Commentary

General

5.A.1 For centuries, adjudication by impartial and independent judges has been recognized as fundamental to the rule of law. Impartiality is a fundamental qualification of a judge and a core attribute of the judiciary.

5.A.2 Impartiality requires not only the absence of bias and prejudgment, but also the absence of any appearance of partiality. This dual aspect of impartiality is captured in the oft-repeated words that justice must not only be done, but manifestly be seen to be done. The test is whether a reasonable and informed person with knowledge of all relevant circumstances, viewing the matter realistically and practically, would apprehend a lack of impartiality in the judge.

5.A.3 While there is a close association between the judge's ethical and legal duties of impartiality, *Ethical Principles* is not intended to deal with the law relating to judicial disqualification or recusal.

Judicial Duties

5.A.4 Judges have a fundamental obligation to be and to appear to be impartial. This obligation of impartiality does not presuppose that judges are free of life experiences, sympathies or opinions. Rather, it requires judges to be sensitive to their own biases and to consider different points of view with an open mind. Judges should interact with all parties fairly and even-handedly.

Commentaires

Général

5.A.1 Depuis des siècles, on reconnaît que la décision des litiges par des juges impartiaux et indépendants est essentielle à la primauté du droit. L'impartialité est l'une des qualités fondamentales des juges et un attribut central de la fonction judiciaire.

5.A.2 L'impartialité requiert non seulement l'absence de préjugés et de partis pris, mais également l'absence d'apparence de partialité. Ces deux volets de l'impartialité sont bien résumés dans la maxime selon laquelle non seulement justice doit être rendue, mais encore elle doit paraître avoir été rendue. Le critère applicable consiste à se demander si une personne raisonnable et bien renseignée, qui serait au courant de toutes les circonstances pertinentes et étudierait la question de façon réaliste et pratique, craindrait que le juge ne soit pas impartial.

5.A.3 Bien qu'il existe des liens étroits entre les devoirs éthiques et juridiques des juges en matière d'impartialité, les *Principes de déontologie* ne sont pas destinés à traiter du droit relatif à la récusation des juges.

Fonctions judiciaires

5.A.4 Les juges ont l'obligation fondamentale d'être et de paraître impartiaux. L'obligation d'impartialité ne présuppose pas que les juges n'ont aucune expérience personnelle, sympathie ou opinion. Elle exige plutôt que les juges soient conscients de leurs propres préjugés et accueillent différents points de vue en gardant un esprit ouvert. Les juges devraient traiter toutes les parties avec équité et sur un pied d'égalité.

5.A.5 Judges should avoid using words or conduct, in and out of court, that might give rise to a reasonable perception of bias. The expectations of litigants are high. Disappointed litigants will sometimes perceive bias when neither actual bias nor a reasonable apprehension of bias exists. A judge's remarks or tone may diminish the judge's perceived impartiality. An unjustified reprimand of counsel, an improper remark about a litigant or a witness or a statement evidencing prejudice or intemperance and impatient behaviour may undermine the appearance of impartiality. Casual conversations or familiarity with counsel or participants in the proceedings may be perceived by others as a form of exclusion. Therefore, judges should ensure that their comments or conduct do not provide reasonable grounds for a perception of bias.

5.A.6 While judges may wish to signal support for causes or viewpoints through words or in the wearing or display of symbols of support, even if they seem innocuous, such communications may be interpreted as reflecting a lack of impartiality or the use of the position of the judge to make a political or other statement. For these reasons, judges should avoid statements or visible symbols of support, particularly in the context of court proceedings.

5.A.7 Judges should ensure that proceedings are conducted in an orderly and efficient manner and that the court process is not abused. An appropriate measure of firmness may be necessary to achieve this end. In the presence of challenging or vexatious litigants, judges should be firm, decisive and at the same time respectful to ensure that litigants' rights are protected.

5.A.5 Les juges devraient éviter de s'exprimer ou de se comporter, en salle d'audience ou ailleurs, de manière à susciter une perception raisonnable de partialité. Les attentes des parties sont élevées. Il peut arriver qu'une partie déçue perçoive l'existence d'un préjugé malgré l'absence de partialité réelle ou de crainte raisonnable de partialité. Des remarques formulées par les juges ou le ton employé pour exprimer celles-ci peuvent miner la perception d'impartialité des juges. Les remontrances injustifiées faites aux avocats, les remarques déplacées au sujet des parties ou des témoins, les déclarations manifestant un parti pris et les comportements immodérés et impatients peuvent saper l'apparence d'impartialité. Les conversations ou comportements empreints de familiarité avec les avocats ou les participants à l'instance peuvent être perçus par d'autres comme une forme d'exclusion. Par conséquent, les juges devraient s'assurer que leurs commentaires ou leur conduite ne donnent pas prise à une perception raisonnable de partialité.

5.A.6 Bien que des juges puissent vouloir exprimer leur appui pour certaines causes ou points de vue, les paroles ou le port d'insignes marquant cet appui, même lorsqu'ils semblent inoffensifs, peuvent être interprétés comme un manque d'impartialité ou être vus comme un moyen d'utiliser la fonction judiciaire pour faire une déclaration politique ou autre. Pour cette raison, les juges devraient éviter de tenir des propos ou de porter des insignes visibles marquant leur appui, en particulier dans le cadre du processus judiciaire.

5.A.7 Les juges devraient veiller à ce que l'instance se déroule de manière ordonnée et efficace, tout en prévenant les abus de procédure. Une certaine fermeté peut s'imposer selon les circonstances. En présence d'une partie difficile ou quérulente, les juges devraient se comporter de manière ferme et décisive, sans renoncer au respect requis pour assurer la protection des droits des parties.

5.A.8 Judges have a responsibility to promote opportunities for all persons to understand the judicial process and to meaningfully present their case, whether or not they have legal representation. Self-represented persons may sometimes be uninformed about their rights and about the consequences of the options they choose. Judges should take appropriate and reasonable measures to provide a fair and impartial process and prevent an unfair disadvantage to self-represented persons.⁸ Such measures are consistent with impartiality provided that they are fair to other parties.

5.A.9 Judges should be particularly attuned to the perception of bias that might arise in circumstances where one or more parties are self-represented. Appropriate assistance to a self-represented litigant may be perceived by the opposing, represented party as manifesting bias. Accommodations extended to self-represented litigants should not extend to the point where they become unfair to the other party. Clear and transparent communication with all parties is necessary to avoid unwarranted apprehension of bias.

5.A.8 Les juges ont la responsabilité de s'assurer que toute personne, qu'elle soit représentée ou non représentée, ait la possibilité de comprendre le processus judiciaire et de faire valoir sa position. Les personnes non représentées peuvent parfois être mal informées de leurs droits et des conséquences de leurs choix. Les juges devraient prendre des moyens appropriés et raisonnables afin d'établir un processus équitable et impartial et d'empêcher que les personnes non représentées ne soient pas injustement désavantagées.⁸ De tels moyens se concilient avec l'impartialité pour autant qu'ils soient équitables envers toutes les parties.

5.A.9 Les juges devraient être particulièrement sensibles à la possibilité d'une perception de partialité dans les situations où l'une des parties ou plusieurs d'entre elles ne sont pas représentées. L'assistance congruente que les juges apportent à une partie non représentée peut être perçue par la partie adverse représentée par avocat comme la manifestation d'un parti pris. Les accommodements accordés aux parties non représentées ne devraient pas rendre le processus injuste pour les parties représentées. Il est nécessaire de communiquer de façon claire et transparente avec toutes les parties afin de dissiper les craintes injustifiées de partialité.

8 Canadian Judicial Council Statement of Principles on Self-represented Litigants and Accused Persons (2006)

8 Conseil canadien de la magistrature, Énoncé de principes concernant les plaideurs et les accusés non représentés par un avocat (2006)

5.A.10 An expanding aspect of judicial responsibility for judges is their work in settlement conferences and the judicial mediation of disputes. Direct engagement with litigants and counsel in these non-adjudicative settings often takes judges outside the confines of their traditional roles and presents additional challenges in relation to impartiality. Given the variety of settings in which this work takes place, it is not possible to articulate bright line rules to provide guidance in every situation. However, there are values and boundaries which judges should respect in these settings. When engaging in non-adjudicative dispute resolution, judges should ensure that: (i) the process and outcomes are acceptable to the parties themselves; (ii) the outcomes are the subject of informed decision-making by the parties; (iii) the process is transparent to the parties; (iv) the outcomes are not coercive, unconscionable, or illegal; and (v) the legitimate interests of known non-involved third parties are considered. Transparency in this context means openness in the broadest sense and is not intended to discourage caucusing in appropriate circumstances.

Restraints

5.B.1 On appointment, judges do not surrender all of the rights and freedoms enjoyed by everyone else in Canada. Nevertheless, the office of the judge imposes restraints that are necessary to maintain public confidence in the impartiality and independence of the judiciary. In defining the appropriate degree of public involvement by a judge there are two fundamental considerations. The first is whether the involvement could reasonably undermine confidence in the judge's impartiality. The second is whether such involvement may expose the judge to criticism or be inconsistent with the dignity and integrity of judicial office.

5.A.10 Les responsabilités des juges s'étendent de plus en plus aux modes alternatifs de règlement des litiges et à la médiation judiciaire. Les interactions directes entre juges, parties et avocats inhérentes à ces processus non juridictionnels s'inscrivent souvent en dehors des cadres traditionnels de l'activité judiciaire et soulèvent des enjeux additionnels en matière d'impartialité. Comme ces cadres de travail varient grandement, il n'est pas possible d'établir des règles claires et précises susceptibles d'apporter des solutions à toutes les éventualités. Néanmoins, les juges devraient respecter certaines valeurs et limites dans ces situations et notamment s'assurer de ce qui suit : (i) le processus et les résultats qui en découleront sont acceptables pour les parties elles-mêmes; (ii) les parties ont consenti en toute connaissance de cause aux résultats; (iii) le processus est transparent pour les parties; (iv) les résultats ne sont pas coercitifs, iniques ou contraires à la loi; et (v) les intérêts légitimes des tiers connus qui ne sont pas parties au litige sont pris en compte. Dans ce contexte, la transparence s'entend d'une ouverture, au sens large, et n'est pas incompatible avec la possibilité de rencontres individuelles, le cas échéant.

Restrictions

5.B.1 Les juges ne renoncent pas, du fait de leur nomination, à l'ensemble des droits et libertés dont jouit chaque personne au Canada. Cependant, la charge de juge impose des contraintes qui sont nécessaires au maintien de la confiance du public dans l'impartialité et l'indépendance de la magistrature. Deux questions fondamentales entrent en ligne de compte lorsqu'il s'agit de déterminer le niveau d'intervention publique qui convient à un membre de la magistrature. La première consiste à savoir si l'intervention pourrait raisonnablement saper la confiance dans l'impartialité du juge et la deuxième, si cette intervention est susceptible d'exposer le juge aux critiques ou est par ailleurs incompatible avec la dignité et l'intégrité de la fonction judiciaire.

Political Activity

5.B.2 Judges must cease all partisan political activity upon the assumption of judicial office. Moreover, judges refrain from conduct that, in the mind of a reasonable and informed person, could give rise to the appearance that the judge is engaged in political activity. For this reason, judges must refrain from: (i) membership in political parties and political fundraising; (ii) attendance at political gatherings and political fundraising events; (iii) contributing financially or otherwise to political parties or campaigns; (iv) signing petitions to influence a political decision; and (v) taking part publicly in controversial political discussions, except in respect of matters directly affecting the operation of the courts, the independence of the judiciary or fundamental aspects of the administration of justice.

5.B.3 Like partisan political activity, out of court statements by a judge concerning issues of public controversy may undermine impartiality. They are also likely to lead to public confusion about the nature of the relationship between the judiciary on the one hand and the executive and legislative branches of government on the other. Partisan actions and political statements by definition involve publicly choosing one side of a debate over another. In order to preserve their impartiality, judges should refrain from any political action or involvement. The perception of partiality will be reinforced if the judge's activities attract criticism and/or rebuttal. This in turn tends to undermine public confidence in the judiciary. Judges should not use the privileged platform of judicial office to enter the public arena because it puts at risk public confidence in the impartiality and the independence of the judiciary.

Activités politiques

5.B.2 Les juges doivent se retirer de toute activité politique de nature partisane dès leur entrée en fonction. De plus, les juges évitent toute conduite susceptible de donner à une personne raisonnable et bien renseignée l'impression qu'ils s'adonnent à une activité politique. Pour cette raison, les juges doivent éviter de faire ce qui suit : (i) adhérer à des partis politiques et à des campagnes de financement politique; (ii) participer à des rassemblements politiques ou à des activités de financement politique; (iii) verser des contributions financières à des partis ou à des campagnes politiques ou y contribuer d'autres manières; (iv) signer des pétitions visant à influencer une décision politique; et (v) intervenir publiquement dans des débats politiques, sauf sur des questions concernant directement le fonctionnement des tribunaux, l'indépendance de la magistrature ou des éléments fondamentaux de l'administration de la justice.

5.B.3 Tout comme les activités politiques de nature partisane, les propos hors du cadre judiciaire sur des questions soulevant une controverse publique peuvent miner l'image d'impartialité du juge. En outre, ils risquent de créer de la confusion auprès du public en ce qui concerne les rapports entre le pouvoir judiciaire, d'une part, et les pouvoirs exécutif et législatif, d'autre part. Par définition, les activités partisanses et les déclarations politiques impliquent une prise de position publique à l'égard d'une question particulière. Afin de préserver leur impartialité, les juges devraient éviter toute activité ou participation politique. La perception de partialité sera plus aiguë si les activités auxquelles s'adonnent les juges font l'objet de critiques ou de contestations. Ces réactions, à leur tour, tendront à miner la confiance du public à l'endroit de la magistrature. Les juges ne devraient pas utiliser le prestige associé à la fonction judiciaire comme levier dans l'arène publique, car, ce faisant, ils mettent en péril la confiance du public dans l'impartialité et l'indépendance de la magistrature.

5.B.4 Chief Justices and other judges with administrative responsibilities will necessarily have contact and interaction with the executive branch of government, including attorneys general, deputy attorneys general and court services officials. These engagements are appropriate provided that the interactions are not partisan in nature.

5.B.5 If a member of a judge's family is politically active, the judge should recognize that such activities of close family members may adversely affect the public perception of the judge's impartiality. In cases where such public perceptions may arise, a judge should consider whether recusal is the appropriate remedy in a given case.

Public Statements

5.B.6 There are limited circumstances in which judges may properly speak out, though with restraint, about a matter that is publicly controversial, namely, when the matter directly affects the operation of the courts, the independence of the judiciary or fundamental aspects of the administration of justice. Chief Justices have particular responsibilities in this regard. Judges should follow any protocol established by their Court on these matters.

5.B.7 If their personal integrity has been called into question in a public context, judges should seek guidance from their Chief Justice and, if appropriate, other trusted advisors.

5.B.4 Les juges en chef et les autres juges qui exercent des responsabilités administratives sont appelés à communiquer et à interagir avec des membres du pouvoir exécutif, dont les procureurs généraux, les sous-ministres ou sous-procureurs généraux et les administrateurs des tribunaux. Ces interactions sont appropriées, en autant qu'elles n'ont pas de dimension partisane.

5.B.5 Les juges devraient être conscients que les activités politiques d'un membre de leur famille immédiate peuvent compromettre leur image d'impartialité auprès du public. Dans les cas où la perception du public pourrait être compromise dans une affaire particulière dont ils sont saisis, les juges devraient considérer s'il y a lieu de se récuser.

Déclarations publiques

5.B.6 Il existe des circonstances où les juges, quoique avec retenue, peuvent exprimer publiquement leur avis sur un sujet controversé, notamment lorsque ce dernier concerne directement le fonctionnement des tribunaux, l'indépendance de la magistrature ou des aspects fondamentaux de l'administration de la justice. Les juges en chef ont une responsabilité particulière à cet égard. Les juges devraient se conformer aux protocoles établis par leur propre cour, le cas échéant.

5.B.7 Dans le cas où leur intégrité personnelle serait publiquement mise en doute, les juges devraient obtenir l'avis de leur juge en chef et, au besoin, d'autres conseillers dignes de confiance.

Judicial Promotion and Opportunities

5.B.8 Leadership positions in courts, opportunities for elevation to a higher court and other opportunities for judges arise from time to time. These decisions are ultimately made by the executive branch of government. Judges are entitled to seek these positions and advance their qualifications, but should exercise reserve in their communication of interest, or the communication of interest by others on their behalf, so as to avoid any conduct that would compromise their impartiality or undermine the integrity of the appointment process.

Public Engagement, Civic and Charitable Activity

5.B.9 Many judges wish to become or continue to be active in various forms of public service to their communities. This involvement benefits the community and judges but also carries risks.

5.B.10 On one hand, there are likely to be beneficial aspects of the judge being active in appropriate forms of public service. Judges administer the law on behalf of the community and are appointed to serve the public. Therefore, unnecessary isolation from the community does not promote wise or just judgments. In order to undertake their work with competence and diligence, and in ways that are consistent with judicial duties, judges are encouraged to take up opportunities to engage with and learn from the wider public, including communities with which they have little or no life experience.

Promotion et autres opportunités pour les juges

5.B.8 Il arrive que des juges soient pressentis pour des fonctions de leadership au sein d'une cour ou en vue de leur accession à une cour de juridiction supérieure, ou que d'autres occasions se présentent à eux. Les décisions finales en cette matière relèvent du pouvoir exécutif. Les juges sont en droit de soumettre leur candidature à ces postes et de faire valoir leurs compétences, mais devraient faire preuve de réserve lorsqu'il s'agit d'exprimer leur intérêt soit directement, soit par l'entremise d'une autre personne, afin d'éviter toute conduite qui mettrait en péril leur impartialité ou minerait l'intégrité du processus de nomination.

Participation à la vie publique et activités sociales ou communautaires

5.B.9 Nombre de juges souhaitent s'impliquer dans des activités sociales ou communautaires ou maintenir leur engagement à cet égard. Cet engagement est bénéfique tant pour la société que pour les juges, mais comporte également des risques.

5.B.10 D'une part, la participation des juges à diverses activités sociales ou communautaires appropriées est sans doute avantageuse. Les juges appliquent la loi au nom de la société et sont nommés pour servir la population. Par conséquent, leur isolement excessif du reste de la collectivité est peu propice à des décisions justes et judicieuses. Afin qu'ils exercent leurs fonctions avec compétence et diligence, dans le respect des devoirs de leur charge, les juges sont encouragés à saisir les occasions qui leur permettent d'interagir avec le public et de mieux comprendre leur société, y compris les groupes qu'ils connaissent peu ou pas de par leur expérience personnelle.

5.B.11 On the other hand, the judge's civic involvement may, in some cases, jeopardize the perception of impartiality. Judges should exercise caution when considering their involvement in community activities and be attentive to the limits that judicial appointment places upon their freedom to undertake these activities. Community involvement on the part of the judge should be assessed in light of the form of public service under consideration, the activities and goals of the organization, the role to be played by the judge within it, the risk that the organization may become engaged in litigation and any other relevant factor.

5.B.12 Generally speaking, judges should refrain from membership in or association with groups or organizations or participation in public discussion which, in the mind of a reasonable and informed person, would undermine confidence in a judge's impartiality with respect to issues that could come before the courts. In service to their communities, judges must not give legal or investment advice, and should avoid involvement in causes or organizations that are likely to be engaged in litigation. Judges should use even greater caution in considering whether to become officers or directors of community organizations.

5.B.13 While, in the past, Canadian judges have served in leadership positions with organizations such as universities and religious bodies, this service is potentially problematic. The risk that such organizations will become involved in litigation or be the subject of public controversy creates the possibility that the judge will be placed in an awkward position, both in relation to public confidence in the judge's impartiality and in the judiciary as a whole. While judges may consider accepting such positions, they should reflect on issues of perceived or actual conflict before doing so, all with a view to determining whether the role can be structured in such a way so as to avoid conflicts and appearances of conflict.

5.B.11 D'autre part, l'engagement social et communautaire des juges peut parfois compromettre leur image d'impartialité. Les juges devraient faire preuve de prudence lorsqu'ils envisagent de participer à des activités sociales ou communautaires et être sensibles au fait que l'accession à la magistrature leur impose des limites à cet égard. L'opportunité d'une participation devrait être appréciée en fonction du type de service public envisagé, des activités et objectifs de l'organisme, du rôle que le juge serait appelé à y jouer, du risque que l'organisme soit partie à un litige et de tout autre facteur pertinent.

5.B.12 En général, les juges devraient s'abstenir d'adhérer ou de s'associer à un groupement ou à un organisme, ou de participer à un débat public, lorsque, du point de vue d'une personne raisonnable et bien renseignée, cette adhésion ou cette participation serait susceptible de miner la confiance dans l'impartialité des juges relativement à des questions susceptibles d'être soumises aux tribunaux. Dans le cadre de leurs activités sociales ou communautaires, les juges doivent s'abstenir de donner des conseils juridiques ou des conseils en matière de placements et devraient éviter de participer à des causes ou à des organisations susceptibles d'être impliquées dans un litige. Les juges ne devraient envisager d'occuper des postes de dirigeant ou d'administrateur d'un organisme social ou communautaire qu'avec la plus grande prudence.

5.B.13 Bien que certains juges du Canada aient dans le passé occupé des fonctions de leadership au sein d'entités telles que des universités ou des organisations religieuses, l'exercice de telles fonctions peut soulever des difficultés. Il existe un risque que ces entités soient parties à un litige, ou qu'elles fassent l'objet d'une controverse publique, ce qui pourrait placer le juge dans une situation délicate du point de vue de la confiance du public, tant à l'égard de son impartialité qu'à l'endroit de la magistrature dans son ensemble. Avant d'accepter de telles fonctions, les juges devraient considérer les risques de conflit réel ou perçu et s'il est possible d'établir une structure permettant d'éviter les conflits et les apparences de conflit.

5.B.14 Involvement with a community organization that at one time was appropriate may become inappropriate. Judges should re-evaluate these associations in light of changing circumstances.

Social Media

5.B.15 Social media activities are subject to the overarching principles that guide judicial behaviour. Judges should be aware of how their activities on social media may reflect on themselves and upon the judiciary and should be attentive to the potential implications for their ability to perform their judicial role. Judges should also be attentive to and may wish to inform family members of the ways in which their social media activities could reflect adversely on the judge.

5.B.16 Communication by social media is more public and more permanent than many other forms of communication. It enables messages to be re-transmitted beyond the originators' control and without their consent. Comments or images intended for a limited audience can be shared, almost instantaneously, with a vast audience and may create an adverse reaction far beyond what one may have considered possible. Social media can also create greater opportunities for inappropriate communications to judges from others.

5.B.14 La participation à un organisme social ou communautaire qui est jugée appropriée à un moment donné peut cesser de l'être par la suite. Les juges devraient réévaluer leurs associations en fonction des changements de circonstances.

Médias sociaux

5.B.15 Les communications dans les médias sociaux sont assujetties aux principes fondamentaux qui guident la conduite des juges. Les juges devraient être conscients du fait que ces communications peuvent ternir leur réputation et celle de la magistrature et se répercuter sur leur capacité d'exercer leurs fonctions judiciaires. Par ailleurs, les juges devraient être conscients que les communications des membres de leur famille pourraient également se répercuter défavorablement sur eux; il pourrait y avoir lieu de les en informer.

5.B.16 Les communications affichées dans les médias sociaux peuvent rarement être effacées et n'ont pas vraiment de caractère privé. Elles peuvent facilement être disséminées sans le consentement de leur auteur et échapper à son contrôle. Les commentaires et les images destinés à être partagés dans un cercle fermé peuvent être rediffusés, parfois instantanément, à un vaste auditoire et provoquer une réaction défavorable qui dépasse largement ce qu'on aurait imaginé. Les médias sociaux ouvrent aussi des avenues additionnelles permettant à un membre du public de transmettre des communications inappropriées à un membre de la magistrature.

5.B.17 Judges' communications and associations with others are commonly used as a basis for claims of lack of impartiality. Judges should be vigilant in minimizing reasonable apprehensions of bias arising from these communications and associations. This is all the more important, and difficult, in the age of social media. Judges who choose to use social media should exercise great caution in their communications and associations within these networks, including expressions of support or disapproval. This includes judges informing themselves about the functioning, and the application, of security and privacy settings appropriate to their use of social media.

5.B.18 In a digital world, out-of-court information is much more accessible and the acquisition of such information by a judge is more readily discoverable. Accordingly, judges should be vigilant to avoid inappropriately acquiring or receiving out-of-court information related to the parties, witnesses or issues under consideration in matters before them. Fairness issues may need to be considered by the judge should this happen.

Gifts and Remuneration

5.B.19 Judges must not accept gifts from litigants, lawyers, law firms or any other person in contexts that give rise to a reasonable apprehension of bias. This does not prevent judges from accepting gifts of nominal value in appreciation for having spoken at or contributed to events or conferences, or have their reasonable expenses reimbursed. Such gifts are acceptable, provided that they do not represent remuneration and their acceptance would not create, in the mind of a reasonable and informed person, a perception of partiality.

5.B.17 Les allégations touchant le manque d'impartialité sont souvent fondées sur des propos des juges ou sur le fait qu'ils entretiennent des rapports avec certaines personnes. Les juges devraient éviter que de telles communications ou de tels rapports donnent prise à une crainte raisonnable quant à leur impartialité. Les médias sociaux compliquent les choses à cet égard. Les juges qui choisissent d'y être présents devraient faire preuve d'une grande prudence dans leurs communications, y compris en ce qui concerne l'usage de symboles d'approbation ou de désaccord. Ils devraient également se renseigner sur le fonctionnement et l'application des paramètres de sécurité et de protection de la vie privée convenant à leur utilisation des médias sociaux.

5.B.18 À l'ère numérique, il est beaucoup plus facile d'accéder à des renseignements extrajudiciaires et de laisser des traces en le faisant. Par conséquent, les juges devraient veiller à éviter d'obtenir ou de recevoir de façon inappropriée des renseignements extrajudiciaires relatifs aux parties, aux témoins ou aux questions dont ils sont saisis. Une telle situation, si elle survenait, pourrait soulever des questions d'équité que le juge pourrait devoir prendre en considération.

Cadeaux et rémunération

5.B.19 Les juges ne doivent pas accepter de cadeaux de la part des parties à un litige, d'avocats ou de leur cabinet ou de toute autre personne lorsque cela est susceptible de susciter une crainte raisonnable de partialité. Cela ne signifie pas qu'il est interdit aux juges d'accepter des cadeaux de valeur symbolique pour leur contribution à la tenue d'événements ou de conférences ou d'obtenir le remboursement de frais raisonnables. De tels cadeaux sont acceptables, en autant qu'ils ne constituent pas une rémunération et que le fait de les accepter ne susciterait pas chez une personne raisonnable et bien renseignée une perception de partialité.

Speeches and Conferences

5.B.20 It is common for judges to be asked to speak in public. Judges' public engagement aimed at educating others is a benefit to the judiciary and the public they serve. Judges are encouraged to attend events as speakers, both to contribute their knowledge and to undertake their own professional development. However, speaking in public carries risks to the public perception of the judge's impartiality and must be approached with care. Judges should give careful consideration to a range of factors when deciding whether to accept a speaking invitation and, if so, what the judge may properly address in a speech. These include: (i) the organization inviting the judge to speak; (ii) the anticipated audience; (iii) the topic or general theme to be addressed in the speech; (iv) the degree to which the topic relates to matters concerning the judiciary or the courts; (v) whether the topic or the judge's remarks relates to a matter of public policy or public controversy; (vi) the likelihood that the speech will be reported on, recorded or made available to a broader public; and (vii) the value of the judge's remarks in informing or educating the intended audience. If judges have any doubts regarding the appropriateness of accepting a speaking engagement they should seek the advice of their Chief Justice.

Attendance at Events

5.B.21 Judges may attend social or public events, or conferences provided that such attendance does not compromise their impartiality and the nature of the event, or host, does not raise other concerns related to *Ethical Principles*.

Discours et participation à des conférences

5.B.20 Il est fréquent que des juges soient invités à prendre la parole en public. La participation des juges à des programmes éducatifs est bénéfique, tant pour la magistrature que pour le public qu'elle sert. Il est souhaitable que les juges donnent des conférences et contribuent par ce moyen à l'avancement des connaissances et à leur propre perfectionnement professionnel. Cependant, la prise de parole en public peut nuire à la perception d'impartialité des juges et devrait être abordée prudemment. Avant d'accepter une invitation à prononcer une conférence, et d'en déterminer le contenu, les juges devraient analyser avec soin un certain nombre d'éléments, dont les suivants : (i) la provenance de l'invitation, (ii) l'auditoire envisagé, (iii) le sujet ou le thème à aborder, (iv) le rapport plus ou moins étroit entre le sujet à aborder et les questions qui touchent la magistrature ou les tribunaux, (v) le rapport entre le sujet à aborder ou l'allocution du juge et des questions de politique publique ou des enjeux controversés, (vi) la probabilité que le discours soit cité dans les médias, enregistré ou autrement mis à la disposition du public et (vii) l'intérêt des propos du juge du point de vue de l'information ou de l'éducation du public. En cas de doute quant à l'opportunité d'accepter une invitation, les juges devraient consulter leur juge en chef.

Présence à des événements

5.B.21 Les juges peuvent participer à des événements sociaux ou publics ou à des congrès ou colloques, pourvu que leur présence ne mette pas en péril leur impartialité, ou que la nature de l'événement ou l'identité de l'hôte ne soulève pas de crainte au regard des *Principes de déontologie*.

5.B.22 Judges may participate in social programs at conferences provided that they are generally available to attendees or speakers and the sponsorship, nature and extent of social programs would not create, in the view of a reasonable and informed person, a perception of lack of impartiality.

5.B.23 Attendance by a judge at conferences and social events sponsored by businesses or organizations is potentially problematic. Where invited, the judge should consider the organization hosting the event, whether the invitation has also been extended to community leaders, the purpose for which the judge was invited and the potential for adverse public perception as a result of the attendance.

5.B.24 When judges are invited to attend social events associated with the law or the legal profession, or hosted by law firms, they should consider the nature of the social event, its sponsorship, the other invitees and attendees at the event, the purpose for which the judge has been invited, the existence of a previous personal relationship with the host and attendees, as well as the benefit to the judge, the judiciary and the legal profession as a result of the judge's attendance. Judges should avoid attendance at such events if a purpose of the event is to advance a commercial interest, to showcase the host's relationship with the judge, or if clients are in attendance.

5.B.22 Les juges peuvent participer au volet social de congrès ou de colloques, en autant que ces activités soient normalement accessibles aux participants ou aux conférenciers et que le commanditaire, la nature et l'étendue de ces activités sociales soient tels qu'ils ne puissent susciter chez une personne raisonnable et bien renseignée la perception d'un manque d'impartialité.

5.B.23 La participation des juges à des congrès ou colloques ou à des activités sociales qui sont commandités par des entreprises ou des organismes peut soulever des difficultés. Lorsqu'ils sont invités, les juges devraient prendre en compte la nature de l'organisme hôte, le fait que d'autres personnes en vue au sein de la collectivité ont aussi été invitées, l'intention derrière l'invitation faite aux juges et la possibilité que le public perçoive défavorablement la présence de juges à un tel événement.

5.B.24 La participation des juges à des activités sociales liées au droit ou à la profession juridique ou organisées par un cabinet d'avocats devrait aussi être évaluée en fonction de la nature de l'événement, de l'identité des commanditaires, de l'identité des autres participants ou invités, de l'intention derrière l'invitation faite aux juges, de l'existence de liens personnels antérieurs entre le juge et les hôtes ou autres invités, et du bénéfice qui résulterait de la présence du juge d'un point de vue personnel, du point de vue de la magistrature ou de celui de la profession juridique. Les juges devraient s'abstenir de participer à de telles activités si leur objet est lié à des fins commerciales, si l'événement vise à souligner l'existence d'une relation entre le juge et l'hôte ou si des clients de l'hôte sont présents.

Conflicts of Interest

5.C.1 The discussion of conflicts of interest in *Ethical Principles* is not intended to state the law relating to judicial disqualification or recusal. It is intended to provide guidance to judges as they identify and assess the circumstances in which their personal interests may be reasonably viewed by others as conflicting with their judicial duties. In assessing their ethical duties in this context, judges should remain conscious of the demands of the sound administration of justice and their duty to hear the cases assigned to them.

5.C.2 The potential for a conflict of interest arises when the personal interest of the judge (or of those close to the judge) conflicts with the judge's duty to adjudicate impartially. Judicial impartiality is concerned with impartiality in fact and in the perception of a reasonable and informed person. As a result, judges should be attentive to both actual conflicts between their self-interest and their duty of impartial adjudication, and to circumstances in which a reasonable and informed person would reasonably apprehend a conflict.

5.C.3 Conflicts of interest may arise from: a pecuniary or non-pecuniary interest in the outcome; a close family, personal or professional relationship with a litigant, counsel or witness; or the judge having expressed views evidencing bias regarding a litigant or an issue that is before the court.

Conflits d'intérêts

5.C.1 Les *Principes de déontologie* n'ont pas pour objet de traiter du droit relatif à la récusation des juges. Dans le présent document, la discussion des conflits d'intérêts vise à offrir aux juges des pistes de réflexion qui leur permettent d'identifier et d'évaluer les circonstances où leurs intérêts personnels pourraient raisonnablement être vus par d'autres comme entrant en conflit avec leurs fonctions judiciaires. Lorsqu'ils évaluent leurs obligations déontologiques dans ce cadre, les juges devraient garder à l'esprit les exigences d'une saine administration de la justice et leur devoir d'entendre les affaires qui leur sont confiées.

5.C.2 Il y a risque de conflit d'intérêts lorsque l'intérêt personnel du juge (ou de ses proches) s'oppose à son devoir de rendre la justice avec impartialité. L'impartialité judiciaire s'entend à la fois de l'impartialité réelle et de l'impartialité apparente, selon la perception d'une personne raisonnable et bien renseignée. Par conséquent, les juges doivent être sensibles non seulement aux conflits réels entre leur intérêt personnel et leur devoir de rendre la justice de manière impartiale, mais également aux situations dans lesquelles une personne raisonnable et bien renseignée éprouverait une crainte raisonnable de conflit d'intérêts.

5.C.3 Un conflit d'intérêts peut survenir lorsque les juges ont un intérêt patrimonial ou extrapatrimonial dans l'issue d'un procès; une relation de parenté, une amitié proche ou une relation professionnelle avec une partie, un avocat ou un témoin; ou lorsque les juges expriment des opinions manifestant de la partialité à l'égard d'une partie ou d'un enjeu débattu devant le tribunal.

5.C.4 Upon appointment, judges must immediately cease practicing law, and should divest themselves and remain divested of their interests in commercial and business activities. Severance of all association with the judge's legal practice should be done as quickly as possible, ideally in an immediate and final way.

5.C.5 Generally speaking, judges are entitled to manage 'passive' investments that do not constitute 'carrying on business', provided that the investment is truly passive with little active management required. Nevertheless, judges should not participate in a case in which they have a financial, property or other interest that could be affected by its outcome or in which their interest would give rise to a potential apprehension of lack of impartiality by a reasonable and informed person. This is true whether the interest is itself the subject matter of the controversy or where the outcome of the case could materially affect the value of any interest or property owned by the judge, the judge's family or close associates. There is no conflict where the judge's financial or property interest is limited to one shared by citizens generally. Owning an insurance policy, having a bank account, using a credit card or owning securities in a widely held enterprise would not, in normal circumstances, constitute a conflict of interest, unless the outcome of the proceedings before the judge could substantially affect such holdings.

5.C.4 Dès leur nomination, les juges doivent immédiatement cesser de pratiquer le droit et devraient se départir, de façon définitive, de leurs intérêts dans toute activité commerciale ou d'affaires. Les liens existant avec leur cabinet devraient être rompus aussi rapidement que possible, idéalement de manière immédiate et définitive.

5.C.5 De manière générale, les juges peuvent détenir des placements « passifs » qui ne constituent pas « la poursuite d'une entreprise », en autant qu'il s'agisse de placements véritablement passifs exigeant peu ou pas de gestion active. Néanmoins, les juges ne devraient pas présider de procès qui mettent en jeu leur propre intérêt pécuniaire ou autre ou leur patrimoine ou dans lesquels leur intérêt pourrait susciter chez une personne raisonnable et bien renseignée la crainte qu'ils pourraient ne pas juger de façon impartiale. Ce principe s'applique aussi bien dans le cas où l'intérêt lui-même est l'objet du litige que dans celui où l'issue du procès pourrait avoir une incidence importante sur la valeur de tout intérêt ou bien appartenant au juge, à sa famille ou à des proches. Il n'y a généralement pas de conflit d'intérêts lorsque l'intérêt financier ou patrimonial du juge est équivalent à celui de la population en général. Ainsi, dans des circonstances normales, ne constituerait pas un conflit d'intérêts le fait de détenir une police d'assurance, d'avoir un compte bancaire, d'utiliser une carte de crédit ou de détenir des titres d'une société inscrite en bourse, à moins que le résultat du litige devant le juge ne puisse affecter substantiellement la valeur de ces intérêts.

Acting as Executors

5.C.6 Judges should not normally act as an executor or fiduciary, unless it concerns the affairs of a close friend or relative and is unlikely to become contentious. Even in that case, judges should not be remunerated for that role and should not act if the executorship may interfere with the performance of judicial duties.

Judges' Former Legal Practice

5.C.7 Judges should be sensitive to the existence of relationships which, to a reasonable and informed person, would give rise to reasonable apprehension of lack of impartiality. In particular, judges will face this issue in relation to cases involving former clients, members of the judge's former law firm or lawyers from the government department or legal aid office in which the judge practiced before appointment. Each case is unique and the apprehension of bias should be assessed in light of all the circumstances. The following general guidelines may be helpful: (i) judges who were involved in private practice should not sit on any case in which the judge or, to their knowledge, the judge's former firm was directly involved in any capacity before the judge was appointed to office; (ii) judges who practised law in government service or legal aid should not sit on cases in which they had any involvement prior to their appointment; (iii) judges should not sit on a matter in which the judge's former law firm is involved until after a 'cooling off period', often established by local law or tradition, of between two and five years; and, (iv) judges should not sit on a matter in which the judge's former law firm is involved for at least as long as there continues to be a financial relationship between the judge and the law firm.

Agir comme liquidateur

5.C.6 De manière générale, les juges ne devraient pas agir comme liquidateur d'une succession ou comme fiduciaire ou fondé de pouvoir, si ce n'est pour le bénéfice d'un ami proche ou d'un membre de leur famille, et à la condition qu'il soit peu probable que la situation devienne litigieuse. Même dans ce cas, les juges ne devraient pas être rémunérés pour cette tâche, laquelle ne devrait pas être acceptée si elle est susceptible de nuire à l'exercice des fonctions judiciaires.

Activités professionnelles antérieures

5.C.7 Les juges devraient être sensibles à l'existence de relations susceptibles de susciter, chez une personne raisonnable et bien renseignée, une crainte raisonnable quant à leur impartialité. Les juges devront parfois se demander s'il convient d'entendre des affaires qui impliquent d'anciens clients, des membres de leur ancien cabinet ou des avocats du ministère ou du bureau d'aide juridique dans lequel ils ont exercé avant leur accession à la magistrature. Chaque cas est unique et la crainte de partialité devrait être appréciée en fonction de toutes les circonstances. Les recommandations suivantes pourraient s'avérer utiles : (i) les juges qui exerçaient en pratique privée ne devraient pas entendre les litiges dans lesquels ils agissaient ou, à leur connaissance, leur ancien cabinet agissait à quelque titre que ce soit, avant leur accession à la magistrature; (ii) les juges qui exerçaient au sein de la fonction publique ou à l'aide juridique ne devraient pas entendre les litiges dans lesquels ils agissaient à quelque titre que ce soit avant leur accession à la magistrature; (iii) les juges ne devraient pas entendre les autres dossiers menés par leur ancien cabinet avant l'expiration d'une certaine période, souvent établie par la loi ou les usages locaux, de deux à cinq ans à compter de leur nomination, et (iv) les juges ne devraient pas entendre les dossiers menés par leur ancien cabinet au moins aussi longtemps que perdurent leurs relations financières avec celui-ci.

Personal Relationships

5.C.8 Frequently judges are faced with situations where the lawyer appearing before the judge is from a law firm where a close friend or member of the judge's immediate family is a partner, associate or employee. It would be inappropriate for a judge to hear a case involving a close friend or family member. Generally speaking, it would not be problematic for a judge to sit on a case involving a lawyer from a firm in which the close friend or family member is a member or employee, provided that the friend or family member has not been involved in the matter. However, there may be circumstances where it would be inappropriate for a judge to hear such a case. For example, where the law firm is very small (such that there is a greater risk of the perception of lack of impartiality) or where the law firm stands to gain or lose significantly by the outcome, such that the judge's decision would result in a monetary or reputational gain or loss to the close family member or friend or former colleague.

Judges in Financial Difficulty

5.C.9 Judges who are in financial difficulty should be particularly vigilant for conflicts of interest, both actual and perceived. Problems arise where judges in these circumstances preside over matters involving their creditors. Serious questions arise if any aspect of the judge's financial difficulties becomes contentious and the possibility of the judge appearing before a judicial colleague as a party or a witness could arise. The actual day-to-day impact of the financial difficulties on the judge's ability to perform the job will obviously vary considerably depending on the circumstances.

Relations personnelles

5.C.8 Il arrive fréquemment que les juges entendent des affaires où l'une des parties est représentée par un cabinet au sein duquel un ami proche ou un membre de leur famille immédiate pratique le droit ou est employé. Il serait inapproprié que des juges entendent des affaires impliquant des membres de leur famille immédiate ou des amis proches. De manière générale, il n'est pas inapproprié qu'un juge entende une affaire où l'une des parties est représentée par un avocat appartenant au même cabinet qu'un ami proche ou un membre de leur famille, pour autant que cette personne n'ait pas participé au dossier. Néanmoins, cette situation pourrait devenir problématique dans certaines circonstances, comme lorsque le cabinet est très petit (accroissant le risque que le juge soit perçu comme manquant d'impartialité) ou lorsque l'enjeu du litige est susceptible de profiter ou de nuire grandement au cabinet, de telle sorte que la décision du juge puisse entraîner un gain ou une perte pécuniaire pour le membre de la famille immédiate, l'ami ou l'ancien collègue ou être favorable ou défavorable à sa réputation.

Les juges en difficulté financière

5.C.9 Les juges qui éprouvent des difficultés financières devraient prendre particulièrement garde aux conflits d'intérêts, tant réels qu'apparents. Des problèmes surviennent lorsque des juges, dans de telles circonstances, président des procès dont l'objet concerne un de leurs créanciers. De graves questions se poseront si un aspect ou un autre des difficultés financières du juge devient litigieux et qu'il est possible que le juge soit forcé de comparaître devant un collègue à titre de partie ou de témoin. Il est difficile de systématiser les conséquences réelles des difficultés financières des juges sur leur capacité d'accomplir quotidiennement leur tâche; ces conséquences varieront selon les circonstances.

Disclosure and Consent

5.C.10 In certain situations, it may be appropriate for a judge to make disclosure of a potential conflict and invite submissions from the parties. However, judges, not the parties or their counsel, bear the burden of ensuring respect for the principle of judicial impartiality. Neither disclosure of a conflict of interest nor the consent of the parties necessarily justifies judges ignoring circumstances which reasonably call into question their ability to hear a case and decide impartially.

Extraordinary Circumstances: Interests of Justice

5.C.11 Extraordinary or urgent circumstances may require judges to weigh the requirements of judicial impartiality against the risk of injustice.

5.C.12 Circumstances which might cause only minor inconvenience to a large court might nonetheless have a significant practical impact on a smaller court. Judges should organize their private affairs to minimize the potential for such conflicts.

Divulgence et consentement

5.C.10 Il peut être approprié pour un juge de divulguer l'existence d'une situation de conflit d'intérêts potentiel et d'inviter les parties à faire des représentations à ce sujet. C'est effectivement aux juges, plutôt qu'aux parties ou à leurs avocats, qu'il incombe de faire respecter le principe d'impartialité. Ni la divulgation du conflit d'intérêts ni le consentement des parties ne permettent forcément aux juges d'ignorer les circonstances dans lesquelles une personne raisonnable pourrait craindre que l'affaire ne puisse être entendue ou jugée de manière impartiale.

Circonstances extraordinaires : intérêt de la justice

5.C.11 Des circonstances extraordinaires ou urgentes peuvent exiger que les juges cherchent un équilibre entre le principe l'impartialité judiciaire et la nécessité d'éviter une injustice.

5.C.12 Les circonstances qui pourraient n'entraîner que de légers inconvénients pour une juridiction de grande taille pourraient avoir de graves répercussions pour un tribunal de moindre envergure. Les juges devraient organiser leurs affaires personnelles de manière à atténuer le risque que surviennent de tels conflits.

Public Education Activities

5.D.1 Judges possess significant knowledge of the law and the legal system. For this reason, they should make reasonable efforts to become engaged in informing and educating the public regarding the rule of law and the role of judges and courts in the administration of justice. Chief Justices have particular responsibilities and opportunities in relation to such public engagement, including public communications on behalf of their courts.

5.D.2 Subject to the limitations imposed by s. 55 of the *Judges Act* and these *Ethical Principles*, judicial participation in law reform or other scholarly or educational activities are not discouraged, provided that such involvement does not include participation in campaigns in support of, or the championing of, law reform initiatives.

Éducation du public

5.D.1 Les juges connaissent à fond le droit et le système de justice. Pour cette raison, ils devraient s'efforcer dans la mesure du possible d'informer et de renseigner le public sur la primauté du droit et le rôle des juges et des tribunaux dans l'administration de la justice. À cet égard, les juges en chef ont une responsabilité accrue, y compris pour ce qui concerne les communications qui émanent de leur cour.

5.D.2 Sous réserve des restrictions imposées par l'article 55 de la *Loi sur les juges* et par les *Principes de déontologie*, la participation des juges à des travaux de réforme du droit et à d'autres activités de recherche ou d'éducation n'est pas découragée, pour autant qu'elle n'inclue pas la contribution à des campagnes de soutien à des initiatives de réforme du droit ou la promotion de telles initiatives.

Post-Judicial Careers⁹

5.E.1 Judges may choose to move on to another career after leaving the bench. This raises several ethical considerations. One issue relates to the situation of judges prior to departure from judicial office. There may well be circumstances in which planning for one's post-judicial career undermines the perception of impartiality a judge should maintain. Discussions, negotiations or proposals of employment with a law firm, a prospective employer who is a litigant before the judge or a party in a case where the judge has delivered a judgment, may create the impression of a conflict of interest. The same concern exists where a judge is soliciting such opportunities. Whether the overture comes from the judge or the prospective employer, there is a risk that the judge's self-interest and duty would appear to conflict in the eyes of a reasonable and informed person. Accordingly, judges should refrain from engaging in such conversations before their judicial term has come to an end.

Carrière post-judiciaire⁹

5.E.1 Il est possible que des juges amorcent une nouvelle carrière après avoir quitté la magistrature. Cette situation soulève plusieurs enjeux éthiques. Un premier type de préoccupation concerne la situation des juges pendant la période qui précède leur départ de la magistrature. Les gestes posés par les juges dans la planification de leur carrière post-judiciaire peuvent, dans certaines circonstances, porter atteinte à l'apparence d'impartialité qu'ils devraient maintenir. Les discussions ou négociations relatives à un emploi avec un cabinet d'avocats ou un autre employeur éventuel qui est partie à une affaire en cours ou à un litige tranché par le juge pourraient susciter une apparence de conflit d'intérêts. La même inquiétude s'attache aux expressions d'intérêt ou propositions qui pourraient être faites par les juges auprès d'employeurs éventuels. Que les invitations discrètes émanent des juges ou de l'employeur éventuel, une personne raisonnable et bien renseignée pourrait y voir un conflit entre l'intérêt personnel du juge et son devoir. Par conséquent, les juges devraient éviter de participer à de telles conversations avant que leurs fonctions judiciaires n'aient pris fin.

⁹ Canadian Judicial Council Position on Former Judges Returning to Practice (2017)

⁹ Conseil canadien de la magistrature, Position sur les anciens juges qui reprennent l'exercice du droit après avoir quitté la magistrature (2017)

5.E.2 The situation of the judge upon leaving judicial office also introduces ethical considerations. Where former judges are professionally active, their conduct can have an impact on the public's perception of the judiciary as a whole. Accordingly, former judges should be attentive to the ways in which their post-judicial actions or activities could undermine public confidence in the judiciary. Former judges are able to return to the legal profession, but there are limits to the types of activities in which they can engage, consistent with the preservation of the principle of impartiality. A former judge could act as an arbitrator, mediator or commissioner. However, former judges should not appear as counsel before a court or tribunal in Canada. Appearance as counsel is broader than physical appearance. While it is appropriate for former judges to review or draft legal arguments and pleadings, to provide advice to counsel and parties, a former judge should not stand, speak or appear as counsel in court or before a tribunal or sign legal documents that are or may be the subject of proceedings before a court or tribunal. This constraint may be subject to exceptions where a judge has left the judiciary after a very short time.

5.E.3 Former judges should exercise appropriate caution in accepting retainers and providing legal advice in high profile or politically contentious matters where it can be anticipated that a client may make use of the judge's former status to advance the client's interests.

5.E.4 Former judges should not disclose the confidential discussions among judges – for example, the deliberations of an appellate court – or discuss anything that gives the appearance of relying on confidential information or judicial confidences.

5.E.2 La situation des juges qui quittent la magistrature soulève également des considérations éthiques. La conduite des juges qui retournent à la vie professionnelle peut affecter la perception qu'a le public de la magistrature dans son ensemble. Les anciens juges devraient être sensibles au fait que leurs activités ou actions pourraient miner la confiance du public à l'endroit de la magistrature. Les juges peuvent réintégrer la profession juridique à l'issue de leur carrière judiciaire, mais certaines restrictions s'appliquent aux types d'activités qui s'ouvrent à eux afin que soit préservé le principe d'impartialité. Les anciens juges peuvent exercer des fonctions d'arbitre, de médiateur ou de commissaire. Néanmoins, ils ne devraient pas comparaître en tant qu'avocat devant une cour ou un tribunal au Canada. La comparution en tant qu'avocat va au-delà de la comparution en personne. Bien qu'il soit approprié pour un ancien juge de rédiger ou de réviser des documents juridiques ou des actes de procédure, ou de donner des conseils aux avocats et aux parties, ils ne devraient pas plaider devant une cour de justice ou un tribunal, ni apposer leur signature sur un document juridique dont l'objet est ou pourrait être lié à une instance. Il est possible que des exceptions à ce principe soient admises à l'égard de juges qui ont quitté la magistrature très peu de temps après leur nomination.

5.E.3 Les anciens juges devraient faire preuve de la prudence requise avant d'accepter un mandat et de donner des conseils juridiques lorsque le client est susceptible d'utiliser l'ancien statut du juge comme levier pour faire avancer ses intérêts dans un dossier controversé sur le terrain politique ou une affaire qui attire beaucoup d'attention sur la scène publique.

5.E.4 D'autre part, les anciens juges ne devraient pas révéler la teneur des discussions confidentielles auxquelles ils ont participé – en tant que membre d'une formation d'une cour d'appel, par exemple – ou révéler quoi que ce soit qui puisse donner à croire qu'ils s'appuient sur des informations confidentielles ou liées au secret judiciaire.

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Tab 131



Model Definition of Judicial Information

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Prepared by Martin Felsky, PhD, JD, for the Canadian Judicial Council

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BACKGROUND AND PURPOSE

The purpose of this document is to propose a single model for identifying, defining and classifying the terms “Judicial Information” and “Judicial Users” which could be recommended for use by all courts in Canada. Such definitions are required for claiming control over information, whether in the hands of the court, the judiciary, or third parties; protecting the security of sensitive information (in accordance with the *Blueprint*¹); safeguarding the independent oversight of judicial administration; migrating to the cloud (as contemplated in the *Cloud Guidelines*), and developing a retention schedule. In fact, the establishment of a common definition and framework for identification and classification is necessary to allow the courts to react and respond to the evolution of technology, court operations and the practice of law.

This work is a companion to the *Background Report* presented to the Council’s Technology Committee on February 16, 2020. Past efforts at defining Judicial Information have tended to emphasize the distinctions between Judicial Information and Court Information. Using a broad constitutional model, it seemed simple (and appropriate) to assign the governance of Court Information to the Executive Branch (as the body legally responsible for the administration of justice) and the governance of a distinct yet smaller collection of so-called Judicial Information to the judiciary. The definition of Judicial Information as proposed in the 2013 *Framework* was adopted in the *Blueprint* and in some courts.

It is important to note that while the *Framework* helped isolate “Judicial Information” from the broader category of “Court Information,” it did not purport to limit the judiciary’s policy-making role in that regard. On the contrary.

Council’s focus on Judicial Information as a data source distinct from Court Information helped many courts to develop policies protecting the core of judicial independence, deliberative secrecy and personal privacy. The *Blueprint* (and the subsequent *Cloud Guidelines*) assigned special status to information derived from the adjudicative process, to data about judicial education, productivity and discipline; and to the personal information of judges.

Figure 1 below is taken from the *Framework*. It shows the interrelationships of key terms as defined in 2013. Note that the heading refers to “Court Information”:

¹ All references are listed in Annex 6.

Diagram 4: Court Information Terms and Inter-relationships



Figure 1 – Diagram of Court Information from the Framework, 2013

Contrary to the narrower focus that has been historically applied, the *Framework* was intended to apply to all Court Information. While Judicial Information is a special category of Court Information that may demand enhanced measures to protect judicial independence, the judiciary should not consider itself limited to policy-making in that regard alone.

Given the broad and comprehensive scope of the *Framework*, and its detailed proposed definitions, why is further work required of Council now? The main reason is that the landscape has changed. Technology moves quickly, bureaucracy moves slowly. 2013 seems a lifetime ago. For example:

1. Many Canadian judges have had their office productivity tools and data (email, word processing, calendar) moved to the cloud, and most others are in transition or in the planning stages of such a move; for the Council, this is the key driver for a reassessment of what constitutes Judicial Information.

2. Some courts have implemented electronic case management and e-filing systems, and more are in development. This represents a significant change in the form and accessibility of Court and Judicial Information.
3. Concerns about the erosion of judicial independence in some jurisdictions continue to prompt more innovative thinking in respect of information and technology governance.
4. New technologies such as analytics and artificial intelligence are driving more sophisticated requests for bulk access to Court and Judicial Information.
5. Despite the availability of the *Framework* as a guide to policy development in the area, there is growing recognition that few courts have actually developed robust information governance policies.
6. The sudden restrictions imposed on courts in light of COVID-19 has been a wake-up call for the urgent need for policies and procedures in respect of virtual hearings and e-filing solutions.
7. As policies are developed, inconsistent approaches to the definition of key terms add unnecessary cost and complexity.

The benefits of a model definition are therefore clear:

1. Lowering the risks of moving sensitive information to the cloud and managing online case management systems.
2. Developing clearer scopes for agreements such as MOUs in relation to information governance, the sharing of roles and responsibilities and the opportunity to co-operate more meaningfully with the executive branch.
3. The ability of courts to consistently and appropriately respond to novel requests for bulk access to court information, balancing the open courts principle against legitimate needs for confidentiality, privacy and integrity.
4. Improving the decision-making process and reducing risk and liability, on a solid foundation of information governance policies.
5. Smoothing the transition from in-person to virtual proceedings to maximize access to justice and the efficiency of court administration.
6. Increased standardization and consistency in how information is governed across all courts and jurisdictions to enhance public trust in the system, reduce conflicts and lower costs.

TABLE OF KEY DEFINITIONS

The definitions table illustrates the complex, interwoven relationships among the different types of information in a court. This is one of the important distinctions between the pre-computer days and today. Before courts used digital information systems, all court information was in the form of a “document” or “record.” These were physical items that were filed in manila folders and lodged in steel filing cabinets. Today we are dealing with invisible data, often not in the form of a document or file but in the form of a database entry, an embedded object or a hypertext link. A judge’s case notes are clearly “Judicial Information” but how do we isolate them when they are embedded in a PDF file or comprise text in a field in a database of an online case management system?

The table shows that some Court Operations, Administrative and Adjudicative Judicial Information may be found within the Case File and Court Record. For example, a draft judgment is Adjudicative Information, but when finalized it forms part of the Court Record. Some Registry Office Information about a particular proceeding could find its way into the Case File. The model below provides flexibility, is consistent with the constitutional premise of the administration of justice, and at the same time shows how the judiciary must be involved in developing governance policies over a broad swathe of Information.

COURT INFORMATION / INFORMATION JUDICIAIRE			
Information that is received, collected, stored, used or produced by a court in relation to its mission.			
Court Operations Information	Judicial Information <i>Renseignements de la magistrature</i>		
Information related to the supervision, management and direction of matters necessary for the operation of the Court or other matters assigned to the Executive by law or agreement.	ADJUDICATIVE Information related to the exercise of a judicial function.	ADMINISTRATIVE The supervision, management and direction of matters necessary for carrying out judicial functions, including: • The scheduling, preparation, assignment, and adjudication of proceedings; • The education, performance, conduct and discipline of Judicial Users; • The governance of Court information and technology; and • All other matters assigned to the judiciary by law or agreement.	PERSONAL Personal Information of Judicial Officers
Case file / Dossier judiciaire A Case File contains the Information that relates directly to a single court proceeding or to a number of related court proceedings that have all been assigned the same case file number. It includes the Information that comprises the Court Record and any other Information that has been captured or placed in the Case File.			
Court Record / Documents judiciaires² Information and other tangible items filed in proceedings and the information about those proceedings stored by the court. <i>Framework:</i> "This term refers to the "Official" Court Record. It is the portion of the Case File that will be made accessible to the public, subject to privacy constraints regarding, for example, disclosure of personal information etc. The Court Record should be preserved indefinitely whereas the rest of the Case File is usually destroyed after a defined period of time."			

² In Quebec, "Documents d'activité des tribunaux" (synonymous with "Documents judiciaires") is translated as "Court Records (plural)." This is a broad category that includes the "Dossier judiciaire", or Case file. In the *Framework*, which is followed here, the Court Record (singular) is a part of the broader Case File. There does not appear to be a corresponding term in Quebec for the narrower concept of Court Record.

MODEL DEFINITIONS

These proposed definitions derive from a number of sources, including the *Framework*, the references cited in Annex 6, and documents referred to in the *Background Report*.

Term	Definition
Case File / <i>Dossier judiciaire</i>	A Case File contains the Information that relates directly to a single court proceeding or to a number of related court proceedings that have all been assigned the same case file number. It includes the Information that comprises the Court Record and any other Information that has been captured or placed in the Case File.
Court Information / <i>Information judiciaire</i>	Court Information is Information that is received, collected, stored, used or produced by a court in relation to its mission.
Court Operations Information ³	Information related to the supervision, management and direction of matters necessary for the operation of the Court or other matters assigned to the Executive by law or agreement (such as a Memorandum of Understanding). In Quebec, Case Management Tools (<i>Outils de gestion des causes</i>) and Court Monitoring Tools (<i>Outils de suivi des affaires judiciaires</i>) are included as subsets of the broad category of Court Records (<i>Documents d'activité des tribunaux</i>) and are probably best included under Court Operations Information.
Court Record / <i>Document judiciaire</i>	Information and other tangible items filed in proceedings and the information about those proceedings stored by the court. Refers to the “Official” recorded Information of a proceeding. It is the portion of the Case File that is made accessible to the public, subject to privacy constraints regarding, for example, disclosure of personal Information.
Information	Information includes recorded information in any medium or format, regardless of how it has been created. This includes information generated by human or other means.
Judicial Administration /	The supervision, management and direction of matters necessary for carrying out judicial functions, including:

³ For the *Framework* definition and examples see *Framework* p. 66.

Term	Definition
<i>Administration judiciaire</i>	1. the scheduling, preparation, assignment and adjudication of court events; 2. the education, performance, conduct and discipline of Judicial Users; 3. the governance of Court Information and technology, and 4. all other matters assigned to the judiciary by law or agreement (such as a Memorandum of Understanding).
Judicial Information / <i>Renseignements de la magistrature</i> ⁴	Irrespective of who created it or how it was created, Judicial Information includes: 1. Personal Information of Judicial Officers (Annex 5); 2. Information related to the exercise of a judicial function ("Adjudicative Information," Annex 3), and 3. Information related to Judicial Administration ("Administrative Information," Annex 4).
Judicial Agent / <i>Agente ou agent judiciaire</i>	A Judicial Agent is a Judicial User who supports a Judicial Officer and may include court staff such as executive officers, lawyers, paralegals, law clerks, JITSOs, law students, articling students, judicial clerks, administrative assistants, as well as independent consultants working under retainer or contract. (See Annex 1B: Judicial Agents.)
<i>Judicial Officer / Officière ou officier judiciaire</i>	A Judicial Officer is a Judicial User acting in a judicial or quasi-judicial capacity, and includes judges, deputy judges, masters, justices of the peace, registrars, prothonotaries or anyone else authorized to act in an adjudicative role. (See Annex 1A: Judicial Officers.)
Judicial User / <i>Utilisateur ou utilisatrice judiciaire</i>	A Judicial User performs or supports judicial functions and may be authorized to access Judicial Information at various levels of permissions, depending on their role.

Annexes 1-5 list particular examples gathered from courts across the country: these lists are meant to be illustrative, not exhaustive, and may be modified to suit different purposes.

⁴ While "*Information Judiciaire*" has been used for "Judicial Information" in the past, in French it means "Court Information." To avoid confusion, it is proposed that "Judicial Information" be translated as "*Renseignements de la magistrature*."

ANNEX 1A: JUDICIAL OFFICERS

- Assessment or taxation officers
- Associate Chief Judge / Justice
- Chief Judge / Justice
- [Puisne] Judge / Justice (including Supernumerary / Retired)
- Magistrate
- Master
- Prothonotary, Deputy Prothonotary
- Registrar, Deputy Registrar
- Senior Regional Judge / Justice
- Other judicial or quasi-judicial decision makers

ANNEX 1B: JUDICIAL AGENTS

- Administrative Assistant
- Bailiff
- Conciliator / Mediator
- Court Clerk
- Court Reporter
- Counsel
- Executive Officer
- External counsel, consultants and advisers
- JITSO (Judicial Information Technology Security Officer)
- Law Clerk
- Legal Counsel, Legal Officer
- Paralegal
- Public Relations Officer
- Publications Director
- Scheduling / ROTA Manager
- Sheriff
- Social media manager
- Supervisor of Court Administration
- Supervisor of Judicial Support
- Other

ANNEX 3: ADJUDICATIVE INFORMATION

Corresponding Framework definition:⁵ *Individual Judicial Information* includes work product, research material and professional development information of staff Lawyers, Law Clerks and Judicial Officers.

- Bench books
- Bench memos or research memos prepared for a Judicial Officer
- Case planning conferences
- Communications and correspondence
- Condensed books and transcript
- Court clerk log notes
- Court Rules and Court Forms (blank)
- Court digital audio recordings and minute sheets
- Draft transcripts
- Judicial activities external to the court
- Jury charges
- Orders, endorsements, rulings, decisions, judgments and reasons for judgment
- Publication bans
- Recordings, notes or transcripts
- Reports - medical, psychiatric, financial
- Research material
- Settlement conferences
- Transcripts
- Trial management conferences
- Weekly Lists (Redacted or un-redacted)
- Working notes and annotations
- Other

ANNEX 4: ADMINISTRATIVE INFORMATION

Corresponding Framework definition: *General Judicial Information* includes information used by Chief Justices, committee materials, statistics, research material, and court-wide professional development information.

- Activity workload statistics

⁵ The three categories of “Judicial Information” here (Adjudicative, Administrative and Personal) correspond broadly to the *Framework’s* categories of “Individual, General and Personal” respectively. For each category the original *Framework* definition is provided for cross-reference purposes. The new terminology is intended to make the distinctions clearer while maintaining the broad outline of the *Framework’s* approach.

- *Ad hoc* appointments
- Appointment of various officials and representatives
- Attendance at educational programs
- Audio and video conferencing setup and configuration
- Blank electronic forms or templates
- Business intelligence
- Case management and tracking data
- Committee management
- Committee materials
- Communications with governments and other justice system stakeholders
- Conduct and discipline management
- Conference management
- Contracting and tender administration
- Court reporting
- Court-wide professional development information
- Courthouse telephone lists
- Education and training content and management
- E-filing systems information
- Emergency contact lists
- Administrative activities external to the court
- Financial resources management
- Governance management
- Human resources management
- Information and records management
- Information produced by the Executive Office
- Inventory management
- Judicial administration research material
- Language, translation and interpretation management
- Office of the Chief Judge / Justice information
- Policies, policy development and procedures
- Professional development information of Judicial Users
- Publication and public/media relations management
- Reporting and approving judicial leaves of absence
- Research, library and knowledge management
- Scheduling information (ROTA) (e.g. court events, sittings, orders, hearings, conferences, appearances)
- Standards setting e.g. for decision publication format
- Statistics
- Technology management
- Webcasting and televising of proceedings
- Other

ANNEX 5: PERSONAL INFORMATION OF JUDICIAL OFFICERS

Corresponding Framework definition: *Personal Judicial Information* includes information produced by, on behalf of, or relating to a Judicial Officer that does not directly relate to the function or role of the Judicial Officer and is not associated with a Case.⁶

- Audit logs containing summaries of computer system activities
- Conduct, discipline information
- Contact lists
- Educational program attendance record
- Expense claims and reimbursements
- File access log and user audit trail
- Judicial administration work product
- Judicial education program content
- Judicom messages, posts and other information
- Location tracking / security swipe card
- Personal account information
- Personal communications including email, voice mail, text messages etc.
- Personal calendar
- Personal notes, research or working papers
- Private or personal affairs and social interactions
- Scheduling of a Judicial Officer within a court calendar
- Social media drafts and posts
- Software applications or other electronic repositories
- Statistics showing a Judicial Officer's individual activity or workload
- Travel and location information
- Website browsing and search history
- Workload and performance information
- Other

⁶ [Footnote 38, *Framework*:] The Administration of Justice Committee's Definitions Working Group concluded that it was not useful to venture a detailed definition of Personal Judicial Information beyond this. In each jurisdiction, it will be necessary to provide precise guidance to technologists in relation to Judicial Internet browsing history logs, email repositories, contact lists, calendars, text messages and voice mail when considering candidate information for this category.

ANNEX 6: REFERENCES

1. *“Judicial Information”: Definitions and Templates*. A Background Report to the Canadian Judicial Council Technology Subcommittee, February 18, 2020.
2. Canadian Judicial Council, *Blueprint for the Security of Judicial Information*, Fifth Edition 2018.
3. Canadian Judicial Council, *Guidelines for Migration of Judicial Information to a Cloud Service Provider*, September 2019.
4. Canadian Judicial Council, *Management Policy Framework to Accommodate the Digital Environment*, 2013.
5. *Métalexique de l’information judiciaire dans le cadre du projet de gouvernance et de gestion de l’information judiciaire* (Québec) v.0.9.
6. Precedents received by Council from Nova Scotia.
7. Supreme Court of British Columbia *Court Record Access Policy*.
8. British Columbia Court of Appeal *Operational Records Classification System*.

Tab 132



Model Policy for the Classification of Court Information

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Prepared by Martin Felsky, PhD, JD – Special Advisor to the CJC on Information Technology

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BACKGROUND

This Model Policy follows upon the Council’s earlier initiatives concerning court information. All courts, and the Council, recognized that the modern concept of “court information” was no longer merely a matter of official or administrative court records acquired or created intermittently, with limited bespoke content, and with practical obscurity arising from its documentary character and its ease of destruction.

A decade on, it is even more obvious and pressing that courts must recognize that “court information” is a far more encompassing concept and is far more accessible and far more durable than it once was. Accordingly, and in addition to its other responsibilities as to court information, each court needs to create, maintain, and review a systematic approach to the protection of sensitive court information throughout its life cycle. This Model Policy proposes a framework for courts to consider in that effort, and elaborates on policy 16 from the Council’s *Blueprint for the Security of Court Information*:¹

Policy 16a: Courts should adopt a classification scheme so that sensitive court information may be designated for special protection. Classification schemes as adopted should be consistent across all courts to ensure a common understanding of asset sensitivity and protection requirements.

Policy 16b: Classified information may be made available to a person only when the originator establishes that the person has a valid “need to know,” appropriate personnel security controls are in place, and the access is necessary to the accomplishment of official court duties.

Classification is a perpetual balancing act that must protect sensitive information without unduly restricting access. The purpose of classification is to ensure that the risk of harm from a security or privacy breach is kept at a level acceptable to the court, corresponding to the court’s risk tolerance, through proper designation, labeling and handling of sensitive information.

¹ *Blueprint for the Security of Court Information* (6th edition, CJC 2021). In French: *Plan directeur pour la sécurité de l’information judiciaire*. Henceforth, *Blueprint*.

CLASSIFICATION IS ONLY PART OF ACCESS CONTROL

The classification of an information asset guides holders with respect to its safe handling and dissemination, but classification is not the only safeguard that limits access. Classified information should be made available to a person only when the originator establishes that the person has a valid “need to know,” such that access is necessary to the accomplishment of their official court duties.

There are other potential restrictions on accessing classified information, including personnel security clearances, and non-disclosure agreements.

CHALLENGES

The protection of sensitive information relies largely upon its originators - judicial officers, court officials and staff - to make the right classification decisions with respect to every email or file they draft or receive. This responsibility can be overwhelming, especially in light of the volume of digital information courts handle, and the velocity at which it moves.

The act of classifying information is not just a one-time activity. Security classifications are dynamic and must be revisited periodically, as the court’s risk profile changes; as its system capabilities or architecture changes, or as the nature of the information assets themselves changes over time.

Remote work, virtual hearings and cloud computing are now a routine part of court operations, expanding the scope of cyber threats well beyond the premises of the courthouse.

Courts should address these issues by promoting a modern approach to classification. Until artificial intelligence can be trusted to make reliable security classification decisions on our behalf, there are steps available to take the burden of classification, but not control, away from members of the court. Hybrid solutions are available that combine automated and manual classification processes. Systems that parse information can be configured in various ways to suggest appropriate classifications based on the content or context of the information.

For example, Microsoft 365 provides a resource tagging feature with sensitivity labels that can be pre-configured by the court. This makes it easier for users to apply (or simply confirm) labels as they prepare emails and documents.²

Data loss prevention (DLP) systems are automated programs that can act as a backstop for classification lapses. They work by parsing outgoing communications and blocking unauthorized communications or warning senders.³

Ultimately, the goal of a modern classification scheme should be to establish the groundwork for fully automatic, artificially intelligent classification software.

JUDICIAL INDEPENDENCE

The judiciary is conferred with institutional and individual independence, which adds an important layer of cooperation to court information governance. The judiciary and executive, or other non-judicial administrators, involved with facilities management, human resources, infrastructure, or supply, administer Canadian courts jointly. At the same time, any form of court business intelligence that the court finds appropriate to its mandate or capacity, falls into the category of judicial administration. Chief Justices are looking at matters like judgment delay, load balancing, judicial education, judicial conduct, wellness, public outreach, and many other issues that are common to courts but not covered by business processes like “human resources.” Thus, while court information is subject to broad-based legislation⁴ and established government policies, it is also subject to individually negotiated MOUs, judicial discretion and the court’s jurisdiction over its process and its records.

² See [Azure Information Protection](#)

³ DLP systems must always be configured with the principles of judicial independence in mind, but judicial officers should not be exempt from the court’s classification rules and security controls.

⁴ Examples of relevant legislation include Official Secrets, Archives and Public Records, *Criminal Code* and Provincial Offences, Judicature acts, Evidence, Electronic Commerce and Privacy, Freedom of Information or Access to Information.

This document should not be read to alter the distinction between court information that is exclusively owned and controlled by the court, and any court information which by its nature can be delegated to or acquired by the executive branch directly or indirectly.

POLICY STATEMENT

1. PURPOSE

This policy establishes a formal process for classifying information assets to ensure that the baseline security controls used to protect court information are proportional to the risks of unauthorized access. It sets out clearly defined classification levels that can be efficiently and consistently applied to all court information assets.

COMMENTARY

Ultimately, the classification of court information is designed to prevent harm to individuals (including loss of life); to the court or other organizations; to financial markets, or to the justice system. It protects privacy, legal privileges, and judicial deliberative secrecy, or any type of sensitive information.

A classification scheme ensures clear lines of accountability for proper securing of court information. It helps prioritize budget allocations for security measures, makes it easier to comply with laws, court orders, non-disclosure agreements, licensing, and other obligations. It is an important means of identifying information that can be safely migrated to a cloud service provider or shared with justice partners.

2. SCOPE

This policy applies to all court information assets, wherever those assets may be located and in whatever format or medium they may be transmitted or stored.

Court information that contains personally identifiable information (for example about litigants, witnesses, judges, and staff) is to be classified accordingly.

Personal papers unrelated to the business of the court are private and do not form part of the court's information assets.

3. GLOSSARY

Case File

A Case File contains the Information that relates directly to a single court proceeding or to a number of related court proceedings that have all been assigned the same case file number. It includes the Information that comprises the Court Record and any other Information that has been captured or placed in the Case File.⁵

Court Record

Information and other tangible items filed in proceedings and the information about those proceedings stored by the court.⁶

Information asset

“An information asset is a body of information, defined and managed as a single unit so it can be understood, shared, protected, and exploited efficiently. Information assets have recognizable and manageable value, risk, content, and lifecycles.”⁷

Information assets include physical information assets (such as paper documents, film, photographic prints) or digital assets stored electronically. An information asset can be a hardcopy document or a box of documents, a spreadsheet, or the contents of a shared network drive; a database, an operating system, an e-filing system, or a PDF file uploaded to such a system; a Case File, a Court Record, an email or an entire email account.

Depending on the context, some courts may wish to categorize non-documentary physical evidentiary objects (for example forensic samples) as information assets.

⁵ See Canadian Judicial Council, *Model Definition of Judicial Information* (2020).

⁶ See footnote 9.

⁷ UK National Archives factsheet.

Custodian

The individual or business unit responsible for maintaining communications and technology systems used for court information.

Provider

External individual or organization that submitted or transferred information assets to the court.

4. ROLES AND RESPONSIBILITIES

Information controller

The information controller has legal control of information assets. This control is divorced from the concept of physical custody or possession.⁸ Information controllers (or data owners) define the overarching information policies governing access, use, and retention of information assets.

Controllers are responsible for determining the classification of court information assets in their control and are authorized to approve access or downgrading requests. Controllers may require additional security controls on an *ad hoc* basis or strengthen information handling protocols as needed.

Originator

An originator is an individual or business unit of the court that authors or receives court information. Originators are responsible for considering and applying classification labels to the assets they create or receive, in accordance with this policy and other directions of the court.

⁸ It is important to bear in mind the distinctions made in the 2013 CJC report: *Court Information Management Policy Framework to Accommodate the Digital Environment*, at page 6: “In a paper based world possession of a court file is synonymous with control over that file. It was easy for the judiciary to control Case Files in such an environment because an original paper file could only reside in one physical location at a time and those with possession of the physical file could easily control the ways in which information within it could be accessed.

In the digital domain however, it is quite possible to have possession of information without control and conversely, it is possible to have control of information without physical possession.”

Judicial Information Technology Security Officer (JITSO)

The JITSO (or other qualified court-appointed officer) is responsible for the administration of this policy. The JITSO periodically updates the Information Asset Register (Policy 6) and ensures compliance through regular review and audit functions. Training on the handling of classified information must be provided regularly to all users.

Users

Anyone with access to court information is a user. Users must attend training and adhere to all policies and procedures relating to the handling of classified court information.

5. TRANSITION

This policy is effective upon its approval by the court.

COMMENTARY

This policy may be implemented progressively, on a day-forward basis. Existing assets can be classified over time, in priority based on the length of their retention period.

6. INFORMATION ASSET REGISTER

The court must prepare and update an Information Asset Register (IAR) that lists, briefly describes, and categorizes all court information assets.

COMMENTARY

The IAR is the first step to gaining control over court information. Key elements to consider recording for each asset category include:

1. Brief description including the purpose and use of the assets
2. Date range
3. Controller (with contact information)
4. Custodian (with contact information)
5. Users, including internal and external sharing relationships

6. Location – cloud, on premise, database, repository, domain
7. Form – paper, electronic, or other format or medium
8. Sensitivities - for example, copyright, private, privileged, confidential
9. Should this be a designated asset?⁹

Current thinking in the information governance profession is that larger, more inclusive categories make more sense for digital information, which is dynamic and often stored in unstructured repositories rather than filed in discrete folders. The more detailed or granular the IAR – for example a listing by document title, the more assets need to be listed and tracked individually.

While the establishment of high-level groupings simplifies the process of assigning classifications, some assets will require classification on a granular level. For example, a single field or record in a database, or particular form or file may contain information requiring classification that differs from its assigned group. Creative design may be required to assign classifications on a granular level, for example within a database, where certain groups of records or fields in the same database may require different classifications. These designs are constrained by the security features and controls built into each system.

Assets can be grouped in various ways. How depends on the court's mandate, size, and technology environment. Typically, the following methods are used:

- **Content**, which groups information by meaning or purpose
- **Context**, which groups information by business unit, function, system or platform
- **User**, which groups information by individual, position or role in the court.

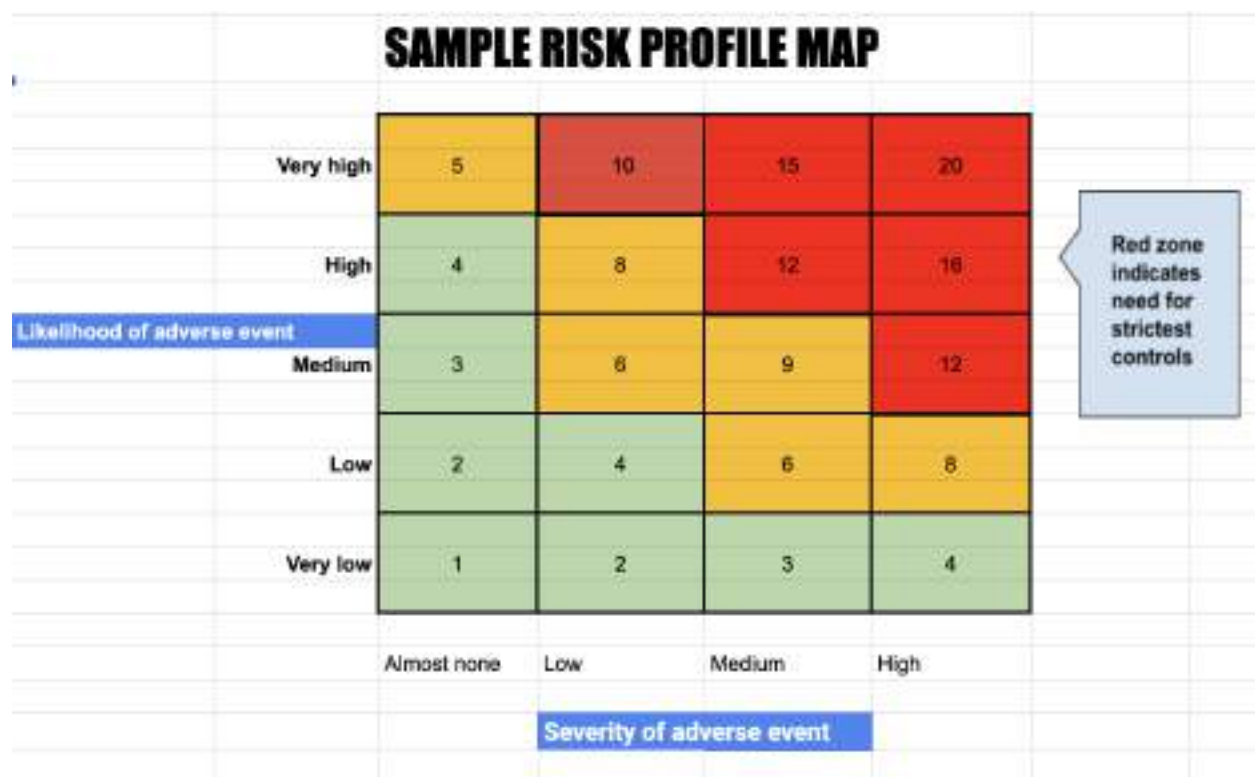
⁹ The IAR forms the basis not only for decisions about classification but is also the foundation of a threat and risk assessment, the retention and disposition of court information, and business continuity procedures. The designation of assets in this listing is relevant to retention issues. See Canadian Judicial Council, *Model Policy for the Retention of Court Information* (2022).

7. RISK ASSESSMENT

The court must plan, conduct, and consider the results of a threat and risk assessment (TRA) in order to determine appropriate classifications for each information asset grouping in the IAR.¹⁰

COMMENTARY

The TRA helps the court assess the degree of harm that could reasonably be expected to result from unauthorized disclosure. A simplified schematic is shown below. Identified risks are assessed in terms of their likelihood and harm. The resulting chart provides decision makers with a basis for determining the court's risk profile, proportionate security controls and classification designations. The TRA report also identifies residual risks which need to be addressed to achieve a level of risk acceptable to the court.



¹⁰ See Blueprint Policy 3b.

8. CLASSIFICATION OF INFORMATION ASSETS

All court information must be classified according to the sensitivity of its content and the risks associated with unauthorized disclosure and access.

Information that is copied, extracted, printed, or otherwise derived from classified information inherits the same classification as the source information.

The following classifications are to be used:

PUBLIC

Applies to information that, if compromised, would pose little or no risk to an individual, the court, or another organization. Information may be made public, as release would have no anticipated adverse impact, or is required by law. For example: Records of Proceedings, Annual Reports, Hearing Lists and Court Dockets.

CONFIDENTIAL¹¹

Applies to information that, if compromised, could cause injury to an individual, the court, or another organization.¹² Internal and external access is limited to individuals or organizations with a valid need to know. For example: internal policies and directives; routine email, case conference briefs and case conference memoranda.

RESTRICTED

Applies to information that, if compromised, could cause serious injury to an individual, the court, or another organization.¹³ Internal access is limited. External access is subject to order of the court, legislation, court policy, court rules, and court-approved security clearance and NDA. Access and actions to be logged. For example: draft judgments and judicial notes; rulings, endorsements and draft jury charges; documents and orders subject to a publication ban, and

¹¹ This departs from the suggestion in the Blueprint, in which the designation “Official” was proposed. However, as the word “official” could be used to designate certain types of court records for purposes other than security, the term “Confidential” is preferred here.

¹² Corresponds to Canada [Protected A](#).

¹³ Corresponds to Canada [Protected B](#).

digital recordings of a closed or sealed proceeding. Restricted court information would be subject to more stringent treatment than Confidential, including special markings, encryption, and storage on designated devices. All such information should be clearly and conspicuously labeled “RESTRICTED.”

SECRET

Applies to information that, if compromised, could cause extremely grave injury to an individual, the court, or another organization.¹⁴ Access is restricted to designated, cleared individuals with a need to know, a non-disclosure agreement, or upon order of the court. All access and actions to be logged. For example: government intelligence, sealed Case Files, and information concerning informers. All such information should be clearly and conspicuously labeled “SECRET.”

(Original source markings should also be left in place.)

COMMENTARY

Each court information asset must be assigned a classification based on the level appropriate to the most sensitive information in its category. Information assets should be classified to the lowest possible level, but as high as necessary. This dynamic represents the critical balance to be achieved between the harm that could be done by unauthorized access and the advantages of accessibility to the court, to parties or the public.

Over-classification leads to increased maintenance costs, restricts legitimate access, and may encourage some users to evade security controls.

Descriptive words like “Confidential” and “Secret” are more meaningful and thus preferred to abstract language such as “Protected A” or “Level 3”. Irrespective of their labels, though, the four-level court information classification scheme in this policy aligns with Canadian federal and provincial government classification schemes, reducing confusion for those court staff regularly working with both government and court information. In specialized courts, more classification levels may be required to fine-tune the handling of sensitive data received from providers such as foreign governments.

¹⁴ Corresponds to Canada [Protected C](#).

One way to clarify the differences among the three secure classifications is to train users that disclosure of Secret information would cause about ten times as much damage as disclosure of Restricted information, and disclosure of Restricted information would cause about ten times as much damage as disclosure of Confidential information.¹⁵

Originators should be aware that the compilation of low-level classified information could in rare cases lead to the compilation requiring a higher classification. This is due to the possibility that the compilation reveals a relationship or a trend that should be classified at a higher level than its components.

9. INFORMATION ALREADY CLASSIFIED

Information that has been classified elsewhere must be classified by the court at a level corresponding to the provider's and handled in accordance with the provider's controls to the extent they are more stringent than the court's.

Information received from external organizations must be protected in accordance with any relevant legislative or regulatory requirements, including any international agreements and obligations.

COMMENTARY

When the court receives information that has been classified by a provider, the court should follow the rules applicable to that classification.

10. DOWNGRADING CLASSIFICATIONS

Information controllers may downgrade information in their control.

Originators (or their successors) may downgrade their own information assets.

Users may not downgrade a court information asset without the approval of its originator or the controller.

¹⁵ See Quist, [Security Classification of Information](#), volume 2, chapter 7.

COMMENTARY

Asset classifications may be upgraded or downgraded as necessary, with the proper authority. Over time, classifications of a document or other asset may be modified depending on an expired time frame, a certain event, or a routine re-evaluation.

11. LABELING CLASSIFIED INFORMATION – BANNERS

All assets (including copies and printouts) must be labeled with a banner indicating their classification level.

The banner consists of the name (or abbreviation) of the court and the classification level in UPPER CASE. For example:

Sample Classification Banner (options)	
Canadian Judicial Council – CONFIDENTIAL	CJC – CONFIDENTIAL

At the time of original classification, the banner must be clearly and conspicuously displayed on the face and every page of the asset, for example in headers and footers, or if the information is not susceptible to such marking, the classification designation must be clearly associated with its subject in a manner suited to its form. Where it is impractical to apply any marking, users must be made aware of the classification designation and any special handling required.

If portions of a document have different classifications, each portion shall be appropriately labeled to indicate its level of classification.

COMMENTARY

The classification banner is the primary mechanism by which the sensitivity of an information asset is displayed. A key aspect of a classification label is that it is like a passport - an important piece of identification that must accompany it on its travels. Whatever method is used to apply a label, it should be conspicuous, legible, and persistent.

Where classifications are pre-determined, they can be added to document templates. For emails, the classification should be marked in the subject line and optionally in the body of the email. Email signatures can also contain classification marking, which works well when policies are applied by user or user group. Preferably, email systems should be configured to compel users to select a classification before sending, for example in a drop-down menu.

12.LABELING CLASSIFIED INFORMATION – BLOCK

In addition to the banner, classified assets may be marked with an optional information block. The purpose is to provide users with more information about the status of the asset. The block should be displayed on the face of every classified document, or otherwise in a conspicuous manner suited to the form of the asset.

The sample below shows the type of information a block would contain:

<i>Classified by:</i> Hon. Moreau, C.J. <i>Reason:</i> Sealed evidence <i>Declassification:</i> On order of the court <i>Additional dissemination restrictions:</i> None

COMMENTARY

By providing the name of the classifying authority (controller or originator), users know who to contact in the event a reclassification is proposed. Providing a reason for the classification is useful for audit and compliance purposes. If a declassification date or event can be determined when the asset is created, this helps users with making decisions about dissemination. Additional restrictions can be useful in various circumstances, for example when handling assets classified by providers who require more than the established controls.¹⁶

¹⁶ Access to court information is not determined by classification alone. Rather, access rights are determined by a combination of classification-based controls, individual security screening or clearance, and the individual's function or assigned work, which determines their need to know.

13. HANDLING CLASSIFIED ASSETS

All court information must be handled in accordance with its classification and the procedures set out in the sample Classification Guide. (See Annex 1.)

Where classified court information is transferred to a third party, the court must ensure that the third party's security policies and procedures are sufficiently robust to respect the required classification controls.

APPENDIX 1: CLASSIFICATION GUIDE

The tables below are examples intended as guidance and are neither definitive nor comprehensive. The list of select references below can be consulted if more approaches or examples are needed.

TABLE 1: MAP OF RISK AND ACCESS

Classification	Risk level	Risk Description	Access
Public	Almost none	Applies to information or assets that, if compromised, would pose little or no risk to an individual, the court, or another organization.	Information may be made public.
Confidential	Low	Applies to information or assets that, if compromised, could cause injury to an individual, the court, or another organization. ¹⁷	Information may be shared internally, and to third parties with a valid need to know.
Restricted	Medium	Applies to information or assets that, if compromised, could cause serious injury to an individual, the court, or another organization. ¹⁸	Internal access is limited. External access subject to court-approved security clearance and NDA. Access and actions to be logged.
Secret	High	Applies to information or assets that, if compromised, could cause extremely grave injury to an individual, the court, or another organization. ¹⁹	Access restricted to designated, cleared individuals with a need to know, and NDA. All access and actions to be logged.

¹⁷ Corresponds to federal Protected A. See <https://www.tpsgc-pwgsc.gc.ca/esc-src/protection-safeguarding/niveaux-levels-eng.html>.

¹⁸ Corresponds to federal Protected B. See <https://www.tpsgc-pwgsc.gc.ca/esc-src/protection-safeguarding/niveaux-levels-eng.html>.

¹⁹ Corresponds to federal Protected C. See <https://www.tpsgc-pwgsc.gc.ca/esc-src/protection-safeguarding/niveaux-levels-eng.html>.

TABLE 2: SAMPLE CONTROLS

Classification	At rest (storage)	In transit	Destruction
Public	May be stored on removable devices and public cloud service	No special controls.	No special deletion requirements.
Confidential	• All baseline Blueprint²⁰ security policies in place. • On premises, must be stored on the court's network with folder-based access controls (and backed up). • May be stored on a court-approved public cloud service. • May be stored on removable devices only if encrypted with court-approved tools. • Technical controls at this level will be based on assured, commercially available products and services, without need for any customization. • Information at rest will be protected at rest by default. Data must only be transmitted via a secure network. • Data traversing an untrusted (insecure) network must incorporate industry standard cryptography.	Only use approved court email, text and other communication platforms.	Information should be purged using industry standard tools.
Restricted	• Enhanced Blueprint²¹ security policies in place. • May be stored on a court-approved public cloud service. • Access requires multi-factor authentication • May be stored on removable devices only if encrypted with court-approved tools.	Information must be encrypted with court-approved tools.	Information should be purged using industry standard tools.
Secret	• Requires the highest level of security controls reasonably available. • All access to be logged and tracked (subject to the Monitoring Guidelines).²²	Not to be transmitted by email or any means over public networks.	Information must be irretrievably purged; storage devices may need to be physically

²⁰ Courts should have reference to the Blueprint for details on access control, physical security, and other controls.

²¹ Courts should have reference to the Blueprint for details on access control, physical security, and other controls.

²² Reproduced in the Blueprint.

Classification	At rest (storage)	In transit	Destruction
	• May not be stored on removable devices. • Not suitable for hosting on a public cloud service. • Data stores should be disconnected from the public internet. • Electronic files and/or data must be stored on a court shared directory or stationary device (i.e., desktop computer or server) with controlled physical access and role based logical access controls. • Electronic files and/or data must be encrypted when stored on portable or insecure devices. • Confidential or sensitive information shared with third parties must use file-based encryption. • Portable or insecure devices must be stored in a secure location when not in use.	Exchanged only via appropriately secured mechanisms. This will involve use of appropriately accredited shared services with high-grade encryption. Information will only be shared with designated users.	destroyed. Data and media must be degaussed (magnetically wiped) or rendered unreadable by other means. Devices may be physically destroyed.

TABLE 3: MARKING CLASSIFIED INFORMATION

The days of the rubber stamp are numbered, so to speak, as are the days of manila envelopes and wax seals. Digital information is not always in the form of a word-processed document to which headers and footers can be readily applied. This table provides some sample methods of marking digital information. Any method used must be appropriate to the format of the asset and must make it clear to the end-user that the information has been classified.

Format	Marking
Email or text message	Insert label banner in subject line. If not possible, insert at the top of the body of the email or signature block.
Text or image file	Insert label in metadata, on all images, or in available in header, footer or watermark.
Database	Insert label in header, footer or watermark of reports generated, and in metadata for each record, field or report.
Audio	Insert audible classification information at the beginning of the file.
Video	Insert audible classification information at the beginning of the file. Insert visible classification label on every frame.

TABLE 4: EXAMPLES OF CLASSIFIED COURT INFORMATION

Please note that these listings are drawn from several public and internal resources as examples only and are neither definitive nor comprehensive. They are simply representative of the type of information that might appear on a court's classification framework.

Classification	Examples
Public	• Case listing history • Pleadings • Orders and reasons for judgment • Trial transcripts • List of judicial districts • Annual reports • Forms, rules and practice directions or notes • Names of judges and dates of appointment
Confidential	• Internal policies and directives • Scheduling of judicial officers and hearings • Professional development information • Staff meeting records (other than judicial administration) • Jury charges • Routine email and other communications • Court Record / Case File not subject to a sealing order
Restricted	• Draft judgments, rulings, endorsements • Final court judgments if subject to a publication ban • Digital recording of a closed proceeding • Research memoranda, judicial notes • Outstanding warrants, pardons • Agendas, note and minutes of meetings regarding judicial administration • Personnel administration information • Information concerning judges • Information obtained with judicial authorization (sealed documents, child/youth protection)

Classification	Examples
Secret	• Certain draft judgments • Personnel information of judicial officers • Applications for warrant for search and seizure, electronic surveillance, and corresponding documentation • Information concerning informers • Psychiatric assessments • Personal information of judges • Privileged documents • Information related to national security

Tab 133



Model Policy for the Retention of Court Information

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FOR CONSULTATION PURPOSES ONLY

Prepared by Martin Felsky, PhD, JD – Special Advisor to the CJC on Information Technology

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BACKGROUND

This Model Policy follows upon the Council’s 2013 initiatives concerning court information including the Blueprint for the Security of Court Information. All courts, and the Council, recognized that the modern concept of “court information” was no longer merely a matter of official or administrative court records acquired or created intermittently, with limited bespoke content, and with practical obscurity arising from its documentary character and its ease of destruction.

A decade on, it is even more obvious and pressing that courts must recognize that “court information” is a far more encompassing concept and is far more accessible and far more durable than it once was. Accordingly, and in addition to its other responsibilities as to court information, each court needs to create, maintain, and review a systematic approach to the audit and regulation of the life cycle of court Information. This Model Policy proposes a framework for courts to consider in that effort.

Using the Council’s Model Definition of Judicial Information¹ as a guide, this Model Policy is aimed at the life cycle of court information and should not be read to alter the Blueprint for the Security of Court Information,² nor alter the distinction between court information that is exclusively owned and controlled by the court, and any court information which by its nature can be delegated to or acquired by the executive branch directly or indirectly.

ACKNOWLEDGMENT

The author would like to thank members of the CJC Technology Subcommittee for their valuable feedback on an earlier version of this Model Policy.

¹ [Model Definition of Judicial Information](#) (CJC, 2020). In French: [Définition modèle des renseignements de la magistrature](#).

² [Blueprint for the Security of Court Information](#) (6th edition, CJC 2021). In French: [Plan directeur pour la sécurité de l’information judiciaire](#).

CURRENT STATE OF RECORDS MANAGEMENT

For any organization, implementing a records retention and disposition policy is not easy. Conventional practices based on paper collections often do not work, because the burden of identifying and retaining records worth keeping falls on individual employees. Making these decisions is time-consuming, complicated, and thus often neglected. Enforcement is almost impossible, as business heads have more important concerns than document retention. Retention schedules are granular, can run to hundreds of pages, and are stale dated as soon as they are published.

For these reasons, many courts are in the same position as any other organization: records at the end of their life cycle are treated in an unregulated fashion. By some estimates only 20% of records are disposed of in accordance with their applicable retention schedules.³

DIGITAL IS DIFFERENT

The conventional approach to records management does not translate to email and other electronic forms of communication such as text messaging, where billions of bits of data are stored in dynamic databases. Digital information can be structured or unstructured and exist in many different formats. Transactional records, which used to be compiled in a single file folder are now distributed in email threads, word processing files, SharePoint sites, online court registries and e-filing applications. The fact that many applications, including essential communications tools, were not designed with retention needs in mind adds to the challenge. Users must apply policies and schedules manually after the fact, unless the software is designed, configured, and deployed with the appropriate features in place.⁴

³ Stephens, *Records Management: Making the Transition from Paper to Electronic* (ARMA, 2007).

⁴ Over time, more software will include retention management features if customers demand it. For example, see the [Microsoft 365 Purview](#) feature set designed for records retention management.

Digital information may not require warehouse space, but it does require disk space. While the price per terabyte has been decreasing over time, the rate of data volume growth outpaces any savings, especially in cloud hosting services. Holding too much information slows down information access and retrieval, increases the risk of a security or privacy breach. As one expert wryly points out, keeping everything online “turns data management into waste management”.⁵

On the other hand, in contrast with paper, digital information can be cost-effectively researched, analyzed and reused. Advocates of information mining argue that it is no longer necessary to enforce a complex matrix of varying retention periods.

COURTS ARE DIFFERENT

Managing retention and disposition in courts is more challenging than in most other organizations for several reasons, some of which are outlined below.

THE COURT RECORD

Courts are not like other organizations. First, “courts of record” are required to preserve the record of proceedings, generally to ensure that an appeal court can effectively perform its review function and other courts can follow precedent.⁶ Second, the Court Record is considered a “source of truth” in the sense that unlike records of other persons or organizations, information upon which the court has acted to make a determination thereby receives an imprimatur of reliability and accuracy. When a court finds a fact in a record of a proceeding to be true on the balance of probabilities, it is generally taken to be true thereafter.

⁵ Stephens, *supra*.

⁶ “The term “record” and other expressions such as “court of record”, “on the record”, “for the record” are used regularly and frequently in legal parlance and have been for years without, in my opinion, a clear consistent understanding of what those expressions mean.” *R. v. H. (K.), Re*, [1985 CanLII 3577](#) (ON CJ). Per Nevens, Prov. Ct. J.

OPEN COURTS

As public bodies, and in accordance with the open courts principle, courts have a responsibility to ensure that a record of their activities is permanently and publicly accessible.

At the same time, courts are guardians of the copious records submitted by third parties (voluntarily or otherwise), including members of the public and justice partners, some of which are provided conditionally and may be subject to being returned at the end of a proceeding.⁷ A great deal of this information routinely contains personal, sensitive, confidential, and privileged information.

INDEPENDENCE

The judiciary is conferred with institutional and individual independence, which adds an important layer of delicate governance and cooperation. The judiciary and executive branch, or other non-judicial administrators, involved with facilities management, human resources, infrastructure or supply, administer Canadian courts jointly. At the same time, any form of court business intelligence that the court finds appropriate to its mandate or capacity, falls into the category of judicial administration. Chief Justices are looking at matters like judgment delay, load balancing, judicial education, judicial conduct, wellness, public outreach and many other issues that are common to courts but not covered by business processes like “human resources.” Thus, while court information is subject to broad-based legislation⁸ and established government policies, it is also subject to individually negotiated Memoranda of Understandings, judicial discretion and the court’s jurisdiction over its process and its records.

⁷ Different courts have rules respecting access or control of specific documents: see, for example, *MediaQMI inc. v. Kamel*, [2021 SCC 23](#) (CanLII).

⁸ Examples of relevant legislation include Official Secrets, Archives and Public Records, *Criminal Code* and Provincial Offences, Judicature acts, Evidence, Electronic Commerce and Privacy, Freedom of Information or Access to Information.

LEGACY

Courts have long histories, and truckloads of physical records including paper are stored in courthouse basements and suburban warehouses. Costs of storage are high, and the corresponding public benefits hard to quantify.

As courts steadily transform their operations from paper to digital, they are now faced with the novel complications of long-term, cost-effective secure data storage in the cloud.

The purpose of this Model Policy is to assist courts in addressing these challenges, by proposing an innovative, practicable approach to retention and disposition. For some courts this may help in the development of new policy, while for others it may contribute to existing policy amendments.

RECORDS MANAGEMENT IN TRANSITION

Records and information management is amid a decades-long transition from paper to digital. The challenge for all organizations including courts is to manage this transition without compromising the principles and values underlying sound information governance practices.

GLOSSARY

Case File

A Case File contains the Information that relates directly to a single court proceeding or to a number of related court proceedings that have all been assigned the same case file number. It includes the Information that comprises the Court Record and any other Information that has been captured or placed in the Case File.⁹

⁹ See Canadian Judicial Council, [Model Definition of Judicial Information](#) (2020).

Court Record

Information and other tangible items filed in proceedings and the information about those proceedings stored by the court.¹⁰

Information asset

“An information asset is a body of information, defined and managed as a single unit so it can be understood, shared, protected and exploited efficiently. Information assets have recognizable and manageable value, risk, content and lifecycles.”¹¹

Information assets include physical information assets (such as paper documents, film, photographic prints) or digital assets stored electronically. An information asset can be a hardcopy document or a box of documents, a spreadsheet, or the contents of a shared network drive; a database, an operating system, an e-filing system or a PDF file uploaded to such a system; a Case File, a Court Record, an email or an entire email account.

Depending on the context, some courts may wish to categorize non-documentary physical evidentiary objects (for example forensic samples) as information assets.

Record

Elsewhere used interchangeably with information asset, in this policy record is used to denote an individual physical document or digital file, including those in the Court Record. Many leading information governance authorities refer to “records”, though the broader, more modern and more technology-friendly term “information asset” is emerging. All records are information assets, but not all information assets are records.¹²

Though the definition of record can be expanded to include digital assets, it originates and resonates in the concept of recorded information as a physical object.

¹⁰ The use of the terms “Judicial Information” and “Judicial Officer” also conform to the Model Definition paper. See footnote 9.

¹¹ [UK National Archives factsheet](#).

¹² The conventional definition is provided by way of *ISO 15489 Information and documentation—Records management*, which defines “record” as “Information created, received and maintained as evidence and information by an organisation or person, in pursuance of legal obligations or in the transaction of business.”

POLICY STATEMENTS

POLICY 1 – PURPOSE

The purpose of this policy is to ensure that court information assets are systematically preserved for as long as needed, but no longer.

COMMENTARY:

The manner in which the court receives, controls, maintains and disposes of its records is not just a part of the institutional characteristics of the court but is a crucial part of the court's reputation for integrity, accuracy, consistency and reliability in the delivery of equal justice under the rule of law. The systems created must be accessible, intelligible, coherent, explicable, predictable and accountable.

A systematic approach may also:

1. Improve access for practical uses throughout the information life cycle.
2. Minimize time wasted in searching for information.
3. Minimize the risks and costs associated with over-retention.
4. Provide a public rationale for the destruction of information assets that might otherwise be criticized as arbitrary.
5. Guide members of the court who may ask - I am allowed to delete this email? Do we need to keep these duplicate submissions?
6. Ensure compliance with applicable legislation, regulations, rules, court orders, and best practices.
7. Ease the burdens associated with conventional records retention programs by proposing a modern strategy.
8. Ensure that courts robustly address the retention and disposition of digital information, as traditional paper-based practices are not suitable.

9. Reduce unnecessary duplication of records.
10. Improve public access to information of historical value.
11. Preserve the court's legacy.
12. Ensure that confidential or private court information is not inadvertently made public when transferred to a public archive.
13. Eliminate the cost and risk of storing information for longer than is justified.
14. Address capacity limits on the storage of old, low-value paper records.

POLICY 2 – JURISDICTION

The court has jurisdiction over its own information.

COMMENTARY:

The court is sole owner of and is responsible for court information throughout its life cycle. That responsibility includes maintaining continuity, accuracy, and accessibility of the information throughout the retention period.

The information controller has legal control of information assets. This control is divorced from the concept of physical custody or possession.¹³ Information controllers (or data owners), define the overarching information policies governing access, use, and retention of information assets.

¹³ It is important to bear in mind the distinctions made in the 2013 CJC report: [Court Information Management Policy Framework to Accommodate the Digital Environment](#), at page 6: "In a paper based world, possession of a court file is synonymous with control over that file. It was easy for the judiciary to control Case Files in such an environment because an original court file could only reside in one physical location at a time and those with possession of the physical file could easily control the ways in which information within it could be accessed. In the digital domain however, it is quite possible to have possession of information without control and conversely, it is possible to have control of information without physical possession."

POLICY 3 – SCOPE

This policy applies to all court information assets, wherever those assets may be located and in whatever format or medium they may be transmitted or stored.

Information assets of the court do not include personal information of judicial officers, court officials or staff, which is to be segregated and clearly identified as personal.¹⁴

COMMENTARY:

This policy is designed to apply to all court information assets irrespective of their format, as the principles of retention and disposition should apply consistently to information based on its context, meaning, purpose, and value.

POLICY 4 – COMING INTO EFFECT

This policy is effective upon its approval by the court.

All information assets must be reviewed prior to [date] and any assets existing beyond the period indicated in the retention schedule must be destroyed within a period to be determined by the court.

COMMENTARY:

Given that the retention periods for many information assets in the custody of courts have already expired, the court must establish a timetable for clearing the backlog, so it is in compliance with its own newly established schedules.

¹⁴ “[Personal papers ... are unrelated to an organization’s mission, goals, objectives, or business operations or to an employee’s assigned duties. They are information-bearing objects of a private nature. ... These items are the personal property of their creators and are consequently excluded from records management authority.” Saffady, *Records and Information Management Fundamentals of Professional Practice* (4th edition, 2021) at p. 6.

POLICY 5 – INFORMATION ASSET REGISTER (IAR)

The court must prepare and update an Information Asset Register (IAR) that lists, briefly describes, and categorizes at a high level, all court information assets.

COMMENTARY:

The IAR forms the basis not only for decisions about retention scheduling but is also the foundation of a threat and risk assessment, the security classification of court information, and business continuity procedures. It is the first step to gaining control over court information.

The descriptive elements of the IAR should be determined in accordance with the volume of information in the court, and the state of the court's transition from paper to digital. Key elements to consider for each asset would include:

1. Relevant category
2. Brief description including the asset's purpose and use
3. Date range
4. Controller (with contact information)
5. Custodian (with contact information)
6. Users, including internal and external sharing relationships
7. Location – cloud, on premise, database, repository
8. Form – paper, digital, other medium
9. Should this be a designated asset? [See Designated Asset policy here.](#)
10. Information Sensitivity - for example, copyright, privacy, confidentiality

Current thinking in the information governance profession is that larger, more inclusive groupings, with longer retention periods, makes more sense for digital information, which is dynamic and often stored in unstructured repositories rather than filed in discrete folders. The more detailed or granular the IAR – for example a listing by document title, the more assets need to be listed and tracked individually.

The IAR therefore should be structured with the broadest possible categories of information, grouped by function, user group, purpose, or repository.

POLICY 6 – DESIGNATED ASSET

Where duplicate copies of information assets are stored in multiple environments such as email inboxes, shared folders on file servers, cloud databases, local hard drives or mobile devices, the court may designate one of these as authoritative (and subject to the court’s retention schedule), in which case copies of the duplicate assets in the other repositories are considered transitory and may be disposed of accordingly.¹⁵

COMMENTARY:

One of the features of digital information is the ease with which it is copied, distributed and otherwise shared. This places an unnecessary onus on individuals or business units to manage and retain duplicate information assets. For example, a court’s e-filing database may be designated, in which case duplicate copies of e-filed material uploaded for a virtual hearing may be deleted when no longer needed, assuming the files have not been annotated or the content otherwise altered.

POLICY 7 – ASSET APPRAISAL

To determine appropriate retention periods, the court must appraise its information assets using methods that are cogent, cost effective, and appropriate for the court’s circumstances.

The ability to properly appraise information assets will be much assisted where the structure under which the court receives, controls, maintains and disposes of its records involves systems for auditing the records regularly when in place to ensure the records are being properly preserved, verified and secured.

¹⁵ Transitory records are “records of convenience” which may be deleted when they are no longer needed by the user. There is no fixed retention period for transitory records.

Similarly, the ability to appraise information assets will be much improved if the court has a full and integrated scheme for court business intelligence derived from the records and their handling by the court.¹⁶

When appraising information assets, the court will consider factors including:

- 1) Applicable laws and orders
- 2) The operational needs of the court
- 3) The impact on the administration of justice
- 4) The legacy of the court
- 5) The needs of parties and justice partners
- 6) The public interest

COMMENTARY:

There are three main appraisal methodologies in use. The conventional method is a file-by-file review, now considered obsolete and impracticable given the volume and nature of digital information assets.

A more modern approach is “macro appraisal.” This method is consistent with a high-level IAR and involves an understanding of the court’s mission, its history, and its structure. For some courts, a functional methodology may be more fitting. Like the macro approach, it focusses on the organization, but at a business unit, activity, or transactional level (i.e., the level at which most records are created). This analysis provides a better context for the asset, through which its meaning and value can be ascertained.

The main aspect of this approach is to analyze and understand the functional context in which the records were created – a functional analysis. Kelvin Smith, in his book *Public Sector Records Management*, summarizes the importance of appraisal thus:

Records appraisal must not be an ad hoc exercise. It should not be undertaken in a hurry when the quantity of records has outgrown the storage space available or

¹⁶ Audit and court business intelligence regimes are beyond the scope of this policy and hence not elaborated upon here, but such regimes are of considerable value to an effective and secure court operation.

when an organisation has to move to new accommodation. If it is done in such an unplanned, non-systematic manner, the wholesale, uncritical destruction of records may take place. Similarly it is often the case that records are examined item-by-item in order to separate current, semi-current records and non-current records – a very time-consuming exercise. Some of the non-current records may then be offered to an archival institution for appraisal to determine whether any of the records have historical value. The archival institution then has to review these records without the necessary contextual information about their origins or purpose. All of these scenarios are extremely wasteful of resources.¹⁷

Assets of Historical Value

The decision to designate assets as historical is often subjective. Differences of opinion may arise when stakeholders are consulted. In the recent Federal Court notice, the preamble explains that “The great majority of Court records are never consulted after being sent to the Court’s archives.” This may be, as implied, because they are not of much historical value after all. On the other hand, mountains of paper records are difficult to find, time consuming to review, and very difficult to compile into meaningful statistics. Digital archives provide a much better opportunity for future researchers, and courts cannot today anticipate easily how and what data will be used a hundred years from today.

The International Criminal Court assesses historical value based on the asset’s “use in the future for the purposes of supporting any sort of legal dispute or reconstructing the general history of the development and governance of the Court and its legacy.”¹⁸ The court may consider information shedding light on the development or organization of the court, or its impact on the community, as having historical interest.

¹⁷ Smith, *supra* at p. 110.

¹⁸ International Criminal Court, [Records retention and disposal policy](#) (2015).

POLICY 8 – RETENTION SCHEDULE

All court information assets are subject to a retention period as defined by the court for each category of asset.

A retention schedule setting out these periods must be published on the court’s website. The court may retain any information asset after the expiry of its designated retention period should the court find it necessary to do so.

COMMENTARY:

Retention schedules must be carefully crafted by professionals in consultation with court staff, court officials, legal counsel and the judiciary. If the court’s information assets are broadly defined in the IAR, then the number of different retention periods is accordingly minimized. Lengthy, complicated registers are difficult to update, complicated to explain, and therefore at risk of non-compliance. Drastic simplification is the key to compliance.¹⁹

Default guidance is provided in some courts. For example, the International Criminal Court provides:

1. Transitory assets must be destroyed in two years
2. Operational assets must be destroyed ten years from the date of last active use
3. Legacy assets – those of historical value – are retained permanently.

The Federal Court recently provided its guidance in an effort to reduce the cost of permanent retention:²⁰

1. Court information that was **not** adjudicated on the merits – destroyed in seven years (with some enumerated exceptions)
2. Court information that **was** adjudicated on the merits – destroyed in fifteen years (with one exception)

¹⁹ A reduction of 80% in the number of categories of information assets is not unexpected, according to some experts. For example see Kahn, “[The Incredibly Compelling Case to Rethink Records Retention in 2018 and Beyond](#)” (Business Law Today, American Bar Association 2018).

²⁰ [Document Retention Schedule](#) pursuant to Rule 23.1 of the Federal Courts Rules (2021).

POLICY – 9 TRIGGERS

Where trigger event dates cannot be tracked automatically, the court should set a reasonable retention date based on the time the asset is received, created, or last accessed.

COMMENTARY:

Trigger dates based on the expiration, termination, or completion of a process, such as the final determination of a matter and the expiry of any period for review or appeal, may be necessary but can complicate the calculation of retention periods if they cannot be tracked automatically.²¹ Manual tracking is difficult and leads to non-compliance.

POLICY 10 – RETENTION BY DIGITIZATION

Requirements for retention of information assets in paper form are satisfied by retention of a reliable digitized or microfilmed copy.

COMMENTARY:

Digitization of high-value information assets is highly recommended, as it can serve to reduce long-term costs of paper storage; provide a critical backup and offers an opportunity to readily encrypt sensitive information that would otherwise be difficult to protect from unauthorized access.

Digitization of paper records, if used as a method of retention, requires attention to the quality control process to ensure that the digital version is reliable and that contextual information about the hard copy is maintained as metadata after the paper is destroyed.

Local standards may be adopted if available, such as the [Digitization Standard from Service Alberta](#). A Canadian standard, CAN/CGSB-72.11-93, was withdrawn but contains many useful guidelines for preserving the integrity of digitized records. It has been replaced by the less

²¹ Analysis of the matter type may be required to properly document the applicable trigger date. For example, in some courts the trigger for child support cases is tied to the age of the minor involved – that is, their period of dependency.

detailed [CGSB 72.34-2017, Electronic Records as Documentary Evidence](#), and in French [Enregistrements électroniques utilisés à titre de preuves documentaires](#). Other resources include those from [Library and Archives Canada](#) and ISO, the International Organization for Standardization.

POLICY 11 – DIGITAL VERSION AUTHORITATIVE

Unless legislation or a court order provides otherwise, digital forms of information assets are authoritative.

COMMENTARY:

Paper documents that have corresponding electronic files, for example computer printouts, are transitory records that may be destroyed when no longer needed for active use.

Paper records can be destroyed when their retention period has been reached or if they have been digitized to an appropriate standard of quality.²²

POLICY 12 – LONG-TERM PRESERVATION

The court must take proper steps to ensure the preservation of its information assets in all forms, where the assets are scheduled for long term or permanent retention.

If there are known issues with asset integrity during a migration, and these issues cannot be mitigated, they should be carefully documented. Data migration must be planned and tested in such a way as to ensure the integrity of all content and metadata.²³

²² For guidance see Library and Archives Canada, [Destruction of Source Records following Digitization](#).

²³ [ARMA International TR22-2016](#) defines “metadata” as “The structured information that describes, explains, locates, or otherwise makes it easier to retrieve, use, or manage information resources.”

COMMENTARY:

Significant volumes of data will need to be meaningfully preserved by courts beyond the typical lifecycle of the technology used to store them. Systems become obsolete quickly, and the pace of change increases over time. Many courts today are undergoing a major platform replacement as they move information from local servers to the cloud. Custom-built case management systems developed fifteen or more years ago are being replaced with commercial off-the-shelf solutions. If a court is required to keep certain assets for, say, fifteen years, it will most likely need to be migrated, converted, or otherwise refreshed at least once.²⁴ Conversion to archival formats such as PDF/A are partial solutions, as original metadata can be lost, and these formats are only suitable for certain types of document-based assets.²⁵

POLICY 13 – DISPOSITION

At the end of their retention periods, the court must promptly dispose of information assets either by secure destruction, by transfer to a storage or archive facility, or by returning them to the parties from whom they were received.

POLICY 14 – CONFIDENTIALITY

Arrangements for the conversion, retention or disposal of Court Information that are sealed or otherwise deemed confidential must preserve the level of protection and non-access required by law.

²⁴ [MoReq 2010](#) (Modular Requirements for Records Systems) at p. 23 suggests that typically, organizations refresh their technologies every 3-5 years.

²⁵ There are several useful references for long-term preservation, including [ISO/TR 18492:2005](#), Long-term preservation of electronic document-based information; ISO 19005 series.), Storing Data For The Next 1000 Years ([Tom's Hardware](#)), and many others including for example the [Minnesota State Archives](#).

POLICY 15 – DISPOSITION BY TRANSFER

Information assets scheduled for long-term or permanent preservation may be transferred to the custody of an approved third-party entity. The court must adopt effective transfer protocols for long-term accessibility and security of information assets.

COMMENTARY:

The court should follow professional guidelines such as [Guidelines on File Formats for Transferring Information Resources of Enduring Value](#) published by Library and Archives Canada.

POLICY 16 – DESTRUCTION

Information assets may only be deleted or destroyed in accordance with the approved retention schedule and procedures.

The court ensures that information assets scheduled for destruction are disposed of in a manner that protects sensitive information and renders it unrecoverable.

Where the destruction has been carried out by third parties, written certification of such destruction should be obtained.

The court must maintain a listing of all scheduled assets destroyed. Such listing must include the category of assets from the retention schedule, a brief description of the assets, the date range during which the assets were created, the date of destruction, and the method used to destroy the assets.

COMMENTARY:

The court may classify certain types of information or data, such as personal Judicial Information, draft documents, or other things, as being subject to discretionary deletion or removal by the Judicial Officer or senior court official involved.

Deletion or removal of any specific information may be reversible or irreversible, depending on the established policies of the court. Where information is deleted or removed, a record should

be kept as to the nature of the information, the policy justifying its deletion or removal, and the date of its deletion or removal unless those policies provide otherwise.

Some courts require that notification to the affected parties be provided, depending on the nature of the assets.²⁶

POLICY 17 – LEGAL HOLD

Any information subject to a lawful information access request or likely to be subject to a legal proceeding should be retained until the matter is resolved, even if its retention period has expired.

COMMENTARY:

The routine destruction of information assets at the expiry of the retention period should be paused if there is a risk of non-compliance with a lawful request for such an asset. An investigation into judicial conduct, a lawsuit by or against a contractor or supplier, or a statutory access request are examples of triggers that may, in the opinion of the court, justify a legal hold.

POLICY 18 – SENIOR COURT OFFICIAL

The court must appoint or designate a senior court official accountable to the court and responsible for implementing and enforcing this policy.

The retention-related duties of this senior official would include:

1. Implementing the policy
2. Developing the IAR and retention schedules, and updating them periodically
3. Training users and system administrators and advising the court on information governance issues

²⁶ For example, see [Document Retention Schedule](#) pursuant to Rule 23.1 of the Federal Courts Rules (2021).

4. Contributing to systems procurement activities to ensure that court systems are compatible with automated retention processes

COMMENTARY:

The senior court official handles the administrative tasks associated with the implementation of information governance policies, including retention and disposition.

Tab 134

Ruffo v. Conseil de la magistrature, 1995 CanLII 49 (SCC), [1995] 4 SCR 267

Source:	Supreme Court of Canada
Date:	1995-12-14
File number:	23127
Other citations:	130 DLR (4th) 1 — 190 NR 1 — 59 ACWS (3d) 159 — 33 CRR (2d) 269 — 35 Admin LR (2d) 1 — JE 96-50 — [1995] SCJ No 100 (QL)
Citation:	Ruffo v. Conseil de la magistrature, 1995 CanLII 49 (SCC), [1995] 4 SCR 267, < https://canlii.ca/t/1frgm >, retrieved on 2026-03-23
Most recent unfavourable mention	Currie v. Alberta (Edmonton Remand Centre) , 2006 ABQB 858 (CanLII) [...] Despite the Conseil's reprimand Ruffo continued her public activities and statements. [...]

Ruffo v. Conseil de la magistrature, [1995] 4 S.C.R. 267

The Honourable Andrée Ruffo

Appellant

v.

**The Conseil de la magistrature,
the Comité d'enquête,
the Honourable Huguette St-Louis,
the Honourable Roch St-Germain,
the Honourable André Bilodeau,
the Honourable Pierre Brassard
and Paul Laflamme**

Respondents

and

The Honourable Albert Gobeil

Mis en cause

and

The Attorney General of Quebec

Mis en cause

and

The Attorney General for Ontario

Intervener

Indexed as: Ruffo v. Conseil de la magistrature

File No.: 23127.

1995: March 23; 1995: December 14.

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

on appeal from the court of appeal for quebec

Constitutional law -- [Charter of Rights](#) -- Fundamental justice -- Independent and impartial tribunal -- Institutional impartiality -- Conseil de la magistrature -- Comité d'enquête -- Chief Judge of Court of Québec also chairman of Conseil de la magistrature -- Whether Chief Judge's authority to file complaint against judge of Court of Québec with Conseil de la magistrature violates principles of judicial impartiality and independence guaranteed by [s. 7](#) of Canadian Charter of Rights and Freedoms -- Whether Chief Judge has influence on members of Conseil de la magistrature and

Comité d'enquête that might compromise their impartiality -- Courts of Justice Act, R.S.Q., c. T-16, ss. 96, 263, 265.

Civil rights -- Impartial hearing by independent tribunal -- Institutional impartiality -- Conseil de la magistrature -- Comité d'enquête -- Chief Judge of Court of Québec also chairman of Conseil de la magistrature -- Whether Chief Judge's authority to file complaint against judge of Court of Québec with Conseil de la magistrature violates principles of judicial impartiality and independence guaranteed by s. 23 of Charter of Human Rights and Freedoms -- Courts of Justice Act, R.S.Q., c. T-16, ss. 96, 263, 265.

Administrative law -- Bias -- Reasonable apprehension of bias -- Conseil de la magistrature -- Comité d'enquête -- Chief Judge of Court of Québec also chairman of Conseil de la magistrature -- Chief Judge filing complaint against judge of Court of Québec with Conseil de la magistrature -- Vindictive tone in wording of complaint -- Proceedings against judge referred to in complaint conducted with diligence -- Whether specific circumstances of case might give rise to reasonable apprehension of bias.

Courts -- Judges -- Judicial ethics -- Whether Chief Judge of Court of Québec has authority to file complaint against judge of that court with Conseil de la magistrature -- Courts of Justice Act, R.S.Q., c. T-16, ss. 96, 263, 265.

Courts -- Judges -- Judicial ethics -- Duty to act in a reserved manner -- Vagueness in constitutional sense -- Judicial Code of Ethics, (1982) 114 G.O. II, 1253, s. 8.

The appellant is a judge of the Court of Québec, Youth Division, noted for her many public statements. In 1988, the director general of a social services centre filed a complaint against her with the Conseil de la magistrature (the "Conseil") alleging that she had committed a number of breaches of the *Judicial Code of Ethics*. The Conseil designated one of its members to examine the complaint. After hearing the appellant's and the complainant's versions of the events, he recommended that the Conseil hold an inquiry into the complaint. The Conseil set up a Comité d'enquête. At the conclusion

of its inquiry, this Comité concluded that the *Code of Ethics* had been breached and a majority of the members recommended that the Conseil reprimand the appellant. Despite the Conseil's reprimand, the appellant continued her public activities and statements. The Chief Judge of the Court of Québec then laid his own complaint against the appellant with the Conseil, in which he alleged that the appellant had acted in a manner inconsistent with the *Code of Ethics*, in particular by breaching her duty to act in a reserved manner and uphold the independence of the judiciary. The Conseil itself ruled on the admissibility of this complaint without hearing the parties and set up a Comité d'enquête made up of five members, including three Court of Québec judges. The Chief Judge did not participate in this session, at the conclusion of which the Conseil called the appellant to a subsequent meeting in order to hear her views on whether she should be suspended for the duration of the inquiry. At that meeting the Conseil denied the appellant's request for an adjournment in order to urge preliminary exceptions asking for the dismissal of the complaint and raising the lack of jurisdiction of the Conseil and the Comité over the case, concluding that it did not have to reconsider jurisdictional issues on which it had already ruled at its meeting on the admissibility of the complaint. The appellant then filed a motion in evocation with the Superior Court, in which she argued that the Conseil and Comité members did not have the necessary impartiality to make a fair and equitable decision concerning her. She further argued that ss. 263 and 265 of the *Courts of Justice Act* ("CJA"), if they are to be interpreted as authorizing the Chief Judge of the Court of Québec to lodge a complaint with the Conseil, violate the rights guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms* and s. 23 of the *Quebec Charter of Human Rights and Freedoms*. The Superior Court dismissed the motion. The Court of Appeal affirmed this judgment in a majority decision. Before this Court, the appellant made the same arguments. She also argued that s. 8 of the *Code of Ethics*, which provides that judges of the Court of Québec should act in a reserved manner, violates s. 2(b) of the *Canadian Charter* and is void on the ground of vagueness.

Held (Sopinka J. dissenting): The appeal should be dismissed.

Per La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin and Iacobucci JJ.: The right to be tried by an independent and impartial tribunal is an integral part of the principles of fundamental justice protected by s. 7 of the *Canadian Charter*, and the constitutional guarantee of an independent

and impartial tribunal includes the concept of institutional impartiality. The protection provided by s. 7 is essentially the same as is provided by s. 23 of the *Quebec Charter*. In the present case, ss. 263 and 265 *CJA* do not violate the rights guaranteed by ss. 7 and 23.

Sections 263 and 265 *CJA* authorize the Chief Judge of the Court of Québec to lay a complaint with the Conseil against a judge of his court. Under s. 248(a) *CJA* the Chief Judge is the chairman of the Conseil, and ss. 263 and 265 provide that any person may lodge a complaint with the Conseil, including a member of the Conseil, although a member cannot participate in the examination of the complaint in such a case. The key role given to the Chief Judge in ethical matters under s. 96(3) *CJA* is simply the expression of a reality that is consistent with general practice and gradual developments over time. The supervisory powers of chief judges over ethics are inherent in the exercise of their functions. In view of the Chief Judge's preferred position, the power to lay a complaint for a breach of the *Code of Ethics* is therefore an intrinsic part of his responsibility as Chief Judge.

As regards institutional impartiality, it cannot be concluded from an examination of the powers conferred on the Chief Judge of the Court of Québec by the *CJA* that they might compromise the impartiality of members of the Conseil or the Comité d'enquête in dealing with a complaint lodged by the Chief Judge. These powers are largely administrative in nature and as such are not liable to compromise the impartiality of Conseil or Comité members in dealing with a complaint.

The Conseil is responsible for receiving and examining complaints lodged by any person against a judge for failure to comply with the *Code of Ethics* and, if an inquiry is necessary, it establishes a Comité d'enquête for that purpose consisting of five persons chosen from among its members. Under the *Code of Ethics*, these members must perform this function in an impartial manner. When the inquiry is completed, the Comité submits its recommendations to the Conseil. Proceedings before the Comité are not similar to an adversarial trial. The complainant is not a prosecutor on whom the burden of proof lies. Rather, the Comité's inquiry is intended to be the expression of purely investigative functions and, in light of this, the actual conduct of the case is the responsibility not of the parties but of the Comité itself. The complaint is merely what sets the

process in motion. It does not initiate litigation, which means that, where the Conseil decides to conduct an inquiry after examining a complaint lodged by one of its members, the Comité does not thereby become both judge and party: its primary role is to search for the truth. The concept of "party" at a Comité hearing does not change the essence of the institution in question. Where the Chief Judge makes use of the disciplinary process by taking the initiative of laying a complaint, there is therefore no reason to think that the Conseil and its Comité do not, in the eyes of a reasonable and well-informed observer, have the impartiality required to carry out their duties. The Chief Judge's authority under the *CJA* is essentially administrative and his moral authority, which is naturally associated with his status and functions, is not restrictive and is part of the context in which all judges perform their duties. This moral authority does not in itself affect the capacity of a judge to decide to the best of his or her knowledge and belief and on the basis of the relevant factors. Finally, the existence of a friendly relationship between the Chief Judge and the members of the Conseil and the Comité d'enquête is not liable to compromise their impartiality. Such an assertion has no legal basis and challenges the dignity and professionalism of the judiciary and its Conseil.

With respect to case-by-case impartiality, a reasonable and well-informed observer would not apprehend in this case that the Conseil was unable to make an impartial decision. The main reason for the Chief Judge's complaint was a general concern with the threat that the appellant's overall conduct represented to judicial institutions and the public's respect for them. The fact that the Chief Judge chose to rely on documents from the same "media monitoring services" agency that had already provided documents to support the first complaint laid against the appellant does not indicate any sort of collusion. There is no reason that the same documents could not be used for separate purposes. The appellant's general conduct was not in issue in the context of the first complaint.

As regards the issue of the Conseil's precipitous conduct, its decision to depart from the usual procedure by not appointing an examiner at the initial stage of examining the complaint cannot be seen as evidence of bias. The purpose of appointing an examiner, which is not mandatory, is solely to assess whether there are grounds for an inquiry. In the present case, such an assessment was made possible not only by the extensive information provided by the Chief Judge in support of his complaint, but also by the fact that most of the information submitted to the Conseil was already in

the public domain. Moreover, in this case the duty to act fairly did not mean the appellant had to be given the opportunity to express her views during the initial examination of the complaint, despite the possible consequences of the decision to hold an inquiry concerning her. The appointment of an examiner is the first step in a procedure that can itself be described as preliminary, since after the formal inquiry the Conseil and the Comité can of their own initiative only reprimand the judge concerned or recommend that removal proceedings be initiated. Finally, the hearing on the suspension of the appellant did not indicate any precipitous conduct that might give rise to a reasonable apprehension of bias on the part of the Conseil members. The Conseil was already aware of certain facts that could *prima facie* have justified a suspension during the proceedings, and the nature of the complaint put directly in issue the appellant's ability to act with the confidence of the parties and to continue to carry out her duties in a manner consistent with public order. By inviting the appellant within the 30-day period provided for by the *CJA* for beginning the inquiry, the Conseil gave itself enough time to make an informed decision on suspension before the inquiry began.

The complaint's tone and language must be assessed on the basis of the specific nature of the complaint, which focuses on an overall situation involving both a judge's conduct and the public's possible perception thereof. Because of the general nature of the duty to act in a reserved manner, it was necessary for the complainant to specify and explain the relevant aspects that he felt might impair the appellant's ability to perform her duties. Although the complaint resembles an indictment because of its categorical tone, the complainant cannot be criticized for setting out facts and conduct that were the matter to be assessed by the Comité d'enquête. The complaint could have been worded more neutrally, but it cannot be said that it made accusations based on supposed intentions. The Chief Judge's concerns related not to illegitimate intentions but to activities and the public's perception of them. There is accordingly no reason to fear that Comité members would be influenced by the language of the complaint or the particular status of its author. The Chief Judge's position carries with it no, or very little, direct authority and his moral authority would be harmful only if it led the decision maker to adopt opinions it did not share. The Comité is for the most part made up of judicial professionals who are bound by an oath and whose functions essentially require them to be able to decide dispassionately between positions that are opposed and fervently defended.

Since the Comité d'enquête has not yet had an opportunity to hear the merits of the case, it appears premature for this Court to rule on the constitutionality of s. 8 of the *Code of Ethics*, which establishes the duty of judges appointed under the *CJA* to act in a reserved manner, under s. 2(b) of the *Canadian Charter* in a context in which no evidence has been adduced and no light can be shed on the issue by lower court judgments. There is no reason, however, to find that the duty to act in a reserved manner is void on the ground of vagueness. More precision cannot be required of ethical rules than their subject matter allows. The general nature of the duty to act in a reserved manner as it is worded does not, as far as substance is concerned, mean that an area of risk is not sufficiently delineated or that there is no adequate basis for legal debate.

Per Sopinka J. (dissenting): For the reasons given by Gonthier J., ss. 263 and 265 *CJA* do not violate the principles of judicial impartiality and independence guaranteed by s. 7 of the *Canadian Charter*. It is also premature for the Court to rule at this stage on the constitutionality of s. 8 of the *Code of Ethics*. Although this section is not void for vagueness, it is open to very broad interpretation. Before determining whether it imposes an unreasonable limitation on freedom of expression, it would be preferable to know how it will be interpreted by the Conseil or the Comité d'enquête.

Under the *CJA*, the Conseil receives and deals with complaints made against judges. Although the legislative framework does not violate the principle of judicial independence and in this sense has no inherent bias, the situation is one which approaches the threshold of tolerance. An appearance of bias may result in some circumstances even though the process followed is consistent with the statutory rules. The Chief Judge's power to file a complaint places the Conseil and the Comité d'enquête close to the edge of the fine line that separates impartiality and partiality.

When the Chief Judge's complaint in this case is analysed in a general context, a number of factors, including the tone and language of the complaint, when taken together raise a reasonable apprehension of bias. The chairman of the Conseil for the second complaint was the dissenting member of the Comité d'enquête formed to examine the first complaint, who had recommended that removal proceedings be initiated. A significant part of the Chief Judge's complaint referred to the

appellant's disregard of this Comité's decision recommending that she be reprimanded: all the members of the Comité d'enquête set up to hear the second complaint were members of the Conseil which approved this decision. A majority of this new Comité was also made up of judges of the Court of Québec. Although the Comité d'enquête agreed to appoint counsel to handle the presentation of evidence against the appellant, this placed the parties in a rather unusual situation where the opponent of the person defending herself against the complaint was the tribunal's counsel. Moreover, the proceedings which followed the filing of the second complaint indicate unwarranted haste. Whether or not the stage of preliminary examination of a complaint is mandatory, the Conseil's decision to bypass it gives the impression that it dealt with the Chief Judge's complaint as evidence and not merely as an allegation. At the hearing to determine whether the appellant should be suspended during the inquiry, the Conseil refused to hear her on such a serious matter as the jurisdiction of the Conseil and Comité on the ground that it had already ruled on this matter *ex parte* and *proprio motu* at the meeting of the Conseil at which it had ruled on the admissibility of the complaint. The 30-day period set out in the *CJA* for beginning the inquiry cannot explain this precipitous conduct, since this period relates simply to the calling of the parties and not the presentation of evidence. Finally, the Chief Judge's complaint is more in the nature of a judgment. It contains both opinions and conclusions expressed with considerable vehemence. The Comité's proceedings are not primarily in the nature of an inquiry, since it may make an official reprimand and may even recommend that removal proceedings be instituted. In short, although the members of the Comité harboured no prejudices against the appellant, when all the circumstances surrounding this matter are considered a well-informed person would have a reasonable apprehension of bias.

Cases Cited

By Gonthier J.

Referred to: *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369; *R. v. Beaugregard*, 1986 CanLII 24 (SCC), [1986] 2 S.C.R. 56; *Pearlman v. Manitoba Law Society Judicial Committee*, 1991 CanLII 26 (SCC), [1991] 2 S.C.R. 869; *R. v. Gagné*, 1992 CanLII 117 (SCC), [1992] 1 S.C.R. 259; *Valente v. The Queen*, 1985 CanLII 25

(SCC), [1985] 2 S.C.R. 673; *MacKeigan v. Hickman*, 1989 CanLII 40 (SCC), [1989] 2 S.C.R. 796; *R. v. Lippé*, 1990 CanLII 18 (SCC), [1991] 2 S.C.R. 114; *R. v. Bain*, 1992 CanLII 111 (SCC), [1992] 1 S.C.R. 91; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CanLII 84 (SCC), [1992] 1 S.C.R. 623; *Idziak v. Canada (Minister of Justice)*, 1992 CanLII 51 (SCC), [1992] 3 S.C.R. 631; *Irvine v. Canada (Restrictive Trade Practices Commission)*, 1987 CanLII 81 (SCC), [1987] 1 S.C.R. 181; Eur. Court H. R., *Le Compte, Van Leuven and De Meyere* judgment of 23 June 1981, Series A No. 43; Eur. Court H. R., *Albert and Le Compte* judgment of 10 February 1983, Series A No. 58; *IWA v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282; *Mackay v. Manitoba*, 1989 CanLII 26 (SCC), [1989] 2 S.C.R. 357; *Danson v. Ontario (Attorney General)*, 1990 CanLII 93 (SCC), [1990] 2 S.C.R. 1086; *Hy and Zel's Inc. v. Ontario (Attorney General)*, 1993 CanLII 30 (SCC), [1993] 3 S.C.R. 675; *Ruffo v. Conseil de la magistrature*, [1989] R.J.Q. 2432 (Sup. Ct.), aff'd (1992), 1992 CanLII 3258 (QC CA), 98 D.L.R. (4th) 202 (Que. C.A.); *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), [1992] 2 S.C.R. 606; *Ontario v. Canadian Pacific Ltd.*, 1995 CanLII 112 (SCC), [1995] 2 S.C.R. 1031.

By Sopinka J. (dissenting)

MacDonald Estate v. Martin, 1990 CanLII 32 (SCC), [1990] 3 S.C.R. 1235; *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369.

Statutes and Regulations Cited

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An Act to amend the Courts of Justice Act and other legislation to establish the Court of Québec, S.Q. 1988, c. 21, s. 30.

An Act to amend the Courts of Justice Act and the Code of Civil Procedure and to establish the Conseil de la magistrature, S.Q. 1978, c. 19, s. 6.

An Act to amend the Revised Statutes, 1909, respecting district magistrates, S.Q. 1922, c. 64, s. 1.

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APPEAL from a judgment of the Quebec Court of Appeal, [1992 CanLII 3257 \(QC CA\)](#), [1992] R.J.Q. 1796, 98 D.L.R. (4th) 176, 48 Q.A.C. 209, 10 Admin. L.R. (2d) 296, affirming a judgment of the Superior Court, [1991] R.J.Q. 2206, dismissing the appellant's motion in evocation. Appeal dismissed, Sopinka J. dissenting.

Michel Robert, Q.C., and David Platts, for the appellant.

Pierre J. Dalphond and Carole Tremblay, for the respondents.

François Aquin, for the mis en cause the Honourable Albert Gobeil.

Jean-Yves Bernard and Marise Visocchi, for the mis en cause the Attorney General of Quebec.

Peter Landmann, for the intervener.

English version of the judgment of La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin and Iacobucci JJ. delivered by

1 GONTHIER J. -- This appeal calls for an examination of the disciplinary procedure for provincially appointed judges instituted by the *Courts of Justice Act*, R.S.Q., c. T-16 ("CJA"). Two main issues are before this Court: (1) What is the constitutional validity of ss. 263 and 265 CJA in light of the principles of judicial impartiality and independence? (2) Is s. 8 of the *Judicial Code of Ethics*, O.C. 643-82, (1982) 114 G.O. II, 1253 (the "*Code of Ethics*"), which provides that judges should act in a reserved manner, void on the ground of vagueness?

I - Facts

2 The appellant is a judge of the Court of Québec, Youth Division. For a number of years now, Judge Ruffo has been noted for her many public statements and her active involvement on all fronts in ensuring that children have adequate resources. She displays unlimited devotion to a cause that everyone agrees is eminently worthy.

3 Strictly speaking, the appeal under consideration relates only to a complaint about Judge Ruffo filed with the Conseil de la magistrature (the "Conseil") on October 5, 1990 by the Honourable Albert Gobeil, Chief Judge of the Court of Québec and chairman of the Conseil ex

officio. A brief outline of the events preceding and following this complaint is nevertheless necessary to understand the entire debate properly.

4 On June 28, 1988, the director general of the Centre des services sociaux Laurentides-Lanaudière ("CSSLL"), Miville Lapointe, filed an initial complaint against the appellant with the Conseil alleging that she had committed a number of breaches of the *Code of Ethics*. At the same time, Robert Dupont, the CSSLL's director of youth protection, served on the appellant a motion for general recusation with respect to all the cases in which he was involved. Given this state of affairs, the appellant and Chief Judge Gobeil met on July 4, 1988 and agreed that she would not sit until the complaint had been dealt with.

5 On July 11, 1988, the Conseil designated Judge André Desjardins to examine the complaint. He heard the appellant's and the complainant's versions of the events and, in a report submitted to the Conseil a month later, recommended that an inquiry be held into certain aspects of the complaint. On August 11, 1988, the Conseil set up a Comité d'enquête (the "Comité") composed of five persons chosen from among its members to conduct an inquiry into ten of the fifty-eight breaches alleged against the appellant by Mr. Lapointe.

6 On December 20, 1988, the first day of the inquiry, the appellant made preliminary objections concerning the jurisdiction and composition of the Conseil and the Comité as well as the procedure followed in examining the complaint. These objections were dismissed on January 30, 1989. A motion in evocation was made respecting the Comité's decision to Philippon J. of the Superior Court, who on August 14, 1989 dismissed all the grounds raised by the appellant: [1989] R.J.Q. 2432. The appellant appealed this judgment, although she did not ask the Quebec Court of Appeal for a stay order. In the meantime, in a long letter dated March 21, 1989, Chief Judge Gobeil asked the appellant to make no further public statements and, in particular, to refrain from making any comments about the Youth Division's mandate, her conception of her role as a judge of that court and the situation with respect to resources available for children. This request by the Chief Judge did not deter Judge Ruffo, who said she was determined to continue her activities.

7 At the conclusion of its inquiry, the Comité concluded in a report submitted to the Conseil on September 19, 1990 that four of the breaches alleged by Mr. Lapointe had occurred. Three of the four Comité members who heard the case felt that a reprimand was a sufficient sanction in the circumstances. In a minority report, the Honourable Yvon Mercier, Senior Associate Chief Judge of the Court of Québec and the chairman of the Comité, stated that the appellant's conduct required that removal proceedings be instituted against her. That same day, the Conseil accordingly reprimanded the appellant in keeping with the Comité's recommendation. The appellant spoke out publicly as soon as the Comité's report was submitted, commented at length on the results and indicated that she fully intended to continue behaving in the same manner despite being reprimanded.

8 It was in this context that Chief Judge Gobeil laid his own complaint against the appellant with the Conseil on October 5, 1990. It is a highly detailed document, supported by numerous exhibits, in which the Chief Judge alleges that the appellant acted in a manner inconsistent with the *Code of Ethics*, in particular by breaching her duty to act in a reserved manner and uphold the independence of the judiciary.

9 On October 17, 1990 the Conseil ruled on the admissibility of the complaint and set up a Comité d'enquête made up of the respondents herein. Chief Judge Gobeil did not participate in this session. It should be noted that on this occasion the Conseil chose not to designate one of its members to receive and examine the complaint and that neither the appellant nor the complainant was heard at this stage, unlike the procedure followed when Mr. Lapointe's complaint was laid. After this session, the Conseil called the appellant to a subsequent meeting in order to hear her views on whether she should be suspended for the duration of the inquiry, pursuant to [s. 276 CJA](#).

10 The appellant and her counsel appeared before the Conseil on October 25, 1990 and requested an adjournment in order to urge preliminary exceptions asking for the dismissal of the complaint and raising the lack of jurisdiction of the Conseil and the Comité over the case.

The same day, the Conseil concluded that it did not have to reconsider jurisdictional issues on which it had already ruled and offered counsel for the appellant a brief adjournment, stating that he would be heard only on the suspension during the inquiry issue. On October 29, 1990, the appellant filed a motion in evocation with the Superior Court in respect of the Comité's decision and also requested a stay order, which was granted on November 1, 1990 by Madam Justice Hélène LeBel: J.E. 91-31. The motion in evocation was dismissed on June 18, 1991 by Mr. Justice Luc Parent: [1991] R.J.Q. 2206. The appellant appealed that judgment and, on September 10, 1991, Beauregard J.A. of the Court of Appeal ordered the respondents to suspend all proceedings relating to the October 5, 1990 complaint filed by the Chief Judge: [1991 CanLII 3126 \(QC CA\)](#), [1992] R.D.J. 168.

11 In the meantime, in a letter to Chief Judge Gobeil on November 2, 1990, the appellant stated that she was available to sit again in accordance with her appointment order. Chief Judge Gobeil therefore took the necessary steps for Judge Ruffo to be reassigned to a regular roll as quickly as possible. It was agreed that she could begin sitting as of November 19, 1990. Following this decision, the CSSLL's director of youth protection, Robert Dupont, discontinued the motion for general recusation he had filed on June 28, 1988, but nonetheless challenged the appellant's assignment by filing a motion for a suspension order on November 14, 1990. This motion was dismissed on November 21, 1990 by Madam Justice Danielle Grenier, and the appellant was therefore able to begin sitting again within the next few days.

12 In 1991, therefore, pursuant to separate proceedings conducted at the same time, two cases were before the Quebec Court of Appeal concerning the same matter: an appeal from Philippon J.'s decision on the preliminary objections made before the inquiry on Mr. Lapointe's complaint was held and an appeal from the judgment of Parent J., who ruled, *inter alia*, on the constitutional issues now before this Court. On November 27, 1991 it was ordered that the two appeals be heard together. On June 16, 1992 they were dismissed: (1992), [1992 CanLII 3258 \(QC CA\)](#), 10 Admin. L.R. (2d) 291, 98 D.L.R. (4th) 202; and [1992 CanLII 3257 \(QC CA\)](#), [1992] R.J.Q. 1796, 10 Admin. L.R. (2d) 296, 98 D.L.R. (4th)

176, 48 Q.A.C. 209. On September 8, 1992 in this Court, my colleague McLachlin J. ordered a stay of all proceedings related to the October 5, 1990 complaint filed by Chief Judge Gobeil. On February 4, 1993 leave to appeal from the two Court of Appeal judgments was granted by this Court: [1993] 1 S.C.R. ix. However, the appellant has discontinued her appeal in the case initially heard by Philippon J. of the Superior Court: [1995] 1 S.C.R. x. Accordingly, only one clearly defined aspect of the matter is now before this Court: as mentioned earlier, these are the issues raised by the filing of the complaint against Judge Ruffo by Chief Judge Albert Gobeil.

II - Judgments Below

Superior Court, [1991] R.J.Q. 2206

13 Before Parent J., the appellant argued that the Conseil and Comité members did not have the necessary impartiality to make a fair and equitable decision concerning her. She based her allegations of bias on a set of circumstances that she divided into four categories: (1) institutional structures; (2) the participation of the complainant, the Honourable Albert Gobeil, and Senior Associate Chief Judge Mercier in the first complaint laid against the appellant in 1988 by Miville Lapointe; (3) the session held by the Conseil on October 17, 1990; and (4) the Conseil's precipitous conduct and its intention to suspend the appellant pursuant to *s. 276 CJA*. She further argued that *ss. 263* and *265 CJA*, if they are to be interpreted as authorizing the Chief Judge of the Court of Québec to lodge a complaint with the Conseil, violate the rights guaranteed by *ss. 7* and *11(d)* of the *Canadian Charter of Rights and Freedoms* (the "Canadian Charter") and *s. 23* of the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 (the "Quebec Charter"). Parent J. dealt with each of these arguments in turn.

14 He began by interpreting *ss. 96, 263* and *265 CJA* together. He found that there was no doubt that the Chief Judge of the Court of Québec has the power to lodge a complaint with the Conseil against a judge of that court. He stated the following at p. 2213:

[TRANSLATION] Since s. 96(3) [C.J.A.](#) expressly gives the Chief Judge the duty "to ensure that the judicial code of ethics is observed", it would seem contrary to the scheme of that statute for the Chief Judge to be the only person incapable of initiating the disciplinary process that is designed precisely to ensure such observance.

15 Likewise, Parent J. saw no justification for the appellant's argument that a reasonable apprehension of bias resulted from the relationship of institutional dependence between the complainant and the respondents. He stated that the appellant could not in this respect rely on the fact that the complainant is chairman of the Conseil *ex officio*, since [s. 265 CJA](#) provides that a member of the Conseil who lodges a complaint cannot participate in its examination. As for the argument that the complainant would testify at the inquiry in the capacity of prosecutor, Parent J. was of the view that although the statute refers to the complainant as a "party", the Comité's inquiry is nevertheless very different from the *lis inter partes* that exists in the regular courts. Because of the pre-eminent role given to the Comité in conducting the inquiry, there could be no apprehension of bias in the assessment of the testimony of the Chief Judge and chairman of the Conseil.

16 Parent J. continued his examination of institutional dependence by looking at the provisions of the [CJA](#) pursuant to which, in the appellant's submission, the Chief Judge had an influence on a majority of Conseil and Comité members that might compromise their impartiality. He found that the powers conferred on the Chief Judge are administrative in nature and ultimately give him very limited authority. He therefore did not accept this argument. He likewise rejected the argument that it would be difficult for Conseil members to disregard the fraternal relationship they had established with the Chief Judge at frequent meetings.

17 The second set of circumstances relied on by the appellant relates to the participation of the complainant and Senior Associate Chief Judge Mercier in the first complaint made against her by Miville Lapointe in 1988. On this point, Parent J. began by stating that despite the analogy that might be drawn between the 1988 and 1990 complaints, Chief Judge Gobeil's complaint related to new facts. He also noted that every time Chief Judge Gobeil was present,

particularly at the Conseil sessions in the summer of 1988 and the one on September 19, 1990, at which the recommendations contained in the Comité's report were implemented, he did not take part in the deliberations concerning the appellant. As for Senior Associate Chief Judge Mercier, who chaired the committee formed in 1988, Parent J. stated that he was required to chair the Conseil meetings on October 17 and 25, 1990 to make up a quorum, in light of the fact that Chief Judge Gobeil, as the complainant, was prohibited from participating in the examination of the complaint. He noted, finally, that none of the members of the committee formed in 1988, including Senior Associate Chief Judge Mercier, was part of the new committee set up to inquire into Chief Judge Gobeil's complaint. In Parent J.'s opinion, it could not in the final analysis be concluded that the intellectual independence of the Conseil members was adversely affected by these events.

18 As regards the circumstances relating to the Conseil's session on October 17, 1990, Parent J. found that the appellant had not established any illegality or impropriety by the Conseil that would give rise to a reasonable apprehension of bias on its part. He stated the following at p. 2220:

[TRANSLATION] It is easy to understand why the Conseil did not appoint someone to conduct a preliminary examination of Chief Judge Gobeil's complaint.

The complaint was set out in a highly detailed 34-page document supported by considerable documentation.

It is difficult to see what additional information the Conseil could have thought it necessary to obtain from an examiner before deciding to conduct an inquiry.

Parent J. was also of the view that the Conseil had seriously examined the complaint since, in addition to devoting an hour to it at the October 17 session, its members had already had seven days to study it, as a copy of all relevant documents had been received a week earlier.

19 Finally, Parent J. rejected the appellant's fourth set of arguments concerning circumstances that could give rise to a reasonable apprehension of bias. On the allegations of precipitous conduct, he concluded as follows, at p. 2221:

[TRANSLATION] By inviting [the appellant] to present her views on the application of s. 276 within the 30-day period provided for by s. 271, the Conseil was ensuring that it could make an informed decision about her suspension before beginning the inquiry within the time prescribed.

In Parent J.'s view, this method of proceeding was in no way unreasonable and could not be a basis for concluding that, by the October 25, 1990 meeting, the Conseil had prejudged the question of the appellant's suspension during the inquiry.

20 In the final part of his analysis, Parent J. dealt with the constitutional issues raised by the case. With respect to the alleged violation of s. 7 of the [Canadian Charter](#), he agreed with the appellant's argument that the right to liberty includes the right to practise a profession and [TRANSLATION] "that depriving a judge of the right to carry out his or her duties involves much more than the loss of the salary attached thereto" (p. 2223). He was accordingly of the view that the risk of removal at the conclusion of the disciplinary proceedings under the [CJA](#) involved a limit on the freedom to carry out the judicial function. However, he found that the infringement resulting from the fact that ss. 263 and 265 [CJA](#) authorize the Chief Judge to commence the disciplinary process does not contravene the principles of fundamental justice, including the maxim *nemo iudex in sua causa*. He referred in this respect to his earlier comments and pointed out that carefully designed mechanisms under the [CJA](#) prevented the Chief Judge from acting as judge of his own case. He noted, finally, that the ultimate decision to remove a judge accused of breaching the *Code of Ethics* is not made by either the Conseil or the Comité.

21 Parent J. dealt briefly with s. 11(d) of the [Canadian Charter](#), which applies only to criminal and penal matters and also to disciplinary proceedings that may lead to the imposition of true penal sanctions, which is not the case here. He also briefly addressed s. 23 of the [Quebec Charter](#), finding that the circumstances did not require that the appellant be heard at the stage of admissibility of the complaint, despite the serious consequences of the decision to conduct an inquiry concerning her.

22 The motion in evocation was dismissed.

Rothman J.A., dissenting

23 In the Court of Appeal the appellant essentially relied on the same four grounds on the basis of which, in her submission, the Conseil and Comité members did not have the impartiality required to perform their duties. Before examining those grounds Rothman J.A., at pp. 181-82, discussed the test for bias developed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1976 CanLII 2 \(SCC\)](#), [1978] 1 S.C.R. 369. He then disposed summarily of three of the four grounds raised by the appellant, namely the participation of Chief Judge Gobeil and Senior Associate Chief Judge Mercier in the proceedings instituted in respect of the first complaint, the Conseil's failure to examine seriously the complaint and the Conseil's precipitous conduct in dealing with the case. With regard to the first of these grounds, he supported the trial judge's conclusions, noting that the two complaints concerned separate incidents. He rejected the second ground on the basis that the [CJA](#) in no way requires the Conseil to appoint someone to examine the complaint on a preliminary basis and that in the case at bar, Chief Judge Gobeil's allegations were carefully considered before an inquiry by the Comité was ordered. As for the allegations of precipitous conduct, Rothman J.A. found that the proceedings against the appellant may have been conducted with diligence, but it was difficult to see in this any evidence of malice or bias.

24 Rothman J.A. spent more time, however, dealing with the issue of the status and role of the complainant, who, as we know, was both the Chief Judge of the Court of Québec and the chairman of the Conseil. On this point, Rothman J.A. agreed with Parent J. of the Superior Court, noting that the powers conferred on the Chief Judge by the [CJA](#) are largely administrative in nature and as such are not liable to compromise the impartiality of Conseil members in dealing with a complaint lodged by the Chief Judge. Likewise, in light of [ss. 96, 263 and 265 CJA](#), he also rejected any interpretation that would tend to prevent the Chief Judge from laying a complaint with the Conseil. He concluded as follows at p. 185:

Not without some initial hesitation, I conclude that the status of Albert Gobeil as Chief Judge and as Chairman of the Conseil did not, *in itself*, disqualify him from bringing a complaint. Nor did his status, *in itself*, create a problem of bias arising out of institutional dependence in the Conseil or the Comité. The members of the Conseil and Comité were sufficiently independent, objective and professional, so that no fear of their impartiality in deciding a complaint by the Chief Judge ought to have arisen on that account. Under normal circumstances, I do not believe a reasonable and well-informed person would have had any apprehension that the Conseil or the Comité might be biased in deciding a complaint against a judge merely because it was signed by the Chief Judge. [Emphasis in original.]

25 Rothman J.A. continued in the following terms. I have reproduced the passage in full so that it can be properly understood (at pp. 185-86):

But if the Chief Judge was legally entitled to lay a disciplinary complaint against a judge of his court, and if his status as complainant would not, *in itself*, have created an apprehension of bias in the Conseil or the Comité d'enquête, his status as Chief Judge and Chairman of the Conseil, and the moral authority of his position, demanded that the complaint he was bringing before the Conseil be objectively and dispassionately framed and that his role in bringing and supporting the complaint be, and be seen to be, scrupulously fair.

In my respectful opinion, this required, at the outset, that the complaint be expressed in a factual, moderate and objective fashion. There was no place, in my view, for personal opinions as to the seriousness or consequences of the judge's misconduct, and any appearance of collegial pressure or influence had to be avoided. The complaint could not be framed so as to give the appearance that, in the opinion of the Chief Judge, the outcome of the complaint was a foregone conclusion or that the dismissal of the complaint would offend strongly held views of the Chief Judge or diminish the honour and dignity or the collegiality of the court.

Unfortunately, with great respect, I do not believe the language of the complaint met the required standard of objectivity. I am far from satisfied that a reasonable person, fully informed, would not conclude that the status and moral authority of the Chief Judge in combination with the conclusive and strongly opinionated language of the complaint might well create an apprehension of bias. [Emphasis in original.]

26 Rothman J.A. then examined the complaint in detail and quoted the most significant passages. On this basis, he concluded at p. 189 that the complaint did not simply put the facts before the Conseil and invite it to draw its own conclusions, but instead exhorted it to adhere to a conclusion already reached by Chief Judge Gobeil that the appellant had placed herself in a situation where she could not usefully continue to fulfil her functions. In Rothman J.A.'s opinion, a reasonable and well-informed observer would be left with an apprehension that the proceedings before the Conseil might not be impartial.

27 For these reasons, Rothman J.A. would have allowed the appeal.

Chevalier J.A. for the majority.

28 In Chevalier J.A.'s opinion, there was nothing further to add to Rothman J.A.'s disposition of the first three grounds raised by the appellant. He also agreed with Rothman J.A.'s conclusions on the lack of a relationship of institutional dependence between the Chief Judge and the Conseil members that would give rise to an apprehension of any bias on their part. However, Chevalier J.A. disagreed with his colleague on the issue of the tone and language of the complaint, which he felt were not such as to influence the conduct of the judges examining it. He also expressed some reservations about the advisability of making this issue the determining factor in the outcome of the case, given that the appellant had deliberately limited the debate to the issue of institutional bias. He stated the following, at p. 193:

[TRANSLATION] Given the limited and quite specific framework in which the appellant has herself chosen to situate the dispute, I ask myself whether, by adding an issue that was not discussed by her in her factum, we might be creating, with regard to the parties, a situation that the appellant did not consider appropriate to raise, and that counsel were correspondingly limited in their ability to address in the course of the hearing.

Chevalier J.A. recognized, however, that when the appeal was heard, the court had itself expressed concerns about this matter and had invited counsel to state their views on it.

29 In his opinion, if the members of the Conseil responsible for examining a complaint against one of their colleagues were not likely to be influenced because the complaint was lodged by the Chief Judge, neither would they be influenced [TRANSLATION] "by the sole fact that the complaint is worded vigorously and contains an instigation to convict the judge in question" (p. 193).

30 Chevalier J.A. also adopted the test for bias set out by this Court in *Committee for Justice and Liberty, supra*. He concluded that in the case at bar, two types of information were available to a reasonable and well-informed person in assessing whether or not there was an

appearance of bias: information relating to the category of persons who make up the Comité and information concerning the individuals who are members thereof.

31 In this regard, Chevalier J.A. looked at the key provisions of the *CJA* and noted the composition of the Conseil, the lack of participation by the Chief Judge in the appointment of its members and the fact that the Chief Judge, as a member of the Conseil, is prohibited from being involved in examining a complaint initially laid by him. He also noted that the Comité is made up of persons chosen from among the members of the Conseil by a resolution of the Conseil passed during a meeting at which a quorum must be present and that neither the chairman nor the vice-chairman has a deciding vote. He stated, finally, that before judges begin performing their duties, they must take an oath or make a solemn affirmation and that, under the *Code of Ethics* with which they must comply, they must, with regard to the public, lawyers and the parties to a case, be impartial and objective and defend the independence of the judiciary.

32 Chevalier J.A. was also of the view that a reasonable and well-informed person who considers the role of a judge and the manner in which judges must do their work could not apprehend any bias on the part of Conseil members. He explained this as follows at p. 199:

[TRANSLATION] [A] well-informed citizen cannot be unaware that hearing and determining disputes is a judge's bread and butter. He is therefore, by necessity, required to work in an essentially adversarial context in which the parties naturally display hostility toward each other, accusing each other, attacking and counter-attacking, and in which the exaggeration with which they often present their respective positions is commonplace in his court.

This typical judge is thus, to the knowledge of the informed citizen, a professional accustomed to presiding day after day over acrimonious debates in the midst of which he must remain serene, keep calm and in all circumstances separate what is receivable from what is not.

33 In concluding his reasons, Chevalier J.A. discussed certain specific circumstances in the case at bar that would support a reasonable and well-informed person's conclusion that there was no bias. Those facts included Chief Judge Gobeil's decision not to call witnesses at the inquiry or cross-examine the witnesses who were heard in order to avoid giving the

proceedings an adversarial character that would obviously not be compatible with the office of chief judge.

34 Judge Ruffo's appeal was dismissed.

III - Issues

35 The following constitutional questions, as stated by my colleague La Forest J. on February 11, 1994, are now before this Court:

1. Do ss. 263 and 265 of the *Courts of Justice Act*, R.S.Q., c. T-16, if they are to be interpreted as allowing the Chief Judge of the Court of Québec and Chairman of the Conseil de la magistrature to bring a complaint against a judge of the Court of Québec before the Conseil de la magistrature, violate the principles of judicial impartiality and independence guaranteed *inter alia* by the preambles to the *Constitution Act, 1867* and the *Canadian Charter of Rights and Freedoms*, as well as by s. 7 of the *Canadian Charter of Rights and Freedoms*?
2. If the answer to question 1 is affirmative, do ss. 263 and 265 of the *Courts of Justice Act* constitute reasonable limits prescribed by law that can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?
3. Does s. 8 of the *Judicial Code of Ethics*, O.C. 643-82, (1982) 114 G.O. II, 1253, which provides that judges of the Court of Québec should act in a reserved manner, violate s. 2(b) of the *Canadian Charter of Rights and Freedoms*?
4. If the answer to question 3 is affirmative, does s. 8 of the Code constitute a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

36 In addition to the constitutional questions stated, the appellant is asking the Court to assess the disciplinary procedure to which she is subject in light of s. 23 of the *Quebec Charter*. In the alternative, she argues that the specific circumstances of this case show that the Conseil and the Comité do not have the impartiality required to perform their duties. She argues, finally, that in the instant case, the form and content of the complaint lodged by Chief Judge Gobeil violate her freedom of expression.

IV - Statutory Provisions

37 The relevant statutory provisions are as follows:

A.The preamble to the *Constitution Act, 1867*:

Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom: . . .

B.The preamble to and ss. 1 and 7 of the *Canadian Charter of Rights and Freedoms*:

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

. . .

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

. . .

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

C.Section 23 of the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12:

23. Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him.

D.At the relevant times, the *Courts of Justice Act*, R.S.Q., c. T-16, provided as follows:

95. The Government may remove a judge only upon a report of the Court of Appeal made after inquiry at the request of the Minister of Justice.

96. The chief judge has the direction of the Court.

The functions of the chief judge shall be, in particular,

(1) to ensure that the general policy of the Court in judicial matters is applied;

(2) to coordinate, apportion and supervise the work of the judges, who must comply with his orders and directives in that regard;

(3) to ensure that the judicial code of ethics is observed.

248. The council shall be composed of 14 members, namely,

- (a) the chief judge of the Court of Québec who shall be the chairman of the council;
- (b) the two senior associate chief judges of the Court of Québec;
- (c) three associate chief judges representing the Civil Division, the Criminal and Penal Division, and the Youth Division of the Court of Québec, respectively, and appointed upon the recommendation of the chief judge of the Court of Québec;
- (d) one of the chief judges of the Municipal Courts of Laval, Montréal or Québec;
- (e) two judges chosen among the judges of the Court of Québec or the Municipal Courts of Laval, Montréal or Québec and appointed upon the recommendation of the Conférence des juges du Québec;
- (f) one judge chosen among the judges of the Municipal Courts other than those of Laval, Montréal or Québec and appointed upon the recommendation of the Conférence des juges municipaux du Québec;
- (g) two advocates appointed upon the recommendation of the Barreau du Québec;
- (h) two persons who are neither judges nor advocates.

256. The functions of the council are:

...

- (b) to adopt, in accordance with Chapter III of this Part, a judicial code of ethics;
- (c) to receive and examine any complaint lodged against a judge to whom Chapter III of this Part applies;

...

262. The code of ethics determines the rules of conduct and the duties of the judges towards the public, the parties to an action and the advocates, and it indicates in particular which acts or omissions are derogatory to the honour, dignity or integrity of the judiciary. . . .

263. The council receives and examines a complaint lodged by any person against a judge alleging that he has failed to comply with the code of ethics.

265. The council shall examine the complaint; it may, for that purpose, require from any person such information as it may deem necessary and examine the relevant record, even if the record is confidential under the [Youth Protection Act \(chapter P-34.1\)](#).

If the complaint is lodged by a member of the council, he cannot participate in the examination of the complaint by the council.

269. To conduct an inquiry on a complaint, the council establishes a committee consisting of five persons chosen from among its members and designates a chairman among them.

...

271. The committee communicates to the judge a copy of the complaint

Within thirty days after the communication of the complaint, the committee calls the judge concerned and the plaintiff;

272. The committee hears the parties, their attorneys and their witnesses.

It may inquire into the relevant facts and call any person apt to testify on such facts.

The witnesses may be examined or cross-examined by the parties.

273. The members of the committee enjoy, for the purposes of an inquiry, the powers and immunity of commissioners appointed under the [Act respecting public inquiry commissions \(chapter C-37\)](#).

276. The council may suspend a judge for the duration of an inquiry on him.

E.Sections 5, 7, 8 and 10 of the *Judicial Code of Ethics*, (1982) 114 G.O. II, 1253:

5. The judge should be, and be seen to be, impartial and objective.

7. The judge should refrain from any activity which is not compatible with his judicial office.

8. In public, the judge should act in a reserved, serene and courteous manner.

10. The judge should uphold the integrity and defend the independence of the judiciary, in the best interest of justice and society.

V - Analysis

A.A Violation of the Constitutional Guarantees of Judicial Impartiality and Independence

(1) Impartiality: Principles and Test

38 It should be mentioned at the outset that the right to be tried by an independent and impartial tribunal is an integral part of the principles of fundamental justice protected by [s. 7](#) of the [Canadian Charter](#) (see, *inter alia*, *R. v. Bearegard*, [1986 CanLII 24 \(SCC\)](#), [1986] 2 S.C.R. 56, *Pearlman v. Manitoba Law Society Judicial Committee*, [1991 CanLII 26 \(SCC\)](#), [1991] 2 S.C.R. 869, and *R. v. Généreux*, [1992 CanLII 117 \(SCC\)](#), [1992] 1 S.C.R. 259).

39 The parties to the case at bar view this aspect of the matter in the same way: it is clear from the arguments made by them that judicial independence is not in issue here, and their submissions are therefore limited to the issue of impartiality. I note, however, that it has not always been easy to distinguish these two concepts and that even today it is difficult to determine the exact relationship between them. It thus seems appropriate in this regard to consider some of this Court's decisions that have directly addressed the issues of judicial

impartiality and independence over the past few years. I do not intend to examine them in detail, but simply to identify their main points in order to be able to trace the evolution of the principles underlying them.

40 *Valente v. The Queen*, [1985 CanLII 25 \(SCC\)](#), [1985] 2 S.C.R. 673, marked the beginning of efforts by this Court to clarify the content of the judicial independence requirement. Le Dain J. set out three essential conditions of judicial independence: security of tenure, financial security and the institutional independence of the tribunal with respect to matters of administration bearing on the exercise of its judicial function.

41 In that case, the concept of impartiality was consistently seen as a principle separate from judicial independence, despite the relationship between them. This is illustrated by the following comments by Le Dain J., at p. 685:

Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" . . . connotes absence of bias, actual or perceived. The word "independent" in s. 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

42 In *MacKeigan v. Hickman*, [1989 CanLII 40 \(SCC\)](#), [1989] 2 S.C.R. 796, McLachlin J., while not departing from this premise, emphasized the close interaction between these concepts and, at p. 826, noted that judicial independence is an underlying condition that contributes to the guarantee of an impartial trial.

43 The connection between these related concepts was further explained by Lamer C.J. in *R. v. Lippé*, [1990 CanLII 18 \(SCC\)](#), [1991] 2 S.C.R. 114, at p. 139. Speaking for the Court on this point, he stated the following:

The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a "means" to this "end". If judges could be perceived as "impartial" without judicial "independence", the requirement of "independence" would be unnecessary. However, judicial independence is critical to the

public's perception of impartiality. Independence is the cornerstone, a necessary prerequisite, for judicial impartiality. [Emphasis added.]

44 The contribution of *Lippé* is not limited to this observation, however, as it was also recognized that the concept of institutional impartiality must be included in the constitutional guarantee of an independent and impartial tribunal. The Chief Justice stated the following, at pp. 140-41:

Notwithstanding judicial independence, there may also exist a reasonable apprehension of bias on an institutional or structural level. Although the concept of institutional impartiality has never before been recognized by this Court, the constitutional guarantee of an "independent and impartial tribunal" has to be broad enough to encompass this. Just as the requirement of judicial independence has both an individual and institutional aspect (*Valente, supra*, at p. 687), so too must the requirement of judicial impartiality. I cannot interpret the Canadian Charter as guaranteeing one on an institutional level and the other only on a case-by-case basis.

. . .

The objective status of the tribunal can be as relevant for the "impartiality" requirement as it is for "independence". Therefore, whether or not any particular judge harboured pre-conceived ideas or biases, if the system is structured in such a way as to create a reasonable apprehension of bias on an institutional level, the requirement of impartiality is not met. As this Court stated in *Valente, supra*, the appearance of impartiality is important for public confidence in the system (at p. 689):

Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial [Emphasis in original.]

45 In the same case, it was established that the test for institutional impartiality should be that set out by de Grandpré J. in *Committee for Justice and Liberty, supra*, at p. 394:

. . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude" [Emphasis added.]

46 This test is similar to that used to assess individual or case-by-case impartiality, with the difference that according to *Lippé, supra*, the assessment of institutional bias assumes that there will be a reasonable apprehension of bias in the mind of the informed person mentioned

above in a substantial number of cases. Since *Committee for Justice and Liberty*, this test has been applied consistently by this Court, *inter alia*, in *R. v. Bain*, 1992 CanLII 111 (SCC), [1992] 1 S.C.R. 91, *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CanLII 84 (SCC), [1992] 1 S.C.R. 623, and *Idziak v. Canada (Minister of Justice)*, 1992 CanLII 51 (SCC), [1992] 3 S.C.R. 631. Accordingly, the appellant's allegations of institutional bias should now be examined. As the protection provided by the *Canadian Charter* (s. 7) and the *Quebec Charter* (s. 23) is essentially the same in this regard, the following analysis will be presented in general terms to address both these aspects of the issue at the same time.

(2) Institutional Bias

(a) *Preliminary Remarks*

47 In this Court, the appellant is arguing that a relationship of dependence exists between Chief Judge Gobeil and the members of the Conseil and the Comité. In her view, such a relationship results from the complainant's status and moral authority, the powers conferred on him by the *CJA* and the friendly relationship that is likely to have developed among these individuals at frequent meetings.

48 As regards the first issue in this case, examining the ground of institutional bias first requires an interpretation of ss. 263 and 265 *CJA*. The appellant maintains that these sections must be read as not authorizing the Chief Judge, given his position and powers, to lay a complaint with the Conseil against a judge of his court.

49 I note at the outset that such a suggestion challenges the operation of any disciplinary jurisdiction based on the principle of peer review of professional conduct. The appropriateness of this method was, however, unanimously recognized by this Court, *per* Iacobucci J., in *Pearlman v. Manitoba Law Society Judicial Committee*, *supra*.

It is clear from a mere reading of the statutory provisions in question that the appellant's suggested interpretation cannot stand. The *CJA* provides that the Chief Judge of the Court of Québec is *ex officio* a member of the Conseil and the chairman thereof (s. 248(a)). It also provides that any person may lodge a complaint with the Conseil (s. 263), including a member of the Conseil, although a member cannot participate in the examination of the complaint in such a case (s. 265, para. 2). Finally, as noted by Parent J. of the Superior Court, at p. 2213:

[TRANSLATION] Since s. 96(3) *C.J.A.* expressly gives the Chief Judge the duty "to ensure that the judicial code of ethics is observed", it would seem contrary to the scheme of that statute for the Chief Judge to be the only person incapable of initiating the disciplinary process that is designed precisely to ensure such observance.

With this aspect of the issue clarified, an examination of ss. 263 and 265 *CJA* in light of the constitutional guarantees of independence and impartiality requires that the Chief Judge's role with respect to judicial ethics and the actual content of his functions and powers in the Court of Québec be properly defined. It also requires an examination of the specific nature of the bodies responsible for deciding the outcome of the complaint. These are the only two aspects I shall analyse in this section. I am of the view that the existence of a friendly relationship between the Chief Judge and the members of the Conseil and the Comité would not give rise to a reasonable apprehension of bias in the mind of a reasonable and well-informed observer. With respect, such an assertion has no legal basis and challenges the dignity and professionalism of the judiciary and its Conseil. In this respect, I agree with the reasons of the Superior Court and the Court of Appeal.

(b) *The Chief Judge: Functions and Powers*

(i) With Respect to Judicial Ethics

Current provincial and territorial legislation in Canada is intended to reflect a marked awareness of judicial ethics and in many cases gives the chief judge a key role in ensuring compliance with them (see, *inter alia*, the *Judges of the Provincial Court Act*, *R.S.N.S.* 1989, c. 238, s. 15; the *Provincial Court Judges Act*, S.A. 1981, c. P-20.1, s. 9; the *Provincial Court*

Act, R.S.B.C. 1979, c. 341, s. 6.1; the *Provincial Court Act*, R.S.M. 1987, c. C275, s. 8.1; the *Provincial Court Act*, 1991, S.N. 1991, c. 15, s. 8; the *Provincial Court Act*, R.S.N.B. 1973, c. P-21, s. 6.6(3); the *Territorial Court Act*, R.S.N.W.T. 1988, c. T-2, s. 5(4); and the *Territorial Court Act*, R.S.Y. 1986, c. 169, s. 20; see also Peter McCormick, "Judicial Councils for Provincial Judges in Canada" (1986), 6 *Windsor Y.B. Access Just.* 160, at pp. 174-75, where the author presents a very useful comparative table on this question). I note, however, that such explicit legislative developments are relatively recent.

53 This is also true in Quebec, where express references to the supervisory power of the chief district judge of the Magistrate's Court, the predecessor of the Provincial Court and of what in 1988 became the Court of Québec in its present form (S.Q. 1988, c. 21, s. 30), cannot be found prior to 1945. In this regard, s. 6 of the *Act to amend the Courts of Justice Act*, S.Q. 1945, c. 18, introduced the following provision:

The district magistrates shall be subject to the supervision, orders and control of such chief magistrates as regards the distribution of cases, the holding of sittings and generally all administrative matters concerning them.

54 Although this section was amended in subsequent years, its substance was not affected (S.Q. 1965, c. 17, s. 2, and S.Q. 1974, c. 11, s. 32). It was only after the 1977 revision that the *Act to amend the Courts of Justice Act and the Code of Civil Procedure and to establish the Conseil de la magistrature*, S.Q. 1978, c. 19, came into force. Section 6 of that statute replaced s. 75 of the old *Courts of Justice Act*, R.S.Q. 1964, c. 20, with a new s. 75 that included an explicit reference to the chief judge's role with respect to ethics:

75. The chief judge has charge of the general policy of the Court in judicial matters.

His function is also to ensure that the judges of the sessions make due exercise of their functions and that they comply with the code of ethics. [Section 27 of the same statute made s. 75 applicable to Provincial Court judges.]

...

75c. In the division where he resides, the chief judge . . . coordinates, apportions and supervises the work of the judges, and they must comply with his orders and directives in that regard. [Emphasis added.]

55 This provision was itself amended by s. 30 of the *Act to amend the Courts of Justice Act and other legislation to establish the Court of Québec*, S.Q. 1988, c. 21, which introduced s. 96 *CJA* as it was worded on the dates relevant here, and in particular conferred on the Chief Judge the duty "to ensure that the judicial code of ethics is observed".

56 The relatively recent date of these statutory provisions may be explained in part, at least in Quebec, by the fact that the position of chief district judge was not established until 1922. On this point, see *An Act to amend the Revised Statutes, 1909, respecting district magistrates*, S.Q. 1922, c. 64, s. 1, which read in part as follows:

3291a. The Lieutenant-Governor in Council may appoint, from amongst the district magistrates of this Province, a Chief District Magistrate, with residence at the place he shall determine.

However, according to H. Patrick Glenn, "La responsabilité des juges" (1983), 28 *McGill L.J.* 228, at p. 234, the principle of judges' disciplinary responsibility, although still in its infancy, can be traced back to before the Conquest of New France in 1759. The position of chief justice in courts now known as "superior" courts has existed in Canada since 1764 (see *Compendium of Information on the Status and Role of the Chief Justice in Canada*, prepared in 1981 for the Canadian Institute for the Administration of Justice; and Léo Pelland, "Aperçu historique de notre organisation judiciaire depuis 1760" (1933-1934), 12 *R. du D.* 14). It must therefore be thought that chief judges or justices, because of their role as co-ordinators, were able to have a certain influence on compliance with rules of conduct in the specific context of a disciplinary authority that was initially in the hands of the executive branch and then, starting in the 19th century after the principle of security of tenure for judges was established, belonged exclusively to the legislative branch.

57 In my opinion, this last observation also applies to the chief district judge. Until 1940, disciplinary control of judges of the chief district judge's court was subject to the dismissal procedure, which required a vote by both legislative assemblies in favour of dismissal (R.S.Q. 1909, ss. 3263 and 3292; R.S.Q. 1925, c. 145, ss. 221 and 269); starting in 1941 it required a report of the Court of King's Bench (Appeal Side), the predecessor of the present Court of

Appeal (R.S.Q. 1941, c. 15, ss. 221 and 269; R.S.Q. 1964, c. 20, ss. 76 and 119; R.S.Q. 1977, c. T-16, ss. 85, 127 and 133; S.Q. 1988, c. 21, s. 30; and [R.S.Q., c. T-16, s. 95](#)). It must not be forgotten that a large part of the chief judge's role in maintaining high-quality justice was defined gradually over the years, in the same way as judicial precedents. Many aspects of this role derived from judicial tradition without being transferred to legislation. Therefore, the fact that there was no explicit legislation on ethics until quite recently does not mean we can doubt the continuity that marked the development of the chief judge's responsibilities in this regard. It accordingly cannot be argued that the supervisory powers conferred on the chief judge by the present [s. 96 CJA](#) were assigned spontaneously by the legislature; in my view, they must rather be seen as the expression of a reality that is consistent with general practice and gradual developments over time.

58 This opinion is shared by the American author C. G. Geyh, who asserts that the chief judge's supervisory powers over ethics are inherent in the exercise of his or her functions and need not be conferred by specific statutory provisions ("Means Of Judicial Discipline Other Than Those Prescribed By The Judicial Discipline Statute, 28 U.S.C. Section 372(c)", in *Research Papers of the National Commission on Judicial Discipline and Removal* (1993), vol. 1, 713, at p. 756). I agree.

59 We must recognize that the chief judge, as *primus inter pares* in the court, the efficient operation of which he or she oversees in all other respects, is in a preferred position to ensure compliance with judicial ethics. First, because of the chief judge's role as co-ordinator, events that may raise ethical issues are more readily brought to his or her attention. As well, because of the chief judge's status, he or she is often the best situated to deal with such delicate matters, thereby relieving the other judges of the court of the difficult task of laying a complaint against one of their colleagues where necessary. In short, the power to lay a complaint is an intrinsic part of the chief judge's responsibility in this area and it would not be fitting for the chief judge to act through someone else, whether a judge or a person outside the judiciary, to fulfil his or her obligations in this regard.

(ii) In the Court of Québec

60 The appellant refers here to a series of [CJA](#) provisions that she argues grant the Chief Judge powers that go beyond mere judicial management and thus affect the ability of Conseil and Comité members to make objective decisions. On this point, I should begin by noting that any argument about the Chief Judge's authority must be analysed specifically having regard to the composition of the Conseil, which as we know consists of, in addition to the Court of Québec judges, two to four Municipal Court judges, two lawyers and two representatives of the public, over whom the Chief Judge cannot have any influence under the *CJA*. As for the Comité, since it is made up of five Conseil members there is an equal chance to ensure that its membership is not monolithic. The same observations concerning the Chief Judge's presumed authority may therefore be applied to it.

61 In his reasons, Parent J. of the Superior Court examined the powers conferred on the Chief Judge by the [CJA](#) in detail and found that there was no institutional bias of any kind. I shall review the main elements of those reasons.

62 Like Parent J., I would immediately reject as an issue the fact that pursuant to [s. 90 CJA](#), Chief Judge Gobeil would have been consulted by the government on the appointment of senior associate chief judges and associate chief judges of the Court of Québec, the former being members of the Conseil *ex officio* and three of the latter being appointed thereto upon his recommendation. It is clear that the Chief Judge has only a power of recommendation in this regard and that the government is not required to follow his recommendation. As for the financial benefits of holding these positions, including additional remuneration ([s. 115 CJA](#)), an expense allowance ([s. 121 CJA](#)), the same salary after leaving the position if the judge has occupied it for at least seven years ([s. 116 CJA](#)) and a year's leave of absence with salary after the same period ([s. 92 CJA](#)), they are all privileges granted by statute and the Chief Judge has no say in them.

63 The *CJA* further provides that all Court of Québec judges may receive various benefits, such as engaging in remunerated teaching activities (s. 134 *CJA*) or exercising the functions of arbitrator (s. 130 *CJA*) or coroner (s. 131 *CJA*). It is also possible for a judge of the court to carry out a mandate entrusted to him or her by the government (s. 132 *CJA*) or to exercise judicial functions after retirement (s. 93 *CJA*). Among these pursuits, only remunerated teaching activities must be authorized by the Chief Judge. In all other cases, it is the government rather than the Chief Judge that makes the final decision, after receiving the Chief Judge's request or opinion but without being bound by it. Like Parent J., I do not believe that a Conseil or Comité member making a decision concerning a complaint lodged by his or her Chief Judge could be influenced by the prospect of obtaining authorization from the Chief Judge to engage in remunerated teaching activities.

64 All that remains are the management functions conferred on the Chief Judge by s. 96 *CJA*, which I have reproduced below for ease of reference:

96. The chief judge has the direction of the Court.

The functions of the chief judge shall be, in particular,

- (1) to ensure that the general policy of the Court in judicial matters is applied;
- (2) to coordinate, apportion and supervise the work of the judges, who must comply with his orders and directives in that regard;

...

Section 100 *CJA* provides that the Chief Judge may designate an associate chief judge to exercise the functions of a senior associate chief judge where the latter is absent or unable to act, until the senior associate chief judge resumes his or her functions or is replaced. As Parent J. notes, at p. 2217, [TRANSLATION] "this power exists only when needed to deal with an emergency, and the designated judge exercises his or her functions only for a limited time". In addition, if the senior associate chief judge must be replaced, his or her successor is appointed by the government, pursuant to s. 90 *CJA*.

The Chief Judge, after consultation with the senior associate chief judge concerned, may also assign a judge to a specific division (Civil, Criminal and Penal, or Youth: [s. 107 CJA](#)), modify that assignment ([s. 111 CJA](#)) and temporarily assign a judge to another regional section ([s. 109 CJA](#)). Although the Chief Judge is not consulted in any way about the initial permanent assignment of a judge to a regional section, which is determined by the government ([s. 86 CJA](#)), the Chief Judge may nonetheless recommend a modification to a judge's notice of appointment concerning the judge's place of residence or the regional section assigned to the judge ([s. 108 CJA](#)). Under [s. 110 CJA](#), however, the recommendations and decisions provided for in ss. 108 and 109 *CJA* cannot be acted upon unless the judge consents to such modification to his or her notice of appointment or unless the Chief Judge considers that the circumstances so require, in which case the judge concerned must have been given the opportunity to present his or her views. In addition, under [s. 112 CJA](#), a decision of the Chief Judge pursuant to ss. 108 or 111 *CJA* may be appealed to the Conseil, which may confirm or quash it.

In short, to quote Parent J., at p. 2218:

[TRANSLATION] The statutory provisions cited above, whose purpose is to authorize the Chief Judge to manage the Court of Québec's activities, therefore grant the Chief Judge only the administrative powers needed for such management. In some cases, it is the Chief Judge who makes the decision, but then it has a temporary effect only; otherwise his power will be limited to making recommendations that the government may or may not approve or follow, except where there is an appeal to the Conseil, in which case it decides the matter. [Emphasis added.]

This being the situation, there is in my opinion no reason to apprehend that the impartiality of the Court of Québec judges sitting on the Conseil or Comité would be compromised in making a decision concerning Judge Ruffo. Accordingly, the specific nature of the bodies responsible for dealing with the complaint and their relationship with the Chief Judge should now be examined.

67 Under ss. 256(c) and 263 *CJA*, the Conseil is responsible for receiving and examining complaints lodged by any person against a judge alleging that the judge has failed to comply with the *Code of Ethics*. Sections 265 and 266 *CJA* authorize the Conseil to gather such information as it may deem necessary; it forwards a copy of the complaint to the judge concerned and may require an explanation from that judge. If after examining the complaint the Conseil decides that the complaint is justified and that an inquiry is warranted because of the nature and importance of the complaint, it establishes a Comité for that purpose consisting of five persons chosen from among its members and designates a chairman among them (ss. 268 and 269 *CJA*). When the inquiry is completed, the Comité prepares a report, which it submits to the Conseil along with its recommendations (s. 277 *CJA*). Under s. 279 *CJA*, if the report establishes that the complaint is justified, the Conseil must implement the Comité's recommendations, which may be of two types: a reprimand of the judge concerned or a recommendation that the Minister of Justice and Attorney General institute removal proceedings by filing a motion with the Court of Appeal in accordance with s. 95 *CJA*. It is important to note at this point that under s. 95 it is the government that makes the final decision to remove a judge, after the Court of Appeal has submitted a report on its inquiry; the Comité, Conseil and Chief Judge of the Court of Québec have no authority in this regard.

68 The Comité's role in light of these statutory provisions was accurately described by Parent J., at p. 2214:

[TRANSLATION] . . . the Comité is a body established for a purpose relating to the welfare of the public, namely to ensure compliance with the code of ethics that sets out the rules of conduct for and duties of judges toward the public, the parties to a case and counsel. The Comité's role is to inquire into a complaint alleging that a judge has failed to comply with the code, determine whether the complaint is justified and, if so, recommend the appropriate sanction to the Conseil.

The Comité's mandate is thus to ensure compliance with judicial ethics in order to preserve the integrity of the judiciary. Its role is remedial and relates to the judiciary rather than the judge affected by a sanction. In this light, as far as the recommendations the Comité may make with respect to

sanctions are concerned, the fact that there is only a power to reprimand and the lack of any definitive power of removal become entirely comprehensible and clearly reflect the objectives underlying the Comité's establishment: not to punish a part that stands out by conduct that is deemed unacceptable but rather to preserve the integrity of the whole.

69 That being the case, other factors tend to eliminate the possibility of a reasonable apprehension of institutional bias arising in the case at bar: it should not be forgotten that Comité members who are Court of Québec judges had to take the following oath pursuant to [s. 89 CJA](#) when they were appointed:

I swear (*or solemnly affirm*) that I will faithfully, impartially and honestly, and to the best of my knowledge and abilities, fulfil all the duties and exercise all the powers of a judge of the Court of Québec. [Emphasis in original.]

Likewise, the *Code of Ethics* explicitly requires that judges be, and be seen to be, impartial and uphold the integrity and independence of the judiciary. Pursuant to [s. 262 CJA](#), these duties and rules of conduct apply toward the public, the lawyers and the parties to an action, which clearly includes the proceeding in which Judge Ruffo is involved. I have reproduced the relevant provisions of the *Code of Ethics* below for ease of reference:

- 5. The judge should be, and be seen to be, impartial and objective.
- 10. The judge should uphold the integrity and defend the independence of the judiciary, in the best interest of justice and society.

70 The appellant argues, however, that the roles of Chief Judge and complainant are naturally incompatible, in that under ss. 271 and 272 *CJA* the complainant becomes a party to the inquiry and may call witnesses and cross-examine the witnesses heard. In the appellant's submission, the authorized use by the Chief Judge of methods that are usually employed by a prosecutor taints the proceedings with bias and therefore requires that they be quashed. In this regard, she relies on a letter dated October 23, 1990 from counsel for Chief Judge Gobeil to the secretary of the Conseil, Judge Bernard Tellier:

[TRANSLATION] Under the Act . . . the complainant is a party to the inquiry. Chief Judge Albert Gobeil will therefore appear and testify before the Comité and may be cross-examined by any party.

However, it does not seem appropriate for the Chief Judge of the Court of Québec and chairman of the Conseil de la magistrature to be involved in conducting adversarial proceedings against a judge of that court. The role of Chief Judge and the activities of the party responsible for prosecuting are clearly incompatible. Accordingly, it does not seem appropriate for counsel for Chief Judge Albert Gobeil to call witnesses at the inquiry or cross-examine the witnesses heard. [Emphasis added.]

The appellant's argument thus rests on the premise that Chief Judge Gobeil is a prosecutor before the Comité. This assertion presupposes that proceedings before the Comité are similar to an adversarial trial in which the burden of proof is on the prosecution.

71 With respect, the relevant provisions of the *CJA* do not support such an assertion. I have reproduced them below for ease of reference:

268. The council may, after examining a complaint, decide to make an inquiry

269. To conduct an inquiry on a complaint, the council establishes a committee consisting of five persons chosen from among its members and designates a chairman among them.

. . .

271. . . .

Within thirty days after the communication of the complaint, the committee calls the judge concerned and the plaintiff

272. The committee hears the parties, their attorneys and their witnesses.

It may inquire into the relevant facts and call any person apt to testify on such facts.

. . .

273. The members of the committee enjoy, for the purposes of an inquiry, the powers and immunity of commissioners appointed under the *Act respecting public inquiry commissions (chapter C-37)*.

275. The committee may make rules of procedure or rules of practice for the conduct of an inquiry.

. . .

281. The council may retain the services of an advocate or of another expert to assist the committee in the conduct of its inquiry. [Emphasis added.]

72 As I noted earlier, the Comité's mandate is to ensure compliance with judicial ethics; its role in this respect is clearly one of public order. For this purpose, it must inquire into the

facts to decide whether the *Code of Ethics* has been breached and recommend the measures that are best able to remedy the situation. Accordingly, as the statutory provisions quoted above illustrate, the debate that occurs before it does not resemble litigation in an adversarial proceeding; rather, it is intended to be the expression of purely investigative functions marked by an active search for the truth.

73 In light of this, the actual conduct of the case is the responsibility not of the parties but of the Comité itself, on which the *CJA* confers a pre-eminent role in establishing rules of procedure, researching the facts and calling witnesses. Any idea of prosecution is thus structurally excluded. The complaint is merely what sets the process in motion. Its effect is not to initiate litigation between two parties. This means that where the Conseil decides to conduct an inquiry after examining a complaint lodged by one of its members, the Comité does not thereby become both judge and party: as I noted earlier, the Comité's primary role is to search for the truth; this involves not a *lis inter partes* but a true inquiry in which the Comité, through its own research and that of the complainant and of the judge who is the subject of the complaint, finds out about the situation in order to determine the most appropriate recommendation based on the circumstances of the case before it.

74 Moreover, it is for this purpose and in order to conduct the inquiry for which it is responsible that the Conseil may retain the services of an advocate, as provided by s. 281 *CJA*. In the present case, the Chief Judge's suggestion to that effect was therefore helpful and in keeping with an approach recognized by other provincial legislatures (see, *inter alia*, the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 49(21); the *Provincial Court Act*, R.S.B.C. 1979, c. 341, s. 18(4); the *Provincial Court Act*, R.S.M. 1987, c. C275, ss. 32(9) and 37(13); and the *Provincial Court Act*, R.S.N.B. 1973, c. P-21, s. 6.9(1)(b)). Along the same lines, it should be mentioned that the American Bar Association has proposed that the states adopt a body of basic rules of judicial ethics incorporating participation by lawyers at inquiries ("Model Rules for Judicial Disciplinary Enforcement" (August 1994)).

As well, a survey of statutes across the country reveals the following: in Ontario, the *Courts of Justice Act*, R.S.O. 1990, c. C.43, provides that a complaint may be made to the Council by any person, which would include the Chief Judge (s. 51.3); the Chief Judge is a member of the Council *ex officio* (s. 49(2)(b)) but is always excluded from the subcommittee reviewing the complaint (s. 51.4(1)). It also provides that the Council determines who are the parties to the hearing (s. 51.6(6)). In British Columbia, s. 15(5) of the *Provincial Court Act*, R.S.B.C. 1979, c. 341, provides that a chief judge who has conducted an investigation into a judge's conduct shall not sit as a member of the council on an inquiry respecting the same matter. In Newfoundland, s. 16(3) of the *Provincial Court Act, 1991*, S.N. 1991, c. 15, contains a similar provision except that it applies where the chief judge has suspended or reprimanded the judge whose conduct is in question. In these last two cases, however, I note that the chief judge is not prohibited from making submissions to the council as a party. In New Brunswick, s. 6.10(4) of the *Provincial Court Act*, R.S.N.B. 1973, c. P-21, provides that the counsel to the panel acts as the prosecutor at the formal hearing.

It is evident that few provincial statutes contain express provisions on the complainant's status at the inquiry. In fact, only the *CJA*, which makes the complainant a party, is explicit on this point. What can be concluded from this uniqueness? First, in light of what is set out in the preceding paragraphs, it is clear that the concept of "party" at a Comité hearing does not change the essence of the institution in question. It even seems that by defining the attributes of each person involved in the inquiry in ss. 271 and 272 *CJA*, the legislature was instead showing a concern to eliminate the uncertainty that often arises as to a person's precise role and standing before a committee of inquiry. Moreover, a comparative analysis shows that disciplinary proceedings for provincially appointed judges are not uniform across the country and that the interaction that occurs among the council, committee and chief judge during such proceedings varies depending on the powers and functions conferred by statute on each of them. In some cases, as I noted earlier, the chief judge plays a much more active role in receiving and examining complaints laid against a judge, whereas in Quebec (s. 263 *CJA*) and Saskatchewan (*The Provincial Court Act, 1978*, S.S. 1978, c. 42, s. 17), for example, these steps are the council's responsibility. In other cases, it is the chief judge who makes the

decision to suspend a judge whose conduct is in question or to take corrective action in respect of that judge (*Judges of the Provincial Court Act*, R.S.N.S. 1989, c. 238, s. 15(2); *Provincial Court Act*, 1991, S.N. 1991, c. 15, s. 8(1)(d); *Provincial Court Act*, R.S.B.C. 1979, c. 341, s. 15(4); *Provincial Court Judges Act*, S.A. 1981, c. P-20.1, s. 9(c); *Provincial Court Act*, R.S.M. 1987, c. C275, s. 36(1); *Territorial Court Act*, R.S.N.W.T. 1988, c. T-2, s. 5(4)), while in New Brunswick and Prince Edward Island these functions are performed by the Council (*Provincial Court Act*, R.S.N.B. 1973, c. P-21, s. 6.8(1)) and the Lieutenant Governor in Council (*Provincial Court Act*, R.S.P.E.I. 1988, c. P-25, s. 10(1)) respectively.

77 In short, each system has its own rules, but they are all based on the same guiding principle: ensuring compliance with judicial ethics through proceedings that comply fully with the duty to act fairly. Accordingly, the *CJA*'s uniqueness in characterizing the complainant as a party must not be allowed to overshadow the special care shown by the Quebec legislature to avoid any structural overlapping in the statute that might give rise to a reasonable apprehension of bias. These rules are an extension of the institutional role that has historically been, and must be, played by the Chief Judge.

78 Where the Chief Judge makes use of the formal disciplinary process by taking the initiative of laying a complaint, as authorized by the statute, there is no reason to think that the Conseil and its Comité do not, in the eyes of a reasonable and well-informed observer, have the impartiality required to carry out their duties. As I stated earlier, the Chief Judge's authority under the *CJA* is essentially administrative; as a result, any scenario involving possible negotiations about benefits to be conferred on or withdrawn from Conseil members dealing with the complaint, depending on what decision is made, is impossible to imagine.

79 Accordingly, the only issue that remains is the Chief Judge's possible influence on Court of Québec judges who are members of the Conseil by virtue of the moral authority that is naturally associated with his status and functions. With respect, I cannot accept the appellant's arguments on this point. It is normal, legitimate and desirable for the Chief Judge to have moral authority. Such authority is associated with the Chief Judge as an individual and with

the office he holds, and is necessary for its exercise. It is not restrictive and is part of the context in which all judges perform their duties. It does not in itself affect the capacity of a judge to decide to the best of his or her knowledge and belief and on the basis of the relevant factors. In ethical matters judges take account of established rules, precedents, theory, their own experience and authoritative opinions -- including that of the Chief Judge -- not as restrictive standards but for their persuasive value, in order to make decisions they consider fair. In this context, therefore, the Chief Judge's moral authority cannot be seen as giving rise to a reasonable apprehension of bias.

(3) Bias With Respect to the Specific Circumstances of the Case

80 In his complaint against the appellant, Chief Judge Gobeil discusses three aspects of her behaviour: her public comments on being reprimanded following the Comité's report on September 19, 1990; her unaltered public conduct and statements despite a written warning by the Chief Judge on March 21, 1989; and her intervention in a case that was then pending before a colleague.

81 The first and third aspects of the complaint clearly refer to one-time events and therefore serve as a basis for making specific allegations; however, the second aspect strives, through a lengthy media review, to illustrate Judge Ruffo's general conduct and show that it resembled a "crusade". Accordingly, it may be thought that it is not so much the incompatibility of Judge Ruffo's specific actions with the rules of judicial ethics that is the main reason for the complaint, but rather a general concern with the threat that such conduct represents to judicial institutions and the public's respect for them.

82 In my opinion, there is no doubt that the overall conduct of a member of the judiciary may be assessed under the *Code of Ethics*, in so far as the judge who is the subject of a complaint is able to know the specific facts alleged against him or her. This assertion is all the more true in the case at bar, where s. 10 of the *Code of Ethics*, which provides that "[t]he judge should uphold the integrity and defend the independence of the judiciary, in the best interest of justice

and society", and which must be complied with by the Chief Judge himself, is superimposed on his general duty to ensure the observance of judicial ethics pursuant to [s. 96\(3\) CJA](#). As well, some of the Comité's comments in the report it submitted on September 19, 1990 suggest that an inquiry could be held on a judge's general conduct:

[TRANSLATION] [In the case under consideration,] the committee's jurisdiction is limited by the mandate it has received from the Conseil de la magistrature to examine the allegations of the complainant [Lapointe] into which the Conseil decided to hold an inquiry. Judge Ruffo's conduct and public statements as a whole were therefore not examined by the committee. [Emphasis added.]

83 In the case at bar, the appellant argued that the conduct of the proceedings against her was marked by specific incidents that could lead a reasonable and well-informed observer to apprehend that the Conseil was unable to make an impartial decision. She relied in this regard on the source of the documents filed in support of the complaint, the Conseil's precipitousness in dealing with the complaint and the tone used by the Chief Judge in formulating his allegations.

84 I agree with the Court of Appeal, which was unanimous on this point, that the first ground must be rejected: the fact that the Chief Judge chose to rely on documents from Verbatim Communications Inc., an agency that had also been used by Miville Lapointe to support the first complaint laid against the appellant with the Conseil, does not indicate any sort of collusion. Verbatim Inc. provides "media monitoring services" and for that purpose merely gathers and reproduces information provided by the press, television and radio. It does not alter its substance in any way. Furthermore, as I mentioned earlier, the Comité made it clear that Judge Ruffo's general conduct was not in issue in the context of the first complaint. The content of press clippings and radio and television interviews could therefore not be considered except with respect to the specific allegations made by Mr. Lapointe. Moreover, there is no reason that the same documents could not be used for separate purposes.

85 Accordingly, the remaining two grounds should now be addressed, namely that the Conseil acted precipitously in examining the complaint and that the Chief Judge formulated

the complaint in a vindictive manner.

(a) *Precipitous Conduct*

86 The appellant argues that the Conseil departed from the usual procedure by not hearing her version of the facts during its preliminary examination of the complaint, thus depriving itself of adequate information to assess whether the complaint was admissible. When it reviewed Miville Lapointe's complaint in June 1988, the Conseil had decided [TRANSLATION] "to follow the usual procedure in this matter and designate Judge André Desjardins to receive and examine the complaint". After hearing the appellant's and the complainant's respective versions of the events, Judge Desjardins had submitted a report to the Conseil recommending that an inquiry be held into certain aspects of the complaint. I note that during the proceedings that followed Mr. Lapointe's allegations, the appellant challenged the legality of this delegation of authority, the benefit of which she now seeks to claim. Be that as it may, for the purposes of the present case she is now arguing that this failure to appoint an examiner must be seen as evidence of bias on the Conseil's part.

87 In his reasons at p. 2220, Parent J. of the Superior Court concluded that the Conseil's decision not to follow this procedure was fully justified given that the Chief Judge's complaint was contained in a letter some thirty pages long and supported by numerous documents. In Parent J.'s view, this situation eliminated the need for additional factual research and therefore made it possible for the Conseil to decide for itself on the admissibility of the complaint. I share this view. The purpose of delegation to an examiner, which incidentally is not mandatory under s. 265, para. 1 *CJA*, is solely to assess whether there are grounds for an inquiry. In the present case, such an assessment was made possible not only by the extensive information provided by the Chief Judge in support of his complaint, but also by the fact that most of the information submitted to the Conseil was already in the public domain and had been widely disseminated.

More generally, I point out that the scope of the requirements imposed by the duty to act fairly and the *audi alteram partem* rule varies depending on the circumstances of each case. Among the factors to be considered, the nature of the inquiry and its consequences are extremely important. It is also interesting to note that this principle, which was stated by this Court in *Irvine v. Canada (Restrictive Trade Practices Commission)*, 1987 CanLII 81 (SCC), [1987] 1 S.C.R. 181, at p. 231, was also recognized in Europe in the judgments of the European Court of Human Rights *Le Compte, Van Leuven and De Meyere* of 23 June 1981, Series A No. 43, and *Albert and Le Compte* of 10 February 1983, Series A No. 58 (reported in Pierre Lambert, "Les droits relatifs à l'administration de la justice disciplinaire dans la jurisprudence des organes de la Convention européenne des droits de l'homme", (1995) *Rev. trim. dr. h.* 161, at pp. 164-65).

I am therefore of the opinion that it cannot be argued in this case that the duty to act fairly meant the appellant had to be given the opportunity to express her views during the initial examination of the complaint, despite the possible consequences of the decision to hold an inquiry concerning her and perhaps to suspend her during that inquiry pursuant to s. 276 CJA. The appointment of an examiner is the first step in a procedure that can itself be described as preliminary, since after the formal inquiry the Conseil and the Comité can of their own initiative only reprimand the judge concerned or recommend that removal proceedings be initiated. It will be recalled that removal is ultimately not their responsibility but that of the government, following an inquiry by the Court of Appeal (s. 95 CJA). In this context and in the specific circumstances of the case, the Conseil's decision to depart from the usual procedure by not appointing an examiner certainly cannot be seen as evidence of bias.

The appellant argues, however, that the Conseil's precipitousness is apparent from other circumstances, specifically the October 25, 1990 session to which she was invited to explain why s. 276 CJA should not be applied to her. In the appellant's submission, this confirms the fact that the Conseil had prejudged the question of suspending her during the inquiry before even hearing what she had to say.

The most worrying aspect of this question was raised during the hearing of the appeal, namely that by asking the appellant to justify why she should continue in her position during the inquiry, the Conseil actually transferred to her the burden of proof it had to discharge under s. 276 *CJA*. However, a careful examination of the transcript of proceedings for the October 25, 1990 session, a copy of which is in the record, shows that if there was any confusion on the question, it was entirely cleared up when the chairman of the Conseil, at pp. 56-57, made it clear to counsel for the appellant that there was no burden of proof on him in this regard.

In fact, the Conseil explained, at p. 46, that it would decide the suspension issue on the basis of factors set out in the complaint and all the documents accompanying it, but that before making its decision it was giving the appellant an opportunity to be heard. It is true that the process seems to have been conducted with diligence, but in my view this becomes less significant when the October 25 session is no longer seen as an isolated event. It must not be forgotten that the Conseil was already aware of certain facts that could *prima facie* have justified a suspension during the proceedings. These included the first agreement between the appellant and the complainant that she would not sit during the inquiry into Mr. Lapointe's complaint and the appellant's clearly expressed intention to continue behaving in a similar manner despite being reprimanded by the Conseil on September 19, 1990. The specific nature of Chief Judge Gobeil's complaint should also be considered: unlike that of Mr. Lapointe, which was based on precise facts, it is based primarily on Judge Ruffo's general conduct and on the fear that some types of conduct affect the public's perception of the impartiality of judicial institutions. The advisability of ordering a suspension depends on the judge's ability to act with the confidence of the parties and to continue to carry out his or her duties in a manner consistent with public order. It is clear that such factors were directly in issue in the present case owing to the very nature of the complaint. In addition, since the Comité was required to begin its inquiry within thirty days after communicating the complaint to the judge concerned (s. 271, para. 2 *CJA*), it was appropriate for the Conseil to deal with the suspension issue at the October 25, 1990 session: this gave it enough time to make an informed decision before the inquiry began within the time prescribed by the *CJA*.

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My colleague Justice Sopinka expresses surprise at the Conseil's refusal to hear the appellant on the appearance of bias by the Comité resulting from the complainant's identity at the hearing on suspension of the appellant, on the ground that it had already ruled on this matter at the meeting of the Conseil on October 17, 1990 when the complaint was received and the Comité set up. I note that in raising the question of the jurisdiction of the Conseil and the Comité, counsel for the appellant indicated some uncertainty as to whether this argument should be raised before the Conseil or directly by evocation in the Superior Court, and made a point of asking, so as to avoid unnecessary preparation and argument, whether the Conseil would be prepared to reconsider its earlier decision. The answer to this was that the decision on the Conseil's jurisdiction to receive the complaint and set up a committee of inquiry had already been made on October 17 and it would not reconsider that decision. The hearing on the suspension of the appellant from performing her duties was adjourned to October 30, 1990. On October 29, as we know, she initiated through her counsel the proceedings in evocation and for a stay order in the Superior Court. I do not see how these circumstances suggest any untoward precipitous conduct on the part of the Conseil.

94

In view of the circumstances as a whole, I agree with the unanimous opinion of the Court of Appeal that there is no reason in the instant case to find that there was any precipitous conduct that might give rise to a reasonable apprehension of bias on the part of the Conseil members.

(b) *The Tone and Language of the Complaint*

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It should be noted at this point that it was at the Court of Appeal's invitation that counsel for the parties were able to express their views on the question of how the Chief Judge's complaint was worded: the appellant's motion in evocation, which is in the record, does not refer specifically to this issue except in paragraphs 68 and 79, which state respectively that the complaint expresses unequivocal opinions and that it makes accusations based on supposed intentions. It seems clear that this issue was not deliberately made the focus of the case. Be

that as it may, it is worth reproducing here in full those parts of the complaint that

Rothman J.A., at pp. 186-87, found incompatible with Chief Judge Gobeil's status:

[TRANSLATION] [The appellant's] comments, it cannot be ignored, occur in a specific and extremely serious context, following a lengthy decision by the Comité d'enquête of the Conseil de la magistrature confirming four breaches of professional ethics by Her Honour Judge Andrée Ruffo and, by majority decision, recommending the reprimand (one member proposing that it be recommended to the Minister of Justice that he present a request pursuant to [section 95](#) of the [Courts of Justice Act](#)).

A reprimand by the disciplinary authority of a professional body is a very harsh sentence, and everyone expects that the person who is the subject of the reprimand will submit to it peremptorily with deference, with wise discretion and with the dignity that such circumstances dictate.

What is true for a professional person should be even more true for a judge, whose function is precisely to render enforceable judgments, decisions and sentences, and the reserve in his or her conduct and expression, out of deference to the authorities imposing the sanction, should be absolutely exemplary in the community.

A reprimand is meaningful and its use as an appropriate disciplinary measure is credible within the community only to the degree that the subject of the reprimand, in this case a judge, accepts it with dignity, recognizing her failings and sincerely wishing to mend her ways. If some other course of action were to be allowed, it would make the reprimand an absolutely useless, if not ridiculous, remedy, and very seriously affect the credibility of the disciplinary process itself, and consequently the very credibility of the judiciary. This is even more obvious in the face of a disciplinary report that is very judicious, very dispassionate, very respectful, and, in my opinion, of remarkable quality overall.

...

Thus, when the report of the Comité d'enquête concluded that not only could she not do what she did, and was prepared to do again, but that this constituted a breach of section 1 of the Code of Ethics, in deliberate disregard of the rule of law, so that the reprimand ought to have induced her to mend her ways in future, Her Honour Judge Ruffo made the above-quoted statements.

Accordingly, in doing so she contravened section 4 of the Code of Ethics, placing herself in a position where she cannot faithfully carry out her functions. [Emphasis added by Rothman J.A.]

Rothman J.A. went on to quote passages from the complaint in which the Chief Judge commented on the appellant's public statements about resources provided to children (at pp. 187-89):

[TRANSLATION] This set of documents discloses, among other things:

1. That Her Honour Judge Andrée Ruffo enjoys significant support, particularly because:

(a) of the nature of "the cause" of which she has made herself the champion: children;

(b) of the style in which she has pursued her cause, which has been characterized as "disturbing" and "denunciatory";

(c) of the fact that she is a judge.

2. That the conduct of Her Honour Judge Ruffo has created reactions of a nature such that, for many, she is a model of what a judge should be.
3. That, on the other hand, some disagree with the fact that, being a judge, she behaves publicly as she does, regardless of the merit of the cause she has embraced.
4. That, for some people, who have confused the nature of the complaints to the Conseil's Comité d'enquête with her later conduct, she is being treated unfairly by the judiciary and the Conseil de la magistrature.
5. That a great number, given the merit of Ms. Ruffo's cause and her tenacity or enthusiasm in defending or promoting it, overlook or subordinate the ethical issue of her conduct in face of the rules of professional ethics governing judges and the fundamental concept of acting in a reserved manner.
6. That Ms. Ruffo has for some people become the almost exclusive symbol of the struggle on behalf of children and their rights.
7. That her conduct has brought her support that is completely inappropriate for a judge; the support of five parliamentarians, as elected members.
8. *That Her Honour Judge Ruffo has become "a case", "an affair: the Ruffo affair", which puts squarely at issue the objectivity, impartiality and independence that a judge must be seen to demonstrate in all circumstances.*

I have referenced my intervention to date to specific complaints. It is possible that, as I submit, some specific actions, some specific situations constitute specific breaches of the code of ethics. However, it is impossible, in the case of Her Honour Judge Ruffo, not to consider the conduct as a whole that she has voluntarily and deliberately adopted for more than two years and that has now made her a known public figure, a "star", a "heroine", a "Joan of Arc", "an affair".

Notwithstanding the opinion of her Chief Judge, notwithstanding certain public disagreements, notwithstanding the disagreement of her colleagues, which is known to her; and, since September 19, 1990, notwithstanding the report of the Comité d'enquête and the reprimands addressed to her by the Conseil, she says she does not wish to change her style and states publicly that she intends to continue.

...

The totality of the observations, comments, criticisms, denunciations, positions, statements and associations with groups and campaigns, and the frequency of same, regardless of forum, and her attitude since the reprimand of September 19, now lead me to *conclude as follows in the case of Her Honour Judge Andrée Ruffo:*

1. *She has violated and continues to violate the duty to act in a reserved manner which every judge is required to observe;*
2. *She has ignored and continues to ignore the imperative duty of impartiality and objectivity of the Code of Ethics and of the [Canadian Charter of Rights and Freedoms](#) and of the [Quebec Charter](#) of Human Rights, which she invoked on her own behalf when she claimed she had been deprived of her fundamental right of free speech;*
3. *She has been and continues to be heedless about preserving the independence of the judiciary and accordingly of the courts, the independence of which is guaranteed to citizens by the Canadian and Quebec charters;*
4. *She has either engaged in activities or associated with movements or campaigns the positive value of which is of course obvious, but in a manner and in circumstances incompatible*

with the exercise of judicial authority;

5. In practice, she has placed herself in a position where she cannot faithfully carry out her functions;

6. Her obvious desire to make the general public the judge of the ethical situation and of her disagreement with the findings of the report of the Comité d'enquête and the reprimand of the Conseil de la magistrature offends judicial dignity in the ethical meaning of the word and impeaches the independence of the judiciary, from which she cannot dissociate herself as an institution. [Emphasis added by Rothman J.A.]

96 I note at the outset that the complaint's tone and content must be assessed on the basis of its specific nature: as I stated earlier, it focuses on an overall situation involving both a judge's conduct and the public's possible perception thereof. By raising what he considered a violation of the duty to act in a reserved manner, Chief Judge Gobeil was relying on a flexible and all-encompassing concept, which meant that the complaint had to set out such basic information as the nature of the rule to be observed, the facts that indicated the violation and the appropriate remedy in the specific circumstances of the case. I will have an opportunity to outline this concept later.

97 Because of the general nature of the duty to act in a reserved manner, it was thus necessary for the complainant to specify and explain the relevant aspects that he felt might impair Judge Ruffo's ability to perform her duties, and in particular to continue to be seen as impartial. In light of this, it was clearly helpful to deal with specific facts and also to describe a more general situation. This required the complainant to assess the impact of a body of information. Because of the quantity and scope of the impugned attitudes and facts, the complaint resembles an indictment, and it is true that this is reinforced by the tone used by its author. However, the complainant cannot be criticized for setting out facts and conduct that were no more nor less than the matter to be assessed by the Comité, however extensive it might be. This matter could not in itself affect a reasonable and well-informed person's perception of the Comité's impartiality.

98 In fact, the concerns expressed about the complaint have to do with the fact that it passes judgment. Although this is inherent in any complaint, the Chief Judge is being criticized here specifically for his categorical and condemnatory language. The complaint shows that Chief

Judge Gobeil and Judge Ruffo disagreed in their respective ideas about judges' freedom of expression. It is true that in this respect one might have wished that the complaint had been worded more neutrally and that after setting out the relevant facts it had simply concluded that an inquiry was needed. Without approving the wording that the Chief Judge chose to use for this purpose, I note that while he vigorously condemned the appellant's conduct he did not attack her personally. It should be specified in this regard that expressions such as "Joan of Arc", "Ruffo affair" and "accusatory", which seem vindictive at first glance, in fact merely restate terms used by the press itself. They were used to illustrate the nature of the allegations made by the Chief Judge, who was not, however, the source of such comments. In addition, it should be mentioned that the Chief Judge criticized the appellant not for espousing a cause -- he himself considered it a worthwhile one -- but for doing so as a member of the judiciary. The appellant's suggestion that the complaint makes accusations based on supposed intentions can therefore not be accepted, as the Chief Judge's concerns related not to illegitimate intentions but to activities and the public's perception of them.

99

In the final analysis, what is in issue here is the tone used and the position of the person using it, not so much on their own account as because of their anticipated effect on a well-informed person's perception of the impartiality of the Comité responsible for deciding the outcome of the complaint in this case. To evaluate whether this apprehension is justified, it is necessary to assess the position of both the Chief Judge and the decision maker as well as the relationship between them. It is not necessary at this point to repeat the earlier analysis with respect to institutional bias. It should suffice to note that the Chief Judge's position carries with it no, or at best very little, direct or material authority. His moral authority, moreover, is legitimate and would be harmful only if it led the decision maker to adopt opinions it did not share. The Comité is for the most part made up of judicial professionals who are bound by an oath and whose functions essentially require them to be able to decide dispassionately between positions that are diametrically opposed and generally fervently defended. On this point, I adopt the comments of Chevalier J.A., at p. 199:

[TRANSLATION] [A] well-informed citizen cannot be unaware that hearing and determining disputes is a judge's bread and butter. He is therefore, by necessity, required

to work in an essentially adversarial context in which the parties naturally display hostility toward each other, accusing each other, attacking and counter-attacking, and in which the exaggeration with which they often present their respective positions is commonplace in his court.

This typical judge is thus, to the knowledge of the informed citizen, a professional accustomed to presiding day after day over acrimonious debates in the midst of which he must remain serene, keep calm and in all circumstances separate what is receivable from what is not.

100 To conclude on this point, mention should be made of *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990 CanLII 132 \(SCC\)](#), [1990] 1 S.C.R. 282, in which this Court had to rule on the validity of the Ontario Labour Relations Board's practice of holding a meeting of the full Board to discuss the draft of the decision to be rendered by a three-member panel. This practice had been institutionalized to promote consistency in Board decisions.

101 A majority of the judges of this Court found that such discussions did not prevent a decision maker from adjudicating in accordance with his or her own conscience or constitute an obstacle to his or her freedom, as the ultimate decision would be that of the decision maker for which he or she would assume full responsibility. Applied to the circumstances of the present case, the principle underlying this finding suggests that the experience of Comité members confirms their independence and impartiality. They have nothing to gain by not deciding as their consciences dictate and nothing to lose by doing justice. There is accordingly no reason to fear that Comité members would be influenced by the language of the complaint or the particular status of its author.

102 In light of the foregoing, I am of the view that the specific circumstances of the case cannot give rise to an apprehension in the mind of a reasonable and well-informed person that the members of the Conseil and of the Comité do not have the impartiality necessary to perform their duties.

B. Whether Section 8 of the Code of Ethics is Void for Vagueness

103 In support of her appeal, the appellant is challenging, under [s. 2\(b\)](#) of the [Canadian Charter](#), the constitutional validity of s. 8 of the *Code of Ethics*, which establishes the duty of

judges appointed under the *CJA* to act in a reserved manner. With respect, since the Comité has not yet had an opportunity to hear the merits of the case, it appears premature for this Court to rule on this delicate issue, in a context in which no evidence has been adduced and no light can be shed on the issue by lower court judgments (see in this regard *Mackay v. Manitoba*, [1989 CanLII 26 \(SCC\)](#), [1989] 2 S.C.R. 357, at pp. 361-63; *Danson v. Ontario (Attorney General)*, [1990 CanLII 93 \(SCC\)](#), [1990] 2 S.C.R. 1086, at pp. 1099-1101; and *Hy and Zel's Inc. v. Ontario (Attorney General)*, [1993 CanLII 30 \(SCC\)](#), [1993] 3 S.C.R. 675, at pp. 693-94). The issue submitted to this Court by the appellant is one relating to application, which must be shaped by circumstances and should not be dealt with in the abstract.

Accordingly, the following comments will be confined to the subject matter of

s. 8 of the *Code of Ethics* rather than its application to the facts involved in this case. I have reproduced the section below for ease of reference:

8. In public, the judge should act in a reserved, serene and courteous manner.

104 When the appeal was heard, the appellant focused her argument on the vagueness of the duty to act in a reserved manner. I note, however, that she discontinued her appeal to this Court in the case that dealt directly with this issue (*Ruffo v. Conseil de la magistrature*, [1989] R.J.Q. 2432 (Sup. Ct.), Philippon J., aff'd (1992), [1992 CanLII 3258 \(QC CA\)](#), 98 D.L.R. (4th) 202 (Que. C.A.)). Nevertheless, I feel that certain observations on this question are in order.

105 I had an opportunity to consider the vagueness theory in depth in *R. v. Nova Scotia Pharmaceutical Society*, [1992 CanLII 72 \(SCC\)](#), [1992] 2 S.C.R. 606. The same analysis also served as a premise for my reasons in *Ontario v. Canadian Pacific Ltd.*, [1995 CanLII 112 \(SCC\)](#), [1995] 2 S.C.R. 1031. Essentially, a legal norm will be found to be sufficiently precise if it gives rise to "legal debate", as I explained at pp. 639-40:

[These norms] bear substance, and they allow for a discussion as to their actualization. They therefore limit enforcement discretion by introducing boundaries, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens.

A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary. This is an exacting standard, going beyond semantics. [Emphasis added.]

106 The assessment of whether the duty to act in a reserved manner falls within these parameters certainly requires that this duty be defined with a certain clarity. However, I do not think it is up to this Court to define the duty in relation to the specific circumstances of the case: the responsibility for doing so lies primarily with the Comité and, more generally, with the individuals and bodies responsible for judicial ethics. Furthermore, the responsibility for determining what behaviour best reflects the requirements inherent in this duty, and for adopting that behaviour, lies primarily with each judge, whose appointment is a sign of confidence in him or her personally.

107 The duty of judges to act in a reserved manner is a fundamental principle. It is in itself an additional guarantee of judicial independence and impartiality, and is aimed at ensuring that the public's perception in this respect is not affected. The value of such an objective can be fully appreciated when it is recalled that judges are the sole impartial arbiters available where the other forms of dispute resolution have failed. The respect and confidence inspired by this impartiality therefore naturally require that judges be shielded from tumult and controversy that may taint the perception of impartiality to which their conduct must give rise.

108 The duty to act in a reserved manner has been enshrined in principle at the international level in various documents, including the *Universal Declaration on the Independence of Justice* adopted unanimously at the final plenary session of the World Conference on the Independence of Justice held in Montreal on June 10, 1983 and set out in S. Shetreet and J. Deschênes, eds., *Judicial Independence: The Contemporary Debate* (1985), at pp. 447 *et seq.* It provides as follows:

2.10 Judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary. Subject to this principle,

judges shall be entitled to freedom of belief, expression, association and assembly. [Emphasis added.]

As well, the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which was held in Milan in 1985, adopted the *Basic Principles on the Independence of the Judiciary* (published in 1988 by the United Nations Department of Public Information), which provide *inter alia* as follows:

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary. [Emphasis added.]

109 A number of writers have also dealt with the duty to act in a reserved manner. See, for example, Canadian Judicial Council, *Commentaries on Judicial Conduct* (1991); The Hon. Mr. Justice Thomas, *Judicial Ethics in Australia* (1988); Steven Lubet, *Beyond Reproach: Ethical Restrictions on the Extrajudicial Activities of State and Federal Judges* (1984); Shetreet and Deschênes, *supra*; A. W. MacKay, "Judicial Free Speech and Accountability: Should Judges Be Seen but Not Heard" (1993), 3 *N.J.C.L.* 159; M. Felsky, "The Berger Affair and the Independence of the Judiciary" (1984), 42(1) *U.T. Fac. L. Rev.* 118; J. Webber, "The Limits to Judges' Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon. Mr. Justice Berger" (1984), 29 *McGill L.J.* 369; and L. Dion, "Plus de démocratie pour les juges" (1981), 41 *R. du B.* 199. There is no need to discuss the specific content of these documents here; it should simply be noted that they all reach the same conclusion: they recognize in every respect that there is a need for standards of conduct within the judiciary designed to maintain the public's confidence in it so as to ensure the continuity of the rule of law in its present form. I recognize that the same consensus does not exist among these writers regarding how such standards can be translated into conduct, be it conduct that is appropriate in court or conduct that judges may adopt in public. Some are strict while others advocate greater freedom. This situation, which some see as a sign of dissatisfaction and as a clear invitation to establish more precisely defined parameters for the

duty to act in a reserved manner, is in my opinion legitimate and natural. It is simply the reflection of ethical rules themselves, which by nature are difficult to define precisely.

110 Ethical rules are meant to aim for perfection. They call for better conduct not through the imposition of various sanctions but through compliance with personally imposed constraints. A definition, on the other hand, sets out fixed rules and thus tends to become an upper limit, an implicit authorization to do whatever is not prohibited. There is no doubt that these two concepts are difficult to reconcile, and this explains the general nature of the duty to act in a reserved manner: as an ethical standard, it is more concerned with providing general guidance about conduct than with illustrating specifics and the types of conduct allowed. It is interesting to note in this regard the comments of Professor H. Patrick Glenn on the *Code of Ethics* adopted in 1987 by the Canadian Bar Association. They are of general application and particularly enlightening in this context: "It is, in short, a Code which instructs in how to act, and not in what to do" (see "Professional Structures and Professional Ethics" (1990), 35 *McGill L.J.* 424, at p. 438). Moreover, the distinctive nature of ethical standards becomes apparent when they are compared with the standard for recusation set out in [art. 234](#) of the *Code of Civil Procedure*, R.S.Q., c. C-25. Article 234 contains a series of precisely defined criteria such as relationship, mortal enmity and conflict of interest, which when present make it possible to initiate recusation proceedings against a judge. Recusation is therefore a necessary sanction for a violation that has already occurred or been perceived, whereas the primary purpose of ethics, in contrast, is to prevent any violation and maintain the public's confidence in judicial institutions. It goes without saying that the same legislative response is not required for these two separate concepts.

111 In short, more precision cannot be required of ethical rules than their subject matter allows. This does not in itself violate the principle that a professional whose conduct is in question must be able to know both the specific facts alleged against him or her and the substance of the standard he or she is alleged to have breached. In "L'imprécision des codes de déontologie professionnelle" (1977), 37 *R. du B.* 669, at p. 671, Y. Ouellette makes the following comments on this point, which still hold true:

[TRANSLATION] . . . breaches of discipline do not have to be defined as precisely as penal offences. Codes of ethics and discipline may thus be considered an exception to the rule that regulations must be certain or precise.

Indeed, an examination of some codes of professional ethics reveals a number of provisions that, while vague, set out fundamental principles that by their very nature are general yet probably perfectly intelligible to those in the profession. [Emphasis added.]

112 This last passage illustrates the distinction that must be made between vagueness in the everyday sense and constitutional vagueness. In this respect, the general nature of the duty to act in a reserved manner as it is worded does not, as far as substance is concerned, mean that an area of risk is not sufficiently delineated or that there is no adequate basis for legal debate, as I explained in *Nova Scotia Pharmaceutical Society, supra*. By way of illustration, I should mention that the issue of the duty to act in a reserved manner was discussed in *Ruffo v. Conseil de la magistrature*, [1989] R.J.Q. 2432 (Sup. Ct.), Philippon J., aff'd (1992), [1992 CanLII 3258 \(QC CA\)](#), 98 D.L.R. (4th) 202 (Que. C.A.); the Superior Court and the Court of Appeal both found that the concept had an identifiable content that was sufficiently precise to operate as a professional standard. This is certainly an eloquent example of a matter that can give rise to legal debate. Accordingly, and in light of the principles set out above, I am of the view that there is no reason to find that the duty to act in a reserved manner is void on the ground of vagueness.

VI - Disposition

113 I would dismiss the appeal with costs throughout and answer the constitutional questions as follows:

1. Do ss. 263 and 265 of the [Courts of Justice Act](#), R.S.Q., c. T-16, if they are to be interpreted as allowing the Chief Judge of the Court of Québec and Chairman of the Conseil de la magistrature to bring a complaint against a judge of the Court of Québec before the Conseil de la magistrature, violate the principles of judicial impartiality and independence guaranteed *inter alia* by the preambles to the [Constitution Act, 1867](#) and the [Canadian Charter of Rights and Freedoms](#), as well as by s. 7 of the *Canadian Charter of Rights and Freedoms*?

A. No.

2.If the answer to question 1 is affirmative, do ss. 263 and 265 of the *Courts of Justice Act* constitute reasonable limits prescribed by law that can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

A. The question does not arise.

3.Does s. 8 of the *Judicial Code of Ethics*, O.C. 643-82, (1982) 114 G.O. II, 1253, which provides that judges of the Court of Québec should act in a reserved manner, violate s. 2(b) of the *Canadian Charter of Rights and Freedoms*?

A.It is premature for the Court to rule at this stage on the question as stated. However, the duty to act in a reserved manner is not found to be unconstitutional for vagueness.

4.If the answer to question 3 is affirmative, does s. 8 of the Code constitute a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

A. The question does not arise.

English version of the reasons delivered by

114 SOPINKA J. (dissenting) -- Having read the reasons of my colleague Justice Gonthier, I would answer the constitutional questions as he does and for the reasons he gives.

115 Nevertheless, on the question of the validity of s. 8 of the *Judicial Code of Ethics*, O.C. 643-82, (1982) 114 G.O. II, 1253, in light of s. 2(b) of the *Canadian Charter of Rights and Freedoms*, I would add the following comments. Although s. 8 is not void for vagueness, it is open to very broad interpretation. Before determining whether it imposes an unreasonable limitation on freedom of expression, it would be preferable to know how it will be interpreted by the Conseil de la magistrature (the "Conseil") or the Comité d'enquête (the "Comité"). An appellate court has a duty to respect as far as possible the interpretation given to rules of ethics by the professional body responsible for applying them. See in this regard *MacDonald Estate v. Martin*, 1990 CanLII 32 (SCC), [1990] 3 S.C.R. 1235.

I agree with Gonthier J. that the legislative structure under which the Conseil receives and deals with complaints made against judges does not violate the principle of judicial independence. In this sense, therefore, I cannot conclude that there is any inherent or inevitable bias in the legislative framework: there is no reason to suppose that in every case, or even in a substantial majority of cases, a reasonable apprehension of bias would be raised in the mind of a well-informed person. However, the situation here is one which approaches the threshold of tolerance. An appearance of bias may result in some circumstances even though the process followed is consistent with the statutory rules. For example, if the Chief Judge filed a complaint and appeared at the hearing as a party to the action, presented evidence to support the complaint and cross-examined the judge concerned and his or her witnesses, it would be difficult to conclude that there is no appearance of bias. This situation was avoided here since the Chief Judge agreed to appear and testify before the Comité without in so doing acting as a party to the proceedings. Nevertheless, I concur in the view of Rothman J.A. of the Court of Appeal that the Chief Judge's authority to file a complaint places the Conseil and the Comité "close to the edge of the fine line that separates . . . impartiality and . . . partiality" ((1992), [1992 CanLII 3257 \(QC CA\)](#), 98 D.L.R. (4th) 176, at p. 185). I conclude that a number of factors, including the tone and language of the complaint, when taken together go beyond the limits and so raise a reasonable apprehension of bias. Consequently, and with respect, I cannot share my colleague's view on this question.

Although I subscribe to Rothman J.A.'s opinion that the tone and language of the complaint are inappropriate, I am of the view that certain other important factors should not be overlooked. As de Grandpré J. put it in *Committee for Justice and Liberty v. National Energy Board*, [1976 CanLII 2 \(SCC\)](#), [1978] 1 S.C.R. 369, a well-informed person must have all the necessary information. The question of bias must therefore be assessed in general terms taking into account all relevant aspects. A well-informed person would not assess each aspect in isolation without regard to context. Whereas any one aspect would undoubtedly not create an apprehension of bias, when taken together they might well lead to the opposite result. In my view, therefore, the general context of the case at bar reinforces Rothman J.A.'s conclusion, with which I entirely agree, that the tone and language of the complaint are

sufficient to raise an apprehension of bias. I will now proceed to consider the various relevant factors.

118 I do not agree that the second complaint can be considered apart from the circumstances surrounding the first complaint. The second complaint, laid by Chief Judge Gobeil, seems to have resulted from the appellant's allegedly inappropriate conduct following the reprimand contained in the decision of the Comité on the first complaint. A significant part of the second complaint is based on the allegation of the appellant's contempt for the decision rendered by the Comité and given effect to by the Conseil (it should be noted that in connection with the reprimand the Conseil must act on the Comité's recommendation: s. 279 of the *Courts of Justice Act*, R.S.Q., c. T-16 ("CJA"): the Comité's recommendation is thus binding on the Conseil). After listing the comments and conduct attributed to the appellant, Chief Judge Gobeil said the following in his complaint:

[TRANSLATION] These comments, it cannot be ignored, occur in a specific and extremely serious context, following a lengthy decision by the Comité d'enquête of the Conseil de la magistrature confirming four breaches of professional ethics by Her Honour Judge Andrée Ruffo and, by majority decision, recommending the reprimand (one member proposing that it be recommended to the Minister of Justice that he present a request pursuant to s. 95 of the *Courts of Justice Act*).

...

A reprimand is meaningful and its use as an appropriate disciplinary measure is credible within the community only to the degree that the subject of the reprimand, in this case a judge, accepts it with dignity, recognizing her failings and sincerely wishing to mend her ways. If some other course of action were to be allowed, it would make the reprimand an absolutely useless, if not ridiculous, remedy, and very seriously affect the credibility of the disciplinary process itself, and consequently the very credibility of the judiciary. This is even more obvious in the face of a disciplinary report that is very judicious, very dispassionate, very respectful, and, in my opinion, of remarkable quality overall.

...

Thus, when the report of the Comité d'enquête concluded that not only could she not do what she did, and was prepared to do again, but that this constituted a breach of s. 1 of the Code of Ethics, in deliberate disregard of the rule of law, so that the reprimand ought to have induced her to mend her ways in future, Her Honour Judge Ruffo made the above-quoted statements.

Accordingly, in doing so she contravened s. 4 of the Code of Ethics, placing herself in a position where she cannot faithfully carry out her functions.

119 The complaint even points to the fact that the Comité's decision on the first complaint was the subject of a dissent recommending that a motion to remove be filed with the Minister of Justice. This dissenting member, Judge Mercier, chairman of the Conseil for the second complaint, had to rule on the matter which is the subject of the present appeal at the Conseil's hearing on October 25, 1990. It should be noted that of the five members of the Comité three are judges of the Court of Québec, including an associate chief judge and a co-ordinating judge, one is the Chief Judge of the Municipal Court of Montréal and one is a lawyer. That is the makeup of the Comité which is to hear a complaint filed by someone who is the chief judge of a majority of its members. Chief Judge Gobeil is also the chairman of the Conseil from which the members of the Comité were appointed. One of the principal charges in the complaint refers to the appellant's disregard of the Comité's decision on the first complaint, which was approved by the Conseil: all the members of the Comité set up to hear the second complaint were members of the Conseil which issued the reprimand following the first complaint.

120 In accordance with a suggestion by Chief Judge Gobeil the Comité agreed to appoint counsel to handle the presentation of evidence against the appellant. This procedure is supposed to avoid any awkward consequences resulting not only from the ability of the Chief Judge (or his counsel) to file a complaint, recognized by the *CJA*, but also from his authority to present the necessary evidence and make the arguments in support of the complaint. Even though the appointment of counsel by the Comité is in fact provided for in the *CJA* (s. 281), this is a rather unusual procedure in a disciplinary context. It places the parties in a situation where the opponent of the person defending himself or herself against the complaint is the tribunal's counsel.

121 I am also of the view that the proceedings which followed the filing of the complaint indicate unwarranted haste. The usual practice of making a member of the Conseil responsible for the receipt and preliminary examination of the complaint was not followed in this case. I am not persuaded that this stage is optional, as the respondents argued. Under s. 265 *CJA*, the Conseil must examine the complaint before deciding whether an inquiry is

necessary: if it is, the Conseil appoints a comité d'enquête. The purpose of the preliminary examination is to ensure that the complaint is well-founded (s. 267 CJA). It is thus a stage which acts as a screening device to eliminate frivolous or unjustified complaints that do not require further inquiry. Clearly, a disciplinary inquiry is a traumatic ordeal for a judge: the stage of the preliminary examination thus gives the judiciary important protection. Whether or not it is mandatory, I am not impressed by the explanation offered to justify the decision to bypass the usual stage of the preliminary inquiry. It was suggested to the Court that the detailed nature of the second complaint made such an examination superfluous. It must be assumed that the Conseil intended to perform its statutory duty itself in assessing the complaint, on October 17, 1990. A complaint, however, is only an allegation. The provisions of the CJA contemplate more than just a superficial examination of the complaint. The CJA provides that the Conseil may require any person to provide information it considers necessary and that it must forward a copy of the complaint to the judge concerned and ask for an explanation. The fact that this stage was bypassed gives the impression that the Conseil dealt with the complaint as evidence and not merely as an allegation.

122

The same sense of haste was displayed on October 25, 1990, when the appellant and her counsel were called before the Conseil to determine whether the appellant should be suspended during the inquiry as permitted by s. 276 CJA. It would appear that the Conseil sought to reverse the onus of proof, at least initially, by demanding that the appellant show why she should not be suspended during the inquiry. When counsel for the appellant objected, this approach was apparently abandoned. However, the Conseil refused to hear the arguments of counsel for the appellant on the question of the Conseil and the Comité's jurisdiction, pointing out to him that this question had already been decided at the meeting of the Conseil on October 17, 1990, at which the complaint had been received and the Comité set up. One of the appellant's arguments had to do with the appearance of bias on the part of the Comité resulting from the complainant's identity. I find it surprising that the Conseil refused to hear the appellant on such a serious matter as the jurisdiction of the Conseil and Comité, on the ground that it had already ruled on this matter *ex parte* and *proprio motu*. My colleague is of the view that the speed of the proceedings was due to the statutory duty to call the parties

within thirty days of receiving the complaint. I do not agree that the relevant provision imposes such a time limit on the presentation of evidence. In my opinion, only the calling of the parties is required, and there is no reason why this could not have taken place on October 25, 1990. In any case, the Conseil and Comité do not appear to have proposed such an explanation for this precipitous conduct. Madam Justice Hélène LeBel dealt with the matter in connection with a motion for a stay order filed by the appellant in the Superior Court. The motion was granted on November 1, 1990. LeBel J. said the following concerning precipitousness:

[TRANSLATION] . . . additionally, the court was not given any evidence or any indication that special reasons exist in this case to justify or require immediate action.

(*Ruffo v. Conseil de la magistrature*, Sup. Ct. Mtl., No. 500-05-014569-907, November 1, 1990, J.E. 91-31.)

123 This therefore is the context in which the tone and language of the complaint filed by Chief Judge Gobeil must be considered. It is not necessary to repeat Rothman J.A.'s comments on the subject. He noted that the complaint is more in the nature of a judgment than a complaint: that is an accurate observation. I cannot agree with my colleague's opinion that passing judgment is inherent in any complaint. Like any statement of claim, a complaint should contain allegations and avoid the expression of personal opinions or conclusions. This complaint contains both which are expressed with considerable vehemence.

124 I agree with my colleague when he says that the scope of the rules of natural justice varies depending on the circumstances, in particular the consequences that may result from an inquiry. I cannot agree, however, that the proceedings in question were purely or primarily in the nature of an inquiry. The Comité may make an official reprimand and may even recommend that removal proceedings be instituted. Regardless of the question of removal, it must be recognized that a reprimand is an extremely serious punishment for a judge. A reprimanded judge is a weakened judge: such a judge will find it difficult to perform judicial duties and will be faced with a loss of confidence on the part of the public and litigants. This reality is recognized by Chief Judge Gobeil in his complaint when he says:

[TRANSLATION] A reprimand by the disciplinary authority of a professional body is a very harsh sentence, and everyone expects that the person who is the subject of the reprimand will submit to it peremptorily with deference, with wise discretion and with the dignity that such circumstances dictate.

125 The merits of the complaint against the appellant are not at issue in this appeal. The Court is concerned here with an appearance of bias on the part of the tribunal in light of the circumstances I have tried to outline above. Every judge, like every citizen, has the right to a hearing by a tribunal which inspires public confidence. Observance of this right is especially important when the reputation and livelihood of a judge or a citizen are at stake. What must be determined is not whether the tribunal actually did, or is likely to, demonstrate bias. On the contrary, I am persuaded that the members of the Comité harbour no prejudices against the appellant. Nonetheless, the law in this area recognizes that it is not possible to determine accurately the actual state of mind of a tribunal. It is for this reason that the appellant only has to establish an appearance of bias in order to oust the tribunal's jurisdiction. For this purpose the law adopts the fiction of the well-informed person as a means of referring to public opinion concerning the credibility of these proceedings. If there is an appearance of bias, neither the public nor the parties can trust the findings of the inquiry. Considering all the circumstances surrounding this matter, I have come to the conclusion that a well-informed person would have a reasonable apprehension of bias. The record thus leaves the impression that the appellant would not have the benefit of an impartial hearing or order concerning the complaint laid against her by Chief Judge Gobeil.

126 I would accordingly allow the appeal, set aside the judgment of the Court of Appeal and those of the lower tribunals and quash the complaint and all related proceedings, the whole with costs against the respondents throughout.

Appeal dismissed with costs, SOPINKA J. dissenting.

Solicitors for the appellant: Langlois Robert, Montréal.

Solicitors for the respondents: McCarthy Tétrault, Montréal.

Solicitor for the mis en cause the Honourable Albert Gobeil: François Aquin, Montréal.

*Solicitor for the mis en cause the Attorney General of Quebec: The Department of Justice,
Sainte-Foy.*

Solicitor for the intervener: The Ministry of the Attorney General, Toronto.

Tab 135

R. v. Baldovi et al, 2016 MBQB 90 (CanLII)

Source: Court of Queen's Bench of Manitoba
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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:

HER MAJESTY THE QUEEN

- and -

) **COUNSEL:**

)

) Anne Turner and

) Janna Hyman

) for the Crown

)

) Wally Oppal, Q.C.

) for all accused (on joint motion)

)

) Sheldon Pinx, Q.C.

) for R. Baldovi

)

) Richard Wolson

) for C. Dhaliwal

RONALD BALDOVI, CAROL BANAYOS,	)	-
OLIVER BANAYOS, CHANDEEP DHALIWAL,	)	<u>Saul Simmonds</u>
CARA SMITH AND JASDEEP WARRAICH,	)	For J. Warraich
	)	
(Accused) Applicants.	)	<u>Evan Roitenberg</u>
	)	For O. Banayos
	)	
	)	<u>David Walker</u>
	)	for C. Smith
	)	
	)	<u>Katherine Smith</u>
	)	for C. Banayos
	)	
	)	<u>Judgment delivered:</u>
	)	May 6, 2016

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JOYAL, C.J.Q.B.

I. INTRODUCTION

[1] This case comes before me as a set of joint motions consented to by all accused (hereinafter referred to as the “accused”).

[2] This case has received considerable media attention, not only because of the serious crimes alleged to have been committed (drug, proceeds, firearm and conspiracy offences), but also, because of allegations made by the accused about their inability to receive impartial and unbiased pre-trial and trial determinations in this, the Manitoba Court of Queen’s Bench.

[3] The Manitoba Court of Queen’s Bench is the province’s highest trial court. It is where the province’s most serious criminal offences eventually appear and are adjudicated. As with any court, allegations of bias, real or apprehended, valid or invalid, are by definition serious and they can have an insidious effect on the integrity of a court’s reputation for administering impartial justice. Any suggestion of bias need be addressed by a judge and a court quickly, directly and with the safeguarding assistance and rigour of the governing legal test.

[4] These reasons address the accused's motion for my recusal. These reasons also address the order that the accused originally sought for the prohibition and disqualification of each and every judge of the Court of Queen's Bench on the basis of what the accused publicly asserted was a reasonable apprehension of bias. That particular motion was eventually and abruptly abandoned, but in my view still requires and will receive comment later in this judgment.

[5] These reasons will also explain my decision on the accused's earlier and connected motion for disclosure. I dismissed that motion for disclosure by way of an oral disposition following the hearing. At the time of that oral disposition, I indicated written reasons might follow. Those reasons are now included in this judgment.

[6] I set out immediately below the issues raised by the three original motions brought by the accused.

II. ISSUES

- (1) On the accused's motion for "disclosure", should the materials and items stipulated in the notice of motion be provided to counsel for the accused as relevant to the allegations of bias?
- (2) Are the background circumstances in the present case such that any judge of the Court of Queen's Bench of Manitoba ought to be disqualified and prohibited from adjudicating the matters to be considered in a joint motion to quash the wiretap authorizations?
- (3) Do the circumstances of this case and the role of the Chief Justice create a reasonable apprehension of bias with respect to the Chief Justice's adjudication of the matters to be considered on the joint motion to quash the wiretap authorizations?

III. BACKGROUND AND CONTEXT

[7] The accused were arrested in February of 2014 following a lengthy investigation conducted by members of the Winnipeg Police Service. The investigation was designated

as "Project Sideshow". This investigation utilized a series of authorizations to intercept private communications.

[8] The first *ex parte* application for an authorization was granted by Mr. Justice Mainella, then a judge of the Court of Queen's Bench, on January 18, 2013. He had been appointed to the Court of Queen's Bench of Manitoba on October 5, 2012. Prior to his initial appointment, Justice Mainella had been employed at the Winnipeg office of the Public Prosecution Service of Canada. He now sits as a judge of the Manitoba Court of Appeal.

[9] Prior to issuing the authorization on January 18, 2013, Justice Mainella would have had before him the approximately 250-page supporting affidavit of Detective Graham Grafton sworn on January 17, 2013. Detective Grafton's 250-page affidavit would have included – as such documents routinely do – supporting information respecting the criminal records or previous convictions of any of the targets who possess such criminal records. That same information about any previous criminal convictions possessed by any of the targets would have been before any other judge involved in the issuance of any subsequent authorization in connection to Project Sideshow.

[10] The supporting material for the first authorization would have been compendious and would have detailed a lengthy investigation which began in April of 2012 and which relied upon warrants which were sought and granted during the timeframe when Justice Mainella was still employed by the Winnipeg office of the Public Prosecution Service of Canada. Three of the primary targets of the Project Sideshow authorizations were individuals that Justice Mainella had jointly prosecuted for similar offences less than four years earlier. Those prosecutions involved Justice Mainella working with Ms. Judy Kliever of the Public Prosecution Service of Canada, who also was the coordinating prosecutor or "police agent" for the applications for wiretap authorizations in the present case.

[11] As a result of the Winnipeg Police Service investigation, which would have included the wiretap interceptions obtained as a result of the court authorizations, 23 individuals (including the six joint applicants in the present case) were arrested and charged with serious drug, proceeds, firearm and conspiracy offences. The six joint applicants in this

case have given notice of their intention to challenge the issuance of the wiretap authorizations based on, amongst other things, an alleged reasonable apprehension of bias on the part of Justice Mainella. As I explain later, that challenge to the issuance of the wiretap authorization will take place September 26-30, 2016.

[12] Following the conclusion of the police investigation and the direct indictment of all of the accused, I was asked to designate this matter as one deserving of case management pursuant to [s. 551.7](#) of the ***Criminal Code***.

[13] Given the nature of some of the identified motions that would require determination prior to trial (particularly the motion in relation to the alleged reasonable apprehension of bias on the part of all judges of the Manitoba Court of Queen's Bench), I acceded to the request for case management and I also assigned myself to the role of the case management judge. In that role, I would preside over not only the foundational challenge respecting bias (on the part of all judges of the Court of Queen's Bench), but also, I would preside over any other adjudication of issues relating to the granting of the wiretap authorizations. Following notification of my assigned role as case management judge, the accused proceeded to advise that they would also be seeking my recusal, again, on the basis of a reasonable apprehension of bias.

[14] The application for my recusal arises in connection to my current role as the case management judge and the above motions that I am set to decide. In seeking my recusal, the accused seem to base their application on the speculative assumption that I had specifically assigned Justice Mainella to be the "duty judge" who in turn, would preside over the *ex parte* application leading to the wiretap authorization. The accused also contend that the mere fact of my role and duties as Chief Justice of the Court of Queen's Bench creates the impression of an institutional protectiveness in relation to the Court of Queen's Bench judges and the system of assigning judges. The accused suggest that the assignment of Justice Mainella in this case, whether done knowingly or unknowingly by me or my office, can be perceived as having been endorsed by me and the court as a whole. The accused say that even an indirect role in the assignment or in the endorsement of the assignment creates a reasonable apprehension of bias.

[15] As I will explain later, the accused also seek my recusal based on a written public explanation provided by me to the Winnipeg Free Press in response to a journalist's questions posed in the context of an article written and appearing on May 5, 2014 in relation to this case. That article itself flows from comments made to a journalist by at least one of the accused respecting Justice Mainella's involvement in the issuance of the wiretap authorization. The comment was made by one of the accused as he awaited a decision on his application for bail in Provincial Court. The resulting headline of the May 5, 2014 article was "*Man Arrested in Huge Undercover Operation Raises Troubling Questions.*"

[16] As mentioned, apart from their concerns respecting my impartiality in the context of my role as case management judge, the accused also initially moved for the disqualification and prohibition of any and all judges of the Court of Queen's Bench from hearing this matter. That motion was based on what the accused said was the judges' "privity to the issue being decided and the potential that they [the judges of the Court of Queen's Bench] are possessed of information regarding the internal policies of the Court of Queen's Bench that are not before the court." The accused summarized their position even more starkly at para. 37 of their brief:

In summation, the Applicants submit that the circumstances surrounding the challenge to the Authorizations in this case creates a situation where the need for fairness and impartiality, and the appearance thereof, requires that no member of the Court of Queen's Bench be tasked with adjudicating and pronouncing on the propriety of the conduct of their former colleague who is now a sitting Justice of the Court of Appeal for Manitoba, the Chief Justice of the Court of Queen's Bench, or the collective administration of the court of which they are a member.

[17] In the lead-up to the motions explained above, the accused brought a separate motion for what they said was "the production of disclosure" from the Court of Queen's Bench. In that regard, the accused enumerated a number of items which they argue are "relevant" in relation to the motion for my recusal and the motion for prohibition and disqualification of all other Court of Queen's judges. The accused submitted that the "disclosure" was also relevant in respect of the future motion in connection to the challenge of the authorization granted by Justice Mainella. In short, all of the disclosure/production sought in the items stipulated in the accused's notice of motion

relate to that aspect of the accused's argument wherein they contend a reasonable apprehension of bias on the part of Justice Mainella, myself and all judges of the Court of Queen's Bench. Notwithstanding what I will explain is "the third party nature" of the records sought by the accused, the accused formulated and argued that motion on the basis of what they said was an application for disclosure pursuant to ***R. v. Stinchcombe***, 1991 CanLII 45 (SCC), [1991] 3 S.C.R. 326.

[18] In the course of the case management discussions with all counsel, timelines were set for the bringing of the identified motions (and supporting materials) in respect of the bias related recusal and prohibition issues. Those timelines were not complied with by accused's counsel. Counsel for the accused explained the delay by submitting that they were seeking out-of-province counsel who they sought to have argue the motions on behalf of all of the accused's counsel of record.

[19] Following the court's insistence and in an effort to minimize any further delay flowing from the accused's motions and inaction in respect of the bias issue, a date for the actual hearing of the recusal and prohibition motions was finally fixed. Dates could then also be set in relation to the accused's application for leave to cross-examine the affiant (May 26, 2016), and the ***Garofoli*** motion (September 26-30, 2016) in which the issuance of the authorization itself will be challenged on the basis of ss. 7 and 8 of the ***Charter***, which arguments now include the specific issue of Justice Mainella's involvement and the alleged apprehension of bias. See ***R. v. Garofoli***, 1990 CanLII 52 (SCC), [1990] 2 S.C.R. 1421. Trial dates have been set for January 2017 and following.

IV. ANALYSIS

The accused's motion for "disclosure"

[20] The accused explain that what they seek is "relevant" material/information which they say might be of use to support the bias aspect of their overall challenge to the wiretap authorization. That motion is to proceed in September 2016 in the context of arguments with respect to ss. 7 and 8. Those arguments will be based in part on the

alleged reasonable apprehension of bias on the part of the issuing judge, Justice Mainella.

[21] The accused also seek any relevant material/information in relation to the arguments they make respecting the need for my recusal based on a similar allegation of apprehended bias.

[22] It must be noted that on most motions where recusal is raised in relation to an issue of bias, the initial and often only evidentiary basis or record upon which counsel's position is taken and argued, and upon which the court's determination is made, is that which results from the information provided "on the record" by counsel and the judge in question as "officers" or "representatives" of the court. In other words, a typical scenario is one where prior to the commencement of a matter, counsel or the judge will themselves raise the issue of a prior association, involvement or action that may give rise to a question about the court's real or perceived impartiality. Whether in relation to real bias or a reasonable apprehension of bias, the issue is raised if for nothing else, "to clear the air". Sometimes the issue is raised in the context of the other party (or the court) having no knowledge or recollection of the now identified or impugned previous association, involvement or action by the judge. In some instances, the information raised by the court or one or both of the parties may lead to an argument for recusal which the court must then address. However the scenario plays out, it is noteworthy that in almost all instances the issue is raised by one or both of the parties and/or the court in a way that provides an easy and agreed evidentiary basis, context or record for any argument the court is required to hear and any recusal determination that it is required to make. That said, there may be cases such as this one where the moving party for the recusal, given its onus, seeks additional information and evidence relevant to the legal test. Needless to say, those efforts cannot involve nor should they contemplate a judge giving formal evidence. Despite the somewhat vague and indirect suggestion by the accused in the present case that the joint motion may have required the presiding judge to hear evidence from other judges or myself, the law in that regard is clear. Testimony from any judge in a context like this one is prevented by judicial immunity, which is in place in order to protect the judiciary as an institution and the public confidence in it.

Judicial immunity is not something that can be waived by the parties or the judge. See **Kosko v. Bijimine**, 2006 QCCA 671 at para. 43, [2006] R.J.Q. 1539. That includes any testimony in respect of the assignment of judges to particular cases or roles. See **MacKeigan v. Hickman**, 1989 CanLII 40 (SCC), [1989] 2 S.C.R. 796 at para. 71.

[23] As it relates to an accused's efforts to obtain more documentary information or evidence from the court, it should also be clear that a mere request for "disclosure" cannot result in automatic or perfunctory provision of court records (assuming they exist) to a moving party. In those rare situations involving a recusal application where more relevant and clearly identifiable information is needed and sought from a court (and where not provided as earlier described), a rigorous process for the production of third party records need be followed. I repeat, such scenarios will be rare as in most instances the background and context for a potential recusal application will be provided in the course of the interaction between the parties and the court, which interaction takes place "on the record".

[24] I will address in a moment the manner in which the accused's motion has been, in my view, erroneously formulated as a motion for disclosure pursuant to **R. v. Stinchcombe**. However formulated, the question of "relevance" on any motion for production, disclosure or discovery is key. Needless to say, relevance requires a reference point.

[25] In order to properly contextualize the issue on this motion and to provide a reference point for the "relevance" of the material/information the accused seek, it is instructive to set out the governing legal test. When determining whether he or she should recuse, the judge must address the following question:

.... what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would decide fairly?

[See **Committee for Justice and Liberty v. Canada (National Energy Board)**, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369]

[26] In examining the above test, it is important to note that it is a purely objective test. It is also important to note the well-known legal proposition that judges are

assumed to know the law. Accordingly, it should be assumed that judges know the test for recusal and are cognizant that the test is an objective one. The nature of the legal test and the assumed knowledge of it on the part of the judiciary are – as will be seen – significant considerations when one reviews the particular and stipulated items sought on the accused’s motion for more material/information.

[27] Although judges must ensure that they themselves feel free from the sort of genuine discomfort and inhibition that could come from previous or current associations, engagements or activity that might reasonably affect their ability to decide impartially, it is nonetheless clear that the governing test sets forth a reference point that is objective, not subjective. Accordingly, idiosyncratic squeamishness or excessive personal scrupulousness on the part of an individual judge should not displace a test which uses, as a reference point, the objective notion of “an informed person”. The test itself has been informed by subsequent jurisprudence which in turn has implicitly confirmed and clarified not only the objective nature of the test itself, but also, the presumption of judicial impartiality. See ***Wewaykum Indian Band v. Canada***, 2003 SCC 45 (CanLII), [2003] 2 S.C.R. 259; and ***R. v. R.D.S.***, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484. The presumption of judicial impartiality can only be displaced where there are serious and convincing grounds to support recusal. A real likelihood or probability of bias must be demonstrated. See ***R. v. R.D.S.*** at paras. 112-113.

[28] The inquiry into bias (real or apprehended) is inherently contextual and fact-specific and there is a correspondingly high burden that rests on the applicants to prove the claim of bias. See ***Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)***, 2015 SCC 25 at paras. 25-26, [2015] 2 S.C.R. 282. Informing the objective test is the recognition that the “informed person” who is reviewing the matter “realistically and practically” is not only informed of the relevant circumstances of the case, but also “the tradition of integrity and impartiality that are the backdrop of our judicial system and which are reflected and reinforced by the judicial oath.” See ***Kalo v. Manitoba (Human Rights Commission)***, 2008 MBQB 92 at para. 18, 226 Man.R. (2d) 139. It is in the context of the above objective test, legal presumption and legal burden, that the accused in the present case seek

material/information that will assist in providing a more fact-specific basis to prove their claim of bias.

[29] Before I set out what specifically the accused are seeking and what should have been the proper characterization of their motion, I will pause to note what is currently “on the record” as information upon which the accused can argue respecting their claim of bias. Consistent with what I have already mentioned typically occurs where motions for recusal are brought, the participants themselves, in the present case, have provided some information which constitutes a backdrop, specific and/or general, against which the accused’s arguments can be made. While the accused are in no way pre-empted from bringing the present application in which they attempt to seek more information, it need be noted that part of the current “record” on which the parties can address the issue of bias, includes the Crown’s endorsement of the accused’s presentation of the factual history of Justice Mainella’s past involvement with the accused, both while a judge, and earlier, as a prosecutor. The record also includes my categorical clarification respecting my non-involvement in the assignment of Justice Mainella as the duty judge on the day the authorization was granted. In that regard, I stipulated for counsel that I had no direct or indirect involvement in the assignment of Justice Mainella respecting his functions as duty judge and respecting his role in the issuance of the wiretap authorization. It was explained to counsel that it is the duty judge who typically receives applications for authorizations like the application in the present case. It was also explained to counsel that the “duty judge” is assigned that role by the trial coordinator. That assignment by the trial coordinator of the duty judge is in turn done arbitrarily and randomly based upon the availability of the judge and the general exigencies and vagaries of the Court of Queen’s Bench rota. Accordingly, where there is an initial application for something such as a wiretap authorization, the supporting materials are brought to the court after they are prepared and without prior knowledge of the identity of the assigned duty judge.

[30] Notwithstanding the above background provided to counsel respecting my involvement (or non-involvement) in the assignment of Justice Mainella, and the general factual agreement provided by the Crown respecting the past involvement of Justice

Mainella with the accused, the accused on this motion seek the following additional material and/or information:

- (a) policies of the court on “cooling off periods” and the duty to avoid conflicts of interest;
- (b) whether new judges are directed to the Canadian Judicial Council Publication on Ethical Principles;
- (c) what guidance or education judges receive on conflicts of interest;
- (d) what guidance or manuals may exist on the role of the Chief Justice;
- (e) whether Chief Justice Joyal attended any meetings of the Canadian Judicial Council and if he did not, the member who was sent in as substitution;
- (f) the date on which the application for authorization 1/213 was made;
- (g) the date on which Justice Mainella was assigned to review the application;
- (h) the process by which Justice Mainella was assigned to review the application;
- (i) any meetings between the court, affiant and/or Ms. Kliewer;
- (j) policies of the Chief Justice to prevent conflicts of interest in case assignments;
- (k) whether Justice Mainella or any other justice of the court reported a potential conflict of interest to the Chief Justice.

[31] When one examines the nature of the materials, documents and/or information the accused seek on this motion, it becomes apparent that except in a couple of instances, those documents, materials and information, if they exist, are assumed to be in the possession or control of the court. As such, the accused’s application which has been framed pursuant to the Crown’s first party disclosure obligation under ***Stinchcombe***, is erroneously framed.

[32] As this should properly be characterized as a motion for third party records thereby triggering the process in ***R. v. O’Connor***, [1995 CanLII 51 \(SCC\)](#), [1995] 4 S.C.R. 411, the Crown takes no position on the ultimate order that should be made, although it does agree that any determination granting or dismissing production should be made in the context of a third party records application under ***O’Connor***. In that

regard, the Crown asserts the now well-known demarcated scope of its own disclosure obligation. The obligation on the Crown is to disclose all relevant information in its possession relating to the charges against the accused. The law does not impose an obligation on the Crown to disclose material which it does not have and cannot obtain. In reminding the court of the necessary limitation to its obligation respecting the provision of information, the Crown invokes **R. v. McNeil**, 2009 SCC 3, [2009] 1 S.C.R. 66, wherein the Supreme Court made clear that the Crown does not encompass other state authorities. The Crown concedes that the concept of “the Crown” does not encompass the court with its constitutionally enshrined independence from other branches of government. This seemingly obvious point is underscored in **R. v. Levin**, 2014 ABQB 113, 585 A.R. 176, wherein an accused charged with attempting to bribe a jury member sought disclosure of the names of the other jury members. A similar point was made in **R. v. Kokopenace**, 2011 ONCA 759, 108 O.R. (3d) 284, where jury rules were sought as part of a challenge to the process of jury selection.

[33] Although the accused’s notice of motion did not properly plead for third party records, it was agreed at the hearing of this motion that for reasons of expediency (where the pre-trial motions have been already too long delayed), the accused’s counsel would be permitted to transform their motion into one brought under the process in **O’Connor**. The motion would, in turn, still rely upon the November 30, 2015 affidavit of Chantale Carriere which had been filed on the incorrectly framed disclosure motion.

[34] The process for an **O’Connor** application where third party record documents are sought, was summarized at para. 27 of **McNeil**, *supra*:

27 Stated briefly, the procedure to be followed on an *O’Connor* application is the following.

(1) The accused first obtains a *subpoena duces tecum* under ss. 698(1) and 700(1) of the *Criminal Code* and serves it on the third party record holder. The subpoena compels the person to whom it is directed to attend court with the targeted records or materials.

(2) The accused also brings an application, supported by appropriate affidavit evidence, showing that the records sought are likely to be relevant in his or her trial. Notice of the application is given to the prosecuting Crown, the person who is the subject of the records and any other person who may have a privacy interest in the records targeted for production.

(3) The *O'Connor* application is brought before the judge seized with the trial, although it may be heard before the trial commences. If production is unopposed, of course, the application for production becomes moot and there is no need for a hearing.

(4) If the record holder or some other interested person advances a well-founded claim that the targeted documents are privileged, in all but the rarest cases where the accused's innocence is at stake, the existence of privilege will effectively bar the accused's application for production of the targeted documents, regardless of their relevance. Issues of privilege are therefore best resolved at the outset of the *O'Connor* process.

(5) Where privilege is not in question, the judge determines whether production should be compelled in accordance with the two-stage test established in *O'Connor*. At the first stage, if satisfied that the record is likely relevant to the proceeding against the accused, the judge may order production of the record for the court's inspection. At the next stage, with the records in hand, the judge determines whether, and to what extent, production should be ordered to the accused.

(emphasis added)

[35] While some modification may be required in applying the ***O'Connor*** process in circumstances involving records sought from a court, in the present case, no such modification is required as it is possible to dispose of the accused's motion with simple reference to the first stage of the test set out in ***O'Connor***. Although some of the materials and documents sought by the accused may not even exist, most of that which is sought by the accused fails to meet the test of relevance ("likely relevant") as properly understood in the context of ***O'Connor*** and ***McNeil*** and with reference to the earlier identified governing test for recusal.

[36] Subject to what might sometimes be more or less complicated preliminary matters in the ***O'Connor*** process, the ultimate substantive step in any application for production of documents in the possession of a third party is for an applicant to satisfy the court that the documents are "likely relevant" to the proceedings. The threshold burden of "likely relevance" in the case of third party records, unlike first party disclosure in the context of ***Stinchcombe***, carries no presumption of relevance. The somewhat distinct threshold of "likely relevance" for third party records underscores the important fact that for the effective administration of justice, criminal trials must remain focused on the issues to be tried and that scarce judicial resources not be diverted to or expended in "fishing

expeditions” for possibly relevant evidence. Simply put, the likely relevant threshold reflects a gatekeeper function. Yet as part of that gatekeeper function, a balance need be sought. It is a balance which recognizes what I just identified as the importance of preventing unnecessary applications for production from consuming scarce judicial resources which could unduly protract criminal proceedings. At the same time, it must be a balance which also recognizes that an accused person cannot be required, as a condition to accessing information that may assist in making full answer and defence, “to demonstrate the specific use to which they might put information which they have not even seen”. See **O’Connor** at para. 25. Mindful of the need for that balance, the phrase “likely relevant” is meant to ensure that there is a reasonable possibility that the information is logically probative of an issue at trial or in a given proceeding. See **McNeil** at para. 33.

[37] With the above threshold in mind, I have examined the accused’s specific requests for production based upon their somewhat vague and bald assertions that such production is relevant and required.

[38] Amongst the requests made by the accused are those in relation to material and/or information respecting the date on which the application or authorization 1/213 was made. The accused also seek to know whether there were any meetings between the court (Justice Mainella or other judges) and the affiant and/or the police agent, Ms. Kliwer. The information surrounding those two questions was conceded by the Crown to be within the proper ambit for Crown disclosure. Accordingly, those inquiries, although part of the itemized list on this motion, have been answered by the Crown and will not be addressed by the court.

[39] I have examined all of the other stipulated requests made by the accused on this motion. A rather large number of those items do not exist or if they do exist, they exist outside of the court’s knowledge or outside of its exclusive possession and control. More fundamentally, given the applicable test on questions of recusal and given the threshold of “likely relevance” regarding third party records, I have determined that the accused have not satisfied their onus. Put simply, even if I had determined that the items stipulated did exist, or if they were in the exclusive possession, control or knowledge of

the court, there is no reasonable possibility that they are logically probative of any issue respecting a test which I have already identified is purely objective and which is assumed to be known by the judges in question.

[40] The overall approach and focus of the accused fails to establish any basis for determining that much of the production sought even exists. The Crown is correct to suggest that many of the requests appear to be “fishing expeditions”. Although discussed in the context of first party applications, it is worth noting that the Supreme Court of Canada has made clear that there is some obligation on the defence to establish a basis to believe that the material sought in a disclosure motion actually exists. See **R. v. Chaplin**, 1995 CanLII 126 (SCC), [1995] 1 S.C.R. 727 at paras. 30-32.

[41] Just as the submissions of the accused fail to establish the actual existence of much of what they seek, their submissions and supporting materials similarly fail to satisfy the significant burden to show “likely relevance”. The accused baldly assert relevance without any compelling or persuasive explanation. Their brief in this regard consisted in its entirety of the following written submission:

. . .

2. The landmark case of *R. v. Stinchcombe* ... holds that the defence is entitled to all disclosure that could possibly be relevant to the case, regardless of whether the Crown plans to call that evidence at trial or not.
3. The Applicants say that the materials detailed in the Notice of Motion are relevant to their Motion for Recusal, Motion for an Order of Disqualification and Prohibition, and the substantive motion yet to be filed challenging the Authorizations granted by Justice Mainella and are thus subject to the disclosure requirement.

[42] The accused have requested that they be provided policies of the court on “cooling off periods” and the duty to avoid conflicts of interest. Nothing was provided by the accused to suggest that such policies exist or that any such policies or guidelines would go beyond those published by the Canadian Judicial Council. It is those published principles and commentaries which provide some of what the accused may be seeking. Assuming without deciding that such information may be relevant, that information is available elsewhere and is not a document which the court controls.

[43] The accused have requested information answering whether new judges are directed to the Canadian Judicial Council Publication on Ethical Principles. Respecting this request, I agree with the Crown that there is no possible relevance to this question. The publication itself may have some limited relevance in informing the discussion as to the existence of an apprehension of bias, but whether a new judge was directed to the policy or not is indeed immaterial to the question of whether a reasonably informed observer would believe that the presiding judge could not decide the case fairly. The reference point is clearly an objective standard which makes the subjective knowledge of any judge as to the policies irrelevant. To the extent that a publication such as the one referred to informs any issue in this case, it can be stated that just as a judge is assumed to know the law, so too is a judge assumed to know the ethical parameters (broadly speaking) within which he or she must work. The Crown put it succinctly and accurately when it stated:

It does not matter what a judge is taught about avoiding conflicts or the apprehension of bias; what matters is whether the informed person would perceive [in the particular circumstances] that there was a conflict of interest or an appearance of bias.

[44] The accused have requested to know what guidance or education judges receive on conflicts of interest. As with an earlier request, there is no evidence to support the existence of any policies beyond the published policy of the Canadian Judicial Council. Even if something further did exist, it would not satisfy the test of “likely relevance” in relation to the issue before the court. Such policies would only go to the subjective knowledge of the judge.

[45] The accused have requested information about what guidance or manuals may exist respecting the role of the Chief Justice. It should be noted that most information about the role of Chief Justice is public information. The role of the Chief Justice is legislatively set out in [s. 24](#) of ***The Court of Queen’s Bench Act***, C.C.S.M. c. C280. The section notes that he or she shall “be responsible for the judicial functions of the court, including direction over sittings of the court and the assignment of judicial duties, and may assign to the judges of the court other duties relating to the administration of justice or for the purposes of an Act of the Legislature.” If further

information respecting the role of the Chief Justice is required, such information/material is not within the exclusive control, possession or knowledge of the court and it can be obtained by consulting, amongst other sources, various scholarly commentary. See, for example, Professor Peter W. Hogg, ***The Role of the Chief Justice in Canada*** (1993), 19 Queen's Law Journal 248 at 249. Irrespective of legislative provisions, scholarly comment or manuals that may or may not exist on the role of the Chief Justice, there is in my view little if any relevance to those materials or information in respect of the court's determinations on bias or recusal. In other words, irrespective of the role of the Chief Justice, what is relevant is not the mere existence of the office of the Chief Justice or the potential role of that office, but rather, whether any acts, associations or engagements on the part of the Chief Justice could give rise to a reasonable apprehension of bias in the particular circumstances of the present case.

[46] The accused have also requested information as to whether I attended any meetings of the Canadian Judicial Council. I will spend little time on this point as in my view, my attendance at meetings of the Canadian Judicial Council has no bearing on the test that need be applied to the issues of bias and recusal as they arise in these proceedings.

[47] The accused have requested the date on which Justice Mainella was assigned to review the application. The Crown has responded accurately in its brief when it says that it is part of the public policy of the court that there is always available a duty judge, emergency or otherwise (see Notice to the Profession, October 1, 2001). I have already stipulated that the duty judges are randomly assigned by the trial coordinator. The accused are also already aware that Justice Mainella received the application for wiretap authorization in the context of his role as a duty judge and that he was not "assigned" to the application *per se*. Indeed, counsel for the accused Baldovi acknowledged as much at Mr. Baldovi's bail application:

The agent in this case was Ms. Judy Kliwer of the federal Crown's office. And the application process, as I understand it, involves the application being dropped at the coordinator's office for the judges. There's a motions coordinator who will then take the file up, as I understand it, to whoever the duty judge is at that time, provide [it] to the duty judge, leave it with them and then wait to hear back.

[48] The accused request information about the process by which Justice Mainella was assigned to review the application. As noted in my stipulated clarification to counsel and as can be observed from the previous paragraph, applications such as the one in question are reviewed by the duty judge. The duty judge is assigned randomly subject to the exigencies and vagaries of the Queen's Bench rota.

[49] The accused seek to know the policies of the Chief Justice as they exist to prevent conflicts of interest in case assignments. In response to this request, it is important to note that the accused know - because they have been advised - that Justice Mainella was not specifically assigned to this matter, but rather, received the application as the randomly assigned duty judge. For that reason, it is not relevant to know the policies of the court for avoiding assignments that might give rise to issues of apprehended bias. Irrespective of the random nature of the assignment, to the extent that such identified policies exist, they are not relevant to nor will they assist in the application of the objective test to the particular facts of this case. In this case, Justice Mainella did not recuse himself from the application for the authorization. What matters in that context is whether an informed person – viewing the matter realistically and practically – mindful of the presumption of judicial impartiality and the sanctity of the judicial oath, perceives an appearance of bias.

[50] The accused have requested to know whether Justice Mainella or any other judge of the court reported a potential conflict of interest to the Chief Justice. That question posed by the accused, even if it uses the conditional language of "a potential conflict of interest", seeks irrelevant information as the information would again (as explained above) have no role or application in the consideration of the governing objective test. In any event, I repeat my earlier stipulation that I had no involvement, direct or indirect, with the assignment of Justice Mainella.

[51] For the foregoing reasons, the accused's motion seeking the identified materials and information from the court is dismissed.

The accused's motion for the prohibition and disqualification of all judges of the Court of Queen's Bench

[52] This motion was filed by the accused on October 30, 2015. It was a motion for which written submissions were also filed.

[53] When, on the basis of an allegation of bias, a litigant seeks the prohibition or disqualification of an entire court, that is, each and every judge of that court, the relief itself speaks to and suggests a perceived loss of confidence in the entire court's capacity to decide impartially. Whatever the context or circumstance, and however it is framed, no allegation goes more directly to the heart of the service a judge and a court are expected to provide. Any such allegation, however isolated and unique, can have long-lasting effects on the reputation of the court as it relates to its own institutional integrity, the integrity of its individual members and, as well, the integrity of the entire administration of justice. See **R. v. R.D.S.**, *supra*, at para. 113.

[54] Motions such as this one brought by the accused are extremely rare. They are rare because most members of the legal profession accept that to seek to prohibit or disqualify an entire bench would require factual circumstances that create, in the clearest of ways, a perception of bias that could not but negate the presumption of impartiality and marginalize the significance and sanctity (for the member judges) of the judicial oath. The breadth and scope of a motion such as this one seem not to be directed at an "informed person" – aware of the rigours of the applicable test – but rather, the cynical onlooker whose reactions will be reflexive and not moored to legal concepts and understandings that tend to complicate outrage with nuance.

[55] Whoever the citizen (informed or uninformed) that hears or reads about the supposed need for the extreme relief contemplated on this motion, the reaction will likely be one of serious concern regarding the fairness and objectivity of those who sit as judges in the impugned Court of Queen's Bench. As a result, where a motion such as this one is not responsibly brought with the required full care and reflection, the motion's supposed goal of ensuring and reinforcing public confidence will be compromised. In fact, paradoxically, where such extraordinary and comprehensive relief is sought, it is the superficially formulated motions themselves which could lead to a loss of public confidence.

[56] Not surprisingly, given the extraordinary relief sought and given what was implied in the requested relief, this motion for prohibition and disqualification received considerable attention in the media. I note, for example, that The Winnipeg Free Press published an additional article on December 16, 2015, with the accompanying headline "*Judges on Trial in Drug Case*".

[57] The motion for the disqualification and prohibition of each and every judge of the Court of Queen's Bench remained "alive" until January 11, 2016. It was on that morning, in the comparative quiet of a one-hour 9:00 a.m. hearing intended for argument on the accused's initially framed disclosure motion, in the media's absence, that the accused's counsel advised that they would be abandoning this particular motion. They stated that they were doing so because the motion "had no merit". That advice and admission came casually but abruptly in the course of argument in response to a specific question that I raised in relation to my concerns respecting the relevance of the items sought in light of the applicable test for recusal. Had I not rooted my specific question in relation to the prohibition and disqualification motion, it was not clear when all of the counsel involved intended to share and advise the court of their realization that this particular motion had no merit and was to be abandoned. I note that there has been no subsequent media coverage of this case informing the public that this extraordinary motion and the extreme relief it sought has been abandoned because of counsel's own recognition that it "had no merit".

[58] When considering the possible need to bring a motion for recusal, counsel should never feel an inhibition or a "chill" such that it might prevent them or their clients from bringing any motion designed to ensure that they receive an impartial and unbiased hearing in any court in which they seek relief. Recusal motions, when properly grounded in at least arguable fact and law, are legitimate and counsel need not apologize for bringing such motions. However delicate, it can be assumed that in most cases where motions for recusal are brought, there are reasonable and genuine issues which require a determination. Indeed, in that regard, some of the motions brought in the case at bar present such genuine issues requiring determination.

[59] Given the acknowledgement by the accused that their argument “had no merit” and given the abrupt and casual manner in which such a motion was abandoned, questions can be legitimately asked about the ethical appropriateness of bringing such a motion in the first place. However indirectly framed in the language of apprehended bias, the motion has nonetheless the effect of calling into question the impartiality (or the capacity to be impartial) of members of an entire court. Questions can be asked about whether a motion as categorically and provocatively pled as one which seeks the disqualification and prohibition of an entire court was properly researched, where in the end it was determined by counsel themselves to possess no merit. Questions might also be asked as to whether counsel – prior to making an allegation which impugns the perceived impartiality of all the members of a court – bear some special and particular responsibility to ensure that such arguments are grounded in fact and law.

[60] One could be forgiven for saying that in a case where the integrity of a court has been challenged, anything but well-researched arguments based on supporting fact and law will be, at the very least, imprudent and ill-considered. Indeed, if this were a civil case, in light of the public and reputational implications arising from the ill-considered and later, casually abandoned allegations, the moving party would be facing the prospect of punitive costs.

The accused’s motion for my recusal

[61] The accused seek my recusal in respect of my role as case management judge and in any connected role in the adjudication of matters to be considered on the joint motion to quash the wiretap authorization.

[62] The accused allege, on my part, a reasonable apprehension of bias based on what can be summarized as the following three grounds:

- (1) speculation around my role in the assignment of Justice Mainella as the judge who reviewed the application for the wiretap authorization;
- (2) my role as Chief Justice generally in the court in which Justice Mainella was assigned to and performed his responsibilities as duty judge on June 18, 2013;

- (3) my written comments to The Winnipeg Free Press in the context of the May 5, 2014 article in which questions were raised about Justice Mainella and the Court of Queen's Bench as a result of comments made to a journalist by one of the accused.

[63] The governing test in respect of recusal applications flowing from allegations of bias (real or apprehended) has already been set out at para. 25 of this judgment. The refinement, amplification and clarification of the governing test has been reported in various decisions encompassing distinct and diverse scenarios. That relevant jurisprudence has been discussed and supplemented by this court in, amongst other cases, **Kalo v. Manitoba**, *supra*; **R. v. Trunzo**, 2012 MBQB 211, 282 Man.R. (2d) 18; and more recently, in **R. v. Amsel**, 2016 MBQB 43, [2016] M.J. No. 68 (QL). Those cases were decided in ways consistent with the application of an objective test and with what the Supreme Court of Canada had reaffirmed in **R. v. R.D.S.**, *supra*, was the stringent requirement for a demonstration of a real likelihood or probability of bias. Mere suspicion will never be enough. That requirement and caution is particularly important given the presumption of impartiality and the significance of the judicial oath. About the judicial oath, Cory J. had the following to say:

116 Often the most significant occasion in the career of a judge is the swearing of the oath of office. It is a moment of pride and joy coupled with a realization of the onerous responsibility that goes with the office. The taking of the oath is solemn and a defining moment etched forever in the memory of the judge. The oath requires a judge to render justice impartially. To take that oath is the fulfilment of a life's dreams. It is never taken lightly. Throughout their careers, Canadian judges strive to overcome the personal biases that are common to all humanity in order to provide and clearly appear to provide a fair trial for all who come before them. Their rate of success in this difficult endeavour is high.

[64] For the reasons that follow, based on the facts, the submissions of the parties and on an application of the governing law, I have determined that there is no cogent evidence establishing a real likelihood of any sort of bias, apprehended, institutional or otherwise, as it relates to my role in either the purported assignment of Justice Mainella, my general role as Chief Justice of the Court of Queen's Bench, or as it relates to my written comments to The Winnipeg Free Press as appearing in the article of May 5, 2014.

[65] The threshold for finding a real or perceived bias is high. The accused's onus in this case has not been satisfied.

(i) My role in the assignment of Justice Mainella

[66] This ground for alleging reasonable apprehension of bias on my part can be disposed of quickly. I have already stipulated that I had no involvement, direct or indirect, with Justice Mainella's assignment either as the duty judge on the day in question or with his assignment on the application *per se*.

[67] Any duty judge, in the course of his or her responsibilities as the duty judge, may decide that a case or an issue before him/her gives rise to an issue of bias (real or apprehended) that might lead to his/her recusal. Any decision in that regard, taken or not taken by a judge in relation to a given matter, may subsequently be reviewed (as is occurring in the present case) on the basis of the governing objective test set out in, amongst other places, ***Committee for Justice and Liberty v. Canada***, *supra*.

[68] Given my non-involvement with any aspect of the assignment of Justice Mainella, I am not persuaded that an informed person with knowledge of all of the relevant circumstances, including the significance of the judicial oath and the traditions of integrity and impartiality that form a part of the background of this and all cases, would determine that it is more likely that I would not (consciously or unconsciously) decide the matter fairly.

(ii) My role as Chief Justice generally

[69] As I identified at para. 14 of this judgment, separate and apart from my non-involvement with the assignment of Justice Mainella, the accused contend that the mere fact of my role and duties as Chief Justice of the Court of Queen's Bench, creates the impression of an institutional protectiveness in relation to the Court of Queen's Bench judges themselves and the system of assigning judges.

[70] The fact of my role as Chief Justice, along with the many responsibilities that accompany that role, cannot by itself, in the absence of cogent evidence, be seen to displace the well-understood duty that flows from the judicial oath to decide matters impartially. Similarly, to the extent that the office of the Chief Justice is, broadly speaking

and in part, associated with the scheduling and assignment of judges, it does not inexorably follow that with respect to any legal controversy involving the scheduling or assigning of judges, the Chief Justice cannot be impartial in his or her review concerning any potential allegation of bias flowing from a given assignment. In the absence of cogent evidence, for an informed person to believe or perceive that the person holding the office of Chief Justice could not so impartially decide such questions, is tantamount to suggesting that the Chief Justice would have difficulty complying with his or her judicial oath. Any such suggestion, without compelling evidence, represents the sort of intellectual shortcut that the Supreme Court of Canada has specifically warned against. It also represents a conclusion that de-emphasizes the importance of the presumption of impartiality which in turn is connected to the perceived sanctity of the judicial oath.

[71] I acknowledge that aspect of the accused's argument that emphasizes the fact that as the case management judge in this instance, I will be adjudicating the motions in question not only as the Chief Justice of the court from which these issues arose, but also, as the Chief Justice of the court in which the impugned judge (Justice Mainella) had been sitting. While I acknowledge the argument, it too presents a logic that constitutes a superficial "shortcut". It is also a logic which is irreconcilable with the presumption of impartiality, the importance of the judicial oath and a rigorous application of the objective test. The reality is that as it relates to the accused's now scheduled September 26-30 challenge to the issuance of the wiretap authorization (which in this case includes the bias argument), that challenge involves the sort of review and adjudication routinely performed by the trial judge or case management judge who is, in the case of wiretap authorizations, a member of the same court as the issuing judge.

[72] In addition to the practical reality discussed above, it can also be said that from time to time, a case presents as "a Chief's case". Such a case may be defined by its challenges, its controversy and/or its high profile nature. Such a case may also present as one whose circumstances place the focus on the integrity of the court. Even if an ultimate adjudication (concerning initial questions that touch the integrity of a court's process) proves not to be determinative in a legal sense, there is in most cases – given the stakes – no one more appropriately positioned to conduct such adjudications than the

Chief Justice. While not all judicial decisions to recuse or not recuse can or should be reduced to an ethical issue, to the extent that a potential link does exist, the Chief Justice as *primus inter pares* is often in a preferred position to comment. No less so in the context of a formal adjudication. See **Ruffo v. Conseil de la magistrature**, 1995 CanLII 49 (SCC), [1995] 4 S.C.R. 267 at paras. 58-59. That is not to say that any Chief Justice can or should consider him or herself in court or in chambers as the final arbiter of ethical questions. Yet, as the face of the court, the Chief Justice is uniquely placed to present for his colleagues, the legal profession and the public generally, a leadership that will address potential legal/ethical issues that require administrative or adjudicative clarification so as to ensure public confidence not only in his or her own court, but the judiciary generally.

[73] Finally, it is instructive to take note of a judgment that addresses many of the concerns raised by the accused in respect of my potential involvement in this case. In **Bossé v. Lavigne**, 2015 NBCA 54 at para. 4, 440 N.B.R. (2d) 118, the New Brunswick Court of Appeal heard a recusal motion where the party being sued had since been appointed to the New Brunswick Court of Queen's Bench. According to the appellant in that case, the judge's appointment and his involvement in the already existing litigation raised an apprehension of bias on the part of the New Brunswick Court of Appeal. In dismissing that argument, the court said:

8. ... The argument we should recuse because the respondent is now a judge of the Court of Queen's Bench is untenable. It should go without saying that a litigant who is now a judge is not isolated from the application of the law, either for events that occurred while that litigant was a lawyer, or those occurring after his or her appointment to the bench. To suggest we would let the current status of a litigant interfere with the fulfillment of our oath of office is an argument devoid of any merit. In this appeal, we simply have to determine a question of law: whether the judge who determined the motion for summary judgment erred in finding that all of the appellants' claims are prescribed. We will not be called upon to pass judgment on anything the respondent is alleged to have done as a lawyer, since those allegations have not been adjudicated. More importantly though, the argument would still have no merit if we had to pass judgment on the actions of the respondent. While litigation involving a judge is not a common occurrence, instances of judges adjudicating a matter in which one of the parties happens to be a judge are not unknown. In those cases, like all others, the judicial oath rises to the occasion.

(emphasis added)

[74] In the circumstances, notwithstanding their arguments concerning my institutional role as Chief Justice, the accused have not satisfied me that an informed person, viewing the matter realistically and practically, would conclude that I would not decide this matter fairly or be perceived to decide this matter fairly mindful of the facts and applicable law.

(iii) *My comments to The Winnipeg Free Press*

[75] Leading up to and resulting in what was to be a Winnipeg Free Press article, published on May 5, 2014, one of the accused made comments to the journalist about Justice Mainella's involvement in the issuance of the wiretap authorization in the investigation known as Project Sideshow. Those comments were made while he awaited the Provincial Court judge's decision on his pending bail. The article when it appeared was headlined as "*Man Arrested in Huge Undercover Operation Raises Troubling Questions*". In the context of inquiries to my office from the same journalist with The Winnipeg Free Press who authored the May 5, 2014 article, I provided certain written comments. Those written comments appeared verbatim in the May 5, 2014 article. For the purposes of completeness and precision, I reproduce that written statement immediately below:

The specific Project Sideshow prosecution identified in Mr. McIntyre's email and the related questions he poses, relate to ongoing cases currently before the Court of Queen's Bench. Accordingly, it would not be appropriate for me as chief justice, or indeed for any judge of this or any other court, to comment upon any aspect of any judicial determination made at any stage of these cases.

Without commenting upon the specific details concerning the case involving Ronald Baldovi now proceeding in the Court of Queen's Bench, it would appear that a concern has been raised by an unidentified accused involved in Project Sideshow respecting Justice Mainella's judicial involvement and by extension, Justice Mainella's impartiality, as it relates to his granting of a judicial authorization in connection to Project Sideshow.

While the press has every right to explore those matters it believes touch upon the public interest, an accused person, especially one represented by counsel, should know that rather than raise a legal issue in the media (where it is known, because of the principle of judicial restraint and the ongoing nature of the proceeding, that the judge in question and the court cannot comment), an aggrieved accused person may challenge and have adjudicated at trial, the validity of an earlier granted authorization. That challenge and adjudication takes place before a trial judge who is not the same judge who granted the authorization. Such a challenge and adjudication respecting the validity of the authorization, would take place in open court where the governing legal principles will be applied. If there is any foundation to an allegation of bias, real or apprehended, the accused person will

argue for the appropriate remedy. Any decision by the trial judge is also subject to review in the ordinary course by the Manitoba Court of Appeal.

The questions that Mr. McIntyre poses in his email and the concerns that were raised by the unidentified accused touch directly or indirectly on the issue of a judge's impartiality. A concern about a judge's impartiality, if it has any basis, must find connection in the legal concept of judicial bias, real or apprehended. As a matter of general public information, where a judge's impartiality is challenged on the basis of bias, real or apprehended, certain governing principles apply.

The criterion for judicial disqualification that an accused may argue should, or should have occurred, is the concept of reasonable apprehension of bias. The apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. A reasonable person must be informed not only of the relevant circumstances of the particular case, but also of the tradition of integrity and impartiality that are the backdrop for our judicial system and which are reflected in and reinforced by the judicial oath.

There are no 'textbook' cases of bias and in each case, the inquiry is highly fact-specific. Whether the facts, as established, point to financial or personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts.

One of the shortcuts that the courts have identified and rejected is that shortcut which flows from the proposition that apprehended bias will inexorably follow from a judge's prior involvement in proceedings involving the same litigant. For example, the mere fact that a judge had previously decided adversely a case involving an accused does not create a reasonable apprehension of bias. The presumption of judicial impartiality prevails in the absence of cogent evidence to the contrary.

[76] When one reviews my published comments, it should be clear that I offered no comment or opinion whatsoever on Project Sideshow or any of the legal issues that might arise therefrom. My comments were limited to nothing more than an explanation respecting how, where an accused has concerns about a judge's real or apprehended bias, a challenge to the issuance of a court order (in this case a wiretap authorization) can occur. My comments do nothing more than review the general legal principles relating to the sort of relief that is available in a court of law for an accused seeking a determination arising from concerns in relation to a judge's impartiality. To repeat, nothing whatever was said, directly or indirectly, that would express an opinion regarding the issues to be adjudicated in this matter. The focus and scope of my comments provided - in the context of a very provocative article which could be seen to raise

questions about the integrity of certain judges and the Court of Queen's Bench - important public information about the dispassionate legal process that can be followed where an accused citizen believes he or she has been aggrieved because of an issue of a real or apprehended bias on the part of a member of the judiciary.

[77] The written comments that I provided to The Winnipeg Free Press are consistent with the role that the Chief Justice must occasionally play in ensuring the provision of important but objective public information, especially in a context where questions are being raised in respect of the integrity of certain judges, the court generally and the process by which such questions can be addressed. Part of such public education involves ensuring that the public is aware of the indispensability of an impartial judiciary and that the public is aware as well, that the governing legal test will be applied in a process that exists so as to ensure that any concerns about impartiality are addressed in an identifiable and transparent legal forum. Animating the public role of a Chief Justice and the focused public information provided in a case like the present, is the knowledge that the constitutional importance and legitimacy of judicial independence is premised upon a public confidence which, in turn, assumes a judiciary that can and will ensure impartial decision-making.

[78] In the circumstances and based upon the application of the governing test, I have concluded that there is nothing in the nature or content of my written comments to The Winnipeg Free Press that would cause an informed person, viewing the matter realistically and practically, to conclude that I could not adjudicate the matters in the present case fairly or impartially.

V. CONCLUSION

[79] Having abandoned their motion for the disqualification and prohibition of all judges of the Court of Queen's Bench, the accused's two remaining motions were in respect of third party production and my recusal. As explained, the two remaining motions are dismissed.

Tab 136

High-Crest Enterprises Limited v. Canada, 2017 FCA 88 (CanLII), [2018] 2 FCR 3

Source: Federal Court of Appeal

Date: 2017-04-28

File number: A-473-15

Other citations: 278 ACWS (3d) 209 — [2017] DTC 5057

Citation: High-Crest Enterprises Limited v. Canada, 2017 FCA 88 (CanLII), [2018] 2 FCR 3, <<https://canlii.ca/t/h3hsh>>, retrieved on 2026-03-23

Acknowledgements: The official copies of the [Federal Courts Reports' decisions](#) are available on the website of the [Office of the Commissioner for Federal Judicial Affairs Canada](#).

[2018] 2 F.C.R. 3

A-473-15

2017 FCA 88

High-Crest Enterprises Limited (Appellant)

v.

Her Majesty the Queen (Respondent)

INDEXED AS: HIGH-CREST ENTERPRISES LIMITED V. CANADA

Federal Court of Appeal, Pelletier, Stratas and Webb JJ.A.—Halifax, November 9, 2016; Ottawa, April 28, 2017.

Judges and Courts — Power of Chief Justice to reassign — Appeal from Tax Court of Canada (T.C.C.) decision rendered by judge who did not hear appeal before T.C.C. — Appellant successful bidder in proposal to construct addition to nursing home facility — Appealing assessment of HST by Canada Revenue Agency — With consent of parties, Chief Justice removing appeal file from presiding judge after matter heard for purpose of having judgment rendered as soon as possible — Assigning appeal to judge of his choosing — As a result, decision rendered by another judge — Respondent arguing, inter alia, power of Chief Justice to remove file from presiding judge, assign it to another resulting from [Courts Administration Service Act, ss. 8\(1\),\(2\)](#), [Tax Court of Canada Act, s. 14\(2\)](#) — Main issue whether Chief Justice having power to remove file from presiding judge, assign it

to another judge; whether second judge having authority to render judgment in this matter — Per Webb J.A (Pelletier J.A. concurring): Chief Justice not having power to unilaterally remove judge from case with which judge seized — Doing so not allowed by Courts Administration Service Act, ss. 8(1), (2), Tax Court of Canada Act, s. 14(2) — Clearer language required if Parliament intending to alter rule that judge seized of matter is only one having jurisdiction to continue with that matter — Removal also not justified under implied jurisdiction of T.C.C. to carry out its functions as a court — No indication herein that removal of judge necessary — That judge still seized with the matter — Matter referred back to judge who heard case to render decision — Appeal allowed — Per Stratas J.A. (dissenting): Power of Chief Justice to reassign confirmed by context, purpose of Tax Court of Canada Act, s. 14 — Question herein whether Chief Justice's power to reassign extending to situations beyond death or incapacity of original judge assigned to case — Power to reassign must extend to situations beyond death or incapacity — Factors guiding Chief Justice to use his discretion to reassign is a question distinct from the question of jurisdiction — Courts Administration Service Act, s. 8, Tax Court of Canada Act, s. 14 not giving Chief Justice blank cheque — Parliament intending that Chief Justice should exercise power to reassign only after carefully considering all circumstances — Protection of mission of court prevailing in certain circumstances — Here, Court not bound to deal with Chief Justice's exercise of discretion — Procedural unfairness in this case — However, appellant not objecting in timely way, could not succeed — Matter should have been remitted to Chief Justice for assignment of a judge in accordance with principles herein.

Customs and Excise — [Excise Tax Act](#) — Appellant successful bidder in proposal to construct addition to nursing home facility — Self-supply rule under Excise Tax Act, s. 191(4) resulting in deemed supply of addition — Canada Revenue Agency determining that Excise Tax Act, s. 191.1 applying, assessing appellant HST — Issue before Tax Court of Canada whether s. 191.1 applicable — Per Webb J.A (Pelletier J.A. concurring): Excise Tax act, s. 191.1(2)(c) in dispute herein — Question whether necessary to determine primary purpose of total amount builder may reasonably expect to receive from a grantor, or whether only necessary that builder may reasonably expect to receive an amount for required purpose from a grantor — Condition in s. 191.1(2)(c) one that, if satisfied, having certain consequences under Act — Amount of tax payable under Act not affected by amount of funding provided or expected to be provided.

This was an appeal from a Tax Court of Canada (T.C.C.) decision rendered by a judge who did not hear the appeal before that Court.

The Province of Nova Scotia issued a request for proposals to increase the number of nursing home beds and residential care facility beds. The appellant was one of the successful bidders in proposing to construct an addition to its existing nursing home facility. The self-supply rule under [subsection 191\(4\)](#) of the [Excise Tax Act](#) (ETA) resulted in a deemed supply of the addition. The Canada Revenue Agency determined that [section 191.1](#) was applicable. The appellant was assessed HST based on the amount of HST paid in relation to the cost of the addition and not on the fair market value of the addition. The issue before the T.C.C. was whether section 191.1 of the ETA was applicable. The matter was heard on February 26, 2014. On June 23, 2015 a post-hearing discussion conference call was held during which the Chief Justice of the T.C.C. stated that he had removed the appeal file from the presiding judge of this appeal for the purpose of having a judgement rendered as soon as possible. With the consent of the parties, it was decided that the matter would be determined by another judge, chosen by the Chief Justice, based on the record and transcripts. As a result, a decision was rendered by another judge of the T.C.C., dismissing the appellant's appeal.

The respondent argued, *inter alia*, that the Chief Justice has the authority to remove the file from the presiding judge and assign it to another judge as a result of the provisions of [subsections 8\(1\) and \(2\)](#) of the [Courts Administration Service Act](#), and [subsection 14\(2\)](#) of the [Tax Court of Canada Act](#).

The main issue was whether the Chief Justice had the power to remove the file from the presiding judge and assign it to another judge, and whether the second judge had the authority to render judgment in this matter.

Held (Stratas J.A. dissenting), the appeal should be allowed.

Per Webb J.A (Pelletier J.A. concurring): The Chief Justice of the T.C.C. did not have the power to unilaterally remove the judge from the case with which he was seized. Parliament did not intend to grant the Chief Justice the power to remove a case from a judge who has been seized with that matter. Reassigning a case that has not been heard is not the same as removing a judge who is seized with a case from that case. As a result, [subsections 8\(1\) and \(2\) of the *Courts Administration Service Act*](#) and [subsection 14\(2\) of the *Tax Court of Canada Act*](#) do not allow a Chief Justice to unilaterally remove a case from a judge who is seized with that case. The general rule is that a judge who is seized of a matter is the one who has the jurisdiction to continue with that matter. If Parliament intended to alter this rule to provide the Chief Justice with the power to remove a file from a judge who was seized of this matter, clearer language would be required. The removal could also not be justified under the implied jurisdiction of the T.C.C. to carry out its functions as a court. This implied jurisdiction does not give the Chief Justice the power to unilaterally remove a case from a judge who has heard the matter and who is not incapacitated. There was no indication in this case that the removal of the judge from this matter was necessary. As a result, that judge was still seized with the matter and all of the proceedings that occurred after the file was removed were annulled. The matter was referred back to the judge who heard the case to render a decision.

Some matters were raised that should be addressed by the presiding judge in deciding how to interpret [section 191.1](#) of the *ETA*. The *ETA* provides that generally a builder of an addition to a residential complex is deemed to have made a self-supply of that addition when the conditions as set out in [paragraphs 191\(4\)\(a\) to \(c\)](#) of the *ETA* are satisfied. The builder, subject to certain exceptions, is deemed to have collected tax on the supply based on the fair market value of the addition. Section 191.1 of the *ETA* provides an exception to this general rule if the conditions set out thereunder are satisfied. The condition in paragraph 191.1(2)(c) was the only condition in dispute herein. A question to be addressed is whether it is necessary to determine the primary purpose of the total amount that a builder may reasonably expect to receive from a grantor or whether it is only necessary that the builder may reasonably expect to receive an amount from a grantor and that amount is for the required purpose. Paragraph 191.1(2)(c) is a condition that, if satisfied, will result in certain consequences under the *ETA*. The amount of tax payable under the *ETA* is not affected by the amount of the funding that is provided or that is expected to be provided by the grantor.

Per Stratas J.A. (dissenting): The context and purpose of [section 14](#) of the *Tax Court of Canada Act* confirms that the Chief Justice has the power to reassign. The central question in this case was whether the Chief Justice's power to reassign potentially extends to situations beyond the death or incapacity of the original judge assigned to determine the case. The power to reassign is coextensive with the need to advance the mission of the courts. Situations beyond death and incapacity can undercut the mission of the courts. Consistent with its purpose, the power to reassign must extend to those situations. What factors will guide the Chief Justice to use his discretion to reassign is a question distinct from the question of jurisdiction. In enacting section 14 of the *Tax Court of Canada Act* and [section 8](#) of the *Courts Administration Service Act*, Parliament did not give the Chief Justice a blank cheque. Instead, Parliament intended that the Chief Justice should exercise the power to reassign only after carefully considering all of the circumstances, both for and against reassignment. The precise circumstances matter. After the judge has heard the matter and is writing reasons, a Chief Justice will be much more constrained. A judge must be allowed to decide a case without any interference. However, there are circumstances where the need to protect the mission of the court must prevail. Here, the Court was not bound to deal with the Chief Justice's exercise of discretion. There was procedural unfairness in this case. The exercise of discretion by the Chief Justice mattered to the parties: they had already argued the case before the original judge and justifiably expected it would be decided by that judge. They should have been asked to make submissions. However, the appellant did not object in a timely way and could not succeed. This was a textbook case of waiver. The matter should have been remitted to the Chief Justice for assignment of a judge to this case in accordance with the principles in these reasons. Further, the Court should not gratuitously pronounce law at this time and tie the hands of a future panel of this Court that may consider this same case.

STATUTES AND REGULATIONS CITED

[Courts Administration Service Act](#), S.C. 2002, c. 8, s. 8.

[Courts of Justice Act](#), R.S.O. 1990, c. C.43, ss. 14, [123](#).

[Criminal Code](#), R.S.C., 1985, c. C-46, s. 499(1).

[Excise Tax Act](#), R.S.C., 1985, c. E-15, ss. 191(4), [191.1](#).

[Income Tax Act](#), R.S.C., 1985 (5th Supp.), c.1.

[Interpretation Act](#), R.S.C., 1985, c. I-21, ss. 12, [31\(3\)](#).

[Legislation Act, 2006](#), S.O. 2006, c. 21, Sch. F, s. 79.

[Supreme Court Act](#), R.S.C., 1985, c. S-26, s. 46.1.

[Tax Court of Canada Act](#), R.S.C., 1985, c. T-2, s. 14.

CASES CITED

APPLIED:

Housen v. Nikolaisen, [2002 SCC 33](#), [2002] 2 S.C.R. 235; *R. v. MacDougall*, [1998 CanLII 763 \(SCC\)](#), [1998] 3 S.C.R. 45, (1998), 165 D.L.R. (4th) 193; *R. v. Gallant*, [1998 CanLII 764 \(SCC\)](#), [1998] 3 S.C.R. 80, (1998), 168 Nfld. & P.E.I.R. 126; *Canada Trustco Mortgage Co. v. Canada*, [2005 SCC 54](#), [2005] 2 S.C.R. 601.

CONSIDERED:

Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans), [1997 CanLII 399 \(SCC\)](#), [1997] 1 S.C.R. 12, (1997), 142 D.L.R. (4th) 193; *Re Ramsey* (1972), [1972 CanLII 1409 \(NB CA\)](#), 4 N.B.R. (2d) 809, 8 C.C.C. (2d) 188; *Clarke v. Trask* (1901), 1 O.L.R. 207, [1901] O.J. No. 42 (QL) (H.C.J.); *Coleshill v. Manchester Corporation*, [1928] 1 K.B. 776, 97 L.J.K.B. 229 (C.A.); *Re Application of British Reinforced Concrete Engineering Co. Limited* (1929), 45 T.L.R. 186, 20 Ry. & Can. Tr. Cas. 78 (Railway and Canal Commission); *Royal Bank of Canada v. Nichols* (1985), [1985 CanLII 5164 \(PE SCTD\)](#), 56 Nfld. & P.E.I.R. 340, [1985] P.E.I.J. No. 12 (QL) (S.C.); *Bolton v. Bolton*, [1949] 2 All E.R. 908, (1950), 47 L.G.R. 730 (H.C.J.); *Liszkay v. Robinson*, [2003 BCCA 506](#), 232 D.L.R. (4th) 276; *D'Amico v. Wiemken*, [2010 ABQB 785](#), 497 A.R. 360; *R. v. Lochard* (1973), [1973 CanLII 1346 \(ON CA\)](#), 12 C.C.C. (2d) 445, 22 C.R.N.S. 196 (Ont. C.A.); *R. v. Cunningham*, [2010 SCC 10](#), [2010] 1 S.C.R. 331; *Lawrie v. Lees* (1881), 51 L.J. Ch. 209, 7 A.C. 19 (H.L.); *Roncarelli v. Duplessis*, [1959 CanLII 50 \(SCC\)](#), [1959] S.C.R. 121, (1959), 16 D.L.R. (2d) 689.

REFERRED TO:

IWA v. Consolidated-Bathurst Packaging Ltd., [1990 CanLII 132 \(SCC\)](#), [1990] 1 S.C.R. 282, (1990), 68 D.L.R. (4th) 524; *Doyle v. Restrictive Trade Practices Commission*, [1985 CanLII 5573 \(FCA\)](#), [1985] 1 F.C. 362, (1985), 21 D.L.R. (4th) 366 (C.A.); *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006 SCC 4](#), [2006] 1 S.C.R. 140; *BP Canada v. Canada (National Revenue)*, [2017 FCA 61](#), [2017] 4 F.C.R. 355; *Hryniak v. Mauldin*, [2014 SCC 7](#), [2014] 1 S.C.R. 87; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014 SCC 59](#), [2014] 3 S.C.R. 31; *R. v. Jordan*, [2016 SCC 27](#), [2016] 1 S.C.R. 631; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998 CanLII 837 \(SCC\)](#), [1998] 1 S.C.R. 27, (1998), 154 D.L.R. (4th) 193; *Provincial Secretary of Prince Edward Island v. Egan*, [1941 CanLII 1 \(SCC\)](#), [1941] S.C.R. 396, [1941] 3 D.L.R. 305; *Canadian National Railway v. BNSF Railway Company*, [2016 FCA 284](#); *Pfizer Canada Inc. v. Teva Canada Limited*, [2016 FCA 218](#), 141 C.P.R. (4th) 165; *Brooke v. Toronto Belt Line Railway Co.* (1891), 21 O.R. 401; *Canadian National Railway Co. v. Lewis*, [1930 CanLII 309 \(CA EXC\)](#), [1930] Ex. C.R. 145, [1930] 4 D.L.R. 537; *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, [2004 SCC 61](#), [2004] 3 S.C.R. 304; *Padfield v. Minister of Agriculture, Fisheries & Food*, [1968] A.C. 997 (H.L.); *MacKeigan v. Hickman*, [1989 CanLII 40 \(SCC\)](#), [1989] 2 S.C.R. 796, (1989), 61 D.L.R. (4th) 688; *Quan v. Cusson*, [2009 SCC 62](#), [2009] 3 S.C.R. 712; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002 SCC 19](#), [2002] 1 S.C.R. 678; *R. v. Sheppard*, [2002 SCC 26](#), [2002] 1 S.C.R. 869; *Parmar v. Bayley*, [2001 BCSC](#)

1394, 19 C.P.C. (5th) 366; *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, [2010] 2 F.C.R. 488; *Johnson v. Canada (Attorney General)*, 2011 FCA 76, 414 N.R. 321; *Telus Communications Inc. v. Telecommunications Workers Union*, 2005 FCA 262, 257 D.L.R. (4th) 19; *Leader Media Productions Ltd. v. Sentinel Hill Alliance Atlantis Equicap Limited Partnership*, 2008 ONCA 463, 90 O.R. (3d) 561.

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APPEAL from a Tax Court of Canada decision (2015 TCC 230, [2015] G.S.T.C. 114) rendered by a judge who did not hear the appeal before that Court. Appeal allowed.

APPEARANCES

Maurice P. Chiasson, Q.C. and *Roderick (Rory) H. Rogers, Q.C.* for appellant.

Dominique Gallant for respondent.

SOLICITORS OF RECORD

Stewart McKelvey, Halifax, for appellant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment rendered in English

[1] WEBB J.A.: This is an appeal from a judgment rendered by a judge of the Tax Court of Canada who did not hear the appeal before that Court. The appeal in this case was heard on February 26, 2014 by a particular judge of the Tax Court and judgment was rendered on September 30, 2015 by a different judge of that Court (*High-Crest Enterprises Limited v. The Queen*, 2015 TCC 230, [2015] G.S.T.C. 114).

[2] For the reasons that follow, in my view, the judgment rendered on September 30, 2015 is a nullity and the matter should be remitted back to the Tax Court Judge who heard the appeal to render judgment.

[3] As a preliminary matter, in the notice of appeal High-Crest indicated that the respondent was the Attorney General of Canada. Since High-Crest was intending to appeal a judgment of the Tax Court of Canada the respondent should have been Her Majesty the Queen. The style of cause is amended to reflect the correct respondent.

I. Background—Assessment in Issue

[4] The Province of Nova Scotia (the Province) issued a request for proposals to increase the number of nursing home beds and residential care facility beds in the province and to provide the necessary services related thereto. High-Crest Enterprises Limited (High-Crest) was one of the successful bidders. Its proposal was to construct a 20-bed addition to its existing nursing home facility in Springhill, Nova Scotia.

[5] As a successful bidder, High-Crest entered into agreements with the Province. Under these agreements High-Crest had to obtain mortgage financing for the construction at the rate fixed by the Nova Scotia Housing Development Corporation. The mortgage amount included an amount for the HST paid by High-Crest to construct the addition. The *per diem* amount that High-Crest could charge for the occupancy of a bed in the nursing

home was fixed by the Province. There are two components of this amount as identified by the appellants—accommodation costs and health care costs.

[6] There is no dispute that the accommodation costs component included an amount to repay the mortgage that was obtained to construct the addition. Therefore, High-Crest would eventually be reimbursed for the HST that it paid in relation to the construction of the addition through the *per diem* amounts that it would be receiving for the occupancy of the beds. High-Crest also claimed input tax credits for the HST paid in relation to the construction of the addition (appellant's memorandum of fact and law, paragraph 17). The appellant acknowledges in paragraph 67 of its memorandum of fact and law that "[t]he accommodation costs are paid for by a combination of the resident and the Province, based on a formula which takes into account the resident's ability to pay".

[7] When the addition was completed and it was first occupied, the self-supply rule under [subsection 191\(4\)](#) of the [Excise Tax Act](#), R.S.C., 1985, c. E-15 (the ETA) resulted in a deemed supply of the addition. But for [section 191.1](#) of the ETA, High-Crest would be deemed to have collected HST based on the fair market value of the addition. However, in this case, the fair market value of the addition was less than the cost of the addition and the Canada Revenue Agency determined that section 191.1 was applicable. As a result, an assessment was issued under the ETA dated July 16, 2010 for the reporting period from January 1, 2010 to March 31, 2010 assessing HST based on the amount of HST paid in relation to the cost of the addition and not on the fair market value of the addition. The parties agree that if section 191.1 of the ETA was not applicable, the HST payable would be \$350 000 (based on the fair market of the addition) and, if section 191.1 of the ETA was applicable, the HST payable would be \$646 304 (based on the cost of the addition).

[8] The issue before the Tax Court was whether [section 191.1](#) of the [ETA](#) was applicable.

II. Procedural Background

[9] The matter was heard on February 26, 2014 by a judge of the Tax Court. On June 23, 2015 a Post-Hearing Discussion Conference Call was held. The Chief Justice of the Tax Court and counsel for the parties participated in this call. The Chief Justice began the conference call with the following statements (which are reproduced below as they appear in the copy of the transcript of this conference call that was included in the appeal book):

I have a situation where I must remove the appeal file from the presiding judge of this appeal for the purpose of having a judgement rendered on this appeal as soon as possible.

I have taken the file from Justice ... for determination.

The appeal decision may be rendered in one of two ways.

Number one, with the consent of the parties via their counsel, the appeal can be assigned to a judge of the Tax Court of Canada chosen by the Chief Justice, and that judge would render a decision based upon the transcript of the appeal, the transcript has been completed.

Or number two, have a conduct of a complete new appeal, new trial altogether with a new a judge assigned by the Chief Justice.

I realize this is an unusual situation but the circumstances are such that this is the course of action I've decided to take as Chief Justice of the Tax Court of Canada.

The litigants are entitled to have their dispute resolved in a timely, efficient and effective fashion.

The Tax Court of Canada has failed in this regard in this appeal to the detriment of all involved.

As Chief Justice, I apologize to the litigants for the circumstances under which this has occurred to date.

What I need to know now is what the parties want to do with the choices that I have presented.

I will give you 10 days to decide.

[10] On July 3, 2015, counsel for the Crown wrote a letter to the Registrar of the Tax Court. After noting that cases are generally reassigned only if the presiding judge is unable to continue as a result of death, incapacity, conflict of interest or apprehension of bias and noting that the presiding judge in this case “continues to be assigned cases”, counsel for the Crown proposed a third option of allowing the presiding judge more time to complete the judgment.

[11] Following the letter of July 3, 2015, a second conference call was held on July 14, 2015. The Chief Justice began this conference call with the following statements (which are reproduced below as they appear in the copy of the transcript of this conference call that was included in the appeal book):

Thank you very much for coming on this conference call.

On June 23rd, 2015 at 3:15 p.m. we had a conference call, and at that time I stated in part as follows:

Basically I said that I have a situation where I must remove the appeal file from the presiding judge for the purpose of having a judgement rendered in this appeal.

I have taken the file from Justice ... for determination. The appeal decision may be rendered in one of two ways, and I stated that there was basically two options.

I stated I realize this is an unusual situation, but the circumstance is such this is the course of action I just stated that I decided to take as Chief Justice of the Tax Court of Canada.

Litigants are entitled to have the dispute resolved in a timely, efficient and effective fashion.

The Tax Court of Canada has failed in this regard in this appeal to the detriment of all involved, and I apologize to the litigants for the circumstances of what has occurred in this particular matter.

What I need to know is what the parties want to do with the choices that I have presented.

And then I will give you 10 days to decide.

If it's option number one, I require an agreement in writing signed by counsel for the parties agreeing to have the appeal decided by a judge appointed by the Chief Justice based the trial record and the transcript.

If there's no agreement between the parties then a new trial will be set down as soon as possible and the matter will be re-tried.

That's what I stated on June 23rd, 2015.

Subsequent to that, I got a letter from the respondent.

I'm not sure what the respondent did not understand. I thought I was pretty clear in the choices that were given. There is no third choice here. There is choice one or choice two.

I have made a determination that this file will be taken from Justice ... and that the matter will be decided — determined by someone else.

[12] The only explanation for the removal of the file from the presiding judge that was provided in either conference call was that the file had to be removed “from the presiding judge for the purpose of having a judgment rendered in this appeal”. Since there is also a reference to matters being resolved in a timely way, presumably the significant delay from the date of the hearing without a decision having been rendered was the motivation for this decision.

[13] Counsel for the parties subsequently submitted a joint letter dated July 14, 2015, indicating that they were choosing the first option—to have the matter determined by another judge based on the record and transcripts.

[14] As a result, a decision dated September 30, 2015 was rendered by another judge of the Tax Court. The second judge dismissed High-Crest's appeal and High-Crest then appealed this decision.

III. Issues

[15] The main issue in this appeal is whether the Chief Justice had the power to remove this file from the presiding judge and assign it to another judge and therefore, whether the second judge had the authority to render judgment in this matter. The parties, at the hearing of this appeal, also requested that if it was determined that the second judge did not have the authority to render judgment, that this Court express its views on the applicability of [section 191.1](#) of the [ETA](#) in the circumstances of this case.

IV. Standard of Review

[16] The questions of whether the Chief Justice had the power to remove this file from the presiding judge and assign it to another judge and the interpretation of [section 191.1](#) of the [ETA](#) are questions of law and therefore the applicable standard of review is correctness (*Housen v. Nikolaisen*, [2002 SCC 33](#), [2002] 2 S.C.R. 235, at paragraph 8).

V. Analysis

[17] The respondent argues that the Chief Justice did have the authority to remove the file from the presiding judge and assign it to another judge as a result of the provisions of [subsections 8\(1\) and \(2\)](#) of the [Courts Administration Service Act](#), S.C. 2002, c. 8 and [subsection 14\(2\)](#) of the [Tax Court of Canada Act](#), R.S.C., 1985, c. T-2. These provisions outline the powers granted to the Chief Justice of the Tax Court in relation to the assignment of cases and are as follows:

[Courts Administration Service Act](#):

Judicial functions

8 (1) The Chief Justices of the Federal Court of Appeal, the Federal Court, the Court Martial Appeal Court and the Tax Court of Canada are responsible for the judicial functions of their courts, including the direction and supervision over court sittings and the assignment of judicial duties.

Included powers

(2) The direction and supervision over court sittings and the assignment of judicial duties include, without restricting the generality of those terms, the power to

- (a) determine the sittings of the court;
- (b) assign judges to sittings;
- (c) assign cases and other judicial duties to judges;
- (d) determine the sitting schedules and places of sittings for judges;
- (e) determine the total annual, monthly and weekly work load of judges; and
- (f) prepare hearing lists and assign courtrooms.

Tax Court of Canada Act:

14 ...

Arrangements to be made by Chief Justice

(2) Subject to the rules of Court, all arrangements that may be necessary or proper for the transaction of the business of the Court and the assignment from time to time of judges to transact that business shall be made by the Chief Justice.

[18] In addition to the above provisions of the *Courts Administration Service Act* and the *Tax Court of Canada Act*, subsection 31(3) of the *Interpretation Act*, R.S.C., 1985, c. I-21, provides that:

31 ...

Powers to be exercised as required

(3) Where a power is conferred or a duty imposed, the power may be exercised and the duty shall be performed from time to time as occasion requires.

[19] In *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, 1997 CanLII 399 (SCC), [1997] 1 S.C.R. 12, (1997), 142 D.L.R. (4th) 193, the Supreme Court of Canada found that applying this provision of the *Interpretation Act* would require a determination of whether Parliament intended the power to be a continuing power or a single use power. The power in question in this case is the power to assign judges to cases as provided in section 8 of the *Courts Administration Act* and subsection 14(2) of the *Tax Court of Canada Act*.

[20] The power to assign judges to cases is a continuing power that would allow the Chief Justice to assign and reassign a case before it is heard. However, once a judge has started to hear a case, in my view, that judge would then be seized with the matter. It does not seem to me that Parliament would have intended to grant the Chief Justice the power to remove a case from a judge who has been seized with that matter. Otherwise, the Chief Justice would have the power to temporarily assign a judge to cover a presiding judge's occasional absences during a lengthy trial. In my view, reassigning a case that has not been heard is not the same as removing a judge who is seized with a case from that case. As a result, these provisions would not allow a Chief Justice to unilaterally remove a case from a judge who is seized with that case.

[21] In *R. v. MacDougall*, 1998 CanLII 763 (SCC), [1998] 3 S.C.R. 45, (1998), 165 D.L.R. (4th) 193, the Supreme Court of Canada noted the significance of a judge being seized of a matter [at paragraphs 50 and 51]:

The Crown's duty to ensure that trial proceedings are not delayed may require the Crown to apply to have a judge removed and replaced when a judge falls ill in the course of a trial. There is no set time period after the onset of illness when the Crown must apply to have the judge removed and replaced. Whether and when the Crown should act depends on what is reasonable in the circumstances of the case.

It can safely be said that the Crown should bring an application to replace the judge when it is clear that the judge will not recover or return to judicial duties. However, where the expectation is that a judge seized of the case will recover and return, the matter is more difficult. In such a case, the Crown must balance two factors. On the one hand, the Crown must consider the fact that a judge who has heard evidence in a case is seized of the case. This means that the task of deciding all the issues on the case, including sentencing, falls to that judge and no other. The removal of a judge from an unconcluded case has the potential to interfere with the independence of the judiciary and the right of an accused to a fair trial. Absent compelling reasons, it would be improper for Crown counsel to apply to remove a judge seized of the case. To do so might create a perception that the Crown was interfering with the right of the judge to independently judge all the issues in the case. It might also create a perception of unfairness to the accused. For example, a trial judge may make comments in the course of a trial that lead the Crown to speculate that he or she is sympathetic to the accused. If the Crown were to apply to have the judge removed prior to sentence absent a compelling reason, the perception might be that the Crown did so to obtain a judge less sympathetic to the accused. Where a judge falls ill and the expectation is that he or she will return to judicial duties, the Crown must bear these considerations in mind in deciding whether it is reasonable to bring an application to have the judge removed. On the other side of the balance, the Crown must consider the accused's right to a prompt trial under s. 11(b) and the prejudice the accused may suffer as a result of the delay. [Emphasis added.]

[22] Also in *R. v. Gallant*, 1998 CanLII 764 (SCC), [1998] 3 S.C.R. 80, (1998), 165 D.L.R. (4th) 219, the Supreme Court of Canada noted [at paragraph 14] that:

When Judge Plamondon fell ill, the expectation was that he would soon return to his judicial duties. On the justifiable assumption that Judge Plamondon would return, the Crown proceeded in accordance with the general rule that an accused should be sentenced by the judge who took the plea or presided at the conviction phase of the trial. The Crown was required to proceed cautiously in moving to replace Judge Plamondon. Against this I balance the right of the accused to be tried within a reasonable time and ask whether the circumstances required departure from the usual rule that the judge seized of the case retains jurisdiction over it until its conclusion. The Crown had no information suggesting that Judge Plamondon would not be returning, nor that his absence would be unduly lengthy. It became apparent that he would not return only upon the announcement of his retirement. The delay in question was 10 months long. However, it occurred in the post-conviction phase of proceedings when the interests engaged by s. 11(b) were more attenuated, in the circumstances, than in the pre-conviction phase. Furthermore, there was no indication that the delay would cause the accused any significant prejudice. In these circumstances, I cannot conclude that the Crown erred in not moving prior to Judge Plamondon's resignation to remove and replace him. Crown delay is therefore not established. [Emphasis added.]

[23] The general rule, as noted by the Supreme Court, is that a judge who is seized of a matter is the one who has the jurisdiction to continue with that matter. In my view, if Parliament intended to alter this rule to provide the Chief Justice with the power to remove a file from a judge who was seized of this matter, clearer language would be required. The power to assign cases would still be applicable to assign or reassign cases before a hearing has commenced. However, once a judge is seized with a case, the powers as set out above in the *Courts Administration Services Act* and the *Tax Court of*

Canada Act cannot be used by the Chief Justice to unilaterally remove that case from that judge, even with the application of the *Interpretation Act*.

[24] In other jurisdictions, the Chief Justice is given the power to assign judicial duties. For example, [section 14](#) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 provides that:

Powers and duties of Chief Justice

14 (1) The Chief Justice of the Superior Court of Justice shall direct and supervise the sittings of the Superior Court of Justice and the assignment of its judicial duties.

[25] [Section 79](#) of the *Legislation Act, 2006*, S.O. 2006, c. 21, Schedule F, provides that “[p]owers that are conferred on a person may be exercised ... whenever the occasion requires”.

[26] Yet, despite these provisions which are similar to those contained in the *Courts Administration Service Act*, the *Tax Court of Canada Act*, and the *Interpretation Act*, the *Courts of Justice Act* specifically addresses the powers of the Chief Justice if a particular judge becomes incapacitated (subsection 123(4)) or does not provide a decision within the time limits as set out in subsection 123(5) of that Act). If the Chief Justice, in exercising his power to assign judicial duties could simply reassign cases regardless of whether a judge is seized of the matter, there would be no need for section 123 of that Act.

[27] There are not many cases where a Chief Justice has removed a file from a sitting judge who has heard a case. In *Re Ramsey* (1972), [1972 CanLII 1409 \(NB CA\)](#), 4 N.B.R. (2d) 809, 8 C.C.C. (2d) 188, the Chief Judge attempted to have a case continued by another judge. In *Ramsey* the parties agreed that the evidence of certain witnesses admitted in the trial of one accused would be admitted into evidence in the subsequent trials of two other accused. When the first accused was acquitted, the Crown requested that the judge who heard the first trial surrender jurisdiction in relation to the trials of the two other accused on the basis that he was biased. Although the judge did not accept that he was biased, he signed a form that had been sent to him by the Chief Judge waiving jurisdiction in favour of the Chief Judge.

[28] The Supreme Court of New Brunswick, Appeal Division [at paragraphs 13 and 20], found that the allegation of bias was unfounded and noted that:

Section 499 (1) provides for a transfer of jurisdiction where the magistrate “dies or is for any reason unable to continue”. Such a reason could be illness, absence, disqualification or other justifiable cause. The order or request of the Chief Judge does not constitute such a reason. The Chief Judge, appointed by the Province, has administrative duties and functions. He should not and cannot interfere with the judicial discretion of a provincial judge acting as a magistrate under the [Criminal Code](#).

...

There was therefore no reason for the proceedings being continued before the Chief Judge of the Provincial Court. The Deputy Judge having commenced the trial was obligated under the circumstances to continue the trial until its conclusion. He was without jurisdiction to transfer jurisdiction to another magistrate and the Chief Judge had no jurisdiction to direct him to transfer jurisdiction and had no right to assume jurisdiction over the trial of the accused Ramsey. [Emphasis added.]

[29] Absent any of the circumstances listed in [subsection 499\(1\)](#) of the [Criminal Code](#) [R.S.C., 1985, c. C-46], the Chief Judge did not have the authority to transfer jurisdiction from one judge to another.

[30] In the civil law context, all of the reported cases that were found that related to the reassignment of a case from a judge who was seized of a matter arose following the death or incapacity of the presiding judge.

[31] In *Clarke v. Trask* (1901), 1 O.L.R. 207, [1901] O.J. No. 42 (QL) (H.C.J.); *Coleshill v. Manchester Corp.*, [1928] 1 K.B. 776, 97 L.J.K.B. 229 (C.A.); *Re Application of British Reinforced Concrete Engineering Co. Limited* (1929), 45 T.L.R. 186, 20 Ry. & Can. Tr. Cas. 78 (Railway and Canal Commission), and *Royal Bank of Canada v. Nichols* (1985), [1985 CanLII 5164 \(PE SCTD\)](#), 56 Nfld. & P.E.I.R. 340, [1985] P.E.I.J. No. 12 (QL) (S.C.), the judge died after a trial had commenced and before judgment was rendered. In *Clarke* and *Nichols*, a new trial was ordered and in the other two cases, the cases were allowed to continue with another judge. In each of these cases the file was removed from the judge as a result of the death of the particular judge.

[32] In *Bolton v. Bolton*, [1949] 2 All E.R. 908, (1950), 47 L.G.R. 730 (H.C.J.), a second judge was allowed to continue a hearing following the incapacity of the judge who had commenced the hearing. Although the particular incapacity is not specifically identified, Lord Merriman, after referring to *Coleshill* (where the judge had died) noted [at page 911] that “[i]t is manifestly an immaterial circumstance whether the change in the tribunal is brought about by death or illness” suggesting that it was an illness that caused the change in magistrate in *Bolton*.

[33] In *Liszkay v. Robinson*, [2003 BCCA 506](#), 232 D.L.R. (4th) 276 and *D’Amico v. Wiemken*, [2010 ABQB 785](#), 497 A.R. 360, the judge who heard a case had to recuse himself before judgment could be rendered. In each case the matter was reassigned to another judge to continue the matter.

[34] In *Liszkay*, the British Columbia Court of Appeal [at paragraph 71] found that:

... it was necessary for the trial judge to withdraw from the proceedings on the basis of a reasonable apprehension of bias. As a result, it was “impossible” for the trial judge to continue with the proceedings and the Chief Justice had jurisdiction to make the order he did under Rule 64(10) and (11) of the *Rules of Court*.

[35] The trial judge withdrew himself from the matter. He was not removed unilaterally by the Chief Justice.

[36] The issue in *D’Amico* was not whether the case could be reassigned to another judge but how the matter should proceed—either based on the transcripts or as a new trial. P.R. Jeffrey J. found authority in the applicable rules to continue the matter even if the parties did not consent. This was also not a case where the Chief Justice unilaterally removed a file from a judge who was seized of the matter but rather a case where the judge had to recuse himself.

[37] With respect to the situations where a judge can remove himself or herself from a matter, the Ontario Court of Appeal in *R. v. Lochard* (1973), [1973 CanLII 1346 \(ON CA\)](#), 12 C.C.C. (2d) 445, 22 C.R.N.S. 196, at pages 446–448, found that an excessive workload was not considered to be a valid reason for a judge to abdicate jurisdiction and have another judge continue with the case under the applicable provision of the [Criminal Code](#).

[38] Any removal by the Chief Justice of a judge who is seized of a matter would also conflict with the principle that the person who decides a case must be the same person who hears the case (*IWA v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282, (1990), 68 D.L.R. (4th) 524, at page 329; *Doyle v. Restrictive Trade Practices Commission*, 1985 CanLII 5573 (FCA), [1985] 1 F.C. 362 (1985), 21 D.L.R. (4th) 366 (C.A.)).

[39] In my view, the removal could also not be justified under the implied jurisdiction of the Tax Court to carry out its functions as a court. In *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at paragraph 19, the Supreme Court of Canada confirmed that statutory courts have an implied jurisdiction by necessary implication to carry out the functions of a court. However, this implied jurisdiction does not give the Chief Justice the power to unilaterally remove a case from a judge who has heard the matter and therefore is seized with the matter and who is not incapacitated. There was no indication in this case that the removal of the judge from this matter was necessary.

[40] There was no indication in this case of any incapacity of the judge who heard the appeal in this case. In my view, the Chief Justice of the Tax Court did not have the power to unilaterally remove the judge from the case with which he was seized. As a result, that judge is still seized with the matter and all of the proceedings that have occurred after the file was removed, are a nullity. Since the decision rendered by the second judge is a nullity, I would refer the matter back to the judge who heard the case to render a decision.

VI. Interpretation of the ETA

[41] The parties have requested that we provide our comments on the interpretation of the ETA in any event. Given the amount of time that has passed since the matter was heard by the presiding judge, the parties indicated that any insight that we may provide to the interpretation of the relevant provisions could assist the parties in reaching a settlement of this matter. Since the matter has not been properly adjudicated by the judge who is seized with the matter, it would not be appropriate to provide our interpretation of the provisions. However, there are some matters that should be addressed by the presiding judge in deciding how to interpret the provisions.

[42] The ETA provides that generally a builder of an addition to a residential complex is deemed to have made a self-supply of that addition when the conditions as set out in paragraphs 191(4)(a) to (c) of the ETA are satisfied. This occurs when the addition is substantially completed and any individual first occupies any residential unit that is a part of such addition as a place of residence. The builder, subject to certain exceptions, is deemed to have collected tax on the supply based on the fair market value of the addition.

[43] Section 191.1 of the ETA provides an exception to this general rule. If the conditions as set out in subsection 191.1(2) of the ETA are satisfied, the amount of the tax that the builder will be deemed to have collected as a result of the self-supply of the addition will be the greater of the tax based on the fair market value of the addition and the tax payable by the builder in relation to the construction of the addition (including any tax payable in relation to the acquisition of any real property for the addition). Since the fair market value of the addition in this case was less than the cost of construction, if the general rule under subsection 191(4) of the ETA is applicable, the amount of HST that High-Crest will be deemed to have collected as a result of the application of the self-supply rule will be significantly less than the HST it paid in relation to the construction of the addition.

[44] The only condition of [subsection 191.1\(2\)](#) of the [ETA](#) that is in dispute in this case is the condition in paragraph (c) thereof:

191.1 ...

Subsidized residential complexes

(2) ...

...

(c) except where the builder is a government or a municipality, the builder, at or before that time, has received or can reasonably expect to receive government funding in respect of the complex,

[45] “[G]overnment funding / *subvention*” is defined in [subsection 191.1\(1\)](#) of the [ETA](#):

Definitions

191.1 (1) ...

government funding, in respect of a residential complex, means an amount of money (including a forgivable loan but not including any other loan or a refund or rebate of, or credit in respect of, taxes, duties or fees imposed under any statute) paid or payable by

(a) a grantor, or

(b) an organization that received the amount from a grantor or another organization that received the amount from a grantor,

to a builder of the complex or of an addition thereto for the purpose of making residential units in the complex available to individuals referred to in paragraph (2)(b). (*subvention*)

[46] The Province is a “grantor / *subventionneur*” as defined in [subsection 191.1\(1\)](#) of the [ETA](#).

[47] The Tax Court Judge who wrote the reasons analyzed the various agreements between the Province and High-Crest and the components of the *per diem* amount that High-Crest could charge for the residential units. He concluded that the primary purpose of the payments by the Province was to make residential units available to seniors.

[48] In *Canada Trustco Mortgage Co. v. Canada*, [2005 SCC 54](#), [2005] 2 S.C.R. 601, the Supreme Court of Canada confirmed that in interpreting legislation (including a taxing statute), a textual, contextual and purposive approach is to be applied.

[49] In determining whether, in any particular case, there is an amount that the builder can reasonably expect to receive from a grantor for the purpose of making residential units available to the individuals referred to in [paragraph 191.1\(2\)\(b\)](#) of the [ETA](#), one question that should be addressed is whether it is necessary to determine the primary purpose of the total amount that a builder may reasonably expect to receive from a grantor or whether it is only necessary that the builder may reasonably expect to receive an amount (which could be part of a larger payment) from a grantor and that amount is for the required purpose.

[50] For example, assume that a law firm has been retained to provide legal services in relation to a reassessment under the [Income Tax Act](#), R.S.C., 1985 (5th Supp.), c. 1.

Assume that there are several issues and that one minor issue relates to the fair market value of vacant land. Once the matter is concluded assume the law firm sends a bill to the client for \$25 000 for legal fees, \$1 000 for disbursements (\$600 for the cost of the appraisal of the vacant land and \$400 for other disbursements) and HST at 15 percent (\$3 900) for a total bill of \$29 900. Assume the client makes one payment of \$29 900. Has the law firm has received an amount of money from the client for the purpose of obtaining the appraisal of the real property even though the amount for the appraisal is a minor part of the total amount paid?

[51] Also paragraph 191.1(2)(c) of the [ETA](#) is a condition that, if satisfied, will result in certain consequences under the ETA. As acknowledged by the appellant, the amount of tax payable under the ETA is not affected by the amount of the funding that is provided or that is expected to be provided by the grantor. The same result will arise under the ETA whether the government funding is \$1 000 or \$1 000 000 (or any other amount) or whether it is 1 percent or 100 percent (or any other percentage) of the cost of construction. This could also raise the question of whether it is necessary to determine the primary purpose of any expected payments or whether it is only necessary to determine if any expected payments will include an amount for the designated purpose.

VII. Conclusion

[52] As a result, I would allow the appeal, set aside the judgment that was rendered and refer the matter back to the Tax Court Judge who heard the tax appeal to render judgment. Given the circumstances of this case, I would not award costs.

PELLETIER J.A.: I agree.

The following are the reasons for judgment rendered in English by

[53] STRATAS J.A. (dissenting): I agree with Justice Webb's account of the facts and the background in this appeal. However, following a different analytical approach, I propose a different disposition for the appeal.

[54] To recap, a judge of the Tax Court of Canada was assigned to hear this case, heard it, and reserved his judgment on it. The judge did not render judgment for some time. The Chief Justice of the Tax Court of Canada (*per* Rossiter C.J.) summoned the parties to a conference call, told them that the case had not been "resolved in a timely, efficient and effective fashion", and announced that he was reassigning the case to another judge.

[55] The new judge has now rendered judgment in the case. The appeal before us is from that judgment.

[56] For the purposes of these reasons, the power the Chief Justice exercised shall be called the "power to reassign" and what the Chief Justice did shall be called a "reassignment".

[57] The Chief Justice's reassignment raises three issues:

(A) *Jurisdiction*. In the abstract, looking at the statutory powers given to the Chief Justice, does he have a power to reassign?

(B) *Discretion.* Assuming the Chief Justice has a power to reassign, he is not forced to exercise it. He can decide not to. He has a discretion. What factors guide his discretion?

(C) *Procedural fairness.* The exercise of a power to reassign affects the legal and practical interests of the parties. What steps should the Chief Justice take to ensure procedural fairness to the parties?

[58] These three issues must be broken out and considered separately because different considerations apply to each. As well, in this case, the appellant did not object to the reassignment until after it had lost in the Tax Court. The appellant's silence has different ramifications depending on the issue we are dealing with.

A. Jurisdiction

[59] In the abstract, looking at the statutory powers given to the Chief Justice, does he have a power to reassign? In my view, yes.

[60] Two provisions give the Chief Justice the power to reassign: the *Tax Court of Canada Act*, R.S.C., 1985, c. T-2, section 14 and the *Courts Administration Service Act*, S.C. 2002, c. 8, section 8. In substance, these provisions are alike or substantially similar to those governing Chief Justices in all Canadian jurisdictions.

(1) Section 14 of the *Tax Court of Canada Act*

[61] Section 14 of the *Tax Court of Canada Act* provides that a judge of the Tax Court sits as "the Court" for the purposes of the Act and that the Chief Justice shall make "assignment[s] from time to time of judges" to transact the business of the Court.

[62] What does "from time to time" mean? The accepted definition of this phrase, applied in a number of Canadian cases, is found in *Lawrie v. Lees* (1881), 51 L.J. Ch. 209, 7 A.C. 19 (H.L.). There, the House of Lords held that "from time to time" means that after the power has been exercised once, it may be exercised again in order to "reverse altogether" the first exercise of the power (at page 29):

.... the words "from time to time" are words which are constantly introduced where it is intended to protect a person who is empowered to act from the risk of having completely discharged his duty when he has once acted, and therefore not being able to act again in the same direction. The meaning of the words "from time to time" is that after he has made one order he may make a fresh order to add something to it, or take something from it, or reverse it altogether.... [My emphasis.]

[63] Thus, just looking in the abstract at the text of section 14 of the *Tax Court of Canada Act*, the Chief Justice has the power to reassign a case heard by a judge. The section contains no words of qualification.

[64] Even where, as here, the text of a section is clear, we must still examine its context and purpose. Sometimes this examination can reveal ambiguities in the meaning of the text or change our understanding of it: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601; and see, e.g., *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 and *BP Canada v. Canada (National Revenue)*, 2017 FCA 61, [2017] 4 F.C.R. 355).

[65] In this case, the context and purpose of [section 14](#) of the *Tax Court of Canada Act* confirms our understanding of the text: the Chief Justice has the power to reassign.

[66] One of the purposes of section 14 is to allow the Chief Justice to ensure that all cases that come before the Court are determined at some point by a judge. Every case must be decided. But section 14 exists within the real-life context of the frailties of judges: some die and some lose the mental or physical capacity to function. If section 14 is to fulfil its purpose, it cannot be just a power to assign a judge to a case and then the power is spent. Section 14 must also include the power to reassign.

[67] Section 14 also sits within a larger context. The Chief Justice is the head of the Tax Court. Like all Chief Justices of all other courts across Canada, the Chief Justice is to do what he can to ensure that his part of the judicial branch fulfils its mission. The mission is to dispense justice with integrity, fairness and efficiency, to improve the reputation of the administration of justice and to win the confidence of the public.

[68] In recent years, parts of this mission have assumed greater urgency and importance. For example, timely, cost-effective access to justice has become a practical necessity, sometimes even a constitutional imperative: *Hryniak v. Mauldin*, [2014 SCC 7](#), [2014] 1 S.C.R. 87; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014 SCC 59](#), [2014] 3 S.C.R. 31; *R. v. Jordan*, [2016 SCC 27](#), [2016] 1 S.C.R. 631. And the mission is increasingly beset by increasingly difficult challenges in an increasingly complex world.

[69] Absent wording to the contrary—and there is none here—statutory provisions that give powers to Chief Justices must be interpreted in a way that allows them to advance their courts’ missions. Doing anything less fails to carry out the accepted approach to statutory interpretation. Doing anything less violates Parliament’s instruction that statutory provisions “be given such fair, large and liberal construction and interpretation as best ensures the attainment of [their] objects”: *Interpretation Act*, R.S.C., 1985, c. I-21, section 12.

[70] I would have thought that it was beyond doubt that section 14 gives the Chief Justice the power to reassign when the original judge is dead or incapacitated by ill-health or an ethical issue such as a conflict of interest. But in this case, the original judge is alive and there is no evidence of incapacity. All we know is that the judge had reserved his judgment on the case for a long time.

[71] Thus, we arrive at the central question in this case: does the Chief Justice’s power to reassign potentially extend to situations beyond the death or incapacity of the original judge assigned to determine the case?

[72] I say yes. The power to reassign is coextensive with the need to advance the mission of the courts. Situations beyond death and incapacity can undercut the mission of the courts. Consistent with its purpose, the power to reassign must extend to those situations.

[73] This can be demonstrated by looking at two situations, one extreme, one benign.

[74] Suppose that a judge seized of a matter is alive and has absolutely no physical or mental impairment. But for whatever reason—perhaps a bad attitude or a crippling workload—the judge does not decide a matter in a timely way. Two years go by and still there is no decision. The parties write, begging for a decision and the judge does not respond. More and more time goes by and the inaction continues.

[75] Is the Chief Justice powerless? Despite the breadth of the wording of [section 14](#) of the *Tax Court of Canada Act*, the Chief Justice's position as head of the Court, his obligation to use his powers to advance the Court's mission, and the importance of the Court's mission itself, is the Chief Justice forced to wait as more and more months and years go by until the judge dies, resigns, becomes incapable or is removed by the Governor General on address of the Senate and House of Commons?

[76] I think not. Provided the reassignment furthers the mission of the Court, the Chief Justice has the power to reassign.

[77] At a benign, less dramatic level, sometimes stuff happens: judges assigned to a case get ill, have to attend suddenly to family obligations, get bogged down with a series of very tough reserves, and so on. To advance the court's mission—to ensure that cases are heard and decided, not adjourned or subject to lengthy reserve times—Chief Justices often reassign judges before hearings. Surely they have that statutory power, in this case [section 14](#) of the *Tax Court of Canada Act*.

[78] Remember that we are dealing here with just the opening, jurisdictional question: can the Chief Justice potentially reassign? To say that the Chief Justice can reassign does not mean that he always should. This is the focus of the second question: what factors govern the Chief Justice's discretion? Before examining this, I wish to examine the other source of the Chief Justice's power to reassign, [section 8](#) of the *Courts Administration Service Act*.

(2) [Section 8](#) of the *Courts Administration Service Act*

[79] This provision gives the Chief Justice the same broad power to reassign that is found in [section 14](#) of the *Tax Court of Canada Act*.

[80] Under [section 8](#) of the *Courts Administration Service Act*, the Chief Justice of the Tax Court is responsible for the "assignment of judicial duties" (subsection 8(1)). This includes "the power to ... assign judges to sittings" (subsection 8(2)). [Section 8](#) says nothing about reassignment. But subsection 31(3) of the *Interpretation Act*, R.S.C., 1985, c. I-21, in conjunction with [section 8](#) of the *Courts Administration Service Act*, makes it clear that the Chief Justice has the power to assign.

[81] [Subsection 31\(3\)](#) of the *Interpretation Act* provides that "[w]here a power is conferred or a duty imposed, the power may be exercised and the duty shall be performed from time to time as occasion requires." The power to assign a particular case to a particular judge in [subsection 8\(2\)](#) of the *Courts Administration Service Act* can be re-exercised or, in the words of the subsection, "performed from time to time as occasion requires." The meaning of "from time to time" is governed by the House of Lords decision in *Lawrie v. Lees*, above.

[82] In *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997 CanLII 399 \(SCC\)](#), [1997] 1 S.C.R. 12, (1997), 142 D.L.R. (4th) 193, the Supreme Court placed restrictions on the use of [subsection 31\(3\)](#) of the *Interpretation Act*. It held that one must first interpret the provision that gives the power in question, here [subsection 8\(2\)](#) of the *Courts Administration Service Act*. If the provision, properly interpreted, allows the power to be exercised once and only once, subsection 31(3) of the *Interpretation Act* does not apply. For example, where a provision grants an adjudicator a power to adjudicate a dispute and the provision, properly interpreted, is intended to finally settle the parties' rights—in other words, where the power is intended to be a single-use

power—subsection 31(3) of the *Interpretation Act* has no room to operate: see the discussion in Sir William Wade and Christopher Forsyth, *Administrative Law*, 7th ed. (Oxford: Clarendon Press, 1994), at pages 261 and 262.

[83] Properly interpreted, [subsection 8\(2\)](#) of the *Courts Administration Service Act* is not a single-use power: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998 CanLII 837 \(SCC\)](#), [1998] 1 S.C.R. 27, (1998), 154 D.L.R. (4th) 193. For this, I repeat my analysis of context and purpose above. This analysis confirms that a Chief Justice has the power to reassign to further the mission of the court.

[84] Before leaving the issue of the Chief Justice's power to reassign, it is worth underscoring that this is a question of subject-matter jurisdiction. The Court must deal with this question whether or not the parties have ever raised it: *Provincial Secretary of Prince Edward Island v. Egan*, [1941 CanLII 1 \(SCC\)](#), [1941] S.C.R. 396, [1941] 3 D.L.R. 305. The parties' consent to or non-contestation of a question of subject-matter jurisdiction cannot give a court a subject-matter jurisdiction or power it does not have: *Canadian National Railway v. BNSF Railway Company*, [2016 FCA 284](#), at paragraph [23](#); *Pfizer Canada Inc. v. Teva Canada Limited*, [2016 FCA 218](#), 141 C.P.R. (4th) 165, at paragraphs [6 and 7](#); *Brooke v. Toronto Belt Line Railway Co.* (1891), 21 O.R. 401; *Canadian National Railway Co. v. Lewis*, [1930 CanLII 309 \(CA EXC\)](#), [1930] Ex. C.R. 145, [1930] 4 D.L.R. 537. In this case, until the matter reached our Court, no one raised the Chief Justice's power to reassign. But it is still incumbent upon us to consider it.

B. Discretion

[85] Assuming the Chief Justice has a power to reassign, he is not forced to exercise it. He can decide not to. He has a discretion. What factors guide his discretion?

[86] This question is distinct from the question of jurisdiction. A statutory provision may have given a public official a very broad power to exercise, perhaps even one that can be said to appear to be untrammelled. But that does not mean that the public official can always exercise the power in every circumstance.

[87] The potential power to do something is one thing; the discretion to exercise it is another: *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, [2004 SCC 61](#), [2004] 3 S.C.R. 304, at paragraph [21](#). In other words,

.... there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.... there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is... objectionable.... [Emphasis added by Deschamps J.]

(*Roncarelli v. Duplessis*, [1959 CanLII 50 \(SCC\)](#), [1959] S.C.R. 121, at page 140; see also *Padfield v. Minister of Agriculture, Fisheries & Food*, [1968] A.C. 997 (H.L.).)

[88] In my view, in enacting [section 14](#) of the *Tax Court of Canada Act* and [section 8](#) of the *Courts Administration Service Act*, Parliament did not give the Chief Justice a blank cheque. Instead, Parliament intended that the Chief Justice should exercise the power to reassign only after carefully considering all of the circumstances, both for and against reassignment.

[89] Though the power to reassign can be exercised to advance the mission of the court, in certain circumstances countervailing considerations must be considered. Indeed, sometimes the countervailing considerations are so weighty that the power to reassign cannot be exercised.

[90] The precise circumstances matter. To take just one example, much may depend on when the power to reassign is exercised. Absent bad faith and before matters are heard, a Chief Justice may shift judicial assignments from one judge to another for administrative reasons. But after the judge has heard the matter and is writing reasons—when the judge is protected by the fundamental principle of adjudicative independence—a Chief Justice will be much more constrained.

[91] Under this fundamental principle, a judge must be allowed to decide a case without any interference, even interference by a Chief Justice: see, e.g., *MacKeigan v. Hickman*, 1989 CanLII 40 (SCC), [1989] 2 S.C.R. 796, (1989), 61 D.L.R. (4th) 688. Associated with this is the principle that “she or he who heard must decide”, a century-old idea lying at the core of fundamental fairness and natural justice.

[92] These principles are as weighty as they come. But like most principles, they are not absolute. There are circumstances—surely most rare—where the need to protect the mission of the court must prevail. Perhaps one circumstance is the example in paragraphs 74 and 75, above, of a judge’s multi-year delay.

[93] Before us is a case of first principle. Given the uncertainty, it would be a mistake for us to say much more. It is best that the jurisprudence develop case-by-case. This much is certain: reassignment can never be prompted by the Chief Justice’s personal views about the result the judge should reach in a case.

[94] In this case, the parties have not challenged the Chief Justice’s exercise of discretion. In our Court, the appellant says that the Chief Justice does not have the power to reassign and, further, that he did not exercise it in accordance with procedural fairness. But it does not invite us to quash the Chief Justice’s exercise of discretion. In these circumstances, are we bound to deal with that issue? In my view, no. This goes to how a power was exercised, not whether a power exists. This is not a question of subject-matter jurisdiction.

[95] In another case, a party dissatisfied with a reassignment may object to the new judge. If the dissatisfied party does not object to the new judge and only raises the issue on appeal, the issue will be regarded as a new issue, one that is fact-based. The Court is very reluctant to entertain new, fact-based issues on appeal: *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678.

[96] Sometimes a dissatisfied party is unable to challenge the Chief Justice’s exercise of discretion because the Chief Justice has not disclosed the reasons why reassignment is warranted. As will be seen in the next section of these reasons, in some circumstances the refusal of the Chief Justice to disclose the reasons is a breach of procedural fairness. Provided the dissatisfied party objects to that—and objects in a timely way—relief may be granted on that ground alone.

C. Procedural fairness

[97] In circumstances where it is impossible for a case to continue with the original judge—for example, situations of death or incapacity—there are no procedural fairness

obligations owed, other than notification to the parties that a reassignment has happened and the reasons for it. In those situations, reassignment must happen and the submissions of the parties will not alter that fact.

[98] In other circumstances—expected to be most rare (see paragraph 92, above)—the decision to reassign can significantly affect the legal and practical interests of the parties. Obligations of procedural fairness arise.

[99] As was the case for the Chief Justice’s exercise of discretion, I do not wish to say much about the level of procedural fairness that must be accorded. We all know that procedural fairness obligations vary according to the circumstances and circumstances can vary greatly. The jurisprudence in this area is best worked out in response to particular situations.

[100] Depending on the circumstances, a Chief Justice might consider disclosing to the parties the problem affecting the judge, review with the parties the considerations for and against reassignment, canvass whether there are any further considerations that bear upon the issue, and then invite submissions on whether reassignment should take place. Where assignment of the matter to a new judge is warranted and this is done over the objection of a party, a Chief Justice should consider offering brief reasons out of fairness and to facilitate later appellate review of the matter: *R. v. Sheppard*, [2002 SCC 26](#), [2002] 1 S.C.R. 869.

[101] Following reassignment, the new judge is in charge of the case. It is for that judge, not the Chief Justice, to receive submissions from the parties concerning how the case should proceed, for example whether the case should be reheard or whether existing material (including transcripts) should be used in whole or in part: *D’Amico v. Wiemken*, [2010 ABQB 785](#), 497 A.R. 360; *Parmar v. Bayley*, [2001 BCSC 1394](#), 19 C.P.C. (5th) 366.

[102] A dissatisfied party must object to a procedural flaw as soon as possible and must maintain that objection, otherwise the party will be taken to have waived the concern: *Irving Shipbuilding Inc. v. Canada (Attorney General)*, [2009 FCA 116](#), [2010] 2 F.C.R. 488, at paragraph 48; *Johnson v. Canada (Attorney General)*, [2011 FCA 76](#), 414 N.R. 321, at paragraph 25; *Telus Communications Inc. v. Telecommunications Workers Union*, [2005 FCA 262](#), 257 D.L.R. (4th) 19, at paragraphs 43–49; *Leader Media Productions Ltd. v. Sentinel Hill Alliance Atlantis Equicap Limited Partnership*, [2008 ONCA 463](#), 90 O.R. (3d) 561.

[103] This means that to the extent the Chief Justice confers with the parties, as happened here, a party should register any procedural fairness objection at that time. This gives the Chief Justice a chance to remedy any procedural deficiency. A dissatisfied party can also register the procedural fairness objection before the new judge. If the dissatisfied party does none of these things and registers the objection only in the appellate court, the dissatisfied party will likely be taken to have waived the procedural deficiency.

D. Application of these principles to this case

[104] In this Court, the appellant raises the issue of jurisdiction, the first of the three issues. It submits that the Chief Justice does not have the power to reassign the case to a new judge: appellant’s memorandum of fact and law, paragraphs 80–82. The appellant did not raise this below. But that does not matter because this concerns subject-matter jurisdiction: see paragraph 84, above. It can raise this here.

[105] However, I reject the appellant's submission. For the reasons set out above, the Chief Justice did have the power to reassign.

[106] I turn now to the second question, the Chief Justice's exercise of discretion to reassign. The appellant does not challenge this: see paragraph 94, above. Thus, we need not consider this. I would simply note, without commenting one way or the other, that the Chief Justice appeared to be concerned about the time that had elapsed and, perhaps mindful of the mission of his Court, expressed regret to the parties that the Court had "failed" them.

[107] In this Court, the appellant raises the third question, procedural fairness. It says that the Chief Justice acted in a procedurally unfair manner: appellant's memorandum of fact and law, paragraphs 33(c) and 35.

[108] The issue of the content of procedural fairness in this sort of situation is one of first impression. However, I agree with the appellant that there was procedural unfairness in this case.

[109] The Chief Justice was not forced to reassign due to the original judge's death. And there is no evidence of incapacity. There is only delay. This was a situation where the Chief Justice had a discretion to exercise. The exercise of discretion mattered to the parties: they had already argued the case before the original judge and justifiably expected it would be decided by that judge. They should have been asked to make submissions.

[110] But the Chief Justice did not ask for submissions. Instead, he summoned the parties to a conference call and simply announced his decision to reassign. The only hint as to a reason was the Chief Justice's comment that the case had not been "resolved in a timely, efficient and effective fashion". Had the parties been invited to make submissions, they might have wanted the original judge continuing notwithstanding the delay. That would have been something significant for the Chief Justice to consider.

[111] There was further unfairness. The Chief Justice announced two options to the parties concerning how the new judge would go about deciding the case. He did not invite submissions. And this was a matter for the new judge, not the Chief Justice, to consider. Later, the respondent wrote, wanting to explore another option. In response, the Chief Justice held a second conference call. He shut the respondent down without inviting any submissions.

[112] Despite the procedural unfairness, the appellant does not succeed. The appellant did not object in a timely way. In fact, after the Chief Justice announced that a new judge would decide the case, the appellant said he was fine with that. Only after the new judge decided the case against the appellant did it object.

[113] This is too late. This is a textbook case of waiver: see the authorities at paragraph 102, above.

E. Postscript

[114] I wish to offer some brief comments on some aspects of my colleague's reasons.

[115] My colleague refers to a number of cases from other jurisdictions where the issue of reassignment has arisen, using them as solid precedents against the Chief Justice's decision to reassign. These cases are of limited value. While they might be of use in

identifying criteria that might bear upon the exercise of discretion to reassign, the weight to be accorded to the various criteria depends on the precise circumstances of each case.

[116] Much also depends on the context in which the cases are decided and the nature of the cases themselves. Cases where the liberty of the subject is at stake, such as criminal cases, cases where there is substantial oral evidence and significant credibility issues such that a rerun of the case might be unfair, and cases where the validity of a public administrative decision is in issue may call for more caution when a Chief Justice is considering whether to reassign.

[117] The same can be said for the legislative provisions in other jurisdictions. They speak only to the law in those jurisdictions and shed no light on the jurisdiction of a Chief Justice of the Tax Court.

[118] Even if I were to agree with my colleague's reasoning and conclusions concerning the Chief Justice's decision to reassign the case to a new judge, I must disagree with his proposed disposition of the appeal.

[119] My colleague proposes that the original judge assigned to this matter render judgment in it. But the circumstances in which the case was taken away from the original judge are not known to us. Was there more going on than delay? We do not know whether the original judge is in fact able to render judgment. And after so much time has gone by, we do not know if he will remember the submissions and the evidence.

[120] Instead, had I agreed with my colleague's analysis, I would have remitted the matter to the Chief Justice for assignment of a judge to this case in accordance with the principles in these reasons.

[121] One last thing. My colleague has found that the Chief Justice had no power to reassign the case and so the judge who rendered judgment had no jurisdiction to decide the matter. The judgment he rendered is a nullity. This matter must go back to the original judge because he alone is to decide the case: identify the law, find the facts and then apply the law to the facts. But then my colleague goes further and offers views on the law (at paragraphs 41–51), views that will bind the original judge. This places this Court in the invidious position of saying one thing and doing another. Further, after the original judge has decided the matter, there may be an appeal to this Court. We should not gratuitously pronounce law at this time and tie the hands of a future panel of this Court that may consider this same case.

F. Proposed disposition

[122] Accordingly, I conclude that the Chief Justice's decision to reassign the case to the new judge should stand.

[123] Were I writing in this case for a majority of this Court, I would now go on to deal with the substantive merits of the appeal. As I have mentioned above, I do not consider this advisable.

[124] If leave to appeal to the Supreme Court from our Court's decision is sought and granted and if the Supreme Court agrees with my proposed disposition of the appeal, it may wish to consider whether the merits of the appeal are most efficiently determined by this Court by way of remand: [Supreme Court Act](#), R.S.C., 1985, c. S-26, section 46.1.

G. Conclusion

[125] The appellant was happy with the reassignment of its case to the new judge—that is, until the new judge dismissed its case. Only then did the appellant object. Now the appellant leaves this Court, its tactical objection effectively and practically upheld and its case assured of a do-over in the Tax Court. The mission of the Tax Court is to dispense justice with integrity, fairness and efficiency, to improve the reputation of the administration of justice, to grant timely, cost-effective access to justice to all, and to earn the confidence of the public it serves. That mission is served by broad powers Parliament has given to the Chief Justice, including the power to reassign. But now that power has been made subject to inflexible, judicially-constructed limits.

[126] If the law drives us to this result, so be it. But it does not. As far as I am concerned, the appellant made its bed in this case and ought to lie in it. And the Chief Justice can exercise his power to reassign—granted by unrestricted legislative wording—to further the court's mission as long as he abides by two limits. First, the Chief Justice must carefully consider his discretion: there are occasions where, on balance, the circumstances are against reassignment, sometimes very strongly so, even conclusively so. And second, the Chief Justice must act in a procedurally fair way. This result places the Chief Justice in the same position as all public officials to whom Parliament has entrusted broad powers—Ministers, chairs of tribunals, heads of investigative bodies, and so on. Absent some basis in the legislation—and there is none here—the Chief Justice should not be treated differently.

[127] Therefore, I respectfully dissent.

Tab 137



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The Role of a Chief Justice in Canada

Peter W. Hogg*

Professor Hogg describes the duties of Chief Justices in Canadian courts, and explains that the effective discharge of their many administrative functions plays a significant role in maintaining the independence of the judiciary.

Introduction

- I. Appointment
 - II. Tenure
 - III. Payment
 - IV. Administration of Court
 - V. Protection of Institutional Independence
- Conclusion

Introduction

Professor William R. Lederman, in the course of his long, productive, and brilliant career, influenced the way we think about most areas of Canadian constitutional law. His influence on scholarship, practice, and doctrine has been immense. One of his early contributions was a massive two-part article entitled "The Independence of the Judiciary," which appeared in the *Canadian Bar Review* in 1956.¹ That article is still universally recognized as the seminal work on the topic. It continues to be cited frequently, and later writers have had to be content to nibble at the edges of the topic. This article is one of those nibbles.

* Professor of Law, Osgoode Hall Law School, York University, Toronto. I acknowledge the research assistance of Margot Ferguson, LL.B. 1993. I also acknowledge the help of my colleague, Garry Wauchope, and of Jeanne Thomas, Executive Director of the Canadian Judicial Council, both of whom made useful comments on an earlier version of the paper. An earlier version was delivered at a seminar for the Canadian Judicial Council on 24 March 1993, and I benefited from discussions that took place there.

1. W.R. Lederman, "The Independence of the Judiciary" (1956) 34 Can. Bar Rev. 769 (Part 1) and 1139 (Part 2).

Professor Lederman never turned his attention to the role of a Chief Justice in the maintenance of the independence of the judiciary. Indeed, very little has been written on the topic by anyone.² And yet it is the Chief Justice of each superior court who manages the relationship between the court and the government which is responsible for the administration of justice in that jurisdiction. It is that relationship which carries the most obvious risks to the independence of the judiciary. The Chief Justice, therefore, has a unique responsibility, which is not shared with the puisne judges, for safeguarding the independence of the judiciary. In this article, I will first describe the office of Chief Justice of a superior court,³ and then I will address the issue of judicial independence.

I. Appointment

The Chief Justice of Canada,⁴ the Chief Justice of the Federal Court of Canada,⁵ and the Chief Justices of the superior courts of the provinces⁶ are all appointed by the Governor in Council — that is, by the federal Cabinet. In law, the appointment process for a Chief Justice is the same as for a puisne judge of the same court. It is often claimed, however, that in practice there is a slight difference in the process; the recommendation to Cabinet for the appointment of a Chief Justice is made by the Prime Minister,

2. The only study that I could find was A. Linden, et al., "The Status and Role of the Chief Justice in Canada" (Study commissioned by the Canadian Institute for the Administration of Justice, 1981) (unpublished). This proved to be a very useful source.

3. The scope of this article is confined to Chief Justices of the superior courts in Canada. I do not deal with Associate Chief Justices that exist in most of the superior courts, or with Chief Judges of the Provincial Courts. However, most of what I have to say is applicable to them.

4. *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 4(2) [hereinafter *Supreme Court Act*].

5. *Federal Court Act*, R.S.C. 1985, c. F-7, s. 5(4) [hereinafter *Federal Court Act*].

6. The mode of appointment of the judges of the superior, district, and county courts of the provinces is stipulated by the *Constitution Act, 1867* (U.K.), 30 & 31 Vic., c. 3, s. 96 [hereinafter *Constitution Act, 1867*].

while the recommendation for the appointment of a puisne judge is made by the Minister of Justice.⁷

The qualifications for appointment as a Chief Justice are, in law, no different from those for a puisne judge of the same court. In the case of the Supreme Court of Canada, the appointee must be either a judge of the superior court of a province or a member of the bar of a province of at least ten years' standing.⁸ In the case of the Federal Court of Canada, the requirement is the same.⁹ In the case of the superior courts of the provinces, the appointee must be a member of the bar of the province of at least ten years' standing.¹⁰ In practice, however, Chief Justices are rarely appointed directly from the bar, but usually from the ranks of the puisne judges.¹¹ As well, of course, in practice, a Chief Justice must possess qualities of leadership, organization, and diplomacy that are not always essential to the task of being a judge.¹²

As will be elaborated later in this article, the Chief Justice of each superior court has the power to assign judges to particular cases. This includes the power to assign himself or herself to a particular case. The Chief Justice also controls the list of cases, including the order in which they are to be tried or heard and the courtrooms in which they are to be tried or heard. As will be elaborated later, it is a constitutional prerequisite of judicial

7. P. H. Russell, *The judiciary in Canada* (Toronto: McGraw-Hill Ryerson, 1987) at 112.

8. *Supreme Court Act*, s. 5.

9. *Federal Court Act*, s. 5(3).

10. *Judges Act*, R.S.C. 1985, c. J-1, s. 3 [hereinafter *Judges Act*]. The statutory requirement of ten years' standing supplements the constitutional requirement that judges be selected from the bar of the province. See *Constitution Act, 1867*, ss. 97 and 98.

11. In the case of the Supreme Court of Canada, all but the first of the Chief Justices have been appointed from within the Court.

12. It goes without saying that Chief Justices have no power to select the new judges to fill vacancies on their courts. These vacancies are filled by the Governor in Council, acting under the powers referred to above, *supra* notes 4-6. The federal Minister of Justice normally consults a Chief Justice before making an appointment to the court of the Chief Justice.

independence that these functions be carried out by or under the control of judges and not of the government.¹³

II. Tenure

Chief Justices hold office on the same basis as puisne judges, that is, they hold office "during good behaviour," and are subject to removal only by a joint address of the Senate and House of Commons.¹⁴ There is mandatory retirement at age 75.¹⁵ However, the Chief Justice of a provincial superior court may relinquish the office after five years and revert to being a puisne judge.¹⁶

Chief Justices play a unique role in securing the tenure of superior court judges through their membership in the Canadian Judicial Council. The Canadian Judicial Council is chaired by the Chief Justice of Canada, and comprises all Chief Justices and Associate Chief Justices of the superior courts.¹⁷ As well as certain coordinating and educative functions, the duty of the Council is to inquire into complaints against superior court judges and to report to the federal Minister of Justice. If the Council recommends that a judge be removed from office and Cabinet agrees, then (if the judge does not resign), a joint address of the

13. See *Valente v. R.*, [1985] 2 S.C.R. 673 [hereinafter *Valente*] at 708-709. See also text accompanying notes 20-22, below. The constitutional requirement applies to all courts of criminal jurisdiction and stems from s. 11(d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* [hereinafter *Charter*].

14. *Supreme Court Act*, s. 9(1); *Federal Court Act*, s. 8(1). The tenure of judges of the superior courts of the provinces is stipulated by the *Constitution Act, 1867*, s. 99. For analysis, see P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at s. 7.1(c).

15. *Supreme Court Act*, s. 9(2); *Federal Court Act*, s. 8(2), as am. by S.C. 1987, c. 21, s. 7. The retirement age of judges of the superior courts of the provinces is stipulated by the *Constitution Act, 1867*, s. 99.

16. *Judges Act*, s. 32.

17. *Ibid.* at Part II. All provinces except Prince Edward Island have established provincial judicial councils, with power to investigate complaints of judicial misbehaviour against judges appointed by the province. The composition of these bodies varies considerably from province to province.

two Houses of Parliament is required under the *Constitution*¹⁸ in order to carry out the recommendation.

III. Payment

The salaries of superior court judges, including Chief Justices, are "fixed and provided" by the federal *Judges Act*.¹⁹ Each Chief Justice is paid more than the puisne judges on the same court.

IV. Administration of Court

The most obvious way in which a Chief Justice differs from other judges is that the Chief Justice is responsible for administering the operations of his or her court.

In carrying out this function, a Chief Justice is subject to external constraints. The most obvious and important of them is lack of access to public funds. The Chief Justice can only request funds from the Minister of Justice (or Attorney General), and hope that the Minister will succeed in persuading his or her Cabinet colleagues, including the Minister of Finance (or Treasurer), that the full amount requested should be included in the estimates for the Department of Justice (or Attorney General). The estimates have to be approved by the Parliament (or Legislature), of course, and they will have to be defended from Opposition criticism by the Minister of Justice.

Once funds have been appropriated, the ability of a Chief Justice to spend them is severely constrained. The buildings, equipment, books, and other physical requirements of the court are all supplied by the Minister of Justice, who must obey the same procurement rules that bind other departments of govern-

18. *Supra* note 10.

19. *Judges Act*, ss. 9-12. Section 100 of the *Constitution Act, 1867* provides that the salaries of superior, district, and county court judges must be "fixed and provided by the Parliament of Canada."

ment. The personnel of the court are public servants within the Department of Justice. Their appointment, job descriptions, and other terms and conditions of employment are all governed by the same rules as apply to the public service generally, including, in many cases, the provisions of collective agreements. Their career prospects are not confined to the courts, and their ultimate loyalty may be owed to Ministers and senior officials in government rather than to the Chief Justice in whose courts they are serving for the time being.

In summary, the Chief Justice may be unable to obtain the resources that he or she is convinced are required for the efficient operation of the court. With the resources that are available, the Chief Justice may be unable to secure the personnel, facilities, and services that he or she is convinced would be best for the efficient operation of the court. An analogy may be drawn to the dean of the law faculty of a university, who must endure the same absence of power to carry out his or her responsibilities. This does not mean that a Chief Justice (or a law dean) is necessarily an ineffective administrator. But it does mean that the ability of the Chief Justice to engage the sympathetic cooperation of the Minister of Justice and the Deputy Minister is of critical importance. This is the part of the work of the Chief Justice that carries risks to the independence of the judiciary.

V. Protection of Institutional Independence

In *Valente*,²⁰ the Supreme Court of Canada held that "institutional independence" was an essential element of the independence of the judiciary. This required that a court be independent of government "with respect to matters of administration bearing directly on the exercise of its judicial function."²¹ Those matters of administration included the "assignment of judges, sittings of

20. *Supra* note 15.

21. *Ibid.* at 708.

the court, and court lists."²² According to *Valente*, the management of the docket of a court is essential to judicial independence. The Chief Justice, or other judges or officials acting under his or her supervision, must prepare court lists, determine the order in which cases are to be tried or heard, and assign judges and courtrooms to the cases.

These tasks require resources. These resources must be obtained by the Chief Justice from the Minister of Justice. The problem which the Chief Justice has is that the judiciary has nothing to give in return. The most obvious and valuable consideration for government funding and cooperation would be the rendering of decisions that are pleasing to the government. That cannot be promised or delivered by the Chief Justice, because it would be the most serious breach of the independence of the judiciary imaginable. Any partiality to government would involve an abandonment of the rule of law, which requires (among other things) that judges be even-handed in resolving disputes between Crown and subject. Thus, the Chief Justice must deal with the Minister and the Deputy at the same time as the judges of the court of the Chief Justice (including the Chief Justice himself or herself, of course) are doing things that are displeasing to the government. Judges acquit defendants who are charged with crime by the Crown; they award damages and other civil remedies against the Crown; and they strike down legislation, regulations, and administrative acts that were drafted, made, or performed by the Crown. Some of these things are bound to be resented by some ministers and officials in the government. Therefore, when the Chief Justice of the court meets with representatives of the government, the Chief Justice does not occupy a position of tangible strength.

The relationship between the Chief Justice and the Minister of Justice (or Attorney General) is further complicated by the fact that the Minister of Justice is the Minister who is responsible for conducting litigation on behalf of the Crown. This means that the Minister of Justice, acting through his or her Crown attorneys (or

22 *Ibid.* at 769.

prosecutors) and his or her civil counsel, is far and away the principal litigant in every jurisdiction. It is anomalous that the Minister who is the principal litigant in the courts is also the Minister who provides the courts with their support staff and services and who presents and defends the budget for the courts in the Parliament or Legislature.

Within a system of responsible, parliamentary government, there are serious limits to the degree of financial and administrative independence that can be accorded the judiciary. Obviously, only the Parliament or Legislature can authorize the expenditure of money, and a Minister of the Crown must be responsible for defending the budget of the courts in the legislative chamber. In principle, as well, a Minister should be responsible for the funding of the courts, because it is the government that is accountable to the electorate for problems in the court system caused by underfunding. Nor is it reasonable to demand that the courts should always receive every cent that the Chief Justice believes is necessary. It is right and proper that the government should ration the available funds among many worthy objects, and the courts cannot be immune from that process.

A Chief Justice is not a member of the Parliament or Legislature or a member of the Cabinet, and is not accountable to the electorate for problems in the court system. Nor could a Chief Justice make direct representations to the Parliament or Legislature (as occurs in many jurisdictions of the United States) without becoming involved in the political process, which would give rise to serious perceptions of a lack of independence from political parties and from government. It seems to be both unavoidable and desirable that the Chief Justice should have to persuade a Minister of the fiscal requirements of the court, because the Minister is then able to carry the brief in Cabinet and in the Parliament or Legislature.

One possible reform would be to confer responsibility over the courts on a minister other than the Minister of Justice (or Attorney General). In this way, the role of funding and staffing the courts would be separated from the role of prosecuting criminal and civil cases before the courts. Here, however, it is important to balance practical concerns with theoretical concerns

about judicial independence. I say theoretical concerns because there is no evidence that the Minister of Justice (or Attorney General) uses his or her position to pressure the courts to favour the government side in criminal or civil cases. The practical concerns that arise in my mind are that a minister other than the Minister of Justice (or Attorney General) is likely to be less senior, less influential, and less committed to the rule of law than the Minister of Justice (or Attorney General). A shift to another portfolio might leave the courts with a weaker champion in Cabinet and in Parliament or the Legislature. The courts would be more exposed to competing claims on public funds, and their own level of funding might suffer.

In the federal jurisdiction, an attempt has been made to give the courts a greater degree of institutional independence. The Minister of Justice remains responsible for the courts. But the *Judges Act* establishes an official called the Commissioner for Federal Judicial Affairs, who has "the rank and status of a deputy head of a department" and who is responsible for preparing budgetary submissions for the Federal Court, the Tax Court, and the Canadian Judicial Council, and for providing premises, equipment, and other supplies and services to those courts and the Council.²³ In the case of the Supreme Court of Canada, the *Judges Act* confers these functions on the Registrar of the Court, who also has the status of a deputy head.²⁴ In this way, the officials who provide support services to the federal courts are separated from those in the Department of Justice who conduct the litigation of the government.²⁵ As well, the *Supreme Court Act* confers on the Registrar of the Court the duty to "superintend the officers, clerks and employees appointed to the Court," and the Act makes this duty "[s]ubject to the direction of the Chief Justice."²⁶ In this way, the Act seeks to locate the legal authority over the staff of the Supreme Court of Canada within the Court.

23. *Judges Act*, ss. 74 and 74.

24. *Ibid.*, s. 75.

25. Both the Commissioner for Federal Judicial Affairs and the Registrar of the Supreme Court report to the Minister of Justice.

26. *Supreme Court Act*, s. 15.

A few provinces have established a separate division of court administration within their departments of justice,²⁷ and some provincial statutes also require court staff to work under the direction of the Chief Justice.²⁸ These measures, like the federal measures, do reinforce the institutional independence of the judiciary. However, no Canadian jurisdiction has removed the funding of the courts from the budgetary responsibility of the Minister of Justice or exempted the funding of the courts from the regular governmental process of budgetary control. Nor has any Canadian jurisdiction excluded the personnel of the courts from the rules of the public service on recruitment, classification, promotion, remuneration, and like matters. Thus, in no Canadian jurisdiction can it be said that the theoretical concerns about judicial independence have been eliminated. In every jurisdiction, the Chief Justice is dependent upon the Minister of Justice (or Attorney General) for the funding of the courts of the Chief Justices, and in some degree upon the Minister of Justice or other Government Ministers or officials for the courtrooms, equipment, supplies, and services that are needed to operate the courts.

In 1981, Jules Deschênes, who was then Chief Justice of the Superior Court of Québec, wrote a report entitled *Masters in their Own House*,²⁹ which proposed a series of radical reforms to fully secure the independence of the judiciary. Relying on American models, Deschênes C.J. recommended that the courts should present their own budgetary estimates directly to the Speaker of the House of Commons or Legislative Assembly. The estimates would be examined by a legislative committee on judicial affairs before which the Chief Justices (or other spokespersons for the

27. See P.S. Millar and C. Baar, *Judicial Administration in Canada* (Kingston: McGill-Queen's Press, 1981) at 59.

28. See E. Colvin, "The Executive and the Independence of the Judiciary" (1986) 51 Sask. L. Rev. 239 at 245.

29. J. Deschênes, *Masters in their Own House* (Ottawa: Canadian Judicial Council, 1981). The report proposed three stages of reform — consultation, decision sharing, and independence — of which only the final stage is described here. The *Report of the Canadian Bar Association Committee on the Independence of the Judiciary* (Ottawa: Canadian Bar Foundation, 1985) at 40, wrapped sheet of endorsing the final stage of the Deschênes proposals.

judiciary) would appear. Upon approval by the committee, the judicial estimates would be automatically included in the budget of the Minister of Justice. In this way, the funding of the courts would be exempt from treasury board constraints and all other internal governmental rules of financial management. The funding of the courts would not be compared with the funding of other areas of government until all the estimates were presented to the Parliament or Legislature for approval.

As I indicated earlier in this article, in my view such a system would be an abdication by government of its responsibility for an important part of the administration of justice. In the United States, a real debate on spending estimates takes place within the Congress or Legislature, and the appropriations that emerge from the legislative process, as well as any related taxing proposals, may well differ from what was initially proposed. But this is not the case in Canada, where the conventions of responsible parliamentary government virtually preclude the Parliament or Legislature from modifying the fiscal measures proposed by the government. In Canada, the effective review of spending proposals takes place within the government *before* the estimates are placed before the Parliament or Legislature. To exempt the funding of the courts from the Treasury Board or other internal governmental controls would place the administration of the courts in a privileged position enjoyed by no other part of government.

That privileged position was the goal of the Deschênes proposals, which were premised on the proposition that the independence of the judiciary was a value to which competing fiscal considerations should yield. That is obviously a tenable position, but I do not share it. In my view, since only elected Ministers can be politically accountable for problems caused by the underfunding of the courts, it is elected Ministers who ought to determine funding levels. The funding of the courts has a powerful political constituency in the organized legal profession. There is also the interest of the press and the Opposition in the administration of justice, especially criminal justice. And the requirement in the *Charter* that a person charged with an offence must be tried

within a reasonable time³⁰ adds legal weight to the political forces at play.³¹ The democratic process thus seems unlikely to produce major problems of underfunding for the courts.

However, even if that conclusion is too optimistic, it seems wrong in principle to me that the courts alone should be exempt from the competition among worthy claimants for their share of scarce public revenues. It is the task of an elected government to assign priorities to the various claims on the public purse, and to take political responsibility for those priorities. The administration of the courts should not be exempt from that process.

Conclusion

A Chief Justice is unlike a puisne judge, not only because of membership in the Canadian Judicial Council, but also because of his or her responsibility for the administration of the court. That responsibility is not accompanied by control over the amount of funding that the court receives. The Chief Justice must persuade the Minister of Justice (or Attorney General) of the requirements of the court, and must hope that the Minister will succeed in obtaining desired funds through the internal budgetary process of the government and through the legislative process. Once funds have been obtained, the Chief Justice must rely upon government procedures regarding recruitment and procurement to obtain the personnel, premises, equipment, and services that are needed to operate the court. These are all constraints on the institutional independence of the court of the Chief Justice, but they are constraints that are difficult to remove without fundamental changes to the system of parliamentary government in Canada.

30. *Charter*, s. 11(b).

31. See *R. v. Anon.*, [1990] 2 S.C.R. 1199, which held that a trial must be held within six to eight months of commitment. It was followed by the staying or withdrawing of 47,000 criminal charges in Ontario alone. The publicity that was given to this virtual amnesty for many persons accused of crime was followed by prompt increases by the Attorney General in the resources available to the courts. The case and its aftermath are discussed in Hogg, *supra* note 14 at s. 49.8(e).

It is realistic to acknowledge that a Chief Justice is inescapably dependent upon government for the resources needed to operate the court. Within those important constraints, however, the Chief Justice must be independent of government "with respect to matters of administration bearing directly on the exercise of [the Court's] judicial function."³² The most important role of the Chief Justice is to make sure that the ineluctable reliance upon government for resources does not infect the independence of the judicial function.

32. See Valente, *supra* note 13.

Tab 138

Regina v. Spezzano, 1977 CanLII 1371 (ON CA)

Source: Court of Appeal for Ontario
 Date: 1977-01-05
 Other citations: 15 OR (2d) 489 — 76 DLR (3d) 160 — 34 CCC (2d) 87
 Citation: Regina v. Spezzano, 1977 CanLII 1371 (ON CA),
<https://canlii.ca/t/g13ft>, retrieved on 2026-03-24

Regina v. Spezzano

**15 O.R. (2d) 489
 76 D.L.R. (3d) 160**

**ONTARIO
 COURT OF APPEAL
 ARNUP, DUBIN AND MARTIN, J.J.A.
 5TH JANUARY 1977.**

Criminal Law -- Obstructing justice -- Elements of offence -- Accused giving false name to police to avoid charge of driving while disqualified -- Meaning of "course of justice" -- Whether offence limited to judicial proceedings existing or proposed -- Whether includes proceedings which accused apprehends may be taken - - Cr. Code, s. 127(2).

Statutes -- Interpretation -- Eiusdem generis rule -- Charge of obstructing justice -- Subsections referring to "judicial proceeding" and to judicial proceeding "existing or proposed" -- Third subsection merely referring to "course of justice" -- Whether ejusdem generis rule applies to limit course of justice to judicial proceedings existing or proposed -- Cr. Code, s. 127.

Civil rights -- Self-incrimination -- Charge of obstructing justice -- Accused giving false name to police to avoid charge of driving while disqualified -- Whether constitutes offence -- Whether accused protected from prosecution by right to remain silent -- Cr. Code, s. 127(2).

The expression "the course of justice" in s. 127(2) (rep. & sub. 1972, c. 13, s. 8) of the Criminal Code which provides that everyone who "wilfully attempts in any manner ... to obstruct, pervert or defeat the course of justice is guilty of an indictable offence" includes judicial proceedings existing or proposed but is not limited to such proceedings and includes an attempt to obstruct, pervert or defeat a prosecution which the accused contemplates may take place, notwithstanding that no decision to prosecute has been made. Although s. 127(1), which deals with obstructing justice through indemnifying sureties, and s. 127(3), which deems certain acts to constitute obstructing justice, both use the words "in a judicial proceeding" and s. 127(3) provides that the proceeding may be "existing or proposed" the ejusdem generis rule should not be applied to similarly limit the offence in s. 127(2). Accordingly, where an accused gives a police officer a false name in order to avoid a charge of driving while disqualified and to thus escape a prosecution which he apprehends may ensue, the "course of justice" has commenced and the accused may be convicted of the offence contrary to s. 127(2) of the Criminal Code. The accused's common law right to remain silent cannot protect him in such circumstances. Although not every false statement to the police, such as a false denial of guilt, will be capable of supporting a charge of wilfully attempting to obstruct, pervert or defeat the course of justice, whatever protection is afforded the accused by his right to remain silent cannot shield him from prosecution where he makes false statements to the police and misleads the police by giving a false name in order to protect himself.

APPEAL by the accused from his conviction on a charge of attempting to obstruct justice contrary to s. 127(2) of the Criminal Code.

[Kalick v. The King (1920), 1920 CanLII 488 (SCC), 35 C.C.C. 159, 61 S.C.R. 175, 55 D.L.R. 104, [1920] 3 W.W.R. 750, apld; R. v. Balsdon, 1967 CanLII 226 (ON SC), [1968] 2 C.C.C. 164, [1967] 2 O.R. 653; Rice

v. Connolly, [1966] 2 Q.B. 414, consd; R. v. Coneybear et al., [1966] N.Z.L.R. 52; R. v. Kane, [1967] N.Z.L.R. 60; R. v. Morin (1968), 5 C.R.N.S. 297; R. v. Sharpe and Stringer (1937), 26 Cr.App.R. 122; R. v. Robinson et al., Journal of Criminal Law, vol. II (1938), p. 62; Dalton v. H.M. Advocate, [1951] S.C. (J.) 76; R. v. Whalen et al. (1974), [1974 CanLII 1581 \(ON SC\)](#), 17 C.C.C. (2d) 217; R. v. Kataja, [1943] V.L.R. 145; R. v. Manley, [1933] 1 K.B. 529; R. v. Field et al. (1964), 48 Cr.App.R. 335, reld to]

H. M. Kelly, for accused, appellant.

J. D. Ewart, for the Crown, respondent.

The judgment of the Court was delivered by

MARTIN, J.A.:-- The appellant appeals from his conviction after a trial by a Provincial Court Judge under Part XVI of the Code and from the sentence of 30 days' imprisonment imposed upon him, on a charge as follows:

... on or about the 8th day of January 1976, at the Municipality of Metropolitan Toronto in the Judicial District of York, unlawfully did wilfully attempt to obstruct, pervert or defeat the course of justice, by identifying himself to a police officer as Vito Miceli, while he was disqualified from driving, and his driver's licence in the name of Frank Spezzano was suspended.

The material facts are these: On January 8, 1976, Police Constable Hoover had set up a radar location on Wilson Ave. At approximately 9:45 p.m., he observed a truck leaving a nearby plaza. The truck pulled into the eastbound curb lane of Wilson Ave. and cut off an eastbound vehicle. The officer followed the truck and stopped it. The appellant was the driver of the truck, which was a delivery truck for a pizzeria. The officer asked the appellant for his licence and he stated "that he had none". He was then requested to produce evidence of identification but was unable to do so. The appellant identified himself verbally to the officer as Vito Miceli, 62 Langstaffe Ave., Thornhill. He also gave the officer the date of his birth, and told him that he had left his licence at home.

The officer was familiar with the name, Vito Miceli, having stopped a person by that name earlier that month. In the meantime another officer had arrived on the scene. Constable Hoover told the appellant that he was not the person he claimed to be, but the appellant maintained that he was. Constable Hoover then left the appellant with the other officer and went to the store of the appellant's employer who was also the owner of the vehicle in question. When Constable Hoover returned with the appellant's employer the appellant was again asked what his name was; whereupon he admitted that he had lied to the officer, and said that "he was under suspension, he needed a job, and that's why he was driving." The appellant then gave the officer his correct name and address.

The appellant did not testify at his trial. The trial Judge in his reasons for judgment said:

In this case on the evidence I find that the Crown has shown that this man did identify himself in the name of some other living person. The Crown on the statement which was given by the accused has proved that the man was driving under suspension, he was disqualified, the accused admitted that, and the evidence which he admitted to the officer is prima facie evidence that he is driving under suspension, and that in fact he used the name of Vito Miceli in order to avoid being prosecuted.

There are cases on this particular section. One case that comes to mind is where the accused denies that he was in fact himself, denies that he was the person that the officer was looking for, and it was held in that case that that was not the purpose of the section, the whole purpose of this section is to prevent people from identifying themselves as some other particular living person, and for that purpose only. It is not an obstruction of justice to deny that you are a particular person, nor is it obstruction of justice to remain silent, but once you step past that mark and identify yourself as some other living person then you are in breach of this section. I find this accused did in fact breach this section and there will in fact be a conviction.

Counsel for the appellant contended before us that there was no evidence that Vito Miceli was a living person. I am disposed to think there was some evidence in support of the trial Judge's finding on this point, although I do not consider that proof that Vito Miceli was a living person was essential to support a conviction of the offence charged against the appellant. I am also of the view that there was evidence which warranted the trial Judge's finding, which is implicit in his reasons for judgment, that the appellant gave a false name to avoid a prosecution under the Code for driving while disqualified, although, for the reasons which I will develop later, it is immaterial whether the appellant's intention was to avoid a prosecution for a criminal offence in the strict sense as distinct from an offence created by provincial enactment, if his conduct otherwise fell within s. 127(2) of the Code.

Two separate but related questions are presented by this appeal:

- (a) Is the offence of wilfully attempting to obstruct, pervert or defeat the course of justice under s. 127(2) of the Code confined to attempts to interfere with judicial proceedings, instituted or proposed, or

does the section extend to attempts to obstruct police investigation which may lead to the detection of an offence or the offender's connection with it

(b) If the offence is not confined to interference with existing or proposed judicial proceedings, did the appellant, in making the particular false statement, commit the offence

Section 127 reads:

127(1) Every one who wilfully attempts in any manner to obstruct, pervert or defeat the course of justice in a judicial proceeding,

(a) by indemnifying or agreeing to indemnify a surety, in any way and either in whole or in part, or

(b) where he is a surety, by accepting or agreeing to accept a fee or any form of indemnity whether in whole or in part from or in respect of a person who is released or is to be released from custody,

is guilty of

(c) an indictable offence and is liable to imprisonment for two years, or

(d) an offence punishable on summary conviction.

(2) Every one who wilfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and is liable to imprisonment for ten years.

(3) Without restricting the generality of subsection (2), every one shall be deemed wilfully to attempt to obstruct, pervert or defeat the course of justice who in a judicial proceeding, existing or proposed,

(a) dissuades or attempts to dissuade a person by threats, bribes or other corrupt means from giving evidence;

(b) influences or attempts to influence by threats, bribes or other corrupt means, a person in his conduct as a juror; or

(c) accepts or obtains, agrees to accept or attempts to obtain a bribe or other corrupt consideration to abstain from giving evidence, or to do or to refrain from doing anything as a juror.

Counsel for the appellant contended before us that s. 127(2) must be read *eiusdem generis* with s-s. (1) and (3), and that the words "in any manner other than a manner described in subsection (1)" are confined to wilfully attempting to obstruct, pervert, or defeat the course of justice in a judicial proceeding existing or proposed in a manner other than that specified in s. 127(1). He also contended that there is no evidence that the constable intended to charge the accused with an offence at the time the appellant gave the false name.

I am unable to accept this submission. In my view, notwithstanding the way in which the section is now cast, s. 127(2) creates a separate offence of wilfully attempting to obstruct, pervert or defeat the course of justice and is not limited by the language of s-s. (1) and (3). The expression "the course of justice" in s. 127(2) includes judicial proceedings existed or proposed but is not limited to such proceedings. The offence under s. 127(2) also includes attempts by a person to obstruct, pervert or defeat a prosecution which he contemplates may take place, notwithstanding that no decision to prosecute has been made.

The legislative history of s. 127(2) as well as the decided cases make it clear that this is the proper construction to be placed on s. 127(2). The predecessor of s. 127 was s. 119 in the Criminal Code that came into force on April 1, 1955. Section 119 read:

119(1) Every one who wilfully attempts in any manner to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and is liable to imprisonment for two years.

(2) Without restricting the generality of subsection (1), every one shall be deemed wilfully to attempt to obstruct, pervert or defeat the course of justice who in a judicial proceeding, existing or proposed,

(a) dissuades or attempts to dissuade a person by threats, bribes or other corrupt means from giving evidence,

(b) influences or attempts to influence by threats, bribes or other corrupt means, a person in his conduct as a juror,

(c) accepts a bribe or other corrupt consideration to abstain from giving evidence, or to do or to refrain from doing anything as a juror,

(d) before or after being released from custody under recognizance, indemnifies or agrees to indemnify in any way, in whole or in part, his bondsman, or

(e) being a bondsman, accepts or agrees to accept indemnity, in whole or in part, from a person who is released or is to be released from custody under a recognizance.

Section 119 was renumbered s. 127 in R.S.C. 1970, c. C-34, but the wording of the section remained unchanged. Paragraphs (d) and (e) of s-s. (2) of s. 127 were re-enacted and reworded by the Bail Reform Act, 1970-71-72, c. 37, s. 3. The entire section was then re-enacted by 1972, c. 13, s. 8, in its present form. The manifest purpose of the re-casting of the section was to leave the penalty imposed for offences in relation to the indemnification or payment of bondsmen at two years and to increase the penalty for the other offences created by the section to 10 years. Unquestionably, Parliament did not thereby intend to narrow the scope of s. 127(2) as it previously existed.

The predecessor of the present s. 127 was s. 180 in the Code, 1927, c. 36. The wording of s. 180 in the 1927 Code was identical to that of s. 154 in the Code, 1892, c. 29; s. 154 of the 1892 Code was derived from s. 128 and 129 of the English Draft Code, para. (d) of s. 154 of the 1892 Code being derived from s. 128 of the Draft Code which read [Report of Royal Commission, Law Relating to Indictable Offences (1879)]:

128. Every one shall be guilty of an indictable offence, and shall be liable upon conviction thereof to two years' imprisonment with hard labour, who wilfully attempts in any way not otherwise criminal to obstruct prevent pervert or defeat the course of justice or the administration of the law.

Section 154 of the 1892 Code read:

154. Every one is guilty of an indictable offence and liable to two years' imprisonment who--

(a.) dissuades or attempts to dissuade any person by threats, bribes or other corrupt means from giving evidence in any cause or matter, civil or criminal; or

(b.) influences or attempts to influence, by threats or bribes or other corrupt means, any jurymen in his conduct as such, whether such person has been sworn as a jurymen or not; or

(c.) accepts any such bribe or other corrupt consideration to abstain from giving evidence, or on account of his conduct as a jurymen; or

(d.) wilfully attempts in any other way to obstruct, pervert or defeat the course of justice.

I observe that s. 117 of the New Zealand Crimes Act, 1961 No. 43, is virtually identical to that of s. 154 of the Canadian Criminal Code of 1892, being also derived from the English Draft Code. The New Zealand Court of Appeal has held that the ejusdem generis rule should not be applied to the section; that para. (d) of s. 117 of that Act (the counterpart of para. (d) of s. 154 in the 1892 Canadian Criminal Code) includes all attempts to obstruct, prevent, pervert or defeat the course of justice not covered by paras. (a), (b) and (c), and that the expression "the course of justice" in s. 117(d) of the Crimes Act is not restricted to the process of adjudication but encompasses the investigation of offences and the arrest of suspected persons: see *R. v. Coneybear et al.*, [1966] N.Z.L.R. 52; *R. v. Kane*, [1967] N.Z.L.R. 60.

In my view, the reasoning of the majority judgments of the Supreme Court of Canada in *Kalick v. The King* (1920), 1920 CanLII 488 (SCC), 35 C.C.C. 159, 61 S.C.R. 175, 55 D.L.R. 104, is conclusive against the contention of the appellant as to what is encompassed by the words "the course of justice" in s. 127(2), although the Court in that case was dealing with a different section of the Code. The appellant in that case was convicted under s. 157 of the Code [now s. 109] on a charge that with intent to interfere corruptly with "the due administration of justice" he corruptly gave a police officer a sum of money in order to induce such officer not to proceed against him for a violation of the Saskatchewan Temperance Act. The Supreme Court upheld the conviction. The Court held that the words "the due administration of justice" were not limited to apprehended proceedings in respect of crimes in the strict sense, that is to say, crimes created by Parliament under its exclusive power to legislate in relation to criminal law but extended to proceedings in respect of provincial offences. The Court also held that it was immaterial whether the police officer actually intended to institute a prosecution; it sufficed if the accused was apprehensive of a prosecution and gave the bribe to prevent it.

Anglin, J., said at p. 164 C.C.C., p. 183 S.C.R., p. 109 D.L.R.:

It is quite immaterial whether the police officer actually intended or contemplated instituting a prosecution. It suffices that the appellant gave the bribe with intent to head off such a proceeding. The due administration of justice is interfered with quite as much by improperly preventing the institution of a prosecution as by corruptly burking one already begun.

Brodeur, J., said at pp. 166-7 C.C.C., p. 186 S.C.R., p. 112 D.L.R.:

I am of opinion that the "administration of justice" mentioned in sec. 157 of the Crim. Code should not be restricted to what takes place after an information had been laid; but it includes the taking of necessary steps to have a person who has committed an offence brought before the proper tribunal and punished for his offence.

Mignault, J., said at p. 167 C.C.C., p. 187 S.C.R., p. 112 D.L.R.:

To give a bribe to a police officer with this intent is a corrupt interference with the administration of justice within the terms of sec. 157. It is, in my opinion, immaterial whether proceedings were then pending or merely likely to be taken, and I do not think that the fact that these proceedings were to be instituted under the Saskatchewan Temperance Act takes the case out of the operation of this section of the Criminal Code.

In *R. v. Morin* (1968), 5 C.R.N.S. 297, Rinfret, J. (with whom Casey and Salvais, JJ., concurred), after referring to the judgment of the Supreme Court of Canada in *Kalick v. The King*, supra, and the broad meaning given in that case to the words "the administration of justice", held that the expression "the course of justice" must be interpreted in the same way:

see also *R. v. Sharpe and Stringer* (1937), 26 Cr.App.R. 122; *R. v. Robinson et al.*, *Journal of Criminal Law*, vol. II (1938), p. 62; *Dalton v. H.M. Advocate*, [1951] S.C. (J.) 76; *R. v. Whalen et al.* (1974), 1974 CanLII 1581 (ON SC), 17 C.C.C. (2d) 217.

I am of the view, as previously indicated, that there was evidence to support the finding of the trial Judge that the appellant made the false statement to the constable during an investigation by the latter of a suspected offence and that it was made by the appellant to escape prosecution for an offence which the appellant apprehended might ensue. In those circumstances the "course of justice" had commenced.

The appellant contended, however, that a false statement made by a person to a police officer investigating an offence, in order to escape prosecution of himself, does not constitute an offence under s. 127(2). Appellant's counsel said that since an accused has a common law right to remain silent and has no obligation to assist the police in establishing that he has committed an offence, the making of a false statement to a police officer in order to circumvent prosecution of himself for an offence is not proscribed by s. 127(2), whatever the position may be with respect to false statements made to a police officer in order to assist a third person to escape detection or prosecution.

In support of his submission counsel for the appellant relied upon the judgment of Judge Waisberg in *R. v. Balsdon*, 1967 CanLII 226 (ON SC), [1968] 2 C.C.C. 164, [1967] 2 O.R. 653, acquitting the accused of a charge under s. 119(1) (the predecessor of s. 127(2)) of wilfully obstructing the course of justice by informing two police officers that he was not Garnet Balsdon. In that case a police officer had attended at a book store to execute warrants issued against the accused following convictions for unlawful parking, and requiring the accused in default of payment of the fines imposed to be imprisoned. The "clerk" in attendance at the store (who was, in fact, Balsdon) told the officer that Balsdon was not there. Subsequently, another police officer entered the store to serve the warrants previously issued as well as additional warrants. The officer was not satisfied with the "clerk's" answer that he was not Balsdon; upon further investigation the "clerk" admitted that he was, in fact, Balsdon. Judge Waisberg in his reasons for judgment considered a number of authorities, including the Australian case of *R. v. Kataja*, [1943] V.L.R. 145 at p. 147, in which Mann, C.J., in acquitting the accused of the common law offence of effecting a public mischief (as declared by the Court of Criminal Appeal in *R. v. Manley*, [1933] 1 K.B. 529) said:

He told lies in order to cover up the further fact that he himself was the offender. In so doing he acted in a very usual and every-day manner, having regard to the methods of wrongdoers.

In acquitting the accused Judge Waisberg said at p. 169 C.C.C., p. 658 O.R.:

The principle to be gleaned from the cases is that while a third party may commit an offence by lying on behalf of an offender, the offender himself has no obligation to be truthful about his own criminal conduct. The doctrines *nemo tenetur seipsum accusare* -- no man can be compelled to criminate himself -- and *nemo tenetur prodere seipsum* -- no one is bound to betray himself -- have been carefully safeguarded and preserved.

In *R. v. Balsdon*, supra, the accused confined himself to denying his identity, unlike the appellant in the present case, who falsely stated that he was Vito Miceli. Moreover, the right of the appellant to remain silent in the circumstances has been encroached upon by s. 14(2) of the Highway Traffic Act, R.S.O. 1970, c. 202, which reads:

14(1) Every operator of a motor vehicle shall carry his licence with him at all times while he is in charge of a motor vehicle and shall produce it when demanded by a constable or by an officer appointed for carrying out the Provisions of this Act:

(2) Every person who is unable or refuses to produce his licence in accordance with subsection 1 shall, when requested by a constable, give reasonable identification of himself and, for the

purposes of this subsection, the correct name and address of such person shall be deemed to be reasonable identification.

R. v. Baldson, supra, is clearly distinguishable from the present case and it is, therefore, unnecessary to express a concluded opinion whether it was correctly decided on its facts. (See the interesting and critical examination of that case by Professor Ed. Ratushny in an article "Is There Right Against Self-Incrimination In Canada", 19 McGill L.J. 1 (1973), at pp. 16-21.)

I feel bound to say, however, that the right to remain silent does not also confer a right to mislead a police officer investigating a crime by false information simply because the false statements are made by a person to shield himself from prosecution.

In *Rice v. Connolly*, [1966] 2 Q.B. 414, the appellant was observed by a constable to be acting in a suspicious manner in a neighbourhood where there had been a number of break-ins that night. He refused to give his correct name and address when requested to do so by the constable. He did not, however, make any false statements. In allowing the appellant's appeal from his conviction on a charge of wilfully obstructing a constable in the execution of his duty, Lord Parker said at pp. 419-20:

Accordingly, the sole question here is whether the defendant had a lawful excuse for refusing to answer the questions put to him. In my judgment he had. It seems to me quite clear that though every citizen has a moral duty or, if you like, a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority, and to refuse to accompany those in authority to any particular place; short, of course, of arrest.

Mr. Skinner [counsel for the prosecutor respondent] has pointed out that it is undoubtedly an obstruction, and has been so held, for a person questioned by the police to tell a "cock-and-bull" story; to put the police off by giving them false information, and I think he would say: well, what is the real distinction. It is a very little way from giving false information to giving no information at all. If that does in fact make it more difficult for the police to carry out their duties, then there is a wilful obstruction.

In my judgment there is all the difference in the world between deliberately telling a false story-- something which on no view a citizen has a right to do--and preserving silence or refusing to answer-- something which he has every right to do.

Lord Parker in the above passage does not suggest that a person who by false information misleads a police officer investigating a crime in order to protect himself from detection or prosecution stands in any different position with respect to criminal liability than one who misleads such officer with the motive of protecting another.

In *R. v. Field et al.* (1964), 48 Cr.App.R. 355, the appellants were convicted of conspiracy to obstruct the course of justice by making false statements to the police in order to conceal the identity of one of the alleged conspirators. Lawton, L.J., delivering the judgment of the Court of Criminal Appeal, rejected the argument of the appellants that the offence committed was merely that of acting in concert to obstruct the police and stated that a conspiracy to obstruct the course of justice is different in nature from a conspiracy to obstruct the police in the execution of their duty, but that the obstruction of the police may be the means by which the object of obstructing the course of justice is sought to be achieved.

I do not wish to be taken as holding that all false statements to the police during the investigation of a crime, made by a suspect in order to circumvent a prosecution of himself, are capable of supporting a charge of wilfully attempting to obstruct, pervert, or defeat the course of justice. Clearly, a false denial of guilt would not constitute the offence; to hold otherwise would be indirectly to require the suspected person to admit that he was guilty and nullify the great principle of the common law that an accused has the right to remain silent.

Whether a particular false statement to a police officer investigating a crime made by a suspect from motives of self-protection will attract criminal liability depends on the nature of the false statement and the particular circumstances in which it was made. I limit my judgment to the precise facts of this case. I am of the opinion that in the circumstances the appellant's false statement that he was Vito Miceli supports his conviction on the charge.

I would therefore dismiss the appeal from conviction. The sentence imposed does not reflect any error. I would also dismiss the appeal against the sentence.

Tab 139

REGINA v. ZECK

*Ontario Court of Appeal, Howland, C.J.O., Martin and Houlden, J.J.A.
May 13, 1980*

J. J. Grosberg, for accused, appellant.

M. A. MacDonald, for the Crown, respondent.

The judgment of the Court was delivered orally by

HOWLAND, C.J.O.:—This is an appeal from the conviction of the appellant on December 28, 1979, of attempting to obstruct the course of justice, and also from the sentence which was imposed on that date of imprisonment for a term of 45 days.

The appellant was charged that on or about September 7, 1979, at the Municipality of Metropolitan Toronto in the Judicial District of York, he unlawfully did wilfully attempt to obstruct or pervert the course of justice by removing and destroying parking tags from automobiles previously tagged by police officers on St. Thomas St. contrary to the *Criminal Code*.

During the late evening of September 7, 1979, Sergeant Jack Lewis of the Metropolitan Toronto Police Force, was driving north on St. Thomas St. when he saw four or five cars on the west side with tags for being illegally parked. He observed the appellant, who was walking north on St. Thomas St., reach out and take a parking tag off a Chevrolet automobile and crumple it up. He then walked to the car behind, which was a Toyota, and again took off the parking tag and made a crunching movement. He had both tickets in his right hand, and when he was asked by the police officer what he was doing he put them back beneath the windshield wiper of the Toyota and made a half-hearted attempt to straighten them out. He gave his name as John Howlett. Constable John Garrow confirmed that he had issued the parking tag in respect of the Chevrolet for parking in a prohibited area. Sergeant David Bowen also gave evidence that when the tags had been removed the owners of the cars would not know that they had been given tags, and would receive summonses in the mail at a slightly increased cost.

Section 127(2) [rep. & sub. 1972, c. 18, s. 8] of the *Criminal Code* provides that:

127(2) Every one who wilfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and is liable to imprisonment for ten years.

The proper interpretation to be given to the words "the course of justice" were considered by this Court in *R. v. Spezzano* (1977), 34 C.C.C. (2d) 87, 76 D.L.R. (3d) 160, 15 O.R. (2d) 489. There the appellant had given a police officer a false name in order to avoid a charge of driving while disqualified. Martin, J. A., in delivering the judgment of the Court pointed out at p. 91 that the expression "the course of justice" included existing or proposed judicial proceedings, but was not limited to such proceedings, and that it also included attempts by a person to obstruct, pervert or defeat a prosecution which the person contemplates may take place, notwithstanding that no decision to prosecute has been made. In that case Martin, J. A., also drew attention to the broad interpretation that had been given by the Supreme Court of Canada in *Kalick v. The King* (1920), 35 C.C.C. 159, 65 D.L.R. 104, 61 S.C.R. 175, to the words "the due administration of justice" in connection with a prosecution under s. 167 of the Code. Referring to that decision he stated at p. 92:

The Court held that the words "the due administration of justice" were not limited to apprehended proceedings in respect of crimes in the strict sense, that is to say, crimes created by Parliament under its exclusive power to legislate in relation to criminal law but extended to proceedings in respect of provincial offences.

He then went on to point out at p. 93 that in *R. v. Morin* (1968), 5 C.R.N.S. 297, Rinfret, J., of the Quebec Queen's Bench (Appeal Side) (with whom Casey and Salvais, J.J., concurred) had held that the same broad meaning must be given to the words "the course of justice" in interpreting the predecessor of s. 127 of the Code as had been given by the Supreme Court of Canada in *Kalick v. The King* to the words "the administration of justice". In reaching his conclusion Rinfret, J., at p. 303 cited with approval the dicta of Brodeur, J., in *Kalick v. The King* that the "administration of justice" "includes the taking of necessary steps to have a person who has committed an offence brought before the proper tribunal, and punished for his offence. It is a very wide term covering the detection, prosecution and punishment of offenders".

We are in agreement that a broad interpretation should be given to the words "the course of justice" in s. 127(2). In our opinion, s. 127(2) applies to steps which are taken to obstruct the

normal enforcement by the police of the contravention of a municipal by-law, such as the parking by-law which is in question in this appeal. Accordingly, the appeal as to conviction is dismissed.

With respect to the appeal as to sentence, it should be noted that the appellant is 41 years of age. He is a dentist, who is married and has four children. There was one previous incident in which the appellant had received two convictions for assaulting the police, and a conviction for mischief in respect of private property. In our opinion, there was no error on the part of the trial Judge in imposing a custodial term. The appellant had been dealt with on the previous occasion in a lenient manner and was on probation at the time of the commission of this offence. Counsel for the Crown conceded that the offence which was committed was in the low range for offences involving the obstruction of justice. However, it was a flagrant interference with the police who were carrying out their normal duties. We consider that the sentence of 45 days was too long in the circumstances, and that a sentence of imprisonment for 14 days would be appropriate.

Accordingly, the appeal as to sentence is allowed and the sentence is varied from a term of 45 days to a term of 14 days.

*Appeal from conviction dismissed;
appeal from sentence allowed.*

Tab 140

Baxter Student Housing Ltd. et al. v. College Housing Co-operative Ltd. et al., 1975 CanLII 164 (SCC), [1976] 2 SCR 475

Source:	Supreme Court of Canada
Date:	1975-06-26
Other citations:	57 DLR (3d) 1 — 5 NR 515 — [1976] 1 WWR 1 — 20 CBR (ns) 240 — [1975] SCJ No 84 (QL) — [1975] ACS no 84
Citation:	Baxter Student Housing Ltd. et al. v. College Housing Co-operative Ltd. et al., 1975 CanLII 164 (SCC), [1976] 2 SCR 475, < https://canlii.ca/t/1z6gt >, retrieved on 2026-03-24

Supreme Court of Canada
Baxter Student Housing Ltd. et al. v. College Housing Co-operative Ltd. et al.,
[1976] 2 S.C.R. 475
Date: 1975-06-26

Baxter Student Housing Ltd. and R.C. Baxter Ltd. (*Defendants*) *Appellants*;

and

College Housing Co-operative Limited and College Housing Holdings Incorporated
(*Plaintiffs*) *Respondents*.

1975: May 12; 1975: June 26.

Present: Martland, Judson, Spence, Pigeon and Dickson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Mechanics' liens—Appointment of receiver to draw upon and borrow undrawn balance of proceeds under a mortgage—Whether judge exceeded jurisdiction in ordering that mortgagee, in respect of any moneys advanced by mortgagee to receiver, should have priority over any other registered or unregistered charges or encumbrances—The Mechanics' Liens Act, R.S.M. 1970, c. M80, s. 11(1)—The Queen's Bench Act, R.S.M. 1970, c. C280, s. 59.

The respondent housing co-operative and the respondent holding company (both non-profit corporations, without funds) entered into a contractual relationship with the appellants whereby, *inter alia*, the first appellant was to construct a student housing project. Title to the project was in the name of the holding company; the housing co-operative was to be the head tenant; the second appellant was to be property manager. In

the late summer of 1972 construction was substantially completed, and the first tenants moved into the building. During the winter of 1972/73 a moisture problem developed in the building, which recurred during the winter of 1973/74, resulting in accumulation of ice, water and mould in some of the suites. The owner of the building sought advice of experts who recommended remedial measures, the estimated cost of which amounted to \$135,000. The contractor refused to authorize that the work be done at its expense. Proceedings subsequently commenced between the parties but little progress was made.

The construction cost of the building, \$2,209,790, was to have been provided from the proceeds of a Central Housing and Mortgage Corporation first mortgage in the principal amount of \$1,988,831, all of which had been advanced except for a holdback of \$228,897, and from a second mortgage in the amount of \$220,959, all of which had been advanced. On June 22, 1973, the contractor caused a mechanics' lien to be filed against the

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property in the amount of \$310,440, claimed to be due to it under the contract.

In the summer of 1974, the owner of the property applied to a Queen's Bench judge in chambers for an order appointing a receiver of the balance of the proceeds of the C.M.H.C. mortgage. The order was granted and contained a provision that any moneys paid by the mortgagee "shall upon payment from time to time to the receiver have priority over any and all other charges or encumbrances registered or unregistered affecting the said lands." An appeal was dismissed by the Court of Appeal, and the appellants, with leave, then appealed to this Court. The question to be decided was whether the judge exceeded his jurisdiction in making the said order.

Held: The appeal should be allowed and the application for the order dismissed.

The appointment of the receiver was wrong in law because the provision ordering that any moneys paid by C.M.H.C. to the receiver would have priority over any other registered or unregistered charges or encumbrances ran contrary to s. 11(1) of *The Mechanics' Liens Act*, R.S.M. 1970, c. M80. Section 11(1) goes a long way in ensuring that once a lien claimant has protected his rights by filing a lien in accordance with the provisions of the Act, the lien is a paramount legal charge not subject to being defeated or eroded in any manner. The inherent jurisdiction of the Court of Queen's Bench, under s. 59 of *The Queen's Bench Act*, R.S.M. 1970, c. C280, is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will. The effect of this order was to alter the statutory priorities which a court simply cannot do.

Boake v. Guild, [1932 CanLII 17 \(ON CA\)](#), [1932] O.R. 617, aff'd. [1933 CanLII 16 \(SCC\)](#), [1934] S.C.R. 10, *sub nom. Carrel v. Hart; Earl F. Wakefield Co. v. Oil City Petroleums (Leduc) Ltd. et al.*, [1958 CanLII 46 \(SCC\)](#), [1958] S.C.R. 361; *Montreal Trust Co. et al., v. Churchill Forest Industries (Manitoba) Ltd.*, [1971 CanLII 960 \(MB CA\)](#), [1971] 4 W.W.R. 542; *Winnipeg Supply & Fuel Co. Ltd. v. Genevieve Mortgage Corp. Ltd.*, [1971 CanLII 1156 \(MB CA\)](#), [1972] 1 W.W.R. 651, referred to.

APPEAL from a judgment of the Court of Appeal for Manitoba^[1], dismissing an appeal from an order of Nitikman J. appointing a receiver. Appeal allowed.

[Page 477]

K.B. Foster and C.R. MacArthur, for the defendants, appellants.

K.G. Houston, for the plaintiffs, respondents.

The judgment of the Court was delivered by

DICKSON J.—This is an appeal from a judgment of the Court of Appeal for Manitoba affirming an order of Nitikman J. appointing a receiver to draw upon and borrow the undrawn balance of proceeds under a mortgage. The question to be decided is whether the judge exceeded his jurisdiction in ordering that the mortgagee, in respect of any moneys advanced by the mortgagee to the receiver, should have priority over other charges or encumbrances registered or unregistered affecting the lands.

The facts are unusual. In late 1971 College Housing Co-operative Limited (the Housing Cooperative) and College Housing Holdings Incorporated (the Holding Company) entered into contractual relationship whereby *inter alia* Baxter Student Housing Ltd. (Baxter Housing) was to construct on a “turnkey” basis a four-storey, 192-suite apartment building, known as “Dalhousie Drive Project”, to provide housing for students at the University of Manitoba. Title to the project was in the name of the Holding Company; the Housing Co-operative, a students’ co-operative, was to be the head tenant; R.C. Baxter Ltd. (R.C. Baxter) was to be property manager. In the late summer of 1972 construction was substantially completed, and the first tenants moved into the building. During the winter of 1972/1973 a moisture problem developed in the building, which recurred during the winter of 1973/1974, resulting in accumulation of ice, water and mould in some of the suites. The owner of the building, the Housing Co-operative, sought advice of experts who recommended certain remedial measures, the estimated cost of which amounted to \$135,000. Baxter Housing refused to authorize that the work be done at its expense. Two questions therefore became crucial (i) who would pay for the remedial work and (ii) where would the money come from. On point (i) I should say that in September 1973 the Housing Co-operative and the Holding Com-

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pany issued a statement of claim against Baxter Housing and R.C. Baxter seeking damages and other relief to which the defendants responded with a counterclaim for \$310,440 for balance of construction cost and the defence, in brief, that the project had been completed in accordance with the plans and specifications in a good and workmanlike manner. Those proceedings have not yet been litigated and little progress has been made. The facts material on point (ii) I take to be the following. The Housing Co-operative and the Holding Company are non-profit corporations, without funds. The construction cost of the building, \$2,209,790, was to have been provided from the proceeds of a Central Housing and Mortgage Corporation (C.M.H.C.) first mortgage in the principal amount of \$1,988,831, all of which has been advanced except for a holdback of \$228,897, and from a second mortgage in the principal amount of \$220,959, all of which

has been advanced. On June 22, 1973, Baxter Housing caused a mechanics' lien to be filed against the property in the amount of \$310,440 claimed to be due to it under the contract.

In the summer of 1974, almost a year ago, the plaintiff owner of the property moved before Nitikman J. for an order appointing W.E. Shields or some other fit and proper person as receiver of the balance of the proceeds of the C.M.H.C. mortgage. The notice of motion referred to (i) the dispute between the parties as to the adequacy of the design and construction of the student housing project, (ii) the recommendations of the experts, (iii) the likelihood that if the repairs were not carried out forthwith there was every probability they would not be able to be done before freeze-up, with the result the project would suffer another winter with the moisture problem in the suites with an anticipated loss of goodwill and an increased vacancy rate, (iv) the filing by the defendants of the mechanics' lien and (v) the refusal by C.M.H.C., by reason of the lien, to advance further moneys under the mortgage. Affidavits were filed in support of the motion and the affiants cross-examined, following which Nitikman J. made the order called into question in these proceedings. That order contained the following provision, inserted no doubt in the hope that C.M.H.C.,

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relying thereon, would advance the holdback moneys notwithstanding the mechanics' lien filed:

2. AND IT IS FURTHER ORDERED AND DECLARED that any monies paid by the said Central Mortgage & Housing Corporation shall upon payment from time to time to the receiver have priority over any and all other charges or encumbrances registered or unregistered affecting the said lands.

Did the learned chambers judge exceed his jurisdiction in making the order? However politic and expedient the appointment of a receiver may have appeared as a means of tapping the only available source of funds and preventing a stalemate, I am of opinion that the judge had no proper ground in law for making the appointment. The appointment was wrong in law because provision 2 above quoted runs contrary to s. 11(1) of *The Mechanics' Liens Act* of Manitoba, R.S.M. 1970, c. M80, reading:

11(1) The lien created by this Act has priority over all judgments, executions, assignments, attachments, garnishments, and receiving orders, recovered, issued or made after the lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of the lien to the person making those payments or after registration of the lien as hereinafter provided.

Section 11(1) goes a long way in ensuring that once a lien claimant has protected his rights by filing a lien in accordance with the provisions of the Act, the lien is a paramount legal charge not subject to being defeated or eroded in any manner. See *Boake v.*

Guild^[2], and Rand J. in *Earl F. Wakefield Co. v. Oil City Petroleums (Leduc) Ltd. et al.*^[3], at p. 364. Section 59 of *The Queen's Bench Act*, R.S.M. 1970, c. C280, it is to be observed, empowers the Court to appoint a receiver "in all cases in which it appears to the Court to be just and convenient so to do" and further provides that "any such order may be made either unconditionally or upon such terms and conditions as the Court thinks fit"; but this cannot afford comfort to the owner because s. 11 of *The Mechanics' Liens*

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Act, in terms, gives a lien created by the Act priority over all receiving orders made after the lien arises. The question whether the receiving order here in question is a receiving order of the kind contemplated in s. 11(1) need not detain us because even if this question be resolved in favour of the validity of the appointment, the closing words of the subsection, in clearest language, give a mechanics' lien priority over all payments or advances made on account of any mortgage. One may escape the first part of the subsection only to be impaled on the second part of the subsection and Mr. Houston, counsel for the owner, concedes as much.

In my opinion the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will. The effect of the order made in this case was to alter the statutory priorities which a court simply cannot do.

In the Court of Appeal Matas J.A. *per curiam* said:

In any event, I am of the opinion that sec. 11(1), *supra*, cannot be interpreted, under the circumstances before us, so as to frustrate the jurisdiction of Court of Queen's Bench to appoint a receiver with effective power to carry out his mandate. (*Montreal Trust Company et al. v. Churchill Forest Industries (Manitoba) Limited*, 1971 CanLII 960 (MB CA), [1971] 4 W.W.R. 542 at p. 546 *et seq.*) In my view, the order appealed from is not in conflict with *The Mechanics' Liens Act*, *supra*, and is in accordance with its intent.

Montreal Trust Company et al. v. Churchill Forest Industries (Manitoba) Limited may well be cited as a paradigm of the exercise of judicial discretion but Chief Justice Freedman, speaking for all his colleagues, was careful to state, p. 547:

Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or Rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

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The case does not stand for the proposition that the Court has a discretion in the application of a statutory imperative, such as that residing in s. 11(1) of *The Mechanics'*

Liens Act, in circumstances of the nature of those upon which Matas J.A. lays emphasis in the following extracts from his judgment:

In the case at bar the receiver has been given control of the only money available as a means of breaking the stalemate which has been created by filing of the lien. The objective in having a receiver appointed was not to prevent dissipation of the fund, but to utilize the fund as a sensible and practical way of getting the necessary work done.

...

There is ample evidence to support a finding that if plaintiffs are prevented from using the only available funds, and are thus prevented from doing the work, there will be an adverse effect on the building and the financial viability of the project will be in jeopardy. It would be fruitless to require plaintiffs to await the result of mechanics' lien or other court action, which would take place some time in the future while the property deteriorated and the financial viability of the project was being seriously affected.

These would be compelling reasons for the appointment of a receiver in the absence of s. 11(1) but, given that subsection, it would seem to me they are considerations which the Court is not entitled to bring into account. Parenthetically, events have proven, as so often appears to be the case, that peripheral skirmishing is wasteful of time and money and justice is better served by getting ahead with trial of substantial issue in the proceedings. Reference was made by Matas J.A. to the case of *Winnipeg Supply & Fuel Co. Ltd. v. Genevieve Mortgage Corp. Ltd.*^[4] In that case the Court of Appeal for Manitoba held that, on an appeal from a judgment at trial in a mechanics' liens action, where a subcontractor's steel shoring supports for a building were essential to hold the building in place and to avoid serious damage, the cost of continuing supply of the supports and of removal would rank in priority to lien claimants. The priority given to the expenditure for an urgent and necessary purpose for the benefit of others was recognized in that case.

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It is commonplace to appoint a receiver at the instance of a creditor in order to preserve property pending litigation. We have here the novel situation of an owner of property applying for the appointment of a receiver. The *res* is not the property but a sum of money to which the owner wishes to have recourse for the purpose of effecting improvements to the property. Until the main litigation has been concluded, it will not be known whether the cost of such improvements will fall upon the owner or upon the contractor and in the meantime the effect of the order of Nitikman J. would be to subordinate the lien of the contractor to any advances under the mortgage made by C.M.H.C. to the receiver. The appointment would permit the receiver to borrow and expend moneys which, in the absence of the moisture difficulties and the litigation ensuing by reason thereof, would be payable to the contractor. None of the authorities to which we have been referred touches upon the appointment of a receiver in such circumstances and with such powers.

Mr. Houston advanced an argument based upon s. 4(1) of *The Mechanics Liens Act* which reads in part:

4.(1) Unless he signs an express agreement to the contrary, any person who performs any work or service upon or in respect of, ...a lien for the price of that work, service, ...upon the... building, ...and the lands occupied thereby or enjoyed therewith, or upon or in respect of which the work or service is performed, ...*limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing (excepting as herein provided) by the owner*; but no such lien exists under this Act for any claim for less than twenty dollars.

(The italics are mine.)

It was contended that the lien of the contractor cannot go beyond the fair value of the work done, and that although the Manitoba Courts have not made an ultimate finding they have implicitly found that no amount is justly due to the lien claimant. I do not think the record before us bears this out. Explicit in the order of Nitikman J. was a finding of a moisture problem affecting the student housing project but there was no finding,

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express or implicit, in either of the lower Courts as to responsibility for the problem. An order directing payment to a receiver at this time of the holdback fund with C.M.H.C. would be tantamount to a finding in favour of the owner on the major issue not yet litigated. Mr. Houston contends that s. 4(1) limits the right to lien. In my opinion its only effect is to limit the amount which the lienholder can recover. Unless and until the main action has been tried, the amount, if any, justly due to the contractor will not be known. The interlocutory proceeding taken for the appointment of the receiver was not intended to have, and did not have, the effect of making any determination of this outstanding issue.

The appellant contractor submitted that the order of Nitikman J. was by its nature hypothetical and unenforceable in that C.M.H.C. did not appear in the proceedings and was known not to release funds except on assurance of priority and furthermore was not bound or directed by the order to advance funds to the receiver appointed. The effect which I would give to the express statutory provision, namely, s. 11(1) of *The Mechanics' Liens Act* makes it unnecessary to consider this additional ground of attack upon the validity of the order.

I would allow the appeal, reverse the decision of the Court of Appeal for Manitoba affirming the order of Nitikman J. and direct that the motion be dismissed with costs in this Court and in the Courts below.

Appeal allowed with costs.

Solicitors for the defendants, appellants: Aikins, MacAulay & Thorvaldson, Winnipeg.

Solicitors for the plaintiffs, respondents: Arpin & Co., Winnipeg.

[1] 1974 CanLII 1112 (MB CA), [1975] 1 W.W.R. 311, 50 D.L.R. (3d) 122.

[2] 1932 CanLII 17 (ON CA), [1932] O.R. 617, aff'd, [1934] S.C.R. *sub nom. Carrel v. Hart*.

[3] 1958 CanLII 46 (SCC), [1958] S.C.R. 361.

[4] 1971 CanLII 1156 (MB CA), [1972] 1 W.W.R. 651, 23 D.L.R. (3d) 160.

Tab 141

T-1040-80

T-1040-80

Fred Steiner (Plaintiff)

Fred Steiner (Demandeur)

v.

c.

The Queen, the Postmaster General, Lawrence F. Reid, A. E. Green and Marc Savoie (Defendants)

La Reine, le ministre des Postes, Lawrence F. Reid, A. E. Green et Marc Savoie (Défendeurs)

Trial Division, Decary J.—Campbellton, January 14; Ottawa, July 17, 1981.

Division de première instance, le juge Decary—
a Campbellton, 14 janvier; Ottawa, 17 juillet 1981.

*Prerogative writs — Declaration — Postmaster decided that flyers submitted by the plaintiff for delivery were non-mailable matter on account of the text which was critical of the Post Office — *Post Office Act* gives the Postmaster General the power to decide what is non-mailable matter and the right to delegate such power — Whether such discretionary power is restricted to mail that is the object of a regulation issued under the Act — Application for a declaration that the defendants have a public duty to accept for delivery all mail which complies with the Act and Regulations, and a declaration that the defendants have a duty to accept for delivery the particular flyer is allowed — *Post Office Act*, R.S.C. 1970, c. P-14, ss. 2, 3(1), 5(1)(a), 5(4), 6(1)(a)(i), 7(1)(a)(i) — *Third Class Mail Regulations*, SOR/78-899, ss. 2, 3(1) — *Prohibited Mail Regulations*, C.R.C. 1978, Vol. XIV, c. 1259, ss. 2, 3 — *Canadian Bill of Rights*, S.C. 1960, c. 44 [R.S.C. 1970, Appendix III], ss. 1, 2*

Brefs de prerogative — Jugement déclaratoire — Le maître de poste a décidé que les circulaires d'annonces que le demandeur avait présentées pour être transmises par la poste étaient des objets non transmissibles en raison du texte qui critiquait le bureau de poste — La Loi sur les postes confère au ministre des Postes le pouvoir de décider ce qui est non transmissible et le droit de déléguer ce pouvoir — Il s'agit d'examiner si ce pouvoir discrétionnaire se limite aux envois qui sont l'objet de règlements pris en application de la Loi — En accueillant la demande tendant à l'octroi d'un jugement déclaratoire portant que les défendeurs ont le devoir, d'ordre public, d'accepter, pour être transmis par la poste, tous les envois qui sont conformes à la Loi et à ses Règlements d'application, et d'un autre jugement déclaratoire portant que les défendeurs ont le devoir d'accepter, pour être transmis par la poste, la circulaire d'annonce particulière — Loi sur les postes, S.R.C. 1970, c. P-14, art. 2, 3(1), 5(1)a, 5(4), 6(1)a(i), 7(1)a(i) — Règlement sur les objets de la troisième classe, DORS/78-899, art. 2, 3(1) — Règlement sur les objets interdits, C.R.C. 1978, Vol. XIV, c. 1259, art. 2, 3 — Déclaration canadienne des droits, S.C. 1960, c. 44 [S.R.C. 1970, Appendice III], art. 1, 2

The plaintiff seeks a declaration that the defendants have a public duty to accept for delivery all mail which complies with the *Post Office Act* and Regulations and a further declaration that the defendants have a duty to accept for delivery the particular item which the plaintiff submitted to the defendants for mailing. The plaintiff wished to mail a flyer which met all physical requirements of the Regulations, but its text was critical of the Post Office. The Postmaster exercised his discretion and decided that the flyers were non-mailable matter on account of their text. Paragraph 5(1)(p) of the *Post Office Act* gives the Postmaster General the power to decide what is non-mailable matter and subsection 5(4) gives the Postmaster General the right to delegate such power to assistant deputy postmasters general. Mailable matter is defined as any thing that by the Act or Regulations may be sent by post. The question is whether the flyers could be the object of the exercise of discretion under section 5 of the Act on account of their text, or whether such an exercise of discretion was unreasonable or a breach of the duty to act fairly.

Le demandeur sollicite un jugement déclaratoire portant que les défendeurs ont le devoir, d'ordre public, d'accepter, pour être transmis par la poste, tous les envois qui sont conformes à la Loi sur les postes et à ses Règlements d'application ainsi qu'un autre jugement déclaratoire portant que les défendeurs ont le devoir d'accepter l'envoi particulier que le demandeur a présenté aux défendeurs pour expédition par la poste. Le demandeur désirait envoyer par la poste une circulaire d'annonce qui remplissait toutes les conditions matérielles des Règlements, mais dont le texte critiquait le bureau de poste. Se prévalant de son pouvoir discrétionnaire, le maître de poste a décidé que les circulaires d'annonces étaient des objets non transmissibles en raison de leur contenu. L'article 5(1)p) de la Loi sur les postes confère au ministre des Postes le pouvoir de décider ce qu'est un objet non transmissible, et le paragraphe 5(4) l'autorise à déléguer ce pouvoir aux sous-ministres adjoints des Postes. L'expression «objet transmissible» est définie comme comprenant tout ce qui, d'après la Loi et les Règlements, peut être envoyé par la poste. Il s'agit d'examiner si les circulaires d'annonces peuvent être l'objet de l'exercice du pouvoir discrétionnaire prévu à l'article 5 de la Loi en raison de leur contenu, ou si un tel exercice était déraisonnable ou constituait un manquement au devoir d'agir équitablement.

Held, the defendants have a public duty to accept for delivery all mail which complies with the *Post Office Act* and Regulations. Further, the defendants have a duty to accept for delivery the particular item which the plaintiff submitted for

Arrêt, les défendeurs ont le devoir, d'ordre public, d'accepter, pour être transmis par la poste, tous les envois qui sont conformes à la Loi sur les postes et à ses Règlements d'application. En outre, les défendeurs ont le devoir d'accepter, pour être

mailing. The definition of "mailable matter" indicates that it is only the Act or the Regulations that should define what is mailable, not the discretion of the Postmaster General or his designate. The legislator having enumerated in the definition and in the regulation section what is a mailable and a non-mailable matter, has in so doing fettered the discretion as it cannot be exercised except if it relates to items in the Act or in the Regulations. Had Parliament intended for the Postmaster General to have an absolute unfettered discretion to interrupt the mails or to refuse to accept mail because he did not agree with the contents of the mail, there would have been provided specific legislation permitting such actions. There being no such specific authority, it does appear that the legislator intended that all matters were mailable unless there were specific restrictions by way of regulation. Through the passage of the *Prohibited Mail Regulations* there is defined what is a non-mailable matter for the Act as well as the Regulations. Nowhere in the Act or Regulations is there the authority to refuse to accept mail because the Postmaster General or his designate does not approve of the purport of the mailing. Unless there is a specific regulation permitting the Postmaster General to refuse to permit the mail to go through, it is not to be inferred from the language that it is permitted to refuse the use of the mails. There are enabling words which permit the plaintiff to mail the flyer in question and, as a result, those words must be read as being compulsory. The Regulations in no way provide authority for the Postmaster General to refuse to accept third class mail because of the contents. The power to decide what is a letter given the Postmaster General at paragraph 5(1)(g) of the Act is only one of making a regulation as to what is a letter, a mailable matter and a non mailable matter, and cannot be exercised unless through the medium of regulations.

Re Fisheries Act, 1914 [1920] 1 D.L.R. 194 (P.C.), applied. *Labour Relations Board of Saskatchewan v The Queen* [1956] S.C.R. 82, applied. *R. v Drybones* [1970] S.C.R. 282, applied. *Re Pacific Press and The Queen* [1977] 37 C.C.C. (2d) 487 (B.C.S.C.), agreed with. *Roncarelli v Duplessis* [1959] S.C.R. 121, referred to.

ACTION.

COUNSEL:

Ronald A. Pink for plaintiff.
A. R. Pringle for defendants.

SOLICITORS:

Kitz, Matheson, Green & MacIsaac, Halifax, for plaintiff.
Deputy Attorney General of Canada for defendants.

transmis par la poste. L'envoi particulier que le demandeur a présenté pour expédition par la poste. Il ressort de la définition d'«objet transmissible» qu'il appartient exclusivement à la Loi ou aux Règlements de définir ce qui est transmissible, et que cette définition ne relève pas de pouvoir discrétionnaire du ministre des Postes ni de la personne qu'il désigne. En prévoyant, dans la définition et dans l'article portant autorisation d'établir des règlements, ce qu'est un objet transmissible et ce qu'est un objet non transmissible, le législateur a limité le pouvoir discrétionnaire puisqu'il ne peut être exercé que relativement à des envois prévus par la Loi ou les Règlements. Si le Parlement avait voulu donner au ministre des Postes la liberté absolue d'interrompre l'acheminement du courrier ou de refuser d'accepter des envois parce qu'il n'était pas d'accord avec leur contenu, une autorisation expresse de le faire aurait été prévue dans la législation. Étant donné qu'il n'existe aucun pouvoir précis à ce sujet, il semblerait que le législateur ait voulu que tous les envois soient transmissibles, à moins de restrictions précises prévues par règlement. Le Règlement sur les objets interdits définit ce qu'est un objet non transmissible aux fins de la Loi ainsi que du Règlement. Nulle part dans la Loi ni dans le Règlement on ne prévoit le pouvoir de refuser d'accepter des envois parce que le ministre des Postes ou la personne qu'il a désignée n'est pas d'accord avec le motif de l'envoi. À moins d'un règlement précis permettant au ministre des Postes de refuser de permettre à un envoi d'être acheminé par la poste, on ne doit pas interpréter le texte comme permettant de refuser à quelqu'un de se servir de la poste. Il existe des dispositions autorisant le demandeur à envoyer par la poste la circulaire d'annonce en question et, par conséquent, ces dispositions doivent être interprétées comme obligatoires. Aucune disposition des Règlements n'autorise le ministre des Postes à refuser d'accepter des objets de la troisième classe à cause de leur contenu. Le pouvoir de décider ce qu'est une lettre, conféré au ministre des Postes à l'alinéa 5(1)g) de la Loi, est seulement le pouvoir d'établir un règlement relativement à ce qu'est une lettre, un objet transmissible et un objet non transmissible, et ce pouvoir ne peut être exercé que par règlements.

Arrêts appliqués. *Re Fisheries Act, 1914* [1920] 1 D.L.R. 194 (P.C.); *Labour Relations Board of Saskatchewan c. La Reine* [1956] R.C.S. 82. *R. c. Drybones* [1970] R.C.S. 282. Arrêt approuvé: *Re Pacific Press et la Reine* [1977] 37 C.C.C. (2^e) 487 (C.S.C.B.). Arrêt mentionné: *Roncarelli c. Duplessis* [1959] R.C.S. 121.

ACTION.

AVOCATS:

Ronald A. Pink pour le demandeur.
A. R. Pringle pour les défendeurs.

PROCUREURS:

Kitz, Matheson, Green & MacIsaac, Halifax, pour le demandeur.
Le sous-procureur général du Canada pour les défendeurs.

The following are the reasons for judgment rendered in English by

DECARY J.: The issue as I understand this matter*, is whether the exercise of discretionary power given the Postmaster General by the provisions of the *Post Office Act*, R.S.C. 1970, c. P-14, is restricted or not to the mail that is the object of a regulation issued under the authority of the Act and to the mail that is unlawful by virtue of the Act itself.

Before stating the facts that gave rise to the action seeking a declaration that the defendants have a public duty to accept for delivery all mail which complies with the *Post Office Act* and Regulations and a further declaration that the defendant, the Queen, and her servants have a duty to accept for delivery the particular item which the plaintiff submitted to the defendants for mailing, I believe that the pivotal sections of the Act and of the Regulations should be quoted and commented upon.

First, subsection 3(1) of the *Post Office Act* states:

3 (1) There shall be a department of the Government of Canada called the Post Office Department over which the Postmaster General shall preside

The purpose of this clause is patent: there shall exist a Post Office and an overall manager

The next section to consider is, in my view, this one:

5. (1) Subject to this Act, the Postmaster General shall administer, superintend and manage the Canada Post Office, and, without restricting the generality of the foregoing, may

(a) decide in any particular case what is a letter, mailable matter or non-mailable matter;

If there were no Regulations, only these provisions of the Act, then the Postmaster General would be vested with an unfettered discretion to decide what is mailable and unmailable matter.

* The notes submitted by counsel for plaintiff, Mr. Pink, have been used to a great extent.

Ce qui suit est la version française des motifs du jugement rendu par

LE JUGE DECARY: Si je comprends bien, la question qui se pose en l'espèce* est de savoir si l'exercice du pouvoir discrétionnaire conféré au ministre des Postes par les dispositions de la *Loi sur les postes*, S.R.C. 1970, c. P-14, se limite ou non aux envois qui font l'objet d'un règlement pris en application de la Loi et aux envois que la Loi déclare illégaux.

Avant d'énoncer les faits qui ont donné naissance à la présente action qui tend à obtenir un jugement déclaratoire portant que les défendeurs ont le devoir, d'ordre public, d'accepter, pour être transmis par le poste, tous les envois qui sont conformes à la *Loi sur les postes* et à ses Règlements d'application ainsi qu'à obtenir un autre jugement déclaratoire portant que la défenderesse, la Reine, et ses employés ont le devoir d'accepter, pour être transmis par le poste, l'envoi particulier que le demandeur a présenté aux défendeurs pour expédition par le poste, je crois qu'il convient de citer et de commenter les articles importants de la Loi et des Règlements.

Premièrement, le paragraphe 3(1) de la *Loi sur les postes* prévoit:

3. (1) Est établi un ministère du gouvernement du Canada, appelé ministère des Postes, ayant à sa tête le ministre des Postes.

L'objet de cet article est évident: on crée un ministère des Postes avec un directeur général.

Le prochain article qu'il convient d'examiner est, selon moi, le suivant:

5. (1) Sous réserve de la présente loi, le ministre des Postes doit administrer, surveiller et gérer la poste au Canada et, sans restreindre la généralité de ce qui précède, peut

(a) décider, dans tout cas particulier, ce qu'est une lettre, un objet transmissible ou un objet non transmissible,

S'il y avait seulement ces dispositions de la Loi, sans Règlements d'application, alors le ministre des Postes aurait la liberté absolue de décider ce qui est transmissible et ce qui ne l'est pas.

* J'ai employé en grande partie les notes soumises par l'avocat du demandeur, Mr. Pink.

That discretionary power could be delegated to and exercised by certain public servants, in view of subsection 5(4):

5. ...

(4) The Postmaster General may delegate any or all of the powers, duties and functions set out in paragraph 42(p) and (q) to assistant deputy postmaster general and to directors of the Post Office Department.

A mailable matter is defined in subsection 2(1) as:

2. (1) ...

"mailable matter" includes any thing that by this Act or any regulation may be sent by post;

The object of the discretion in subsection 5(1) is to decide what may be sent by post and what may be sent by post is only what is defined in the Act or the Regulations.

The provisions of section 6 give the power to make regulations for, *inter alia*, the following purposes amongst those enumerated from (a) to (y):

6. The Postmaster General may make regulations for the efficient operation of the Canada Post Office and for carrying the purposes and provisions of this Act into effect, and, without restricting the generality of the foregoing, may make regulations

(a) prescribing, for the purposes of this Act, what is a letter and what is mailable matter and non-mailable matter;

(b) for the classification of mailable matter;

(f) prescribing the conditions under which mailable matter may be sent by post;

(g) for excluding non-mailable matter from the mails and providing for the return to the sender or other disposition of non-mailable matter;

I note that Parliament has stated that the Regulations are for the efficient operation of the Canada Post Office, initially, and, secondly, for carrying the purposes and provisions of the Act into effect. It is also the first mention of non-mailable matter which is defined by reference to mailable matter by deducing that it has to be an item that cannot be sent by post.

The definition of "mailable matter" in subsection 2(1) indicates that it is only the Act or the Regulations that should define what is mailable, not the discretion of the Postmaster General or his designate. If it was the intention of Parliament to

Ce pouvoir discrétionnaire pourrait être délégué à certains fonctionnaires en vertu du paragraphe 5(4):

5. ...

(4) Le ministre des Postes peut déléguer tout ou partie des pouvoirs, attributions et fonctions énoncés aux alinéas 42(p) et q) aux sous-ministres adjoints des Postes et aux directeurs du ministère des Postes.

Un objet transmissible est défini comme suit au paragraphe 2(1):

2. (1) ...

«objet transmissible» comprend tout ce qui, d'après la présente loi ou quelque règlement, peut être envoyé par la poste.

L'objet de ce pouvoir discrétionnaire prévu au paragraphe 5(1) est de décider ce qui peut être envoyé par la poste, et ce qui peut être envoyé par la poste est uniquement ce qui est prévu dans la Loi ou les Règlements.

L'article 6 confère le pouvoir d'établir des règlements pour la réalisation des objets prévus aux alinéas a) à y), notamment:

6. Le ministre des Postes peut établir des règlements pour le fonctionnement efficace de la poste au Canada, ainsi que pour la réalisation des objets et l'application des dispositions de la présente loi, et, sans restreindre la généralité de ce qui précède, édicter des règlements

a) prescrivant, aux fins de la présente loi, ce qu'est une lettre et ce qui constitue un objet transmissible ou un objet non transmissible;

b) établissant la classification des objets transmissibles,

f) prescrivant les conditions auxquelles un objet transmissible peut être envoyé par la poste;

g) portant exclusion d'objets non transmissibles de la poste et décrétant leur renvoi à l'expéditeur ou quelque autre façon d'en disposer;

Je remarque que le Parlement a déclaré que les Règlements sont d'abord établis pour le fonctionnement efficace de la poste au Canada et, en deuxième lieu, pour la réalisation des objets et l'application des dispositions de la Loi. C'est également la première fois qu'il est fait mention d'objets non transmissibles qui se définissent par rapport à ce qui est transmissible; on déduit qu'il doit s'agir d'objets qui ne peuvent être envoyés par la poste.

Il ressort de la définition d'«objet transmissible» au paragraphe 2(1) qu'il appartient exclusivement à la Loi ou aux Règlements de définir ce qui est transmissible et que cette définition ne relève pas du pouvoir discrétionnaire du ministre des Postes.

allow the Postmaster General to have an unlimited discretion in this regard then the only mention needed would be paragraph (p) in subsection 5(1).

The legislator having enumerated in the definition and in the regulation section what is a mailable and a non-mailable matter, has in so doing fettered the discretion as it cannot be exercised except if it relates to items in the Act or in the Regulations.

The provisions of paragraphs 7(1)(a) and (b) deal with the use of the mail for unlawful purposes.

7. (1) Wherever the Postmaster General believes on reasonable grounds that any person

(a) is, by means of the mails,

(i) committing or attempting to commit an offence, or
(ii) aiding, counselling or procuring any person to commit an offence, or

(b) with intent to commit an offence, is using the mails for the purpose of accomplishing his object,

the Postmaster General may make an interim order (in this section called an "interim prohibitory order") prohibiting the delivery of all mail directed to that person (in this section called the "person affected") or deposited by that person in a post office.

The legislative scheme becomes more apparent upon reading this section. It is elaborate and detailed and is indicative that where Parliament wanted to give a broad discretion to interfere with the operations of the mail then it has said so specifically and exactly. It is submitted that this exact reference to the use of the mails for unlawful purposes is in keeping with the legislative intent.

When one considers the purpose of section 7 in light of the entire Act, the powers provided are understandable, but it is important to understand that when Parliament wanted to restrict in some way the proper flow of the mail specific authority was enunciated.

Had Parliament intended for the Postmaster General to have an absolute unfettered discretion to interrupt the mails or to refuse to accept mail because he did not agree with the contents of the mail there would have been provided specific legis-

ni de la personne qu'il désigne. Si le Parlement avait eu l'intention de donner au ministre des Postes un pouvoir discrétionnaire illimité à ce sujet, alors l'alinéa p) du paragraphe 5(1) aurait suffi.

En précisant, dans la définition et dans l'article portant autorisation d'établir des règlements, ce qu'est un objet transmissible et ce qu'est un objet non transmissible, le législateur a limité le pouvoir discrétionnaire puisqu'il ne peut être exercé que relativement à des envois prévus par la Loi ou les Règlements.

Aux alinéas 7(1)a) et b), il est question de l'utilisation de la poste à des fins illégales:

7. (1) Chaque fois que le ministre des Postes a des motifs raisonnables de croire qu'une personne,

a) au moyen de la poste,

(i) commet ou tente de commettre une infraction ou
(ii) aide, incite ou pousse une personne à commettre une infraction, ou,

b) dans l'intention de commettre une infraction, emploie la poste pour atteindre son but,

le ministre des Postes peut rendre un ordre provisoire (dans le présent article, appelé «ordre prohibitif provisoire»), interdisant la livraison de tout courrier adressé à cette personne (au présent article, appelée «personne en cause») ou déposé par cette personne à un bureau de poste.

Le but poursuivi par la Loi devient plus évident à la lecture de cet article. Il est d'une facture travaillée et détaillée et permet de constater que lorsque le Parlement a voulu donner un vaste pouvoir discrétionnaire d'intervention dans les activités de la poste, il l'a dit de façon expresse et précise. Il est allégué que cette mention précise de l'emploi de la poste à des fins illégales est conforme à l'objet de la Loi.

Si l'on considère l'objet de l'article 7 à la lumière de l'ensemble de la Loi, on peut comprendre pourquoi ces pouvoirs y sont prévus, mais il est important de comprendre que lorsque le Parlement a voulu restreindre d'une façon ou d'une autre l'acheminement normal du courrier, le pouvoir précis de le faire a été prévu expressément.

Si le Parlement avait voulu donner au ministre des Postes la liberté absolue d'interrompre l'acheminement du courrier ou de refuser d'accepter des envois parce qu'il n'était pas d'accord avec leur contenu, une autorisation expresse de le faire

lation permitting such actions. This is what Parliament did with respect to the use of the mails for unlawful purposes, and the same could easily have been provided had Parliament wanted the Postmaster General to review the contents of flyers to ensure that they met the Postmaster General's standard of approval. There being no such specific authority permitting the Postmaster General or his designates to refuse to permit the mailing of matters because the Postmaster General or his designates do not agree with the contents of the mailing, then it does appear that the legislator intended that all matters were mailable unless there were specific restrictions by way of regulation.

To this point, we have considered only the provisions of the Act but the Act makes numerous references to the use of regulations for the definition of what is mailable or non-mailable matter. In the *Third Class Mail Regulations*, SOR/78-899, 30 November, 1978, a flyer is defined as:

2
... an item of householder mail not exceeding four ounces in weight that is not in card or envelope form and that is not enclosed in an envelope;

A flyer is the kind of mail we shall be dealing with. The general authority for persons to use third class mail is subsection 3(1) which states:

3 (1) Subject to subsection (2), an item of Domestic Third Class Mail may be posted at the rate of postage set out for that item in Schedule I if the item is posted in accordance with the conditions in respect of that item set out in this Part.

When reference is made to section 9 of the Regulations, it can be seen that there are some 13 conditions which must be met. If all of the technical requirements of section 9 of the Regulations have been met then there is the right to post a third class mail in accordance with subsection 3(1), inasmuch as the flyer is a mailable matter in accordance with the definition of mailable matter in the Act.

What is left to determine is whether it is possible or not that the flyer was a non-mailable matter. In the *Prohibited Mail Regulations*, C.R.C. 1978, Vol. XIV, c. 1289, non-mailable matter is defined in section 2 as:

aurait été prévue dans la législation. C'est ce que le Parlement a fait relativement à l'utilisation de la poste à des fins illégales, et il aurait facilement pu faire la même chose s'il avait voulu que le ministre des Postes examine le contenu de circulaires d'annonce pour s'assurer qu'elles soient conformes aux normes du ministre des Postes. Étant donné qu'il n'existe aucun pouvoir précis permettant au ministre des Postes ou aux personnes par lui désignées de refuser de permettre l'expédition par la poste d'envois parce qu'ils ne sont pas d'accord avec leur contenu, il semblerait que le législateur ait voulu que tous les envois soient transmissibles à moins de restrictions précises prévues par règlement.

Jusqu'ici, nous n'avons examiné que les dispositions de la Loi, mais celle-ci renvoie souvent aux règlements pour la définition des objets transmissibles et des objets non transmissibles. Dans le *Règlement sur les objets de la troisième classe*, DORS/78-899, daté du 30 novembre 1978, une circulaire d'annonce est définie comme suit.

2
... un envoi sans adresse, ne pesant pas plus de quatre onces, qui n'est pas sous forme de carte ni d'enveloppe et n'est pas inséré dans une enveloppe;

C'est le genre d'envoi qui nous intéresse en l'espèce. C'est au paragraphe 3(1) qu'est prévue l'autorisation générale d'envoyer des objets de la troisième classe:

3. (1) Sous réserve du paragraphe (2), tout objet de la troisième classe du régime intérieur peut être déposé au tarif d'affranchissement visé pour cet objet à l'annexe I si l'objet est déposé selon les conditions énoncées dans la présente partie.

Si l'on se rapporte à l'article 9 du Règlement, on peut voir qu'il y a 13 conditions à remplir. Le respect de toutes les exigences techniques prévues à l'article 9 du Règlement donne le droit d'envoyer un objet de la troisième classe, conformément au paragraphe 3(1), dans la mesure où la circulaire d'annonce est un objet transmissible selon la définition qu'en donne la Loi.

Il reste à déterminer si la circulaire d'annonce était ou non un objet non transmissible. Dans le *Règlement sur les objets interdits*, C.R.C. 1978, Vol. XIV, c. 1289, on trouve à l'article 2 la définition suivante de l'expression objet non transmissible:

2. ... anything prescribed as non-mailable matter by section 3.

Section 3 which identifies what a non-mailable matter is states in its introductory language the purpose for which there is such a list of articles from (a) to (j):

3. For the purposes of the Act and these Regulations, the following articles are non-mailable matter:

None having any bearing in the matter at issue, there is no need to quote the list.

The language of section 3 of the *Prohibited Mail Regulations* is similar to the language of the regulation section of the Act, i.e. section 6.

Section 3 of the *Prohibited Mail Regulations* establishes a list of articles that are non-mailable "for the purposes of the Act" and section 6 of the Act establishes a list of objects for which a regulation can be made. Through the passage of these *Prohibited Mail Regulations* there is defined what is a non-mailable matter for the Act as well as the Regulations. Although there is no specific definition in the Act of a non-mailable matter, there is reference in sections 5 and 6 to non-mailable matters and prohibited mail. This Regulation defines for the purposes of the Act under the authority of paragraph 6(1)(a) what is non-mailable matter. The Regulation being made pursuant to the power granted by the Act and there being no conflict between that power and the Regulation made by the exercise of that power, there cannot be any question of priority of the Act. The Regulation was made pursuant to the power granted by the Act.

Has the Postmaster General, once he has defined what is a non-mailable matter, the right to decide other matters which are enunciated in the *Prohibited Mail Regulations*? Nowhere in the Act or Regulations is there the authority to refuse to accept mail because the Postmaster General or his designate does not approve of the purport of the mailing.

The facts, as I find them in the evidence and the agreed statement of facts, are such that they either comply or do not comply with the *Third Class Mail Regulations* and consequently the matter desired to be mailed was or was not a mailable

2. ...

... tout objet prescrit à l'article 3 comme objet non transmissible.

L'article 3 qui précise ce qu'est un objet non transmissible dit dans sa partie introductive pourquoi il y a une telle liste d'articles aux alinéas a) à j):

3. Aux fins de la Loi et du présent règlement, les objets suivants sont des objets non transmissibles par la poste:

Aucun de ces articles n'étant pertinent, il est inutile de citer la liste.

Le langage de l'article 3 du *Règlement sur les objets interdits* est semblable à celui de l'article de la Loi portant autorisation d'établir des règlements, soit l'article 6.

L'article 3 du *Règlement sur les objets interdits* établit une liste d'articles qui ne sont pas transmissibles «aux fins de la Loi» et l'article 6 de la Loi établit une liste d'objets pour lesquels un règlement peut être pris. Le *Règlement sur les objets interdits* définit ce qu'est un objet non transmissible aux fins de la Loi ainsi que du *Règlement*. Bien qu'il n'existe dans la Loi aucune définition précise d'un objet non transmissible, il est fait allusion, aux articles 5 et 6, aux objets non transmissibles et aux objets interdits. Ce règlement définit, aux fins de la Loi, en vertu de l'alinéa 6(1)a), ce qu'est un objet non transmissible. Étant donné que le règlement est adopté conformément aux pouvoirs conférés par la Loi et qu'il n'existe aucun conflit entre ce pouvoir et le règlement établi par suite de l'exercice de ce pouvoir, il ne peut être question de la priorité de la Loi. Le règlement a été établi conformément au pouvoir conféré par la Loi.

Le ministre des Postes a-t-il le droit, après avoir défini ce qu'est un objet non transmissible, de désigner d'autres objets que ceux qui sont mentionnés dans le *Règlement sur les objets interdits*? Nulle part dans la Loi ni dans le *Règlement* est-il prévu le pouvoir de refuser d'accepter les envois parce que le ministre des Postes ou la personne qu'il a désignée n'est pas d'accord avec le motif de l'envoi.

Les faits, tels qu'ils ressortent de la preuve et de l'exposé conjoint des faits, sont tels qu'il y a conformité ou non avec le *Règlement sur les objets de la troisième classe* et, par conséquent, l'objet que l'on voulait expédier était ou n'était pas un objet

matter under the provisions of the *Post Office Act* and its duly issued Regulations and furthermore the exercise of discretion relating to the purport of the article to be mailed could or could not be exercised.

I find that the facts determinant to decide of the matter, as shown by the evidence of the then Postmaster in Campbellton, by the evidence of the plaintiff and the agreed statement of facts and by the written evidence filed are:

- a) the article desired to be mailed was a flyer;
- b) the flyer met all physical requirements of the Regulations in order to be sent by the post;
- c) the purport of the flyers for which post was required was not to the liking of the authorities of the Post Office Department as it pertained to the operation of a Post Office;
- d) the flyers were the object of a discretionary decision of a duly authorized officer of the Post Office to exercise discretion, made by invoking the power of paragraph 5(1)(p) and subsection 5(4) of the Act granting delegation as follows:

5. (1) Subject to this Act, the Postmaster General shall administer, superintend and manage the Canada Post Office, and, without restricting the generality of the foregoing, may

(p) decide in any particular case what is a letter, mailable matter or non-mailable matter,

and

5. ...

(4) The Postmaster General may delegate any or all of the powers, duties and functions set out in paragraphs (1)(c) and (1) to assistant deputy postmasters general and to directors of the Post Office Department.

- e) the reasons given for deciding discretionarily that the flyers were non-mailable matter are: the nature of the text, the circumstances being a campaign against the management of the local office; responsibility to the general public, the postal system not being a vehicle for conveying labour disputes.

transmissible selon les dispositions de la *Loi sur les postes* et de ses Règlements d'application dûment adoptés et, en outre, le pouvoir discrétionnaire relatif à la raison pour laquelle l'article devait être expédié pouvait ou non être exercé.

D'après le témoignage du maître de poste d'alors à Campbellton, d'après le témoignage du demandeur, d'après l'exposé conjoint des faits ainsi que d'après les dépositions écrites, je conclus que les faits importants pour trancher cette question sont les suivants:

- a) l'article que l'on voulait expédier par la poste était une circulaire d'annonce;
- b) cette circulaire d'annonce remplissait toutes les exigences matérielles des Règlements pour être acheminée par la poste;
- c) le contenu des circulaires d'annonce que l'on voulait expédier par la poste ne plaisait pas aux autorités du ministère des Postes parce qu'il se rapportait au fonctionnement d'un bureau de poste;
- d) les circulaires d'annonces ont fait l'objet de l'exercice du pouvoir discrétionnaire d'un fonctionnaire dûment autorisé du ministère des Postes, décision prise en invoquant le pouvoir conféré par l'alinéa 5(1)p) et le paragraphe 5(4) de la Loi qui délèguent ce pouvoir dans les termes suivants:

5. (1) Sous réserve de la présente loi, le ministre des Postes doit administrer, surveiller et gérer la poste au Canada et, sans restreindre la généralité de ce qui précède, peut

p) décider, dans tout cas particulier, ce qu'est une lettre, un objet transmissible ou un objet non transmissible;

et

5. ...

(4) Le ministre des Postes peut déléguer tout ou partie des pouvoirs, attributions et fonctions énoncés aux alinéas (1)p) et q) aux sous-ministres adjoints des Postes et aux directeurs du ministère des Postes.

- e) les raisons données pour décider, en vertu d'un pouvoir discrétionnaire, que les circulaires d'annonce étaient des objets non transmissibles sont: la nature du texte, les circonstances étant une campagne contre la gestion du bureau de poste local, la responsabilité envers le public, le système des postes n'étant pas un véhicule pour les conflits de travail.

The flyers read as follows:

10 REASONS WHY WE WANT THE POSTMASTER'S RESIGNATION

1. Four suspensions in 4 months without justification; 2. Blatant disregard for contractual rights; 3. Destroying morale and productivity by constantly harassing and intimidating local workers; 4. Completely destroying labour/management relations by attacking the union and its representatives; 5. Union representatives denied the right to defend fellow workers who are unjustly disciplined; 6. Retalizing against local workers who defend their rights, by changing their hours of work and days off; 7. Human rights violated by orders concerning the type of clothes which must be worn to work, and how hair and beards must be cut; 8. Reducing the number off on vacation at one time from 4 to 2 although this practice has been in effect for at least the last 4 years; 9. Refusing to hire a sufficient number of full-time employees to provide proper service; 10. Delaying the payment of pension checks and welfare checks by refusing to effect overtime.

And the other item:

Whereas Postmaster Marc Savoe has undertaken a continuous harassment and intimidation campaign against C.U.P.W. members in the Campbellton Post Office. Whereas in the past 4 months, three executive members of the Union Local have been suspended for attempting to uphold their negotiated rights; and Whereas Mr. Savoe has issued a number of dictatorial orders violating both contractual and civil rights of Postal Workers in Campbellton; and Whereas Mr. Savoe has denied members both Local and Regional Union representation while unjustly reprimanding these suspended employees; and Whereas Mr. Savoe has destroyed all communications and Union/Management relations in the Campbellton Post Office; and Whereas this action has affected the morale to the extent that it is affecting the service to the public; and Whereas the members of the Campbellton Local have called for the resignation or the release of Mr. Savoe without success in their efforts to resolve this matter; and Whereas it may be necessary for the Campbellton Local to resort to strike action in their efforts to find a solution to this problem; Be it resolved that this Regional Conference supports the Campbellton Local in all actions necessary, up to and including a strike to have Mr. Savoe removed from his position as Postmaster.

(N.B. Text of both flyers copied integrally, except for printing disfigurement)

The Court does not have to decide if these flyers amount to a defamation, and though it takes note that the evidence discloses that no action was taken following the distribution of these documents hand to hand to the public, the comments therein, over the radio and in the newspapers, nevertheless for the purpose of the case, the contents of the texts are irrelevant to decide the issue

Les circulaires d'annonce sont ainsi rédigées:

[TRADUCTION] 10 RAISONS POUR ESQUER LE NOUS DEMANDONS LA DÉMISSION DU MAÎTRE DE POSTE

1. Quatre suspensions en 4 mois sans justification; 2. Méconnaissance flagrante des droits contractuels; 3. Entrave au moral et à la productivité par une intimidation et un harcèlement constants des employés locaux; 4. Réduction à néant des relations patronales-syndicales en attaquant le syndicat et ses représentants; 5. Dénéi du droit des représentants syndicaux de défendre leurs collègues de travail qui font injustement l'objet de sanctions disciplinaires; 6. Mesures de rétorsion échangeant des heures de travail et des jours de congé prises contre les employés locaux qui défendent leurs droits; 7. Violation des droits de l'homme en donnant des ordres au sujet du genre de vêtements qui doivent être portés au travail, au sujet de la coiffure et au sujet de la barbe; 8. Réduction [de 4 à 2] du nombre d'employés pouvant prendre leurs congés annuels en même temps bien que cette pratique soit admise depuis au moins 4 ans; 9. Refus d'engager un nombre suffisant d'employés à temps plein pour fournir un service adéquat; 10. Retard du versement des chèques de pension et de bien-être en refusant de permettre les heures supplémentaires.

Et l'autre texte:

[TRADUCTION] Attendu que le maître de poste Marc Savoe a entrepris une campagne soutenue de harcèlement et d'intimidation contre les membres du SPC au bureau de poste de Campbellton; attendu qu'au cours des 4 derniers mois, trois dirigeants du syndicat ont fait l'objet d'une suspension pour avoir tenté de défendre les droits qui leur étaient reconnus par la convention collective; attendu que M. Savoe a donné plusieurs ordres dictatoriaux violant à la fois les droits contractuels et civils des postiers à Campbellton; attendu que M. Savoe a dénié aux membres leur droit à la représentation syndicale aux niveaux local et régional et a fait des remontrances aux employés faisant l'objet d'une suspension; attendu que M. Savoe a détruit toute communication et toute relation entre le syndicat et la direction au bureau de poste de Campbellton; attendu que cette action a détruit le moral au point où la qualité du service au public est touchée; attendu que les membres du local de Campbellton ont demandé la démission ou le renvoi de M. Savoe sans succès dans leurs tentatives pour résoudre cette question; et attendu qu'il est possible que le local de Campbellton doive avoir recours à la grève pour trouver une solution à ce problème; il est résolu que cette conférence régionale appuie toutes les actions prises par le local de Campbellton, y compris la grève, pour que M. Savoe soit révoqué de son poste de maître de poste.

(N.B. le texte des deux circulaires d'annonce est reproduit intégralement, sauf pour la présentation)

La Cour n'a pas à décider si ces circulaires d'annonce sont diffamatoires, et bien qu'elle prenne note du fait qu'il ressort de la preuve qu'aucune action n'a été prise à la suite de la distribution de ces documents au public et des commentaires à ce sujet à la radio et dans les journaux, néanmoins aux fins de la présente affaire, le contenu des textes n'est pas pertinent

as indeed the provisions of section 7 of the Act, dealing with the unlawful use of the mails have no application there having been no action taken in that sense.

Could the flyers, on account of their text, be legally the object of the exercise of discretion under the provisions of paragraph 5(1)(p) of the Act or was such an exercise of discretion unreasonable or in fact a breach of the duty to act fairly?

As said previously, nowhere can there be found in the Act or the Regulations, except in section 7, not applicable here, dealing with the use of the mails for unlawful purposes, anything that renders an article non-mailable on account of its text or contents.

The decision shows clearly that the contents were the only subject that mattered for the exercise of the discretion.

At a question put by the Court, the Postmaster, as he then was, answered that he would have extracted the mailing for advice from the regional and the national headquarters had the operation of another post office been involved or even had he known, if the same had been desired to be sent by first class mail.

In the case *Re Fisheries Act, 1914*,¹ the Privy Council (Lord Tomlin), on appeal from the Supreme Court of Canada, at page 201, stated with respect to the issuance of fishing licences:

Do the regulations rightly interpreted, give to the Minister any discretion in granting or refusing a licence where it is applied for by a qualified person

The regulations in question affect both public and private rights of fishing. There is no express provision for withholding a licence where a qualified applicant submits a proper application and pays the small prescribed fee, and in their Lordships' judgment, there is nothing in the language of the regulations giving rise to a necessary implication that the Minister has a discretion to grant or withhold the licence.

Therefore, unless there is a specific regulation permitting the Postmaster General to refuse to permit the mail to go through, it is not to be inferred from the language that it is permitted to refuse the use of the mails. To the same effect

pour trancher la question, puisque, de toute façon, les dispositions de l'article 7 de la Loi relatives à l'utilisation illégale de la poste ne sont pas applicables, aucune action n'ayant été prise en ce sens.

Les circulaires d'annonce pouvaient-elles légalement, compte tenu de leur texte, faire l'objet de l'exercice du pouvoir discrétionnaire en vertu des dispositions de l'alinéa 5(1)p) de la Loi ou cet exercice du pouvoir discrétionnaire était-il déraisonnable ou constituait-il un manquement au devoir d'agir équitablement?

Comme je l'ai déjà dit, il ne se trouve rien dans la Loi ou dans les Règlements, si ce n'est à l'article 7, qui n'est pas applicable en l'espèce et qui porte sur l'utilisation de la poste à des fins illégales, qui rende un objet non transmissible à cause de son texte ou de son contenu.

Il ressort clairement de la décision que le contenu était le seul élément retenu aux fins de l'exercice du pouvoir discrétionnaire.

En réponse à une question que lui posait la Cour, le maître de poste d'alors a répondu que s'il avait été question de la gestion d'un autre bureau de poste, il aurait retenu l'envoi pour demander à cet égard l'avis du siège social régional et du siège social national et, s'il l'avait su, même si on avait voulu l'envoyer sous forme de première classe.

Dans l'arrêt *Re Fisheries Act, 1914*,¹ le Conseil privé (lord Tomlin), saisi d'un appel d'une décision de la Cour suprême du Canada, dit, à la page 201, relativement à l'émission de permis de pêche:

Les règlements, les règlements correctement interprétés donnent-ils au Ministre un pouvoir discrétionnaire d'accorder ou de refuser un permis lorsque demande en est faite par une personne admissible à l'obtenir?

Les règlements en question touchent les droits public et privé de pêche. Il n'existe aucune disposition expresse permettant de refuser un permis lorsqu'un requérant admissible soumet une demande appropriée et paie les droits peu élevés qui sont prescrits, et leurs Seigneuries estiment que rien dans le texte des règlements ne permet de conclure que le Ministre a un pouvoir discrétionnaire d'accorder ou de refuser le permis.

Par conséquent, à moins d'un règlement précis permettant au ministre des Postes de refuser de permettre à un envoi d'être acheminé par la poste, on ne doit pas interpréter le texte comme permettant de refuser à quelqu'un de se servir de la poste.

¹ [1930] 1 D.L.R. 194 (P.C.).

[1930] 1 D.L.R. 194 (P.C.).

there is the case of *The Labour Relations Board of Saskatchewan v. The Queen*,² where the Court was considering an application of reconsideration before the Labour Relations Board where, in a unanimous judgment, Kerwin C.J.C., Kellock and Estey J.J., concurring, Locke J. said at pages 86-87:

While this language is permissive in form, it imposed, in my opinion, a duty upon the Board to exercise this power when called upon to do so by a party interested and having the right to make the application (*Drysdale v. Dominion Coal Company* ((1904) 34 Can. S.C.R. 128 at 336; Killam J.). Enabling words are always compulsory where they are words to effectuate a legal right (*Julius v. Lord Bishop of Oxford* ((1850) 5 A.C. 214 at 243); Lord Blackburn).

In the case at bar, there are enabling words which permit the plaintiff to mail the flyer in question and, as a result, those words must be read as being compulsory. It would take the strongest language to permit the Postmaster General to refuse to accept mail because he did not approve of the contents.

It is my opinion that the Act and the Regulations establish a scheme wherein the public may send mail through the post as third class, provided that it meets certain specific regulations. The flyer in question met all of the necessary physical and technical regulations but because the defendant did not approve of the contents of the mailing he did not permit the mail to be processed. There is no authority for the Postmaster General to refuse to accept mail because he does not approve of the contents. Paragraph 5(1)(p) of the Act is not broad enough to grant such an authority. Paragraph 5(1)(p) must be read in conjunction with the provisions of section 6 that provide the instrument for deciding what is a letter, mailable or non-mailable matter, which instrument if so decided to use, is to issue a regulation, and also in conjunction with the *Prohibited Mail Regulations* and the *Third Class Mail Regulations*.

It is necessary to be cognizant of the Regulations which have been enacted to assist in the

On retrouve ce point de vue dans l'arrêt *The Labour Relations Board of Saskatchewan v. La Reine*, où la Cour était saisie d'une affaire de demande de réexamen devant la commission des relations de travail et où, dans un jugement unanime prononcé par le juge Locke, le juge en chef Kerwin, les juges Kellock et Estey souscrivant, il est dit aux pages 86 et 87:

[TRADUCTION] Bien que le texte soit rédigé dans une forme qui comporte autorisation, à mon avis il impose à la commission l'obligation d'exercer ce pouvoir lorsqu'une partie intéressée et ayant le droit de faire la requête le lui en fait la demande (*Drysdale v. Dominion Coal Company* ((1904) 34 Can. R.C.S. 328 à la p. 336); le juge Killam). Les dispositions portant autorisation sont toujours obligatoires lorsqu'elles ont pour objet de reconnaître un droit (*Julius v. Lord Bishop of Oxford* ((1850) 5 A.C. 214 à la p. 243); lord Blackburn).

En l'espèce, il existe des dispositions autorisant le demandeur à envoyer par la poste la circulaire d'annonce en question et, par conséquent, ces dispositions doivent être interprétées comme obligatoires. Il faudrait un langage très clair pour permettre au ministre des Postes de refuser d'accepter des envois parce qu'il ne serait pas d'accord avec leur contenu.

Je suis d'avis que la Loi et les Règlements établissent un système permettant au public d'envoyer par la poste des objets de la troisième classe, à condition qu'ils soient conformes à certains règlements précis. La circulaire d'annonce en question était conforme à tous les règlements portant sur les aspects matériels et techniques mais le défendeur n'a pas permis à ces envois d'être acheminés parce qu'il n'était pas d'accord avec leur contenu. Aucune disposition de la Loi n'autorise le ministre des Postes à refuser d'accepter des envois parce qu'il n'est pas d'accord avec leur contenu. L'alinéa 5(1)p) de la Loi n'est pas d'une portée assez vaste pour lui donner ce pouvoir. L'alinéa 5(1)p) doit être lu conjointement avec les dispositions de l'article 6 qui prévoient le moyen de décider ce qu'est une lettre, un objet transmissible ou un objet non transmissible, le moyen prévu, si on décidait d'y avoir recours, étant de prendre un règlement, et conjointement, aussi, avec le *Règlement sur les objets interdits* et le *Règlement sur les objets de la troisième classe*.

Il est nécessaire de prendre connaissance des Règlements adoptés pour permettre l'application

²[1986] S.C.R. 82

³[1956] M.C.S. 82

proper implementation of the Act and there one finds that the Regulations in no way provide authority for the Postmaster General to refuse to accept third class mail because of the contents. All of the foregoing is premised on the fact that the materials did not in any way violate the provisions of section 7 of the *Post Office Act*.

It is my considered opinion that the power to decide what is a letter given the Postmaster General at paragraph 5(1)(p) is only one of making a regulation as to what is the very same subject-matter as in paragraph 6(a), to wit: what is a letter, a mailable matter and a non-mailable matter, and cannot be exercised unless through the medium of regulations, not by a decision without regard to regulations. Further, in my opinion, there is no discretion that the Postmaster General could exercise in the case at bar because if there had been a discretion, it would have to be by way of a regulation covering the purport or nature of the text of the flyers. There is nowhere in the Act nor in the Regulations any authority for refusing mail on account of its contents except if it falls within the ambit of section 7 dealing with the use of the mails for unlawful purposes. There was nothing shown to be unlawful in the flyers as no action was ever taken and decided upon by the Courts that could make the tenor of the flyers an offence falling under section 7 of the Act.

If the Postmaster General and his employees have divergent opinions about certain matters and the latter cannot use the mail for purposes of criticism because the employer refuses its use at the whim of the moment, the same method of proceeding could be applied by the Postmaster General for any other divergent thinking or dispute between any other Department or Crown Corporation and the employees, still in every instance, be the medium the press, the radio or the television networks, the media are very prone to comment and to transmit the opinion of both parties to the dispute. The Postmaster General has no right to be immune from that risk because of the fact that he is in control of the operation of the mails whereas the other Departments or Crown Corporations do not have at their disposal such an

appropriée de la Loi, pour constater qu'il ne s'y trouve aucune disposition autorisant le ministre des Postes à refuser d'accepter des objets de la troisième classe à cause de leur contenu. Tout ce qui précède est fondé sur la prémisse que les objets ne contrevenaient nullement aux dispositions de l'article 7 de la *Loi sur les postes*.

Après avoir mûrement réfléchi, j'estime que le pouvoir de décider ce qu'est une lettre, conféré au ministre des Postes à l'alinéa 5(1)p), est seulement le pouvoir d'établir un règlement relativement au même sujet qu'à l'alinéa 6a), soit: ce qu'est une lettre, un objet transmissible et un objet non transmissible, et que ce pouvoir ne peut être exercé que par règlements, non par une décision qui ne tient pas compte des règlements. Je suis en outre d'avis que le ministre des Postes ne pouvait, en l'espèce, exercer aucun pouvoir discrétionnaire parce que s'il lui avait été loisible d'en exercer un, ce pouvoir aurait dû se fonder sur un règlement portant sur l'objet ou la nature du texte des circulaires d'annonce. Il n'existe, ni dans la Loi ni dans les Règlements, aucune disposition permettant de refuser des envois à cause de leur contenu, sauf s'ils tombent sous le coup de l'article 7 qui porte sur l'utilisation des postes à des fins illégales. On n'a pas démontré qu'il y ait eu quoi que ce soit d'illégal dans les circulaires d'annonce puisque aucune action n'a été prise, ni décision judiciaire rendue pouvant permettre de conclure que le contenu des circulaires d'annonce constituait une infraction prévue à l'article 7 de la Loi.

S'il survient un désaccord entre le ministre des Postes et ses employés sur certains sujets et que ceux-ci ne peuvent avoir recours aux postes pour diffuser leur critique parce que l'employeur, par caprice, leur en refuse l'emploi, le ministre des Postes pourrait faire la même chose pour toute autre opinion contraire ou toute dispute entre tout autre ministère ou société de la Couronne et ses employés, même si dans tous les cas, qu'il s'agisse de la presse écrite, de la radio ou de la télévision, les journalistes sont toujours empressés de commenter ou de transmettre l'opinion des deux parties à un différend. Le ministre des Postes n'a pas le droit de se mettre à l'abri de ce risque parce qu'il contrôle la poste, alors que les autres ministères ou sociétés de la Couronne n'ont pas à leur disposition des moyens aussi efficaces que le déni

effective way as the denial of the use of the post, but still they could use such a refusal if the defendants were to be right in their interpretation.

That method of proceeding, be it for the benefit of the Postmaster General only, or for any other Department or Crown Corporation, would amount to a breach of duty to act fairly by the Postmaster General in the operation of his Department and maybe as well by other Departments or Crown Corporations by resorting to such a drastic way of proceeding.

That way of thinking, the breach of duty to act fairly, by refusing mail that otherwise qualifies for using the facilities of the Canada Post Office, could, if it is found to be misconduct, be the object of resorting to the provisions of paragraph 5(1)(c):

5. (1) Subject to this Act, the Postmaster General shall administer, superintend and manage the Canada Post Office, and, without restricting the generality of the foregoing, may

(c) remove or suspend or impose lesser penalties on any postal employee for misconduct in office;

and could use that power to remove, suspend or impose a lesser penalty.

It is amazing to find out that a decision of a Postmaster General as to a letter, mailable or non-mailable matter, requires that the Postmaster be first enabled by a regulation, but that for the removal, suspension or penalty imposed upon an employee, no regulation is needed.

If there is the requirement of a regulation to be enabled to be competent to decide what is a letter, a mailable or non-mailable matter, except in the case of unlawful purposes foreseen at section 7 of the Act, surely there would have been much more so a need for a regulation to decide what is a mailable or non-mailable matter, on account of the text or purport of the letter or the matter.

A perusal of the *Third Class Mail Regulations* and of the *Prohibited Mail Regulations* convinces me that these were issued to rule the physical aspects or the physical nature of the matter desired to be mailed but in no way their tenor unless the tenor be falling under the provisions of

de l'utilisation de la poste, mais ils pourraient néanmoins avoir recours à ce moyen si l'interprétation des défendeurs était maintenue.

Cette façon de faire, que ce soit uniquement à l'avantage du ministre des Postes ou de tout autre ministère ou société de la Couronne, équivaudrait, pour le ministre des Postes dans la gestion de son Ministère, à un manquement à son devoir d'agir équitablement, et peut-être en serait-il de même pour les autres ministères ou sociétés de la Couronne qui auraient recours à ce moyen radical.

Cette façon de penser, le manquement au devoir d'agir équitablement, en refusant des envois autrement transmissibles par la poste au Canada pourrait, si on jugeait qu'il s'agit de mauvaise conduite, faire l'objet de l'application des dispositions de l'alinéa 5(1)c):

5. (1) Sous réserve de la présente loi, le ministre des Postes doit administrer, surveiller et gérer la poste au Canada et, sans restreindre la généralité de ce qui précède, peut

c) congédier ou suspendre tout employé de la poste ou lui infliger une moindre peine, pour mauvaise conduite dans l'exercice de ses fonctions,

et pourrait utiliser ce pouvoir pour congédier, suspendre ou infliger une moindre peine.

Il est étonnant d'apprendre qu'une décision du ministre des Postes relativement à une lettre ou à un objet transmissible ou non transmissible exige que le Ministre y soit d'abord autorisé par un règlement mais que pour le congédiement, la suspension ou une peine infligée à un employé, aucun règlement n'est requis.

S'il faut un règlement pour avoir le pouvoir de décider ce qu'est une lettre, un objet transmissible ou un objet non transmissible, à l'exception du cas des fins illégales prévu à l'article 7 de la Loi, à plus forte raison, il y aurait certainement besoin d'un règlement pour décider ce qu'est un objet transmissible ou non transmissible en fonction du texte ou du but de la lettre ou de l'objet.

Un examen du *Règlement sur les objets de la troisième classe* et du *Règlement sur les objets interdits* me convainc que ces Règlements ont été adoptés pour régir les aspects matériels des objets qu'on désire envoyer par la poste, mais aucunement pour régir leur teneur, sauf si, s'agissant

section 7 of the Act as being for an unlawful purpose.

The contents, the purport of a matter desired to be mailed, cannot be refused the use of the mails unless it be for an unlawful purpose. To put another interpretation on the Act is to permit a censorship contravening the right granted to the people of our country to exercise free speech.

I cannot not give great weight to the remarks of the learned counsel for the plaintiff in connection with the infringement of the right of free speech if the application of the Act as was done in this case were to be condoned by the interpretation the Court might give to the provisions of the Act and the Regulations.

It is not assistance that one can seek in the *Canadian Bill of Rights*, S.C. 1960, c. 44 [R.S.C. 1970, Appendix III], for the interpretation of the *Post Office Act*; it is in my view a duty to resort to the *Canadian Bill of Rights* for the interpretation of the *Post Office Act* and its Regulations as the *Canadian Bill of Rights* recognizes rights that existed.

Section 1 of the *Canadian Bill of Rights* states:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(a) freedom of speech;

Section 2 states:

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared. . . .

I do not believe, and I do not wish to believe, that the interpretation to be placed upon the Act and Regulations should restrict the freedom of speech as protected by the *Canadian Bill of Rights*. An interpretation of the *Post Office Act* which infringes upon the *Canadian Bill of Rights* is to be avoided.

d'une fin illégale, ils tombent sous le coup des dispositions de l'article 7 de la Loi.

On ne peut refuser d'acheminer un objet par la poste à cause de son contenu ou de son but à moins qu'il ne s'agisse d'une fin illégale. Interpréter la Loi autrement serait permettre la censure, ce qui porterait atteinte au droit de parole reconnu au peuple canadien.

Je ne pourrais pas ne pas accorder beaucoup de poids aux remarques de l'avocat du demandeur relativement à la violation du droit de parole si la façon d'appliquer la Loi en l'espèce devait être approuvée par l'interprétation que la Cour pourrait donner des dispositions de la Loi et des Règlements.

Cela n'est d'aucun secours que l'on puisse se rapporter à la *Déclaration canadienne des droits*, S.C. 1960, c. 44 [R.S.C. 1970, Appendice III], pour l'interprétation de la Loi sur les postes; c'est selon moi un devoir de se rapporter à la *Déclaration canadienne des droits*, pour interpréter la Loi sur les postes et ses Règlements parce que la *Déclaration canadienne des droits* reconnaît des droits qui existaient.

L'article 1 de la *Déclaration canadienne des droits* est rédigé comme suit:

1. Il est par les présentes reconnu et déclaré que les droits de l'homme et les libertés fondamentales ci-après énoncés ont existé et continueront à exister pour tout individu au Canada quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe:

(a) la liberté de parole;

L'article 2 prévoit ce qui suit:

2. Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera notwithstanding la *Déclaration canadienne des droits*, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, et à en autoriser la suppression, la diminution ou la transgression . . .

Je ne crois pas, et je ne veux pas croire, que la Loi et les Règlements devraient pouvoir être interprétés de façon à restreindre la liberté de parole qui est protégée par la *Déclaration canadienne des droits*. Il faut éviter une interprétation de la Loi sur les postes qui contrevienne aux dispositions de la *Déclaration canadienne des droits*.

In the case of *Re Pacific Press and The Queen*,¹ at page 494 Nemetz C.J. said:

Where, then, does the matter stand in Canada? Counsel for the petitioner submits that Parliament has awarded the free press a special place under the *Canadian Bill of Rights*. Accordingly, he argues, ss. 1(f) and 2, must be taken into consideration and weighed by the Justice of the Peace before he exercises his judicial discretion to grant the issuance of a search warrant against an organ of the free press of this country. *Ad fortiori*, he says, this fact is to be weighed in cases where the premises of the newspaper are not the premises of those persons accused of the crime. I agree with this submission.

So do I, and in my opinion a matter desired to be mailed, meeting all the requirements of the Act and its Regulations cannot be refused the use of the post on account of the whim of the Postmaster General without infringing the freedom of speech that should be protected in the interpretation of the *Post Office Act* unless specific provisions to the contrary are enacted.

One of the leading cases on the *Canadian Bill of Rights*, *The Queen v. Drybones*,² ought to be consulted. Even the dissenting judgment of Pigeon J. in this case indicated that the *Canadian Bill of Rights* was to be used as a means of interpretation in considering other federal statutes. Mr. Justice Pigeon, at page 307, stated:

On the whole, I cannot find in the *Canadian Bill of Rights* anything clearly showing that Parliament intended to establish concerning human rights and fundamental freedoms some overriding general principles to be enforced by the courts against the clearly expressed will of Parliament in statutes existing at the time. In my opinion, Parliament did nothing more than instruct the courts to construe and apply those laws in accordance with the principles enunciated in the *Bill* on the basis that the recognized rights and freedoms did exist but that they were to be brought into existence by the courts.

It is my opinion that the refusal to accept the mail was an infringement of the right to free speech and that the provisions of the *Post Office Act* and its Regulations should be construed so as to protect that right to its full extent unless the use of that right is resorted to for an unlawful purpose.

Finally, there are strong policy considerations which dictate that the Post Office ought not to

Dans l'arrêt *Re Pacific Press et La Reine*³, à la page 494, le juge en chef Nemetz dit:

[TRADUCTION] Alors, quelle est la situation au Canada? L'avocat de la requérante soutient que le Parlement a accordé à la liberté de la presse une place spéciale dans la *Déclaration canadienne des droits*. Par conséquent, il prétend que les art. 1(f) et 2 doivent être pris en considération et examinés par le juge de paix avant d'exercer le pouvoir discrétionnaire qui lui est conféré d'émettre un mandat de perquisition contre un organisme de la presse libre de ce pays. *Ad fortiori*, dit-il, il faut tenir compte de ce fait dans les cas où les locaux du journal ne sont pas les locaux des personnes accusées du crime. Je suis d'accord avec cet argument.

Moi aussi, et je suis d'avis qu'on ne peut, sans violer la liberté de parole qui devrait être protégée dans l'interprétation de la *Loi sur les postes* à moins que des dispositions expresses à l'effet contraire ne soient adoptées, refuser d'acheminer par la poste, pour un caprice du ministre des Postes, un objet présenté pour expédition qui satisfait à toutes les exigences de la *Loi* et de ses *Règlements*.

Il convient de consulter un des cas faisant autorité relativement à la *Déclaration canadienne des droits*, *La Reine c. Drybones*⁴. Même dans les motifs dissidents du juge Pigeon dans cette affaire, on se dit d'avis que la *Déclaration canadienne des droits* doit être utilisée comme guide d'interprétation lors de l'examen des autres lois fédérales. Le juge Pigeon dit à la page 307:

En définitive, je ne trouve rien dans la *Déclaration canadienne des droits* qui démontre clairement que le Parlement avait l'intention d'établir à l'égard des droits de l'homme et des libertés fondamentales des principes fondamentaux d'ordre général, que les tribunaux devraient appliquer à l'encontre de la volonté clairement exprimée du Parlement dans les lois existant à cette époque. À mon avis, le Parlement n'a fait rien de plus que de prescrire aux tribunaux d'interpréter et d'appliquer ces lois conformément aux principes énoncés dans la *Déclaration*, en considérant que les droits et libertés reconnus existaient alors et non pas qu'ils seraient établis par les tribunaux.

Je suis d'avis que le refus d'accepter l'envoi constituait une violation du droit à la liberté de parole et que les dispositions de la *Loi sur les postes* et de ses *Règlements* d'application devraient être interprétées de façon à protéger ce droit le plus possible à moins qu'il ne soit utilisé à des fins illégales.

Enfin, il existe des motifs sérieux d'ordre politique qui exigent que le ministère des Postes n'ait

¹ (1977) 27 C.C.C. (2d) 487 (B.C.S.C.).

² (1970) S.C.R. 282.

³ (1977) 27 C.C.C. (2d) 487 (C.S.C.-B.).

⁴ (1970) R.C.S. 282.

have the authority to review mail to determine whether or not its contents are acceptable. What are the norms of acceptability? Strong exception has to be taken to a comment by Mr. Savoie in his testimony in answer to a question from the Court at page 154 where it states:

Q. Let us say that a flyer has a very controversial issue on its face. It is up to you to accept it or not, as third class, isn't it? Like abortion, for instance?

A. Yes.

If this interpretation of the authority of a postmaster is correct, then there is a frightening amount of power which exists in the Post Office.

If the interpretation of the defendant is correct, then what would happen if a newspaper wrote an editorial condemning the actions of the Post Office? Would the Post Office then interfere and remove that editorial from any newspaper which the newspaper mailed through the Post Office? Surely, this cannot be permitted to occur.

What would happen if the Jehovah's Witnesses in mailing their *Watch Tower* magazine tried to mail it in a Post Office where there was a postmaster who had strong views to the contrary? Could he then arrange to have the material extracted from the post subject to confirmation by the Postmaster General or his designate? This is reminiscent of the case *Romarelli v. Duplessis*¹.

What would happen if the Conservative Party condemned the Liberals in a flyer to be distributed to householders for the poor operation of the Post Office? Would the Postmaster General want these materials extracted from the mail because it might present the Post Office in a poor light?

The answer to the foregoing questions must be surely a resounding "no". The *Post Office Act* was never intended to ensure that there were censorship rights vested in the Postmaster General. The Act is defined and described sufficiently well to limit non-mailable mail which falls in a certain category. If Parliament had intended that the Postmaster General would have powers in this area, then there would have been specific reference to it in the Act and Regulations. Broad, sweeping statements which run counter to the intent of the legislation ought not to be interpreted against a

pas le pouvoir d'examiner le courrier pour déterminer si le contenu en est acceptable. Quelles sont les normes d'un envoi acceptable? Il faut désapprouver vigoureusement la réponse donnée par M. Savoie à une question que lui posait la Cour, à la page 154, où on lit ce qui suit:

[TRADUCTION] Q. Disons qu'une circulaire traite d'un sujet très controversé. Est-ce que c'est à vous qu'il revient de l'accepter ou non à titre d'objet de la troisième classe? S'il s'agit d'avortement par exemple?

R. Oui.

Si c'est là l'interprétation correcte du pouvoir d'un maître de poste, alors il existe au ministère des Postes un pouvoir d'une ampleur effrayante.

Si l'interprétation du défendeur est exacte, alors qu'arriverait-il si un journal publiait un éditorial condamnant les actions du ministère des Postes? Le ministère des Postes interviendrait-il pour enlever l'éditorial de tout exemplaire que ce journal enverrait par la poste? On ne peut manifestement pas permettre cela.

Que se produirait-il si les témoins de Jehovah essayaient d'expédier leur revue *Watch Tower* dans un bureau de poste dirigé par un maître de poste au point de vue fermement opposé? Pourrait-il alors faire retirer cette revue de la poste sous réserve de la confirmation du ministre des Postes ou de la personne désignée par lui? Cela rappelle l'affaire *Romarelli c. Duplessis*².

Qu'arriverait-il si le parti conservateur blâmait les libéraux pour le mauvais fonctionnement des postes dans des imprimés sans adresse? Le ministre des Postes voudrait-il retirer ces imprimés de la poste parce qu'ils pourraient présenter les postes sous un jour défavorable?

La réponse à ces questions doit certainement être un «non» retentissant. La *Loi sur les postes* n'a pas été conçue pour donner au ministre des Postes un droit de censure. La Loi est suffisamment précise pour limiter les objets non transmissibles qui relèvent d'une certaine catégorie. Si le Parlement avait voulu conférer au ministre des Postes des pouvoirs dans ce domaine, il en aurait été fait mention expresse dans la Loi et les Règlements. Des énoncés généraux qui vont à l'encontre de l'objet de la Loi ne devraient pas être interprétés contre une personne essayant de se prévaloir

¹ [1949] S.C.R. 121.

² [1949] R.C.S. 121.

person attempting to use the Act for its proper purposes.

The Post Office is available to all Canadians to use provided such use meets the conditions set out in the Act and Regulations. The flyer of the plaintiff met the conditions set out in the Act and Regulations, and there is no discretion upon any person in the Post Office Department to refuse to accept the mailing.

In the present circumstances the remedy sought by the plaintiff is a proper one. We read in Mullan, *Administrative Law*, 2nd ed., at page 3-220:

There are difficulties in defining the precise scope of the declaratory judgment as a public law remedy. However the situations in which it may be available can be divided into two categories: (a) where it is sought as an original remedy to declare a person's legal status or entitlement under a statute or constitutive document, (b) where it is sought as a supervisory remedy to declare that administrative decisions have been wrongly taken.

The issue is significant and a declaration decides the rights of the plaintiff with respect to the interpretation of the *Post Office Act*.

Both counsel have put their case in a very able manner, have delved into the matter thoroughly and should be congratulated for their conduct of their case and the witnesses on their part have shown a true objective view of the facts in the way they answered the questions and I have come to the conclusion that the declaration sought ought to go forth as prayed for.

Therefore, for all these reasons, the Court declares that the defendants have a public duty to accept for delivery all mail which complies with the *Post Office Act* and Regulations.

The Court further declares that the defendant, the Queen, and her servants have a duty to accept for delivery the particular item which the plaintiff submitted to the defendants for mailing.

The costs of this action to be paid by defendants.

des dispositions de la Loi pour la réalisation d'un de ses objectifs légitimes.

Tous les Canadiens peuvent se prévaloir de la poste à condition que l'emploi qu'ils veulent en faire soit conforme aux conditions prévues dans la Loi et les Règlements. La circulaire d'annonce du demandeur était conforme aux conditions de la Loi et des Règlements et il n'est conféré à quiconque au ministère des Postes aucun pouvoir discrétionnaire l'autorisant à refuser l'envoi.

En l'espèce, le redressement demandé par le demandeur est approprié. On lit, à la page 3-220 de Mullan, *Administrative Law*, 2^e éd.:

[Traduction] Il est difficile de définir la portée exacte du jugement déclaratoire si titre de redressement de droit public. Toutefois, les cas où il peut être accordé peuvent se diviser en deux catégories: (a) les cas où il en est fait demande si titre de redressement principal pour bien déclarer quel est le statut légal d'une personne ou quels sont ses droits en vertu d'une loi ou d'un document constitutif, (b) dans les cas où il en est fait demande dans le cadre d'un recours au pouvoir de surveillance et de contrôle pour faire déclarer que des décisions administratives ont été prises à tort.

La question est importante et un jugement déclaratoire dit les droits du demandeur relativement à l'interprétation de la *Loi sur les postes*.

Les deux avocats ont plaidé leur cause d'une façon très adroite, ont étudié la question de façon approfondie, et ils méritent des félicitations pour la façon dont ils ont conduit leur cause. Les témoins ont pour leur part, par leurs réponses aux questions, donné un aperçu vrai et objectif des faits. Je conclus que le jugement déclaratoire devrait être accordé en la forme demandée.

Par conséquent, pour toutes ces raisons, la Cour déclare que les défendeurs ont le devoir, d'ordre public, d'accepter, pour être transmis par la poste, tous les envois qui sont conformes à la *Loi sur les postes* et à ses Règlements d'application.

La Cour déclare en outre que la défenderesse, la Reine, et ses employés ont le devoir d'accepter, pour être transmis par la poste, l'envoi particulier que le demandeur a présenté aux défendeurs pour expédition par la poste.

Les frais de cette action seront payés par les défendeurs.

Tab 142

Halton (Regional Municipality) v. Rezaizadeh, 2004 CanLII 6236 (ON SC)

Source:	Superior Court of Justice
Date:	2004-08-10
File number:	928/04
Other citation:	[2004] OTC 704
Citation:	Halton (Regional Municipality) v. Rezaizadeh, 2004 CanLII 6236 (ON SC), < https://canlii.ca/t/1hn36 >, retrieved on 2026-03-24

COURT FILE NO.: 928/04
DATE: 20040810

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: THE REGIONAL MUNICIPALITY OF HALTON v. DAVOOD REZAIZADEH, FARGOL REZAIZADEH, FARNOOSH REZAIZADEH, FARNEZ REZAIZADEH and KOBRA FATHI

BEFORE: MURRAY J.

COUNSEL: Carolyn A. Calwell, for the Plaintiff

No one appearing for the Defendants

HEARD: August 4, 2004

AMENDED

REASONS FOR JUDGMENT

[1] This is a motion for default judgment pursuant to Rule 19.05 of the *Rules of Civil Procedure* or, in the alternative, for summary judgment pursuant to Rule 20.01(1). This is a default proceeding and is not properly brought as a motion for summary judgment.

[2] The plaintiff, the Regional Municipality of Halton, commenced proceedings against the defendants by statement of claim issued on February 27, 2004. The defendants, Davood Rezaizadeh, Fargol Rezaizadeh, Farnoosh Rezaizadeh, Farnez Rezaizadeh and Kobra Fathi, are a family and have been in receipt of social housing and income support from the plaintiff Regional Municipality since August 1, 2000.

[3] The statement of claim asserts that the defendant Kobra Fathi, applied for subsidized housing for the benefit of herself and her three adult daughters. Fargol, Farnoosh and Farnez are the three adult daughters of Ms. Fathi and the defendant Davood Rezaizadeh. On July 21, 2000, the defendant Kobra Fathi successfully applied for subsidized housing and, effective August 1, 2000 the family took possession of a townhouse at 1490 Elm Road, Unit 2, Oakville, Ontario.

[4] The market rent for the unit marked was \$1,088.00 per month. Based on the information provided to the housing authority by the defendant Fathi, Ms. Fathi was charged rent of \$320.00 per month for the period from August 1, 2000 to July 31, 2002. Based on information provided to the housing authority by the defendant Fathi, during the period from August 1, 2002 to August 31, 2002 the rent was further reduced to \$282.00. The Region subsidized Ms. Fathi for the difference between the rents paid by her and market rental rates. The actual amount of rent charged to Ms. Fathi was geared to income.

[5] Further, on August 9, 2000 Ms. Fathi applied for "Ontario Works" benefits from the Region and was eligible for and received benefits under the *Ontario*

Works Act, 1997.

[6] The statement of claim asserts that the father of the children, Davood Rezaizadeh, lived in the subsidized housing unit with Ms. Fathi and their three children from August 1, 2000 to August 31, 2002. He earned income from employment during some or all of this time and all of this was kept hidden from the Regional Municipality.

[7] Ms. Fathi and her three daughters were the only persons permitted to occupy the leased premises without the written approval of the landlord.

[8] On August 9, 2000, and August 16, 2001, Ms. Fathi declared to the relevant authorities that she was separated from Davood, that she was the sole support parent of Fargol, Farnoosh and Farnez. The defendant Ms. Fathi declared that the only inhabitants at their residence (the subsidized unit) were herself and her three daughters.

[9] Similar factual misrepresentations were made to Ontario Works which required her to disclose all income that any adult resident member of the family earns and required her to advise of her present living arrangements and to report if the number of people in her household changes.

[10] The pleading asserts that Ms. Fathi repeatedly declared she was separated from Davood. She never disclosed, as she was required to do, that his residence was with her at 1490 Elm Road. She never disclosed to the plaintiff the fact that he had employment income or the amount of his income. Such disclosure, if made by her, would have affected the amount of rent subsidy received from the Regional Municipality for subsidized housing as well as the amount of income support she received from Ontario Works. The plaintiff alleges that her false statements were relied on by the Region and as a result the plaintiff

paid more Ontario Works benefits to the defendant Fathi and provided a greater rent subsidy than she was qualified to receive.

[11] The plaintiff's claim is based on the alleged tort of deceit. The tort of deceit is based on five factors:

- (a) The defendants made a false representation of fact;
- (b) The representation was made with knowledge of its falsity;
- (c) The representation was made with the intention it should be acted on by the plaintiff;
- (d) The plaintiff acted on the representation;
- (e) The plaintiff suffered damage by so doing.

[12] Based on the deemed admissions in the statement of claim the tort of deceit is established against the defendant Kobra Fathi. She misled both Ontario Works and the housing authority by making misleading and false statements and contrary to her clear obligations to report that the father, Davood Rezaizadeh, was living in the subsidized housing unit. Further, she failed to disclose that he was earning employment income, which, if it had been disclosed, would have been factored into decisions relating to the quantum of rent and income subsidization. The plaintiff relied on the representation of the defendant, Ms. Fathi, to its detriment and suffered damage as a result.

[13] With respect to the defendant Farnoosh Rezaizadeh, the statement of claim asserts that on two occasions (April 22nd, 2002 and July 31st, 2002) she declared that she, her two sisters, and her mother were the only persons living at 1490 Elm Road when in fact her father Davood also resided at 1490 Elm Road.

[14] A problem with the plaintiff asserting detrimental reliance on these “declarations” is that they are made on April 22nd, 2002 and July 31st, 2002 long after the defendant Kobra Fathi had successfully secured subsidized housing and income support from the plaintiff based on her misrepresentations to the plaintiff. The decision that the defendant Fathi qualified for benefits and the decision to provide benefits were decisions made by the plaintiff in the year 2000. Benefits were discontinued in the summer of 2002. To the extent that Farnoosh’s declarations were false and were relied on by the plaintiff, it is clear from the pleading that they could have been relied on only for a short period of time immediately preceding the cessation of such benefits and, at most, would have assisted in securing their continuation.

[15] The statement of claim does not stipulate to whom Farnoosh made these declarations, or in what manner they were made. Importantly, it is not asserted in the pleading that the declarations were made to a representative of the plaintiff. Making false representations to the plaintiff is an essential component of the tort of deceit. It is the evidence in the affidavits filed in support of the motion, and not in the pleading, that establishes that the persons to whom Farnoosh made false representations were representatives of the plaintiff. For the reasons expressed below I am not prepared to consider affidavit evidence filed in support of the motion to fill in the blanks in the statement of claim in order to establish liability of a defendant.

[16] In the affidavit evidence filed by the plaintiff in support of the motions, additional facts are established that relate to the declarations made by Farnoosh on April 22nd, 2002 and July 31st, 2002. These additional facts augment the facts set out in the pleading. It is deposed that Farnoosh signed a Family Information Form dated April 22, 2002 that was filed with the Halton Community Housing

Corporation (the predecessor authority to the plaintiff). In this Form, Farnoosh states that she, her two sisters and her mother are the only other persons living in the subsidized housing unit and that everything stated by her in the form is true. There is no mention in the Form of her father Davood being a resident. With respect to Ontario Works, affidavit evidence establishes that the defendant Farnoosh Rezaizadeh met with Bonnie Gill a community services caseworker on July 31, 2002. Ms. Gill was meeting with the defendant Ms. Fathi and her daughter in order to conduct an information update (called a Consolidated Verification Process) to ensure that persons receiving Ontario Works benefits are entitled to continue to receive them. During this meeting, the affidavit evidence establishes that Farnoosh advised Ms. Gill, the representative of the Regional Municipality, that she did not know where to find Davood Rezaizadeh. According to the affidavit evidence filed in the case, Farnoosh made this false statement in response to a suggestion by Ms. Gill that Davood Rezaizadeh should be pursued for support and that an effort should be made to find him.

[17] Evidence properly before the Court on a motion pursuant to Rule 19.05, is evidence to support a claim for unliquidated damages and, pursuant to Rule 19.05(2), affidavit evidence is admissible for this purpose. Affidavit evidence is not to be used by a judge on a motion for default judgment as the basis of a further inquiry into the facts underpinning the claim as established by the statement of claim. In *Umlauf v. Umlauf et al.* (2001), [2001 CanLII 24068 \(ON CA\)](#), 53 O.R. (3d) 355, the Finlayson J.A. stated at paragraph 13:

There is nothing in either the *Rules of Civil Procedure* or the established jurisprudence to authorize a trial judge on an assessment of damages to enter into an inquiry into the facts or the underpinning of the torts that the defendants are deemed to have admitted by their default.

Affidavit evidence is to be used on a motion for judgment under Rule 19.05 to establish a claim for unliquidated damages but not to augment or erode the facts

as alleged in the claim. The facts asserted in the claim are deemed to be admitted and, provided the facts entitle the plaintiff to judgment, judgment can be obtained. But it is to the pleading that one must look for the facts to establish liability.

[18] In the claim, the plaintiff states that Farnoosh was present at “various meetings” where her mother, the defendant Kobra Fathi declared herself to be the sole support parent and where she (Farnoosh) remained silent and failed to correct the misinformation provided to the Region and to the Halton Housing Authority by the mother. The “failure to correct” is stated to be the equivalent of making a false representation to the plaintiff. I disagree. The plaintiff’s counsel relied on the case of *Sidhu Estate v. Bains*, [1996 CanLII 3332 \(BC CA\)](#), [1996] B.C.J. No. 1246 to establish that silence in the face of a false representation can lead to liability for deceit. In the *Sidhu Estate* case, the B.C. Court of Appeal found that all the elements of a successful claim in deceit were proven against the defendant Bains who had remained silent at the time false information had been communicated to induce an executor to invest estate monies in a company in which the defendant had an interest. Bains was a director, shareholder and president of the company. The directors and shareholders intended the company to be listed on the VSE. The defendant attended a meeting with the estate executor where false statements were made particularly with respect to the extent of Bain’s investment in the company. Bains remained silent when these false representations, designed to induce investment by the executor, were made. Liability was found.

[19] While I do not dispute that silence in the face of a false representation by another (as in the *Sidhu Estate* case) can lead to liability for deceit, it is not clear in this case that the silence of the daughter, Farnoosh, at meetings when her mother made false representations would be tantamount to misrepresentation by Farnoosh because of a failure to correct. As a practical matter, her situation as a child (albeit an adult child) is very different from a person who as shareholder,

director and president of a corporation stays silent in the face of false representations designed to induce investment by an investor. I am not prepared to find that the silence of the defendant Farnoosh Rezaizadeh is sufficient to amount to false or negligent misrepresentation. There would have to be facts asserted (other than the relationship of mother and daughter) that would establish that the plaintiff could reasonably construe silence as a misrepresentation. Secondly, the times and dates of the meetings at which Farnoosh attended and remained silent are not pleaded. If the meetings happened after the plaintiff had set the level of income and rent subsidy, how can there be detrimental reliance? An essential component of the tort of deceit is that the false representation occurs before the reliance. The pleading does not establish that the dates of Farnoosh's failure to correct preceded the decision to grant relief.

[20] I have concluded that the statement of claim does not entitle the plaintiff to judgment against the defendant Farnoosh Rezaizadeh.

[21] With respect to the defendant Farnez Rezaizadeh, although the plaintiff alleges in the statement of claim that Farnez was present at various meetings where Kobra Fathi describes herself as the sole support parent, silence by Farnez is not enough to make her liable for deceit for the reasons stated above re Farnoosh. Secondly, the times and dates of the meetings at which Farnez attended and remained silent are not pleaded. If the meetings happened after the plaintiff had set the level of income and rent subsidy, there can be no detrimental reliance. The pleading does not establish that the dates of Farnez's failure to correct preceded the decision to grant rent and income subsidy.

[22] I have concluded that the statement of claim does not entitle the plaintiff to judgment against the defendant Farnez Rezaizadeh.

[23] With respect to the defendant Fargol, in the statement of claim, the plaintiff alleges her presence at meetings where she was silent during her mother's statements that she was the sole supporting parent. The claim for liability against Fargol based on these factual allegations is flawed for the same reasons as set out above with respect to Farnoosh and Farnez.

[24] Neither can the claim be established based on the facts set out in paragraph 22 of the statement of claim. It is here stated that Fargol allowed Davood to transfer ownership of his vehicle to her. She then applied for a parking permit to the Housing Authority. This is stated to be for the purpose of hiding Davood's presence in the housing unit. Even if the temporary transfer of ownership was a device to get a parking place for Davood and to avoid disclosure to the plaintiff that Davood was a resident, this in my view does not amount to false representation which led to the damages claimed in this case. The claim makes no assertion that the application was false at the time it was made or induced the plaintiff to subsidize the defendants or any of them. The pleading does not establish a date on which the transfer of the vehicle was made. Without a date, it is impossible to tell when the vehicle transfer and application for parking permit occurred. Was it before or after the plaintiff had decided to provide housing and income support?

[25] I have concluded that the statement of claim does not entitle the plaintiff to judgment against the defendant Fargol Rezaizadeh.

[26] As against the defendant Davood Rezaizadeh, the statement of claim makes no allegation that he made any false representation to the plaintiff at any time. The action is based on deceit. It is not a conspiracy case. The claim against Davood Rezaizadeh fails because one of the essential ingredients of the case, a false statement of fact made by the defendant is not asserted in the claim.

Davood's failure to disclose does not amount to false, negligent or fraudulent misrepresentation. He never attended meetings, made no written or oral representation and never filled out forms. The first element of the tort of deceit, making a false representation, is not established.

[27] I have concluded that the statement of claim does not entitle the plaintiff to judgment against the defendant Davood Rezaizadeh.

[28] Based on the claim and the evidence filed, the defendant Kobra Fathi is liable for the amounts claimed as follows:

- (a) The amount of \$25,967.50 paid directly by the plaintiff to the defendant Kobra Fathi as income assistance pursuant to the *Ontario Works Act* for the period August 1, 2000 to August 31, 2002; and
- (b) The amount of \$19,447.00 being the amount of rent subsidy provided by the plaintiff to the defendant Kobra Fathi during the period August 1, 2000 to August 31, 2002.

[29] These payments were obtained by deceit and the defendant Kobra Fathi is liable to the plaintiff for these amounts.

[30] Judgment is granted against the defendant Kobra Fathi in the amount of \$45,414.50.

[31] The action against the defendants Farnoosh Rezaizadeh, Farnez Rezaizadeh, Fargol Rezaizadeh and Davood Rezaizadeh is dismissed.

[32] Costs are awarded to the plaintiff to be paid by the defendant Kobra Fathi in the sum of \$4,000.00.

MURRAY J.

DATE: August 10, 2004

COURT FILE NO.: 928/04

DATE: 20040810

**SUPERIOR COURT OF JUSTICE - ONT
ARIO**

RE: THE REGIONAL MUNICIPALITY OF HALTON v. DAVOOD REZAIZADEH, FARGOL REZAIZADEH, FARNOOSH REZAIZADEH, FARNEZ REZAIZADEH and KOBRA FATHI

BEFORE: MURRAY J.

COUNSEL: Carolyn A. Calwell, for the Plaintiff

No one appearing for the Defendants

**AMENDED
REASONS FOR JUDGMENT**

MURRAY J.

DATE: August 10, 2004.

Tab 144

Sunrise North Senior Living Ltd. v. The Sheriff (Regional Municipality of York), 2020 ONSC 469 (CanLII)

Source: Divisional Court
Date: 2020-01-23
File number: 257/19
Other citation: 443 DLR (4th) 458
Citation: Sunrise North Senior Living Ltd. v. The Sheriff (Regional Municipality of York), 2020 ONSC 469 (CanLII),
<<https://canlii.ca/t/j4vgz>>, retrieved on 2026-03-24

CITATION: Sunrise North Senior Living Ltd. v. The Sheriff (Regional Municipality of York),
2020 ONSC 469
DIVISIONAL COURT FILE NO.: 257/19
DATE: 20200123

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

M.G.J. Quigley, Conway and Favreau JJ.

B E T W E E N :

SUNRISE NORTH SENIOR LIVING
LTD. (C.O.B. SUNRISE OF RICHMO
ND HILL)

Applicant

– and –

THE SHERIFF OF THE REGIONAL
MUNICIPALITY OF YORK, ENFOR
CEMENT OFFICE OF THE SUPERI
OR COURT OF JUSTICE (NEWMAR
KET) AND ROHAN SALMON

Robyn Grant
for the Applicant

Robert B. Lawson and Chantelle Blom
for the Respondent The Sheriff of the Regi
onal Municipality of York

Melissa Miller
for the Respondent Rohan Salmon

BY THE COURT:

Introduction

[1] The applicant, Sunrise North Senior Living Ltd ("Sunrise"), seeks an order in the nature of *mandamus* compelling the Sheriff of the Regional Municipality of York (the "Sheriff") to comply with an order requiring the eviction of the respondent Rohan Salmon from a unit in a retirement home operated by Sunrise.

[2] In November 2017, the Landlord and Tenant Board (the "Board") made an eviction order that was to take effect on May 31, 2018. To date, Mr. Salmon has not moved out and the Sheriff has refused to enforce the eviction order because of health and safety concerns.

[3] For the reasons below, we grant an order in the nature of *mandamus* requiring the Sheriff to deliver vacant possession to Sunrise of the unit occupied by Mr. Salmon. However, given the unique circumstances of this case, the Sheriff is given until March 31, 2020 to comply with the order.

Background facts and procedural history

The parties

[4] Sunrise operates a retirement home located in Richmond Hill. Retirement homes in Ontario are governed by the *Retirement Homes Act*, 2010, S.O. 2010, c. 11.

[5] Mr. Salmon is 50 years old. Mr. Salmon has been living at the Sunrise retirement home for over 15 years. He was seriously injured in a car accident over 16 years ago. There is some dispute in the evidence over whether he is paraplegic or quadriplegic, but there is no dispute that the accident has left him with significant physical impairments. Mr. Salmon is also morbidly obese. He requires extensive care and assistance in his daily life, including a lift for his transfers, personal support workers for his personal care and hygiene needs, and assistance with all household tasks. There is no issue about Mr. Salmon's capacity to make decisions about his own care; he is capable and has no difficulties communicating verbally and in writing.

[6] As detailed below, the Sheriff is responsible for enforcing eviction orders made under the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17. As explained in the Sheriff's evidence on this application, in Ontario the Sheriff is no longer a specific person. Instead, duties assigned to the "Sheriff" in various statutes are performed by authorized Enforcement Officers within Court Enforcement Offices of the Ministry of the Attorney General.

Proceedings before the Landlord and Tenant Board

[7] In July 2017, Sunrise applied to the Board to terminate Mr. Salmon's tenancy due to the non-payment of rent. According to Sunrise, up to that point Mr. Salmon had a long history of not paying his rent and Sunrise made the application to the Board as a "last resort" after years of attempting to negotiate a resolution.

[8] Mr. Salmon was represented by counsel throughout the Board proceedings and these proceedings.

[9] Before the matter went to a hearing before the Board, Mr. Salmon and Sunrise reached a settlement. On November 3, 2017, the Board issued a consent order reflecting the terms of the settlement, which were as follows:

- a. The tenancy between Sunrise and Mr. Salmon was terminated;
- b. Mr. Salmon was to move out of his unit by May 31, 2018;
- c. Sunrise would not seek payment of Mr. Salmon's unpaid arrears, which at that point exceeded \$18,000;
- d. Mr. Salmon was to pay a daily rate of \$202.96 for the remainder of the tenancy on the 15th of every month. If Mr. Salmon failed to make these payments, Sunrise could move without notice to the Board for an earlier eviction;
- e. The Sheriff was to give vacant possession of the unit to Sunrise on or after June 1, 2018;
- f. If the unit was not vacated on or before May 31, 2018, starting on June 1, 2018, Sunrise could file the Board's order with the Sheriff for enforcement; and
- g. Sunrise was to undertake good faith efforts to assist Mr. Salmon in identifying adequate alternative housing.

[10] It appears that Mr. Salmon did not initially pay the daily rate agreed to under the Board's consent order. In December 2017, Sunrise applied to the Board for relief. On March 7, 2018, the Board issued an order in which it found that Mr. Salmon did not meet his payment obligations and required him to move out on April 23, 2018.

[11] Mr. Salmon and Sunrise then reached an agreement to reinstate the consent order that required Mr. Salmon to move out of his unit by May 31, 2018. The Board issued an order on April 23, 2018, that reflects this agreement.

[12] Mr. Salmon never appealed the Board's eviction order.

[13] Mr. Salmon did not move out of his unit at Sunrise on May 31, 2018, as required under the eviction order.

Sunrise's efforts to enforce the eviction order and the Sheriff's response

[14] Given that Mr. Salmon did not move out of the unit, on June 11, 2018, Sunrise filed the Board's eviction order with the Newmarket Court Enforcement Office for enforcement by the Sheriff. As part of the process, Sunrise was required to provide information about any special circumstances relevant to the eviction. Sunrise advised the Court Enforcement Office about Mr. Salmon's health circumstances, including that he is a paraplegic with severe obesity, that he requires a mechanical lift to be transferred from his bed, and that he requires the ongoing care of service providers.

[15] Following Sunrise's filing of the eviction order with the Court Enforcement Office, Enforcement Officers took a number of steps to assess how they would conduct the eviction. They attended Mr. Salmon's unit to serve him with the eviction order. At that time, Mr. Salmon advised that he would not willingly leave his unit and that he had no place to go. Enforcement Officers also met with the York Regional Police who advised that their role "would be limited to keeping the peace, and that they would not forcibly remove or apprehend Mr. Salmon ... if he refused to leave". Based on these consultations with the police and its own internal assessment, the Court Enforcement Office concluded that "there was no safe place for Mr. Salmon to be moved in light of his underlying physical challenges and associated daily care needs".

[16] In the circumstances, the Court Enforcement Office requested that Sunrise apply to the Superior Court of Justice to obtain directions on how to carry out the eviction pursuant to [Rule](#)

Justice Bale's decisions

[17] Sunrise brought an application for directions to the Superior Court in Newmarket on September 21, 2018. The application was before Bale J. The Sheriff and Mr. Salmon were respondents on the application.

[18] On September 21, 2018, the application judge made an order based on the consent of the parties that included the following terms:

- a. The Sheriff "is authorized to take such steps as are reasonably required to evict" Mr. Salmon "and provide vacant possession" of the unit to Sunrise on November 30, 2018.
- b. The parties could re-apply to the application judge if they required further directions on four days notice.
- c. The March of Dimes, Centre for Independent Living and A Place for Mom were to provide information to Mr. Salmon's lawyer about when Mr. Salmon placed his name on their waiting lists and when he could reasonably expect to be accommodated. This information was then to be provided to Sunrise and the Sheriff.
- d. The Local Health Integration Network (the "LHIN") was to provide Mr. Salmon with "information relating to the options available for patients with the needs of Mr. Salmon", and that information was to be shared with Sunrise and the Sheriff.

[19] In his brief endorsement, the application judge also stated that "it is the expectation of the court that Mr. Salmon, through counsel, will pursue alternate accommodations, over and above that available through the organizations" listed in the order.

[20] Despite this order, Mr. Salmon did not identify a place where he was to be moved to and the Sheriff did not enforce the eviction order by November 30, 2018.

[21] On January 8, 2019, Bale J. issued a further endorsement in this matter based on the written submissions of the parties. In his decision, he found that he did not have jurisdiction to make the order sought by Sunrise because [Rule 60.17](#) of the *Rules of Civil Procedure* does not contemplate a freestanding application for directions but, rather, a "motion" for directions in the proceeding in which the order was originally made. He also held that a motion for directions was not the appropriate procedure for Sunrise to seek the enforcement of the eviction order.

[22] Despite finding that he did not have jurisdiction over this matter, the motion judge made findings in relation to the efforts made by Mr. Salmon to comply with the September 21, 2018 order to find alternative housing:

[11] In response to my request for further submissions, Ms. Miller, on behalf of Mr. Salmon, advised that she had been informed by each facility to which he has applied that they are unable to provide information with respect to his place on their list. They have no way of knowing when a place will become available, and when one does, they have to interview the next person on the list to determine whether the placement is appropriate. Ms. Miller also advised that she had spoken with the Central LHIN manager and had been told that they could not provide any information as to what facilities may be available and appropriate for Mr. Salmon, because he has not applied for long-term care. The reason that he has not applied is that he believes long-term care facilities to be inappropriate for him, given his relative youth, and mental acuity. She reports that Mr. Salmon is frustrated and depressed at his inability to find an appropriate placement.

[23] The motion judge went on to describe the Sheriff's responsibilities:

[20] The law applying in this case is clear. Sunrise is entitled to possession of the rental unit, and has been so entitled since June 1, 2018. Pursuant to s. 141(1) of the *Courts of Justice Act* and s. 85 of the *Residential Tenancies Act, 2006*, the sheriff is required to enforce the eviction order, in the same manner as a writ of possession, and has been required to do so since the order was filed with her on June 11, 2018.

[21] With absolutely no disrespect to Mr. Salmon, and while I have sympathy for the position in which he finds himself, having no right to remain at Sunrise and nowhere to go (he says), he is, in effect, a homeless paraplegic. I am confident that in Ontario in 2018 (and now 2019) there is some place, or places, to which the sheriff may safely take such a person, upon carrying out an eviction order. It is, in my view, the public duty of the sheriff to determine what that place or places are, and to carry out the eviction.

[24] Finally, the motion judge held that an application to enforce the eviction order should be brought to the Divisional Court by way of an application for judicial review:

[22] Sunrise has not asked the court to order the sheriff to fulfill her public duty by enforcing the eviction order, and in any event, my view is that such an order is not available on a motion for directions under rule 60.17. If the sheriff continues to delay in enforcing the order, Sunrise's remedy would be an application to the Divisional Court for judicial review, pursuant to s. 2 of the *Judicial Review Procedure Act*. However, it is my expectation that the sheriff will now proceed to enforce the eviction order, without requiring the applicant to engage in further, and unnecessary, litigation.

Justice Charney's decision

[25] Following Bale J.'s January 8, 2019 decision, the Court Enforcement Office took additional steps to find a suitable place to which Mr. Salmon could be taken upon his eviction. They contacted a number of organizations and shelters in the York Region and the Greater Toronto Area, and concluded that there was nowhere they could take him because Mr. Salmon's consent would be needed for admission or because the places they had contacted were not able to accommodate Mr. Salmon's medical needs.

[26] The Court Enforcement Office also contacted the LHIN, which informed them that it could facilitate Mr. Salmon's admission to a long-term care home, even on a temporary or urgent basis, but that Mr. Salmon's consent would be required for admission. In addition, the Enforcement Office identified a number of retirement homes that had vacancies and that could accommodate Mr. Salmon. Again, admission to a retirement home would require Mr. Salmon's consent.

[27] The Enforcement Office shared the information it obtained about the availability of long-term care homes and retirement homes with Mr. Salmon. In response, his counsel advised that Mr. Salmon would never consent to placement in a long-term care home and that the retirement homes identified were "not appropriate".

[28] On March 12, 2019, the Enforcement Office ultimately advised Sunrise that they would not carry out the eviction unless Mr. Salmon consented to be moved to alternative accommodations. The Sheriff also raised an issue about the eviction order expiring on the one-year anniversary of its being filed with the Court, which was June 11, 2018.

[29] Sunrise then brought an urgent application for judicial review before a single judge in Newmarket. The application was heard by Charney J. on April 26, 2019.

[30] In a decision released on April 29, 2019, Charney J. granted a one-year extension of the eviction order, starting from the date of his decision. The extension was without prejudice to Sunrise's ability at a later date to argue that the order does not expire. Having renewed the eviction order, the application judge went on to find that the matter was no longer urgent, and that it should be heard by a full panel of the Divisional Court. The matter was transferred to Toronto so that it could be heard more expeditiously.

Adjournment of July 2, 2019 hearing

[31] The application for judicial review came before this panel on July 2, 2019.

[32] At the beginning of the hearing, the panel heard initial submissions from Ms. Miller, counsel for Mr. Salmon, and from Sunrise. However, rather than continuing with the full hearing of the application, the panel then encouraged the parties to try to resolve the matter. The parties were then able to reach agreement on a process that was meant to lead Mr. Salmon to identify and move to suitable alternative accommodations, failing which the matter was to come back for a hearing before the panel at a later date. The agreement of the parties was reflected in an order of this Court, which included the following terms:

- a. By July 16, 2019, Mr. Salmon was to provide consent to Sunrise and the Sheriff disclosing his personal health information for purposes of inquiring into potential new accommodations on his behalf.
- b. By July 16, 2019, Mr. Salmon was to provide Sunrise and the Sheriff with copies of his applications to The March of Dimes, Centre for Independent Living and A Place for Mom.
- c. By July 16, 2019, Mr. Salmon was to serve Sunrise and the Sheriff with the medical records relevant to his search for new accommodations.
- d. By July 16, 2019, Mr. Salmon was to advise the parties of the parameters he was using to identify potential new accommodations.
- e. By July 16, 2019, Mr. Salmon was to provide the list of parameters to his LHIN caseworker. Mr. Salmon was to ask his LHIN caseworker to inquire into all long-term care homes that can reasonably accommodate his parameters. If a long-term care home could not meet his parameters, Mr. Salmon was to ask his LHIN caseworker to advise which long-term care homes, if any, can come closest to accommodating his parameters.
- f. By July 30, 2019, the Sheriff and Sunrise were to provide Mr. Salmon with a list of potential new accommodations. Sunrise and the Sheriff were permitted to update the list from time to time.
- g. Mr. Salmon was to continue reasonable efforts, independent of Sunrise and the Sheriff, to identify and pursue potential new accommodations.

[33] In addition to the terms above, the order also required Mr. Salmon to report regularly on his communications with potential new accommodations, to provide details about why he found potential new accommodations not suitable and to report on his communications with his LHIN caseworker about potential accommodations in a long-term care home.

[34] Paragraph 10 of the order also provided that:

If Mr. Salmon maintains that long-term care home is not a suitable destination, he is to complete a medical assessment and to serve the report of the medical assessor

regarding his eligibility for admission to a long-term care home by no later than 30 days after the assessment.

[35] Finally, Mr. Salmon was to advise the Sheriff where he was to be moved by November 30, 2019. In the event Mr. Salmon failed to do so, the matter was to come back before this panel on a date to be arranged with the Court for early 2020, and a schedule was set for the parties to deliver their materials. Mr. Salmon's materials were due on December 17, 2019.

Events since July 2, 2019

[36] Unfortunately, following the July 2, 2019 order, Mr. Salmon did not identify a place where he was to be moved, and the matter came back before the panel on January 14, 2020.

[37] In advance of the hearing, Sunrise and the Sheriff filed supplementary materials, outlining what has occurred since July 2, 2019. Mr. Salmon did not file additional materials.

[38] Based on the evidence filed by the parties, it appears that Sunrise and the Sheriff met their obligations under the order made July 2, 2019. Mr. Salmon met some, but not all, of his obligations.

[39] Mr. Salmon did provide a list of parameters he is using to search for new accommodations. He is seeking a 500 square foot suite or a space with a layout that can accommodate specified equipment. Counsel for Sunrise points out that the list includes some equipment that Mr. Salmon does not currently have in his unit and that he did not include his budget as part of his parameters.

[40] While Mr. Salmon provided a copy of his application to The March of Dimes, he did not provide copies of his applications to either the Centre for Independent Living or A Place for Mom.

[41] With respect to the option of moving to a long-term care home, it appears that Mr. Salmon maintained his objection to this option throughout most of the time leading to this hearing despite the requirement in the July 2, 2019 order that he explore this option with the LHIN:

- a. In a letter dated July 15, 2019, counsel for Sunrise asked counsel for Mr. Salmon to advise of his inquiries with his LHIN caseworker about the long-term care homes that could accommodate his parameters. In response, in correspondence of the same date, Mr. Salmon's lawyer stated:

I'm not sure how many other ways I can say that there is no discussion of LTC facilities if there is no consent for same. That's how it works. So no specific options were discussed. That part of the order is now satisfied in my view. Further compliance is not possible as long as my client has not provided his consent to be placed in LTC.

- b. In a letter dated July 15, 2019, the LHIN described a meeting it had with Mr. Salmon. In the letter, the LHIN indicated that Mr. Salmon's caseworker could assist him with the admission process to a long-term care home, but that "Mr. Salmon declined to apply for admission..."
- c. On August 21, 2019, the LHIN provided Mr. Salmon with a list of 14 long-term care homes that may be able to accommodate him, and encouraged him to take a virtual tour of the facilities. In the same correspondence, the LHIN indicated that it could not assess Mr. Salmon's suitability for the homes without his consent.
- d. In correspondence dated August 29, 2019, Mr. Salmon's lawyer again advised Sunrise's lawyer that Mr. Salmon was not consenting to be placed on a long-term care home list,

and that the assessment process could therefore not begin.

- e. In October 2019, Sunrise's counsel and the Sheriff's counsel contacted this panel, seeking direction on the basis that Mr. Salmon was not meeting his obligations under our order of July 2, 2019. On October 18, 2019, the panel made a written direction that included a requirement that Mr. Salmon was expected to comply with all of the terms of the order in good faith.
- f. On November 5, 2019, Mr. Salmon's lawyer wrote to the panel with the following information:

I can further advise that my client has now made an application with the CLHIN for the sole purpose of inquiring about long-term care options to comply with the Order. His intention remains clear that he does not wish to be placed into long-term care, but he will advise what options exist. This confirms the advice of the CHLIN that an application to long-term care does not equate to admission to long-term care, which still requires his consent.

- g. Finally, on November 25, 2019, Mr. Salmon's lawyer advised counsel for Sunrise and the Sheriff that her client advised her "that he did formally apply for long-term care and is waiting to hear back on suitable accommodation". She also advised that Mr. Salmon was on his way to the hospital due to an infection and that he would not be able to meet the November 30th deadline.

[42] With respect to the option of moving to another retirement home, both Sunrise and the Sheriff provided Mr. Salmon's lawyer with lists of retirement homes that appeared to meet Mr. Salmon's needs and that had vacancies or upcoming vacancies. Mr. Salmon's lawyer provided some emails her client had sent to a number of retirement homes, including some of the retirement homes identified by Sunrise and the Sheriff. However, it is hard to accept that these emails represent a serious effort to find a suitable place. For example:

- a. The criteria identified in the emails are higher than what Mr. Salmon has in his current unit. For instance, his email makes reference to three lifts, when he currently only has one, and to needing space for items he currently does not have, such as a power wheelchair and rehab arm-bike.
- b. Mr. Salmon's budget is unclear, arguably making it sound like he has a lower budget than he has. At Sunrise, his rent is \$6,000 per month and he pays separately for support workers. However, his emails to retirement homes suggest that he has a ceiling of \$6,000 per month for his rent and for his support workers.
- c. There is no evidence of follow up. For example, one retirement home said that they may be able to accommodate his needs, but there is no follow up correspondence from Mr. Salmon.

[43] Mr. Salmon also did not comply with the requirement that he undergo a medical examination to determine his suitability for a long-term care home. As reviewed above, the July 2, 2019 order required him to undergo a medical examination if he maintained his position that long-term care was not suitable for him. In its October 2019 correspondence, Sunrise advised that Mr. Salmon had still not undergone a medical assessment. In our subsequent direction, the panel required that Mr. Salmon undergo a medical assessment by no later than November 15, 2019, and as stated above that he "comply with the terms of the Order in good faith". Despite this direction, it appears that Mr. Salmon did not undergo a medical examination. Instead, at the hearing before us, his counsel argued that he was not required to undergo the medical examination because he had

applied for long-term care. Up until the November 5th communication from Mr. Salmon's counsel, Mr. Salmon had made it clear to Sunrise and the Sheriff that he was only applying for long-term care to comply with the order. However, since it is plain that he had no intention of actually consenting to a placement, it is hard to see that Mr. Salmon's refusal to undergo a medical assessment to determine his suitability for long-term care was made in good in faith.

[44] Finally, and most significantly, Mr. Salmon did not advise where he was to be moved by the November 30, 2019 deadline. As indicated above, his lawyer did advise Sunrise and the Sheriff that he would not be able to comply with this term of the order due to his hospital admission in late November. However, Mr. Salmon returned to the Sunrise retirement home in early December, and nevertheless did not comply with this aspect of the order after that date nor did he provide an explanation for not doing so.

[45] Besides Mr. Salmon's failure to comply with the July 2nd order, Sunrise's evidence is that Mr. Salmon has not paid the full amount of rent owed since that time. Mr. Salmon maintains that three of the cheques he provided to Sunrise were misplaced. Even if this were true, it could be easily remedied with replacement cheques, which he has not provided. In addition, without going into detail or deciding who is in the wrong, it is evident from Sunrise's evidence that relations between Mr. Salmon and Sunrise's staff continue to deteriorate. There are significant disagreements over the scope of services Mr. Salmon is to receive while he is still at Sunrise, and Sunrise's staff have complained that Mr. Salmon is rude and has threatened them.

Adjournment request

[46] At the beginning of the hearing on January 14, 2020, Mr. Salmon's lawyer requested an adjournment. She advised that Mr. Salmon was in the hospital and that she had not been able to get instructions from him over the past seven weeks. She indicated that the latest medical information she had received was from Mr. Salmon's sister on the Friday before the hearing, who indicated that Mr. Salmon was in the hospital due to internal bleeding. Mr. Salmon's lawyer indicated that she was unable to serve responding materials because of Mr. Salmon's unavailability due to medical issues.

[47] Both Sunrise and the Sheriff opposed the adjournment. Sunrise provided an affidavit that indicated that Mr. Salmon was hospitalized between November 25 and December 3, 2019, and again since December 31, 2019. This suggests that Mr. Salmon was at home for most of December and, yet, in that time period, he took no steps to comply with the requirement that he advise where he was to be moved nor with the deadline for providing responding materials by December 14, 2019.

[48] After hearing submissions from the parties, we denied the request for an adjournment. For the sake of completeness, we take the opportunity to explain here the reasons for denying the adjournment.

[49] There is no doubt that Mr. Salmon has serious health issues and challenges. In the normal course, the Court would grant an adjournment request in circumstances where one of the parties is hospitalized and has not had an opportunity to instruct counsel. However, in this case there has already been an almost two year delay since the eviction order was made. In the interim, Mr. Salmon's rent payments have been sporadic, and Sunrise and Mr. Salmon now disagree on many issues related to the services Mr. Salmon is to receive while he remains at Sunrise.

[50] The application is brought against the Sheriff to compel the enforcement of the eviction order. While Mr. Salmon certainly has an interest in the application, the relief Sunrise seeks on the application is not directly against him.

[51] In seeking the adjournment, Mr. Salmon's lawyer argued that Mr. Salmon should have an opportunity to file materials in response to the supplementary materials filed by Sunrise and the Sheriff. The materials filed by Sunrise and the Sheriff address what has occurred since July 2, 2019. This information is only marginally relevant to the issue of whether Sunrise is entitled to an order in the nature of *mandamus* requiring the Sheriff to enforce Mr. Salmon's eviction. We granted the adjournment on July 2, 2019 because it was evident to us that it would be preferable for this matter to be resolved consensually, without further court intervention. That is why we granted that adjournment to give Mr. Salmon the opportunity to voluntarily find and choose an alternative place to live. However, ultimately, Sunrise's entitlement to the relief it seeks does not depend on what efforts Mr. Salmon has made or not made to find an alternative place to live.

[52] As seen below, while we find that Sunrise is entitled to the order it seeks, we have taken Mr. Salmon's current circumstances into consideration in setting the date by which the eviction order is to be enforced.

Jurisdiction of the Court

[53] Pursuant to [section 2\(1\)](#) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, this Court has the power to make an order in the nature of *mandamus* on an application for judicial review.

Analysis

[54] The issue raised on this application is whether the Court should make an order in the nature of *mandamus* requiring the Sheriff to enforce the Board's eviction order.

[55] The remedy of *mandamus* "compels an individual to perform a statutory duty imposed on him or her": *Zaki v. Ontario (Director, Disability Support Program)*, [2017 ONSC 1324](#) (Div. Ct.), at para. 45.

[56] The parties agree that the test for *mandamus* is the eight-part test articulated by the Federal Court of Appeal in *Apotex v. Canada (Attorney General)*, [1993 CanLII 3004 \(FCA\)](#), [1994] 1 FC 742 (C.A.), at para. 55. This test has been consistently adopted and applied by all levels of court in Canada, including in Ontario: *National Farmers Union - Ontario v. Ontario*, [2013 ONSC 6452](#), at para. 79. The eight parts of the test are as follows:

- a. The party against whom the order is made must have a public legal duty to act;
- b. The duty must be owed to the applicant;
- c. The applicant must have a clear right to the performance of that duty;
- d. Where the duty sought to be enforced is discretionary, certain rules apply;
- e. There is no other adequate alternative remedy available to the applicant;
- f. The order sought will be of some practical value or effect;
- g. There is no equitable bar to the relief sought; and
- h. The balance of convenience favours granting an order in the nature of *mandamus*.

[57] Sunrise argues that it has met the requirements for *mandamus*, and that the Court should exercise its discretion and make an order requiring the Sheriff to enforce the eviction order.

[58] The Sheriff agrees that the first four parts of the test are met, but argues that Sunrise has not met the last four parts of the test. Mr. Salmon's lawyer supports the argument made by the

Sheriff, and emphasizes that the balance of convenience favours her client.

[59] We are satisfied that the eight-part test is met and that an order in the nature of *mandamus* should be made requiring the Sheriff to carry out the eviction.

[60] Despite the respondents' concession that the first four parts of the test are met, our analysis addresses each part of the test with emphasis on the last four parts.

The Sheriff has a legal duty to act

[61] The statutory regime that governs evictions and the powers of the Sheriff make clear that the Sheriff has a duty to enforce eviction orders made by the Board.

[62] [Section 85](#) of the *Residential Tenancies Act, 2006* provides that an "order evicting a person shall have the same effect, and shall be enforced in the same manner as a writ of possession".

[63] Section 141(1) of the *Courts of Justice Act*, R.S.O., c. C.43, states that "orders of a court arising out of a civil proceeding and enforceable in Ontario shall be directed to a sheriff for enforcement".

[64] As held by Bale J. in his decision of January 8, 2019, in combination these two provisions make clear that the sheriff "is required to enforce the eviction order, in the same manner as a writ of possession..."

The duty is owed to the applicant

[65] The eviction order was issued in favour of Sunrise. Sunrise filed the eviction order with the Sheriff's office. The purpose of enforcement is to provide Sunrise with vacant possession of the unit.

The applicant has a clear right to performance of the duty

[66] Pursuant to *Apotex*, this part of the test requires Sunrise to demonstrate that:

- a. It has met all of the conditions precedent giving rise to the duty; and
- b. There was (i) a prior demand for performance of the duty, (ii) a reasonable time to comply with the demand unless refused outright, and (iii) a subsequent refusal which can be either express or implied.

[67] In this case, the only condition precedent to the Sheriff's duty to enforce the eviction order was that Sunrise file the order with the Sheriff's office, which it did.

[68] Sunrise has made repeated requests that the Sheriff enforce the order; the initial request was made in June of 2018, which is over 18 months ago; and the Sheriff's office has taken the position that it will not effect the eviction unless Mr. Salmon consents to be moved to a specific retirement home, long-term care home or other location.

[69] Therefore, we are satisfied that Sunrise has established that it has a clear right to the performance of the duty.

The duty is not discretionary

[70] The Sheriff does not have the discretion to decide not to enforce the eviction orders.

[71] In *Central Guaranty Trust Co. v. McRae* (1993), [1993 CanLII 8542 \(ON SC\)](#), 13 O.R. (3d) 295 (Sup. Ct.), at para. 12, the Superior Court held that the Sheriff has a duty to enforce validly made writs of possession and no discretion not to do so:

A writ of possession is an order of the court. It is granted only after a Judge or master has made a judicial determination which includes consideration of the rights of the occupants. A Sheriff is an officer of the court, sworn to uphold the law. Refusal by a law enforcement officer to enforce an order of the court can only serve to undermine respect for the judicial system and bring the administration of justice into disrepute. A Sheriff, therefore, has no discretion to refuse to execute a writ of possession.

[72] The same principle clearly applies to the Sheriff's obligation to enforce an eviction order made by the Board, given that section 85 of the *Residential Tenancies Act* provides that an eviction order is to be enforced in the same manner as a writ of possession.

There are no adequate alternative remedies

[73] The Sheriff argues that Sunrise must exhaust other remedies before seeking *mandamus*, and that, in this case, Sunrise ought first to seek a contempt order against Mr. Salmon.

[74] We reject this argument.

[75] The record before us does not suggest that a contempt order would serve a practical purpose. Despite the eviction order to which Mr. Salmon consented which was made almost two years ago, he has taken few steps to find alternative accommodations and he has not voluntarily made arrangements to move out of the unit.

[76] The Sheriff suggests that a contempt order could be enforced through escalating fines. Again, this is unsatisfactory because it would lead to further delay in implementing the eviction order. Significantly, economic sanctions would have the effect of depriving Sunrise of potential rent while Mr. Salmon remains in the unit and of depriving Mr. Salmon of funds he will likely need to relocate to other accommodations.

[77] More importantly, the legislature has created a clear enforcement mechanism to deal with eviction orders by allowing landlords to seek enforcement by the Sheriff. Requiring landlords to first bring contempt proceedings defeats the legislative scheme and would have the effect of dragging out what should be a fairly efficient process once the eviction order is made and appeal rights are exhausted.

The order sought will have some practical value or effect

[78] The Sheriff argues that an order compelling the Enforcement Office to carry out the eviction order will have no practical value for two reasons. First, the order would be redundant because section 141(1) of the *Courts of Justice Act* already compels the Sheriff to enforce eviction orders. Second, the police have already advised that they will not assist in evicting Mr. Salmon unless there is a place to which he can be safely taken.

[79] On the first issue, while the Enforcement Office acknowledges the Sheriff's statutory obligation, Enforcement Officers have not yet fulfilled that obligation. *Mandamus* is available to require compliance with a statutory obligation. A court order will therefore not be redundant, but will require the Sheriff to comply with its obligations despite its perceived impediments to doing so.

[80] On the second issue, while there is evidence that the police would not assist the sheriff with the eviction last year, there is no evidence that the police will not assist in the face of a court order requiring the Sheriff to fulfill this statutory duty. In fact, we note that in the affidavit filed on behalf of the Sheriff in response to this application, the affiant states that the York Regional Police "could not provide assurance that they would remove the tenant if he refused to leave without a court order directing them".

[81] [Section 21\(1\)](#) of the *Execution Act*, R.S.O. 1990, c. E.24, provides that, when acting under a writ of possession, the Sheriff "may use reasonable force to enter and take possession of the land and premises referred to in the writ". [Section 141\(2\)](#) of the *Courts of Justice Act* gives the Sheriff the authority to "require a police officer to accompany the sheriff in the execution of the order".

[82] The Sheriff relies on the decision in *Canada Post Corporation v. Doe et al.*, [2018 ONSC 7283](#), at para. [15-20](#), where Hainey J. of this Court found that the court does not have the power to direct the police to enforce an order arising out of a civil proceeding. That case arose out of a labour dispute between Canada Post and one of its unions. Canada Post was seeking an order from the Court compelling the police to enforce injunctions that had been granted against protesters.

[83] The circumstances in this case and the order sought by Sunrise are different. Sunrise does not seek an order against the police, but against the Sheriff who has a clear statutory duty to enforce the eviction order. If *mandamus* is granted, the Sheriff will be responsible for figuring out how to implement the order and what assistance, if any, will be required from the police. At this point, it would be premature for this Court to assume that Mr. Salmon will not be more cooperative in the face of an order from this Court or that the police will not assist in enforcing the Court's order.

[84] In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992 CanLII 110 \(SCC\)](#), [1992] 1 SCR 3, at para. [109](#), the Supreme Court of Canada held as follows:

Prerogative relief should only be refused on the ground of futility in those few instances where the issuance of a prerogative writ would be effectively nugatory. For example, a case where the order **could not possibly be implemented**, such as an order of prohibition to a tribunal if nothing is left for it to do that can be prohibited... [emphasis added]

[85] This is not such a case. The evidence before us does not establish that an order from this Court would have no utility or effect.

There is no equitable bar to mandamus

[86] The Sheriff and Mr. Salmon argue that, as between Sunrise and Mr. Salmon, the equities favour Mr. Salmon. In our view, weighing the interests of the parties is relevant to the balance of convenience, but not to whether there is an equitable bar to the relief sought.

[87] In considering whether there is an equitable bar to the relief sought, the Court is concerned with whether the applicant, in this case Sunrise, comes to the Court with clean hands: *Zaki*, at para. [92](#); *Khalil v. Canada (Secretary of State)*, [1999 CanLII 9360 \(FCA\)](#), [1999] 4 F.C. 661 (C.A.), at para. [15](#).

[88] Based on the record before us, there is no doubt that Sunrise has acted fairly and appropriately throughout these proceedings. Initially, in the proceedings before the Board, Sunrise consented to an order that provided Mr. Salmon with a generous period of time for finding alternative accommodations, while foregoing significant arrears in rent. More than two years have elapsed since that order was made. In the interim, while Sunrise has pursued its right to enforcement of the eviction order, the record before this Court makes clear that Sunrise has worked cooperatively with Mr. Salmon and the Sheriff in trying to find alternative accommodations for Mr. Salmon.

[89] Under the circumstances, we see no equitable bar to granting the relief sought.

The balance of convenience favours granting the order

[90] The Sheriff and Mr. Salmon argue that the balance of convenience favours not granting *mandamus* because Sunrise's interests are only economic, whereas Mr. Salmon's interests, and by association the Sheriff's interests, are matters of health and safety.

[91] In *Apotex*, at para. 118, the Federal Court of Appeal stated that "denying *mandamus* appears to arise in instances where potential health and safety risks to the public are perceived to outweigh an individual's right to pursue personal or economic interests". At the same time, at paras. 124-125, the Court also recognized that, in weighing the balance of convenience, the Court's discretion to refuse *mandamus* should only be exercised in the "clearest of circumstances", given the public interest in upholding the rule of law.

[92] Therefore, in balancing the relevant interests in this case, the Court is not only to consider the relative interests of Sunrise and Mr. Salmon, but also the public interest in ensuring that eviction orders are complied with and enforced.

[93] With respect to Sunrise's interest, by this point, its interests are not just economic. It is evident that the relationship between the parties has deteriorated to such a point that it is difficult for Sunrise and its employees to deal with Mr. Salmon while he remains in the unit.

[94] With respect to Mr. Salmon's interests, neither the Sheriff nor Mr. Salmon have established that complying with the order will inevitably endanger Mr. Salmon's health and safety and that there are no alternatives other than leaving Mr. Salmon in his unit at the retirement home.

[95] First, based on the evidence available since July 2, 2019 and reviewed above, it is evident that there are retirement homes within the general geographic area identified by Mr. Salmon that have vacancies and that can accommodate his needs. It is also evident that there may be long-term care homes that can accommodate Mr. Salmon on an urgent, short-term or long-term basis, but that Mr. Salmon has made only limited efforts to explore this option. This is not a case in which there is nowhere, other than Sunrise, that can accommodate Mr. Salmon. The only impediment to these options appears to be Mr. Salmon's consent.

[96] Second, while it is clear from the record that Mr. Salmon has serious disabilities and health needs, the evidence on the application does not establish that he cannot be moved safely nor does it establish that there is nowhere where he can be accommodated on a temporary basis. Mr. Salmon has been moved to and from the hospital from time to time. Therefore, he clearly can be moved. In addition, while the Sheriff's affiant states that the Enforcement Office has explored temporary options, very little evidence is provided on this point. This cannot be the first time the Enforcement Office has faced a case in which an individual with significant health issues has refused to move in the face of an eviction order. Therefore, based on the record before us, we are not prepared to find that Mr. Salmon cannot be moved safely to another location, even without his consent.

[97] With respect to the public interest, there is no doubt that this is a difficult situation. There is a long-outstanding order requiring Mr. Salmon to vacate his unit at the Sunrise residence. While Mr. Salmon has significant health issues and limitations, the evidence before us plainly demonstrates that there are alternatives available to Mr. Salmon that are within his budget. The evidence before us also suggests that he has acted unreasonably by failing to cooperate in the search for an alternative home. There is no doubt that this places the Sheriff in a difficult situation. However, this does not give the Sheriff an excuse to abdicate a clear statutory duty. There is a clear public interest in ensuring that valid eviction orders are enforced.

[98] Weighing Mr. Salmon's interests, Sunrise's interests and the public interest, it is evident that the eviction order should be enforced. Otherwise, the Court would be sanctioning Mr. Salmon's deliberate non-compliance with a valid eviction order that has been in place for over two years.

Additional issues raised by Mr. Salmon

[99] While not pressed at the hearing, Mr. Salmon raised two issues in his factum that we address briefly here.

[100] First, he seems to argue that the original eviction orders made by the Board were unfair or improper. However, these orders were never appealed. They are valid orders, and the only issue appropriately raised on this application is their enforcement. Any attack on their validity is an impermissible collateral attack: *Ontario (Human Rights Commission) v. Ontario*, [2000] O.J. No. 2419 (Sup. Ct.), at para. 13.

[101] Second, Mr. Salmon also argues that, in enforcing the eviction order, the Sheriff must comply with the *Human Rights Code*, R.S.O. 1990, c. H.19. Again, this issue was not pressed by Mr. Salmon's counsel at the hearing. However, we note that compliance with the *Human Rights Code* cannot mean that Sunrise is not entitled to the enforcement of a validly made eviction order. As the evidence above demonstrates, both Sunrise and the Sheriff have worked together for almost two years to assist Mr. Salmon in finding alternative accommodations.

Appropriate remedy

[102] For the reasons above, we have concluded that Sunrise is entitled to an order in the nature of *mandamus* requiring the Sheriff to carry out the eviction order. The only remaining issue is whether we can and, if so, should include directions as to how the Sheriff is to carry out the order.

[103] During the hearing, counsel for Sunrise and the Sheriff conceded that the Court likely has no authority to compel Mr. Salmon to be placed in a specific long-term care home or retirement home. Indeed, section 7 of the *Long-Term Care Homes Act, 2007*, S.O. 2007, c. 8, requires a resident to consent to an assessment for admission or to be cared for in a long-term care home, and section 46(1) provides that consent for admission "must be given voluntarily". In addition, section 53(1) of the *Retirement Homes Act, 2010* requires residents and retirement homes to enter into an agreement before a resident can start living at the retirement home. We were provided with no authority that would allow this Court to bypass this requirement. Indeed, Mr. Salmon is capable and, as such, if his consent is needed, he cannot be compelled by this Court to consent. In any event, the Court cannot compel a third party retirement home or long-term care home to accept Mr. Salmon. Furthermore, the Court is not in a position to assess which specific retirement home, or long-term care home, may be suitable for Mr. Salmon.

[104] In any event, we note that in *North Vancouver (District) v. Canada*, [1978] F.C.J. No. 619 (T.D.), at para. 38, the Federal Court issued a *mandamus* order, finding that the harbour authority in that case had a statutory duty to address unlawfully moored houseboats, but that it was not up to the Court to dictate how that duty was to be fulfilled. In our view, the same point is equally applicable here.

[105] While Sunrise and the Sheriff have worked hard and cooperatively to find an alternative home for Mr. Salmon, the Sheriff's responsibility is ultimately not to find a permanent home for him but to carry out the eviction order. This may mean that Mr. Salmon has to be brought to a temporary location. Where Mr. Salmon is to be taken will be for the Sheriff to determine. As mentioned above, this cannot be the first time the Sheriff has been faced with an eviction involving a resident with serious health issues who is reluctant to move.

[106] While we are satisfied that an order compelling the Sheriff to perform its statutory duty to evict Mr. Salmon is appropriate in this case and while we find that it would not be appropriate for the Court to give directions on how the order is to be carried out, we wish to ensure that the parties are given sufficient time to implement the order.

[107] At the time of the hearing, Mr. Salmon was in the hospital. He should be given time to return from the hospital, and an opportunity, in the face of this decision, to finally find and consent to alternative accommodations. As mentioned above, toward the end of November, his lawyer indicated that her client had finally applied for long-term care. Working with his LHIN caseworker, based on the Sheriff's evidence about the availability of urgent and short term long-term care, we are confident that Mr. Salmon should be able to find accommodations, even in the short term, and thereby have control over where he is to be taken. Alternatively, given that there are retirement homes with vacancies that can accommodate his needs, he should be able to make arrangements with a retirement home.

[108] At the same time, in the event that Mr. Salmon does not do so, the Sheriff will require some time to identify a temporary location where Mr. Salmon can be taken.

[109] Accordingly, while we grant the *mandamus* order, we find that it is appropriate that the Sheriff be given until March 31, 2020 to comply with the order. In the meantime, we remind Mr. Salmon that he is required by the eviction order to continue paying rent to Sunrise.

Costs

[110] At the conclusion of the hearing, we requested that the parties confer on the issue of costs to see if they could reach an agreement. Counsel for Sunrise and the Sheriff indicated that they had reached agreement as between their clients. They agreed that the successful party was to receive \$35,000 in costs. Counsel for Mr. Salmon indicated that she acts *pro bono* for Mr. Salmon and that she is not seeking costs and argues that no costs should be awarded against Mr. Salmon.

[111] With respect to costs payable by the Sheriff to Sunrise, we find that \$20,000 in costs is appropriate in this case. While the Court would normally accede to the agreement made between the parties, \$35,000 is far in excess of the costs that would normally be awarded on an application for judicial review. In accordance with the Court of Appeal's decision in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 OR (ed) 291 (C.A.), at para. 26, the prevailing principle in awarding costs is "to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding". In this case, we note that the Sheriff is a public official whose representatives were trying to deal with what could be described as an impossible situation. Any additional costs incurred by Sunrise were not attributable to the Sheriff's conduct, but rather to Mr. Salmon's circumstances and reluctance to fully engage in efforts to find alternative accommodations. In these unique circumstances, we find that it is appropriate to reduce the amount agreed to by the parties, and to limit the costs payable by the Sheriff to Sunrise to \$20,000, all inclusive.

[112] We accept the submission made by Mr. Salmon's counsel, and order that there shall be no costs payable by or to Mr. Salmon.

Conclusion

[113] For the reasons above, this Court makes the following order:

- a. An order in the nature of *mandamus* is granted directing the Sheriff to enforce the Board's eviction order and to deliver vacant possession of the premises to Sunrise by no later than March 31, 2020; and
- b. The Sheriff is to pay costs to Sunrise in the amount of \$20,000 within 30 days.

M.G.J. QUIGLEY J.

CONWAY J.

FAVREAU J.

RELEASED: January 23, 2020

CITATION: Sunrise North Senior Living Ltd. v. The Sheriff (Regional Municipality of York),
2020 ONSC 469

DIVISIONAL COURT FILE NO.: 257/19

DATE: 20200123

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

M.G.J. Quigley, Conway and Favreau JJ.

B E T W E E N :

SUNRISE NORTH SENIOR LIVING LTD. (C.O.B.
SUNRISE OF RICHMOND HILL)

Applicant

– and –

THE SHERIFF OF THE REGIONAL MUNICIPAL
ITY OF YORK, ENFORCEMENT OFFICE OF TH
E SUPERIOR COURT OF JUSTICE (NEWMARK
ET) AND ROHAN SALMON

Respondents

REASONS FOR JUDGMENT

By the Court

RELEASED: January 23, 2020

Tab 145

407 ETR Concession Company v. Ontario (Registrar of Motor Vehicles), 2005 CanLII 49963 (ON SCDC)

Source:	Divisional Court
Date:	2005-11-07
File number:	412/04
Other citations:	82 OR (3d) 703 — 214 OAC 251 — 47 Admin LR (4th) 184 — [2005] OJ No 4830 (QL) — 29 MVR (5th) 62
Citation:	407 ETR Concession Company v. Ontario (Registrar of Motor Vehicles), 2005 CanLII 49963 (ON SCDC), < https://canlii.ca/t/1mg3h >, retrieved on 2026-03-24

407 ETR Concession Company Limited v. Registrar of Motor Vehicles

**[Indexed as: 407 ETR Concession Co. v. Ontario (Registrar
of Motor Vehicles)]**

82 O.R. (3d) 703

**Ontario Superior Court of Justice, Divisional
Court,**

Carnwath, Lax and Swinton JJ.

November 7, 2005 *

*** This judgment was recently brought to the attention of the
editors.**

Administrative law -- Extraordinary remedies -- Mandamus -- Toll road concession operator giving notice to Registrar of Motor Vehicles of failures to pay tolls -- Registrar having statutory duty to refuse to validate vehicle permit in case of non-payment -- Statutory scheme not providing for review of process by Registrar to ensure that individuals were not wrongly denied plate renewal -- Preconditions existing for order of mandamus requiring Registrar to refuse to validate permits where Registrar had refused to act.

The applicant was the operator of a toll road concession, with the power under the [Highway 407 Act, 1998, S.O. 1998, c. 28](#) to establish, collect and enforce the payment of tolls, fees and interest.

The road in question was an all-electronic, open- access toll road. Persons who used the highway were identified either by the use of cameras that identified licence plates, or through the use of scanners to identify transponders. Where a vehicle was driven on the highway, an obligation to pay a toll and any related fee and interest was imposed upon the person in whose name the plate portion of the vehicle was issued or, if there was a transponder, upon the person to whom the transponder was registered. If tolls, fees and interest were not paid within 90 days of the day a person received Notice of Failure to Pay under [s. 16](#) of the Act, and if the applicant gave notice to the respondent Registrar of Motor Vehicles of that fact, then under [s. 22\(4\)](#) of the Act, the respondent "shall, at the next opportunity, refuse to validate the vehicle permit issued to the person who received the notice of failure to pay under section 16 and refuse to issue a vehicle permit to that person". [Section 10](#) of [O. Reg. 138/00](#) under the Act provides for periodic audits by an independent auditor. In 2004, the Ministry withdrew its approval of the independent auditor on the basis that the auditor was also the applicant's external auditor, and was therefore not independent. The applicant objected, and the decision to withdraw approval was the subject of arbitration between the parties. In the meantime, the auditor continued to perform audits. The applicant sent a number of Notices to Pay to customers who had not paid for the use of the highway and asked the respondent to act in accordance with [s. 22\(4\)](#) and deny plates to the persons in question. The respondent refused to do so until he was satisfied that the applicant had complied with the Act and Regulation and that there would be no wrongful denials of permit validations. The applicant brought an application for judicial review, seeking an order in the nature of mandamus compelling the respondent to refuse to validate or issue plate renewals in response to the Notices.

Held, the application should be granted. [page704]

The [Act](#) placed the onus on the user of the road to dispute the obligation to pay, rather than on the applicant to prove an entitlement to pay before delivering an invoice or a [s. 16](#) notice. The Act did not require the applicant to satisfy the respondent that the user was accurately identified; nor did it give the respondent any role in determining whether that was the case. The legislature recognized that there would be instances where plates were misread and notices under [s. 16](#) were improperly delivered, and left this to be determined in the dispute resolution process described in [ss. 17 to 21](#) of the Act. The respondent had no role in this process and no authority to act as a monitor of the enforcement process. [Section 22\(4\)](#) of the Act used mandatory language that did not afford the respondent any discretion. The Regulation imposed additional requirements on the applicant that were designed to provide additional safeguards to the public, but it did not alter the statutory scheme and did not give the respondent the powers he claimed to have. The withdrawal of approval of the auditor was the subject of a dispute that would be determined by arbitration. The Concession and Ground Lease Agreement under which the applicant operated imposed a requirement of continuing performance on the parties to the Agreement and, consistent with that Agreement, the auditor had continued to deliver reports. The respondent had the power to request additional compliance audits, but had not done so. The jurisdictional requirements for mandamus were met.

The respondent's determination of whether alleged conditions precedent to the exercise of his statutory duty had been met was not a finding of fact to which deference had to be granted. A public body's discretion does not extend to defining the limits of its own power. The court's function is to ensure the public body does not make decisions based on a misapprehension of jurisdiction.

While the court had a residual discretion to refuse mandamus, there was no basis for exercising that discretion. The alternative remedies suggested by the respondent -- collection of tolls through collection agencies or court proceedings -- were impracticable. The use of collection agencies would result in a significant percentage loss of tolls collected, and court proceedings would choke the court system. The "public interest in good government" did not support the denial of mandamus on the basis that the public interest was not advanced by allowing the applicant to

"wrongly place individuals into plate denial". The process established by the Act and Regulation was in the public interest as it provided an effective method of dealing with scofflaws who refused to pay their share, and also provided a dispute mechanism for those tolls imposed in error.

APPLICATION for an order in nature of mandamus.

Cases referred to *Algonquin Wildlands League v. Ontario (Minister of Natural Resources)*, 1998 CanLII 5756 (ON CA), [1998] O.J. No. 4331, 117 O.A.C. 174, 29 C.E.L.R. (N.S.) 31, 83 A.C.W.S. (3d) 412 (C.A.), varg [1998] O.J. No. 419, 110 O.A.C. 201, 26 C.E.L.R. (N.S.) 163, 77 A.C.W.S. (3d) 772 (Div. Ct.); *Apotex Inc. v. Canada (Attorney General)*, 1994 CanLII 47 (SCC), [1994] 3 S.C.R. 1100, [1994] S.C.J. No. 113, 176 N.R. 1, 59 C.P.R. (3d) 82, affg 1993 CanLII 3004 (FCA), [1993] F.C.J. No. 1098, [1994] 1 F.C. 742, 69 F.T.R. 152n, 162 N.R. 177, 51 C.P.R. (3d) 339 (C.A.) (sub nom. *Apotex Inc. v. Merck & Co.*); *Enbridge Gas Distribution Inc. v. Ontario Energy Board* (2005), 2005 CanLII 250 (ON CA), 74 O.R. (3d) 147, [2005] O.J. No. 33, 193 O.A.C. 180 (C.A.); *Karavos v. Toronto (City)*, 1947 CanLII 326 (ON CA), [1948] 3 D.L.R. 294, [1948] O.W.N. 17 (C.A.); *R. v. McIntosh*, 1995 CanLII 124 (SCC), [1995] 1 S.C.R. 686, [1995] S.C.J. No. 16, 21 O.R. (3d) 797n, 178 N.R. 161, 95 C.C.C. (3d) 481, 36 C.R. (4th) 171 [page705] Statutes referred to *Highway 407 Act*, 1998, S.O. 1998, c. 28, ss. 1-8, 13, 25, 65 *Interpretation Act*, R.S.O. 1990, c. I.11, s. 29(2) *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2(1) Rules and regulations referred to *O. Reg. 138/00* (*Highway 407 Act*, 1998), ss. 8, 9, 10 Authorities referred to *Highway 407 Concession and Ground Lease Agreement*, art. 25 *Royal Commission: Inquiry into Civil Rights* (Commissioner: Honourable James McRuer, LL.D.), vol. 1 (1968) Sullivan, R., *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994)

J. Thomas Curry, Nina Bombier and Rebecca Jones, for applicant.

M. Michele Smith, Troy Harrison and Taia Wong, for respondent.

[1] BY THE COURT:-- The applicant, 407 ETR Concession Company Limited ("407 ETR"), applies for judicial review seeking an order in the nature of mandamus compelling the Registrar of Motor Vehicles (the "Registrar") to refuse to validate or issue vehicle permits for those persons who have failed to pay tolls and administrative fees owed to 407 ETR (as listed in Revised Schedule "A" to the Notice of Application). The application requires an understanding of the *Highway 407 Act*, 1998, S.O. 1998, c. 28 (the "Act") and *O. Reg. 138/00* passed under the Act (the "Regulation").

[2] For mandamus to issue, 407 ETR must overcome the following submissions of the Registrar:

(a) There are pre-conditions in the Act of which the Registrar must be satisfied before denying permit validation or issue.

(b) There are pre-conditions in the Regulation of which the Registrar must be satisfied before denying permit validation or issue.

(c) The Ministry of Transportation's withdrawal of its approval of the independent auditor appointed under the Regulation relieves the Registrar from his statutory duty.

(d) The refusal of the Registrar to act requires the court to apply a "standard of review" analysis to his decision. [page706]

(e) The court should exercise its residual discretion. and refuse mandamus.

Background Facts

[3] 407 ETR is the private operator of the Highway 407 toll road concession, pursuant to the authority of the Act and a 99- year Concession and Ground Lease Agreement with the Province of Ontario. Highway 407 is the world's first all-electronic, open-access toll road. Persons who use the highway are identified either by the use of cameras that identify licence plates or through the use of scanners to identify the use of a toll device called a "transponder".

[4] When the highway was first opened in 1997, it was operated by a Crown corporation. In May 1999, the province privatized Highway 407, and 407 ETR became the operator of the highway. The [Act](#) defines 407 ETR as the "owner" with the statutory power to establish, collect and enforce the payment of tolls, fees and interest in respect of Highway 407 (s. 14).

[5] When a vehicle is driven on Highway 407, an obligation to pay a toll and any related fee and interest payable under the [Act](#) is imposed upon the person in whose name the plate portion of the vehicle is issued or, if there is a transponder, upon the person to whom the transponder is registered (s. 13(1)). Photographic or electronic evidence of the use of Highway 407 is proof, in the absence of evidence to the contrary, of the obligation to pay a toll (s. 13(2)). [Section 13\(3\)](#) of the Act deals with enforcement, stating:

13(3) Sections 16 to 25 apply to the enforcement and collection of tolls and related fees and interest payable under this [Act](#) by a person described in subsection (1) but do not apply to the enforcement and collection of such tolls, fees and interest if,

- (a) the person is responsible for the payment of such tolls, fees and interest under clause (1)(b); and
- (b) the toll device that was affixed to the vehicle in question was obtained without providing information identifying the plate portion of a vehicle permit.

[6] A toll or fee is due and payable on the day that an invoice for these amounts is mailed, delivered or otherwise sent to the person responsible for payment, and interest begins to accrue and is payable 35 days after the invoice is mailed (s. 15). Pursuant to s. 16, the owner may send a notice of failure to pay a toll to the invoiced user if payment is not made within 35 days after the day it is payable. Subsection 16(2) sets out the content of the notice, which must include information that the person may [page707] dispute the matter on the grounds set out in [s. 17\(1\)](#) of the [Act](#), and that if the amount owing is not paid within 90 days of the receipt of the notice, the Registrar may refuse to validate the person's vehicle permit or refuse to issue a vehicle permit to the person.

[7] A dispute is determined in the first instance by 407 ETR. If the dispute is unsuccessful, the owner must give notice to the person of the right to appeal to a dispute arbitrator on the grounds set out in s. 17(1) (see s. 17(6)). Sections 18 through 19 deal with appeals.

[8] If a toll, related fees and interest are not paid within 90 days of the day a person receives a Notice of Failure to Pay under s. 16, 407 ETR may give notice to the Registrar of that fact and must also inform the person who received the Notice of Failure to Pay of the fact that notice has been provided to the Registrar under [s. 22](#) of the [Act](#) (ss. 22(1) and (3)). Subsections 22(4) through (7) deal with the Registrar and read:

22(4) If the Registrar of Motor Vehicles receives notice under subsection (1), he or she shall, at the next opportunity, refuse to validate the vehicle permit issued to the person who received the notice of failure to pay under section 16 and refuse to issue a vehicle permit to that person.

- (5) The Registrar of Motor Vehicles may act under subsection (4) even though the person who received the notice of failure to pay under section 16 has disputed his or her

obligation to pay under section 17 or has appealed a decision of the owner under section 19.

(6) If notice has been given to the Registrar of Motor Vehicles under subsection (1) and the toll and related fees and interest are subsequently paid, the owner shall immediately notify the Registrar of the payment.

(7) If the Registrar of Motor Vehicles is notified by the owner that the toll, fees and interest have been paid or is notified by the dispute arbitrator that the person is not responsible for paying the toll, fees and interest, the Registrar shall,

(a) validate any vehicle permit that he or she refused to validate under subsection (4);

(b) issue a vehicle permit to a person if it was refused under subsection (4).

[9] After privatization in May 1999, the Registrar acted on s. 22 notices and refused to issue or validate vehicle permits to those who owed a debt to 407 ETR until the debt was paid. However, with the increasing popularity of the highway, 407 ETR was unable to deal effectively with customer service inquiries; as well, the computer system, sold as part of the privatization, lacked the capacity to generate information required to support customer service issues. Moreover, the billing and enforcement systems [page708] were generating erroneous plate denial requests. Some initiatives were implemented to resolve these issues, but as licence plate denial was in effect, this attracted further customer complaints, which could not be resolved due to inadequate staffing and customer service infrastructure.

[10] On February 24, 2000, 407 ETR and the Ministry of Transportation (the "Ministry") entered into a Temporary Suspension Agreement, in which they agreed to suspend temporarily the operation of licence plate denial while the customer service issues were being addressed, without prejudice to the rights of either side under the [Act](#). Pursuant to the agreement, 407 ETR undertook not to submit any new requests for plate denial to the Registrar until certain customer service and dispute resolution initiatives were implemented. In addition, 407 ETR withdrew all s. 22 notices already forwarded to the Registrar.

[11] On the same day, the Ministry filed [O. Reg. 138/00](#) (the "Regulation") to implement certain changes to the licence plate denial process. Part of the regulation dealt with the sending of notices (ss. 1-5). Under the heading "Additional Procedures for the Owner in Enforcing Payment of Tolls", new obligations were imposed on 407 ETR with respect to confirming customer addresses (s. 6) and appeal procedures (s. 7). In addition, s. 8 imposed an obligation on 407 ETR to send a certificate signed by a senior company official, at the time of sending a s. 22 notice of failure to pay to the Registrar, which includes the following assurances:

(a) the tolls and related fees and interest that are the subject of the notice have not been paid or been deemed, by [subsection 17\(7\)](#) of the [Act](#), to have been paid;

(b) the notice of failure to pay required by [s. 16](#) of the [Act](#) in respect of such tolls, fees and interest was sent in accordance with the Act, this Regulation and the terms and conditions of any agreement between the owner and the Crown in right of Ontario; and

(c) the notice being sent under [subsection 22\(1\)](#) of the [Act](#) with the certificate is being sent in accordance with this Act, this Regulation and the terms and conditions of any agreement between the owner and the Crown in right of Ontario.

[12] In addition, the owner is to advise the Registrar if a person could not be considered to have received a failure to pay notice under [s. 16](#) of the [Act](#) (s. 9). The owner is also required to withdraw

any s. 22 notices sent to the Registrar if there was an error [page709] in the Notice of Failure to Pay or if the tolls, fees and interest have been paid or deemed to have been paid.

[13] Finally, s. 10 of the [Regulation](#) provides for periodic audits by an independent auditor. It reads as follows:

10(1) The owner shall appoint a chartered accountant or certified general accountant who is approved by the Ministry of Transportation as an independent auditor to conduct audits of the owner and to submit the reports of the audits to the owner and to the Registrar of Motor Vehicles.

(2) The independent auditor shall review the owner's compliance, with respect to the enforcement of tolls, fees and interest, with the [Act](#), this [Regulation](#), the terms and conditions of any agreement between the owner and the Crown in right of Ontario and the terms and conditions of any agreement between the owner, the dispute arbitrator and the Crown in right of Ontario.

(3) The independent auditor shall conduct random audits of the owner, at least once every three months, and shall also conduct an audit of the owner at any time if the Registrar of Motor Vehicles, believing on reasonable grounds that there may have been a lack of compliance as described in subsection

(2), requests an additional audit.

(4) Upon request, the owner shall provide the independent auditor with a certificate, and the supporting documentation, prepared under section 8.

(5) The fees and expenses of the independent auditor shall be paid by the owner.

[14] In accordance with the Temporary Suspension Agreement, 407 ETR implemented customer service and dispute resolution initiatives. In the period after the agreement was made, 407 ETR and the Ministry held meetings and corresponded on many occasions with respect to the reinstatement of licence plate denial.

[15] In 2001, the Ministry approved the appointment of Arthur Andersen LLP as the independent auditor on two conditions:

first, the accountants performing the audits would not reside on the premises of 407 ETR, and second, the particular accountants performing the audit would not be engaged in any other audit capacity with 407 ETR. These conditions were imposed because Arthur Andersen was the co-auditor of the financial statements of 407 ETR. The Ministry's approval was continued on the same conditions with respect to Deloitte & Touche LLP after it acquired Arthur Andersen LLP in June, 2002. There is no evidence that these conditions have not been fulfilled.

[16] On November 1, 2002, 407 ETR began issuing s. 16 notices of a failure to pay to customers who had not paid for the use of Highway 407. Then on August 7, 2003, 407 ETR sent ten s. 22 [page710] Notices and the certificate required by the [Regulation](#) to the Registrar and asked that the Registrar act in accordance with s. 22(4) and deny the plates. Each of the ten was among the most flagrant abusers of the open access system. Although not required to do so, 407 ETR requested that the independent auditor examine each of the ten accounts in order to ensure the required compliance with the [Act](#), the [Regulation](#) and the applicable agreements. The Registrar was informed that the auditor had done this and had concluded that 407 ETR was in compliance with its obligations. 407 ETR also undertook other quality control procedures when it first began to submit plate denial notices, such as calling each customer to ensure that he or she had actually been on Highway 407.

[17] While correspondence was received from the Deputy Minister stating that the province had not agreed to re-instate plate denial, no reply was received from the Registrar. 407 ETR continued to send s. 22 notices to the Registrar, along with audit reports. Those reports were based on an examination of each of the s. 22 notices by the auditor. In a letter to the Registrar dated November 12, 2003, Ken Walker of 407 ETR indicated that the s. 22 notices targeted the most flagrant abusers of Highway 407.

[18] On December 15, 2003, the Registrar, Frank D'Onofrio, wrote to 407 ETR, stating that it was a pre-condition to a notice being sent under s. 22(1) of the [Act](#) that the amounts in it are outstanding as of the date the notice is sent and that 407 ETR has procedurally complied with the Act and the Regulation. He went on to say:

In order to independently determine whether 407 ETR is able to meet all of the requirements of the legislation and the regulations pertaining to the plate denial process, I will shortly be initiating a review of the 407 ETR's systems and processes including the information related to the notices sent to the Registrar.

Until I am satisfied that 407 ETR has complied with all of the requirements of the [Highway 407 Act, 1998](#) and [Ontario Regulation 138/00](#), I will not be in a position to satisfy myself that I have jurisdiction to carry out the requested refusal to validate the vehicle permits of those persons pursuant [sic] to a notice sent to me under s. 22(1) of the Highway 407 Act, 1998.

[19] 407 ETR made a direct demand that the Registrar act on January 12, 2004. The Registrar refused to act in a letter dated January 19, 2004, where he stated that:

. . . prior to acting under s. 22(4) of the Highway 407 [Act](#) I believe under the circumstances that I am obliged to make reasonable inquiries to satisfy myself that the notice and requirements precedent to my suspending drivers' licences, have been complied with.
[page711]

Accordingly, I am not yet in a position to refuse to validate vehicle permits pursuant to the Highway 407 [Act](#).

[20] On the same date, the Ministry, acting through Bruce McCuaig, Assistant Deputy Minister, withdrew its approval of Deloitte & Touche as the independent auditor, stating,

We understand that Deloitte & Touche are 407 ETR's external auditors. Clearly, Deloitte & Touche is not independent as required under the [Regulation](#).

[21] 407 ETR objected and the dispute over the Ministry's decision to withdraw its approval is to be the subject of arbitration between the parties under the Ground Lease Agreement. 407 ETR has continued to use Deloitte & Touche to perform audits, based on a sampling of accounts since January 2004. The audit of 407 ETR's enforcement systems and processes is presently a process audit that involves sampling a number of items so as to provide a confidence level for the auditor that the error rate in the population does not exceed a certain error rate. In his sampling, the auditor compares the Notice of Failure to Pay and the s. 22 notice to see that it reflects the same account as that on the regular invoice. While the auditor has been using a 90 per cent confidence level and a 3 per cent error rate, the Registrar and the Ministry, in discussions with 407 ETR, have sought a higher confidence level and a lower error rate.

[22] In a chart of audits prepared by the auditor between August 2003 and July 2004, each of the audits reflected in the chart actually achieved confidence levels at or higher than 95 per cent and error rates at or lower than 1.5 per cent. In each audit, the auditor has stated:

In our opinion 407 ETR Concession Company Limited is in compliance, in all material respects, with the criteria established by the above Acts, [Regulation](#), agreements and interpretation with regard to the issuance of Section 22 Notices as at [the relevant date of the audit].

[23] Although the Registrar has the authority pursuant to [s. 10\(3\)](#) of the [Regulation](#) to request an additional independent audit on reasonable grounds, he has never exercised this power.

The Law of Mandamus

[24] 407 ETR seeks mandamus. There are four jurisdictional requirements for mandamus, as described by Laidlaw J.A. in *Karavos v. Toronto (City)*, [1947 CanLII 326 \(ON CA\)](#), [1948] 3 D.L.R. 294, [1948] O.W.N. 17 (C.A.), at p. 297 D.L.R., p. 3 (QL): [page712]

(1) The applicant must demonstrate "a clear legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced".

(2) The duty must be due and incumbent on the official at the time the relief is sought.

(3) The duty must be purely ministerial in nature -- in other words, "plainly incumbent upon an officer by operation of law or by virtue of his office, and concerning which he possesses no discretionary powers".

(4) There must be a demand and a refusal to perform the act which the applicant seeks to have ordered.

[25] In this case, the court must determine whether 407 ETR has met the requirements for mandamus and whether the court should exercise its discretion to grant the remedy sought.

(a) The alleged pre-conditions in the [Act](#)

[26] The Registrar submits that the [Act](#), and in particular, s. 13, imposes an obligation on 407 ETR to ensure a match between an invoice sent to a user and the licence plate that actually travelled on the highway, so that users are not incorrectly denied a licence plate renewal.

[27] As noted above, the purpose of the [Act](#) was to privatize the operation of Highway 407 and, given its open-access character, to provide the owner an effective method of toll collection. The legislature recognized that plate denial is a necessary feature of an open-access toll highway given the exceptionally large number of transactions, the small balances and the cost of other means of debt collection. Contrary to the submissions of the Registrar, the Act places the onus on the user to dispute the obligation to pay, rather than on the owner to prove an entitlement to pay before delivering an invoice or a s. 16 notice.

[28] [Section 13](#) of the [Act](#) imposes a mandatory obligation to pay on the highway user, who is identified either by licence plate or by transponder. Under s. 15, a toll or fee is payable on the day an invoice is mailed, delivered or sent to the person described in s. 13. The Act does not require the owner to satisfy the Registrar the user is accurately identified. Neither does the Act give the Registrar any function to perform in the operation of these sections.

[29] [Sections 16 to 25](#) of the [Act](#) describe the process by which tolls and other charges are collected and enforced. They place the [page713] onus for disputing payment and proving that the debt is not owed on the recipient of the s. 16 Notice of Failure to Pay. The Act is explicit that a recipient of the notice is expected to pay the charge (or have his or her licence plate renewal denied) even if a dispute is pending. If the dispute is successful, the Act requires 407 ETR to reimburse the recipient of the notice with interest. There is a right to appeal the determination of a

dispute to an independent dispute arbitrator appointed by the Lieutenant- Governor-in-Council (s. 18). These sections of the Act provide a comprehensive code of dispute resolution and do not involve the Registrar.

[30] The [Act](#) provides that a person may dispute the obligation to pay if the person who has received notice under s. 16 is not the person responsible for the payment of the toll under s. 13. By including this as a statutory ground of dispute, the legislature recognized there would be instances where plates are misread and notices under s. 16 are improperly delivered. The legislature has left this to be determined in the dispute resolution process described in ss. 17 to 21. The Registrar has no role in this process.

[31] Further, the dispute resolution process provides safeguards and remedies that satisfy the Registrar's concerns. These include the payment without prejudice provision in s. 17(3); the lengthy notice period of 90 days before a s. 22 notice may be sent to the Registrar (ss. 22(1) and (3)); the requirement that the owner respond within 30 days to a notice of dispute or forfeit its entitlement to be paid (s. 17(7)); and the owner's obligation under s. 22(6) to immediately notify the Registrar of payment, if a s. 22 notice has been previously sent.

[32] Under s. 22(5), the Registrar has the power to refuse to issue or renew a vehicle permit notwithstanding a dispute or appeal. The legislature could have limited or suspended the Registrar's power until the determination of a dispute or appeal. By removing the Registrar from this process and allowing him to act despite a dispute or appeal, the legislature recognized, as with erroneous invoices and s. 16 notices, that there could also be erroneous plate denials. In this event, the Registrar's only role upon being notified of an error or of payment is to rectify this by validating or issuing a vehicle permit that he had refused.

[33] The [Act](#) imposes statutory requirements on 407 ETR and on the Registrar as part of the licence plate denial scheme, but the Registrar has no authority to act as a monitor of the enforcement process. The Act prescribes a limited and strictly administrative role for the Registrar. Only s. 22, and [page714] specifically s. 22(4) and (5), prescribe the statutory duty and power of the Registrar.

[34] [Subsection 22\(4\)](#) of the [Act](#) uses mandatory language that does not afford the Registrar any discretion. Once the Registrar receives a notice under subsection (1), he or she "shall, at the next opportunity" refuse to validate a vehicle permit or to issue a vehicle permit to the person named in the notice.

[35] The golden rule of literal construction provides that a statute be interpreted in a manner consistent with the plain meaning of its terms (*R. v. McIntosh*, [1995 CanLII 124 \(SCC\)](#), [1995] 1 S.C.R. 686, [1995] S.C.J. No. 16, at para. 18). Moreover, s. 29(2) of the [Interpretation Act, R.S.O. 1990, c. I.11](#) provides:

29(2) In the English version of an [Act](#), the word "shall" shall be construed as imperative and the word "may" as permissive.

[36] We find [s. 22\(4\)](#) of the [Act](#) obliges the Registrar to act when he receives a notice under s. 22(1). However, s. 65(b) of the Act permits the Lieutenant-Governor-in-Council to pass regulations "respecting additional procedures to be used by the owner for enforcing payment of tolls on Highway 407". [Regulation 138/00](#) has added further procedures with respect to enforcement, to which we now turn.

(b) The alleged pre-conditions in the [Regulation](#)

[37] The [Regulation](#) requires 407 ETR:

(1) To provide the Registrar with a certificate of compliance with the [Act](#) prepared by a senior corporate officer (s. 8);

(2) To notify the Registrar at any time of an error in the s. 16 notice or of payment (s. 9); and

(3) To appoint an independent auditor satisfactory to the Ministry of Transportation (s. 10).

[38] The Registrar submits the [Regulation](#) was intended to reduce erroneous plate denials by giving him the right to examine the owner's compliance with the Act and Regulation. He submits that as an "end user" of the compliance certificate required by s. 8 and the audit reports required by s. 10(3), the Lieutenant-Governor-in-Council intended the Registrar to have an oversight role, in order to safeguard the public from erroneous plate denial. The Registrar submits he has a discretion to "go behind" the compliance certificate and require a "proper" audit report that virtually guarantees the recipient of the s. 16 notice is the actual user of the highway. [page715]

[39] We accept that the [Regulation](#) intends to provide greater scrutiny of the collection and enforcement process under the [Act](#), with a view to minimizing erroneous plate denial. We reject the submission that the Regulation gives the Registrar the discretions he purports to exercise.

[40] [Section 9](#) of the [Regulation](#) requires 407 ETR to advise the Registrar at any time if a person ought not to have received a notice under [s. 16](#) of the [Act](#) due to error, payment, or 407 ETR's failure to comply with the Act and Regulation. At the same time, the owner must withdraw the s. 22 notice and request that the Registrar "not take the actions he or she would otherwise be required to take under subsection 22(4)". By this section, the Lieutenant-Governor-in-Council has placed the onus on 407 ETR to withdraw an improper s. 22 notice. This is consistent with the general scheme of plate denial and consistent with the intention of the Act that the mere delivery of the s. 22 notice triggers the Registrar's duty to act. The Registrar must act unless the s. 22 notice is withdrawn. This is consistent with the mandatory language of "shall" in s. 22(4).

[41] [Section 8](#) of the [Regulation](#) requires 407 ETR to deliver to the Registrar with the s. 22 notice, a certificate from a senior corporate officer stating that the owner has complied with its duties under the [Act](#). Thus, the Regulation augments the statutory pre-condition of notice under s. 22(1). Section 8 prescribes the context of the certificate of compliance, which is to be "in a form satisfactory to the Registrar". The discretion is limited to the "form" of the certificate; the use of such language in this context reinforces the lack of any broader discretion given to the Registrar by this section. The Registrar takes no issue with the form of certificates that 407 ETR has delivered since August 7, 2003, but submits that, as the recipient of the certificate, he is entitled to have some degree of confidence that the certificate is accurate. The Regulation does not give him this authority. Instead, it contemplates in s. 10 that an independent auditor will monitor accuracy through regular and random audits, performed at least quarterly.

[42] The auditor's function under s. 10(2) is to review 407 ETR's compliance with "the enforcement of tolls, fees and interest". It follows that no audit can be conducted until the company has actually sent invoices, s. 16 notices and s. 22 notices. Clearly, the audits are to be conducted within an operational licence plate denial scheme. The content of the audit report and methodology of the auditor cannot therefore be a pre-condition to the Registrar's duty under s. 22(4) as he contends. The [Regulation](#) explicitly requires the independent auditor, not the Registrar, to perform this role. [page716]

[43] The [Regulation](#) does not give the Registrar authority to impose his standards on an independent auditor. This would defeat the intent of an independent audit. If it were intended that audit standards were to be left to the subjective discretion of individual Registrars, different language would have been used. Further, unlike s. 8(1) where the Registrar is given limited discretion to be satisfied of the form of the certificate of compliance, s. 10 has no similar language.

[44] The Registrar's duty to act is distinct from the obligation imposed by s. 10(3) of the Regulation with respect to quarterly reports from an independent auditor. The Registrar is given the authority to request at any time an additional audit if, on reasonable grounds, he believes 407 ETR is not in compliance with s. 10(2). He has never exercised this power.

(c) The Ministry of Transportation's withdrawal of its approval of the independent auditor

[45] The Registrar has a duty to refuse to issue and renew vehicle permits upon receipt of s. 22(1) notices and s. 8 certificates of compliance from 407 ETR. Did this change after January 19, 2004, when the Ministry of Transportation withdrew approval of the independent auditor?

[46] The withdrawal of approval is the subject of a dispute that will be determined by arbitration. The Registrar argues, however, that the appointment of an independent auditor is a condition precedent to the exercise of his statutory duty. Since there no longer is one, the argument runs, he is not obliged to deny plate renewal or issue. This is not an answer to the notices delivered before January 19, 2004. Notices delivered after January 19, 2004, remain valid because there is no statutory language connecting the receipt of a quarterly audit report with the Registrar's statutory duty described in s. 22(4). If 407 ETR fails to comply with the independent audit requirements, it is the province, as opposed to the Registrar, that may initiate a dispute under the Concession and Ground Lease Agreement. This is precisely what happened.

[47] Article 25 of the Highway 407 Concession and Ground Lease Agreement deals with dispute resolution. Article 25.12(a) provides:

25.12 Continuing Performance

(a) At all times, notwithstanding the existence of any dispute, the Grantor and the Concessionaire shall continue to perform their respective obligations in accordance with the provisions of this Agreement without prejudice to the right to contest, dispute and [page717] challenge the relevant matter in accordance with the provisions of this Agreement. For example, in the event of a dispute with respect to the reasonableness of any Approval by the Grantor, the Concessionaire shall comply with such decision but shall have the right to submit the question of reasonableness to the Arbitrator pursuant to this Article 25.

[48] Article 25.12 imposes a requirement of continuing performance on the parties to the Agreement. Consistent with this provision, the independent auditor has continued to deliver quarterly reports. In our view, this is contemplated by the Regulation and by the Agreement. Otherwise, there would be no audit reports pending the determination of the dispute, although the Regulation requires them.

[49] Finally, as a matter of statutory interpretation, regulations are a form of subordinate legislation. The provisions of the Regulation dealing with the independent audit do not derogate from the mandatory intention expressed by the legislature in s. 22(4) of the Act. To the extent of any conflict, the statutory provision prevails. The Registrar's interpretation of the statutory scheme and of his powers relies primarily on the alleged intention of the legislature and the Regulation. Since this intention cannot be reconciled with the explicit mandatory language of s. 22(4), his interpretation cannot prevail. (See Ruth Sullivan, Driedger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994) at pp. 185-56, 246.)

[50] In summary, we reject the Registrar's argument that the Regulation grants him a "significant role" by making him the recipient of a compliance certificate and the audit report. There is no language granting additional powers to the Registrar other than the right to be satisfied with the

form of the compliance certificate and to request an additional audit if he reasonably believes there has been a lack of compliance.

[51] The [Regulation](#) imposes additional requirements on 407 ETR that are designed to provide additional safeguards to the public, but they do not alter the statutory scheme, nor cloak the Registrar with the powers he claims to have under the Regulation. The Act and Regulation are explicit in defining only two requirements for triggering the Registrar's duty to act: delivery of a notice under s. 22(1) of the Act and delivery of a certificate from a senior corporate officer under [s. 8](#) of the Regulation.

[52] For the foregoing reasons, we find the jurisdictional requirements for mandamus as set out in para. 24 above, have been met. [page718]

(d) Does the refusal of the Registrar to act require a "standard of review" analysis?

[53] The Registrar submits that his determination of whether alleged conditions precedent to the exercise of his statutory duty have been met, is a finding of fact to which deference must be granted. We reject this submission. As far back as 1968, the Inquiry into Civil Rights conducted by former Chief Justice McRuer stated the law as follows:

Where a statute provides that a tribunal has power to make a decision, if facts, A, B and C exist, a court, on judicial review of a purported exercise of power by the tribunal, may determine whether the facts existed or not. If the court finds that the facts existed, the decision of the tribunal will be upheld as authorized. If the court finds that the facts did not exist, the decision will be quashed. The power of the tribunal to decide never arose and its purported exercise was unauthorized.

Royal Commission: Inquiry into Civil Rights (Commissioner: Honourable James Chalmers McRuer, LL.D), vol. 1 (1968) at p. 250.

[54] The question of whether pre-conditions exist before a public official must carry out an action directed by a statute is not governed by "findings of fact" made by that official. A public body's discretion does not extend to defining the limits of its own power. It is the court's function to ensure the public body does not make decisions based on a misapprehension of jurisdiction.

[55] Thus, where the Ontario Energy Board issued a gas distribution ruling, two major gas distributors appealed, alleging lack of jurisdiction in the Board. The Ontario Court of Appeal agreed with the Divisional Court that the standard of review was correctness. The Board's view of its jurisdiction to issue the disputed ruling was accorded no deference and the standard of correctness was applied. *Enbridge Gas Distribution Inc. v. Ontario Energy Board* (2005), [2005 CanLII 250 \(ON CA\)](#), 74 O.R. (3d) 147, [2005] O.J. No. 33 (C.A.).

[56] The law does not permit the Registrar to ascribe to himself certain discretionary powers and then to conduct an analysis of the pragmatic and functional approach to shield his action from judicial scrutiny. To describe his actions as "findings of fact" adds nothing. The pragmatic and functional analysis is never engaged.

Should the Court Exercise its Residual Discretion and Refuse Mandamus?

[57] The Registrar is correct in submitting the court has a residual discretion to refuse mandamus. [Judicial Review Procedure Act, R.S.O. 1990, c. J.1, s. 2\(1\)](#). [page719]

[58] In exercising that discretion, the court can decide whether, and what sort of, a remedy should be granted. But the court does not, any more than the government, have the power to suspend the operation of a public statute that is fully enforced by operation of law. *Algonquin Wildlands*

League v. Ontario (Minister of Natural Resources), [1998] O.J. No. 419, 110 O.A.C. 201 (Div. Ct.), varied on other points in [1998 CanLII 5756 \(ON CA\)](#), [1998] O.J. No. 4331, 117 O.A.C. 174 (C.A.).

[59] The Registrar further submits the court may consider:

- (a) the existence of alternative remedies;
- (b) the public interest in good government;
- (c) the balance of convenience; and
- (d) the potential consequences of the order.

The Registrar derives these principles from a reading of *Apotex Inc. v. Canada (Attorney General)*, [1993 CanLII 3004 \(FCA\)](#), [1993] F.C.J. No. 1098, [1994] 1 F.C. 742 (C.A.), *affd* [1994 CanLII 47 \(SCC\)](#), [1994] 3 S.C.R. 1100, [1994] S.C.J. No. 113. While the above categories may not be set out in *Apotex* exactly as submitted by the Registrar, we are content to use them for purposes of our analysis.

(a) The existence of alternative remedies

[60] The Registrar submits the owner can achieve collection of tolls by other means, i.e., collection agencies or court proceedings. We reject this submission. The use of collection agencies would result in a significant percentage loss of tolls collected; we take judicial notice of the fact that collection agencies seldom, if ever, act without fee. Court proceedings would choke the court system, particularly Small Claims Court. Between November 1, 2002 and June 30, 2004, 531,350 s. 16 notices were issued. It does not take a febrile imagination to conclude court action is not a useful alternative.

(b) Public interest in good government

[61] The Registrar submits the public interest is not advanced by allowing 407 ETR to "wrongly place individuals into plate denial". We reject the suggestion that the owner is "allowed" to wrongly place individuals into plate denial. The Act and Regulation recognize there will inevitably be errors underlying the issue of a certain number of toll notices. In its wisdom, the government has placed the onus of disputing the toll notices on the recipient of the notice, with the penalty of plate denial [page 720] applied until the dispute process is complete. We find this process is in the public interest for two reasons: it provides an effective method of dealing with scofflaws who refuse to pay their share and also provides a dispute mechanism for those tolls imposed in error.

[62] The residual discretion to refuse mandamus is an answer to the Registrar's in *terrore* submission that, were we to accept the owner's arguments, the Registrar would be forced into plate denial, even where the owner had flagrantly ignored the requirements of the Act and Regulation. Were such to happen, the residual discretion is available to the court to respond by refusing mandamus in the name of the public interest and good government.

(c) The balance of convenience

[63] The Registrar made no submissions on this head. Since we take the view the Registrar had no discretion to refuse plate denial, the balance of convenience does not involve the owner and the plate holders, as alleged by the Registrar. If the balance of convenience has any application, which we doubt, it would be between the Registrar and the owner. The balance of convenience clearly favours the owner.

(d) The potential consequences of the order

[64] The Registrar made no submissions on this head. We find the potential consequences of the order are those envisaged by the legislature when it passed the Act and Regulation -- that is, an effective method by which to collect the tolls from users unwilling to pay and a dispute mechanism to relieve from payment those tolls issued in error.

[65] For the foregoing reasons, we order as follows:

We order the Registrar to comply with his statutory obligation to refuse to validate or issue vehicle permits for those persons, as listed in the Revised Schedule "A" to the Notice of Application, who have failed to pay tolls and administrative fees owed to 407 ETR and with respect to whom a s. 22 Notice and Certificate under the [Act](#) have been delivered to the Registrar.

[66] The parties have 30 days to make brief written submissions as to costs.

Application granted.

Tab 146

Quong v. Pong, 1925 CanLII 11 (ON CA)

Source:	Court of Appeal for Ontario
Date:	1925-03-06
Other citations:	56 OLR 616 — [1925] 2 DLR 1192
Citation:	Quong v. Pong, 1925 CanLII 11 (ON CA), < https://canlii.ca/t/1vnx9 >, retrieved on 2026-03-24

Ontario Court of Appeals
Quong v. Pong
Date: 1925-03-06

E.F. Raney, for the appellants.

Norman Sommerville, K.C., for the defendant Pong, respondent.

M. Grant, for the defendant Thomson, respondent.

[1] By consent of counsel, the appeal was heard upon the merits of the action, treating the motion before MOWAT, J., as a motion for judgment.

[2] March 6. The judgment of the Court was read by MIDDLETON, J.A.:—The facts are simple. Thomson is the owner of premises on Spadina avenue, Toronto, occupied or used as a Chinese laundry. The plaintiff Lum Quong and the defendant Pong were members of a firm carrying on the laundry business. There was a third partner in the firm, but he does not appear to be a factor of importance. Thomson leased the premises to Pong in his own name for a term of three years, from the 1st March, 1916. The partnership was dissolved before the expiry of this lease, on the 19th June, 1918. Pong thereupon acquired a lease of the property in his own name for a period of five years commencing at the expiry of the first term. Litigation followed. The action was tried before the late Judge Winchester in the County Court of the County of York, and, among other things, he directed that Pong should assign the lease to Quong and his co-partner in consideration of \$600 to be paid to him. The lease was accordingly assigned, and in and by the assignment it is provided that the assignees “may hold and enjoy the premises for the residue of the term granted

by such lease and for a renewal thereof (if any) for their own use and benefit without any interference of the assignor.” Notwithstanding this, before the expiry of this second lease, which did not contain any provision for renewal, Pong procured from Thomson a further lease of the premises for six years from the 1st March, 1924, being the expiry of the second term, and the defendant Thomson is now proceeding to evict Quong with a view to Pong entering under this new lease. The plaintiffs are desirous of continuing the laundry business in the same premises and would suffer a substantial loss if Pong could obtain possession of the premises in question.

[3] The result of the rivalry between these parties has been to enure to the benefit of the landlord, for the new lease is at an increased rental, but the plaintiffs are willing to assume the burden of this new lease, and the landlord stands indifferent and is ready to accept either faction as tenant if protected from claims by the other.

[4] The learned Judge, as we understand it, took the view that there was nothing to prevent the defendant obtaining a lease in his own name for his own benefit, and that the plaintiffs, not having been provident enough to arrange for a renewal, and, in fact, having at one stage, long before their lease had expired, intimated that they would not pay an increased rental, had no rights in the premises.

[5] With this decision we cannot agree, as we think that when Pong received his \$600 for an assignment of the current term and “for a renewal thereof (if any)” he precluded himself from entering into competition with the assignees in seeking a renewal of the lease. If it had not been for this provision the case would not have been brought within the provision of the equitable principle of *Keech v. Sandford* (1726), 2 W. & T.L.C., 8th ed., 706. In that well-known case a term had descended to an infant. The landlord refused to renew, not desiring to have an infant tenant. The trustee then took a renewal for his own benefit. He acted without fraud, but Lord Chancellor King said he “should rather have let it run out than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who may not have the lease; but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease on refusal to renew to *cestui que use*.”

[6] It is true that here there was not an express trust, but there was a trust implied, raised and created, by the act of the parties and by implication of law. When Pong, for good consideration, sold the right of renewal, he precluded himself from seeking to renew the lease for his own benefit.

[7] The parties well knew that there was not in strictness any right of renewal, and what was meant by this expression when used in the assignment was clearly the probability that the landlord would grant a new lease to the tenant in preference to a stranger.

[8] The principle is of wide and general application. As said by Parker, J., in *Griffith v. Owens*, [1907] 1 Ch. 195, at p. 205, "I see no reason why, if there existed on the part of the purchaser the necessary fiduciary relationship or duty, the principle of *Keech v. Sandford* should not be applied whether the lease were renewable of right or not renewable at all."

[9] The same result is reached by a slightly different process of reasoning. Pong sold the renewal of the lease, having at that time no title to it. When a new lease was granted, that went to feed his title, and so he became a trustee for the plaintiffs.

[10] The appeal should be allowed and the plaintiffs should have judgment directing that the lease he assigned by Pong to the plaintiffs, who should covenant to indemnify him against the lessee's covenants contained in the new lease. Pong should be ordered to pay the costs of the action and of the appeal, both of the plaintiffs and of his co-defendant Thomson.

Judgment for the plaintiffs.

Tab 147

Pong v. Quong, 1926 CanLII 6 (SCC), [1926] SCR 651

Source: Supreme Court of Canada
Date: 1926-10-05
Citation: Pong v. Quong, 1926 CanLII 6 (SCC), [1926] SCR 651,
<<https://canlii.ca/t/1ttk6>>, retrieved on 2026-03-24

Supreme Court of Canada
Pong v. Quong, [1926] S.C.R. 651
Date: 1926-10-05

Jack Pong (*Defendant*) *Appellant*;

and

Lum Quong and Lum Chong (*Plaintiffs*) *Respondents*.

1926: October 5.

Present: Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Appeal to Supreme Court of Canada—Jurisdiction—Value of matter in controversy—Parties each claiming right to lease of premises used for laundry—Elements to be considered in estimating value.

On a motion to affirm jurisdiction in the Supreme Court of Canada to entertain an appeal from a judgment of the Appellate Division of the Supreme Court of Ontario, deciding which party was entitled to a certain lease of premises used for a laundry business, the Registrar affirmed jurisdiction, taking into account, in estimating the value of the matter in controversy, the exceptional value of the premises by reason of the existing privilege of running a laundry business thereon; and his order was affirmed by the court. In such a case the question to be considered, with regard to jurisdiction, is the value of the subject matter as between the parties.

MOTION by respondents by way of appeal from the Registrar's order affirming jurisdiction.

The Appellate Division of the Supreme Court of Ontario, reversing the order of Mowat J., had declared that the defendant Pong was trustee for the plaintiffs of a certain lease of premises used in the carrying on of a Chinese laundry, and ordered that the defendant

Pong assign the lease to the plaintiffs and that the plaintiffs should covenant in the assignment to indemnify the defendant against the lessee's covenants contained in the lease^[1].

The defendant Pong appealed to the Supreme Court of Canada, and moved before the Registrar of that Court for an order affirming its jurisdiction to hear his appeal. The Registrar's decision, delivered 21st June, 1926, was as follows:

The sole question for determination on this motion to affirm jurisdiction, is with respect to the elements which can be taken into consideration when estimating the value of a leasehold property in view of its commercial possibilities.

In Toronto premises can not be used for the purpose of carrying on a Chinese laundry except with the approval of the ratepayers in the

[Page 652]

neighbourhood. The premises in question have received that approval. A laundry business has been established there for many years. The premises therefore have an exceptional value for this special purpose. I have no doubt on the evidence, that without this privilege, the property would not have a leasehold value sufficient to give the court jurisdiction, but with the privilege, I think the amount in controversy is more than \$2,000. I therefore affirm the jurisdiction of the court; costs in the cause.

If I am wrong in the above expressed view, there is nothing to prevent the respondent, when the case comes to be heard on the merits, from moving to quash for want of jurisdiction. No order made by me can confer jurisdiction, if otherwise there is none.

The respondents moved by way of appeal from the Registrar's order affirming jurisdiction, on the ground that the sole question at issue was the right to possession of the premises under the lease in question, and that any rights conferred upon the occupant of the premises by virtue of a license from the city of Toronto to conduct a laundry business were not appurtenant to the said lease as between the parties to this appeal.

After argument, judgment was rendered dismissing the motion with costs, the Chief Justice stating that the members of the court were all agreed that the proper question to be considered was the value of the property as between the parties, and it was impossible to say that the Registrar had erred in his appreciation of the evidence.

Motion dismissed with costs.

Fraser Raney for the motion.

Norman Sommerville K.C. contra.

^[1] (1925) 1925 CanLII 11 (ON CA), 56 Ont. L.R. 616.

Tab 148

Pong v. Quong, 1927 CanLII 2 (SCC), [1927] SCR 271

Source:	Supreme Court of Canada
Date:	1927-02-24
Other citation:	[1927] 3 DLR 129
Citation:	Pong v. Quong, 1927 CanLII 2 (SCC), [1927] SCR 271, < https://canlii.ca/t/1ttkf >, retrieved on 2026-03-24

Supreme Court of Canada
Pong v. Quong, [1927] S.C.R. 271
Date: 1927-02-24

Jack Pong (*Defendant*) *Appellant*;

and

Lum Quong and Lum Chong (*Plaintiffs*) *Respondents*;

and

Mrs. W.J. Thomson (*Defendant*) *Respondent*.

1927: February 23, 24.

Present: Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Trust—Procuring of new lease by former partner—Assignment thereof to those continuing the business on the premises—Covenants in assignment—Rights between the parties as to acquisition of further lease—Implied trust—Question of estoppel by res judicata—Effect of judgment in overholding tenants proceedings—Jurisdiction of judge in such proceedings—The Landlord and Tenant Act, R.S.O., 1914, c.155.

P. and others had, as partners, conducted a laundry business on leased premises. The partnership was dissolved, the others continuing the business on the premises. P. procured from the landlord a new lease dating from the expiry of the existing one. As a result of litigation, P., for a certain sum, assigned to the others the new lease, covenanting that the assignees might “hold and enjoy the said premises for the residue of the term granted by the said lease and every renewal thereof (if any) for their own use and benefit, without any interruption of the assignor.” The lease had no provision for renewal. Before its expiry P. procured from the landlord a further lease dated from the expiry of the

existing one. Plaintiffs, the aforesaid assignees or their successors in interest, sued for a declaration that P., the defendant, was a trustee of the lease for them, and for other relief.

Held, affirming judgment of the Appellate Division, Ont. ([1925 CanLII 11 \(ON CA\)](#), 56 Ont. L.R. 616) that P. held the lease as trustee for plaintiffs; his obtaining it was a breach of good faith and contravened an implied obligation with regard to renewals; the allusion to renewal in the assignment must be taken to refer to the reasonable expectation of the tenants in possession to obtain a renewal; *Griffith v. Owen* ([1907] 1 Ch. 195) applied.

Held further, that plaintiffs were not estopped by *res judicata* by reason of certain overholding tenants proceedings (under *The Landlord and Tenant Act*, R.S.O., 1914, c. 155) and judgment therein; in such proceedings the judge had no jurisdiction to adjudicate as to the relations between Pong and plaintiffs.

APPEAL by the defendant Pong from the judgment of the Appellate Division of the Supreme Court of Ontario^[1] which (reversing order of Mowat J.) declared that said

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defendant was trustee for the plaintiffs of a certain lease, and ordered that he assign it to the plaintiffs.

The plaintiff Quong and the defendant Pong were members of a firm carrying on a laundry business on premises leased from the defendant Mrs. Thomson. Mrs. Thomson had leased the premises to Pong in his own name for a term of three years from 1st March, 1916. Before the expiry of this lease, the partnership was dissolved (in November, 1917). Pong, in June, 1918, acquired a lease of the property in his own name for a period of five years, commencing on 1st March, 1919 (at the expiry of the first term). Litigation followed. A judgment of Winchester Co. C.J. contained an alternative direction that Pong should assign the lease to Quong and his co-partner in consideration of \$600 to be paid to him. The lease was accordingly assigned, and in the assignment it was provided that the assignees might

hold and enjoy the said premises for the residue of the term granted by the said lease and every renewal thereof (if any) for their own use and benefit, without any interruption of the assignor.

The lease did not contain any provision for renewal. Before the expiry of the lease, Pong procured from Mrs. Thomson a further lease of the premises for six years from 1st March, 1924 (the date of expiry of the existing lease). The plaintiffs, Quong and his co-partner Chong (who was the successor in interest of Quong's former co-partner Lum Lin), remained in possession after 1st March, 1924, being willing to assume the burden of the new lease (which was at an increased rental), and claiming the right to the benefit of it. They continued to pay rent which was taken by Mrs. Thomson without prejudice. The latter took proceedings under the overholding tenants provisions of *The Landlord and Tenant Act*, R.S.O., 1914, c. 155. The proceedings came on before His Honour, Judge Denton, of the County Court of the County of York. It was apparently agreed that the

hearing should proceed on the basis of the assumption that rent from the plaintiffs had not been accepted by Mrs. Thomson; in other words, that, if Quong and Chong were not entitled to the benefit of the lease made to Pong, she should not be prejudiced in the proceedings by having taken rent from Quong and Chong. It appeared that the real dispute was between Pong on the one hand, and Quong

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and Chong on the other, as to the right to the lease. There was some discussion, and, apparently, misunderstanding, as to the question of jurisdiction, and consent in regard thereto, which is referred to in the judgment now reported.

His Honour, Judge Denton, held that the lease acquired by Pong was not a renewal, in any sense, of the former lease, and made an order for possession against the present plaintiffs. The latter appealed to the Appellate Division of the Supreme Court of Ontario, which dismissed the appeal without written reasons. See the reference to this appeal in the judgment now reported.

The plaintiffs then brought the present action in the Supreme Court of Ontario, claiming a declaration that the defendant Pong was a trustee for the plaintiffs of the lease, and that it should be assigned to them, and for an injunction restraining him from assigning the lease to any person other than the plaintiffs, and for an injunction restraining the defendant Mrs. Thomson from evicting them.

The plaintiffs' motion for an interlocutory injunction was dismissed by Mowat J. The plaintiffs appealed to the Appellate Division of the Supreme Court of Ontario. By consent of counsel, the motion was turned into a motion for judgment and the case was heard upon the merits. The Appellate Division allowed the appeal, holding that the defendant Pong was a trustee of the lease for the plaintiffs, and that the lease should be assigned by Pong to the plaintiffs, who should covenant to indemnify him against the lessee's covenants contained therein^[2].

The defendant Pong appealed to the Supreme Court of Canada. His two main grounds of appeal were:² That plaintiffs were estopped by *res judicata* by reason of the overholding tenants proceedings above mentioned and the judgment of Denton Co. C.J. therein, sustained by the Appellate Division; and (2) That, on the merits, the Appellate Division was wrong in holding that Pong should be deemed a trustee of the lease for the plaintiffs.

Norman Sommerville K.C. for the appellant.

Fraser Raney for the plaintiffs, respondents.

No one appeared for the defendant (respondent) Mrs. Thomson.

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At the conclusion of the argument for the appellant, the Chief Justice orally delivered the judgment of the court as follows:

“It is not necessary to call on you, Mr. Raney.

“We have all had an opportunity of considering this case over night, and the position seems to us quite clear.

“The first ground of appeal is that the respondent is estopped from bringing this action by reason of the judgment given in the overholding tenancy proceedings by His Honour, Judge Denton, nominally affirmed on appeal. I say “nominally” for reasons presently to appear.

“Judge Denton’s only jurisdiction under the overholding tenants provisions was to determine the right of the landlord to possession. He himself states that in order that he should proceed it was necessary that there must be an admission before him that the rent had not been paid. His jurisdiction was to determine whether or not the landlord was entitled to possession. It was apparently desired that he should deal with issues as to the relationship of Pong and Quong, and determine the rights between them. Mr. Raney consented in some sort of form to that being done, but it would appear that his consent was given on the understanding and basis that the judge should deal with the matter as one within his jurisdiction under the overholding tenants provisions. It is perfectly manifest that he had no jurisdiction to do so—no jurisdiction subject to appeal; that he could entertain such collateral matter only either as *persona designata* or as arbitrator. That being so, the Appellate Division, when the case came before it on appeal from Judge Denton, must have taken the view, as Mr. Raney states, and as the subsequent proceedings bear out, that the judge had assumed a jurisdiction he did not possess under the overholding tenants provisions, and that as to the relations between Pong and Quong the matter was *coram non jndice*. Mr. Raney’s consent had been given subject to a condition which could not be fulfilled; in other words, he consented upon the condition that he would retain an effective right of appeal. On the appeal in the present action, the Appellate Division must have taken the view that the former proceeding was not binding as to the obligations of Pong; that the only thing judici-

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ally determined by it was the landlord’s right to possession, the order in this respect, assuming non-payment of rent, being within the jurisdiction of the judge who made it. Taking that view,—and they of course knew what had been their appreciation of the former proceeding—it was open to the Appellate Division to deal with the appeal from the judgment of Mowat J. in this action, as they did.

“The other branch of the appeal is directed to the merits. It is claimed by the plaintiffs that the lease obtained by Pong is held by him as trustee for them. The Appellate Division gave effect to that contention, and, in our opinion, upon the whole case, rightly gave effect to it. It is manifest to us that the transaction carried out by Pong was in breach of good faith and contravened his obligation with regard to renewals, which was implied in the whole arrangement between him and Quong. While there is no express right of renewal in the lease, the assignment of it does deal with renewal, and the allusion must be taken to refer to the reasonable expectation of the tenant in possession to obtain a renewal. The case is fairly within the principle stated by Mr. Justice Parker in *Griffith v. Owen*. That principle was properly applied in the judgment now appealed from. That judgment is affirmed, and the appeal is dismissed with costs.”

Appeal dismissed with costs.

Solicitors for the appellant: Norman Sommerville & Co.

Solicitors for the respondents, plaintiffs: Raney & Raney.

Solicitors for the respondent, Mrs. Thomson: Grant & Grant.

[1] (1925) 1925 CanLII 11 (ON CA), 56 Ont. L.R. 616.

[2] (1925) 1925 CanLII 11 (ON CA), 56 Ont. L.R. 616.

Tab 149

Turigan v. Alberta, 1988 ABCA 333 (CanLII)

Source: Court of Appeal of Alberta
Date: 1988-10-03
File number: 8703-0264-AC
Other citations: 53 DLR (4th) 321 — [1988] 6 WWR 673 —
62 Alta LR (2d) 1 — 90 AR 118 — 45 CCC (3d) 136 —
35 CPC (2d) 46
Citation: Turigan v. Alberta, 1988 ABCA 333 (CanLII),
<<https://canlii.ca/t/2dmwx>>, retrieved on 2026-03-24

In the Court of Appeal of Alberta

Citation: Turigan v. Alberta, 1988 ABCA 333

Date: 19881003
Docket: 8703-0264-AC
Registry: Edmonton

Between:

**Ricky William Turigan and Ricky William Turigan,
as Representative of the class of persons convicted under s. 238(3)
(rep. & sub. 1974-75-76, C93 s. 19(2) *Criminal Code*)**

Plaintiff
(Appellant)

- and -

Her Majesty the Queen in Right of the Province of Alberta

Defendant
(Respondent)

The Court:

**The Honourable Mr. Justice Harradence
The Honourable Mr. Justice Stevenson**

**Reasons for Judgment of The Honourable Mr. Justice Harradence
Reasons for Judgment of The Honourable Mr. Justice Stevenson
Concurred in by The Honourable Mr. Justice Foisy**

**APPEAL FROM THE JUDGMENT OF THE HONOURABLE MR. JUSTICE F.R.
MacNAUGHTON DATED THE 27th DAY OF JANUARY, 1987**

COUNSEL:

R.A. McLennan, Esq., Q.C, for the Appellant

D.W. Kinloch, Esq., for the Respondent

**REASONS FOR JUDGMENT
OF THE HONOURABLE MR. JUSTICE HARRADENCE**

[1] This is an appeal from a decision on a preliminary point of law. A representative action had been commenced by the Appellant, Ricky William Turigan, on behalf of the class of persons convicted under [Section 238\(3\)](#) of the [Criminal Code](#) (rep. & sub. 1974-75-76, C. 93, s. 19(2)) against Her Majesty the Queen in Right of the Province of Alberta (the Crown), the Attorney General of Alberta, the Solicitor General for Alberta, and the Provincial Treasurer of Alberta. The statement of claim was struck out in respect to the latter three Defendants, leaving the Crown as the sole Defendant. The Appellant was granted leave pursuant to R. 220 of the *Alberta Rules of Court* for determination of a preliminary point of law. The agreed statement of facts for the R. 220 application was:

“1. On or about the 15th day of April, A.D. 1980, the Plaintiff Ricky William Turigan was convicted under s. 238(3) (rep. & sub. 1974-75-76 C. 93 s.19(2)) [Criminal Code](#), and fined Two Hundred and Fifty (\$250.00) Dollars, which fine was paid by TURIGAN to the Defendant.

2. On February 3, A.D. 1981, the said s. 238(3) was declared to be *ultra vires* by the Supreme Court of Canada in R. v. Boggs (1981) [1981 CanLII 39 \(SCC\)](#), 58 CCC (2d) 7 (S.C.C.).

3. The said fine has never been returned to TURIGAN nor has said conviction been removed from the Plaintiff’s criminal record.”

The question of law for determination was phrased in the following terms:

“As a matter of law, is TURIGAN entitled to have his fine refunded by the Defendant?

The learned Judge in chambers, without providing reasons for judgment, answered this question in the negative. The same question is now before this Court.

[2] The basic issue that confronts us in this appeal involves the legal consequences attaching to a judicial pronouncement that a law is unconstitutional. What effect does the pronouncement have on rights and obligations that have arisen pursuant to that law? In the case at bar, is the Appellant entitled to the return of the fine paid as an incident of conviction under Section 238(3)? That law was declared to be unconstitutional by the Supreme Court in R. V. Boggs (1981) [1981 CanLII 39 \(SCC\)](#), 1 S.C.R. 49.

[3] The direct result of a declaration of unconstitutionality is that the impugned legislation is rendered void *ab initio*. The legislation is, and always has been, invalid and of no force or effect. The United States Supreme Court, as noted by Professor Hogg at p. 345 of his text *Constitutional Law of Canada* (2 ed., 1985), has strayed from this principle by ruling that it possesses a discretion in certain cases to make the declaration of unconstitutionality prospective only. This discretion has been primarily exercised in relation to criminal statutes, where a retroactive ruling of unconstitutionality would result in the reopening of a significant number of convictions. The Supreme Court of Canada, however, has never adopted this doctrine of “prospective overruling”. This is confirmed by the result in Reference Re Language Rights Under the Manitoba Act (1985) [1985 CanLII 33 \(SCC\)](#), 19 D.L.R. (4th) 1. In that case, the Supreme Court was forced to grapple with the consequences flowing from its declaration that “All unilingually enacted Acts of the Manitoba Legislature are, and always have been, invalid and of no force and effect” (at p. 36). Rather than simply apply the doctrine of “prospective overruling” to overcome the legal chaos that would result from a wholesale declaration of unconstitutionality, the Supreme Court chose instead to preserve the rights, obligations and other effects that accrued through past reliance on Manitoba’s unconstitutional laws. This was accomplished through the *de facto* doctrine, the *res judicata* doctrine, the doctrine of mistake of law, and where those doctrines were ineffective to preserve rights, obligations and other effects, a declaration that (at p. 29):

“... in order to uphold the rule of law, these rights, obligations and other effects have and will continue to have, the same force and effect they would have had if they had arisen under valid enactments ...”

In addition, it should be recalled that the Supreme Court temporarily validated Manitoba’s laws to allow the Manitoba Legislature sufficient time to re-enact its laws in compliance with the requirements of the constitution thereby preventing a legal vacuum in that province.

[4] In the case at bar, the declaration by the Supreme Court in Boggs that Section 238(3) is unconstitutional has the effect of nullifying that section of the [Criminal Code](#). Extreme circumstances similar to those in the Manitoba Language Reference are not present in this case. Legal chaos has not and will not result from the Supreme Court’s declaration in Boggs. The rule of law, which was the Supreme Court’s motivating force in the Manitoba Language Reference, is not threatened by the striking down of Section 238(3). Consequently, there is no need in the present case to take the exceptional steps

taken by the Supreme Court in the Manitoba Language Reference, in the result, all actions taken in pursuance of Section 238(3) have been done without legal authority.

[5] Therefore, the criminal court that convicted and fined the Appellant did so without legal authority. This result, the Appellant submits, entitles him to a return of the fine. Unfortunately, the solution is not that simple. There are three legal hurdles that must be cleared before the Appellant can successfully claim entitlement:

1. Mistake of Law - Money paid under a mistake of law is generally not recoverable. There are exceptions however.
2. *Res Judicata* - Is the Appellant's action barred by reason that as between the Appellant and the Respondent Crown, s. 238(3) must be considered to be constitutionally valid?
3. The *De Facto* Doctrine - Although the criminal court had no legal authority to convict the Appellant, did s. 238(3) nevertheless give that court sufficient colour of authority to convict? If so, then the conviction (and fine) are protected from collateral attack.

For the reasons that follow, I am of the view that the Appellant is not entitled to the recovery of his fine.

1. Recovery of Money Paid Under a Mistake of Law

[6] The Appellant clearly paid the fine as a result of a mutual mistake of law. The mistake of law was in respect to the constitutional validity of [Section 238\(3\)](#) of the [Criminal Code](#). If the mistake of law had not been made, the Appellant would not have been convicted, nor would he have paid the fine.

[7] No authority need be cited for the principle that money paid as a result of a mistake of law cannot be recovered in an action for monies had and received. This must be contrasted with money paid under a mistake of fact, which is recoverable. This distinction has been subjected to much criticism, on the basis that it is hard to differentiate mistakes of fact and law. In fact, Dickson, J. (as he then was) in Hydro Electric Commission of Township of Nepean v. Ontario Hydro (1982) [1982 CanLII 42 \(SCC\)](#), 132 D.L.R. (3d) 193 (S.C.C.) recently called for the elimination of this distinction, preferring instead to rely on principles of unjust enrichment to determine entitlement to recovery of money. However, Dickson, J. (Laskin, C.J.C. concurring) was in dissent in Nepean. The majority judgment, written by Estey, J., Martland and Lamer, JJ. concurring, upheld the distinction. In the words of Estey, J. (at p. 243):

"These authorities, both old and current, relating to the situation where mistake of law alone is present, are founded, in my respectful view, on good sense and practicality. Certainty in commerce and in public transactions such as we have here is an essential element of the well-being of the community. The narrower rule applicable to mistake of law as compared to that applicable to mistake of fact springs from the need for this security and the consequential freedom from

disruptive undoing of past concluded transactions. Mistake of fact is, of course, limited to the parties and has no *in rem* consequences; hence the more generous view. In any event, nothing has been brought to light in the review of the law by the parties on this appeal to indicate any basis for the merging of the principles applicable to the categories of mistake, and indeed the wisdom embodied in the authorities augurs for the maintenance of this ancient distinction.”

Consequently, I am bound by precedent to apply the principles relating to recovery of money paid under mistake of law.

[8] The Appellant submits that where the mistake of law is in respect to the constitutional validity of the legislation in question, the common law principles relating to recovery of money paid under mistake of law do not apply. In such cases, it is argued, the money that was paid to the government in reliance of the constitutionality of the legislation must be returned; to retain the funds would be to flout the constitution. The Appellant places the foundation for this proposition on the Supreme Court of Canada’s judgment in Amax Potash v. Government of Saskatchewan [1976 CanLII 15 \(SCC\)](#), [1976] 6 W.W.R. 61. Further reliance is placed in the British Columbia Court of Appeal’s judgment in Air Canada v. The Queen in Right of British Columbia [1986 CanLII 1118 \(BC CA\)](#), [1986] 5 W.W.R. 385. In my opinion, Amax Potash cannot be interpreted as supporting the proposition submitted by the Appellant. Consequently, inasmuch as the Air Canada decision interprets Amax Potash in a manner similar to that put forth by the Appellant, it cannot provide further support for the Appellant’s proposition. I now propose to examine both of these cases.

[9] At issue in Amax Potash was the constitutionality of certain taxes imposed on Saskatchewan potash producers. Amax Potash was one of several potash producers who objected to the taxing provisions and therefore commenced an action to test their constitutionality. In their statement of claim, the potash producers asked for a declaration that all monies paid under the provisions, if found to be *ultra vires* the provincial Legislature, be returned. The Saskatchewan government, in its statement of defence, submitted that the taxing provisions were *intra vires* the provincial Legislature, and even if they were not, the statement of claim disclosed no cause of action because Section 5(7) of *The Proceedings Against The Crown Act*, [R.S.S. 1965, c. 87](#) provided a complete defence. Section 5(7) purported to bar actions against the government for recovery of monies paid notwithstanding that the taxing provisions under which the monies were levied had been declared *ultra vires*. The potash producers applied for an interim preservation order in respect of monies paid to the government under the taxing provisions in dispute. The interlocutory application was refused at first instance in chambers. The refusal was upheld in the Saskatchewan Court of Appeal (reported [1976] 1 H.W.R. 569). On further appeal to the Supreme Court, leave was granted to challenge the constitutionality of Section 5(7) of *The Proceedings Against The Crown Act* itself. Although the Supreme Court upheld the refusal of the interim preservation order, the Court did declare Section 5(7) to be *ultra vires* the Province of Saskatchewan.

[10] In finding Section 5(7) to be constitutionally offensive. Dickson. J. (as he then was), writing for a unanimous Court, was repulsed by the notion that a legislature could insulate itself from the effect of its own *ultra vires* actions merely by legislatively extending Crown immunity. The gist of Dickson. J.'s reasoning can be found in the following paragraph (at p. 73):

“Section 5(7) of The Proceedings against the Crown Act, in my opinion, has much broader implications than mere Crown immunity. In the present context, it directly concerns the right to tax. It affects, therefore, the division of powers under the B.N.A. Act. It also brings into question the right of a province, or the federal Parliament for that matter, to act in violation of the Canadian Constitution. Since it is manifest that if either the federal Parliament or a provincial legislature can tax beyond the limit of its powers, and by prior or ex post facto legislation give itself immunity from such illegal act, it could readily place itself in the same position as if the act had been done within proper constitutional limits. To allow moneys collected under compulsion, pursuant to an *ultra vires* statute, to be retained would be tantamount to allowing the provincial legislature to do indirectly what it could not do directly, and by covert means to impose illegal burdens.”

At p. 74, his Lordship summarizes the governing principle:

“The principle governing this appeal can be shortly and simply expressed in these terms: if a statute is found to be *ultra vires* the legislature which enacted it, legislation which would have the effect of attaching legal consequences to acts done pursuant to that invalid law must equally be *ultra vires* because it relates to the same subject matter as that which was involved in the prior legislation. If a state cannot take by unconstitutional means, it cannot retain by unconstitutional means.”

[11] It should be emphasized that the proceedings in Amax Potash were interlocutory. The Supreme Court did not rule on the constitutionality of the taxing provisions in dispute. It therefore did not decide whether the potash producers would be entitled to the return of taxes paid should the taxing provisions be found to be unconstitutional. The Court merely examined the constitutional propriety of the bar against recovery of those taxes contained in Section 5(7) of *The Proceedings Against the Crown Act*.

[12] However, the trial court as well as arguably a majority of the British Columbia Court of Appeal in the Ait Canada case, [1986] 5 W.W.R. at p. 385, interpreted the Amax Potash decision as deciding that any monies paid to government under legislation subsequently declared to be unconstitutional cannot be retained by the government. With respect, and for the reasons set out above as well as those that follow. I cannot agree.

[13] Air Canada concerned, *inter alia*, a British Columbia taxing statute that was found to be unconstitutional. The plaintiff airlines sued for judgment against the defendant government claiming the return of the taxes paid under the unconstitutional taxing scheme. There existed two statutory bars against recovery similar in effect to the one in Amax Potash that was found to be *ultra vires*. Both the trial court and the Court of Appeal quickly disposed of the statutory bars by applying the governing principle in Amax Potash.

The courts were then left with the question of whether the plaintiff airlines were entitled to the return of their funds.

[14] The trial judge gave judgment to the plaintiffs. In his opinion (reported at [1984 CanLII 686 \(BC SC\)](#), [1984] 3 W.W.R. 353), the decision in Amax Potash “foreclosed” all argument on mistake of law as a bar to recovery. In other words, the trial judge accepted the argument that the appellant in the case at bar submitted, namely that the government must return all monies paid under unconstitutional legislation for to retain the money would be to disregard the constitution.

[15] In the Court of Appeal, three judgments were delivered with three separate conclusions as to the issue of entitlement to the return of taxes. Hinkson, J.A. concluded that the plaintiffs were entitled to repayment, not on the basis of common law principles relating to payments under mistake of law which if applied precluded recovery, but rather on his interpretation of the Amax Potash case. In his opinion, a government cannot assert any claim to monies paid under unconstitutional legislation, whether that claim is based on a statutory bar to recovery (as was the case in Amax Potash) or based on a common law doctrine such as mistake of law. To uphold a claim would be tantamount to disregarding the “paramount concern” mentioned by Dickson, J. in Amax Potash, namely the preservation of the Constitution.

[16] Esson, J.A. came to the opposite conclusion. In his view, Amax Potash should not be interpreted as widely as was done by both the trial judge and Hinkson, J.A. Amax Potash merely declared offensive attempts by the legislature to protect itself from the consequences of unconstitutional legislation. The case did not go so far as to remove the application of general principles of law relating to the recovery of money paid under a mistake of law. After applying those principles to the facts before him, Esson, J.A. concluded that the plaintiffs were not entitled to repayment.

[17] The third judgment was delivered by Lambert, J.A. He agreed with Esson, J.A. that on a strict reading of Amax Potash, it does not establish the proposition that government must return monies levied under unconstitutional legislation. However, this did not prevent Lambert, J.A. from accepting the proposition. In his opinion, there must be an exception to the general mistake of law bar, where the mistake of law in question was the constitutionality of a taxing statute, “otherwise the Constitution would be flouted in the result” (at p. 409). His Lordship reasoned further that even if no such exception existed, money paid under an unconstitutional taxing statute should be considered to be money paid under practical compulsion, which is a recognized exception to the mistake of law bar.

[18] In my view, and with respect to those who disagree, the judgment of Esson, J.A. is to be preferred in regard to the effect that the Amax Potash decision had on the common law principles relating to recovery of money paid under mistake of law. In my view, Dickson, J. in Amax Potash did not decide that money paid to a government under

unconstitutional legislation must in all cases be returned. That issue was not before him. What was before his Lordship was the constitutional propriety of attempts by government to insulate itself from repayment by extending Crown immunity from suit to cover actions for the recovery of taxes paid under unconstitutional taxing statutes. Dickson, J. does not remove the applicability of the general common law principles respecting payments made under mistake of law.

[19] In the result, the issue of entitlement to repayment of funds paid under unconstitutional legislation is still governed by the common law principles relating to recovery of money paid under mistake of law. Furthermore, no new exception to the mistake of law bar is created by the Amax Potash decision. With the greatest respect, I am unable to agree with the reasoning of Lambert, J.A. that the Constitution would be flouted if government was able to retain the monies through application of the mistake of law doctrine. In such cases, it is not the violation of the constitution which is providing the basis for the government's defence. Rather, it is the application of principles of fairness and equity that have evolved through the centuries which courts have seen fit to apply in situations where one person has paid another while operating under a mistake of law.

[20] I am supported in my conclusion by the Supreme Court's judgment in the Manitoba Language Reference case, *supra*. In that case it should be recalled that the Supreme Court had declared all of Manitoba's statutes and regulations to be unconstitutional and therefore of no force or effect because of the provincial Legislature's failure to enact the legislation in both English and French. This created a problem for the Supreme Court in that rights, obligations and other effects that had arisen under the invalid legislation could be challenged on the ground that the legislation was unconstitutional. Legal chaos would result. As a partial solution, the Supreme Court relied on the doctrine of mistake of law to provide some relief from the aforementioned consequences. As was stated by the Court (at p. 29):

"It should be noted that there are other doctrines which might provide relief from the consequences of the invalidity of Manitoba's laws. ... The doctrine of mistake of law might, in some circumstances, preclude recovery of moneys paid under invalid laws ..."

From this it can be inferred that the Supreme Court was of the view that the principles relating to recovery of money paid under a mistake of law govern even where the mistake of law in question is the constitutional validity of the particular legislation in issue.

[21] Finally, it should be noted that leave has been granted by the Supreme Court in the Air Canada case: [1987] 1 W.W.R. lxviii.

[22] Consequently, the fact that [Section 238\(3\)](#) of the [Criminal Code](#) was declared to be unconstitutional does not by itself entitle the Appellant to the return of his fine. Reference must be made to the principles governing recovery of money paid under mistake of law. What, then, are these principles? The Supreme Court of Canada recently

had the opportunity to examine this subject in Nepean, *supra*. In Nepean, the plaintiff municipality (Nepean) had commenced an action for the repayment of certain surcharges which it argued were beyond the legislative jurisdiction of Ontario Hydro to levy. The Supreme Court concluded that Ontario Hydro did exceed its jurisdiction, therefore the payments were made by Nepean under a mutual mistake of law. As a result, the recovery by Nepean of those payments was governed by the principles relating to recovery of money paid under mistake of law.

[23] After thoroughly canvassing the authorities and tracing the historical development of the doctrine of payment under mistake of law, Estey, J., writing for the majority, summarized the present state of the law in the following terms (at p. 242):

“Mistake of law ‘without more’ and without ‘something more in addition’ (in the words of Lord Denning in *Kiriri*, *supra*, at p. 204) may be an allusion to the need to find compulsion or illegality to introduce a right of recovery on the happening of mutual mistake of law. In compulsion, recovery is allowed as the payment is not made voluntarily and there is no reason to suppose, only because of the fact of payment, that the plaintiff had surrendered his right to recover his moneys paid under practical compulsion. In the case of illegal transactions, the concept of *in pari delicto* is introduced to determine entitlement to recovery. In the absence of either of these elements, the ‘something more in addition to a mistake of law’ is missing, and the rule applicable on mutual mistake of law operates to deny recovery.”

The following principles regarding recovery of monies paid under mistake of law can be extracted from the majority judgment in Nepean:

1. The general rule is that “without more”, money paid under a mistake of law is not recoverable.
2. “Something more” has been found to exist where:
 - i. the money was paid under compulsion; or
 - ii. the money was paid in the context of an illegal transaction and the parties were not *in pari delicto*.

Under either of these two branches, the money is recoverable notwithstanding that it may in addition have been paid under a mistake of law.

3. Under the first branch of recovery, the compulsion need only be “practical” compulsion. Estey, J. refers to Eadie v. Township of Brantford (1967) 1967 CanLII 13 (SCC), 63 D.L.R. (2d) 561 (S.C.C.), where at p. 571 Mr. Justice Spence discussed the concept of “practical” compulsion:

“It was submitted by counsel for the respondent that in order to justify the plaintiff demanding repayment of money paid under mutual mistake in law upon the basis that he was under compulsion to do so, the plaintiff must have been faced with a situation where there was no other alternative available to him. I am of the opinion that the bar to the plaintiff’s recovery is not so stringent and that a practical compulsion is alone necessary. In each of the three cases in this Court approving *Haskell v. Horner*, which I have cited above, there were other courses available to the plaintiffs but those other courses were time consuming and impractical.”

To establish compulsion, payment need not be the only choice; recovery is permitted where payment was compelled by practical considerations.

4. With respect to the second branch of recovery, Estey, J. held that it does not extend to situations where the illegality in question was an excess of jurisdiction by a statutory entity. The transaction must be one that is “contrary to public policy or prohibited by statute” (at p. 239) if entitlement to recovery is to be established under this branch of recovery.

[24] It is appropriate to note at this juncture that what the Appellant was essentially arguing for in respect to his reliance on the Amax Potash and Air Canada decisions was the establishment of a third branch of recovery. In other words, “something more” than the mistake of law exists where the payment was made to a government entity in pursuance of unconstitutional legislation. For the reasons set out above, I reject this line of argument.

[25] Applying these principles to the case at bar, the Appellant cannot recover his fine paid as a result of the mistake as to the constitutional validity of Section 238(3) unless he is able to establish entitlement under either of the two branches of recovery mentioned above. Clearly the second branch of recovery is inapplicable. The transaction with which we are concerned is not contrary to public policy or prohibited by statute. It is illegal only in the sense that the criminal court exceeded its jurisdiction by convicting the Appellant under a section of the Criminal Code that was unconstitutional. Consequently, the nature of illegality required by the second branch of recovery is not present in this case.

[26] However, in my view the Appellant is not barred from recovering the fine on the basis of the first branch of recovery. There is no doubt in my mind that the Appellant was under practical compulsion to pay the fine. Why? Because the consequence of not paying the fine was imprisonment. Therefore, while payment may not have been the only option open to the Appellant, it was the only practical choice. After all, what can be more compelling than the threat of imprisonment if the fine is not paid? Consequently, I have no difficulty in finding that the Appellant paid the fine under practical compulsion.

[27] In the result, the mistake of law hurdle has been cleared. I now turn to the second hurdle, that being the doctrine of *res judicata*.

2. Res Judicata

[28] The Respondent Crown submits that the Appellant is barred from recovering the fine by the doctrine of *res judicata*:

“It is respectfully submitted that as between the Crown and the Appellant the matter is res judicata. In a court proceeding between the same parties (the Crown and the Appellant), Turigan was judicially required to pay. He did not appeal. The matter as between Turigan and the Crown is now final and conclusive.

Res judicata applies when an issue is decided, expressly or implicitly, in court proceedings between the same parties (that is, the issue is either argued or could

have been argued in earlier proceedings).

...

In the case at bar, Turigan either (i) could have, but did not, raise the defence of ultra vires at his trial or (ii) raised the defence unsuccessfully, but failed to appeal. His conviction could not have followed but for section 238(3) having been recognized as valid by the Court; therefore res judicata applies.”

[29] The Crown’s argument is essentially that as between the Appellant and the Crown, the Appellant is bound by the decision of the criminal court that Section 238(3) is constitutional. As a consequence, the Appellant is prohibited from coming to court to seek relief from the Crown on a claim which for its viability is dependent upon a result contrary to that decided by the criminal court.

[30] Technically speaking, this plea would more accurately be described as issue estoppel. As noted in *Halsbury’s Laws of England* (4th ed.), vol. 16, para. 1528 and 1529, *res judicata* relates to situations where the second suit is based on essentially the same cause of action as the first suit. In the case at bar the cause of action in the proceedings now before this Court cannot be said to have also been before the criminal court. In fact it is difficult to conceptualize a criminal proceeding as having a distinct cause of action, other than I suppose the guilt or innocence of the accused, and in that regard the pleas of *autrefois acquit* and *autrefois convict* stem from the doctrine of *res judicata*. Consequently, the plea of *res judicata* is not strictly appropriate.

[31] In my view, the proper plea is issue estoppel which evolved from *res judicata*. The *vires* of Section 238(3) was at issue in the prior criminal proceedings, and is again at issue in the present proceedings. *Halsbury’s, op. cit.* at para 1530, describes this form of estoppel in the following terms:

“A party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action, provided it is embodied in a judicial decision that is final, is conclusive in a second action between the same parties and their privies. This principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or one of mixed fact and law. The conditions for the application of the doctrine have been stated as being that (1) the same question was decided in both proceedings; (2) the judicial decision said to create the estoppel was final; and (3) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.”

This Court had the opportunity to examine the doctrine of issue estoppel in *R. v. Duhamel (No. 2)* (1981) 1981 ABCA 295 (CanLII), 64 C.C.C. (2d) 538. At issue in *Duhamel (No. 2)* was whether a finding by one trial judge as to the voluntariness of a confession was binding on a second trial judge before whom the confession was again sought to be admitted. Mr. Justice Moir, writing for the Court, acknowledged (at p. 541) that issue

estoppel originated from the principle of “estoppel *per rem judicatam*”. His Lordship proceeded to accept and apply the six *probanda* set out by Spencer Bower and Turner in their text, *Res Judicata*, (2nd ed., 1969), at para. 19 as the “constituent elements of estoppel *per rem judicatam*” (at p. 542). The party attempting to set up the estoppel has the burden of establishing:

- “(i) that the alleged judicial decision was what in law is deemed such;
- (ii) that the particular judicial decision relied upon was in fact pronounced, as alleged;
- (iii) that the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf;
- (iv) that the judicial decision was final;
- (v) that the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised;
- (vi) that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceeding in which the estoppel is raised, or their privies, or that the decision was conclusive *in rem*”.

[32] Can the Crown Respondent in the case at bar establish all six *probanda*? The first, second and fourth requirements are not at issue in this case. Furthermore, the sixth requirement, namely that the same parties must be involved, cannot be disputed. That leaves us with the third and fifth requirements for consideration.

[33] Dealing first with the fifth requirement,
that the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised;

The question with which we are concerned is the constitutionality of [Section 238\(3\)](#) of the [Criminal Code](#). The Crown Respondent argues that the Appellant’s claim is dependent upon a determination that the Appellant paid the fine pursuant to conviction for an offence that was *ultra vires* Parliament. There can be no argument that Section 238(3) is *ultra vires*. However, what is argued by the Respondent is that as between it and the Appellant, Section 238(3) must be considered to be *intra vires*, because the criminal court could not have convicted without first deciding, either expressly or by necessary implication, that Section 238(3) was *intra vires*. Therefore, the Respondent continues, the Appellant’s claim must fail, because it depends on an opposite determination to a question that was fundamental to the earlier criminal proceedings.

[34] In my view, the two proceedings do involve the same question. We were not told whether the Appellant raised the issue of constitutionality in the criminal proceedings. However, this is not critical. It is settled law that to establish an issue estoppel, it is not necessary to show that the issue was one that was expressly determined in the previous judicial proceedings, so long as the issue must necessarily have been determined and

determined in a particular way by the court to have reached the decision it pronounced. This principle of issue estoppel by implication is formulated by Spencer Bower and Turner in the following terms (at para. 193):

“Where the decision set up as a *res judicata* necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, even though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms: but, beyond these limits, there can be no such thing as a *res judicata* by implication.”

This same principle has been formulated in a slightly different context in the leading case of Hoystead v. Taxation Commissioner [1925 CanLII 607 \(UK JCPC\)](#), [1926] A.C. 155 (P.C.):

“... the same principle - namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs.”

These principles apply even where the previous judgment was given by default: Spencer Bower and Turner, para. 196; *Halsbury's*, vol. 16, para. 1533. Presumably, then, they should also apply where the defendant in the previous criminal proceeding entered a guilty plea.

[35] In the case at bar, the question of constitutionality was clearly an issue fundamental to the decision by the criminal court to convict the accused. Regardless of whether or not the constitutionality of Section 238(3) was actually raised by the Appellant in the criminal proceedings, the criminal court must have either expressly or impliedly (perhaps through reliance on the presumption of constitutionality) ruled that Section 238(3) was constitutional, otherwise it would not have had the jurisdiction to convict the Appellant. Consequently, the same issue of constitutionality which is now before this Court, was decided against the Appellant in the previous criminal proceedings. In the result, the fifth requirement for issue estoppel is established.

[36] That leaves us with only the third of the six *probanda* for consideration. To recall, the third requirement is “that the judicial tribunal pronouncing had jurisdiction in that behalf”. As noted by Spencer Bower and Turner, at paras. 113 and 114:

“113 Competent jurisdiction is an essential condition of every valid *res judicata*, which means that, in order that a judicial decision relied upon, whether as a bar, or as the foundation of an action, may conclusively bind the parties, or (in the case of *in rem* decisions) the world, it must appear that the judicial tribunal pronouncing the decision had jurisdiction over the cause or matter, and over the parties, sufficient to warrant it in so doing.

114 A tribunal may exceed its jurisdiction either by embarking upon an inquiry outside its province, or, while confining its inquiry within the proper limits, by making an order in excess of its powers. In either case the result will be to nullify the decision as a *res judicata*: in the former case, by the effect of the events we have mentioned upon the declaratory part of the decision, and, in the second, by their effect upon its jussive or prohibitory provisions.”

See also *Halsbury’s, op. cit.*, para. 1554, where it is stated that:

“1554. Lack of jurisdiction. In order that estoppel by record may arise out of a judgment the court which pronounced the judgment must have had jurisdiction to do so: the lack of jurisdiction deprives the judgment of any effect, whether by estoppel or otherwise.”

The lack or excess of jurisdiction is said to deprive the decision of the court of any “conclusive effect”.

[37] It is for this reason that the Respondent’s plea of issue estoppel must fail. The section under which the Appellant was convicted and ordered to pay the fine was subsequently declared to be *ultra vires* Parliament. As a result, the section was void *ab initio*, and not merely voidable. The section never had any force or effect. Consequently, the criminal court exceeded its jurisdiction by convicting the Appellant under that section. Canadian courts have no inherent jurisdiction, apart from their contempt jurisdiction, to order criminal sanction. Our courts can only convict for those offences validly created by statute. In the result, the decision by the criminal court to convict the Appellant for an offence that never existed is a nullity. Consequently, the conviction cannot form the basis for *res judicata*.

[38] However, it may be argued that even though the criminal court had no jurisdiction to convict under s. 238(3), it nevertheless had jurisdiction to enter into a determination as to the constitutionality of that section; therefore, while the conviction may be a nullity, the Court’s decision that the section was constitutional is not and may still form the basis for a plea of issue estoppel. The flaw in this argument is that the constitutionality of a provision under the *Criminal Code* is a jurisdictional question. Although I have not been referred to any authority directly on point, the constitutionality of the charging section must be an issue going to the criminal court’s jurisdiction, for if that Court finds that the section is unconstitutional, the proceedings are terminated; the Court has no jurisdiction to proceed any further. In my view, this is a clear indication that the constitutionality of a charging section is a jurisdictional question.

[39] It is a well-established principle of law that a tribunal cannot give itself jurisdiction by a wrong decision on a question of law. In short, a court only has jurisdiction to decide a jurisdictional question correctly; it exceeds its jurisdiction by deciding the question incorrectly.

[40] Consequently, while the criminal Court in the case at bar did have jurisdiction to enter into a determination as to the constitutionality of s. 238(3), it exceeded its

jurisdiction by incorrectly deciding the issue. In the result, its decision on that issue cannot raise an issue estoppel.

[41] The requirement that the court whose decision is relied upon as forming the *res judicata* have jurisdiction to make that decision has long been recognized. For instance, in Toronto Railway Company v. Corporation of the City of Toronto [1904] A.C. 809 (P.C.), the plaintiff railway had decided to challenge the defendant municipality's decision to tax its railway cars as realty. Both the Court of Revision (the court of first instance), and the Court of Appeal of Ontario held against the plaintiff. The following year, the plaintiff decided to challenge the assessment again and met with the same results in the Court of Revision and Court of Appeal. However, on appeal to the Privy Council, the decision was reversed. The City argued *res judicata*. The Privy Council rejected their plea, holding that both lower courts exceeded their jurisdiction by deciding that the railway cars were realty. Like the criminal Court in the case at bar, both of the lower Courts' jurisdictions were statutorily defined; their jurisdictions did not include the power to determine whether railway cars were assessable as realty. The Supreme Court of Canada applied the same reasoning in Pong v. Quong 1927 CanLII 2 (SCC), [1927] S.C.R. 271 in rejecting a plea of *res judicata*, as did the High Court of Australia in O'Keefe v. Williams (1907) 5 C.L.R. 217.

[42] Normally it would not be necessary to cite strong authority to support a principle as basic as the requirement that a court whose decision is relied upon for the plea of *res judicata* have jurisdiction to make that decision. However, in my view, such recitation is made necessary in this case by the judgment of the Supreme Court in the Manitoba Language Reference case referred to earlier. The Court, in order to preserve legal rights, obligations and other effects that had arisen pursuant to Manitoba legislation which had been declared to be *ultra vires*, turned to the doctrine of *res judicata* (at p. 29):

"It should be noted that there are other doctrines which might provide relief from the consequences of the invalidity of Manitoba's laws. For example, *res judicata* would preclude the reopening of cases decided by the courts on the basis of invalid laws."

The Supreme Court cited no authority for this proposition. In my view, the Supreme Court did not intend to effect a fundamental change in the law of *res judicata*. This is evidenced by the complete absence of analysis and precedent in their judgment in respect to *res judicata*. Furthermore, it is possible to reconcile the Supreme Court's statement with the above mentioned authorities. This is accomplished by recognizing that not all laws upon which a court bases its decision relate to that court's jurisdiction over the matter in question. In some cases the court will have had jurisdiction to decide the matter, even though legislation (not pertaining to the court's jurisdiction) which affected the outcome is subsequently declared to be *ultra vires*. In my view, it is this type of situation to which the Supreme Court is referring in its statement quoted above. In such cases, even though the court decided the matter on the basis of an invalid law, *res judicata* applies to prevent the reopening of the court's decision because the court did not exceed its jurisdiction by

deciding the matter. This must be contrasted with those situations where the impugned legislation relates to the very jurisdiction of the court to decide the matter. The Supreme Court, in my view, did not intend to extend their above quoted comment to this latter situation. Consequently, the Manitoba Language Reference case has not obviated the requirement that the decision upon which the plea of *res judicata* is based must have been decided by a court with jurisdiction to make that decision.

[43] It should be pointed out that the Supreme Court in Wigman v. The Queen (1987) 1985 CanLII 1 (SCC), 33 C.C.C. (3d) 97 refers to the comments it made in the Manitoba Language Reference concerning the scope of the doctrine of *res judicata*. The accused in Wigman had been charged with attempted murder. The trial judge's charge to the jury in regard to the requisite intent for attempted murder was based on Lajoie v. The Queen (1973) 1973 CanLII 146 (SCC), 10 C.C.C. (2d) 313 (S.C.C.) which expressed the applicable law as of the date of the trial. The accused was convicted. An appeal to the British Columbia Court of Appeal proved unsuccessful. However, the accused was granted leave to appeal to the Supreme Court. Subsequent to granting leave, the Supreme Court in R. v. Ancio (1984) 1984 CanLII 69 (SCC), 10 C.C.C. (3d) 385 held that Lajoie should no longer be followed. As a consequence, one of the issues facing the Supreme Court in Wigman was whether the accused could rely on the overruling of Lajoie subsequent to his trial and conviction. At p. 104 the Supreme Court states:

"The appropriate test is whether or not the accused is still in the judicial system. As expressed in the Crown's factum, this test affords a means of striking a balance between the 'wholly impractical dream of providing perfect justice to *all* those convicted under the overruled authority and the practical necessity of having some finality in the criminal process'. Finality in criminal proceedings is of the utmost importance but the need for finality is adequately served by the normal operation of *res judicata*: a matter once finally judicially decided cannot be relitigated. Thus a person convicted under Lajoie will not be able to reopen his or her case, unless, of course, the conviction is not final. In the *Reference re Language Rights under Manitoba Act, 1870* (1985), 1985 CanLII 33 (SCC), 19 D.L.R. (4th) 1 at pp. 28-9, [1985] 1 S.C.R. 721 at p. 757, [1985] 4 W.W.R. 385 at pp. 414-5, the court observed that *res judicata* would even preclude the reopening of cases decided by the courts on the basis of constitutionally invalid laws. The *res judicata* principle would apply with at least as much force to cases decided on the basis of subsequently overruled case-law."

In my view, this pronouncement does not add to what was stated by the Supreme Court in the Manitoba Language Reference regarding the scope of *res judicata*. The subsequent overruling of Lajoie by the Supreme Court did not vitiate the jurisdiction of the trial judge in Wigman. As was the case in the Manitoba Language Reference, the Supreme Court in Wigman does not purport to extend the scope of *res judicata* to situations where the judge exceeded his jurisdiction by deciding the matter in issue.

[44] In the result, the Respondent's plea of issue estoppel cannot succeed. The criminal Court exceeded its jurisdiction by deciding (either expressly or implicitly) that s.

238(3) was *intra vires*, and had no jurisdiction to convict under that section. Consequently, there is nothing upon which the Respondent Crown can base its plea of issue estoppel.

[45] This leaves us with the final hurdle for consideration.

3. The De Facto Doctrine

[46] It is argued on behalf of the Respondent Crown that both the conviction and fine paid by the Appellant, although arising under unconstitutional legislation, are protected from collateral attack by the *de facto* doctrine. The premise underlying this argument is that although the criminal Court had no *de jure* authority to convict and order the payment of a fine pursuant thereto, it nevertheless had *de facto* authority by reason of the colour of authority imparted upon the criminal Court by s. 238(3). The Manitoba Language Reference, *supra*, and Bilodeau v. A.-G. Manitoba (1986) 1986 CanLII 64 (SCC), 27 D.L.R. (4th) 39 (S.C.C.) are cited in support of this argument.

[47] In my view, the Supreme Court has extended the scope of the *de facto* doctrine through its decisions in the Manitoba Language Reference and Bilodeau. Therefore, it may prove illuminative to set out the state of the law prior to the rendering of those two decisions before examining how the doctrine has been extended.

[48] The *de facto* doctrine has been defined in the following terms by Judge Albert Constantineau in his treatise entitled *The De Facto Doctrine* (1910) at p. 3:

“The de facto doctrine is a rule or principle of law which, in the first place, justifies the recognition of the authority of governments established and maintained by persons who have usurped the sovereign authority of the State, and assert themselves by force and arms against the lawful government; secondly, which recognizes the existence of, and protects from collateral attack, public or private bodies corporate, which, though irregularly or illegally organized, yet, under color of law, openly exercise the powers and functions of regularly created bodies; and thirdly, which imparts validity to the official acts of persons who, under color of right or authority, hold office under the aforementioned governments or bodies, or exercise lawfully existing offices of whatever nature, in which the public or third persons are interested, where the performance of such official acts is for the benefit of the public or third persons, and not for their own personal advantage. The doctrine is grounded upon considerations of public policy, justice, and necessity, and is designed to protect and shield from injury the community at large or private individuals, who, innocently or through coercion, submit to, acknowledge, or invoke the authority assumed by the governments, corporate bodies, or officers, above mentioned.”

This definition was quoted with approval by the Supreme Court in the Manitoba Language Reference (at p. 27). It is the third branch of this definition with which we are concerned, namely, the imparting of “validity to the official acts of persons who, under colour of right or authority ... exercise lawfully existing offices of whatever nature ...”. Professor Wade, in his text *Administrative Law* (4th ed., 1977), at p. 287, describes this branch of the *de facto* doctrine in similar terms:

“In one class of cases there is a long-standing doctrine that collateral challenge is not to be allowed: where there is some unknown flaw in the appointment or authority of some officer or judge. The acts of the officer or judge may be held to be valid in law even though his own appointment is invalid and in truth he has no legal power at all. The logic of annulling all his acts has to yield to the desirability of upholding them where he has acted in the office under a general supposition of his competence to do so. In such a case he is called an officer or judge *de facto*, as opposed to an officer or judge *de jure*.”

A similar definition can be found in *de Smith's Judicial Review of Administrative Action* (4th ed., 1980) at p. 153:

“In a few cases [the courts] have gone so far as to accord full legal recognition, in the public interest, to decisions by *de facto* officers, who because of the informality of their appointment, were not strictly entitled to exercise any jurisdiction at all.”

The *de facto* doctrine has experienced its most widespread usage in the United States. *Corpus Juris Secundum* defines the doctrine in the following terms (48A C.J.S., s. 2, Judges):

“A judge *de facto* is one acting with color of right and who is regarded as, and has the reputation of, exercising the judicial function he assumes. He differs, on the one hand, from a mere usurper of an office who undertakes to act without any color of right; and, on the other, from an officer *de jure* who is in all respects legally appointed and qualified to exercise the office.”

[49] What should be discerned from the above quoted definitions is that the *de facto* doctrine was originally intended to prevent the decisions and actions of public officials from being collaterally attacked on the ground that the official did not have proper legal title to the office he purported to hold and exercise. The scope of the doctrine was limited to preventing collateral attack on the basis of irregularity of appointment to office. As will be illustrated *infra*, the case law prior to the Manitoba Language Reference supports this characterization of the *de facto* doctrine.

[50] As acknowledged by the Supreme Court in the Manitoba Language Reference (at p. 27), the rationale underlying the *de facto* doctrine is premised on the preservation of the rule of law. The House of Lords attributed the doctrine to the same theoretical underpinnings:

“With regard to the competence of the vestrymen, who were vestrymen *de facto*, but not vestrymen *de jure*, to make the rate, your Lordships will see at once the importance of that objection, when you consider how many public officers and persons there are who are charged with very important duties, and whose title to the office on the part of the public cannot be ascertained at the time. You will at once see to what it would lead if the validity of their acts, when in such office, depended upon the propriety of their election. It might tend, if doubts were cast upon them, to consequences of the most destructive kind. It would create uncertainty with respect to the obedience to public officers, and it might also lead to persons, instead of resorting to the ordinary legal remedies to set right anything done by the officers, taking the law into their own hands.”

Scadding v. Lorant (1851) 3 H.L.C. 418 at 447, 10 E.R. 164 at 175.

[51] Constantineau, *op. cit.*, sets out three prerequisites that must be established to constitute one a *de facto* officer:

“Three things are essential to constitute one an officer de facto, viz: -

1. The office held by him must have a de jure existence, or at least one recognized by law;
2. He must be in the actual possession thereof; and
3. His holding must be under color of title or authority.

Without the existence and concurrence of these three elements, no person can be regarded as an officer de facto. Indeed, whatever color of title one may have, and whatever may be his possession, if the office be one not recognized by law, he can never acquire the status of an officer. On the other hand, however strong and well founded may be a person’s claim to a lawfully existing office, yet if he be deprived of the actual possession thereof, he may be an officer de jure, but he cannot be an officer de facto. Finally, the bare possession of a de jure office, without color of title or authority, will only constitute the occupant a usurper.”

The same three prerequisites exist in American jurisprudence: see *Corpus Juris Secundum, op. cit.*

[52] The rationale underlying the prerequisite that the office have a *de jure* existence before the possessor of that office can be given *de facto* recognition was succinctly stated by Mr. Justice Field of the United States Supreme Court in Norton v. Shelby County (1886) 118 U.S. 425, 6 Sup. Ct. 1121, 30 L.Ed. 178 as follows:

“The idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office, and a public office can only exist by force of law.”

It follows from this requirement that the office cannot be one created by unconstitutional legislation in that an office established under an unconstitutional statute cannot be said to enjoy a *de jure* existence. This proposition is well supported by the authorities: see Constantineau, *op. cit.*, pp. 51 *et seq.* However, it should not be confused with appointment under unconstitutional legislation to a *de jure* office; in this case the officer may possess *de facto* authority. In other words, although unconstitutional legislation cannot create a *de jure* office, it does not prevent an officer who has been appointed to a *de jure* office under unconstitutional legislation from being an officer *de facto*. This stems from the fact that the *de facto* doctrine was originally designed to prevent collateral attacks based on a defect in appointment or title, and not defects as to the constitution of the office itself.

[53] The *de facto* doctrine has long been recognized by Canadian courts. A case typical of situations where the doctrine has traditionally been applied is O’Neil v. A.-G. Canada (1896) 1896 CanLII 58 (SCC), 26 S.C.R. 122. The *Criminal Code* had authorized “the chief constable or deputy chief constable” to apply for a warrant to seize gaming equipment. In O’Neil, the warrant had been applied for by the son of the chief constable,

the chief constable having appointed his son to act as his deputy in his absence. A police magistrate declared that the money that had been seized pursuant to the warrant forfeited to the Crown. The plaintiff sought the return of this money, *inter alia*, on the ground that the son had not been duly sworn into office as deputy chief constable thereby invalidating the search warrant. The Supreme Court of Canada held that even if the son had not been properly sworn in as deputy, he held the office *de facto*, given that he had performed the functions of a deputy constable for several years. The Supreme Court described the *de facto* doctrine in the following terms (at p. 130):

“The rule of law is that the acts of a person assuming to exercise the functions of an office to which he has no legal title are, as regards third persons, that is to say, with reference to all persons but the holder of the legal title to the office, legal and binding. Especially is this so in the case of officers holding over and continuing to perform official duties after their term has expired. Further, this rule has been held to apply to a delegate of a delegate whose appointment would be manifestly without legal authority. Further, it has been held to apply even to judicial officers and *a fortiori* to those appointed for the performance of mere ministerial duties such as a head constable. And particularly it has been held to apply to officers who have failed to qualify themselves by taking an oath of office prescribed by law.”

[54] Further illustration of the classic application of the *de facto* doctrine can be seen in the case of *R. v. Cyr* [1917] 2 W.W.R. 1185 (Alta. S.C.T.D.). In *Cyr*, the defendant sought to quash her conviction on the ground that the convicting magistrate was a woman. Women, it was argued, were not capable of holding judicial office. Scott, J. (as he then was) held that (at p. 1187):

“While I entertain serious doubt whether a woman is qualified to be appointed to that office, I am of opinion that the legality of such an appointment cannot be questioned or inquired into on this application.”

His Lordship proceeded to examine the authorities regarding the *de facto* doctrine, and concluded that the conviction could not be collaterally attacked on the regularity of the magistrate’s appointment.

[55] It is readily apparent that the *de facto* doctrine as explained and illustrated above would not serve to preclude the Appellant from recovering his fine. The defect with which we are concerned is not one going to the validity of title or regularity of appointment to office. The convicting judge was presumably properly appointed to that office; he was an officer *de jure*. The defect which had been subjected to challenge in these proceedings is that the convicting judge exercised powers which went beyond the jurisdiction of his office. In other words, what we are faced with is an exercise of power in excess of jurisdiction by a *de jure* officer. Traditionally, the *de facto* doctrine did not prevent collateral attacks on this basis. This limitation on the *de facto* doctrine is recognized by the authors of *Corpus Juris Secundum*, *op. cit.*, where at s. 63 they state:

“The rule that the official acts of *de facto* judges are valid as against third persons cannot be applied to an attempted exercise of judicial power by an officer *de jure*

who claims the right so to act by virtue of his office, when in fact no such power is vested therein.”

This is precisely the situation we face in the case at bar: the *de jure* convicting judge, in convicting the Appellant and ordering him to pay a fine pursuant to s. 238(3) of the *Criminal Code*, exercised a power that was not vested within his judicial office, given that s. 238(3) was declared to be of no force or effect *ab initio* by the Supreme Court in Boggs. The *de facto* doctrine did not preclude a collateral challenge on this basis.

[56] This limitation on the scope of the *de facto* doctrine can be viewed in a slightly different context. It is possible to conceptualize the power to convict under s. 238(3) as an office separate and apart from the office of the convicting judge. It can then be argued that although the convicting judge was never legally appointed to hold that “s. 238(3) office”, he was nevertheless a *de facto* possessor of that office. Under this reasoning, the actions of the convicting judge in performing his duties as a *de facto* officer of the s. 238(3) office would not be subject to collateral challenge. However, it should be recalled that one of the prerequisites for application of the *de facto* doctrine was that the office have a *de jure* existence, and that an office could not have a *de jure* existence if attempted to be created under unconstitutional legislation. Given that the “s. 238(3) office” was created under unconstitutional legislation, it had no *de jure* existence. In the result, this reasoning collapses; the convicting judge cannot be said to be a *de facto* officer of the s. 238(3) office.

[57] Therefore, the *de facto* doctrine, as traditionally understood and applied, would not preclude the Appellant from challenging the validity of his conviction under s. 238(3) and hence recovering his fine. However, the *de facto* doctrine has undergone a significant revision in light of the Supreme Court’s recent decisions in the Manitoba Language Reference, *supra* and Bilodeau, *supra*. As a result of this revision, I am bound to conclude that while the convicting judge did not possess *de jure* authority to convict, he nevertheless had *de facto* authority, thereby prohibiting collateral attack on this basis.

[58] The Manitoba Language Reference was referred to earlier in these Reasons. One should recall that the Supreme Court in that case was faced with the task of preventing legal chaos from erupting as a result of their finding that all of Manitoba’s laws were invalid *ab initio*. The Supreme Court examined the *de facto* doctrine in this context. After reviewing some of the authorities on this subject, the Supreme Court (at p. 28) stated that:

“There is only one true condition precedent to the application of the doctrine: the *de facto* officer must occupy his or her office under colour of authority. This is consistent with the rationale for the doctrine, *viz.*, that the members of the public with whom the officer dealt relied upon his ostensible status.”

No mention is made of the first of Constantineau’s three prerequisites, namely that the office have a *de jure* existence. Perhaps one could argue that an official has no colour of

authority if the office he occupies has no *de jure* existence. However, as is subsequently made clear by the Supreme Court, the office need no longer have a *de jure* existence for the *de facto* doctrine to apply: it is sufficient that the office enjoy *de facto* recognition. The Supreme Court summarized the effect of the *de facto* doctrine in the following terms (at p. 28):

“Thus, the *de facto* doctrine will save those rights, obligations and other effects which have arisen out of actions performed pursuant to invalid Acts of the Manitoba Legislature by public and private bodies corporate, courts, judges, persons exercising statutory powers and public officials. Such rights, obligations and other effects are, and will always be, enforceable and unassailable.”

[59] The conclusion that one is forced to draw from the statements of the Supreme Court above quoted is that a public official can be given colour of authority by unconstitutional legislation, even though such legislation is said to have had no force or effect *ab initio*. This colour of authority can relate to both the existence of the office, as well as the powers associated with that office. Consequently, in the Manitoba Language Reference, even though the office and powers which the public officials purported to hold and exercise arose under unconstitutional legislation, the actions of the public officials were enforceable and unassailable because the unconstitutional legislation imparted colour of authority, not only to the official's actions, but also to the existence of the office itself.

[60] It is clear that the *de facto* doctrine, as interpreted by the Supreme Court, now applies to preclude collateral challenge to the actions of public officials on the basis that the power which the official purported to exercise was unconstitutional. I confess to difficulty in rationalizing this decision with the approach taken by the Supreme Court in Amax Potash v. Saskatchewan, *supra*. It should be recalled that the Supreme Court in Amax Potash found offensive any attempt by a government to legislatively immunize itself from the effects of unconstitutional legislation. It would now appear that the *de facto* doctrine immunizes all acts done pursuant to unconstitutional legislation from collateral attack. Nevertheless, this extension of the *de facto* doctrine is confirmed by the Supreme Court's judgment in Bilodeau *supra*.

[61] Bilodeau arose out of the aftermath that followed the Supreme Court's decision in the Manitoba Language Reference. Bilodeau had been charged with speeding contrary to the *Highway Traffic Act*, R.S.M. 1970, c. H-60 and was issued a court summons under the *Summary Convictions Act*, R.S.M. 1970, c. S-230. Bilodeau had raised the invalidity of the two statutes as a defence at his trial, but did not succeed in persuading the trial judge. As a result, he was convicted. His conviction was confirmed on appeal to the Manitoba Court of Appeal. Subsequent to the Court of Appeal's decision, the Supreme Court rendered judgment in the Manitoba Language Reference, which in effect ruled that the two above mentioned statutes were invalid because they were not enacted in both English and French. Therefore, when Bilodeau appealed his conviction to

the Supreme Court, that Court was faced with the question of whether his conviction could be upheld in light of the invalidity of the laws under which he was convicted.

[62] The conviction was challenged on three grounds: first, that the summons was invalid because it was issued under the *Summary Convictions Act*, which was itself invalid; secondly, that the summons itself was printed in English only and for that reason was invalid; and thirdly, that the conviction under the *Highway Traffic Act* was invalid because that *Act* was enacted in English only. The first and third grounds are of interest in the case at bar.

[63] With respect to the validity of the summons, the Supreme Court held that even though the *Act* under which the summons was issued was invalid, the summons itself was protected from challenge by the *de facto* doctrine. The operation of the *de facto* doctrine was summarized as follows (at p. 43):

“... the rights, obligations and other effects which have arisen under this Act will be forever enforceable if they arose out of, *inter alia*, reliance ‘upon the acts of those administering the invalid laws’ under colour of authority. Actions performed pursuant to invalid Acts by courts and judges, acting upon colour of authority, will be saved by the *de facto* doctrine. Thus in the present case, the *de facto* doctrine will preclude any challenge to the effectiveness or enforceability of the summons on the ground that it was issued pursuant to an invalid Act, since the summons was clearly issued under colour of the authority of the *Summary Convictions Act*.”

[64] As for the validity of the conviction under the *Highway Traffic Act*, the Supreme Court held that the *de facto* doctrine would not preserve the conviction because the *de facto* doctrine only prohibited collateral attacks against the acts of public officials acting under *de facto* authority. Whereas the challenge to the validity of the issuance of the summons was collateral, the attack on the conviction was direct; Bilodeau had raised the validity of the *Highway Traffic Act* both at trial and on appeal from his conviction. As stated by Dickson, C.J.C., for the majority (at p. 45):

“I do not believe that a trial judge can be said to be acting under colour of authority when the very ground for the defence is the invalidity of his authority and when his or her decision on this point is appealed. If a person is convicted under a statute which, on appeal from conviction, is deemed invalid, the conviction cannot be saved by invoking *de facto* authority on the part of the judge.”

Although the *de facto* doctrine did not protect the conviction, the Supreme Court held that the declaration made by the Supreme Court in the Manitoba Language Reference temporarily validating all rights, obligations and other effects arising under Manitoba’s invalid laws (to uphold the rule of law) preserved the conviction entered against Bilodeau under the invalid *Highway Traffic Act*.

[65] From the foregoing analysis, the following can be concluded:

1. The *de facto* doctrine is no longer restricted to situations involving defects in the public official’s title to office or regularity of appointment. The *de facto* doctrine may apply to preserve the acts of *de jure* officials acting outside their jurisdiction as well as the acts

of persons whose office has no *de jure* existence where those acts are done with colour of authority.

2. Unconstitutional legislation, although it is said to be of no force or effect *ab initio*, has sufficient force and effect to impart colour of authority to public officials holding office or exercising powers created under that legislation.

3. The *de facto* doctrine does not apply to direct challenges to an official's authority. It only precludes collateral challenges where the official acted under colour of authority.

[66] In the result, the Appellant's claim cannot succeed. Although the Appellant was convicted and paid a fine pursuant thereto under an unconstitutional law, that law nevertheless gave the convicting judge sufficient colour of authority to protect his decision from collateral impeachment. To rephrase, although the convicting judge had no *de jure* authority to convict, s. 238(3) gave him *de facto* authority. Consequently, the Appellant's claim, which amounts to a collateral attack on the conviction, must fail.

4. Conclusion

"As a Matter of Law, is Turiaan Entitled to Have His Fine Refunded by the Defendant?"

[67] This preliminary question of law must be answered in the negative. Although the mistake of law and *res judicata* doctrines do not bar the recovery proceedings, the Appellant is barred from collaterally challenging the authority of the convicting judge by virtue of the *de facto* doctrine.

[68] Accordingly, the appeal is dismissed. Given the uniqueness and importance of the legal principles herein discussed, I would not award costs.

DATED at Edmonton, Alberta
this 3rd day of October,
1988.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE STEVENSON

[69] I have read the draft judgment of my brother Harradence and agree that the appellant is not entitled, as a matter of law, to the refund of his fine. However, I do so on the basis that the original conviction is not open to collateral impeachment in these proceedings and is a bar to the recovery.

[70] The original conviction constitutes an estoppel per rem *judicatem*. The elements of such an estoppel were adopted by Moir, J.A. in Duhamel (No. 2) (1981), [1981 ABCA 295 \(CanLII\)](#), 64 C.C.C. (2d) 538 from Spencer-Bower and Turner, *Res Judicata*, (second ed., 1969), para. 19. In my opinion all of the necessary elements are present.

[71] The argument is advanced that the convicting judge lacked jurisdiction because he convicted under a law that was later held to be *ultra vires*. The validity of that law was impliedly in issue in that original proceeding and the court in pronouncing its judgment necessarily concluded that the law was valid even if the issue was not expressly raised. A party cannot re-litigate a claim which might have been raised in an earlier proceeding: 17 Halsbury (4th) para. 1533.

[72] As Spencer-Bower and Turner note, at pp.14 and 15, the correctness of a decision does not, of itself, go to jurisdiction: a competent tribunal has "... jurisdiction to decide wrongly, as well as rightly." The convicting judge made an error in the exercise of his jurisdiction in accepting the validity of the impugned section of the Code.

[73] In the *Manitoba Language Reference*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721 at 757 the court noted that "... res judicata would preclude the re-opening of cases decided by the courts on the basis of invalid laws." That proposition is affirmed in *Wigman* (1987), 1985 CanLII 1 (SCC), 33 C.C.C. (3d) 97 where the court, at 104, says the earlier case "... observed that res judicata would even preclude the reopening of cases decided by the courts on the basis of constitutionally invalid laws." The point is also made in *Bilodeau v. A.G. Manitoba*, 1986 CanLII 64 (SCC), [1986] 1 S.C.R. 449.

[74] I derive no assistance from *Toronto Railway v. Corporation of City of Toronto*, [1904] A.C. 809 (P.C.); *Pong v. Quong*, 1927 CanLII 2 (SCC), [1927] S.C.R. 271, or *O'Keefe v. Williams* (1907), 5 C.L.R. 217. In *Toronto Railway*, the Privy Council held that an earlier decision, apparently deciding an issue and thus said to be *res judicata*, was not a bar because the tribunal, and the court which exercised a statutory appeal from it, lacked jurisdiction to decide that issue. In *Pong* it was argued that an earlier judgment decided an issue, but the Supreme Court held that the judge in the earlier case lacked jurisdiction to decide the issue. Similarly, in *O'Keefe*, the court held that the first tribunal lacked jurisdiction to decide the question in issue. The issue here is the constitutionality of the charging section, which the convicting judge unquestionably had jurisdiction to decide.

[75] I disagree with, and know no authority, for the proposition that the constitutionality of a provision of the *Criminal Code* is a jurisdictional question. Indeed, the proposition is contrary to the well recognized principle I quoted from *Spencer-Bower and Turner* that a competent tribunal has jurisdiction to decide wrongly as well as rightly.

[76] Reference was made to *Neely v. U.S.A.* (1976), 41 A.L.R. Fed. 331. That was an action for the return of fines paid under unconstitutional convictions. The decision that such an action lies is based on U.S. legislation, the Tucker Act, which (quoting from the headnote) "... provides authority for a district court to order the return of fines and costs based upon unconstitutional convictions." Moreover, the action there sought to "vacate, annul and set aside judgments and sentences of conviction" (p.340). That relief, which I doubt is available in civil proceedings in Canada, is not, in any event, sought. The conviction at bar has not been impeached by any proper proceedings to that end.

[77] The appellant is seeking to re-litigate an issue open to him in the earlier proceedings and is precluded from so doing as long as that conviction stands. I would, therefore, dismiss the appeal, with costs.

DATED at EDMONTON, Alberta,
this 3rd DAY OF October,
1988.

Tab 150

- Use of an imitation firearm while committing an indictable offence (sexual assault) contrary to s. 85(2)(a) of the *Criminal Code*;
- Robbery contrary to s. 343 of the *Criminal Code*;
- Forcible confinement contrary to s. 279(2) of the *Criminal Code*;
- Sexual assault with a weapon contrary to s. 272(1)(a) of the *Criminal Code*;
- Sexual assault with a weapon contrary to s. 272(1)(a) of the *Criminal Code*; and
- Sexual assault with Jevor Brown contrary to s. 272(1)(d) of the *Criminal Code*.

[2] He now stands to be sentenced.

Background Facts

[3] The complainant, C, was 23 years old at the time of the offence. She was resident in Montréal. On 10 July 2019, she came to Toronto with two male friends, hereinafter referred to as D and G, along with D's girlfriend, hereinafter referred to as A.

[4] They rented an Airbnb paid for by G. The Airbnb was located on the 14th floor of 111 Bathurst Street in Toronto.

[5] At some point during their first night in the city, D and G went outside the building to smoke a cigarette. C had fallen asleep but was woken by A who asked her to go downstairs to let G and D back into the building. The only key to the apartment was an electronic fob which was needed to access their floor when using the elevator. G and D had left the key with the two women.

[6] C agreed to go down to the building's lobby to let her friends in. When she approached the 14th floor elevators, she noticed two men waiting nearby. C became uneasy because the two men did not look like residents of the building. When the elevator arrived, she got in. The two men followed.

[7] A security camera from inside the elevator captured the events that followed.

[8] C began to look at her mobile phone. She was approached by one of the men who was wearing sunglasses and a Toronto FC baseball cap. This was Mr. Codrington. The second man, Jevor Brown, stood in the corner watching.

[9] Mr. Codrington asked C, "do you want to have fun". When she said "no", she was told to "shut the fuck up". Mr. Codrington took her phone and began to pull down the straps of her dress. She was afraid and tried to resist. Mr. Codrington pointed a gun at her and yelled, "shut up".

[10] The elevator stopped at the ground floor, but Mr. Codrington stood directly in front of C preventing her from leaving. He pressed the eighth-floor button. When the elevator doors opened, Mr. Codrington grabbed C's hair and forcibly dragged her from the elevator. Mr. Brown exited with them.

[11] C testified she was taken to a nearby stairwell and forced down a flight of stairs. Mr. Codrington began to choke her before demanding she perform fellatio on him. When doing so, he pointed a gun at her head. He also wanted the password to her phone. Mr. Codrington told C to "suck it" whilst he held her head in place. Scared for her safety, C did as she was told. Mr. Brown moved behind her and had vaginal and anal sex with her without her consent whilst she continued to perform oral sex on Mr. Codrington. Throughout, Mr. Codrington continued to hold a gun to C's head and told her to "shut the fuck up".

[12] The two men swapped positions and Mr. Codrington anally and vaginally raped C from behind whilst Mr. Brown inserted his penis into her mouth. Mr. Codrington made demands as he

kept the gun pointed at her head. Mr. Brown remained silent. C could not tell how long the event lasted but remembered that it ended just after she heard a noise from outside the stairwell.

[13] Just before the two men left the scene, Mr. Codrington turned to C and told her “we are going to be looking for you”.

[14] C ran up the stairs to the 14th floor where she found her friends. She saw G standing next to the lift. She was crying. G asked her what had happened, and C told him.

[15] The police were called the next day. She was also seen by a doctor who prescribed medication. The sexual assault nurse who examined C said that she saw swelling and redness on C’s labia and anus. She was unable to examine C’s vaginal area using a speculum because C told her that she would be unable to bear the pain that would result. Even a routine medical swabbing proved to be impossible because of C’s extreme discomfort. Ultimately, it was left to C to take her own swab sample, which the nurse testified to as being very rare.

[16] The nurse also said C’s neck was tender to the touch and there was redness. She also observed a bruise on the right side of her leg. This injury was captured by a photograph taken by police.

Position of the Parties

[17] Ms. Verboom, on behalf of the Crown, submits this offence is of such a serious nature that a sentence of 12 years is appropriate as a global sentence. She also asks for the following ancillary orders:

- a DNA order;
- an order pursuant to the *Sexual Offender Information Registration Act* for a period of 20 years; and
- an order under [s. 109](#) of the *Criminal Code* prohibiting Mr. Codrington from possessing any weapons for life.

[18] Ms. Brown, on the other hand, submits that Mr. Codrington has served the equivalent of five- and one-half years and asks for a sentence of time served. She argues that this is sufficient when considering Mr. Codrington’s personal circumstances.

Personal Circumstances

[19] Mr. Codrington is now 28 years old. He was born in Toronto to an American mother, Mary Codrington. He also has a sister. He informed the author of his pre-sentence report that he was unsure where his biological father was born and has limited contact with him.

[20] Mr. Codrington indicated that his mother and grandmother have an history of Indigenous descent. This was confirmed by his mother. He described his relationship with his mother as being “fair”. However, it appears that their relationship is volatile and that they have “fallouts”.

[21] Apparently, Mary Codrington has health issues and indicates that Mr. Codrington would be required to care for her youngest son, if anything would happen to her.

[22] Mr. Codrington grew up in Toronto with his maternal grandparents, his aunt, and his sister. His grandfather was a role model for him and taught him how to respect people. Mr. Codrington indicated that in his past, there was some Children Aid Society (CAS) involvement but was unable to recall the details. At age 15, the CAS removed Mr. Codrington and his sister from the family home and placed them into the care of his grandparents.

[23] Mr. Codrington indicated that he had a "bad upbringing" and missed out on his childhood. He never went on a trip or played any sport. He said that he suffered physical, spiritual, and mental abuse from his grandmother. Mr. Codrington also said he was subjected to corporal punishment. He indicated that he would have preferred to have lived with his mother.

[24] Mr. Codrington also spoke of his feelings towards his grandmother who identified him to the police after the offences. He indicated that he feels "betrayed" and cannot understand why she did so. His grandmother told the author of the pre-sentence report that she wanted "what is best for him".

[25] It would appear that Mr. Codrington had a learning disability and needed support throughout high school.

[26] Mr. Codrington is currently single with no children, although he had been in a relationship with a woman for 10 years residing together for a year and a half. He indicated there was domestic violence in the relationship but denied being the perpetrator. He could not explain as to why the relationship ended.

[27] Mr. Codrington recalled attending two elementary schools and multiple high schools. He did not complete his high school education and left school at the age of 17. He told the author of the pre-sentence report that he had anger issues in elementary school and got into fights with other students. In elementary school, he was diagnosed with intellectual delay. Thereafter, he was given an individual education plan which placed him in a special-needs classroom accompanied by an educational assistant. He said that his behaviour changed for the better after this development. His mother has also confirmed that Mr. Codrington has been diagnosed with an intellectual impairment which caused problems for him at school and in everyday life. His mother added that Mr. Codrington has a hearing impairment and lower than average memorisation skills relative to others his age.

[28] Mr. Codrington told the author of the pre-sentence report that he had been diagnosed with schizophrenia as a child but could not provide any details. Mary Codrington confirmed the existence of mental health issues when Mr. Codrington was a small child, but also failed to provide any dates or details. He told the author of the pre-sentence report that he had never seen a psychiatrist, but later changed that claim saying that he did. He was on medication for four years but would stop taking it. Much of Mr. Codrington's claims about his mental health could not be supported with details or specifics. It does appear, however, that whilst in detention, Mr. Codrington has been seeing a psychiatrist at the Toronto South Detention Centre and taking medication. He has been diagnosed as having schizophrenia and is taking psychotropic medication as prescribed.

[29] Mr. Codrington has been steadily employed throughout his life. Prior to his current incarceration, he was employed at a call centre for two months and previous to that as a security guard. He said that he was fired from his security guard position because he was unable to renew his licence due to the criminal charges. In his pre-sentence report, Mr. Codrington said that he had worked in numerous positions in factories, call centres, and retail stores. More recently, he was financially supported through the Ontario Works program because he was unable to find employment due to court-imposed restrictions.

[30] Mr. Codrington has no drug or alcohol related issues.

Aggravating and Mitigating Features

[31] There is no doubt that this was an opportunistic assault on an unsuspecting and vulnerable victim visiting Toronto.

[32] Ms. Verboom suggests that there was evidence of a planned assault in this case. After taking C's phone, Mr. Codrington immediately pressed the eighth floor of the elevator as if both parties had previously decided that they would be going to that floor. Upon reviewing the video evidence, I found beyond a reasonable doubt that when they followed C into the elevator, they had already formed their plan to sexually assault her and had chosen the floor where they would commit their attack.

[33] There is no doubt that this was a very serious, violent offence. However, much of the seriousness is reflected in the nature of the charges and cannot be considered as aggravating features.

[34] Mr. Codrington continues to maintain his innocence and protests his "wrongful conviction". This is not an aggravating feature as this is his right. However, an offender who continues to proclaim that he is not guilty is not entitled to the significant discount in sentencing they would otherwise receive. Mr. Codrington's repeated assertions that he is not responsible for the offences also speaks to his poor prospects for rehabilitation.

[35] In mitigation, it is clear that Mr. Codrington does have mental health challenges with his mental health and learning difficulties. He has provided letters of support from his family including his mother who is suffering from terminal cancer, his grandfather, his aunt, and his older brother who has spoken with Mr. Codrington in pursuing a career in trades.

[36] Mr. Codrington does not have a criminal record. Ms. Brown filed records from the Toronto South Detention Centre and the Toronto East Detention Centre which appear to indicate that Mr. Codrington was subject to lockdown conditions which were exacerbated during the pandemic. Mr. Codrington was also on very restrictive house arrest conditions when released from 22 November 2022 to 15 June 2023. Accordingly, he is entitled to credit under the principles set out in *R. v. Downes* (2006), [2006 CanLII 3957 \(ON CA\)](#), 79 O.R. (3d) 321.

[37] On the other hand, the records also show that Mr. Codrington was guilty of three acts of misconduct in May, June, and July 2023. One of these acts involved Mr. Codrington being violent towards a cell mate and grappling with institutional officers as they attempted to restrain him.

The Sentencing Precedents

[38] In seeking a sentence of 12 years imprisonment, the Crown relies upon several cases.

[39] In *R. v. Myers*, [2000] O.J. No. 1787, aff'd [2002] O.J. No. 965 (C.A.), the offender pleaded guilty to sexual assault on a woman that he dragged off the street as she was walking home. He attempted to rape her, removing her clothes and pushing her onto the ground, which was covered with ice. It was not clear whether there was penetration, but the victim suffered several injuries including bruises and hypothermia from the attack. The offender was a 26-year-old alcoholic with limited education. He also had a criminal record that included convictions for assault upon previous girlfriends. He expressed remorse and apologised to the victim. He was sentenced to the maximum sentence of nine years imprisonment. This sentence was upheld by the Court of Appeal who commented that whilst the sentence was a "substantial one", the brutality of the attack and the duration of the assault made it fit: at para. 1.

[40] In *R. v. Sousa*, [2023 ONCA 100](#), 165 O.R. (3d) 641, the offender was convicted of sexual assault on a victim who had passed out at a house party. The offender took her to an isolated area and forced her to perform oral sex before penetrating her twice vaginally and once anally. After he had finished, he drove the victim back into town and left her on an unfamiliar street, where she found assistance and the police were called. He was given a ten-year jail sentence. The Court of Appeal found the sentence to be excessive and reduced it to eight years. The Court found that the

assault took place on a vulnerable victim and could be characterised as opportunistic. However, the offender had no criminal record.

[41] In *R. v. Kavanagh*, [2009 ONCA 759](#), 255 O.A.C. 285, the offender was convicted of sexual assault with a weapon, unlawful confinement, and robbery. The Court of Appeal described this as a "brutal, sexual assault on a vulnerable woman working at night in a convenience store": at para. 7. The offender, who was unknown to the victim, entered the store, locked the door, and threatened the complainant with a knife that he claimed to have in his back pocket. He took her into a back room of the store and made her perform oral sex on him before raping her. The offence was found to be a premeditated one on a vulnerable victim who suffered long-term consequences in her personal life. The offender had a criminal record that included domestic assault. The Court of Appeal held that a ten-year sentence was appropriate.

[42] In *R. v. R.M.*, [2020 ONCA 231](#), 150 O.R. (3d) 369, the offender was convicted of a sexual assault on a sex trade worker who was violently and repeatedly raped at knife point by the offender and another male in 1990. In 2016, a DNA profile identified the offender as the perpetrator. The Court of Appeal upheld a global sentence of eight years for the youthful first-time offender.

[43] In *R. v. Assing*, [2008 CanLII 58607 \(ON SC\)](#), [2008] O.J. No. 4527 (Ont. S.C.), the first-time offender was convicted of sexual assault whilst using a knife, robbery, and unlawful confinement. The victim was walking home from a shopping excursion. She was grabbed by the offender, a stranger, who wielded a knife with a blade of approximately one foot in length. After taking her money and personal objects, the offender dragged the woman into a nearby park and into a townhouse in a residential development. She was forced into the basement, tied up, and raped repeatedly. She was punched about the head and body when she tried to resist. The judge took the view that the offender was a "predator". The attack was pre-planned on a vulnerable victim and a weapon was used. The judge held that public safety, denunciation, and deterrence were paramount and imposed a sentence of nine years.

[44] In *R. v. Broekaert*, [2003 MBCA 10](#), 170 Man. R. (2d) 229, the offender was convicted of aggravated sexual assault and sentenced to 11 1/2 years imprisonment. He had been drinking at a bar. He followed the victim, dragging her into a construction site before removing her clothing. He then inserted an object into her vagina and anus. After he struck her in the face, he dragged her to a second location, where he continued a similar attack. The victim suffered serious injuries, including lacerations to her vagina and anus. She was required to undergo emergency surgery to close the wounds. As a result of her injuries, she required long-term attention and additional surgeries to recover. She required the continuing attention of a home care nurse and undertook a continuous course of medication to cope with the emotional and physical scarring of the attack. The offender had a minor, dated, and unrelated criminal record.

[45] In support of its position of time served, the defence relies on several cases.

[46] In *R. v. Alexander*, [2013 ABCA 231](#), [2013] A.J. No. 655, the offender pleaded guilty to sexual assault. He contacted a sex trade worker and enticed her to the parking garage of an apartment building. When she arrived, the offender attacked her, holding a knife to her throat. He then stole money from her and took her mobile phone. The offender received a six-year sentence which was reduced to five years on appeal.

[47] In *R. v. Sutherland*, [2016 ONCA 674](#), 342 C.C.C. (3d) 309, the offender was convicted of sexual assault of a woman whom he had met whilst trafficking crack cocaine. Both the offender and the victim were drug addicts. On the day in question, the victim went to the offender's house to smoke cigarettes and purchase some crack cocaine. The offender attacked the victim. He threw her to the ground and raped her with a knife pointed at her throat. After she fled, the offender chased her with a broken beer bottle. The offender received a sentence of six years.

[48] In *R. v. Richards*, 2016 ONSC 2940, the offender was convicted of a sexual assault on a sex trade worker whom he approached as he was driving his vehicle. He drove the victim to a cemetery, punched her in the face and the head, and then produced a knife, threatening her with it. With the knife held at her neck, the offender sexually assaulted her by digitally penetrating her vaginal and anal areas. He then forced her to perform oral sex on him whilst continuing to hold the knife over her head. Afterwards, he raped her vaginally and anally. He received a global sentence of seven years.

The Appropriate Sentence

[49] Section 718 of the *Criminal Code* sets out the factors that a judge must consider when imposing a sentence. These principles emphasise balancing denunciation and deterrence with rehabilitation and promoting a sense of responsibility.

[50] The fundamental principle of sentencing is contained in s. 718.1 of the *Criminal Code*. This principle mandates that any sentence must be proportionate to the gravity of the offence and degree of the responsibility of the offender.

[51] I find the cases advanced by the defence to be of limited assistance. For example, in *Alexander* – the low point in these sentencing cases – the offender pleaded guilty and received the benefit of a significant discount. Moreover, none of the cases involve a gang sexual assault, a significant feature of seriousness in this case.

[52] There is no doubt that this was an horrific assault on a vulnerable complainant who was a stranger to the city of Toronto. I have already found beyond a reasonable doubt that there was planning involved before Mr. Codrington and Mr. Brown entered the elevator. In their choice of the eighth floor, the offenders clearly knew of the stairwell – which might provide some seclusion – as they took C there directly and forced her down a flight of stairs. The use of the gun, both in the elevator and the stairwell, when Mr. Codrington and Mr. Brown carried out their attack on C would have been terrifying in its impact. It is telling that C could not bring herself to write a Victim Impact Statement for the sentencing hearing because she was too emotionally scarred.

[53] Accordingly, denunciation and deterrence must take precedence in a case with facts such as these.

[54] In light of these factors, the Crown's position of 12 years is not unreasonable. However, I must also take into account the mitigation that I have described. This includes Mr. Codrington's incarceration during the COVID-19 pandemic as well as the lockdowns at the institution during the pandemic. I also take into account his house arrest conditions which would entitle him to a credit pursuant to *Downes*.

[55] I conclude that a global sentence of ten years is appropriate in this case. That shall be marked on the indictment. From that, I deduct 5 years and 5 months pursuant to the credit Mr. Codrington is entitled to under *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575. The sentence left to be served is 4 years and 7 months.

[56] I also make the following ancillary orders:

- An order that he provide a DNA sample pursuant to s. 487.051(1) of the *Criminal Code*. With the exception of the offences pursuant to s. 85, the offences are all primary designated offences;
- a section 109 order prohibiting Mr. Codrington from possessing weapons for life. This order is mandatory for all of the offences;
- a registration on the *Sexual Offender Information Registration Act* for a period of 20 years; and

- a non-communication order with C and her family pursuant to [s. 743.21](#) of the *Criminal Code*.

The *Kienapple* Principle

[57] Although Mr. Codrington originally faced eight counts on the indictment, one count (Count 7) was not proceeded with by the Crown. Ms. Verboom also concedes that Count 1 on the indictment should be stayed pursuant to the principle in *R. v. Kienapple*, [1974 CanLII 14 \(SCC\)](#), [1975] 1 S.C.R. 729, as it duplicates Count 3 on the indictment (Robbery). I would also find that Count 2 on the indictment is also captured by *Kienapple* as the essential elements of s. 85 contains the same legal elements as Counts 5 and 6 (Committing a Sexual Assault Using a Weapon). For these reasons, Counts 1 and 2 are stayed in accordance with the *Kienapple* principle.

Allocation of the Sentence

[58] The global sentence of 10 years shall be allocated across the counts as follows:

- Count 6 – Sexual assault with a weapon in the stairwell of 111 Bathurst Street – 10 years imprisonment;
- Count 8 – Sexual assault committed with Jevor Brown – 10 years concurrent to Count 6;
- Count 3 – Robbery – 3 years concurrent to Count 6;
- Count 4 – Forcible confinement – 3 years concurrent to Count 6; and
- Count 5 – Sexual assault with a weapon in the elevator – 5 years concurrent to Count 6.

S.A.Q. Akhtar J.

Released: 10 November 2023

CITATION: R. v. Codrington, 2023 ONSC 6352

COURT FILE NO.: CR 20-10000157

CR-20-10000158

CR 23-10000372

DATE: 20231110

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HIS MAJESTY THE KING

– and –

SHANE CODRINGTON

REASONS FOR SENTENCE

S.A.Q. Akhtar J.

Tab 151

Evans v. Sproule, 2008 CanLII 58428 (ON SC)

Source: Superior Court of Justice

Date: 2008-11-12

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DATE: 20081112

SUPERIOR COURT OF JUSTICE

HEARD: September 8, 9, 10, 11, 12, 15, 16, 17 and 18, 2008

Reasons for Judgment

It is tragic but true that people working with the vulnerable sometimes abuse their positions and commit wrongs against the very people they are engaged to help.

Bazley v. Curry, 1999 CanLII 692 (SCC), [1999] 2 S.C.R.

534, *per McLachlin J.*

[1] In the wee hours of January 7, 1979, the plaintiff, Marian Evans, a 24-year-old single female, was subject to an admittedly outrageous and despicable sexual assault at the hands of Police Constable John David Sproule (Sproule), a member of the Toronto Police Services Board (the Board) or its predecessor. The assault took place in the officer's police cruiser while he was on duty and in full police uniform.

[2] Following an investigation, Sproule was charged with a criminal offence under the *Criminal Code of Canada*. He resigned from the police force in August 1979, prior to charges being laid, under the *Police Act*, R.S.O. 1970, c. 351. In October 1979, after the preliminary hearing and as a result of a guilty plea, he was convicted of indecent assault and fined \$1,000.00.

[3] The plaintiff has been diagnosed as suffering from post-traumatic stress disorder (PTSD), anxiety and depression. Shortly after the assault, she moved out of her Irish Catholic home and has not re-integrated with her family members since that time. She avoids people, suffers from panic attacks and displays paranoid tendencies, all of which are well-documented. According to the expert psychiatrists, Ms. Evans requires focused mental health treatment for her condition, but will, nonetheless, suffer some symptoms for the remainder of her life.

[4] The plaintiff commenced these civil proceedings against Sproule and the Toronto Police Services Board (the Board) in October 2002. When Sproule failed to attend the trial, his pleadings were struck and judgment was awarded against him; the Board's crossclaim against Sproule for contribution and indemnity was allowed, and the trial essentially proceeded against the Board.

[5] The case before me revolves around issues of trust and fiduciary duty, negligence, vicarious liability, limitations and laches, and damages.

THE EVIDENCE

1. The Plaintiff and Her Witnesses

(a) The Incident of Sexual Assault

[6] On Saturday, January 6, 1979, Marian Evans, at 24 years of age, attended a party with her boyfriend, Raymond Feeney. As Raymond had been drinking and she had not, Ms. Evans drove Raymond home and was driving Raymond's car back to her home at about 3:30 a.m. when she was stopped by Sproule who was in full police uniform with his police badge and gun visible in its holster, and driving a marked police vehicle.

[7] Sproule directed her to get out of her vehicle and to sit in the front passenger seat of his police car. When asked for identification, she said she had none with her, and identified herself as Kathleen Evans, the name of her older sister. After searching her vehicle Sproule returned and began to write a ticket for a traffic-related violation. At this time, the plaintiff disclosed her true name and that her licence had been suspended a week ago, for an unpaid traffic ticket.

[8] The plaintiff described the ensuing events, as follows:

- a) The officer retorted, "With me writing this summons, you just made yourself liable to 14 years in prison." He then asked "so what do you think we should do?" In response, the plaintiff who by this time, was "nervous, upset and shaking," answered that she didn't know. Sproule told her to stay in the police car while he drove her vehicle to a nearby parking lot.
- b) Sproule then drove her in his vehicle to the parking lot in which he had parked her boyfriend's car, directed her to sit in the passenger seat of that car and told her to wait there until he returned, which she did. The plaintiff described the weather as "freezing" and when she went to turn on the heat in the car, she realized that the officer had taken the keys to the car. She was wearing a black dress with lace at the neck, no bras, a corduroy coat, high heels and no boots. Frightened and "out of control", she could not stop shaking as she contemplated the trouble she was in and the prospect of going to jail for 14 years.

- c) After 10 to 15 minutes, Sproule returned in an unmarked police car and had Ms. Evans get into the front passenger side. He then drove the car through an alleyway into the corner of an empty parking lot, and turned off both the lights and the car. In the plaintiff's words:

He turned off the car. He took off his cap and put it on the window sill. He said, 'Well, Marian, what made you lie like that? I mean, making yourself liable for 14 years?' He was holding up the summons when he said that.

- d) Sproule then pulled the plaintiff toward his face with both hands, rubbed his face on hers and tried to kiss her. Though she kept "twisting and turning [her] face away from him," he kept turning her face with his hands towards his face and touched his lips to her face and lips.
- e) He then pushed her right shoulder towards him and reached inside her coat, pressing hard with his hand over her right breast. He kept trying to kiss her, leaned his chest against hers and put his head close to her breast. He then put his hand on her leg and started to rub her leg. She continued to struggle while asking him to take her to the police station.
- f) The officer then began to push her down, making her lie on the seat on her back. In her words, "he was on top of me smothering me with his body." When asked by counsel what was going through her mind at the time, she replied, through tears,

I was just frightened. I was scared. I was thinking of my life. I was thinking of rape.... I kept thinking of being raped and being killed. I didn't know what was going to happen to me. I didn't know how to get out of this situation other than taking me to the station.

- g) When Ms. Evans reached for the car radio and threatened to scream, the officer "jumped" off her, lit a cigarette and apologized. After a short conversation, he began again. In her words,

...he started pulling my face towards his again. He grabbed my hands. He was trying to put them on his shoulders, and I kept pulling away, and he wouldn't stop, and he kept pulling them, and he asked me to kiss him, and he was rubbing his face on me again. And I kept saying, don't, please don't, just take me to the station. And he wouldn't do that.

- h) The officer then asked, "What if I told you that I wanted it right now? Indicating that she would be "an emotional disaster," she gave him a peck on the cheek, thinking that would make him leave her alone. The officer then pulled her towards him while complaining that he was not getting along with his wife. The plaintiff explained that she was raised in a "very strict" home and that her parents would be worried about her.
- i) Sproule then told her to lie down on the seat of the car as he did not want his Sergeant to see her in the car with him, which she did. According to the plaintiff, she was weeping and kept wiping her face with her coat while the officer stared down at her. He finally started the cruiser and drove her to Raymond's car. He did not give her a summons.

[9] Sproule followed the plaintiff's vehicle for a distance, pulled up beside it, looked at her and then drove away. She reached her home at about 6:00 a.m. Shortly after she arrived home she called her boyfriend Raymond who was staying with his brother, Robert Feeney, and told him about the incident.

[10] The plaintiff's account of the events has been remarkably consistent in its detail since the incident and throughout these proceedings. As to her feelings at the time, she stated,

I was so frightened for my life. I thought I was going to be..... I thought of my parents, all my life. I thought if I was going to be dead or alive the next day. I thought of my friends ... I was so afraid.... I've never been so scared in my life before or after.

[11] Later that day, the plaintiff went to Robert's place and he convinced her to call the Rape Crisis Centre and to attend at police headquarters, which she did, along with Robert and Raymond. At the trial Robert described the plaintiff on the day in question, as being "visibly upset" when recounting the story of the molestation; more specifically, she was crying, shaking and trembling, and did not know what to do. Sergeant Donald Madigan took Ms. Evans' statement, investigated the incident and as previously noted, criminal charges were laid against Sproule as a result.

(b) Her Family and Personal Life Prior to the Incident

[12] The plaintiff was born in Dublin, Ireland, as the second oldest in a line of five siblings. The family moved to Canada in 1960, when the plaintiff was 6 or 7 years old. She is closest to her eldest sibling, Kathleen, who is two years older than her, is a single mother with a 27-year-old daughter and presently, serves as their mother's caregiver.

[13] According to the plaintiff and her sister Kathleen, their father, who owned a successful contracting company, was a quiet, gentle soul who passed away suddenly in 2006 at the age of 79. Their mother whom they described as a thoughtful, kind and hardworking person with a sense of humour, worked for many years as a seamstress.

[14] By all accounts, the plaintiff enjoyed a happy, normal family life in a typically religious Irish Roman Catholic family. After high school, she entered a two-year early childhood education program at Centennial College and completed the course but did not write her final exams as she had lost interest in working in a daycare centre.

[15] Kathleen described the plaintiff as kind-hearted, talented, charming, witty, very beautiful and charismatic. According to her, "she lit up the room — family, friends and strangers, all loved her." She frequently lent a helping hand to others, had aspirations, self-esteem and confidence. She was stable and focused; she had intelligence, ability and was proud of her accomplishments. In Kathleen's words, "She had it all." One summer, for example, she turned the house and backyard into a daycare with lunch, games and parties for neighbourhood children. She and her sister were extremely close — they spent summers together, travelled, shopped, talked and "did everything" together.

[16] The plaintiff's boyfriend at the time, Raymond Feeney, also came from an Irish Catholic family who had known the Evans' family for many years. He was described as quiet, respectful and, according to Kathleen, he treated the plaintiff "like gold."

(c) Her Life After the Incident

[17] The plaintiff observed the expression of shock on her mother's face when Sergeant Madigan told her parents about the incident and the fact that she had been driving while under

suspension. Though she continued to live at home, the incident was never mentioned again and she felt the tension, shame and embarrassment caused to her family because of it. This led her to flee her home environment a few months later in the middle of the night. To this date she has not re-established family relationships, other than occasional meetings with Kathleen or sporadic attendances at family celebrations. She has not communicated with her other siblings or family members from the date of this incident. In Kathleen's words, "She totally disappeared. It's so sad."

[18] The plaintiff's relationship with Raymond continued, on and off, for about two years, but they lived in low-income accommodation in "run down areas", and their relationship was never the same. When asked if she discussed the assault with him after the initial disclosure, she replied, "No, I was too ashamed to bring it up." Raymond's brother, Robert, noted that in those days, this was not unusual.

[19] In the mid to late 1980's, the plaintiff took the real estate brokers course but could not afford to take the additional courses necessary to maintain her license. Since that time, she has worked at various jobs, mainly in contract positions as this affords her more freedom and less intrusiveness. After her son was born in 1985, she stayed home with him for various periods of time between jobs.

[20] She is presently residing with a friend in an apartment and works for a book company as a freelance permissions coordinator, a position she quite enjoys. Her wage is \$30.00 per hour and she does the bulk of her work from home, so she does not have to socialize with others.

[21] When asked about the impact the sexual assault had on her life, she stated,

I am – I hate to admit things like this, but I feel depressed. I feel frustrated. I feel emotional all the time. I am always crying. If I laugh, I cry. If I cry, I laugh. I am confused about my feelings. I can't make them out sometimes. I can't accept – it is hard for me to accept kindness from people because I don't trust them. I have such an issue trusting people. It is like what did they mean behind that. Do they really mean this kindness or is it just a facade? I don't know what to believe. I – and then I question myself. I don't know how – if I'm thinking the right thing or if I'm doing the right thing. I question my ability. I question my shame. My self-doubt. I blame myself. I feel guilty. I question my – if I went on an interview, I questioned everything about the interview. I always came out thinking, 'well, there goes another one; I didn't get that.'

I always feel people can see through me so I tried to stay away from people. I tried not to get involved. People that I know now or people I know over my life, new people that try to befriend me, it is very difficult for me to take that friendship and keep it close. So I tend to walk away from anyone who tries to take me into their life. I keep my – I keep my distance from people. I have no ambition. I am 54. I am only figuring things out now. Sorry [wiping away tears]. I am only figuring things out now and it is – I'm really angry about it, angry and saddened by it. I wish it had been a long time ago that I could have pieced it together, and I mean I'm trying to stay optimistic. It is not like I'm, you know, dead or anything, but it is hard. It is just hard for me to put my life in an optimistic way and think positive about my future.

[22] As to her sleeping pattern, she reported:

I sleep very poorly. I wake up a lot. I have nightmares. If I think about it in the middle of the night, I pace the floor. I've been known to go for drives and

just do some work at a coffee shop and just do some work just so I can get tired, so I can come back and sleep.....

I have – I am very isolated in my nightmares. And I feel like I’m in an enclosed – I feel enclosed. Even in an open area, I have dreams of fields and they’re dark, and I mean I am enclosed in that field even though it is open. I feel – I dream of people, their faces. They don’t have a face but I know that they’re authority figures and it – and I’m trying to escape from them. I feel like I’m caged and I can’t move, and I feel very alone in my nightmares. I’m very alone and I have nowhere to reach out in the crowd.

[23] After the incident, at various times, both Kathleen and Robert observed her panicking when seeing police cars in the community. It was only after a chance meeting with Sergeant Madigan some years later that she learned about the disposition of the criminal proceedings against Sproule.

[24] The plaintiff’s only stabilizing force has been her son, Adam, who is now self-employed and with whom she has a close and loving relationship.

[25] The last family event she attended was her father’s funeral in 2006. She tearfully articulated feelings of guilt at not having ever discussed this matter with him before he passed away.

(d) The Realization

[26] It was Kathleen who referred the plaintiff to Dr. Caridad M. Cruz, psychiatrist, in early 2001. She did so in response to the plaintiff’s worsening condition and her perception that the plaintiff was living in fear and thinking she was “mental.”

[27] This is consistent with the plaintiff’s own evidence that she was feeling anxious, fearful and panic stricken at the time, and she needed to talk to someone professional about it. In her words,

After the break-up with Neil Folkard, just trying to piece together what I had done wrong in the relationship and what caused him to leave me, and I started going – *when I healed from the break-up*, I started reflecting back on my life and I thought there’s got to be something I’m doing wrong. And I reflected back on my relationships and my relationships with boyfriends and with my siblings and with my parents, and I – it brought me all the way back to the assault. When that happened, everything tended to fall apart in my life. *My self-doubt, my shame, my blame, my fears, everything just started from that day.* And I hadn’t put everything together in my head. I just felt that *I was confused about it.* So I thought I had to go and see someone to straighten my thoughts out, to help me organize my thoughts and my feelings.

[28] The plaintiff’s first meeting with Dr. Cruz took place on March 23, 2001. She continues to see her “about once a month,” and is on anti-depressants. Prior to seeing Dr. Cruz, the plaintiff’s family physician, Dr. Masson, had counselled her regarding her anxiety, depression and failed relationships, from 1992 to about 2000. However, the plaintiff did not at any time mention the sexual assault to Dr. Masson throughout that entire period of time.

[29] The plaintiff contends that she only began to really understand the root of her problems through her therapeutic interventions with Dr. Cruz. In her words, “It was only through Dr. Cruz piecing things together that I admitted I had problems”. When asked directly why she did not start the civil action until many years after the sexual assault incident, the plaintiff stated,

I – I didn't realize what was wrong with me. I didn't think about the assault. I didn't realize it had so many harms in my life. I trusted Sergeant Madigan at one point. I trusted him as looking after me. He told me that the Crown would look after me. He told me I'd be taken care of. He told me all these things. He told me that I didn't need a lawyer, that the Crown was going to act as my lawyer. And I felt that he was looking after my best interests. I just – it was because of the break-up with Neil that I had to look in my past and see what I had done wrong to have this relationship fail, and then looked at my other relationships and had to question why they failed, and each of them failed because I was messed up, and I can't fix those now. All I can do is apologize for them.

2. Dr. Caridad Cruz

[30] Dr. Cruz obtained a fellowship in psychiatry from the Royal College of Physicians and Surgeons in 1977, worked as a staff psychiatrist at Whitby Psychiatric Hospital from 1975 to 1981, and at the Rouge Valley Health System, Centenary Site, from 1981 to the present. Due to her qualifications and extensive experience with patients suffering from trauma-induced psychological disorders, Dr. Cruz was qualified as an expert to give opinion evidence in general psychiatry, with specialized expertise in the area of trauma arising from sexual assault and post-traumatic stress disorder.

[31] Dr. Cruz first saw the plaintiff on March 23, 2001, on referral from her family physician, and has seen her consistently since then, on average once per month and often more frequently. Her clinical notes and records were filed with the court.

[32] She described the patient's presenting problems as confusion, poor concentration, feeling unwell, moodiness, depression and insomnia. A mental health examination as to the plaintiff's psychological functions indicated depressive symptoms, irregular appetite, low energy, guilt feelings, nightmares and insomnia, among other things.

[33] Psychological testing results under the DSM-IV, Diagnostic and Statistical Manual of Mental Disorder, led to a diagnosis of Axis I, post-traumatic stress disorder (PTSD) with depressive symptoms. The mental illness known as PTSD is commonly characterized by:

- intrusive symptoms such as memories, nightmares and physical sensations
- avoidance of people, places or situations that remind the individual of the traumatic incident
- diminished responsiveness to the outside world, such as detachment or estrangement, loss of interest in previously enjoyed activities, or an ability to experience emotions or intimacy
- symptoms of increased arousal such as difficulty sleeping or concentrating, intense fear or irritability and mood fluctuations

(See Exhibit 8)

See also Schedule A for the complete list of Diagnostic DSM-IV Evaluation Criteria.

[34] Ms. Evans' level of functioning under the Global Assessment of Functioning (GAF) scale was 70%, indicating a level of functioning under stress; and with triggers such as seeing police vehicles on the road, she displays a 60% impaired level of functioning. Testing showed avoidance

and paranoid features in her personality which, according to the doctor, were utilized as “defence mechanisms to protect her ego from harm.”

[35] Since there had not been any other trauma in the plaintiff’s life, her symptoms, the PTSD and the guilt, fear and shame she experienced were attributed to the initial trauma resulting from her sexual molestation in 1979. The patient was prescribed medication for depressive symptoms and a tranquilizer to help her sleep at night.

[36] It was the doctor’s evidence that following the assault, the onset of the plaintiff’s PTSD was immediate and then prolonged. The plaintiff was aware that she had problems in her life, but she did not know why this was so or the root of the problems. She did not connect the problems to the assault which had occurred 22 years earlier. Moreover, she internalized the guilt, shame and fear associated with the event such that it affected her own self-image, and in the doctor’s words, “numbed” her understanding. It was only through the process of “exploratory psychotherapy” that the plaintiff became aware in any meaningful or consistent way, that her problems and poor relationships were connected to the sexual assault; and that she began to shift the blame from herself.

[37] A further psychological assessment was conducted in August 2002 when the plaintiff “was trying to make up her mind whether to pursue a lawsuit” with similar results. It was the doctor’s evidence that it was through the process of psychotherapy that the plaintiff began to develop substantial insight into the root cause of her psychological, familial and interpersonal problems.

[38] Dr. Cruz also opined that, without treatment, Ms. Evans’ condition will remain the same. She has suggested an in-patient treatment plan at Homewood Health Centre which has a specialized program for Traumatic Stress Recovery. Apparently, that is the only in-patient program of its kind in Canada, helping people to recover from the after-effects of trauma.

3. Dr. Hy Bloom

[39] Dr. Bloom has had a diverse career in both psychiatry and law. He obtained a fellowship in Forensic Psychiatry from the Royal College of Physicians of Canada in 1989 and a Bachelor of Laws degree from the Law Society of Upper Canada in 1980. Among other things, he works on a part-time basis as a staff psychiatrist at the Centre for Addiction and Mental Health, Clarke Branch, in Toronto and as coordinator for Psychiatric Resources at the Ontario Review Board. His curriculum vitae and statement of qualifications sets out his training, teaching positions, publications and forensic experience in the courts, as an expert witness. He was accepted by the court to give evidence as an expert in psychiatry.

[40] At the request of the defence, Dr. Bloom saw the plaintiff for a total of approximately 5 hours over a two-day period in July 2008. He also referred her to Dr. Mini Mamak, psychologist, for psychological testing, and incorporated much of the test results into his reports and testimony. His diagnosis based on the test results and what he described as “limited collateral corroboration,” was that the plaintiff is suffering from the mental health disorder PTSD with delayed onset. In his testimony, he adopted the following test results from Dr. Mamak’s report.

- 1) The plaintiff is functioning at an average range of intelligence.
- 2) She is experiencing moderate symptoms of depression and is quite pessimistic about her future.
- 3) Her overall profile is suggestive of post-traumatic stress disorder and autonomic arousal, depressive symptoms, indicating *marked distress and severe impairment in*

functioning. The profile suggests that her symptoms of anxiety and tension “may be related to the experience of a traumatic event.” Her symptoms were marked by cognitive features of depression such as negative expectancies and low self-esteem.

- 4) Paranoid and avoidance personality traits appear in her profile. She has a “rather harsh opinion of herself” and her working relationships may be strained.
- 5) She has seemingly not embellished the nature of the psychological, emotional and social harm the behaviour has caused her.

[41] The test results are consistent with those taken by Dr. Cruz. Where Dr. Bloom’s opinion evidence appears to differ from that of Dr. Cruz is in his assertion that the plaintiff’s condition of PTSD only reached sufficient severity to cross the diagnostic threshold after her breakup with Neil Folkard in 1999, and that she had the capacity to instruct counsel and commence an action prior to that time.

[42] Moreover, in his reports and testimony, he opined that Ms. Evans “always had some awareness of having been damaged by the incident in 1979.” Specifically, he reported that she had “some notion in her mind, even if it was not at her fingertips,” that her emotional responses to police vehicles, and her leaving the family home, were the result of the incident of sexual assault. He then stated that, based on this “it would not be reaching too far to at least wonder whether she had, at any point prior to 2001, hypothesized a relationship between the incident and any other aspects of her life that she felt were not going well for her.”

[43] At the same time, the doctor agreed in his cross-examination that a common sequelae experienced by sexual assault victims is shame and guilt, elements that were present here; that these often become integrated into the victim’s self-image, especially when the assault includes a power/dependency factor as it did here; and that the shame and guilt can become a barrier to the victims reaching an understanding that the sexual assault was not their fault. Indeed, in the doctor’s report, he noted that the plaintiff “felt riddled with guilt” when she “slinked” out of the family home in the middle of the night as, in his words, “she couldn’t take the pressure, guilt, shame and sense of failure the incident caused her and then reverberated into her family life.” Dr. Bloom also agreed that, in general, psychotherapy can help people to really understand how potentially robust the original assault has been in affecting a number of features of their life, and that it is common for victims of sexual assault to remain silent for many years, especially when the assault involves power and authority, as they would rather suppress the thoughts of the sexual assault, than relive the experience.

[44] According to Dr. Bloom, though the plaintiff has developed some supportive relationships that may serve as a buffer against the effects of stress, she suffers from marked distress and impairment in function, shows little insight into her problem areas and is likely to experience notable stress and turmoil in a number of major life areas in the future.

4. Rhonda Hearn

[45] As the Executive Assistant to the Director of Legal Services for the Board, Rhonda Hearn opened and managed the police file on behalf of the Board and disclosed documents that have some relevance to the issues in this case.

[46] It was noted that Sproule’s personnel file described him as “a large young man” whose physical characteristics at the time of his application for employment in 1974 were: 27 years of age, 6 feet 3-¾ inches tall and weighing 207 pounds.

[47] More importantly, Ms. Hearn produced evidence in Sproule's file that documented an unrelated incident of somewhat similar nature to that in this matter. In summary, Police Constable Kershasp Mulla was on uniformed patrol duty with Sproule on December 22, 1978, when they stopped a vehicle driven by 19 year old Brenda Zegil, at about 1:20 a.m. due to a noisy muffler. In the course of searching Ms. Zegil's purse, Sproule located a small quantity of marijuana wrapped in a plastic bag. When Sproule drove her car away and left her in the police vehicle, Ms. Zegil swallowed the marijuana. Upon discovering this, the officers told Ms. Zegil she would be facing an additional charge of obstruct police.

[48] Sproule then drove around the area of 41 Division with Officer Mulla in the front passenger seat and Ms. Zegil in the rear of the police scout car. He then stopped the car in an empty parking lot, asking Ms. Zegil what she intended to do. She answered, "Go home, I guess. I'm tired." According to Officer Mulla, who later provided a written statement to investigators:

Then Sproule told her that he was going to search her. P.C. Sproule turned around and searched Brenda P.C. Sproule asked Brenda if she was agreeable to him frisking her body. Brenda replied, "No." P.C. Sproule asked Brenda if she was going to show him her body. Brenda replied, "No." P.C. Sproule then stated, "Well, then, you will be going to (the) station if that's what you want." At this point, Brenda stated, "Okay, I'll show you, what part you want to see, top or bottom." Sproule stated, "Both." Brenda refused to show him both parts of her body and stated, "The next thing you are going to demand is sex. I don't want any part of that, just let me go." P.C. Sproule stated, "Okay, show me one part of your body and then I get to touch it." Brenda replied, "No. You don't touch me. How come you are so determined?"

[49] When Officer Mulla suggested that Sproule take Ms. Zegil to her car or to the station, Sproule said, "Wait" and again asked her to show him her body. She said, "Okay, one part, I'll show you." When Officer Mulla went to leave the car, Ms. Zegil grabbed him, begging him not to leave. He cautioned her not to touch him and Sproule, referring to Officer Mulla, said to Ms. Zegil, "He does not want anything. How about a blow job for me?" Officer Mulla left the vehicle and upon his return, Ms. Zegil was dropped off near her vehicle at approximately 2:10 a.m. and served with 3 summonses written by P.C. Mulla.

[50] On January 9, 1979, after learning about the charge of indecent assault laid against Sproule in respect of Ms. Evans, Officer Mulla disclosed the prior incident to his supervisor.

[51] On February 26, 1979, a charge of discreditable conduct under the *Police Act* was laid against Sproule in the Zegil matter, but it failed to proceed due to Sproule's resignation from the police force, as at August 17, 1979.

[52] The final aspect of Ms. Hearn's testimony that is worthy of some note involves the removal of the investigative file by Sergeant Madigan who kept it in his personal possession for many years and only disclosed its contents recently. According to Ms. Hearn, though this has occurred on occasion, it is not the normal course. Further, protocols were in place at the time to ensure police files, both investigative and personnel files, were maintained in the custody and control of the Board in order to guarantee their integrity.

5. Sergeant Madigan

[53] As noted, Sergeant Madigan was the investigating officer in the case. I have not separately summarized his evidence. Though he was called by the defendant as a witness, much of his

testimony underlined and confirmed that of the plaintiff – his observations of her demeanour and so on. He mentioned in passing, that the plaintiff’s father believed Sproule was perhaps being dealt with “too harshly”, thus underscoring the shame and embarrassment the family felt related to what they may have perceived as fault on the plaintiff’s part.

THE ISSUES

[54] The issues before me are as follows:

- 1) Did Sproule stand in a position of trust vis-à-vis Ms. Evans, and if so, did he breach his fiduciary obligation to her?
- 2) In the alternative, was the Board negligent based on the failure of Officer Mulla to report the unrelated incident of sexual abuse that had occurred on December 22, 1978?
- 3) Is the Board vicariously liable for the misconduct of Sproule?
- 4) Is the plaintiff’s civil action statute-barred, having been commenced 23 years after the incident; or if Sproule is found to have breached a fiduciary duty to the plaintiff, (in which case there is no limitation period) does the principle of laches act as an equitable bar to the plaintiff’s action?
- 5) What are the damages, if any, sustained by the plaintiff as a result of the sexual assault?

ANALYSIS

1. FIDUCIARY DUTY AND TRUST

[55] The plaintiff contends that, as a police officer charged with protecting the community to which he belonged, and vested with significant police authority over individuals, including the plaintiff, Sproule stood in a fiduciary relationship with Ms. Evans. As such, he owed her a duty of loyalty to act in her best interests and not to abuse his fiduciary power over her for his own personal benefit.

[56] The three-step analysis for identifying a fiduciary relationship was enunciated by Wilson J. in her dissent in *Frame v. Smith*, [1987 CanLII 74 \(SCC\)](#), [1987] 2 S.C.R. 99 at 136 (S.C.C.), adopted by the Supreme Court of Canada in *Norberg v. Wynrib*, [1992 CanLII 65 \(SCC\)](#), [1992] 2 S.C.R. 226, and restated by that court in *Hodgkinson v. Simms*, [1994 CanLII 70 \(SCC\)](#), [1994] 3 S.C.R. 377, where, at p. 408, the characteristics of a fiduciary relationship that might give rise to a fiduciary duty are set out as follows:

- 1) the fiduciary has scope for the exercise of some discretion or power;
- 2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests;
- 3) the beneficiary is particularly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[57] In order to determine whether the relationship is a fiduciary one the court must assess the characteristics of the relationship and not simply the category in which it falls. As noted by

McLachlin C.J.C. in *Norberg* at p. 272, “the essence of a fiduciary relationship is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other.”

[58] The plaintiff argues that all of the indicia giving rise to a fiduciary duty exist in this case. In particular, the trust relationship was created due to the power and authority given to Sproule as a police officer and his use of that power.

[59] It was established in evidence that Sproule had the power and discretion to detain the plaintiff, charge her with an offence and even arrest her and place her in custody. This was confirmed by Sergeant Madigan at trial and Sergeant John Knaap in his discovery evidence given on the Board’s behalf (and read in as part of the plaintiff’s case). Moreover, Sproule was expected to comply with his obligations with honesty and integrity.

[60] Clearly, on the evidence, a motorist is not at liberty to leave the scene while in the process of being questioned by an officer. When asked about this, Sergeant Knaap stated (at Q. 630):

Q. And a motorist is not at liberty to leave until the officer says “you may go.”

A. That’s correct.

Q. So the motorist who, in those circumstances, is told to go sit in the cruiser, that motorist is effectively in custody at least for that period of time?

A. Correct.

[61] Accordingly, Sproule had ample scope for the exercise of discretion and power.

[62] In these circumstances, the plaintiff argues, where Sproule, in full uniform and on duty, threatened the plaintiff with criminal charges, he unilaterally exercised his power so as to affect the plaintiff’s legal and practical interests.

[63] The final test, the plaintiff’s vulnerability, is self-evident, the power/dependency relationship having been enhanced by the uniform (cap, gun and handcuffs) visible on the officer’s person, the police cruiser and the fact he was on duty at the time. The plaintiff, being a young 24-year old female whose upbringing in a religious Catholic environment taught her respect for authority figures, increased her vulnerability.

[64] The essence of Sproule’s obligation was not to place his personal interests above that of the plaintiff in the exercise of his police powers. Given that the police generally have a duty to garner trust and confidence and the respect of the citizens in the community, Sproule’s wrongful actions were in breach of those duties.

[65] The defendant contends that there was no fiduciary relationship established in these circumstances. Further, for the Board to be vicariously liable for Sproule’s alleged breach of fiduciary duty, there must be a pre-existing fiduciary relationship established between the parties, such as occurred in the case of a police informer or a family in the witness protection program. In the alternative, breach of fiduciary duty was not properly pleaded in this case. Moreover, s. 24 of the *Police Act*, R.S.O. 1970, c. 351 (the *Police Act*) that renders the chief of police a joint tortfeasor in respect of torts committed by members of the police force under his direction and control, references torts as opposed to equitable wrongs.

[66] This is indeed a difficult area of the law. In general, the courts treat fiduciary duty separate from vicarious liability. As noted by the Supreme Court of Canada in *E.D.G. v. Hammer*, [2003 SCC 52 \(CanLII\)](#), [2003] 2 S.C.R. 459 at p. 471,

The fact that a breach of fiduciary duty requires fault is one of the features that distinguishes this type of claim both from claims based upon statutory non-delegable duties and from claims based upon vicarious liability. The latter two types of claim are no-fault claims, breaches of fiduciary duty, however, require fault.

[67] Indeed, this reasoning led the court in *Romagnuolo v. York (Regional Municipality) Police* (2001), 108 A.C.W.S. (3d) 57, [2001] O.J. No. 3537 (Sup. Ct. J.) to strike allegations of breach of fiduciary duty in the pleadings against police officers and vicariously the relevant police services boards and police chiefs, as disclosing no reasonable cause of action. In that case, the police had knocked down the plaintiff's door, and shot two of the occupants. The court found that certain hallmarks of a fiduciary relationship including trust, confidence, and loyalty were "completely absent" from that scenario.

[68] I share the comment of Keenan J. at para. 36 of that case that "it is the very nature of the duties owed to society as a whole that makes it impossible to define the limits of the powers and duties of police officers in relation to private citizens."

[69] Clearly, the duties imposed on police officers are a matter of public law, and they owe their duties to the public at large, rather than to the Board or to individual members of the public. See, for example, *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1989), 1998 CanLII 18876 (ON SC), 39 O.R. (3d) 47 (Gen. Div.), aff'd (1990) 1990 CanLII 6611 (ON SC), 74 O.R. (2d) 225 (Div. Ct.).

[70] The plaintiff trusted Sproule's authority. She followed his orders while pleading with him, at the very least, to properly take her to the station. The very language of the fiduciary implies a trust relationship and a beneficiary of that trust. In a similar situation, had the plaintiff, for example, approached or asked Sproule for advice or assistance in some way, the trust relationship may well have been established.

[71] This is a close call but in all the circumstances, I find that the plaintiff has not proven that Sproule stood in a fiduciary relationship with her at the relevant time, such that he breached his trust obligations by reason of his wrongful conduct towards her.

[72] In doing so, I note as well that the claim for breach of trust and fiduciary duty was not properly pleaded in this case and the appropriate section of the *Police Act* references torts as opposed to equitable remedies (though I leave the full import of this latter observation for another day and another court).

2. NEGLIGENCE

[73] The plaintiff asserts an alternative claim in negligence.

[74] The principles underlying such an action were succinctly stated by Moldaver J. (as he then was) in the *Doe* case (Div. Ct.), *supra*, at 230:

To establish a private law duty of care, foreseeability of risk must coexist with a special relationship of proximity.

[75] In the *Doe* case, the plaintiff was held to be in the category of identifiable females likely to be a target of rapists. In the instant case, the relevant identifying category would be a female motorist caught in the commission of an offence in the territory of 41 Division who is fearful of the consequences of her infraction.

[76] A few weeks prior to the incident with Ms. Evans, Officer Mulla overheard the inappropriate sexually-charged exchanges between Ms. Zegil and Sproule; and not only did he not extend a helping hand, but he left the scene and took a walk, leaving Ms. Zegil vulnerable to the advances of Sproule. He did not report the incident to his supervisors.

[77] The plaintiff argues that it was reasonably foreseeable, based on the December 22, 1978 incident with Brenda Zegil, that the failure of Officer Mulla to discharge his duty to report Sproule's actions would place other females at risk of being subject to inappropriate sexual advances by Sproule.

[78] Moreover, according to Sergeant Madigan, had Mulla reported the incident promptly, an investigation would likely have been commenced immediately, as it was here, and the offending officer (Sproule) would have been removed from communication with the public in timely fashion. As it was, the 1978 incident was reported only after the case involving Ms. Evans came to light.

[79] However, the issue before me, as I perceive it, is not whether Sproule would have been on patrol in the early hours of January 7, 1979, if the prior incident had been reported in timely fashion. The real issue is whether the private law duty of care extended to the Board in these circumstances, and I find it did not.

[80] The plaintiff in the *Doe* case comprised one of a discreet group of potential victims. Not only did the police fail in their duty to warn Doe of her vulnerability, they decided not to do so in order to use her as bait to apprehend the perpetrator.

[81] In this case, as at January 7, 1979, the Board had received no complaints about inappropriate or improper conduct on the part of Sproule. Thus, the harm was not reasonably foreseeable. Had the Board, or a member of it (other than Officer Mulla), been advised of the incident or suspected wrongdoing and done nothing, then the duty of care may well have arisen. As it was, Sproule committed an intentional tort. He was the person who committed the criminal and improper acts against the plaintiff.

[82] In my view, in the present circumstances, the Board did not stand in a sufficient relationship of proximity to the plaintiff so that it was reasonably foreseeable that similarly situated female motorists, would be placed at risk by Sproule. The plaintiff's claim against the Board based on negligence, therefore, fails.

3. VICARIOUS LIABILITY

[83] The plaintiff alleges that the Board is vicariously liable for the wrongful conduct of Sproule as his tortious act was committed in the course of his employment with the Board. The opportunity to do what he did was directly attributable to his employment position and the power and authority conferred on him as a police constable.

[84] The defendant takes the position that Sproule was acting independently at the time and for his own gratification, that his actions were unrelated to his duties as a police officer and thus, vicarious liability cannot be established against the Board.

[85] The seminal case in this area of law, *Bazley v. Curry*, [1999 CanLII 692 \(SCC\)](#), [1999] 2 S.C.R. 534 (S.C.C.) established the test for vicarious liability in cases of sexual assault. In *Bazley*, the employer operated a residential care facility for troubled children, and an employee abused a young child in his care. The case raised the question of whether the organization that employed the offender should be held liable for the wrong, though there was an absence of any fault on the part of the employer.

[86] In its decision, the Supreme Court confirmed the scope of employment or *Salmond* test, taken from *Salmond and Heuston on the Law of Torts*, 19th ed. (London: Sweet & Maxwell, 1987). The Court stated, at p. 543:

Both parties agree that the answer to this question is governed by the Salmond test, which posits that employers are vicariously liable for (1) employee acts authorized by the employer; or (2) unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an authorized act.

[87] The court in *Bazley* found the employer vicariously liable for the intentional and unauthorized wrong committed by the employee.

[88] Both parties agree that it is the second branch of the *Salmond* test that applies in this case. The applicable criteria underlying the test are summarized in *Bazley*, at p. 563:

In summary, the test for vicarious liability for an employee's sexual abuse of a client should focus on whether the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm. The test must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability – *fair and efficient compensation for wrong, and deterrence*. This requires trial judges to investigate the employee's specific duties and determine whether they gave rise to special opportunities for wrongdoing. Because of the peculiar exercises of power and trust that pervade cases such as child abuse, special attention should be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing [Emphasis added].

[89] These principles are, in my view, broad in nature and not restricted to cases involving young children or to those engaged in a pre-existing fiduciary relationship. Since no binding precedent exists in this case that is persuasive, a contextual and policy analysis considering the twin goals of fair compensation and deterrence under the "enterprise risk" theory is required.

[90] Did the employer's enterprise and its empowerment of Sproule materially increase the risk of sexual assault with its resulting harm, in the circumstances of this case?

[91] Sproule, a first class constable, was vested with power and authority to detain motorists in certain circumstances. The evidence of Sergeant Madigan and Sergeant Knaap (in discovery) clearly established the inability of a motorist to leave the scene when stopped and detained by a police officer. They also confirmed that a motorist would, in effect, be held in custody once asked to enter a police vehicle. In this context, the plaintiff's belief that she had no choice but to obey the requests of the officer is entirely reasonable.

[92] On the evening in question, Sproule was assigned to patrol the streets in 41 Division without a partner in a marked police cruiser. The vehicle, as well as his gun and other police paraphernalia were furnished to him by the defendant.

[93] In these circumstances, the power/dependency relationship developed the moment Sproule pulled over the plaintiff. She was trapped for a time in a police cruiser in a parking lot in the middle of the night. The fact that she had committed an infraction made her particularly vulnerable to intimidation by the officer.

[94] In *Bazley*, it is noted at para. 44 that the more an enterprise requires the exercise of power and authority for its successful operation, the more materially likely it is that an abuse of that

power relationship can be fairly ascribed to the employer. Society has granted police officers extraordinary power and authority. An officer who detains an individual acts as the official representative of the state with all its coercive power. As visible symbols of that power, an officer is given a distinctively marked car, a uniform, handcuffs, a badge and gun.

[95] In *Jacobi v. Griffiths* 1999 CanLII 693 (SCC), [1999] 2 S.C.R. 570, the Supreme Court of Canada reviewed cases consistent with the application of vicarious liability, one of them being *Mary M. v. City of Los Angeles*, 814 P.2d 1341 (1991). In that case, the Supreme Court of California found the City of Los Angeles liable for the rape of a motorist by a police officer in circumstances where a police officer, in uniform, found a motorist impaired, and instead of taking her to the police station, took her to her home and raped her. The majority of the court held that, in view of the significant power and authority granted to the officer by the City, “it is neither startling nor unexpected that, on occasion, an officer will misuse that authority by engaging in assaultive conduct.”

[96] The evidence in this case established that the Board attempts to foster an environment that encourages its residents to obey and trust police officers in the course of executing their duties. Moreover, the defendant Board is in the most propitious position to regulate the conduct of its employees.

[97] I appreciate the high bar created in the jurisprudence for imposing no-fault liability on an employer. Nevertheless, in the particular circumstances of this case, Sproule’s actions were so connected with matters authorized by the Board that they may be properly linked with them so as to justify the imposition of vicarious liability on the Board. It was the Board that provided Sproule with the opportunity for Sproule to abuse the considerable power and authority granted to him. At the same time, its objectives fostered obedience and trust on the part of the part of the victim whose vulnerability, in this situation, was manifest.

[98] Fairness dictates that the enterprise that introduces or enhances the risk to the community bear the cost of the resulting harm. As for deterrence, the imposition of liability on the employer Board may well serve to prevent a recurrence of the wrongful conduct. It may, for example, provide an incentive for vigilance and the imposition of preventative measures, such as ensuring that no police officer be on night patrol without a partner and that vigilant reporting measures are in place for suspicious circumstances or infractions involving one of them. In any event, the imposition of liability upon the Board might well provide an incentive to initiate measures designed to minimize the risk of harm to citizens. Thus, the finding of vicarious liability in this case also meets the policy objectives set out in *Bazley*, being fair and sufficient compensation for wrong and deterrence of future harm.

[99] Section 24(1) of the *Police Act*, states that the chief of police (or his designate) is liable in respect of torts committed by members of the police force under his or her direction and control in the performance or purported performance of their duties and they shall, in respect of any such torts, be treated for all purposes as a joint tortfeasors.

[100] In this case, I have no difficulty in finding the Board, both under the statute and the common law, vicariously liable for the wrong and resulting harm occasioned to the plaintiff by Sproule, on January 7, 1979.

4. LIMITATIONS AND LACHES

[101] Pursuant to section 45(1)(j) of the *Limitations Act*, R.S.O. 1970, c. 246 (the *Limitations Act*) an action for assault and battery is subject to a limitation period of four years after the cause of action arose. Though the provisions of the new *Limitations Act*, S.O. 2002, c. 24 abolish the limitations where sexual assault involving a power/dependency relationship exists (see section 16(1)

(h)) and this has retroactive application even where the applicable time period has expired (section 24(7), the parties agreed that in this case, it is the four-year limitation period that applies to the plaintiff's case against the Board.

[102] The issue then requires a determination as to when the cause of action arose, which brings us to the concept of "reasonable discovery."

[103] The evolution of the concept of "reasonable discovery" in cases involving sexual assault commences with the decision of the Supreme Court of Canada in *M.(K.) v. M.(H.)* 1992 CanLII 31 (SCC), [1992] 3 S.C.R. 6. In that case, the court thoroughly reviewed the interrelationship between limitation periods and the reasonable discoverability of tortious actions within the context of incest. The court found that the usual policy rationale underlying the establishment of limitation periods had little bearing in sexual abuse, in particular, incest cases. It concluded that the tort of assault and battery in that context does not accrue until the plaintiff is reasonably capable of discovering the wrongful nature of the defendant's acts *and the nexus between those acts and the plaintiff's injuries.*" (emphasis added)

[104] Noting that the instant action was commenced many years "out of time," the defendant takes the position that all elements of the plaintiff's cause of action were discoverable and discovered at the time of the assault or shortly thereafter. In support of this position, the Board makes particular reference to a number of matters. First, that the plaintiff came forward to tell her boyfriend and his brother about the assault the following day, reported it to the police, was present when the police told her parents about the incident, gave a statement, attended at the preliminary hearing, and so on. Second, that feelings of shame and guilt around the incident which caused the plaintiff to leave the family home, and her experience of having panic attacks when seeing police cars, indicate an awareness of a connection between the incident and her injuries. This was also suggested by Dr. Bloom. Third, that her conscious suppression of the unpleasant memories, and decision to get on with life, to acquiesce and accept the *status quo*, allowed her to have a series of committed relationships for a time, raise her son and work at various jobs. Fourth, prior to her first visit with Dr. Cruz in 2001, she consulted a lawyer and told her sister she was contemplating a lawsuit to "get her life back." Then, on her first visit to the psychiatrist, she told Dr. Cruz about the sexual assault. Fifth, there were other reasons to explain why her relationship with Neil Folkard may have failed that did not relate back to the assault. Sixth, there was no evidence that the therapy sessions or any insight gleaned from them led to an abatement of her symptoms.

[105] The doctrine of reasonable discovery for victims of sexual assault means that the victim has a "substantial awareness of the harm and its likely cause before the limitations period begins to toll," see *M.(K.) supra*, at p. 35. The jurisprudence has established four elements that must be satisfied before the substantial awareness test is met: Not only must the plaintiff recognize the wrongful nature of the impugned behaviour, but she must shift the blame from herself to the defendant, identify the harms she has suffered and continues to suffer, and gain a substantial awareness that those harms were caused by the defendant's abuse. See, for example, *S.L. v. S.A.* (1999), 87 A.C.W.S. (3d) 563, [1999] O.J. No. 1267 (Gen. Div.); and *T.R. v. Alberta (Criminal Injuries Review Board)*, 2006 ABCA 306, [2006] A.J. No. 1302 (Alta. C.A.).

[106] Certainly, the plaintiff recognized the wrongful nature of the assault: she did go to the police, sign a statement, attend at the preliminary, etc.; but that does not necessarily meet the test of substantial awareness nor is it determinative that she was at the time reasonably capable of discovering the nexus between the sexual assault and her injuries.

[107] The plaintiff consistently stated that the linkage between her victimization and her ensuing familial, social, and interpersonal difficulties and symptoms was not apparent to her prior to 2001. Indeed, the evidence indicates that the plaintiff's own feelings of shame and guilt impaired her ability to realize and appreciate the nexus between the abuse and the harm resulting from it.

[108] When asked at trial why she did not start the lawsuit sooner, the plaintiff replied “I never really felt there was anything wrong with me. I put the assault at the back of my head and tried to remove it from my memory.” This is consistent with the preponderance of evidence, indicating that the required connection was not made in any meaningful way prior to her therapy sessions with Dr. Cruz which commenced in March 2001. Some of that evidence can be summarized as follows:

- 1) the clinical notes and records of Dr. Masson, her family physician, commencing in 1991 reveal that over a 10-year period, the plaintiff never raised the sexual assault with her, despite having counselling sessions with the doctor around her anxiety, depression and failed relationships. Indeed, prior to March 23, 2001, no health care professional diagnosed her with any psychiatric disorder or treated her with anti-depressants for her anxiety symptoms.
- 2) Kathleen, Robert and Sergeant Madigan each independently observed her feelings of shame and guilt around the issue of the sexual assault and her reluctance to raise the topic. Indeed, prior to 2001, there were no disclosures to third parties of the sexual assault beyond the initial disclosure in 1979. Kathleen confirmed, as well, that the topic was never raised in a family context with her parents or siblings, nor did anyone speak about it in the presence of the plaintiff or otherwise.
- 3) According to Dr. Cruz, who has engaged her in approximately 100 hours of psychotherapy, it was only in the course of therapy that the plaintiff began to transfer blame for her problems in life from herself to Sproule and to gain some meaningful understanding of the nexus between her relationship problems and the assault.
- 4) Though Dr. Bloom postulated an awareness or some “notion in her mind” of a connection between the assault and her family problems and the panic she experienced when seeing the police, he also made several observations consistent with those of Dr. Cruz, indicating that no sustained connection was ever made. He stated, for example,
 - (a) that the breakup with Neil served “a catalytic role” in bringing a number of existential issues to the fore; but that the plaintiff, failed *to connect* the sexual assault to her “potentially most weighty failed relationship with Neil”
 - (b) that the plaintiff’s personality style is “to suffer in silence” and she would rather suppress thoughts of the sexual assault than relive the experience;
 - (c) that Ms. Evans is an emotionally vulnerable individual, prone for many years to employing the psychological defence mechanisms of suppression and denial in order to maintain her psychological integrity;
 - (d) that the psychological test results suggested among other things that the plaintiff lacked substantial insight into her issues and problems;
 - (e) that she felt “riddled with guilt” and has “little or no insight into what went wrong” in her family relationships.

[109] In summary, Dr. Bloom as late as July 2008 noted the plaintiff’s marked distress and *severe impairment in functioning*, that she was “riddled with guilt” and “showed little insight” into her problem areas. Moreover, referring to her “unique family dynamic,” Dr. Bloom opined that:

The familial, cultural and religious background she comes from probably have significantly contributed to her shame-proneness and made it difficult for her to seek help from others by disclosing the shameful event that caused her distress.

[110] This makes his suggestions in the area of substantial awareness somewhat suspect – suggestions which were not unequivocal by any means. Given this, combined with the brief time he spent with the plaintiff, I prefer the conclusions of the plaintiff’s treating psychiatrist, Dr. Cruz where their opinions differ in the matter of reasonable discovery.

[111] It may well be that, prior to 2001, a tenuous or fleeting understanding of the root of her problems emerged in the plaintiff’s psyche. However, Dr. Masson’s records show a marked deterioration in Ms. Evans’ mental health and emotional stress in 2000. Her sister Kathleen confirmed the plaintiff’s own testimony that she thought she was “going crazy” around that time. This appears to have forced her to seek help, resulting in her first appointment with Dr. Cruz on March 23, 2001. Interestingly, it was in 2001 that she finally disclosed the assault to three people — her earlier boyfriend, a longstanding friend, and her son, Adam. At this time she also disclosed the assault to Drs. Masson and Cruz, revisited it with Kathleen, raised it with Dr. Adelstein (when requesting a referral to the psychiatrist) and saw a lawyer.

[112] In the circumstances of this case, the mere fact that she consulted a lawyer in early 2001, prior to her first visit with Dr. Cruz, does not, in my view, mean that the plaintiff was at the time, able to make the connection between the assault and the harm caused to her. The overwhelming body of evidence in this case is to the contrary.

[113] Clearly, many years elapsed between the assault in 1979 and the commencement of the civil action in November 2002. However, I am satisfied that it was only through the therapeutic psychological process focusing on the sexual assault in 2001 and following, that the plaintiff was able to shift the shame and guilt from herself, to gain an understanding of the harm caused to her by the assault, and to make the required linkage. Prior to this, she internalized the guilt, and her particular circumstances and mental health condition impaired her ability to make the connection.

[114] This is, in my view, the exact type of scenario envisaged by the Supreme Court of Canada in *M.(K.)* and the doctrine of reasonable discovery. As noted in *N.C. v. Blank* [1998] O.J. No. 2544 (Gen.Div.) at para 103, a case that involved the sexual abuse of a patient by a psychotherapist:

“It is patently unreasonable to require a plaintiff to commence an action before the plaintiff realizes he or she has a cause of action. That lack of realization can result from many factors, such as a lack of knowledge of who was responsible for the damages suffered *or a lack of appreciation that injuries of the magnitude justifying legal recourse were suffered.* (See *Peixeiro v. Haberman*, 1997 CanLII 325 (SCC), [1997] S.C.J. 31.)”
[Emphasis added]

[115] I find on the evidence, that the limitation period did not accrue until the year 2001, when the plaintiff was reasonably capable of discovering, not only the wrongful nature of the defendant’s acts, but the nexus between the sexual assault and her injuries, through the therapeutic process. Accordingly, she commenced her action well within the four-year limitation period established in the *Limitations Act*.

[116] Needless to say, I reject the defendant’s assertions that the ratio in *M.(K.)* and the “substantial awareness test” is limited to cases of sexual assault involving young children, incest or established fiduciary or therapeutic relationships gone bad. Nor will this case “open the floodgates” to others, given its rather unique circumstances and the strict criteria established in the case law. Finally, the specific concerns articulated by the defendant were either minor in nature or overtaken by other evidence. For example, the defendant asserted that there were reasons unrelated to the assault for the plaintiff’s breakup with Neil Folkard. This ignores the evidence of its own specialist, Dr. Bloom, who suggested that the plaintiff’s post-traumatic mistrust, anxiety, volatility and emotional instability “may have played a significant role in the demise of her relationship with Neil.”

[117] Some confusion arose as to the exact dates surrounding the breakup with Neil. I am satisfied, however, that whether the actual breakup took place in early 1999 or early 2000 or even shortly before this, it was not until the plaintiff starting seeing Dr. Cruz in early 2001, that the connection was made to the assault.

[118] The peculiar underlying facts such as the officer's threats and the internalizing of guilt and shame ignited by the fact that the plaintiff was driving under suspension and had initially lied about her identity, her strict upbringing and the family's silence, as well as her serious mental health diagnosis, make this case distinguishable on its facts from those in *Smith v. Toronto (City)* (2005), [2005 CanLII 13038 \(ON SCDC\)](#), 197 O.A.C. 136, 8 M.P.L.R. (4th) 90, *Scaglione v. McLean* (1998), [1998 CanLII 14667 \(ON SC\)](#), 38 O.R. (3d) 464, and similar cases cited by the defendant.

[119] The defendant asserts, alternatively, that the doctrine of laches acts as an equitable bar to the plaintiff's action, i.e. the plaintiff's delay in pursuing the claim has been so great that the action must be barred. Upon reviewing the authorities in this area, LaForest J. in *M.(K.)*, at p. 39, concluded that mere delay is insufficient to trigger laches. The doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable.

[120] In this case, there was no prejudice to the Board such that it altered its position due to the plaintiff's delay and no circumstances that make the prosecution of the action difficult or "unreasonable." As in most such cases, there were no eyewitnesses to the event and, hence, no loss of corroborative evidence or essential documents. The criminal conviction against Sproule is not challenged. In these circumstances, one cannot infer acquiescence on the part of the plaintiff. To be fair, the defendant did not vigorously raise the issue of laches in argument. In any event, I find that it would be precluded on the facts from relying on this equitable defence.

5. DAMAGES

(a) Non-Pecuniary Damages

[121] The plaintiff claims \$100,000 for non-pecuniary damages and an additional \$50,000 based on the aggravating factors related to the assault.

[122] Both Dr. Cruz and Dr. Bloom found no embellishment or exaggeration in the plaintiff's responses. Indeed, her test scores indicated that she answered questions "in a reasonably forthright manner" and did not attempt to paint an "unrealistic or inaccurate impression" of her circumstances. Clearly, she has suffered and continues to suffer from post-traumatic stress disorder with manifestations such as intrusive thoughts, sleep disorder, nightmares, difficulties with trust, impaired family relationships, a series of unsuccessful intimate relationships, low self-esteem, anxiety and depressive episodes as well as panic attacks related to chance encounters with police cruisers. Her impaired level of functioning compared with the norm fluctuates between 60 and 70 on a scale of 100.

[123] The Supreme Court of Canada in *Young v. Bella*, [2006 SCC 3](#), [2006] S.C.J. No. 2, in the face of a jury award of \$430,000 for non-pecuniary damages, refused to extend the cap placed on damages in catastrophic physical personal injury cases to cases such as this.

[124] In a recent review of the authorities as to damages, the Nova Scotia Court of Appeal in *B.M.G. v. Nova Scotia (Attorney General)*, [2007 NSCA 120](#), [2007] N.S.J. No. 506, set out the functions of such an award in sexual battery cases, at para. 132, as being to provide solace for the victim's pain and suffering and loss of enjoyment of life, to vindicate the victim's dignity and personal autonomy, and to recognize the humiliating and degrading nature of the wrongful acts. See also *Norberg v. Wynrib*, [1992 CanLII 65 \(SCC\)](#), [1992] 2 S.C.R. 226 at 265; *R. v. McCraw*, [1991](#)

[CanLII 29 \(SCC\)](#), [1991] 3 S.C.R. 72; and *R. v. Osolin* [1993 CanLII 54 \(SCC\)](#), [1993], 4 S.C.R. 595 at 669.

[125] The element of aggravated damages takes into account the entire conduct of the defendant, and may also be awarded against a party who is vicariously liable for the wrong-doer's conduct. See *Doe v. O'Dell* (2003), [2003 CanLII 64220 \(ON SC\)](#), 230 D.L.R. (4th) 383, [2003] O.J. No. 3546 (Sup. Ct. J.) at para. 279.

[126] Some of the factors to consider in the award are the circumstances of the victim at the time, including his or her age and vulnerability, the nature of the assault or assaults, the circumstances of the defendant, and the consequences for the victim.

[127] The Court in *B.M.G.*, *supra*, came to the conclusion that the level of damages in such cases ranges between \$125,000 and \$250,000. In *O'Dell*, *supra*, Swinton J. perceived awards in cases of ongoing sexual abuse as ranging from \$85,000 to \$200,000 in the years 2001 to 2003. In *J.R.S. v. Glendenning* (2004), [2004 CanLII 5011 \(ON SC\)](#), 237 D.L.R. (4th) 304, [2004] O.J. No. 285, Kerr J. reviewed a number of authorities and concluded that in 2004, the range was between \$125,000 and \$250,000. Those amounts would have increased by 2008 fiscal standards. Notably, some of the cases cited involved a number of sexual assaults on young children in progressive years, and others were accompanied by acts of violence. Clearly, each case turns on its own peculiar facts.

[128] In the particular circumstances of this case, relevant factors include the relatively young age of the victim (though not a child), her vulnerability, the power and authority exercised by the perpetrator, the threats made and fear engendered in the victim over a period of 1-½ hours to 2 hours, as well as the specific injury to her, the impairment to her family and other relationships, and the depth of psychological injury and its effect on her daily existence. By all accounts, she will require psychotherapeutic treatment for many years in the future. This provides a very different scenario than that present in cases cited by the defendant, such as *T.W. v. Seo* (2005), [2005 CanLII 21356 \(ON CA\)](#), 199 O.A.C. 172, [2005] O.J. No. 2467 (C.A.) in which a significant jury damage award was set aside by the court and damages in the sum of \$25,000 were awarded for the injury and humiliation of being surreptitiously videotaped by a health care worker while dressing and undressing for a stressful and intimate ultrasound procedure.

[129] In my view, the plaintiff's claim for \$100,000 in non-pecuniary general damages lies at the low end of the acceptable range.

[130] As for her claim for aggravated damages, Sproule used his power and authority to detain Ms. Evans. He left her in the cold for a period of time without recourse. He forced her to remain in his police vehicle while sexually assaulting her. The humiliation and emotional stress this caused her is well-documented. As such, an award of \$50,000 in aggravated damages is warranted. Nothing less would, in my view, constitute fair compensation and go some way towards making the plaintiff "whole."

(b) Loss of earning capacity

[131] The next level of damages claimed is loss of earning capacity and economic opportunity. In this case, as in others like it, it is difficult to prove definitively a person's past or future loss of income as there is not a sufficient prior employment history. Therefore, in recognition of one's earning capacity as an asset, the courts have imposed a global assessment of loss where there is an impairment of earning ability due to sexual abuse. In doing so, some of the considerations are whether the plaintiff is less capable of earning income from all types of employment, less marketable as an employee, cannot take advantage of job opportunities or is "less valuable to himself as a person capable of earning income in a competitive labour market." *P.B. v. R.V.E.*, [2007 BCSC 1568](#), [2007] B.C.J. No. 2305 at para. 316.

[132] In this case, the plaintiff has, over the years, tended to withdraw socially both at home and in the workplace. She prefers to work at home and has low self-esteem and lacks confidence in herself and her future prospects. Dr. Bloom documented “avoidance and paranoid personality features.” This would likely have made her a less marketable or attractive candidate to potential employers. Further, it has led her to take contract positions rather than permanent ones. Given these factors and the fact that the incident that occurred on January 7, 1979 was the only trauma she has experienced in her life, her earning capacity has clearly been impaired as a result of the sexual assault.

[133] Dr. Cruz, noting that the plaintiff has been engulfed in shame, guilt and anger “all these many years of her existence,” postulated that without the disturbing event, she would have achieved a higher university-level course. Her sister Kathleen opined that her prior sense of humour and confidence would have served her well in deciding on a career path. The plaintiff’s school records reveal that she was an average student in high school, and it is difficult to definitively assess her economic or career potential, absent the assault. However, on the evidence, I am satisfied that the sum of \$40,000 adequately reflects her loss of earning capacity, and I award her that sum under this category.

(c) Future Therapy and OHIP Subrogation

[134] For future treatment, Dr. Cruz has suggested closed sessions of 6 to 12 weeks “or longer” at Homewood Health Centre which has a particular program to assist people suffering from post-traumatic stress disorder. The residential program, in a semi-private environment would cost \$12,432 for 8 weeks of treatment. The plaintiff has agreed to take this Traumatic Stress-Recovery program, and Dr. Bloom also agreed that such treatment is indicated. Indeed, the plaintiff’s prognosis, without treatment, is chronic in nature and she may well suffer some residual effects of the assault, in any event.

[135] In the circumstances, I have no difficulty in making the award of \$12,432 for the specialized treatment program at Homewood, and an additional sum of \$12,978.30 to cover her previous sessions for supportive counselling with Dr. Masson and for psychiatric counselling with Dr. Cruz.

(d) Punitive Damages

[136] The plaintiff claims \$25,000 in punitive damages against Sproule only. [Section 4\(1\) of the *Victims' Bill of Rights, 1995*](#), S.O. 1995, c. 6, (the *Bill*), provides redress for victims of crime for harm suffered as a result of the commission of the crime. In this case, Sproule received a fine of \$1,000 on a guilty plea to the charge of indecent assault.

[137] In his statement of defence, now struck, Sproule took the position that he operated under the “honest but mistaken belief” of consent. He showed no remorse for his outrageous and reprehensible actions even after the conviction. In my view, the punishment imposed was not sufficient to satisfy deterrence, or any of the other principles of sentencing. In the circumstances, I award the plaintiff the sum of \$25,000 in addition to the other amounts, as punitive damages against Sproule.

6. COSTS

[138] The *Victims' Bill of Rights, supra*, section 4(6) mandates that a judge who makes an order for costs in favour of a victim of crime “shall make the order on a solicitor and client basis, unless the judge considers that to do so would not be in the interests of justice.” Since this provision applies in generic terms to a “civil proceeding” in which a victim seeks redress from a person convicted of a crime (s. 4(1)), this provision as to costs would, in my view, *prima facie* apply to

both Sproule and the Board. See also, *Stevens v. Robson* [1999] O.J. No. 1626 (Sup. Ct. J.) at para. 8.

[139] As to the question of retroactivity of the *Bill's* various provisions, the Court of Appeal in the case of *Pilon v. Janveaux* (2006), [2006 CanLII 6190 \(ON CA\)](#), 211 O.A.C. 19, [2006] O.J. No. 887 distinguished between aspects of a case that are procedural or substantive in nature, and indicated at para. 21 that it may be that the procedural aspects such as those dealing with costs, would apply retroactively.

[140] In the preamble to the *Bill*, it is stated that victims of crime who have suffered harm and whose rights and security have been violated by crime, should be treated with compassion and fairness.

[141] In my view, in the particular circumstances before me, justice and fairness demand that the plaintiff not bear costs associated with this proceeding. As such, she is awarded costs to be assessed on a substantial indemnity basis against both Sproule and the Board, as well as prejudgment interest on the award of non-pecuniary damages at the rate of 5% per annum from the commencement of the action.

CONCLUSION

[142] In summary, I have found the Board vicariously liable for the tortious conduct of Sproule. Accordingly, both defendants are jointly and severally liable to the plaintiff in damages, as follows:

a) Non-pecuniary - General and Aggravated Damages:	\$ 150,000.00
b) Loss of Earning Capacity:	40,000.00
c) Future Therapy Costs	12,432.00
d) OHIP Subrogated Claim	12,978.30

And, as against Sproule only \$25,000 in punitive damages.

[143] Costs to the plaintiff on a substantial indemnity scale to be assessed, or agreed upon, and pre-judgment interest as described above.

[144] I wish to thank all counsel for their able and efficient conduct of the trial and their invaluable assistance to the court in this case.

CHAPNIK J.

Released: November 12, 2008

Diagnostic criteria for 309.81 Posttraumatic Stress Disorder

- A. The person has been exposed to a traumatic event in which both of the following were present:
- (1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others
 - (2) the person's response involved intense fear, helplessness, or horror.
- B. The traumatic event is persistently reexperienced in one (or more) of the following ways:
- (1) recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions.
 - (2) recurrent distressing dreams of the event.
 - (3) acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur on awakening or when intoxicated).
 - (4) intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.
 - (5) physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.
- C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:
- (1) efforts to avoid thoughts, feelings, or conversations associated with the trauma
 - (2) efforts to avoid activities, places, or people that arouse recollections of the trauma
 - (3) inability to recall an important aspect of the trauma
 - (4) markedly diminished interest or participation in significant activities
 - (5) feeling of detachment or estrangement from others
 - (6) restricted range of affect (e.g. unable to have loving feelings)
 - (7) sense of foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span)
- D. Persistent symptoms of increased arousal (not present before the trauma), as indicated by two (or more) of the following:
- (1) difficulty falling or staying asleep
 - (2) irritability or outbursts of anger
 - (3) difficulty concentrating
 - (4) hypervigilance

(5) exaggerated startle response

- E. Duration of the disturbance (symptoms of Criteria B, C, and D) is more than 1 month.
- F. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Specify if:

Acute: if duration of symptoms is less than 3 months

Chronic: if duration of symptoms is 3 months or more

COURT FILE NO.:02-CV-238550CM2

DATE: 20081112

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

MARIAN EVANS

Plaintiff

- and -

JOHN DAVID SPROULE and TORONTO POLICE SERVICES BOARD

Defendants

REASONS FOR JUDGMENT

CHAPNIK J.

Released: November 12, 2008

Tab 152

Shaw v. Staples, 2013 ONSC 3290 (CanLII)

Source: Superior Court of Justice
 Date: 2013-06-06
 File number: 337/07
 Citation: Shaw v. Staples, 2013 ONSC 3290 (CanLII),
 <<https://canlii.ca/t/fzd37>>, retrieved on 2026-03-24

CITATION: Shaw v. Staples, 2013 ONSC 3290
COURT FILE NO.: 337/07
DATE: 20130606

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Cassandra Shaw

Plaintiff

)
)
)
) Jeff Lancot and Catharine Blastorah, for the
) Plaintiff

– and –

Jason Staples

Defendant

)
)
)
) Jason Staples noted in default and not presen
) t;

)
)
) **HEARD:** May 15, 16, 17, 21, 22, 27, 28, 29
and 30, 2013, in conjunction with related cas
e, File No. 16/11.

GUNSOLUS, J.

- [1] The plaintiff, Cassandra Shaw was a 25 year old university student, in the midst of pursuing her education at Trent University. She was enrolled in a Bachelor of Science programme and had a special interest in Biology. The defendant, Jason Staples, was a store clerk in an independent health food store, located in what is popularly known as “East City” in Peterborough, Ontario.

- [2] On November 7th, 2005, Ms. Shaw was studying for her final exams. She was suffering from a headache and decided to visit the health food store in order to purchase mint tea, which she found sometimes helped to alleviate the effects of her headaches. The innocent retail excursion quickly became an unforgiveable tragedy.
- [3] Jason Staples restrained her at knifepoint, bound her with duct tape, forcibly confining her and committing sexual assault and physical assault upon her. The attack was without warning and most brutal. Ms. Shaw continues to suffer in the result.
- [4] Jason Staples was noted in default in this action. He pled guilty on December 20th, 2007 to the following, amongst other, charges in relation to Cassandra Shaw: kidnapping with intent to confine Ms. Shaw against her will; aggravated sexual assault; rendering the plaintiff unconscious by choking; carrying a weapon for the purpose of committing a criminal offence; verbally and knowingly uttered a threat to the plaintiff to cause her death.
- [5] On February 28, 2008, Jason Staples was found guilty of those charges in the Ontario Superior Court of Justice by Mr. Justice Barry MacDougall.
- [6] On May 15th, 2008, Mr. Justice MacDougall designated Jason Staples a dangerous offender and sentenced him to an indeterminate sentence in penitentiary based upon these and other charges before him.

Issues Before This Court

- [7] Ms. Shaw's claim includes a request for damages for assault and battery, for the intentional infliction of mental suffering together with aggravated and punitive or exemplary damages.
- [8] Ms. Shaw also claims non-pecuniary economic loss, including loss of past income and loss of future earning capacity.

Cassandra Shaw

- [9] Cassandra Shaw was born November 9th, 1979, and although she is not married, has maintained a long-term relationship with her boyfriend, Curtis Self. She currently resides in the City of Peterborough with her mother and her one sister.
- [10] On November 7th, 2005, she was studying for examinations in relation to the Bachelor of Science she was pursuing at Trent University. She was then 25 years of age.
- [11] Because she was feeling headachy, she left the apartment that she then shared with her boyfriend in order to walk the couple of blocks to Kelcey's Nutrition Centre in order to purchase mint tea, which she found sometimes helped her headaches. She had visited the store before, which she described as being "high-end" and welcoming and located amongst a number of other stores and eateries. The time of day was approximately 5pm.
- [12] After finding the tea which she wished to purchase, she approached the cash, where she encountered the sole employee working at the time, whom she later learned to be Jason Staples. He began asking her a number of questions which she found to be rather forward, and eventually he asked her if she could help him. Being an outgoing person, she agreed, set down her tea and held a broom handle against a vent for Mr. Staples.
- [13] At that juncture, Mr. Staples absented himself in order to retrieve a hammer. Moments later, he came up behind Ms. Shaw, brandishing a knife and ordering her to descend stairs

into the basement of the retail establishment. She reacted by grabbing his arm, which resulted in a serious cut between her thumb and first finger on her right hand. Although she began screaming and yelling for help, she soon realized that she could not overtake Staples, and he was able to easily pull her down the stairs despite her struggling and resistance.

- [14] Once Mr. Staples had her in the basement, he threw her to the ground and straddled her, choking her while she pleaded with him, trying to understand what was happening and why it was happening.
- [15] Ms. Shaw described Mr. Staples as being extremely large such that he easily overwhelmed her. She next recalls hitting her head on the basement floor while she groped for objects she saw around her, hoping to be able to retrieve one in order to hit him and hopefully knock him out.
- [16] All the while, Jason Staples was telling her “shut up you bitch, stop screaming. I don’t want to kill you, I just want to rape you. Don’t make me hurt you more.” She recalls passing out and when she began to revive, she realized that Jason Staples was taping her hands, arms and legs together, eventually putting duct tape over her eyes and mouth.
- [17] Staples repeatedly touched her sexually. She recalls fearing that she would vomit and choke, the duct tape having been placed over her mouth. Ms. Shaw recalls the horrendous events and realization that her fate was completely within Jason Staples’ control.
- [18] Jason Staples left her from time to time in order to attend to matters in the retail establishment above, only to return in order to grab and shake and rub her breasts.
- [19] Ms. Shaw recalled that many things were going through her head during Mr. Staples’ assault and torment of her, including thoughts about her own family, prisoners of war and the awful realization that Jason Staples had complete control over her.
- [20] At some point, Ms. Shaw became aware that there was another person in the basement with her, who had also been overcome and restrained by Staples.
- [21] Over time, he covered them both in garbage bags, top and bottom, duct taping the bags together, leaving holes, which again left her fearing she was going to suffocate and die.
- [22] At some point, Staples took them, one by one, and dropped them into a van where she felt the cold metal of the van floor as her head hit the bottom of it.
- [23] Staples then took his captives to what Ms. Shaw later learned to be his home and again recalls being dropped on a cement floor, once again hitting her head. Staples continued to physically and sexually assault her. She described her fear, not knowing her ultimate fate at Staples’ hands.
- [24] Based on comments Staples made, she began to fear that he would kill himself and that they would be left alone in the basement, and she feared how long it would be before they were discovered.
- [25] At one point, Staples left, saying “I’m going to do it”, which left her with the initial thought that he was going to kill himself. As events unfolded, and as it turned out, Staples had gone to a telephone booth and called police in order to turn himself in.
- [26] Rather than feeling immediate relief upon the arrival of the police, Ms. Shaw recalled the police officers as being large and “in full gear, with large rifles”. To her, they were scary, and yet they were supposed to be “the good guys”.

- [27] Ultimately, Ms. Shaw was taken, along with her fellow victim, to the Peterborough Regional Health Centre, where she received treatment to her hand and where she was treated for her injuries to her neck, throat and back by a doctor and a sexual assault nurse.
- [28] Ms. Shaw described her physical injuries, which included the cut to her hand and the bruising to her throat, head, neck and back. She also described the emotional exhaustion and disappointment she felt, as she had always trusted people and thought that people were “generally good”. As she said, she was “crushed” and she felt that her heart was “broken”, as was her faith in humanity. She described feeling at the time, and for many months thereafter, that her “heart had been weakened”. She began suffering headaches as well as discomfort in her throat and back. She began suffering light sensitivity, tinnitus, and often finds herself unable to focus during conversations.
- [29] As a result of these horrendous events, she suffers from anxiety to the extent that she has begun to question the purpose of her life. She explained that she now feels the need to do something “amazing in her life” and often feels that what she is doing at any given time is “not good enough”.
- [30] Ms. Shaw suffers flashbacks and has gone through periods of extreme heightened vigilance and is distrustful of all male strangers. Her sleep pattern has become disrupted; her relationships have suffered from her mood swings. Overall, she has lost her optimistic, happy view of life. Her energy levels have diminished and she is no longer the independent, strong, capable individual that she once was.
- [31] She described, and some of this was clear from her evidence, that she has lost confidence in herself; she is not confident in putting words together and sometimes finds it hard to stay focussed in the moment. Although she was able to successfully complete her academic career, she has been unable to pursue post-graduate studies that she once thought she would, and she has been unable to achieve the full employment status that she once envisioned for herself.
- [32] Ms. Shaw also described the counselling that she initially pursued. She found most helpful the pursuit of yoga and speech-language pathology. She would like to pursue physiotherapy in order to see if there are exercises that would help her deal with the stress in her neck and back, however, has no funds with which to do so.

Lynn Shaw and Candace Shaw

- [33] Lynn Shaw is Cassandra Shaw’s mother. Candace Shaw is her sister. As a result of the terrible assault that the plaintiff suffered at the hands of Mr. Staples, these witnesses described Cassandra as not being as open or fun-loving as she once was. They described her as “having no hope for the future” and as sometimes coming across as “flaky and unmotivated” with no definite plans.

Curtis Self

- [34] Curtis Self has been Ms. Shaw’s boyfriend for a number of years. He described Ms. Shaw, post-incident, as being traumatised and “emotionally in shambles”, lacking in passion for activities she once pursued and lacking in focus and often left with the ability to only look upon things in a negative light.
- [35] Their plans to have a family are pretty much now out of the question, as “she sees no point in bringing another person into a world that she does not see as a happy place anymore”. She now often exhibits an attitude that things “just are not worth it” and she easily becomes angered, flustered and suffers from “high anxiety”.

Joanna Sinclair

- [36] Ms. Sinclair, was the owner of “Dreams of Beans” and, at one time, employed Ms. Shaw. She described Ms. Shaw as a caring, reliable and gentle person with a great sense of humour who did not let much “faze her”. Post-incident, she described her as being less able to concentrate and very defensive, especially if a male customer should come too close to her.
- [37] She valued Ms. Shaw as an employee so much that she paid Ms. Shaw’s wages for approximately four months post-incident until she was able to return to work again on a part-time basis.

Dr. Joanna Hamilton

- [38] Dr. Joanna Hamilton was qualified as a neuropsychologist and gave evidence in relation to Ms. Shaw’s cognitive diagnosis, prognosis and disabilities and provided evidence in relation to the relative permanency of her condition and as to her possible future care needs.
- [39] Dr. Hamilton is well-respected in her area of expertise and was of great assistance to the court in understanding the effects that this matter has had on Cassandra Shaw.
- [40] She described Ms. Shaw as an individual with superior intellectual functioning, who demonstrates significant strengths in respect to perceptual organization skills, but who also shows significant weaknesses with respect to her ability to process information. When Dr. Hamilton saw Ms. Shaw, she was not showing signs of post-traumatic stress, however, she was exhibiting moderate depression (dysthymi). Dr. Hamilton believed that this will present a barrier in relation to her academic progress and attaining employment.
- [41] Dr. Hamilton recommended, amongst other things, that she undergo a vocational assessment and undertake ongoing psychological counselling in order to deal with the ongoing impact of the incident upon her.

Stephanie Zawalicz-Mowinski

- [42] Stephanie Zawalicz-Mowinski is a speech-language pathologist and provided evidence in relation to her assessment of Ms. Shaw’s speech and language functioning, along with treatment and recommendations concerning the future speech-language needs of Ms. Shaw.
- [43] Ms. Shaw was initially seen by this witness and a colleague from June, 2010 until January, 2011 on a weekly basis, when sessions were then reduced to bi-weekly. After April, 2011, Ms. Shaw had completed her undergraduate university degree and had obtained a summer job that would take her out of the area, so that speech-language sessions were put “on hold”.
- [44] It was clear from the evidence of this witness that, as a result of the speech-language sessions, Ms. Shaw was able to acquire a greater ability to focus on and to organize, her academic career. In the result, Ms. Shaw excelled in the final stretch of her academic career, achieving standing on the President’s Honour Role as well as other academic awards.
- [45] This witness opined that Ms. Shaw will probably require speech-language intervention throughout her life, specifically in relation to life-changing events that will result in stress. She gave, as examples of such major changes, as a decision to again attend school on a full-time basis, to change employment; to marry; to have children and so on.

[46] Ms. Zawalicz-Mowinski believes that although Ms. Shaw has made significant gains with respect to planning, goal-setting, organization, time management and self-monitoring, she will continue to have some difficulty in these “executive functions”, and this will likely have a negative impact on her vocational success.

[47] Ms. Zawalicz-Mowinski recommended that Ms. Shaw continue speech-language pathology intervention as needed and that she consult a psychiatrist regarding her anxiety issues, specifically in respect to planning her own future.

Robert Lychenko

[48] Mr. Lychenko was qualified as a vocational consultant in order to provide evidence as to Cassandra Shaw’s vocational aptitudes, interests, ambitions and in relation to her employability and skills as they relate to the labour market and how these have been affected by her injuries and disabilities and provided an opinion as to her future ability to maintain work on a full-time basis.

[49] Mr. Lychenko advised that testing results revealed that Ms. Shaw is a very bright individual who had the capacity to pursue graduate level studies at both the masters and doctoral levels. In his opinion, Ms. Shaw’s vocational potential has become drastically altered as a result of the events surrounding the sexual assault she suffered. He was of the view that she had become marginalized from an employment perspective. To quote him: “Ms. Shaw suffers disability related to her emotional functioning, and to a lesser degree, her cognitive functioning. Thus, she can be considered multiply handicapped.” In short, he believes that she will be less than competitive in the job market.

[50] This witness confirmed that Ms. Shaw will need ongoing assistance in order to achieve her full potential, either in the academic world or in relation to employment.

Dr. vanReekum

[51] Dr. Robert vanReekum is a psychiatric expert qualified to provide the court with a diagnosis and prognosis as to the psychiatric condition of Cassandra Shaw, including an opinion as to the impairment and handicaps that Ms. Shaw suffers from and to provide areas of consideration for her future treatment. He felt that Ms. Shaw was subjected to acceleration-deceleration forces directed towards her head and neck when her abductor slammed her head on flooring of both the retail establishment and his van. He suggested that such forces would have potentially put her at risk for suffering a mild Traumatic Brain Injury (mTBI). He also noted that she was at risk for a hypoxic insult to her brain, which could have occurred during Staples’ choking of her. He opined that Cassandra may have suffered either an mTBI, hypoxic brain insult or both.

[52] He also noted that the incident has produced a number of stresses for Cassandra, including her acute fear of death during the incident itself, and ongoing stresses related to legal issues and the need for assessments that caused a “reliving” of the incident, as well as a number of perceived losses such as reduced quality of life, loss of self-confidence and loss of self-esteem.

[53] Dr. vanReekum suggested that Cassandra had probably developed the following sequelae:

- (1) Common post-concussion symptoms of photosensitivity and tinnitus.
- (2) Post-Traumatic Stress Disorder, which when he saw her, was at least in partial remission.

- (3) Sleep disturbance.
- (4) Greatly reduced energy levels.
- (5) Probable Major Depressive Episodes or Adjustment Disorder with Depressed Mood.
- (6) Generalized Anxiety Disorder
- (7) Cognitive impairments which are multi-factorial in origin, with potential contribution from the concussion and/or hypoxic brain insult, sleep disturbance, Major Depressive Episodes and Generalized Anxiety Disorder.
- (8) Significant loss of general interest and motivation.

[54] As a result, he described her as being handicapped such that she is probably significantly disadvantaged in the maintenance and pursuit of her usual, expected social roles, such as her academic career; her employment career; relationships; social and leisure functions; and independent living. Finally, he opined that Cassandra's future role functioning (for example, parenting or contributing to her community generally) may also be adversely affected. As he noted: "I can't tell the future and no one can, when it comes to mental health." However, he pointed out that this was his opinion based upon his examination of Cassandra, his experience, education and research.

[55] Going forward, Dr. vanReekum feels that Cassandra remains at risk for permanent suffering, impairment and handicap. These include, but are not limited to suicidal behaviours; apathy and cognitive impairments.

[56] In the result, Dr. vanReekum suggested that Cassandra's treatment should include consideration of the following:

- (1) A full medical/medical metabolic workup as related to her lack of energy as this may relate to blood sugar levels, iron levels or other causes;
- (2) A sleep study in relation to her complaints of sleep disturbances, lack of restful sleep and interruptions in her sleep pattern;
- (3) An assessment in relation to her complaint of tinnitus;
- (4) Consideration of a rehabilitation case manager who, over time, could assist Cassandra in pursuing rehabilitation by way of "ongoing periodic involvement" of a rehabilitation case manager;
- (5) A trial of an anti-depressant medication;
- (6) Psychotherapeutic interventions which should probably not, at least initially, focus on the incident itself, but rather on her symptoms and/or her future.

[57] Dr. vanReekum felt that Ms. Shaw may benefit from, at various points in her life, supportive therapy, cognitive behavioural therapy, educational interventions and family therapy.

[58] From Dr. vanReekum's evidence, it became clear that Cassandra Shaw will likely require treatment in the future that may include many of the six components that he felt caregivers should consider.

Future Care and Loss of Past and Future Income

- [59] The court also received and reviewed the reports of an economist, Douglas Welland and future care consultant, Mary Ellen Meyers, in relation to future care costs.

Applicable Law and Analysis

Liability of Jason Staples

- [60] Jason Staples committed the intentional tort of sexual assault on Cassandra Shaw, amongst other things. Such a tort is known as battery, which is the intentional infliction of unlawful force on another person. It is actionable without proof of damage and the consequential liability is not limited to foreseeable damage.^[1]
- [61] Staples is also liable as a result of the provisions of the *Victim's Bill of Rights*^[2] since he was convicted of the crime and is therefore liable in damages to Ms. Shaw for emotional distress, bodily harm resulting from the stress and arising from the actual commission of the crimes that he committed against Ms. Shaw. Further, by section 3.2, as a victim of sexual assault, Ms. Shaw is presumed to have suffered emotional distress.
- [62] Jason Staples pled guilty to sexual assault amongst other crimes in relation to Ms. Shaw before Mr. Justice Barry MacDougall on December 20th, 2007 and he was found in the result to be a dangerous offender by Justice MacDougall on May 15th, 2008.
- [63] Rules 19.02 and 19.06 of the *Rules of Civil Procedure*^[3] apply such that Jason Staples, being a defendant noted in default, is deemed to admit the truth of all allegations of fact made in the statement of claim filed in this matter as against him.
- [64] Paragraphs 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30 of the Statement of Claim set out the facts upon which Ms. Shaw is entitled to judgment as against Jason Staples. The evidence that the court heard also entitles Cassandra Shaw to judgment against Jason Staples.

Damages

- [65] In *B.M.G. v. Nova Scotia (Attorney General)*, 2007 NSCA 120 (CanLII), [2007] N.S.J. No. 506 (NSCA), Justice Cromwell suggested taking a functional approach to the assessment of non-pecuniary damages in cases of sexual battery. The objectives of providing solace for the victim, to vindicate the victim's physical autonomy and dignity, through an award of aggravated damages, account for the humiliation and degradation caused by the defendant's conduct.
- [66] Using this functional approach, damages are intended to cover a single loss, that being the plaintiff's overall psychological condition and the consequent need for solace. These non-pecuniary damages are typically covered by a global sum.^[4] Such damages now include distress from psychological illness and common feelings such as anxiety, frustration and so on. Such anxiety and depression are at the core of such suffering, whether it is due to cancer or trauma.^[5]
- [67] In determining damages to reflect the victim's dignity, personal autonomy and pain and suffering, a number of factors must be considered, including but not limited to:
- (a) The age and vulnerability of the victim;

- (b) The frequency, level of violence, invasiveness and degradation of the assault;
- (c) The consequences for the victim of the wrongful behaviour, including ongoing psychological injuries.^[6]

- [68] Ms. Shaw was abducted, physically and sexually assaulted and held by Mr. Staples for at least 7 hours. He repeatedly groped her. He inserted his penis in her mouth. She was bound and gagged, believing that her fate was completely and utterly at Mr. Staples' mercy. She had innocently entered the retail establishment that Mr. Staples worked in and was attacked on a completely unprovoked basis.
- [69] Ms. Shaw continues to suffer anxiety and depression and her cognitive abilities have been compromised such that she is currently unable to pursue a full-time academic or employment career. Her relationship with her sisters and mother and boyfriend of long-term standing have been negatively affected. She and her boyfriend are no longer looking forward to raising a family.
- [70] Ms. Shaw remains overly vigilant and is far-less outgoing and no longer pursues social activity or the art that she once loved.
- [71] Witnesses have diagnosed her as suffering from post-traumatic stress disorder, depression, mild brain injury, all of which have negatively impacted her social and family relationships; the intimate relationship she attempts to enjoy with her boyfriend of longstanding; the ability to pursue and obtain employment and to achieve the level of academic education that she once thought she would. She has benefitted from speech-language intervention and will continue to need such intervention throughout her life. Although reluctant to do so, she clearly could benefit from psychological counselling. It would appear that it is to be expected that the effects of the assault committed by Jason Staples upon her, will be with her for the rest of her life.
- [72] A review of the case law indicates a range of anywhere from as low as \$25,000 to an amount above \$300,000 for damages applicable to a case such as this one.
- [73] It is open to the court to consider, in addition to a general award of damages, aggravated damages, which are meant to augment the assessment of general damages, by taking into account any aggravating features.^[7]

Determination of General Damages including Aggravated Damages

- [74] This is a case of abduction and sexual abuse that occurred over a period of time in excess of seven hours. The plaintiff innocently entered a retail establishment and was viciously physically and sexually attacked. The evidence indicates that she will never be as she was pre-incident. The prognosis is such that her attempts to re-enter the academic world and the world of employment will be adversely affected in that she may only be able to achieve work on a part-time status and will require ongoing intervention. Her family relationships and her relationship with her long-time boyfriend are no longer the close, loving relationships that she once enjoyed. She continues to have a negative outlook on life and suffers ongoing depression. She did nothing to attract the attention of Jason Staples and continues to have, hanging over her, the question of why this happened to her.
- [75] I order General Damages in the amount of \$225,000, which includes \$75,000 representing Aggravated Damages, arising out of Ms. Shaw's personal violation, distress and humiliation as appropriate in this case.

Punitive Damages

- [76] While punitive damages are only ordered in exceptional cases, they are intended to go beyond compensatory damages with the intention to punish the wrongdoer.
- [77] Justice Binney, in *Whitten v. Pilot Insurance Company*^[8] describes punitive damages as designed to meet the objectives of punishment, deterrence and denunciation outside the realm of compensation.
- [78] Punitive damages are generally imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible conduct that departs, from a marked degree, from the ordinary standards of behaviour. A quantum of punitive damages should be awarded in an amount reasonably proportionate to such factors as the harm caused, the degree of misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant. Punitive damages should generally be given only where the misconduct would otherwise be unpunished, or other penalties are or are likely to be, inadequate to achieve the objections of retribution, deterrence and denunciation. While they are not intended to compensate the plaintiff, they are intended to deter the defendant or others from similar misconduct in the future and to reflect the community's collective denunciation of such activity.
- [79] Considering these and in particular the eleven criteria set out by Justice Binney in *Whitten* at paragraph 94^[9], I believe in this case, punitive damages should be ordered. Jason Staples' behaviour was vicious, cruel and inflicted upon the plaintiff, who was a total stranger. The attack was unprovoked. In the circumstances of a young student innocently entering into a retail establishment in order to buy a small item, to be viciously physically and sexually assaulted, is conduct that markedly departs from ordinary standards of decent behaviour and that society, not only collectively condemns but expects to be responded to in such a way by our courts, to deter a defendant such as Jason Staples and others from similar conduct in the future.
- [80] Jason Staples' actions were reprehensible. Cassandra Shaw's person and self-worth reflect compensatory damages insufficient to accomplish the objective of punishment in this case. The sum of \$75,000 shall be so ordered.

Past Loss of Income and Future Loss of Income

- [81] In considering the awards under this category, the award may cover not only all injuries actually suffered and disabilities proved as of the date of this trial, but also the "risk or likely" future developments attributable to such injuries. A plaintiff is not required to prove on a balance of probabilities, the probability of future damage, but rather may be compensated, if they prove in accordance with the degree of proof required in civil matters, that there is a possibility or a danger of some adverse future development.^[10]
- [82] The evidence of Dr. Joanna Hamilton, Stephanie Zawalicz-Mowinski, Robert Lychenko and Dr. vanReekum, have satisfied me that Cassandra Shaw's ability to earn future income will, in all likelihood, suffer as a result of the injuries that she sustained at the hands of Jason Staples.
- [83] I also had the report of Douglas Welland with his best estimates as to the past lost income and future loss of income that Ms. Shaw will in all likelihood suffer. Having regard to the evidence provided to me, I find an award of \$27,957.00 for past lost income and \$800,000 for future lost income would be appropriate in the circumstances of this case.

[84] The evidence is such that it is doubtful that Ms. Shaw will ever be in a position to achieve, on a regular basis, full-time income. Her academic career was interrupted such that she has not pursued the post-graduate education that she was not only capable of, but which she had expected to pursue, before the incident. It is clear that her pursuit of continuing education and full-time employment have not only been delayed, but her ability to earn the income that she might have, has been reduced, probably for her entire productive lifetime.

Future Therapy and Care Costs

[85] The evidence of Dr. vanReekum, Dr. Joanna Hamilton, Stephanie Zawalicz-Mowinski, Robert Lychenko and Mary Ellen Meyers prescribed a number of therapies, including but not limited to: speech-language pathology, individual counselling, assessments and re-assessments, as well as specific counselling to assist Ms. Shaw through major changes in her life that will cause high anxiety that she will need to address. It is very difficult, based on the evidence, to conclude which of these therapies Cassandra Shaw is likely to pursue. However, having considered the evidence and the present values of the costs of such future care items as provided to me by the Welland report, I fix these costs in the amount of \$125,000.

Costs

[86] In matters of this nature, I believe that the appropriate level of cost indemnification would be on a substantial indemnity basis. Ms. Shaw is the victim of the intentional acts of Jason Staples, and the costs of the litigation should be borne by Jason Staples. I have reviewed the bill of costs presented to me to reflect an hourly rate for counsel over the life of this litigation to vary between \$275 to \$375. Counsel for Ms. Shaw indicated that when the action started, his billing rate was \$275 per hour and is now at the rate of \$375. As suggested by counsel, I am going to provide substantial indemnity compensation in the amount of \$128,000, (which reflects the change in hourly rates) together with disbursements of \$25,000, plus applicable GST.

Summary

[87] Judgment shall issue requiring that Jason Staples pay to the plaintiff damages for:

- (a) Non-pecuniary, general and aggravated damages in the amount of \$225,000;
- (b) Punitive damages in the amount of \$75,000;
- (c) Past Loss of Income of \$27,957;
- (d) Future Loss of Income in the amount of \$800,000;
- (e) Future Care and Therapy Costs in the amount of \$125,000
- (f) Costs in the amount of \$128,000, plus applicable GST;
- (g) Disbursements of \$25,000, plus applicable GST;

[88] Pre-judgment interest shall be payable at a rate of 5% per annum on the general damages. Pre-judgment interest on the past-income loss shall be payable at the rate of 4.8%, commencing the 5th of November, 2007. Post-judgment interest will also apply.

Conclusion

[89] It is to be hoped that this judgment will allow Cassandra Shaw to move on with her life. I think it is important that Ms. Shaw understand that the court heard her and the suffering that she was subjected to at the hands of Jason Staples. It is difficult to believe that good can come from such an evil event, however, Ms. Shaw presented herself as being an articulate and intelligent person, but whose self-esteem and very “self” have been damaged. She, with the assistance of counselling, and in particular, speech-language pathology, has begun to shake off the effects of this terrible event upon her life. She clearly can accomplish much as she proved, by making the President’s Honour Roll when she graduated from Trent University with her Bachelor of Science degree. Having watched Ms. Shaw as she bravely provided her evidence in difficult circumstances, there is no doubt in my mind that Cassandra Shaw has the ability to continue an academic career and/or to attain much success in the working world. She is a strong and resilient person, who can and will rise above the awful events of November 7, 2005.

[90] Counsel who undertake this type of action on behalf of victims, are to be commended. These matters are emotionally charged and, ultimately, may be undertaken without actual compensation. This matter initially involved other defendants; however, that aspect of this litigation was resolved either before the commencement of trial or mid-trial. The plaintiff in this case was indeed fortunate to have counsel who was prepared to pursue this matter on her behalf with much zeal, professionalism and compassion.

“Mr. Justice D.S. Gunsolus”

Released: June 6th, 2013

CITATION: Shaw v. Staples, 2013 ONSC 3290

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Cassandra Shaw

Plaintiff

– and –

Jason Staples

Defendant

JUDGMENT

GUNSOLUS, J.

- [1] See: *Norberg v. Wynrib*, 1992 CanLII 65 (SCC), [1992] 2 S.C.R.226, at para. 26; and *K.T. v. Vranich*, 2011 ONSC 683, at para. 66
- [2] See: *Victim's Bill of Rights*, 1995, S.O. 1995 c.6. section 3.1
- [3] See: Rules of Civil Procedure, R.R.O. 1990, Reg. 194
- [4] See: Cooper-Stephenson, K. D., & Saunders, I. B. (1996). *Personal injury damages in Canada*. Scarborough, Ont: Carswell, 1996, at page 489
- [5] See: *Personal injury damages in Canada*, *supra*, at page 485; also see: Theodore I. Koskoff, *Essays on Advocacy*. Washington West Group, 1988, at page 52
- [6] See: *B.M.G.*, *supra*, at para 134
- [7] See: *Norbert*, *supra*, at para 53 and *T.W. v. Seo* [2005] O.J. No. 2647 and see *K.T. v. Vranich*, 2011 ONSC 683 at para 110.
- [8] See: *Whitten v. Pilot Insurance Company*, 2002 SCC 18 (CanLII), [2002] 1 SCR 595
- [9] See *Whitten*, *supra*
- [10] See: *Schrump et al v. Koot et al*, (1977) 1977 CanLII 1332 (ON CA), 18 O.R.(2d) 337 (Ont.CA),

Tab 153

Snowball v. Ornge, 2017 ONSC 4601 (CanLII)

Source: Superior Court of Justice
 Date: 2017-07-28
 File number: CV-16-556972
 Citation: Snowball v. Ornge, 2017 ONSC 4601 (CanLII),
 <<https://canlii.ca/t/h53fq>>, retrieved on 2026-03-24

CITATION: Snowball v. Ornge, 2017 ONSC 4601
COURT FILE NO.: CV-16-556972
DATE: 20170728

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

BROOK-LYNNE SNOWBALL, JOHN SNO
 WBALL, and DEBBORAH SNOWBALL

Plaintiffs

– and –

ORNGE, 7506406 CANADA INC. o/a ORN
 GE ROTOR-WING, THE ATTORNEY GEN
 ERAL OF CANADA, TRANSPORT CANA
 DA INSPECTOR #1, AND TRANSPORT C
 ANADA INSPECTOR #2

Defendants

Christopher Du Vernet and C. McGoogan,
 for the Plaintiffs

Timothy Trembley and L. Kittmer, for the
 Defendants Ornge and 7506406 Canada In
 c.

HEARD: July 20, 2017

M. D. FAIETA, J.

REASONS FOR DECISION

INTRODUCTION

[1] This action arises from the crash of an air ambulance helicopter that took the life of Christopher Snowball (“Snowball”). The plaintiffs, being Snowball’s immediate family, have commenced an action against the defendants in negligence for damages for mental distress and damages under s. 61 of the *Family Law Act*, R.S.O. 1990, c. F.3 (“FLA”), as a result of his death.

[2] The family of another paramedic, Dustin Dagenais, who died in the same helicopter accident, also commenced an action against the defendants seeking the same relief. See *Dagenais v. Ornge*, Court File No. CV-16-558377.

[3] The defendant Ornge and 7506406 Canada Inc. (hereafter collectively referred to as “Ornge”), the operator of the air ambulance service, bring this motion pursuant to r. 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 in respect of both actions. Ornge submits that no right of action exists at common law for mental distress resulting from the negligently caused death of a human being unless the plaintiffs witnessed the accident or its aftermath. Ornge submits that the plaintiffs’ only right to claim is under s. 61 of the *FLA*.

[4] Given the similarity of their allegations, the parties have agreed that the outcome of this motion in relation to the Snowball action shall bind the parties to the Dagenais action.

[5] For the reasons given below, I find that it is not plain and obvious that the plaintiffs’ negligence action seeking damages for mental distress as a result of the death of Snowball has no reasonable prospect of success.

BACKGROUND

[6] The Statement of Claim in the Snowball action advances a claim in negligence for mental distress as well as a claim pursuant to s. 61 of the *FLA*.

[7] The Statement of Claim includes the following allegations:

1. Each Plaintiff claims against the Defendants, jointly and severally, for:

(a) general damages in the amount of ... (\$500,000.00) per Plaintiff, for negligence;

(b) general damages in the amount of ... (\$250,000.00) per Plaintiff, for loss of care, companionship and guidance;

(c) special damages in an amount to be particularized ... for loss of income and support, and out-of-pocket expenses incurred by each Plaintiff;

(d) punitive and exemplary damages in the amount of ... (\$500,000.00);

...

2. During the night of May 31st, 2013, Christopher Snowball (“Christopher”), a paramedic, perished when a medical helicopter operated by the Defendant Ornge in Moosonee, Ontario, crashed and burned. He was 38 years old.

3. Christopher Snowball left behind a close-knit family, including his then 16-year old daughter Brook-Lynne Snowball, and his parents, John Snowball and Deborah Snowball. The loss was utterly devastating to his family members.

4. The crash and Christopher’s ensuing death was completely avoidable, and occurred only because of the gross negligence of the Defendants herein.

...

Negligence

30. The Plaintiffs state and the fact is that the negligent acts or omissions of the Defendants caused or contributed to the crash which killed Christopher Snowball.

31. Particulars of the negligent acts and omissions of Ornge are as follows:

- a) Ornge failed to ensure that the pilots had sufficient training and experience to safely complete the flight, including, without limitation, night- and instrument-flying proficiency;

...

33. Full particulars of the negligent acts and omissions committed by the Defendants are set out in the Transportation Safety Board of Canada's Aviation Investigation Report....

34. In the circumstances described hereinabove, the Defendants owed the Plaintiff a duty of care.

35. Previous decisions of this Court and other Courts in Canada have established that a duty of care is owed to family members of persons who die in aviation crashes by Transport Canada, its inspectors, and the operators of such flights. The Plaintiffs therefore state that there is a presumptive duty of care owed by the Defendants to the Plaintiff in the circumstances of this case.

36. A presumptive duty of care arises in this case and has been previously recognized in factually analogous cases precisely because (1) the harm which occurred was the reasonably foreseeable consequence of the Defendants acts and omissions, and (2) there is sufficient proximity between the parties that it would not be unjust to impose a duty of care on the Defendants.

37. In the alternative, if a presumptive duty of care does not arise in this case, ... , a duty of care ought to be recognized in the circumstances of this case.

38. The Defendants were all well aware that [Ornge] were operating dangerous machinery and that the slightest dereliction of duty could have catastrophic consequences.

...

40. The Defendants knew or ought to have known that persons such as Christopher Snowball who were on board their flights were likely to have family members and other persons close to them who were likely to experience significant mental and emotional distress if persons such as Christopher Snowball were to die.

...

50. In these circumstances, the Plaintiffs state that the Defendants owed a private-law duty of care to the Plaintiffs, which they breached in the manner set out hereinabove.

...

Mental Distress

52. The Plaintiffs had a tight-knit family, and in particular maintained a very close relationship with Christopher throughout his entire life. The news of Christopher's death hit the Plaintiffs like a freight train.

53. As a direct and foreseeable consequence of the Defendants' negligence in causing or contributing to Christopher's death, as particularized hereinabove, the Plaintiffs suffered and continue to suffer extreme mental and emotional distress.

...

55. Particulars of the mental distress experienced by the Plaintiffs are as follows:

- a. Recurrent, involuntary, intrusive, and distressing memories, and dreams related to Christopher Snowball's death;
- b. Dissociative reactions;
- c. Intense and prolonged physical distress at exposure to cues that remind them of Christopher Snowball.
- d. Avoidance of external reminders that arouse distressing memories ... ;
- e. Persistent negative emotional states;
- f. Markedly diminished interest or participation in significant activities;
- g. Feelings of detachment and estrangement from others;
- h. Persistent inability to experience positive emotions;
- i. Irritable behaviour and angry outbursts;
- j. Hypervigilance;
- k. Problems with concentration;
- l. Significant sleep disturbance and recurring nightmares;
- m. Recurring ruminations over the horrible manner in which the late Christopher Snowball met his death, the terrible agony he endured before perishing ... ;
- n. Unresolved anger at the Defendants neglect....

56. The mental distress suffered by the Plaintiffs was caused by the negligent acts of the Defendants particularized hereinabove.

57. The Defendants were well aware that the helicopter at issue was staffed by people such as the late Christopher Snowball, and that those people could be killed if it crashed. Moreover, the Defendants were also aware that those people on board the helicopter had families and loved ones, who were likely to suffer significant emotional trauma if their family member was killed.

58. It was accordingly reasonably foreseeable that if Christopher Snowball was killed, the Plaintiffs would suffer significant mental distress, and the Plaintiffs did in fact

suffer significant mental distress.

59. The Plaintiffs all had one of the closest relationships possible to the deceased – that of parent and child. The Plaintiffs therefore state and the fact is that they were within the direct contemplation of the Defendants as persons who would suffer damages as a consequence of the Defendants' negligence.
60. The Plaintiffs accordingly seek damages of \$500,000.00 each for the mental distress which they have suffered as a direct and foreseeable consequence of the Defendants' negligence, particularized hereinabove.

Care, Companionship and Guidance

61. The Plaintiff Brook-Lynne Snowball was 16 years old at the time of her father's death. As a child, she was especially dependent upon her father to provide her with care, companionship and guidance in all aspects of her life.
62. Brook-Lynne Snowball had a very close emotional bond with her father. She would routinely look to him for guidance and support with all aspects of her life, from her school work to her personal relationships.
63. Brook-Lynne Snowball and her father would frequently engage in recreational activities such as fishing, camping, and horseback riding. Through these activities, Brook-Lynne Snowball developed and deepened her emotional bond with her father.
64. As a minor, Brook-Lynne Snowball was also financially dependent on her father.
65. Brook-Lynne Snowball had spoken with her father about attending university, and planned to do so. However, after his death, she was left utterly adrift. Previously a successful and motivated student, after her father's demise she barely managed to finish high school. Now lacking the guidance and support of her father, and struggling with the trauma of his death, she has been unable to pursue any further education.
66. Brook-Lynne Snowball's future earning capacity has been significantly diminished as a consequence of the loss of care, companionship and guidance and by the mental distress she has experienced arising out of her father's death.
67. The Plaintiff states and the fact is that she is entitled to compensation from the Defendants for her loss and her injury.

...

70. The Plaintiffs John Snowball and Deborah Snowball have also suffered a grievous loss of care, companionship and guidance. ...

...

76. The Plaintiffs state and the fact is that they have suffered a significant loss of care, companionship and guidance as a consequence of their son's death, to which they are entitled to compensation, and seek \$250,000.00 each for the loss of care, companionship, and guidance which they have all suffered as a consequence of the Defendants' negligence.

77. The Plaintiffs plead and rely upon [section 61](#) of the [Family Law Act, R.S.O. 1990,c . F.3](#), as amended.

Punitive and Exemplary Damages

78. The Plaintiffs state that the acts and omissions of the Defendants set out hereinabove constitute such oppressive, high-handed misconduct as to warrant an award of punitive damages.

...

ANALYSIS

The Test under r. 21 of the [Rules of Civil Procedure](#)

[8] Ornge's brings this motion under r. 21 of the [Rules of Civil Procedure](#) for "[a]n order for a determination of a question of law raised by a pleading". Ornge's motion raises two issues:

- (1) Do the plaintiffs have a right to advance a claim at common law for mental injury resulting from the death of Christopher Snowball? [Notice of Motion, page 2, paragraphs (d), (e) and (f)]
- (2) Are the plaintiffs' claims under [s. 61](#) of the [FLA](#) governed by the limitation period under [s. 38](#) of the [Trustee Act](#), R.S.O. 1990, c. T.23 or by the limitation period under [s. 4](#) of the [Limitations Act, 2002](#), S.O. 2002, c. 24, Sched. B? [Notice of Motion, page 2, paragraphs (g) and (h)]

[9] [Rule 21.01\(1\)-\(2\)](#) of the [Rules of Civil Procedure](#) provides that:

- (1) A party may move before a judge,
 - (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or
 - (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

- (2) No evidence is admissible on a motion,
 - (a) under clause (1) (a), except with leave of a judge or on consent of the parties;
 - (b) under clause (1) (b).

[10] At the hearing of this motion, the plaintiffs noted that Ornge's Notice of Motion does not specify which specific provision of r. 21 is being relied upon by Ornge in respect of the determination of the first issue. In my view, r. 21.01(1)(b) governs the analysis of whether the plaintiffs' claim in negligence is tenable.

[11] In *R. v. Imperial Tobacco Canada Ltd.*, [2011 SCC 42](#), [2011] 3 S.C.R. 45, at paras. 17, 19, 21, the Supreme Court of Canada provided the following guidance on when a claim should be struck:

... A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial.

...

The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

...

Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932 CanLII 536 \(FOREP\)](#), [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners, Ltd.*, [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. [Emphasis added; citations omitted.]

Do the Plaintiffs' Claims in Negligence for Mental Injury have no Reasonable Prospect of Success?

[12] For more than 200 years, the common law has provided that the right to bring an action in tort does not survive the death of a person. Neither the estate of the victim nor the victim's relatives have a right to sue for their losses: *Baker v. Bolton* (1808), 1 Camp. 493, 170 E.R. 1033. In that case, the plaintiff brought an action against the proprietor of a stage-coach, in which the plaintiff and his wife were travelling, that overturned and led to the death of the plaintiff's wife about one month later. The court, at p. 1033, found that the plaintiff was not entitled to any damages for the loss of her "society", or for "distress of mind he had suffered on her account" in the form of "great grief, vexation and anguish of mind" after the moment of her death. Lord Ellenborough stated that "[i]n a civil Court, the death of a human being could not be complained of as an injury".

[13] If there was a principled basis for this rule it was not described in *Baker*. Courts have been left to speculate as to why a person should be barred from seeking compensation for losses resulting from the death of a family member, but not when it results from an injury to a family member: *Ferraiuolo v. Olson*, [2004 ABCA 281](#), 246 D.L.R. (4th) 225, at paras. 19-30, 68; and *Monahan Estate v. Nelson*, [2000 BCCA 297](#), 76 B.C.L.R. (3d) 109, at paras. 5-6.

One commentator has noted that a strict application of *Baker* has "the astonishingly absurd result that a parent could recover for mental disorder caused by negligent injury to their child but not where the negligence has killed their child": Dr. Norman Katter, "Reining in the Rule in *Baker v Bolton*", online: (July 2015), 73 Hearsay, The Journal of the Bar Association of

[14] Despite its dubious principled basis, *Baker* has generally continued to apply in Canada, Australia and England: *Mason v. Peters* (1982), [1982 CanLII 1969 \(ON CA\)](#), 139 D.L.R. (3d) 104 (Ont. C.A.), at pp. 30-32, leave to appeal refused, [1982] S.C.C.A. No. 51; *Lord (Litigation Guardian of) v. Downer* (1999), [1999 CanLII 1875 \(ON CA\)](#), 179 D.L.R. (4th) 430 (Ont. C.A.), at para. 4, leave to appeal refused, [1999] S.C.C.A. No. 571; *Ordon Estate v. Grail*, [1998 CanLII 771 \(SCC\)](#), [1998] 3 S.C.R. 437, at paras. 98, 105; *Admiralty Commissioners v. S.S. Amerika*, [1917] A.C. 38 (H.L.); and *Barclay v. Penberthy*, [2012] HCA 40, 246 C.L.R. 258 (Austl. H.C.), at paras. 26-27. However, no such limitation exists under the *Civil Code of Québec: Augustus v. Gosset*, [1996 CanLII 173 \(SCC\)](#), [1996] 3 S.C.R. 268, at para. 27.

[15] The harshness of *Baker* led to statutory reform in England in 1846, in Ontario and Quebec in 1847 and in other provinces and common law jurisdictions. In Ontario, the impact of *Baker* is somewhat muted given that s. 61 of the *FLA* permits the family of the deceased to maintain an action for pecuniary damages including damages for loss of guidance, care and companionship. However, there is no basis under s. 61 of the *FLA* to recover for grief, sorrow or mental anguish suffered by reason of the death of a family member: *Mason*, at pp. 32, 39; or punitive and aggravated damages: *Latimer v. Canadian National Railway Company*, [2007 CanLII 5689 \(ON SC\)](#), at paras. 7-10. Damages for grief following the death of a family member are authorized by statute in Alberta, Saskatchewan and Quebec: see Government of Alberta, Justice and Solicitor General, *Review of Damage Amounts under Section 8 of the Fatal Accidents Act* (A Discussion Paper) (Edmonton: Fatal Accidents Act Review, May 2012), at p. 6. In the United Kingdom, damages for bereavement following the death of a family member is also authorized by statute: *Fatal Accidents Act 1976* (UK), 1976, c. 30, s. 1A.

[16] The plaintiffs submit that claims in negligence for damages for mental injury suffered by a family member following the injury or death of another family member are allowed. Some cases arise from witnessing the bodily injury or death suffered by a family member: *Logan v. Lovesy*, [1983] O.J. No. 262 (H.C.). Other cases arise from seeing the aftermath of the accident involving a family member: *McCartney v. Andrews*, [1987] O.J. No. 1092 (H.C.); and *McLoughlin v. O'Brian*, [1983] 1 A.C. 410 (H.L.); or witnessing the injury or death of a stranger that the claimant tried to save following an accident: *Bechard v. Haliburton Estate* (1991), [1991 CanLII 7362 \(ON CA\)](#), 5 O.R. (3d) 512 (C.A.). However, none of the cases provided by the plaintiffs involve a situation where damages for mental injury have been awarded to a person who has not suffered bodily injury or who has not witnessed the injury or death of another person or its immediate aftermath. Courts have refused to award damages for mental injury to a person who is merely informed of an accident: *Abramzik et al. v. Brenner et al.* (1967), [1967 CanLII 415 \(SK CA\)](#), 65 D.L.R. (2d) 651 (Sask. C.A.); *Rhodes Estate v. C.N.R.*, [1990 CanLII 5401 \(BC CA\)](#), 50 B.C.L.R. (2d) 273 (C.A.), leave to appeal refused, [1991] S.C.C.A. No. 1 and *Latimer*, at paras. 12, 14.

[17] The plaintiffs submit that the Supreme Court of Canada's decision in *Saadati v. Moorhead*, [2017 SCC 28](#), is a "game changer" in that it rejected the use of various considerations, such as geographical and temporal proximity, as absolute bars to the recovery of damages for mental injury in negligence.

[18] The *ratio* of the Supreme Court of Canada's decision in *Saadati* is that a claimant in negligence is not required to prove a recognised psychiatric illness in order to establish that he or she has suffered a mental injury so long as "the disturbance suffered by the claimant is 'serious and prolonged and rise[s] above the ordinary annoyances, anxieties and fears' that come with living in civil society" (citations omitted): *Saadati*, at para. 37.

[19] In arriving at the above conclusion, the court considered the legal principles governing a claim for the recovery of damages for mental injury caused by negligence. It ruled that the elements of the cause of action in negligence described in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 3, (namely, findings that: (a) the defendant owed the plaintiff a duty of care; (b) the defendant's behaviour breached the standard of care; (c) the plaintiff sustained damage; and (d) the damage was caused, in fact and law, by the defendant's breach) furnish a sufficiently robust array of protections against unworthy claims for negligently caused mental injury without the need for satisfying arbitrary, absolute proximity criteria: *Saadati*, at paras. 19-22.

[20] Moreover, the Supreme Court of Canada in *Saadati*, at paras. 14-16, 18-24, stated the following:

14 The early common law's posture towards claims for negligently caused mental harm was one of suspicion and sometimes outright hostility. ... Mental injury was seen as "not derived through the senses, but [as] a product of the imagination". This scepticism persisted into the last century, such that mental injury was not compensable unless accompanied by physical injury.

15 While the absolute bar to recovery for mental injury absent physical injury was eventually lifted, the suspicion which originally impelled that bar persisted, and common law courts continued to impose conditions upon recovery beyond those applied to claims for negligently caused physical injury. While, therefore, in England liability for negligently caused mental injury was first recognized as early as 1901, it was conditional upon "a shock which arises from a reasonable fear of immediate personal injury to oneself", or, "a reasonable fear of immediate personal injury either to [the claimant, or the claimant's children]". While recovery for mental injury in Canada remained parasitic to recovery for compensable physical injury well into the 20th century, by mid-century Canadian courts had also begun to permit recovery on similar conditions as English law — typically, on claimants having had at the material time a reasonable fear of physical injury to themselves or to their family.

16 Further obstacles to recovery for mental injury arose in English law. In *McLoughlin v. O'Brian*, at pp. 419-21, Lord Wilberforce posited three considerations that could limit the boundaries of compensable "nervous shock": the class of persons whose claims should be recognized (often referred to as relational proximity), the proximity of such persons to the accident (locational, or geographical proximity), and the means by which the "shock" is caused (temporal proximity). Where claimants alleged mental injury arising out of a sudden traumatic event, later judgments further distinguished between a "primary" victim (who was directly involved as a participant) and a "secondary" victim (who witnessed physical injuries caused to others). ...

...

18 Like the English courts, Canadian courts have occasionally struggled, as Professor Klar has described, "to find words which can clearly explain why, on the basis of arbitrary policy choices, certain types of claims seem to be too remote and uncompensable". ...

19 This Court has not, however, adopted either the primary/secondary victim distinction, or *McLoughlin v. O'Brian*'s disaggregated proximity analysis. Rather, in *Mustapha*, recoverability of mental injury was viewed (at para. 3) as depending upon the claimant satisfying the criteria applicable to any successful action in

negligence — that is, upon the claimant proving a duty of care, a breach, damage, and a legal and factual causal relationship between the breach and the damage. Each of these elements can pose a significant hurdle: not all claimants alleging mental injury will be in a relationship of proximity with defendants necessary to ground a duty of care; not all conduct resulting in mental harm will breach the standard of care; not all mental disturbances will amount to true “damage” [qualifying] as mental injury, which is “serious and prolonged” and rises above the ordinary emotional disturbances that will occasionally afflict any member of civil society without violating his or her right to be free of negligently caused mental injury (*Mustapha*, at para. 9); and not all mental injury is caused, in fact or in law, by the defendant’s negligent conduct.

20 Indeed, the claim in *Mustapha* failed on that last element: the claimant’s damage was not caused in law by (that is, it was too remote from) the defendant’s breach. *Mustapha* thus serves as a salutary reminder that, even where a duty of care, a breach, damage and factual causation are established, there remains the pertinent threshold question of legal causation, or remoteness — that is, whether the occurrence of mental harm in a person of ordinary fortitude was the reasonably foreseeable result of the defendant’s negligent conduct (*Mustapha*, at paras. 14-16). And, just as recovery for physical injury will not be possible where injury of that kind was not the foreseeable result of the defendant’s negligence, so too will claimants be denied recovery (as the claimant in *Mustapha* was denied recovery) where mental injury could not have been foreseen to result from the defendant’s negligence.

21 It follows that this Court sees the elements of the cause of action of negligence as furnishing principled and sufficient barriers to unmeritorious or trivial claims for negligently caused mental injury. The view that courts should require something more is founded not on legal principle, but on policy — more particularly, on a collection of concerns regarding claims for mental injury (including those advanced in this appeal by the intervener Insurance Bureau of Canada) founded upon dubious perceptions of, and postures towards, psychiatry and mental illness in general: that mental illness is “subjective” or otherwise easily feigned or exaggerated; and that the law should not provide compensation for “trivial matters” but should foster the growth of “tough hides not easily pierced by emotional responses”. The stigma faced by people with mental illness, including that caused by mental injury, is notorious, often unjustly and unnecessarily impeding their participation, so far as possible, in civil society. While tort law does not exist to abolish misguided prejudices, it should not seek to perpetuate them.

22 Where, therefore, genuine factual uncertainty arises regarding the worthiness of a claim, this can and should be addressed by robust application of those elements by a trier of fact, rather than by tipping the scales via arbitrary mechanisms. ...

23 I add this. As to that first necessary element for recovery (establishing that the defendant owed the claimant a duty of care), it is implicit in the Court’s decision in *Mustapha* that Canadian negligence law recognizes that a duty exists at common law to take reasonable care to avoid causing foreseeable mental injury, and that this cause of action protects a right to be free from negligent interference with one’s mental health. That right is grounded in the simple truth that a person’s mental health — like a person’s physical integrity or property, injury to which is also compensable in negligence law — is an essential means by which that person chooses to live life and pursue goals. ...

24 It is also implicit in *Mustapha* that the ordinary duty of care analysis is to be applied to claims for negligently caused mental injury. With great respect to courts that have expressed contrary views, it is in my view unnecessary and indeed futile to re-structure that analysis so as to mandate formal, separate consideration of certain dimensions of proximity, as was done in *McLoughlin v. O'Brian*. Certainly, “temporal”, “geographic” and “relational” considerations might well inform the proximity analysis to be performed in some cases. But the proximity analysis as formulated by this Court is, and is intended to be, sufficiently flexible to capture all relevant circumstances that might in any given case go to seeking out the “close and direct” relationship which is the hallmark of the common law duty of care. ... [Emphasis added; citations omitted.]

[21] Given that courts have apparently disregarded *Baker* by allowing claims in negligence for mental injury so long as the claimant witnesses a person’s injury, death or the aftermath of such injury or death (see the cases described above at paragraph 16 of these reasons), and given that the court in *Saadati* rejected the “primary/secondary victim” distinction, as well as the view that there are geographic, temporal and relational proximity restrictions that are an absolute limitation on the duty to take reasonable care to avoid causing foreseeable mental injury, it is my view that the plaintiffs’ claims for mental distress following Snowball’s death might succeed even though they are secondary victims who did not witness this sudden, traumatic event. As directed by the Supreme Court of Canada in *Saadati*, the outcome of the Snowball action should turn on the robust application of the elements of an action in negligence by the trier of fact rather than on the separate application of geographic, temporal, and relational considerations or a distinction between “primary” and “secondary” victims.

[22] Ornge further submits that the allegations in the Statement of Claim reflect a claim for the death of the deceased rather than a claim for mental injury suffered by the plaintiffs themselves as a result of a breach of duty of care owed by the defendants to them. There is no merit to this submission as the Statement of Claim, particularly paragraphs 34-40 and 50, alleges that a duty of care was owed by the defendants to the plaintiffs to prevent the mental distress that they suffered as a result of Snowball’s death and that such distress was a direct and foreseeable consequence of the defendants’ negligence in causing or contributing to Snowball’s death.

CONCLUSIONS

[23] I dismiss Ornge’s motion under r. 21.01(1)(b) in respect of both the Snowball action and the Dagenais action. It is not plain and obvious that the plaintiffs’ claim in negligence for mental distress has no reasonable prospect of success.

[24] The second issue raised by Ornge on this motion, related to whether a claim under s. 61 of the *FLA* is governed by the limitation period under s. 38(3) of the *Trustee Act*, was not addressed at the hearing of this motion. Should the parties wish to submit additional written submissions on the question of the applicable limitation period, then they may provide no more than ten pages of submissions by August 3, 2017, and five pages in reply by August 9, 2017. I will dispense with oral submissions on this second issue and shall rely on the written submissions provided by the parties.

Mr. Justice M. D. Faieta

CITATION: Snowball v. Ornge, 2017 ONSC 4601
COURT FILE NO.: CV-16-556972
DATE: 20170728

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

BROOK-LYNNE SNOWBALL, JOHN SNOWBALL, and D
EBBORAH SNOWBALL

Plaintiffs

– and –

ORNGE, 7506406 CANADA INC. o/a ORNGE ROTOR-WI
NG, THE ATTORNEY GENERAL OF CANADA, TRANSP
ORT CANADA INSPECTOR #1, AND TRANSPORT CAN
ADA INSPECTOR #2

Defendant

REASONS FOR DECISION

Mr. Justice M. D. Faieta

Released: July 28, 2017

Tab 154

Merrifield v The Attorney General, 2017 ONSC 1333 (CanLII)

Source:	Superior Court of Justice
Date:	2017-02-28
File number:	CV-13-00333733-00OT; 2005-1117
Other citations:	42 CCLT (4th) 4 — [2017] OJ No 1009 (QL)
Citation:	Merrifield v The Attorney General, 2017 ONSC 1333 (CanLII), < https://canlii.ca/t/h03q8 >, retrieved on 2026-03-24
Most recent unfavourable mention	Moore v. Habib-Allah , 2022 ONSC 5290 (CanLII) [...] [20] 2019 ONCA 205 , 145 O.R. (3d) 494, rev'g 2017 ONSC 1333 . [...]

CITATION: Merrifield v. The Attorney General, 2017 ONSC 1333
COURT FILE NO.: CV-13-00333733-00OT
DATE: 20170228

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

PETER MERRIFIELD

Plaintiff

– and –

THE ATTORNEY GENERAL OF CANADA,
 INSPECTOR JAMES JAGOE, SUPERINTENDENT
 MARC PROULX

Defendant

Ms. L. Young and Mr. J. Phillips, Counsel for the Plaintiff

Mr. S. Gaudet, Mr. J. Gorham, Mr. A. Law, Counsel for the Defendant

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) **HEARD:** November 17 to 21, 24-28, Decem
) ber 1 to 4, 2014, May 19, 20, 21, 22, 25, 26,
) 27, 29, June 1, 2, 3, 4, 5, November 16, 17, 1
) 8, 19, 20, 30, December 1, 2, 3, 4, 2015, Mar
) ch 30, 31, April 1, 2016

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REASONS FOR DECISION

VALLEE J.

Introduction

[1] Peter Merrifield^[i] joined the Royal Canadian Mounted Police in 1998 and continues to serve as a member. He alleges that after he participated in a Barrie nomination meeting for the Progressive Conservative Party in 2005, his superiors made certain unjustified and unwarranted decisions about him based on allegations that had no merit. He was investigated and punitively transferred. His reputation was tarnished. He was not permitted to work during a national security emergency because his superior officers believed he was “not the appropriate resource.” Mr. Merrifield states that he was accused of committing criminal offences and subjected to an internal investigation which was groundless. He states that his superiors harassed and bullied him. They damaged his reputation, impaired his career advancement, and caused him to suffer severe emotional distress including depression. As a result, he was off work for significant periods of time. Mr. Merrifield states that his superiors intentionally caused him emotional distress or had a reckless disregard for causing him to suffer emotional distress. Mr. Merrifield claims damages for harassment, intentional infliction of mental suffering, loss of income and general damages, among other things.

[2] The Attorney General, on behalf of the RCMP, states that Mr. Merrifield violated the *Royal Canadian Mounted Police Regulations 1988, SOR/88-361*; however, he was never formally disciplined for any of the matters raised in this action. None of the decisions made by his superiors nor their actions taken constitute harassment or intentional infliction of mental suffering. Mr. Merrifield is a well-respected member of the RCMP. He is regarded as a very skilled officer and an asset to the organization. His superiors were entitled to make their decisions. He was not treated inappropriately. Mr. Merrifield’s career has not been impacted. He has been promoted twice and is now a Sergeant. His compensation has increased. He is a valued and respected member of the Force.

Issues

1. Should the statement of defence be struck for late disclosure?
2. In Ontario, is harassment recognized as a tort upon which a civil cause of action may be based?
3. If it is, do the actions taken by the RCMP regarding Mr. Merrifield constitute harassment?
4. Do the actions of the RCMP constitute a breach of Mr. Merrifield's rights under the *Canadian Charter of Rights and Freedoms*?
5. Has the RCMP breached a contract of employment with Mr. Merrifield?
6. Do the actions of the RCMP regarding Mr. Merrifield constitute abuse of public office?
7. Do the actions of the RCMP regarding Mr. Merrifield constitute intentional infliction of mental suffering?
8. Does the RCMP have a fiduciary duty to Mr. Merrifield? If so, do its actions constitute a breach of fiduciary duty?
9. Has Mr. Merrifield suffered a loss of income related to the actions taken by the RCMP? If so, what amount should be awarded to Mr. Merrifield for his loss of income?
10. If Mr. Merrifield is entitled to general damages, what amount should be awarded to him?
11. Is Mr. Merrifield entitled to punitive and or aggravated damages? If so, what amount should be awarded?

[3] To properly consider these issues, a review of Mr. Merrifield's career with the RCMP and the various decisions made by his superiors is required. ^[ii]

[4] Mr. Merrifield's first posting was the Wynyard Detachment in central Saskatchewan. In January 2002, he was transferred to Ontario. He successfully applied to the Air Marshall program in April, 2002. The program was set up in response to the terrorist attacks in the United States on September 11, 2001. As an Air Marshall, Mr. Merrifield's duties were to operate covertly as a passenger on aircraft in order to provide security and respond to any potential terrorist situations. In the same year, Mr. Merrifield joined the Mounted Police Association (MPA). It provides representation to members experiencing issues with management.

[5] In November 2003, Mr. Merrifield had a performance evaluation. It covered the time from his arrival in the Air Marshall unit up to November 2003. The evaluation was very positive. It stated:

Constable Merrifield has designed and prepared lectures on CACPP [Canadian Air Carrier Protection Program] and presented to outside agencies, and has been involved in designing and presenting APO [Aircraft Protective Officers] training program of tactical skills to seconded members, he planned and prepared in-service training terrorism lectures for APO Unit.

Cst Merrifield is a highly motivated, confident member who is an asset to this program. Cst. Merrifield is a team player and is a value added member to the program. His enthusiasm, dedication, commitment to duty has [sic] a positive influence on others and this along with his positive attitude, out going [sic] personality will serve him well in his future endeavours. A pleasure to have this member in the program.

- [6] Mr. Merrifield enjoyed public speaking. His superior, Insp. Josey supported his speaking engagements and interest in national security work.

Leave Without Pay.

- [7] Mr. Merrifield had been interested in politics since the 1980s. At that time, he was the co-founder of a Liberal youth riding association. He became involved in politics again in 2004. No member of the RCMP had ever run for political office; however, the RCMP had applicable rules and policies if a member wanted to do so.

- [8] Early in 2004, Mr. Merrifield explored running in a nomination meeting ^[iii] to be held in the York-Simcoe riding. He downloaded the paperwork two weeks before the application deadline.

- [9] Mr. Merrifield requested guidance and direction regarding the RCMP's policies and process from the Policy Center. On February 3, 2004, he exchanged emails with Sgt. Wendy Verecchia, (Advisor, Harassment, Human Rights, Conflicts of Issue, Central Region). She advised him that she thought he would need to be placed on leave without pay ("LWOP") and that she would contact Policy Center to confirm.

- [10] Section 58.4(1) of the *Royal Canadian Mounted Police Regulations* [SOR/88 – 361](#) states that:

A member who is a peace officer may, only while on leave without pay granted for that purpose, (a) run for nomination or stand as a candidate in a federal...election"

- [11] The March 19, 1999 Administrative Manual states in section F.4 that:

LWOP ensures separation between the member and the RCMP: consequently, annual leave, RTO [regular time off] and LTO [lieu time off] cannot be used for political activities when LWOP is warranted.

- [12] Mr. Merrifield sent a memo to Insp. Josey, requesting LWOP to participate in political activities on February 11, 2004 and March 31, 2004. March 31, 2004 was the date for another nomination meeting to be held in Richmond Hill. Mr. Merrifield stated that this memo was actually back-dated. It was prepared after the first nomination meeting because Sgt. Verecchia's memo dated February 11, 2004 was attached to it.

- [13] Cpl. DuPuy, who was an operations support officer, filled out the forms for Mr. Merrifield to apply for LWOP. A transfer authorization, form A-22A, was required to change his status to LWOP.

- [14] Mr. Merrifield requested one day of LWOP. The completed forms indicated only LWOP, not any particular type. Mr. Merrifield was directed to put "personal needs" LWOP on the form. He did not know at the time when he completed the forms that he could take only two personal needs LWOPs in his career. Due to time constraints, the LWOP for Mr. Merrifield to participate as a candidate in the York-Simcoe nomination meeting was actually requested and granted after the nomination was held.
- [15] Sgt. Verecchia received a formal response from the Policy Center. She sent an email to Mr. Merrifield dated February 11, 2004 which stated, "while running for nomination, a member must be on LWOP but once the nomination process is completed and the electoral campaigning has not begun, the member may return to his usual employment. When the member stands as a candidate in an election, LWOP would have to be taken again." Mr. Merrifield interpreted "while running for nomination" to mean the date of the nomination meeting.
- [16] After February 11, 2004, Mr. Merrifield prepared paperwork to run in a number of other ridings, which included York-Simcoe, Richmond Hill and Mississauga-Brampton-South. He stated that all of his paperwork was submitted between February 11, 2004 and March 31, 2004. After that, the PC Regional Co-ordinator approached him and advised against using this shot gun approach to secure a nomination.
- [17] Mr. Merrifield participated as a candidate in the nomination meeting for York-Simcoe on February 11, 2004. He did not make any efforts in advance to be nominated. He simply attended the meeting. Accordingly, he was not successful in obtaining the nomination. Mr. Merrifield participated in this nomination meeting without proper approval (which came after the fact) because he decided to run on short notice; however, he stated that he did so but with full knowledge of the RCMP. He stated that he obtained informal approval from Insp. Josey to attend.
- [18] At the end of the meeting, he was approached to run as a candidate at the Richmond Hill's riding's nomination meeting.
- [19] Mr. Merrifield then attempted to withdraw his papers relating to the other nomination meetings; however, it was too late to withdraw from the Mississauga-Brampton-South nomination meeting. He did not request LWOP to attend this meeting. He stated that he spoke with Cpl. DuPuy who advised that he should submit the paperwork for two nomination meetings, being York-Simcoe and Richmond Hill, even though he had attended more than two, and that would be enough.
- [20] On March 13, 2004, Mr. Merrifield attended the nomination meeting for Mississauga-Brampton-South. He stated that he attended as a courtesy. The ballots had been printed and he did not want to be a "no show".
- [21] Mr. Merrifield requested LWOP for the Richmond Hill nomination meeting and the related election period at the same time that he requested LWOP for the York-Simcoe nomination meeting. No election date had been set yet. Mr. Merrifield's application for these LWOPs was granted.
- [22] On March 31, 2004, Mr. Merrifield participated as a candidate in the nomination meeting for Richmond Hill and was successful. He sent a memo to Insp. Josey dated May 5, 2004 requesting LWOP to run in the upcoming election. He included a partially completed form A-22A because the election date had not yet been set.
- [23] On the same day, Insp. Josey sent a memo to the Assistant Commissioner for "O" Division, Bradley Holman, stating that the request for LWOP was not processed in timely

fashion because of time constraints. He stated, "I am submitting it to you for review and favourable consideration."

- [24] On May 13, 2004, Sgt. Steven Boos, Advisor to the Career Development and Resourcing Unit (CDR), called Mr. Merrifield to discuss the rules for fundraising. He advised that LWOP would be required for active campaigning and attending meetings as a candidate. Two days later, Mr. Merrifield received LWOP approval for the election.
- [25] Sgt. Boos sent an email to Insp. Josey on May 18, 2004 discussing the two LWOP dates, February 11, 2004 (for the York-Simcoe nomination meeting) and March 31, 2004 (for the Richmond Hill nomination meeting). The email states that transfer authorizations were issued for these dates and it requests transfer authorizations be prepared showing Mr. Merrifield going on "personal needs" LWOP for these dates. The two transfer authorizations showing just "leave without pay" were attached.
- [26] Mr. Merrifield stated that from May to June 2004, he campaigned for the election. He had a campaign manager, a support team and campaign materials. They set out his rank and work experience which was permitted according to s. 57(2) of the *RCMP Regulations*, as set out in X.2 of the Administrative Manual. It states that a member who is running for nomination or standing as a candidate in a federal election, may for identification purposes, disclose his or her rank, level and work experience in the force. He ran in the federal election which was held on June 28, 2004 but he was not elected. None of his superiors had any concerns regarding his campaign materials.
- [27] After the election, Mr. Merrifield returned to work as an Air Marshall. He was very interested in terrorism. As a result, he developed other areas of work in addition to just doing his job as an Air Marshall. He gathered open source intelligence on terrorism and did some restricted outside speaking engagements which he enjoyed.
- [28] Subsequently, there was a lot of confusion regarding Mr. Merrifield's LWOPs. On June 30 2004, Sgt. Sergeant, RCMP Policy Analyst Human Resources, sent an email directing Cathy Jenion, District Manager for London, Central Region Compensation Services, to re-identify the three "personal needs" LWOP to "special leave without pay." Sgt. Verecchia had stated that Mr. Merrifield's leaves were to be shown as regular LWOP but no such type of leave was identified in the HRMIS program for members. ^[iv]
- [29] Mr. Merrifield stated that he did not know why the three personal needs LWOPs were shown or why they were re-coded to special LWOP. These decisions were made at the policy level. He never received a copy of this email during the course of his employment. In July 2004, he understood from a conversation with Sgt. Boos that he was entitled to only two personal needs LWOPs in his career. He thought he had used both of them.
- [30] Mr. Merrifield stated that sometime between July and the end of September, Sgt. Boos called him and said that he had good news. Only one LWOP was being used for the election so he could run again because he still had one LWOP remaining. Mr. Merrifield stated that, at this point, he understood that LWOPs had not been used and were not required for nomination meetings.
- [31] Cpl. DuPuy recalled that between January and June 2004, Mr. Merrifield approached him and Insp. Josey about needing LWOP because he had political ambitions. He recalled that they contacted Sgt. Verecchia and Sgt. Boos and sought their guidance as to what to do and how the process worked. Cpl. DuPuy stated that all of this was new to him. Insp. Josey directed him to look into it, see what was required and make sure it was done. He stated that he knew Mr. Merrifield was attempting to get a nomination for the PC party.

- [32] Cpl. DuPuy knew that Mr. Merrifield needed LWOP to run for a nomination. He contacted Sgt. Verecchia prior to preparing the documents. He knew that Mr. Merrifield had run at another nomination meeting but could not recall which riding.
- [33] Cpl. DuPuy was familiar with transfer reports. If a person's duties changed, these had to be filled out. He had never prepared a LWOP application for political reasons. He completed one for Mr. Merrifield which stated "LWOP – Personal Needs". He signed the document dated January 11, 2004 because at that time he was acting for Insp. Josey.
- [34] Later, Cpl. DuPuy learned that an Inspector could not sign the form. LWOP had to be requested from the Commanding Officer (C.O.). This meant that the forms had to be redone, backdated and resubmitted.
- [35] Cpl. DuPuy stated that Mr. Merrifield was quite helpful. He did not conceal his political activities and in fact was very open about them. He wanted to do everything properly. He still wanted to be employed by the RCMP if he was not elected. It was in his interest to make sure everything was done right.
- [36] Sgt. Verecchia was responsible for coordinating harassment complaints and providing human resource advice to the members in 2004. On February 3, 2004, she received an email from Mr. Merrifield requesting conflict of interest advice. He wanted to run for political office and was seeking clarification on exactly what the regulations and policies stated.
- [37] Sgt. Verecchia stated that ss. 56 to 58(7) of the *RCMP Regulations* cover political activities, when members need LWOP and how they are to act. She looked up the regulations and responded to Mr. Merrifield with her interpretation. She sent him an email stating that because he was presenting himself for nomination to eventually run in a federal election, the policy stated that he must be on LWOP to run for the nomination. A member could not be on annual leave or regular time off for this purpose. The LWOP would be continuous and without pay. In the case of the nomination process, it would begin on the day he entered the process and end on the day he withdrew or the process was concluded. Sgt. Verecchia sent a request to the Policy Branch, for their interpretation. The Policy Branch's interpretation was the same as hers. A member cannot voice his or her political opinion or solicit support while working for the RCMP. There has to be a separation.
- [38] Part of Sgt. Boos' responsibilities was the administration of LWOP policies. As part of the protocol, he would interview a member requesting LWOP to ensure that the member was fully aware of the conditions. He stated that LWOP is a separation of the member's employment from RCMP. Even though the member is separated, the member still has obligations with respect to conduct. A member had to be fully advised of conditions regarding other employment.
- [39] Sgt. Boos' general understanding of LWOP with respect to political activities was that LWOP was required for nomination, soliciting funds, the actual period of campaigning and running in the election. Sgt. Boos explained that in 2004, there were six kinds of LWOP. Two were potentially applicable to Mr. Merrifield. Personal needs LWOP could be granted for two periods during a member's career for a specific cumulative length. Special LWOP required exceptional circumstances and it had to be in the best interests of the RCMP. There were no conditions regarding the number of times that special LWOP could be taken. The C.O. of a division was the person who had authority to approve LWOP.
- [40] Sgt. Boos explained that his responsibility was to identify the type of leave that Mr. Merrifield required and then to make a recommendation to the C.O. for approval. If a member wanted LWOP, he would submit a request through his Line Officer (immediate

superior) setting out the need for it. It would come to Sgt. Boos' department. A staffing interview would be conducted to advise the member of the LWOP conditions followed by a recommendation to the Officer in Charge (OIC) of CDR, who was his superior. The OIC would then forward the recommendations to the C.O. for approval or denial of LWOP. If it was approved, the recommendation would come back. The OIC of CDR could authorize a transfer notice. Once it was issued, it would be distributed to various sections involved. One would be the Compensation Branch so that they could stop payment of the member's salary and physically separate the member from the organization. The transfer notice would also be sent to the member's Line Officer.

- [41] Sgt. Boos stated that he had a telephone discussion with Insp. Josey. They discussed that there had been a previous occasion when Mr. Merrifield had stood for nomination as a federal election candidate. Sgt. Verecchia had provided direction with respect to LWOP on the same day as the nomination meeting. There was not enough time to go through the full LWOP application process.
- [42] Sgt. Boos noted that Sgt. Verecchia said that "regular" LWOP was required. In fact there is no such thing as regular LWOP.
- [43] Sgt. Boos looked through the six types of LWOP. He stated that only two potentially applied to Mr. Merrifield, being personal needs LWOP and special LWOP. He explained that special LWOP is for exceptional circumstances. He did not consider Mr. Merrifield's running as a candidate to be an exceptional circumstance. He thought exceptional circumstances would be a death in the family or something beyond the member's control. Special LWOP had to be in the best interests of the RCMP. Sgt. Boos acknowledged that he did not have training regarding interpretation of policy. He had no previous experience with personal needs or special LWOP. This was the one and only political leave that he ever had to deal with.
- [44] Sgt. Boos stated that he had a formal interview with Mr. Merrifield to explain LWOP to him. Prior to this time, Mr. Merrifield did not know that personal needs LWOP was limited to two terms. Mr. Merrifield provided information as to what constituted campaigning and what did not. He described what he thought he could do without LWOP. Sgt. Boos described when LWOP was required. He described the nature of personal needs LWOP. A member could take it two times in his career up to a period of 15 months cumulative. Mr. Merrifield said he would need 35 to 40 days of leave for the election. They discussed some possible start dates. The election call was expected in the very near future. Since LWOP was subject to approval by the C.O., Sgt. Boos told Mr. Merrifield that he would make the recommendation to go forward with LWOP. Sgt. Boos stated that he went through the policy line by line with Mr. Merrifield. He said the election could be called on Sunday May 23, 2004. Monday May 24th was a holiday. The party wanted him to start campaigning on May 25th. Mr. Merrifield agreed to call and let Sgt. Boos know as soon as he learned that the election had been called. Mr. Merrifield would also call his OIC. A system would be put in place where theoretical approval would be obtained and then Mr. Merrifield could be on LWOP before the documents were actually signed.
- [45] Sgt. Boos made a note of this discussion and spoke to Insp. Josey the next day. They discussed the first two occasions when Mr. Merrifield sought nomination without LWOP. Insp. Josey was going to deal directly with the C.O. They decided that the two days when Mr. Merrifield should have had LWOP would be considered one day.
- [46] On May 18, 2004 when he had the approval from the C.O., Sgt. Boos sent an email to Insp. Josey with a copy to Mr. Merrifield. He provided his work cell and personal home number. He was working diligently to make LWOP in two periods work. Sgt. Boos'

strategy was to consider the earlier two days to be one first request for LWOP, even though they were not continuous, and the election period to be the second request for LWOP. He prepared the transfer authorizations and submitted them.

- [47] One of the transfer documents shows Mr. Merrifield's transfer from the Air Marshalls to LWOP. At the bottom of the form it says, "personal needs without pay – no relocation expenses." The implementation date was to be May 22, 2004. Sgt. Boos learned that the first two requests, being the request to consider two non-consecutive days as one request for LWOP, had been approved by C.O. Holman on May 17, 2004. Sgt Boos advised Mr. Merrifield that the LWOP for the electoral period had also been approved by the C.O.
- [48] Sgt. Boos explained that when Mr. Merrifield did not have LWOP, steps were taken to retroactively approve LWOP for the two dates, February 11 and March 30, 2004, and to stop Mr. Merrifield's pay for them. The LWOP was put into effect.
- [49] After the two personal needs LWOPs were granted, Sgt. Boos reflected on the situation and began to wonder whether personal needs LWOP was the right type of LWOP to use. He did not share this concern with Mr. Merrifield. Upon making an inquiry on June 23, 2004, he learned that the compensation department was having some difficulty with the fact that there were three time periods that had to be coded to personal needs but the system only allowed for two. This issue was addressed by re-coding the two personal needs LWOPs to three special LWOPs. Since a special LWOP had no restrictions with respect to the cumulative length or number of approved requests, it appeared to be a better fit when LWOP was required for three dates. Sgt. Boos learned about this re-coding in an email but he did not forward it to Mr. Merrifield.
- [50] Sgt. Boos recalled that he had a conversation with Mr. Merrifield following the election, after Mr. Merrifield returned to work. He could not recall where the conversation occurred and whether it was in person or over the phone. He advised Mr. Merrifield that the LWOPS were re-coded to special LWOPs so the two personal needs LWOPs remained for future use. He stated that this was the only conversation that he had with Mr. Merrifield about the re-coding. He could not find any notes or documents with respect to this conversation.
- [51] Mr. Seguin was the C.O. of "O" Division. He retired from the RCMP on March 31, 2008. He testified that he became the C.O. of "O" Division beginning on October 12, 2004. He was aware of the regulations governing participation in political activities. He understood that members could participate but they had to apply for a leave during campaigns. Requirements with respect to running for nomination in a party were also included in the regulations. Mr. Seguin was familiar with the Administrative Manual and appendix 12.12 regarding the leave requirements. The C.O. had to approve requests for LWOP.
- [52] The Administrative Manual states that LWOP can be approved for education, spousal relocation, care of pre-school children and personal needs. With respect to special LWOP, in contrast to personal needs LWOP, it was granted for exceptional circumstances. Furthermore, the Division had to be in a position to allow someone to go on leave without impact on its operations. Mr. Seguin did not receive an application from Mr. Merrifield for LWOP to run for a political party, either for special LWOP or personal needs LWOP. In his term as C.O., he never received a request by a member for LWOP for political activities.
- [53] Mr. Seguin became aware at some point that Mr. Merrifield had run in the 2004 election for the Conservative Party. He understood that Mr. Merrifield had applied for LWOP and had received it for the election.

- [54] Mr. Merrifield had another performance evaluation for the period February 2004 to October 2004. This covered the time when he was participating in political activities. Some excerpts are as follows:

As a member of this unit who is particularly passionate about counter-terrorism, Cst. Merrifield took the initiative to provide instructional lectures to the Peel Regional Police Airport Division via their training section. These lectures included topics such as The History of Aviation and Airport Terrorism and an authorized explanation of the Canadian Air Carrier Protection Program...

Cst. Merrifield recognizes the importance of keeping abreast of terrorist trends, profiles and recent intelligence. He is very passionate about this issue and in addition to reviewing all of the intelligence information that is forwarded to our office from various agencies, he researches and seeks out materials related to terrorism. He also readily shares this information with other members of the unit and applies it to his work on a daily basis...

Cst. Merrifield is a highly motivated, dedicated, productive member of this unit. Cst Merrifield has the respect of his peers and supervisors and his positive attitude influences others to perform at higher levels. Cst. Merrifield's input is value added, demonstrating many of the qualities necessary for a supervisor role. Cst. Merrifield is an asset and credit to the force and will do well in his future endeavours. A pleasure to have on the unit.

INSET/TAG 2004

- [55] In addition to the Air Marshalls unit, the Integrated National Security Enforcement Team (INSET) was also established after the terrorist attack that occurred in the United States on September 11, 2001. It was responsible for all criminal investigations in Ontario relating to people who posed a threat to Canada. There were two sides to INSET: investigations and intelligence information gathering. It carried out long-term investigations and had a quick response team for day-to-day investigations. It also had an intelligence component comprised of analysts.
- [56] During his time as an Air Marshall, Mr. Merrifield expressed an interest in working at INSET.
- [57] Mr. Merrifield was transferred to INSET on October 17, 2004. He then reported to S/Sgt. King and Insp. Jagoe. On October 19, 2004, after being at INSET for two days, he participated in a radio talk show hosted by Michael Coren. The topic was "What is terrorism?" Apparently, someone made a complaint to INSET about Mr. Merrifield's participation on the show.
- [58] Two days later, S/Sgt. King learned that Mr. Merrifield had been on the show. S/Sgt. King asked him about comments that he provided on the radio show. Subsequently, S/Sgt. King asked him to review a security information sheet and sign it, which he did. S/Sgt. King asked Mr. Merrifield not to make any more appearances while he was working at INSET. Mr. Merrifield stated that he respected this direction and agreed to it.
- [59] Mr. Merrifield stated that early in 2005, he was doing open source work with the Jewish community. Speaking at events was considered community outreach. He did this

approximately six times in the course of his duties. He never requested permission to attend these speaking engagements. The Indo-Canadian Community in Mississauga recognized him at an awards dinner and named him Police Officer of the Year.

- [60] Mr. Merrifield explained that within INSET was a small unit known as the Threat Assessment Group (TAG). The members of TAG carried out threat assessments on international people who came to visit Canada including heads of state and special dignitaries. Mr. Merrifield explained that in addition to investigators, TAG also had analysts. They did tactical analysis on active investigations. The analysts looked at trends, predictors and human intelligence.
- [61] Mr. Merrifield expressed an interest in working in TAG. On January 20, 2005, Sgt. Rick Cousins carried out a "file review" at Headquarters to consider whether Mr. Merrifield would be suitable for TAG. Mr. Merrifield did not meet with Sgt. Cousins. In the written review, Sgt. Cousins' point form notes state: "able to handle any type of investigation; very intelligent person, learns and comprehends quicker than most; Commanding Officers Certificate of Appreciation for apprehending dangerous offender in trying circumstances; ability to express himself verbally/written are [sic] exceptional; well rounded police officer with unlimited potential." He concluded, "It is recommended Cst Merrifield be planned to INSET TAG"
- [62] On February 2, 2005, Mr. Merrifield was invited to and attended an event at B'nai Brith, a Jewish organization, where he gave a short speech as a member of the RCMP. Julian Fantino, (then Chief of Police for Toronto Police Service), among others, gave a speech as well.
- [63] On February 10, 2005, Mr. Merrifield was permanently posted to TAG. His work consisted of monitoring criminal extremist and terrorist groups. He gathered open source information, carried out community outreach and worked to recruit confidential informants. He investigated threats to national security and Very Important Persons (VIPs) such as the Prime Minister. He also looked after threat assessments of official visitors like the Royal Family and Members of Parliament. At times, he travelled with the Prime Minister's protective detail when the Prime Minister made visits to various places. For example, he travelled with the Prime Minister to four or five media outlets in the Greater Toronto Area (GTA) where the Prime Minister was addressing issues arising from the sponsorship scandal.
- [64] Mr. Merrifield was required to have top secret security clearance to perform this job. He was also a top level marksman. His work at TAG was an achievement of a career goal. It was his dream job.
- [65] In February or early March, 2005, a threat was made against then Liberal Prime Minister Paul Martin and U.S. President George W. Bush. Mr. Merrifield was the lead investigator for the team that investigated this threat. They successfully located the person who made the threat. As a result of Mr. Merrifield's work, that person was arrested, tried and convicted of a criminal offence.
- [66] Up until May 2005, Mr. Merrifield got along well with everyone at TAG. He was asked to train others. He loved the work. An incident occurred when a person penetrated the U.S. Oval Office's electronic inbox and bombarded it with emails. Mr. Merrifield carried out an extensive internet tracing operation through numerous countries. He and TAG located the person who was subsequently convicted.
- [67] No concerns were ever raised about Mr. Merrifield's earlier political activities, involvement with the Conservative Party and any impact they might have on his ability to

do his job at TAG, which included providing protection for a Liberal Prime Minister.

- [68] In June or July 2004, Supt. Proulx became the “O” Division Intelligence Officer (DIO) for the Criminal Intelligence branch. He held that position until June 2006 and was the Superintendent responsible for TAG. As DIO, he reported to C/Supt. Mazerolle whose superior officer was the C.O. Supt. Proulx retired on May 15, 2009.
- [69] Mr. Proulx explained that TAG was an anomaly. TAG reported in a straight line directly to him but Insp. Jagoe, who was in charge of INSET, had authority over TAG’s day-to-day operations. TAG took their day-to-day tasks from INSET. Mr. Proulx described his role in TAG as primarily administrative.
- [70] Mr. Proulx learned of Mr. Merrifield in January 2005. There was a vacancy in TAG. He was approached by someone who stated that there was a member who wanted to come to TAG. He received a staffing note about Mr. Merrifield. He came highly praised. The transfer was subsequently authorized. Supt. Proulx agreed to the transfer. He stated that anyone would want to take on Mr. Merrifield, given the contents of the staffing note.
- [71] Prior to May 2005, Supt. Proulx did not know anything about Mr. Merrifield’s political activities. He did not learn about them until May 16, 2005.
- [72] In December 2002, Insp. Jagoe was promoted to run INSET and was its OIC until 2007. Insp. Jagoe was promoted to Superintendent in December 2007. Insp. Jagoe reported to C/Supt. Mazerolle. Subsequently, he reported to Insp. Van Doren whose portfolio included national security and border integrity.
- [73] All employees at INSET reported to Insp. Jagoe except for the people in TAG who reported to Supt. Proulx. Insp. Jagoe received regular briefings from A/Sgt. Crane who worked in TAG. Insp. Penny was Insp. Jagoe’s second in command.
- [74] Supt. Jagoe recalled that shortly after Mr. Merrifield arrived at INSET, S/Sgt. King spoke to him about his participation in a radio interview. Supt. Jagoe understood that S/Sgt. King told Mr. Merrifield that speaking about national security matters was not appropriate and he agreed that he would discontinue it. Insp. Jagoe did not hear the interview. He briefed Insp. Van Doren about Mr. Merrifield’s participation in the radio show.
- [75] A/Sgt. Crane explained that he was acting as Sgt. with respect to TAG. It had existed since at least 2000 when he joined it. In January 2005, it had seven members although they were not at the office all the time. In addition, there were two TAG members who provided personal protection to VIPs when they visited. TAG was the intelligence side to the VIP visits. A/Sgt. Crane reported to Supt. Proulx who was his Line Officer. A/Sgt. Crane also reported to Insp. Jagoe daily so that he had an operational awareness of TAG’s activities.
- [76] TAG members would monitor known subjects of interest with potential to cause any danger or embarrassment to any VIPs coming to the area. They would also perform Order in Council checks which were requests from the government to carry out background checks on certain people with respect to criminal activity. A check could be requested with respect to anyone who was going to be appointed to do something. TAG also did risk assessments for the criminal intelligence branch and the federal government.
- [77] When Mr. Merrifield joined INSET, TAG was understaffed and had a vacancy. A/Sgt. Crane spoke to Mr. Merrifield about joining TAG and suggested that he apply. At the time, A/Sgt. Crane knew that Mr. Merrifield had offered himself for political candidacy previously but he did not know the details of his political background. He was aware that Mr. Merrifield had run in an election in 2004 but he did not recall the party that he

represented. The fact that Mr. Merrifield had run for office previously did not cause A/Sgt. Crane any concerns whatsoever.

[78] A/Sgt. Crane stated that initially, he did not know much about LWOP. He just knew that a member could not participate in politics without it.

[79] In April 2005, A/Sgt. Crane had a conversation with Mr. Merrifield about his future participation in politics because there was another upcoming federal election. A/Sgt. Crane asked Mr. Merrifield, out of curiosity, whether he had any ambition to run in the next federal election. A/Sgt. Crane thought that if Mr. Merrifield did have ambitions, he could have a conflict of interest because the RCMP's primary duty was to serve the elected Liberal party. The RCMP had duties to the other parties but to a lesser degree. A/Sgt. Crane said Mr. Merrifield's answer was "none whatsoever. It was too expensive." He did not differentiate between running at a nomination meeting and running as a candidate in a Federal election.

[80] In spring 2005, there were a lot of high level VIP visits. Mr. Merrifield had no limits on the work that he could do. A/Sgt. Crane stated that he had an excellent working relationship with Mr. Merrifield. He was a good member and who showed a lot of promise. In fact, on May 3, 2005, he asked Mr. Merrifield to mentor another member and help raise his standard of performance.

[81] Supt. Jagoe stated that he was aware that Mr. Merrifield had investigated death threats against Prime Minister Martin and U.S. President George Bush. He read somewhere that Mr. Merrifield had done a good job. Nobody was concerned about his investigating these threats. Nobody was concerned about Mr. Merrifield's working in TAG after running in an election.

[82] Mr. Merrifield had another performance evaluation covering the period August 1 2004 to August 1, 2005. On the evaluation, A/Sgt. Crane stated that "his educational background and expertise in world politics are well suited for the TAG environment." Mr. Merrifield's role as lead investigator with respect to the threat against the Prime Minister and the U.S. President, which concluded with charges being laid, was also noted.

Operation Bridgeout

[83] Sgt. Park worked at INSET from 2003 to 2007. He was in charge of Operation Bridgeout, a complex tactical exercise held in May 2005. Mr. Merrifield helped to organize it which required several months of intensive planning. He did this in addition to his regular duties.

[84] Sgt. Park had a lot of interaction with Mr. Merrifield during the planning for the exercise. They drove back and forth to Sault Ste. Marie, London and Sarnia to attend meetings so that they could keep abreast of the project.

[85] Sgt. Park recalled that Mr. Merrifield had mentioned running for a Conservative seat in either Newmarket or Barrie. This came up during a trip to Sault Ste. Marie. Sgt. Park could not recall exactly when this occurred. There was not much conversation about it. Sgt. Park knew that Mr. Merrifield had run for a seat a year earlier.

[86] Mr. Merrifield had worked a minimum of twenty hours of voluntary overtime on the Operation Bridgeout. He was not paid for these hours nor did he receive any additional time off. Sgt. Park stated that Mr. Merrifield was enthusiastic about national security work and he put more time and effort into Operation Bridgeout than even Sgt. Park did.

[87] At the conclusion of the project, Sgt. Park signed a performance log dated May 17, 2005 with respect to Mr. Merrifield. He described Operation Bridgeout as follows:

Operation bridge out was a multi-agency/bi-national exercise that took place between Sault Ste. Marie, Michigan and Sault Ste. Marie, Ontario. It was the largest exercises between Ontario and the State of Michigan and possibly the largest in Canadian and US history of its kind. Three separate exercises were occurring simultaneously, Detroit/Windsor, Sarnia and Sault Ste. Marie, Ontario and Michigan. The operation commenced May 9 and terminated in the evening of May 11, 2005. The exercise was designed to challenge agencies on both sides of the border to react to a national, state and local emergency, namely a terrorist incident. Canadian, U.S. federal, state and local agencies would be participating in Operation Bridgeout, more than 70 agencies in the U.S. and Canada in the Sault Ste. Marie region.

...

During the scenario Constable Merrifield wore many hats. He acted as a referee/marshal along with Sergeant Park. He assisted in coordinating and controlling the scenario to ensure the script and timelines were on track. He was diligent in his duties and along with Sergeant Park worked 16 hour days back-to-back. Although Constable Merrifield came down with flu-like symptoms, he pushed forward and at the end of the day the scenario proved to be a big success. Sergeant Park received comments from several personnel involved in the exercise stating that this had been the best planned scenario that they had been involved in, in recent times and for some it was the best ever. Much of the success is attributed to the hard work and dedication of Constable Merrifield.

During the actual exercise and the months of planning leading to the exercise I was very impressed with the above average abilities and strong work ethic displayed by Constable Merrifield. He presented himself professionally throughout the exercise and was a good ambassador for the force. In my opinion, Constable Merrifield was the best selection I could have made in planning and preparing a scenario of this magnitude. Should something of this nature arise in the future he would no doubt be my number one selection. Outstanding job!!

[88] Sgt. Park stated that there was general talk on the floor that Mr. Merrifield was going to run for a seat for the Conservative Party; however, he did not pay much attention to it.

[89] Supt. Jagoe stated that he did not have any concerns about Mr. Merrifield's entering TAG. The first significant conversation he had with Mr. Merrifield was in Sault Ste. Marie during Operation Bridgeout. Mr. Merrifield sat next to him when a large group of people went out for dinner at the end of the exercise. At that point, he and Mr. Merrifield got into a discussion about Mr. Merrifield's interest in politics. They discussed Mr. Merrifield's previous run for the Conservative Party and that when he did this, he had to take a leave of absence from the Force. There was some conversation about the upcoming election. Mr. Merrifield said it was very expensive to be involved in campaigns and running for politics. Insp. Jagoe did not ask Mr. Merrifield whether he was going to be running in the upcoming election.

Barrie Nomination Meeting - May 14, 2005

- [90] Mr. Merrifield stated that after he ran unsuccessfully for the Richmond Hill seat, he was still interested in politics but mostly from a policy, criminal justice reform and national security perspective. He wanted to contribute to the direction of the Party in a non-partisan way.
- [91] He had been to events as the candidate of record for Richmond Hill. They were hosted by Belinda Stronach and Peter Van Loan. It was public knowledge that he had stood for election as a Conservative in 2004. Mr. Merrifield's personal friendship with Belinda Stronach was also well known. He would openly attend a lunch or breakfast with her and her staff.
- [92] Mr. Merrifield recalled that before May 12, 2005, at the end of Operation Bridgeout, all the participants went out for dinner. He was sitting near Insp. Jagoe, Sgt. Park and A/Sgt. Crane. He received a call and left the table to take it. The Richmond Hill riding association was offering him a candidacy. He returned to the table and mentioned the call. He was asked if he would run again in election and said he would not do that "anytime soon." It was too expensive and he had issues with the process.
- [93] Mr. Merrifield stated that some things were happening in the Barrie riding that he did not think were proper. The riding association was not following the rules. He was told that the only way he could speak to the riding association was by being a candidate at a nomination meeting. He had to renew his party membership. He stated that he did not want to pursue candidacy in another election.
- [94] Mr. Merrifield stated that he mentioned to Sgt. Park, during one of their many car trips that he would participate in another nomination meeting. The nomination meeting was not discussed at the Bridgeout dinner. He did not tell Insp. Jagoe that he would be running at a nomination meeting.
- [95] Based on his earlier conversation with Sgt. Boos, when he learned his LWOPs were re-coded such that only one had been used for the Richmond Hill nomination meeting and the election, Mr. Merrifield concluded that he did not need LWOP to participate in a nomination meeting. Furthermore, s. 3.2 of the Administrative Manual, part XII.12, entitled Political Activities stated, "If LWOP is not required to participate in political activities, a member must conduct any politically related activities on his/her own time." At the end of April 2005, just prior to the deadline, Mr. Merrifield put in his name for the Barrie riding nomination meeting which was to be held on Saturday, May 14, 2005.
- [96] On May 2, 2005, Mr. Merrifield sent a letter to members of Conservative Party National Council regarding his concerns, specifically that the nomination process was being abused. He asked the Council to take control of the nomination selection.
- [97] While he was away at Operation Bridgeout, Mr. Merrifield's wife and his former Richmond Hill campaign manager sent out three hundred campaign cards. They were recycled from the Richmond Hill election.
- [98] On May 6, 2005, Mr. Merrifield was part of Prime Minister Paul Martin's protective detail for his visit to Hamilton and Brantford. Around the same time, he spoke to Cpl. Frith, who worked at INSET, about his running at the nomination meeting. Cpl. Frith was a member of the Conservative Party and had received a campaign card.
- [99] On Friday May 13, 2005, the day before the Barrie nomination meeting, Mr. Merrifield had the flu and took the day off. He stated that several RCMP members were fully aware in

advance of the date that he intended to run at the Barrie nomination meeting. They included C/Supt. Mazerolle, Sgt. Gilchrist, S/Sgt. Smith and Insp. Jagoe. None of them expressed any concerns to him about it prior to the event.

- [100] Mr. Merrifield stated that on Saturday May 14 2005, which was a day off for him, he ran at the Barrie nomination meeting. He stated that mathematically, he could not have won the nomination. It was all about selling memberships. The only point to his attending was to try and draw votes away from the leading candidate and throw the election in favour of the second candidate.
- [101] When Mr. Merrifield returned to work on Monday, May 16, 2005, A/Sgt. Crane said that Insp. Jagoe was upset. A co-worker said he was in trouble. He understood that there were three issues: first, he had run in the meeting without LWOP, second, he had identified himself as working in national security, and third, the campaign literature mentioned defending the traditional concept of marriage and challenging the gun registry.
- [102] A/Sgt. Crane stated that he first learned of Mr. Merrifield's running at the Barrie nomination meeting on Friday May 13, 2005, the day before the meeting, when Cpl. Frith came into his office and said, "Did you hear Merrifield is running for nomination?" A/Sgt. Crane said that Cpl. Frith told him about the campaign literature. He had joined the party so he had received it. A/Sgt. Crane stated that he scoffed at this suggestion because he had already spoken to Mr. Merrifield about it. Cpl. Frith had the literature with him. A/Sgt. Crane stated that he had a look at it for a couple of minutes and asked if he could keep it. Cpl. Frith said no. He wanted it back. A/Sgt. Crane returned it. Cpl. Frith also advised him that the nomination meeting was being held the next day, on Saturday, May 14, 2005.
- [103] A/Sgt. Crane said that he was shocked by the campaign literature. Mr. Merrifield had said that he was not going to run in an election but now he was doing so. He felt that Mr. Merrifield had lied to him.
- [104] A/Sgt. Crane then had a brief conversation with Insp. Jagoe in his office. A/Sgt. Crane said, "Are you aware that Cst. Merrifield is running for nomination in the Barrie riding?" Insp. Jagoe was not pleased. He told A/Sgt. Crane to contact Supt. Proulx.
- [105] Supt. Proulx was not in the office that day so A/Sgt. Crane spoke to Sgt. Gilchrist on the phone. He was acting for Supt. Proulx. Mr. Merrifield was not on duty that day either so A/Sgt. Crane did not have an opportunity to speak with him at the office. A/Sgt. Crane did not recall whether he attempted to call Mr. Merrifield at home. He stated that he had Mr. Merrifield's phone number and could have called him.
- [106] A/Sgt. Crane discussed the matter at length with Sgt. Gilchrist. They both agreed that they should review the provisions of the *RCMP Regulations* so that they would have the information when they had an opportunity to speak to Supt. Proulx.
- [107] A/Sgt. Crane stated that he had not received from Mr. Merrifield a request for LWOP for the nomination meeting. If Mr. Merrifield had obtained LWOP for the nomination meeting, he would have known about it.
- [108] A/Sgt. Crane stated that he was shocked, hurt and annoyed when he learned that Mr. Merrifield was running for the nomination. He felt that Mr. Merrifield had told him one thing and then had done the opposite. He thought Mr. Merrifield had lied to him. He testified that he still believes that Mr. Merrifield lied to him.
- [109] A/Sgt. Crane agreed that if he was aware that a member was going to act contrary to policy, he should stop the member. Section 37(e) of the *Royal Canadian Mounted Police Act*

R.S.C. 1985 c. R-10R states, "It is incumbent on every member...to ensure that any improper or unlawful conduct or of any member is not concealed or permitted to continue." A/Sgt. Crane stated that he did not know where Mr. Merrifield was in the process with respect to the nomination meeting. He had not attended it yet. A/Sgt. Crane felt he had to update himself on the rules. He believed he did not have all of the facts.

- [110] A/Sgt. Crane stated that after the nomination meeting, a lot of members in INSET were upset and dismayed that Mr. Merrifield had referred to himself as an RCMP officer in his political materials. There were approximately eighty-five people at the office. They understood that he was promoting himself an expert. A/Sgt. Crane stated that he would never say that he, himself, was an expert on anything. It seemed that Mr. Merrifield had taken an air of authority. A/Sgt. Crane acknowledged that the term "expert" was not used in any of Mr. Merrifield's campaign materials.
- [111] C/Supt. Mazerolle was the Criminal Operations (CROPS) officer for "O" Division from 2004 until the end of the April 2012. From August 2010 until the end of May 2011 he was acting C.O. Both Supt. Proulx and Insp. Van Doren reported directly to him. All three of them, as well as C.O. Seguin, had offices on the same floor near each other in London.
- [112] C/Supt. Mazerolle stated that on May 13, 2005, Insp. Van Doren told him that there was a concern with respect to a nomination pamphlet relating to Mr. Merrifield. Insp. Van Doren said that he had directed Insp. Jagoe to address the matter with Supt. Proulx.
- [113] C/Supt. Mazerolle stated that he did not know that Mr. Merrifield had run in an election in 2004 when he spoke to Insp. Van Doren on Friday, May 13. He learned about it after the brochure came to his attention. The 2004 election did not present any issues because policies and procedures were followed at that time.
- [114] C/Supt. Mazerolle said that he did not see the pamphlet prior to the nomination meeting. On Sunday, May 15, 2005 he first spoke to Supt. Proulx about it. He was shopping and ran into Supt. Proulx. He took him aside and asked him if he was aware of the pamphlet and that Mr. Merrifield had been seeking a nomination. Supt. Proulx was not aware of it and said that he would look into when he got back to the office.
- [115] C/Supt. Mazerolle stated that if Mr. Merrifield had gone through the right procedure, there would have been no concern about his running at the Barrie nomination meeting. C/Supt. Mazerolle said that he did not have all of the information but believed there was no need to intervene because matter had been sent to a competent Superintendent, being Supt. Proulx.
- [116] A/Sgt. Crane stated that he spoke to Mr. Merrifield when he returned to work on Monday, May 16, 2005. Mr. Merrifield said that he had concerns about the Conservative party and had issues with people who were standing for the nomination. The only way that he could speak out about it was to put his name forward at the nomination. Mr. Merrifield said it was not going any further. He said his campaign manager had sent out literature without his knowledge while he was working on Operation Bridgeout. A/Sgt. Crane reviewed the provisions of the *RCMP Regulations* with Mr. Merrifield and told him that he still had to meet the requirements, which included being on LWOP or resigning from the Force. Mr. Merrifield felt that he had done nothing wrong. A/Sgt. Crane described the tone of the meeting as cordial. He stated that after he reported the matter, it was out of his mind. He was on holidays for the following week and did not have any further involvement in the matter until he returned on May 24, 2005.
- [117] Supt. Jagoe stated that he was aware that Mr. Merrifield had previously run for political office and had obtained the approvals. It was general knowledge that Mr. Merrifield had run as a Conservative. Supt. Jagoe stated that on Friday, May 13, 2005, he was not aware

that the Barrie nomination meeting was happening the next day. If Cpl. Frith gave a statement saying that he told him about the upcoming nomination meeting, it would be wrong. If A/Sgt. Crane stated that he told him about the upcoming nomination meeting, he would also be wrong. Supt. Jagoe stated that he had no information as to the date of the nomination meeting. If he was aware that Mr. Merrifield's conduct was potentially improper, he would have been required to take steps to prevent it in accordance with Part IV, s. 37(e) of the *RCMP Act*. He understood that if a person were to participate in a full campaign, some special leave would be required. He had to obtain approval from his Line Officer.

- [118] Supt. Jagoe stated that a few days after the Operation Bridgeout dinner, Cpl. Frith, an INSET employee, came into his office. Cpl. Frith showed him Mr. Merrifield's pamphlet. Supt. Jagoe stated that he was busy at the time and asked Cpl. Frith if he could have the pamphlet. Cpl. Frith declined but offered to get one for him. Supt. Jagoe stated that he did not order Cpl. Frith to get it.
- [119] Insp. Jagoe asked Cpl. Frith for the pamphlet because was interested in looking at the content. He knew that the Assistant Commissioner had to approve investigations into sensitive sectors such as politics. Supt. Jagoe stated that he did not know that the pamphlet was going to be used at a private political function. He also stated that he did not know that the pamphlet had been distributed for a campaign
- [120] A couple of days later, Cpl. Frith brought him the pamphlet and then he took the time to read it. He stated that he was surprised by the content. Mr. Merrifield had identified himself as a member of the RCMP. There was information in the pamphlet that was critical of the sitting government and the gun registry. Supt. Jagoe stated that this concerned him because Mr. Merrifield's duties in TAG included conducting threat assessments on internationally protected people including the Prime Minister. Supt. Jagoe questioned whether this was appropriate. If the Force had a member conducting a threat assessment and if that member was very critical of the government and if something happened to an internationally protected person such as the Prime Minister, this would be a conflict. It would result in an inquiry.
- [121] Insp. Jagoe wanted to ensure that Mr. Merrifield had sought the appropriate authority. He called Supt. Proulx and asked him if he was aware of Mr. Merrifield's interest in politics. Supt. Proulx stated that he was not. Insp. Jagoe said that he would send the pamphlet to him.
- [122] Supt. Jagoe stated that he was not familiar with section 57(2) of the *Regulations* which states that a member who is running for nomination may disclose his rank, level, position and work experience. He stated that he was more concerned about whether Mr. Merrifield had approval to attend the meeting. He stated that he did not know whether Mr. Merrifield needed approval with respect to the platform he was advancing because he did not have that level of detail. Nevertheless, he was concerned about the platform. He drew that concern without looking at the Administration Manual.
- [123] Supt. Jagoe recalled that within a few days of receiving the pamphlet, A/Sgt. Crane and Sgt. Gilchrist came into his office and told him that they were aware that Mr. Merrifield was interested in running for politics. Supt. Jagoe stated that he told them that the information they had should be shared with Supt. Proulx and that it was a matter between A/Sgt. Crane, Mr. Merrifield and Supt. Proulx.
- [124] On Wednesday May 18, Insp. Jagoe sent a memo to Supt. Proulx. The email begins with, "further to our discussions and emails..." (None of the emails that preceded this one were produced.) Supt. Jagoe stated that he kept all the emails related to making decisions of

substantive value. There may have been previous emails that he deleted. Supt. Jagoe stated the archival system at the RCMP keeps documents for ninety days. He searched for other emails but did not find any in his deleted box. He did not obtain archived tapes or take any other steps to look for them.

- [125] In addition to sending the email to Supt. Proulx, Insp. Jagoe also briefed his superior, Insp. Van Doren who was happy with the steps he had taken. Supt. Jagoe said he had two or three phone conversations with Insp. Van Doren specifically regarding the pamphlet and that Mr. Merrifield might be considering running. Supt. Jagoe stated that he did not take any notes of these conversations.
- [126] Mr. Van Doren retired from the RCMP as a Superintendent. He was the Assistant Criminal Operations Officer (CROPS) for border integrity and national security. In May of 2005 he was an Inspector acting as a Superintendent. He oversaw responses to national security for Ontario. Insp. Van Doren was the Line Officer for INSET. He stated that Insp. Jagoe reported to him. His own superior was C/Supt. Mazerolle. He would speak to Insp. Jagoe daily in briefings on operational issues and sometimes on human resources issues.
- [127] Mr. Van Doren had a vague recollection of a conversation with Insp. Jagoe on Friday May 13, 2005. Insp. Van Doren took notes dated Friday May 13, 2015. At 11:30 a.m. there is a reference to Insp. Jagoe. In his point form notes, Insp. Van Doren stated, "Re: Peter Merrifield - ran in the last election as a conservative - lost - proper authorities previously sought - pamphlet identifies RCMP's role - NS team - INSET- background in NS. Threat Assessment group - Marc Proulx - OIC CROPS advised." Insp. Van Doren spoke to Insp. Jagoe about Mr. Merrifield. He was seeking a nomination for a political position. Mr. Van Doren recalled there was a pamphlet. Mr. Merrifield was part of TAG under the authority of Supt. Proulx. Mr. Van Doren recalled that he told Insp. Jagoe to deal with Supt. Proulx regarding any concerns relating to Mr. Merrifield. He stated that he briefed C/Supt. Mazerolle about the telephone call and then took no further steps. He left Insp. Jagoe and Supt. Proulx to deal with the matter.
- [128] Supt. Jagoe stated that he was familiar with the Ministerial direction regarding investigations into sensitive sectors dated November 4, 2003. It was issued after the terrorist attacks on September 11, 2001. Insp. Jagoe knew about the policy when he spoke to Cpl. Frith about the pamphlet. Investigations into political parties required Ministerial approval. Supt. Jagoe was aware that allegations had been made that he violated the policy and that he ordered Cpl. Frith to attend a political meeting. He stated that he never ordered Cpl. Frith to attend any meeting. The allegation was not true.
- [129] Mr. Frith retired from the RCMP in 2010 as a Corporal. He worked in the National Security section from 2002 to 2008. He worked in the same building and on the same floor as Mr. Merrifield did when he was in TAG. In 2005, he lived in the Barrie riding.
- [130] Mr. Frith stated that he became a member of the Conservative Party to support Mr. Merrifield at the nomination meeting. Since Mr. Merrifield was in his riding, Mr. Frith volunteered to vote for him. Mr. Merrifield did not ask him to do it. Mr. Frith stated that he received Mr. Merrifield's nomination meeting campaign brochure. He brought it to the office before the election and showed it to several people. He was impressed by it because there was a good picture of Mr. Merrifield's family on it. He stated that he thought it was sharp. He was proud of the brochure which is why he brought it to the office. Mr. Frith stated that he was not sure whether he showed the brochure to A/Sgt. Crane. They all worked in the same area.
- [131] Insp. Jagoe had an open door policy. Mr. Frith stated that he showed the brochure to Insp. Jagoe on Thursday, May 12 or Friday, May 13 2005. Mr. Frith said that he told Insp. Jagoe

about the nomination meeting to be held on Saturday, May 14 2005.

- [132] Mr. Frith said that Insp. Jagoe wanted the brochure for his personal use. Mr. Frith did not give it to him. It was his property. They discussed the upcoming nomination meeting. Insp. Jagoe knew that Cpl. Frith was going to the nomination meeting. Cpl. Frith told him that the only place he could get a brochure for Insp. Jagoe was the nomination meeting location. Mr. Frith stated that he was comfortable getting a brochure for Insp. Jagoe if it was only for his personal use and not for any other use. Insp. Jagoe stated that it would be for his personal use only. Mr. Frith stated that his understanding of personal use was whatever a person might want to do with the brochure in his own house, such as displaying it. Sending the brochure to headquarters for scrutiny would not be personal use. Mr. Frith testified that if Insp. Jagoe had wanted it for any other purpose beyond personal use, he would not have obtained a campaign brochure for him. He would have had to get his own if he wanted it for other reasons.
- [133] There were three candidates at the nomination meeting: Mr. Merrifield, Mr. Brian Broley and Mr. Patrick Brown. Mr. Frith stated that he attended the nomination meeting with his wife and went for the sole purpose of voting for Mr. Merrifield. He obtained a brochure for Insp. Jagoe, took it home and gave it to Insp. Jagoe on the following Monday. He told Insp. Jagoe that the brochure was only for his personal use.
- [134] Cpl. Frith did not know anything about the rules regarding participation in political events. He did not know whether Mr. Merrifield had applied to participate. Mr. Frith stated that he went to vote because he thought Mr. Merrifield might win. He did not want the other candidate to win. He was not ordered by Insp. Jagoe to attend. He stated he had always planned to attend.
- [135] Supt. Proulx stated that prior to the Barrie nomination meeting, no one mentioned to him that Mr. Merrifield had investigated a threat made against President Bush and Prime Minister Martin. He did not recall discussing this with anyone after Mr. Merrifield ran in the 2004 election. It never came up.
- [136] On Monday, May 16 2005, A/Sgt. Crane called Supt. Proulx and told him that Mr. Merrifield had run in a nomination meeting over the weekend. A/Sgt. Crane told him that Mr. Merrifield had a previous career as a politician. Supt. Proulx asked A/Sgt. Crane if Mr. Merrifield had followed the correct process. A/Sgt. Crane said that Mr. Merrifield had told him that he did not need leave because the nomination meeting occurred on a Saturday and he did not want to win. He just wanted to make a speech. Supt. Proulx asked A/Sgt. Crane whether Mr. Merrifield had permission to attend the nomination meeting and A/Sgt. Crane stated that he did not think so.
- [137] Right after he spoke with A/Sgt. Crane, Supt. Proulx called Insp. Jagoe and asked him to send the campaign materials to him so that he could review them.
- [138] Mr. Proulx recalled that Insp. Jagoe did not express any concerns prior to the nomination meeting. He received Insp. Jagoe's comments on May 18 or 19, 2005. Supt. Proulx was not concerned about what happened in 2004 because it was approved. He was concerned about Mr. Merrifield's attendance at the 2005 nomination meeting, possibly without LWOP.
- [139] Mr. Proulx stated that on Monday, May 16 2005, he reviewed the Operations Manual and determined that members were allowed to run in politics but they had to have approved leave. At that time he did not quite understand the various types of leave. He stated that he still does not really understand them. He just knew that Mr. Merrifield needed permission.

- [140] Mr. Proulx stated that he also either looked in the HRMIS system or asked his assistant to look into it. He stated that all of the holidays, leave and sick days are recorded in this system for all of the members. He did not find anything in the HRMIS system that indicated that Mr. Merrifield had been granted leave. Then he made a call to Sgt. Cousins in Career Resource Development.
- [141] Sgt. Cousins told him that the coding for Mr. Merrifield's leave in the previous year was done improperly. It would have to be re-done. Sgt. Cousins also told him that Mr. Merrifield would have to ask permission for the recent nomination meeting after it occurred and this would have to be approved by the C.O.
- [142] Mr. Proulx stated that at some point in the same week, he spoke to Sgt. Verecchia. She was very familiar with Mr. Merrifield and believed that he had been granted leave in 2004. Sgt. Verecchia told him she had outlined the process to Mr. Merrifield in 2004. Mr. Proulx testified that at some point in the same week, Insp. Jagoe sent him the campaign brochure. He read it and had a conversation on the Thursday or Friday with Mr. Merrifield. He told Mr. Merrifield that he had run without authority and that he would have to ask for retroactive permission. He should write a memo to explain the fact that his name had been in the nomination. Mr. Proulx stated that he told Mr. Merrifield that Sgt. Cousins had explained to him that there were errors in the coding of his leave in 2004. Sgt. Cousins had said that Mr. Merrifield's two opportunities for elections had been used. Mr. Proulx stated that he told Mr. Merrifield that if he wanted to run again, he should not bypass the policy. Rather, he should write a memo to him. They would then visit the C.O. Supt. Proulx thought that this would be the end of the matter, and that Mr. Merrifield would write the memo.
- [143] Supt. Proulx attended a briefing meeting with C/Supt. Mazerolle and C.O. Seguin in C.O. Seguin's office on May 26, 2005. He discussed his concerns about Mr. Merrifield's involvement in the Barrie nomination meeting without LWOP. He did not tell them that he was planning to have a meeting with Mr. Merrifield on the 27th.
- [144] Mr. Seguin stated that his earliest recollection of Mr. Merrifield was in May 2005. The nomination meeting in Barrie came to his attention. Mr. Merrifield had put his name forward for the riding nomination. He first heard of this from Supt. Proulx. He did not make any notes of the discussion. He did not know that Mr. Merrifield had previously run in an election. Mr. Seguin stated that when Mr. Merrifield ran for office in 2004, he was not the C.O.
- [145] Mr. Seguin stated that he was not aware of any concern about Mr. Merrifield's working in TAG and, in the previous year, having run as a Conservative candidate in a federal election. He stated that he subsequently learned that other officers knew about the nomination meeting before it occurred. He learned this from Supt. Proulx and by reading statements. Mr. Seguin stated that he was not aware that anybody took any steps to prevent Mr. Merrifield from attending the Barrie nomination meeting. He would have expected someone to take action if that person knew of Mr. Merrifield's involvement.
- [146] Mr. Seguin stated that he asked Supt. Proulx whether Mr. Merrifield had submitted a request for leave and he told him to make sure the policy was being followed. He left the issue with Supt. Proulx to follow up and report to C/Supt. Mazerolle.
- [147] Mr. Seguin stated that he was unsure of whether he knew, at the time, that Mr. Merrifield attended the nomination meeting. Mr. Seguin stated that he did not discuss these activities with Insp. Jagoe then. It was probably a year or two afterwards when they discussed it. He recalled that he was at INSET one day and Insp. Jagoe still had the brochure regarding Mr.

Merrifield's nomination meeting attendance. Mr. Seguin stated that he glanced at it but did not read it. He had not seen it previously.

- [148] Mr. Seguin stated that in the end, a review was done. Mr. Merrifield was given a memo dated September 28, 2005, was advised of policy and was reminded of his obligations. The memo resulted in no discipline. Mr. Seguin stated that the memo satisfied him. The issue was resolved. Mr. Seguin testified, "I wasn't concerned that Mr. Merrifield attended the nomination without my consent."

Stronach Investigation - May 19, 2005

- [149] Mr. Merrifield stated that after the nomination meeting, he returned to work on either May 18 or 19, 2005. TAG received a request for an Order in Council check on Belinda Stronach because she was going to be a Liberal cabinet minister. Mr. Merrifield stated that he declined to do the check because he was friends with her.
- [150] Shortly afterwards, Ms. Stronach received a death threat. She had received a number of threatening emails after she crossed the floor and became a Liberal. One of the threats was, "You just signed your death sentence, you German whore." This was taken seriously. A/Sgt. Crane stated that after he returned from holidays, he learned about the death threat. The investigation was assigned to Mr. Merrifield.
- [151] Mr. Merrifield stated that on May 19, 2005, A/Sgt. Crane called him at home. The protective unit was going to extend security to Ms. Stronach and A/Sgt. Crane needed to find her. Mr. Merrifield had Ms. Stronach's cell number. He gave it to A/Sgt. Crane.
- [152] A/Sgt. Crane was the officer who assigned the investigation to Mr. Merrifield. Mr. Merrifield stated that he worked on it for six days. On the first day, he went to Ms. Stronach's constituency office and reviewed many emails. Mr. Merrifield stated that he contacted Ms. Stronach directly on that day to ask her if she was comfortable with his doing the investigation. Mr. Merrifield said that she stated that she had no concerns. She said that she would prefer that he do the investigation because she knew that he would take care of her and her children. Mr. Merrifield said he was going above and beyond expectations. It was about the victim.
- [153] Mr. Merrifield stated that he received information regarding the location of the phone where the death threat had been made. It was a payphone. He went to the area to see if there was any video surveillance. He went to Ms. Stronach's home, spoke to the person responsible for security and made arrangements to install a panic button. He organized a special level response for this. He worked many hours on the investigation. He stated that everyone in TAG was aware that he was handling the investigation. His information was turned into briefing notes that were sent up to his superiors.
- [154] A/Sgt. Crane wondered whether Mr. Merrifield should be working on the file as he had just run for the Conservative nomination in Barrie. A/Sgt. Crane stated that he was concerned about it. His specific concern was that there was a potential for a conflict of interest as Ms. Stronach had gone from being a Conservative to a Liberal. A/Sgt. Crane stated, "You can't have a Conservative candidate guarding a Liberal MP." Furthermore, A/Sgt. Crane stated that he learned that Mr. Merrifield had called Ms. Stronach. Mr. Merrifield said that he called her and that she had no problem with his conducting the investigation. This call raised a red flag with A/Sgt. Crane. The issue was that Mr. Merrifield was seeking the opinion of the complainant. This did not sit well with him. A/Sgt. Crane stated that he told Supt. Proulx about the situation. Supt. Proulx had the same concerns. Therefore, Mr. Merrifield was removed from the Stronach file. It was re-assigned. A/Sgt. Crane said that

his instructions were that Mr. Merrifield was not to deal with any VIP visits. All of the files were taken away from him, not just those relating to politics.

- [155] Mr. Merrifield testified that on May 24, 2005 he met with A/Sgt. Crane who told him that he was being removed from the Stronach investigation on Supt. Proulx's instructions. A/Sgt. Crane may have said that this was due to a conflict of interest. The next day he was actually removed from the investigation. Mr. Merrifield stated that he had also been doing a threat assessment for the Royal Family. He was removed from this assessment as well as a Prime Minister's visit.
- [156] Mr. Merrifield testified that he was upset that he had been removed from the investigation and that other work was taken away from him. There was certainly no conflict regarding the Royal Family. Everyone knew that he had been removed from the Stronach death threat investigation. It was unusual. There was an appearance that he had done something wrong.
- [157] Mr. Merrifield stated that Insp. Jagoe alleged he had broken a policy by having direct communication with a victim, Ms. Stronach. He spoke to Sgt. Boos who referred him to the local MPA representative, Sgt. Nicota.
- [158] Supt. Jagoe stated he was concerned that a junior Constable would be phoning a Member of Parliament and having a conversation. He did not feel that this was appropriate. He believed that officers must remain an arm's length from victims. Otherwise, it would appear that Ms. Stronach was deciding who was doing the investigation and this could be viewed as a conflict. Supt. Jagoe stated that he was not aware of any policy that would have prevented Mr. Merrifield from contacting Ms. Stronach.
- [159] Mr. Proulx stated that in February 2005, he was not aware of Mr. Merrifield's past political activities. When he was in charge of TAG, he could not recall deaths threats being made against Prime Minister Martin and President Bush. Later on he became aware that Mr. Merrifield had investigated the threats. He learned that Mr. Merrifield had received a related commendation. He agreed that Mr. Merrifield's 2004 election activities were probably well known. Nobody at that time suggested that there was a conflict. Mr. Proulx stated that if he had known about the 2004 election activities back then, he would have seen them as a conflict. Mr. Proulx said that Mr. Merrifield's running against Prime Minister Martin in 2004 and then at a nomination meeting in 2005 meant that he could not investigate a death threat. He did not know that a nomination meeting takes place at a private party event. He did not see the distinction between this and running in an election.
- [160] Mr. Proulx stated that when he discussed the Stronach matter with A/Sgt. Crane, A/Sgt. Crane said that he felt there was a conflict of interest. Mr. Proulx shared his concern, specifically that Mr. Merrifield was a member of the Conservative party. Most members of the Conservative party were upset with Ms. Stronach. If something were to happen to her, the RCMP's threat assessment would be reviewed. If Mr. Merrifield's name was attached to it, the RCMP would be blamed regardless of whether Mr. Merrifield had done a perfect job. Someone might think he was happy that something happened to her. (Mr. Proulx was confused. He thought Mr. Merrifield was doing a threat assessment. As noted above, he was investigating a death threat.) Mr. Proulx stated that he instructed A/Sgt. Crane to take the file away from Mr. Merrifield. He then asked A/Sgt. Crane what kind of work could be assigned to Mr. Merrifield if he could not work on a political file because of his past. A/Sgt. Crane said "not much". Anyone could make a point of it. They agreed to schedule a meeting on Friday morning in London to discuss the matter. Mr. Proulx stated that prior to the meeting in London, he did not know that Mr. Merrifield had spoken with Ms. Stronach. He said that this heightened the conflict and it was not acceptable.

- [161] Mr. Proulx stated that he had a second conversation with Sgt. Verecchia on May 24, 2005. He wanted to ask her about the Stronach issue and whether he was wrong to think that there was a conflict. Sgt. Verecchia told him that he was correct and that she would send him the policies. She said the conflict could be real, apparent or potential. She sent him a copy of the email that she had received from Mr. Merrifield on February 3, 2004 and the response from Professional Standards.
- [162] Mr. Merrifield said that he explained to Supt. Proulx that he had already spoken to Ms. Stronach and that she had no issue with him carrying out the investigation. Mr. Proulx stated that this was also a conflict. One is not supposed to talk with a Member of Parliament. He stated that if the RCMP does a threat assessment on a U.S. President, the RCMP does not speak to him.
- [163] In his testimony, Mr. Proulx subsequently agreed that Mr. Merrifield was assigned to investigate a death threat against Ms. Stronach. It was not a threat assessment. A threat assessment is about gathering information and determining a threat. He stated that A/Sgt. Crane described it as a threat and risk assessment. Mr. Proulx stated that even if it was only a death threat, he would still have seen a conflict. A/Sgt. Crane said there was a conflict.
- [164] Mr. Proulx agreed that there was no policy that would prohibit a member from speaking to a Minister. Mr. Proulx then changed his testimony and stated that he did not see anything wrong with an officer's contacting a victim of a potential death threat.
- [165] Mr. Proulx stated that his concern was not about Mr. Merrifield's integrity or the quality of his work. It was about what would be perceived if something happened. Mr. Proulx stated that he told Mr. Merrifield that he had asked A/Sgt. Crane to remove him from the Stronach investigation.
- [166] C/Supt. Mazerolle recalled that there was one meeting with Insp. Proulx and C.O. Seguin close to the end of May in C.O. Seguin's office about the issues relating to the Stronach investigation. After the meeting in the C.O.'s office, C/Supt. Mazerolle recalled that Insp. Proulx told him that he intended to remove Mr. Merrifield from TAG and assign him to Criminal Investigations North.
- [167] Mr. Seguin stated that the Stronach investigation was an operational matter and that C/Supt. Mazerolle was taking care of it. He was not sure if there was a policy would prevent Mr. Merrifield from contacting Ms. Stronach. There was perception of conflict and a decision was made to remove Mr. Merrifield from the investigation. He agreed with the decision. He stated that the actions taken were within the authority of the officers who made the decisions. He was not aware that Mr. Merrifield had been taken off a 2005 Royal Family visit. He agreed that this visit was not a political matter.
- [168] Sgt. Verecchia stated that on May 26, 2005, Supt. Proulx sent her a request for guidance regarding the conflict of interest policy and whether Mr. Merrifield had contravened the policy on this issue. He provided Mr. Merrifield's brochure for the Barrie nomination event. Sgt. Verecchia stated that it was not just a coincidence that Supt. Proulx contacted her. He contacted her because he already knew that she had provided advice to Mr. Merrifield in 2004.
- [169] Sgt. Verecchia explained that Supt. Proulx had asked her for the information that she had given to Mr. Merrifield earlier regarding LWOP and political activities. She sent it to him. She understood Supt. Proulx wanted an opinion as to whether Mr. Merrifield had contravened the conflict of interest policy and whether his campaign material was contrary to the requirements in the *RCMP Regulations*.

[170] Supt. Proulx then sent her an email with respect to Mr. Merrifield's website and information about the Stronach investigation. She told Supt. Proulx that Mr. Merrifield's investigation of Ms. Stronach's death threat was a conflict. He was partisan and his objectivity might be questioned. The RCMP had to be objective especially with respect to political investigations. Sgt. Verecchia stated she believed that objectively, it was an apparent conflict for Mr. Merrifield and the RCMP. If something had happened, Mr. Merrifield's integrity could be questioned and the Force's objectivity could be questioned as well. His involvement in the Stronach investigation created both perceived and apparent conflicts.

[171] Sgt. Verecchia stated that she had some concerns about the material that Supt. Proulx sent her. Mr. Merrifield was not on LWOP at this time and was still working for the RCMP. She was concerned that the pamphlet had been distributed. Mr. Merrifield was speaking against some of the laws of the day, including the gun registry, while not on LWOP. The gun registry was a law of Canada and it had to be enforced. Mr. Merrifield was voicing political opinions and undertaking political activities contrary to the *RCMP Regulations* and the conflict policy. She discussed four specific concerns with Supt. Proulx:

- (a) speaking about the gun registry;
- (b) the distribution of the campaign material;
- (c) an active website in which it appeared that Mr. Merrifield was campaigning; and
- (d) his involvement in a political investigation with respect to Ms. Stronach.

[172] She stated that he should not be involved in any of them. She stated that she felt Mr. Merrifield had crossed a line, that he was using the RCMP to further his political activities and to sell himself as a nominee. While working as an RCMP officer, he should not have taken a public stance against the government and its existing laws. He had an obligation to enforce the laws and remain objective. Mr. Merrifield was proceeding contrary to the advice that she had given him in 2004.

[173] Sgt. Verecchia stated that section 12.12 F of the Conflict of Interest Policy states that once a member returns from LWOP, the officer is to determine a suitable assignment taking into account political opinions expressed, political impact that may result from the posting and investigations with political overtones being conducted by the proposed unit. Sgt. Verecchia stated that she advised Supt. Proulx that Mr. Merrifield should not be doing any political investigations as it was a conflict.

London Meeting - May 27, 2005

[174] Mr. Merrifield stated that he and A/Sgt. Crane were summoned to a meeting on May 27, 2005 at the London office. He was led to believe that Supt. Proulx wanted to discipline him for his participation in the Barrie nomination meeting and deal with his removal from the Stronach investigation. Two days before the meeting, he contacted Sgt. Nicota, who was a part-time Staff Relations Representative (SRR) because he wanted a SRR with him at the meeting. Mr. Merrifield explained that SRRs help to guide members through policy issues and provide advice regarding grievance matters, among other things.

[175] Mr. Merrifield stated that he met with Sgt. Nicota for an hour. He in turn contacted Sgt. Bohus who had a full-time SRR position. Sgt. Nicota wanted Sgt. Bohus to be at the meeting.

- [176] The meeting was held on May 27, 2005. Mr. Merrifield recalled that he, Supt. Proulx, Sgt. Smith, Sgt. Bohus and Sgt. Nicota attended. The meeting was approximately two hours long and centered around Mr. Merrifield's participation in politics, the Barrie nomination meeting, the Stronach matter and the alleged conflict in TAG. Supt. Proulx asked him if he had obtained LWOP. The meeting started out in a professional manner but deteriorated after Sgt. Bohus excused himself to attend another matter.
- [177] Mr. Merrifield stated that he showed Supt. Proulx s. 3.2 of the Administration Manual, XII.12, the same section that he had shown to A/Sgt. Crane. He said he believed that LWOP was not required for nomination meetings based on his discussion with Sgt. Boos.
- [178] Mr. Merrifield stated that Supt. Proulx became condescending and belligerent as he made a series of allegations: that he was using the Force to advance his political career; that a Conservative policy was in contravention of the Force policy, being the position on the firearms registry; and that the Conservative position on the traditional definition of marriage was hate literature. Mr. Merrifield stated that the views on the traditional definition of marriage were his own. The conversation went in circles. Supt. Proulx attacked his personal integrity. He did not understand or would not accept the difference between running in a nomination meeting which was a private event open to only members of the Conservative Party in contrast to running in a public election. Mr. Merrifield stated that he explained the difference at least twice.
- [179] Mr. Merrifield stated that Supt. Proulx asked him why he had run in the nomination meeting. He explained that it was to protest. Supt. Proulx did not believe that he would be involved only for reasons of ethics and integrity. Supt. Proulx stated that he would have to choose between politics and the RCMP.
- [180] Mr. Merrifield said that he was very upset by Supt. Proulx's accusation that he was using the Force to further his political career. He stated that in his seven years as a police officer, he had been shot at, attacked with a knife and steel bar, run off the road and left for dead. He had a strong commitment to the RCMP.
- [181] At one point, Supt. Proulx stood up and leaned across the table, balancing himself on his fingers. He then went into the partisan aspect of politics and stated that Ms. Stronach was a Liberal and Mr. Merrifield was a Conservative. If anything happened when he was investigating a threat, there would be a big problem. Mr. Merrifield stated that he reminded Supt. Proulx that he had investigated the threat related to Prime Minister Martin who was a Liberal and there was no issue. He disclosed his political views before he became part of TAG. Supt. Proulx stated that he would forward the campaign literature to headquarters for review and he would be looking into it. Mr. Merrifield had the impression that he would be under investigation.
- [182] Mr. Merrifield stated that Supt. Proulx had already made a decision before the meeting started. He told him to clean up his things at TAG and report to Toronto. Mr. Merrifield stated that he felt intimidated. He had worked in the private sector before he became a member of the RCMP. He had not been on the Force long enough to qualify for a pension. He had three young children. The prospect of being unemployed was very stressful.
- [183] Mr. Nicota retired from the Force in August 2009 as a Sergeant. He recalled attending the meeting on May 27, 2005 and said it was two hours long. Going into the meeting, he believed that Mr. Merrifield had followed all of the relevant policies. He was aware that Mr. Merrifield had run as a candidate in Richmond Hill during the 2004 election.
- [184] Mr. Nicota's recollection of the meeting was that it started with a discussion of the Stronach situation. Mr. Merrifield had been investigating a threat to her life. After Sgt.

Bohus left, the meeting turned into an attack on Mr. Merrifield by Supt. Proulx. He started looking at Mr. Merrifield's resume and questioned its validity. It was a trenchant attack on Mr. Merrifield's character, on everything that he had done prior to joining the Force and during his career with the Force. Mr. Nicota recalled that Sgt. Smith quietly took notes. A/Sgt. Crane looked flushed and upset. Supt. Proulx was agitated, his voice was elevated and his tone was sarcastic.

- [185] Mr. Nicota stated that it was the most unusual meeting that he had ever seen in the Force. He said it was like watching a totally unforeseen, bad train wreck. After Sgt. Bohus left, the atmosphere completely changed and the meeting became out of hand. The tone went from professional and collegial to disrespectful. Supt. Proulx stated that he did not believe anything that Mr. Merrifield said about his previous work. He questioned Mr. Merrifield's political motives and asked what he was doing in the Force. Supt. Proulx could not seem to understand the difference between Mr. Merrifield's putting forward his name as candidate at a nomination meeting and actually running for office. Mr. Nicota understood that Mr. Merrifield did not intend to win the nomination meeting. He attended because he had a problem with one of the other candidates.
- [186] Mr. Nicota stated that other people will say that Sgt. Bohus never left the meeting. Mr. Nicota said that they are incorrect and that Sgt. Bohus did leave half way through. He noted this in an email one year later because he found it was suspicious and interesting that Supt. Proulx would change his tone after Sgt. Bohus left. It was as if he waited for Sgt. Bohus to leave and then went into attack mode.
- [187] Mr. Nicota stated that Supt. Proulx's demeanor and questioning was intrusive, inappropriate and unprofessional. He was questioning Mr. Merrifield's campaign literature and waving his hands. He was not behaving the way a Superintendent should behave.
- [188] At the meeting, an issue regarding Cpl. Frith was discussed. Mr. Merrifield believed that Cpl. Frith had been directed to attend the political meeting where Mr. Merrifield was standing as candidate. He was directed to bring back materials and report on the meeting. Mr. Nicota stated that this was a gross violation of RCMP Policy and the law.
- [189] Prior to the meeting, Mr. Nicota thought that the issues between A/Sgt. Crane, Supt. Proulx and Mr. Merrifield could be resolved; however, Supt. Proulx said Mr. Merrifield should choose between politics or the RCMP. Mr. Nicota stated that based on his own experience with the RCMP and how it works, he believed that Supt. Proulx had commenced an investigation. Mr. Nicota stated, "You have a feeling when something just doesn't add up." He stated that after he left the meeting, he wondered where the matter would be going. To him, it seemed like it was heading toward disciplinary action rather than an informal resolution. He stated that Supt. Proulx's manner of dealing with the issues at the meeting came right out of left field and was totally unexpected.
- [190] Mr. Nicota stated that after the May 27, 2005 meeting, he called C.O. Seguin, who was a troop mate and personal friend. He asked C.O. Seguin to contact an officer from outside of the Division to come in and conduct an investigation, to try to unravel what other issues might be at hand. He wanted to make sure C.O. Seguin had all of the information from an independent investigator.
- [191] Sgt. Nicota sent an email later on to SRR Ford and Mr. Merrifield. It states:
- ...in my 32 years, I never witnessed an "Accused" (let alone a serving member of the RCMP) confronted in the manner as Peter MERRIFIELD was subjected to by Supt. PROULX....Mr. PROULX'S manner of questioning was the epitome of harassment

and could be used for classic textbook lecture material example.
Supt. PROULX'S questions ridiculed, demeaned and embarrassed
MERRIFIELD.

- [192] Mr. Proulx's recollection of May 27, 2005 was that prior to the meeting, he spoke to Sgt. Bohus. Sgt. Bohus told him, "Be careful with this member. You're treading on thin ice." Sgt. Bohus said that he would support Supt. Proulx at the meeting arranged for May 27, 2005. Mr. Proulx stated he believed that Mr. Merrifield's work on the Stronach investigation was a clear conflict.
- [193] Mr. Proulx stated that he called the May 27, 2005 meeting because he wanted to personally explain to Mr. Merrifield why he had removed him from the Stronach file and also to get his side of the story. Mr. Proulx said that he was considering transferring Mr. Merrifield from TAG and wanted to hear from him. He also wanted to discuss the nomination meeting, the fact that Mr. Merrifield had run without LWOP and the contents of the pamphlet.
- [194] Mr. Proulx stated that at the outset of the meeting, he initiated the discussion and said that he wanted to address three things: running in the election without approval, the Stronach investigation and what to do with Mr. Merrifield with respect to TAG. Mr. Proulx had a very different recollection of the tone of the meeting in contrast to that of Mr. Merrifield and SRR Nicota. He stated that overall the tone of the meeting was very good. There was no shouting or finger pointing. It was a civilized meeting.
- [195] Mr. Proulx stated that he told Mr. Merrifield that he should have had permission from the C.O. to attend the "election". Mr. Merrifield replied that he had no intention to win the nomination. He was just there to speak. The nomination meeting was not an election. Mr. Merrifield stated that A/Sgt. Crane had only asked him whether he would be running in another election. Mr. Proulx said that he told Mr. Merrifield that he was playing on words and that A/Sgt. Crane would not know the difference between a "nomination election" and a federal election. Mr. Merrifield stated that he wanted to speak at the nomination meeting because he had a concern about one of the candidates. He did not want to win the nomination meeting. Mr. Proulx conceded that the tone of the meeting was raised at this point. Mr. Merrifield stated that he had distributed only 300 pamphlets whereas in the previous year, when he was running in the Federal election, he distributed 50,000. Mr. Merrifield stated that he understood he did not need LWOP because the nomination meeting was on a Saturday. Mr. Proulx commented that Mr. Merrifield had invested money in the pamphlets but said he did not want to win. This did not make sense to Mr. Proulx.
- [196] Mr. Proulx told Mr. Merrifield that his website was open and that he was running for election. There was a lot of discussion between the difference between running at a nomination meeting and in an election. Mr. Proulx told Mr. Merrifield he was splitting hairs and that regardless of which it was, he had to be on LWOP. At the same time, Sgt. Nicota was saying that the nomination meeting was not an election. Mr. Proulx stated that voices were raised at this point as three people were trying to talk over each other. Mr. Merrifield was not seeing things the way he did.
- [197] With respect to the pamphlet and the website, Mr. Proulx said he asked Mr. Merrifield about the contents. He stated, "Don't you think you're criticizing the Commissioner if you say you're going scrap the gun registry? You're a member, you can't do it." Mr. Proulx stated that he was not a politician and that he did not follow politics at all. He had no idea of what the Conservative platform was for the upcoming election. In the pamphlet, Mr. Merrifield stated that he had received numerous awards. Mr. Proulx stated that he asked Mr. Merrifield about his awards and that they discussed a couple of them. The pamphlet

said that Mr. Merrifield had worked across North America. Mr. Merrifield told him that he had travelled as an Air Marshall to numerous locations. Mr. Proulx said, "Don't you think you're misleading your constituents?" Mr. Merrifield said no.

- [198] On the last page of the pamphlet, there was a statement that the traditional definition of marriage would be defended. Mr. Proulx stated he was concerned about this because an RCMP officer has to treat everybody equally. He stated to Mr. Merrifield, "Doesn't this show your views against gay marriage?" He also asked Mr. Merrifield, "Didn't you think that this was in conflict with your position?" Mr. Merrifield was not on LWOP. Mr. Proulx stated that Mr. Merrifield did not see a conflict in any of these issues. Mr. Proulx stated that as far as he was concerned, nominations and elections were all in the same group. They were the same thing. Mr. Merrifield had different definitions.
- [199] Mr. Proulx stated that he may have questioned Mr. Merrifield about his objectivity. At the end of the meeting, he stated that he was going to forward the campaign materials to headquarters for review.
- [200] Mr. Proulx stated that he subsequently had a telephone conversation with Supt. Dubeau. Mr. Dubeau told him to be careful about issues relating to political activity and human rights. Politics was a touchy issue in the Force.
- [201] Mr. Proulx said that he stated to Mr. Merrifield that ninety-five percent of TAG's work dealt with politicians. TAG members have to interview them. It was important to get the best information available from the subject of a threat. Mr. Proulx stated that they might be reluctant to give information to Mr. Merrifield. He was recognizable because he was a candidate for three nomination meetings and one election.
- [202] Mr. Proulx stated that Mr. Merrifield told him that he wanted to continue to work at INSET. Mr. Proulx said that INSET was not in line of command. He told Mr. Merrifield that TAG was an issue and that he did not see Mr. Merrifield staying there. Mr. Proulx said the meeting did not provide him with any evidence that he could leave Mr. Merrifield at TAG. Mr. Proulx stated that at the end of the meeting, he told Mr. Merrifield that he would make a decision about it and get back to him. He did not threaten Mr. Merrifield's employment. He said, "You've chosen a hobby that comes in conflict with TAG duties. You can't be on TAG." He stated that he never said that Mr. Merrifield would have to choose between the RCMP and politics.
- [203] Mr. Proulx stated that he returned to his office and made some notes of the meeting. Neither Sgt. Bohus nor Sgt. Nicota came to him on that day to raise any concerns about the meeting.
- [204] Mr. Smith retired from the RCMP in April, 2008 as a Staff Sergeant. He now provides contract services to the RCMP.
- [205] Mr. Smith stated that, prior to retirement, when he was in charge of Criminal Analysis, he worked at London headquarters. His line officer was Supt. Proulx.
- [206] Mr. Smith stated that he did not know Mr. Merrifield until spring 2005. He did not know that Mr. Merrifield had been involved in politics, that he had attended a political event without LWOP or that he was involved in the Stronach investigation.
- [207] He first met Mr. Merrifield at the May 27, 2005 meeting. Supt. Proulx asked him to attend in absence of another member, Sgt. Gilchrist. He recalled that copies of pages from Mr. Merrifield's website and a pamphlet were at the meeting.

- [208] Mr. Smith recalled that Mr. Merrifield responded to Supt. Proulx's concerns. He said emphatically that it was not his intention to run for nomination. He was there just to speak publicly to members of the Conservative party. He had concerns about one particular candidate that was running and wanted to speak about him.
- [209] Mr. Smith stated that the exchange between Supt. Proulx and Mr. Merrifield went on for some time and became heated. The tone was argumentative on both sides. Mr. Merrifield may have felt that his integrity was being challenged. He did not recall Supt. Proulx's standing up and leaning over the table during the meeting. There was a perception that Mr. Merrifield was not being honest and forthright.
- [210] Mr. Smith stated that Supt. Proulx was concerned about Mr. Merrifield's exercising poor judgment. Supt. Proulx said that Mr. Merrifield would have to make a choice between his career or politics. Mr. Smith testified that Supt. Proulx did not say Mr. Merrifield could not work at TAG, only that he was considering it. He said he would consult with various policy centers in Ottawa. The meeting lasted approximately two and a half hours and ended at this point.
- [211] Mr. Smith stated that he would expect steps to be taken against an officer who was not forthright with a superior officer. No Code of Conduct proceedings were initiated against Mr. Merrifield, nor was he disciplined in any way regarding the issues discussed at the meeting.
- [212] Mr. Smith stated that Sgt. Nicota's comments in his email to SRR Ford were false.
- [213] Mr. Smith stated that Supt. Proulx was on leave in August 2005 and previously had assigned to him full acting duties as Superintendent in charge of the Criminal Intelligence branch. He prepared an email dated August 12, 2005 to Cpl. Dunn, the OIC of the Conflict Resolution Team. He had obtained a cassette video regarding Mr. Merrifield's appearance on the Michael Coran radio show ten months earlier, on October 19, 2004. Mr. Smith stated that Supt. Proulx had asked him to send the tape to Cpl. Dunn for review because Supt. Proulx wanted her comments.
- [214] Mr. Merrifield had another performance review for the period August 1, 2004 to August 1, 2005 which included the time period when he participated on the Coren show, when he ran in the Barrie nomination meeting, and when he was at TAG. Mr. Smith noted that in the review, Supt. Proulx stated, "Cst. Merrifield is a great asset to the RCMP. His leadership skills and overall communication abilities were quite apparent during his stay with TAG." A/Sgt. Crane stated:

[Cst. Merrifield's] personable character, dedicated work ethic and tireless ambition are several of the notable qualities of this member...Though only in the Force for a limited number of years, he has continually stepped to the forefront and exhibited a willingness to apply himself to the tasks presented to him. He assimilated into the TAG quickly and was tasked to become a team leader and develop a program to establish a balanced reporting of the seven Strategic Criminal Extremist Groups...He was also the lead investigator involving an individual who was sending threatening letters to the Prime Minister Canada/President of the U.S. This file involved several local Police Services and a foreign agency. Cst. Merrifield directed the file and mentored several other members who had less experience in criminal code investigations. The file was concluded with charges and the unit benefited by his professionalism

and mentoring. Cst. Merrifield is a forward thinking individual who seeks innovation and solutions to resolve operational requirements.

- [215] Regarding the questions that Supt. Proulx asked Mr. Merrifield in the London meeting, Mr. Seguin agreed that if Supt. Proulx had questioned Mr. Merrifield about the pamphlet's contents, this would amount to a sensitive sector investigation because the questions would be about a private political event. Mr. Seguin stated that questions should have been asked about policy compliance. Mr. Merrifield should not have been asked about the contents of the pamphlet.
- [216] Mr. Seguin stated that his direction to Supt. Proulx was to follow up with respect to the Administrative Manual, as to whether Mr. Merrifield sought authority to attend the nomination meeting. He was not aware that an Internal Complaint file had been opened nor was he aware of the actions that Supt. Proulx was taking. He knew that no actions were ultimately taken with respect to Mr. Merrifield's failure to obtain LWOP to attend the nomination meeting. Mr. Seguin said that there was no Code of Conduct investigation with respect to the LWOP issue because it was not a big deal. Mr. Merrifield's comments on the Coran radio show were also not a big deal. He expected that there would be follow up on the LWOP issue and that it would be addressed.
- [217] Mr. Merrifield stated that after the May 27, 2005 meeting, he had a lot of medical issues. He had headaches and dizziness. He was nauseous and felt very stressed and intimidated. He was fearful for his employment. He felt that Supt. Proulx was targeting him. He felt isolated from his peers and most members of the Force. He stated that there is a perception of two tiered justice in the Force: one for Commissioned ranks and one for the others. Those who are not commissioned officers fear reprisal for stepping out of line.
- [218] Mr. Merrifield stated that his colleagues perceived that he had done something wrong. He was stripped of his investigative role in TAG. A/Sgt. Crane had told people that he was in trouble. After that, he was transferred. It was an embarrassing, stressful situation. It left him in doubt about his future with the Force.

Criminal Intelligence - June 2005

- [219] Mr. Merrifield stated that in June 2005, Supt. Proulx transferred him from TAG to Toronto North Criminal Intelligence. It had no vacancies. He was considered "surplus to establishment." This unit was under Supt. Proulx's line of command. Mr. Merrifield stated that he had no choice in the transfer. He discussed it with Sgt. Nicota. He asked Insp. Jagoe if he could stay on the investigative side of INSET where there were vacancies. Nobody had said that the conflict concern extended beyond TAG's work. Even though INSET was under Insp. Jagoe's command, not Supt. Proulx's command, Insp. Jagoe said that it was Supt. Proulx's decision.
- [220] Mr. Merrifield stated that the other members in Criminal Intelligence were gracious and supportive. He became a recruiter of confidential informants and a source handler. The investigations were restricted to criminal enterprise, organized crime, biker gangs, immigration and passports. He obtained approval to probe intelligence in areas of his interest. This included criminal organizations and firearms, and to identify high risk gangs using smuggled firearms.
- [221] Mr. Merrifield stated that there was a homicide at the Phoenix night club in Toronto. He had obtained related confidential information about firearms smuggling. Some individuals were stopped at the border and were arrested. Mr. Merrifield stated that while he was travelling to Niagara Falls to interview them, INSET asked him to return. Mr. Merrifield

believed that this was an interference with the performance of his duties. He had top level security clearance. He was never told the reason why he was called off the interview.

The Bob Pritchard Radio Show - July 9, 2005

- [222] Mr. Merrifield stated that in the summer of 2005, he had knee surgery and was off work. Shortly after the terrorist attacks in London, England, he was contacted by an acquaintance to participate in a talk show regarding the history of terrorism. He agreed to do it but said clearly that he could not be identified as a member of the RCMP nor would he speak in any official capacity. He spoke on the radio as a private citizen.
- [223] Mr. Merrifield stated that he was not aware of s. 1.1, Part 27 of the Operations Manual which stated that all media contacts were to be reported to the detachment or unit commander and to a Division Media Relations non-commissioned officer as soon as possible.
- [224] Mr. Merrifield recalled commenting on the talk show that Al Qaeda indicated that Canada was a potential target for terrorism. This was not a secret. It was widely reported.
- [225] Mr. Merrifield stated that Supt. Proulx called him at home the next week. He accused him of disclosing top secret information. Mr. Merrifield stated that he tried to reason with Supt. Proulx. He said that the information that he had provided was about the historical development of terrorism which he had learned from self-study. Mr. Merrifield said that he had not disclosed any RCMP information. Supt. Proulx was not satisfied. He said several times that C.O. Seguin and C/Supt. Mazerolle were very upset. He recited several complaints that Insp. Jagoe had made and said that Insp. Jagoe was making calls about him. Mr. Merrifield said that the conversation was direct, terse and accusatory. Supt. Proulx said that there would be an investigation and disciplinary proceedings.
- [226] Mr. Merrifield stated that disclosing top secret information would be a violation of the *Security of Information Act*, R.S.C. 1985, c. O-5 (SOIA). The penalty for this offence was up to 14 years of imprisonment. The only person who could investigate this was the officer in charge of INSET, being Insp. Jagoe. This represented a glaring conflict because he had made the complaint and he would be investigating it.
- [227] Regarding the Pritchard show, Supt. Jagoe testified that he was on his way to work one morning in July 2005, after Mr. Merrifield had been transferred to Criminal Intelligence, when he received a phone call from Cpl. Oliver asking him if he was listening to the radio. He said that Mr. Merrifield was doing an interview on the radio and that he was talking about national security. Supt. Jagoe said that when he got to the office he called Supt. Proulx to ask him if he was aware of it. He was not. Supt. Jagoe stated that his immediate concern was national security. There are clear protocols and processes that have to be followed to do media interviews. National Headquarters was very concerned about providing a message in a consistent manner. It wanted only certain people to speak on behalf of the RCMP. Supt. Jagoe said he thought that Mr. Merrifield should have obtained the approvals to do an interview. He knew that Mr. Merrifield had not sought approval through him.
- [228] Supt. Jagoe received a recording of the show from Supt. Proulx. He listened to the entire interview. Mr. Merrifield was described as a consultant, someone who works within the field. He was not identified as an RCMP member but his name was clearly mentioned. Supt. Jagoe stated he was concerned because the discussion was about the history of terrorism. There were questions about Toronto and Canada as targets for terrorists. He believed that this information was getting into some very sensitive areas. The fact that Mr.

Merrifield was not identified as member of the Force did not allay his concerns. He was readily identifiable as a member and therefore his comments would be viewed as credible.

- [229] Supt. Jagoe stated that shortly after listening to the CD, he wrote a memo dated July 20, 2005 to Supt. Proulx in which he outlined his concerns. He stated he believed that Mr. Merrifield was aware that approval was required to do media interviews because S/Sgt. King had spoken to him about this shortly after his arrival at INSET. He believed that Mr. Merrifield had spoken about sensitive topics. Even if the information was available in the public domain, having a member validate it was potentially harmful to the Force's ability to collect information in the future.
- [230] Supt. Jagoe stated that people who work in the intelligence field at the RCMP are bound by [SOIA](#). They are required to sign documents stating that they will not talk about secret information in the public domain. Supt. Jagoe stated that after he listened to the CD, he concluded that Mr. Merrifield had not violated the legislation. Nevertheless, he had concerns.
- [231] Supt. Jagoe stated that the information that Mr. Merrifield had provided on the radio show was widely known but in the circumstances, Mr. Merrifield, as a member of the RCMP, was validating the information for the public. Supt. Jagoe stated that he was not aware of any investigation that had been done to determine whether Mr. Merrifield had violated [SOIA](#). He was not aware of any steps taken by Supt. Proulx after their conversation. He was not involved in this matter after he spoke to Supt. Proulx. He agreed that in the briefing note from Supt. Proulx to the Commissioner dated January 17, 2006, Supt. Proulx stated, "Merrifield didn't reveal any classified information." Supt. Jagoe stated that he did not know that Supt. Proulx had made this determination.
- [232] Mr. Merrifield stated that while he was at Criminal Intelligence, Supt. Proulx attended at the unit to give a briefing about an upcoming restructuring. The meeting took place in a small boardroom. All the members of the unit were there. Supt. Proulx said, "All of you have a job, except for you Peter." His expectation was that everyone would toe the line. Then he said, "You know what toeing the line is like eh Peter?" Mr. Merrifield stated that he took this as a reference to his adhering to the Conservative platform. He said that Supt. Proulx told a story about when he was a non-commissioned officer and how a commissioned officer was rude to him. Supt. Proulx stated that he was subsequently promoted and got even. Mr. Merrifield stated that this sense of retaliation bothered him. Supt. Proulx did not spend any time with him personally and did not say anything about the disciplinary investigation that he had threatened earlier.
- [233] A/Sgt. Crane stated he had no involvement in Mr. Merrifield's reassignment out of TAG. He was not consulted about where Mr. Merrifield should go. He stated he did not talk with anyone about it and had nothing to do with it. He said it was up to Insp. Jagoe to determine whether Mr. Merrifield could go to the investigative side of INSET. A/Sgt. Crane stated that he was not prepared to continue to work with Mr. Merrifield after he misrepresented his intentions. He had asked Mr. Merrifield if he would be running in an election and Mr. Merrifield said no. He put his name up for the nomination. At that point the trust was broken. He stated that Mr. Merrifield had to work somewhere else, notwithstanding the fact that Mr. Merrifield told him that he was just at the meeting to make a speech. A/Sgt. Crane said that Mr. Merrifield was transferred because he participated in the nomination meeting. He did not recall asking for Mr. Merrifield to be removed from TAG. It was not within his purview to do this. A/Sgt. Crane stated that he had nothing to do with the transfer and that it was Supt. Proulx's decision based on the information that he collected.

- [234] Supt. Jagoe stated that even though he did not know how Supt. Proulx was going to deal with his concerns and even though there was no discussion with Mr. Merrifield about the information provided on the radio show, he decided that Mr. Merrifield was not coming back to INSET. In addition, there was the situation with Ms. Stronach. Supt. Jagoe believed that Mr. Merrifield's contacting her directly and asking her if it was okay to conduct the investigation was inappropriate. In Supt. Jagoe's opinion, Mr. Merrifield showed very poor judgment.
- [235] Supt. Jagoe stated that he did not discuss his concerns about Mr. Merrifield with the officers who administered Criminal Intelligence because he did not want to tarnish Mr. Merrifield's reputation. Regardless of whether a Code of Conduct proceeding had been initiated, it did not alter his belief that Mr. Merrifield had poor judgment.
- [236] C/Supt. Mazerolle took some notes regarding Mr. Merrifield's remaining in TAG or potentially being transferred to INSET. His note dated June 2, 2005 states "Jagoe called to say he tried to accommodate Merrifield at INSET." C/Supt. Mazerolle stated that he took this to mean that Mr. Merrifield was seeking a position at INSET. The note went on to say, "he was concerned about the review and hoped the C.O. in CROPS knew what they were doing." C/Supt. Mazerolle stated that this was about the pamphlet. He knew that Mr. Merrifield wanted to be in INSET. He did not recall having any concerns about Mr. Merrifield's working at INSET.
- [237] C/Supt. Mazerolle stated that several months later, Insp. Jagoe told him that he would not have Mr. Merrifield at INSET. He said that Mr. Merrifield has not been truthful with him. Insp. Jagoe did not tell him whether he or Supt. Proulx had asked Mr. Merrifield for an explanation.
- [238] C/Supt. Mazerolle stated from June 2, 2005, Mr. Merrifield wanted to return to INSET and that INSET probably had vacancies. C/Supt. Mazerolle was asked whether there was any reason why Mr. Merrifield could not return to INSET. He stated it was not his call. There were no findings against Mr. Merrifield. By this time, Insp. Jagoe said that Mr. Merrifield could not go to INSET. He would not support it. Insp. Jagoe would not support it then or even in 2006.
- [239] Mr. Proulx stated that on May 30, he was not sure whether he had authority to remove Cst. Merrifield from TAG. He met with Insp. Brine, who was in charge of Human Resources in London, to ask him what he could do and what the best approach would be. Mr. Proulx stated that he learned that he could transfer Mr. Merrifield to another one of his units as long as it did not involve a lot of extra travel for Mr. Merrifield. He knew that Mr. Merrifield lived in Barrie at that time and that the drive to Criminal Intelligence in Newmarket was less than the drive to Steeles where TAG was located. Mr. Proulx stated that he could not transfer Mr. Merrifield to INSET because it was not one of his units. That would require full staffing transfer. Mr. Proulx stated that he decided to transfer Mr. Merrifield to Criminal Intelligence. He was still being paid through TAG. It was a temporary, good solution. It allowed him to properly assess the matter before making a final or radical decision. Mr. Proulx stated that he also spoke to C.O. Seguin and C/Supt. Mazerolle on May 30.
- [240] Mr. Proulx stated that on June 1, he travelled to Toronto and met with Mr. Merrifield and A/Sgt. Crane. He confirmed that he was transferring Mr. Merrifield to Criminal Intelligence temporarily. He explained that the reason for this was because there were hardly any duties for Mr. Merrifield in TAG. Mr. Merrifield was concerned about the optics of the transfer and what others would think. Mr. Proulx stated that he met with the

other people in TAG to advise them that he was transferring Mr. Merrifield to Newmarket temporarily and that he had done nothing wrong. He was not under investigation.

[241] Mr. Proulx stated that Mr. Merrifield was in fact not under investigation. He had not interviewed anyone and had all of the information he needed. He knew that Criminal Intelligence in Newmarket was busy but there were no Constable vacancies there.

[242] Mr. Proulx stated that he sent an email to A/Sgt. Crane to ask him some questions. A/Sgt. Crane answered the questions in his email to Supt. Proulx. Mr. Proulx stated that he wanted to be precise in the memo that he would be sending to C/Supt. Brown, head of Human Resources for Central Region.

[243] Mr. Proulx stated that on June 6, he received another email from A/Sgt. Crane. Mr. Proulx stated that his writing is at the bottom of this email. It was a summary of the information that he had. It states:

Early March 2005 not running, May 13 NCO found out, PMRTO
[regular time off] 14 NOM (lost) no intention of winning a seat 300
pamphlets delegate, website open April 29, no LWOP as per last
year's running from NCPC [National Compensation Policy Centre]
SGT Boos not of opinion that AM [administrative manual] 2.5.H.3
special leave applied.

[244] Mr. Proulx stated that on June 7, 2005, he sent his email to C/Supt. Brown. He did not fully understand the various types of leave without pay. He set out the issue in his memo and figured Human Resources could make a ruling. Making this type of decision was not his job. Mr. Proulx set out four questions:

1. By his actions has Constable Peter Merrifield contravened the RCMP regulation 58.4(1) taking into the account the policy ruling from 2004? This includes reactivating its website and distributing pamphlets.
2. By his "public" views on certain topics as outlined in his campaign platform, has he placed himself in a conflict of interest situation?
3. Should the special leave of 2004 be modified to reflect two (2) periods of LWOP personal leave as per AM.II.5.S.5? Meaning, Constable Merrifield's entitlement for two periods of LWOP in his career has been expanded. [sic expended]
4. By his actions, has Constable Merrifield contravened the RCMP regulation 56.1 and impaired his ability to be impartial with a view to work within national security investigations within the RCMP (INSET)?

[245] This memo shows that Supt. Proulx thought that Mr. Merrifield originally had special LWOP and wondered if it should be classified as personal needs. This is the opposite of what happened.

[246] Mr. Proulx said that he did not initiate a Code of Conduct investigation regarding the fact that Mr. Merrifield attended a nomination meeting without LWOP. He stated that he felt it was a misinterpretation of policy. It was not a conduct matter. He saw it as an administrative issue.

[247] Mr. Proulx stated that he made a decision to transfer Mr. Merrifield out of TAG. Mr. Merrifield was concerned about how this would be perceived. Mr. Proulx stated that he wanted to make sure it was not perceived negatively. He recalled making an

announcement. He could not recall who was there. He thought there were five members in TAG.

- [248] Mr. Proulx was asked whether he could have seconded Mr. Merrifield to INSET with Insp. Jagoe's concurrence. He stated that Insp. Brine told him that he could transfer Mr. Merrifield within only his unit. He agreed that Mr. Merrifield had asked to go to INSET but he did not ask Insp. Brine about it. He did not recall asking Insp. Jagoe whether he would accommodate it.
- [249] Mr. Proulx stated that in June 2005, he did not think that the 2004 LWOP coding issue had been fixed. He did not know whether it would be re-coded to the kind of leave that a member could take only two times. He did not really understand LWOP.
- [250] Sgt. Sim is a serving member of the RCMP. He has worked in the Criminal Intelligence section since 2003. He worked with Mr. Merrifield when he was there in 2005 along with Cst. Brown. He recalled that Mr. Merrifield first came into the section in the summer of 2005. At that time, Sgt. Penny was the OIC of the Criminal Intelligence section. When Mr. Merrifield was transferred to the Criminal Intelligence section he was "surplus to establishment" meaning that there was no vacancy in the section.
- [251] Sgt. Sim knew that Mr. Merrifield had previously been at TAG. Sgt. Sim recalled that he and Cst. Brown were told to take over a file relating to threats against Belinda Stronach. Mr. Merrifield had been the previous investigator. Sgt. Sim understood that there was some conflict of interest with Mr. Merrifield and the file.
- [252] Sgt. Sim stated that he and Cst. Brown were handling human sources and getting information from them. They introduced Mr. Merrifield to their sources. Sgt. Sim said that Mr. Merrifield had a knack for intelligence work. He was one of the best. His work was exemplary. He was invaluable to the section, especially with respect to intelligence probes regarding criminal groups. Sgt. Sim stated that they never had to explain anything to him.
- [253] Mr. Brown retired from the RCMP as a Constable. He first met Mr. Merrifield when he and Sgt. Sim were assigned the Stronach file. He stated that he did not know why Mr. Merrifield was transferred from TAG to Criminal Intelligence. He thought that something was going on between Mr. Merrifield and his superiors.
- [254] Mr. Brown stated that at Criminal Intelligence, he, Sgt. Sim and Mr. Merrifield were developing sources and they were working on issues relating to guns. Mr. Brown stated that Mr. Merrifield was innovative and sharp. He was good at getting information out of people who did not want to provide it.
- [255] Supt. Proulx stated that he received a phone call from Insp. Jagoe on July 11, 2005. Mr. Merrifield had been on the Bob Pritchard show on Saturday July 9, 2005. He understood that Mr. Merrifield had talked for a few hours on counter-terrorism and Insp. Jagoe had some concerns about it. He did not know why Mr. Merrifield would do this. He told Insp. Jagoe that he would look into it, get a copy of the tape and listen to it and then speak to Mr. Merrifield.
- [256] Mr. Proulx stated that the RCMP is sensitive about public speaking. Members were not allowed to go out and speak on their own initiative. Public speaking on local issues had to be authorized by a line officer or him. Public speaking on national issues had to be authorized by the C.O. The C.O. should have authorized this interview.
- [257] Mr. Proulx stated that he researched the show on the internet. He was able to listen to the first part of it and recognized Mr. Merrifield's voice. He had identified himself as a

consultant in terrorism. The whole interview was not available on the website.

- [258] Mr. Proulx then called Sgt. Penny, the officer in charge of Criminal Intelligence where Mr. Merrifield was working. He wanted to know whether Sgt. Penny was aware of the interview. Sgt. Penny told him that it was not the first time that Mr. Merrifield had spoken. He said that Supt. Proulx only needed to Google Mr. Merrifield's name and he would find other occasions. Sgt. Penny told Supt. Proulx that he had not authorized it.
- [259] Mr. Proulx then called Mr. Merrifield at home where he was recovering from knee surgery. Mr. Merrifield said that Bob Pritchard was a friend of his and he had spoken on the show on Saturday. He stated that Bob Pritchard had called him 45 minutes in advance. Mr. Proulx told Mr. Merrifield he should not have done it because terrorism is a sensitive issue and public speaking on the issue had to be pre-approved. Mr. Proulx stated that he told Mr. Merrifield that Insp. Jagoe was very concerned and that he would have to listen to the tape and determine whether Mr. Merrifield's comments were from open sources. His concern was that people who listened to the show would want to identify Mr. Merrifield. They would Google him and they would find out that he was an RCMP officer. They would think his comments were coming from the RCMP. Mr. Merrifield had to refrain from doing this without proper authorization.
- [260] Mr. Proulx stated that the next morning he sent an email about the interview to Insp. Schmidt (because C/Supt. Mazerolle was on holidays) and to C.O. Seguin to give them some notice. Mr. Proulx stated that he copied the email to Insp. Jagoe keep him updated.
- [261] Mr. Proulx stated that on July 13, 2005, Mr. Merrifield called him and wanted a clarification of their discussion. He asked if he was under investigation. Mr. Proulx stated that he was not but he had to ascertain that Mr. Merrifield had not divulged any secrets in the interview.
- [262] On July 18, 2005, Supt. Proulx received the DVD of the show. A copy of it was made and sent to Insp. Jagoe so that he could listen to it and determine whether Mr. Merrifield said anything that was top secret. Mr. Proulx testified that in his view, it was a huge conflict of interest for a member to speak about national security in the media. He was concerned that Mr. Merrifield might have released top secret information to the public.
- [263] On the same day, Supt. Proulx sent an email to Sgt. Paradis. He wanted a transcript of the show and wanted to know if a search could be done to see if Mr. Merrifield had participated in other shows. In addition, Supt. Proulx wanted to know if Mr. Merrifield had permission to speak on these shows and whether he did this regularly.
- [264] On July 18 or 20, 2005, Supt. Proulx received an email from Sgt. Paradis. She advised him that she had requested a transcript and could not identify any other shows in her search through the media system. Mr. Proulx stated that he received the transcript and read it before July 27, 2005.
- [265] Mr. Proulx stated that by July 21, 2005 he had not received an answer from C/Supt. Brown regarding his email dated June 7, 2005 setting out the four questions. He sent a follow up email. Mr. Proulx testified that he was in the process of cataloguing the other shows and they would be forwarded to C/Supt. Brown. The tape was being analyzed to determine if there was a Code of Conduct breach. He did not know if anything on the tape was outside of public knowledge. Mr. Proulx stated that regardless of whether Mr. Merrifield had released information that was not public, he was still considering whether Mr. Merrifield had breached the Code of Conduct.

[266] Mr. Proulx stated that he did not order an investigation under Part IV of the Code of Conduct at that time. He believed that the matter could be resolved at the lowest level and that this was preferable because Code investigations “make people uneasy.” At that point, he had not made a final decision yet as to whether a Code of Conduct investigation was warranted and was still waiting for an answer from C/Supt. Brown. He thought that talking about national security publicly without authorization might have been a breach of the Code.

[267] Mr. Proulx stated that on July 26, 2005, he received a copy of two emails between from Supt. Trueman and Sgt. Davis of Professional Standards and Employee Relations. He did not know who Sgt. Davis was. It appears that Sgt. Davis was providing advice to Supt. Trueman regarding the relevant policy sections to consider.

[268] On July 27, 2005, Supt. Proulx sent a memo to Supt. Trueman in Ottawa. It states, “As per my discussion with Cpl. Dunn of your unit last week, here is a summary of the preliminary research I have conducted on the parallel activities of Cst. Peter Merrifield as a “panelist” or as a “host” of a radio/TV show.” Supt. Proulx provided details regarding Mr. Merrifield’s speaking on the Coran show, on the Pritchard show and at a B’nai Brith event. He stated:

I strongly believe that Mr. Merrifield has placed himself in a conflict of interest situation by appearing on those shows and may cause some embarrassment for the RCMP as a result of his views, actions or comments. However, I am seeking your view on this from a National Policy Center’s perspective regarding the “Conflict of Interest” policy/guidelines.” Transcripts and media articles were attached to the memo.

[269] Supt. Trueman was located at the National Policy Center and was an expert on conflict issues. Mr. Proulx stated that he wanted his advice before making a harsh decision. Mr. Proulx stated that he sent an email to Supt. Trueman dated July 27, 2005 with a number of attachments. One was the end of the transcript of the Pritchard show. He was seeking review from the National Policy Centre with respect to conflict issues. The fourth paragraph in the memo noted the B’nai Brith panel discussion on February 2, 2005. Supt. Proulx stated in the memo to Supt. Trueman that Mr. Merrifield had attended a panel with police chiefs and was referred to as a security expert with RCMP’s INSET. Mr. Proulx said that he was seeking advice from Supt. Trueman because Mr. Merrifield had appeared on other shows. Mr. Proulx stated, “I’m not a Code of Conduct guy. I wanted to take a different approach with other actions.”

The Secret File 2005-1117

[270] On July 26 2005, Supt. Proulx opened a file marked “Secret”. It was coded as a Professional Standards matter, “XX82”. The word “Secret” was written on the file jacket. Mr. Merrifield stated that he was never served with notice of a Professional Standards investigation relating to this file. He obtained this file jacket in 2014 on the eve of trial from the Professional Standards unit, (which investigates allegations of misconduct made against members), only because he made an access to information request after several years of litigation. This document was not produced by the Attorney General. There were no contents in the file jacket.

[271] Mr. Proulx stated that he had a number of documents regarding the inquiries that he was making with respect to Mr. Merrifield. On July 25 or 26, 2005, he gave all of the documents to his assistant, Ms. Robson, and asked her to open an official file. He was

going away on holidays and wanted all of the documents to be accessible to others while he was away. He explained that an Occurrence Report (form 2500) is the first page of any file that is opened. An Occurrence Report was prepared for this file. In the upper right hand corner there is a file number, 2005-1117. In the left hand corner, there is a reported date which is July 26, 2005. An "OSR" classification is noted on the document. Mr. Proulx did not know what OSR stood for. He stated that he reviewed a code cheat sheet with Ms. Robson and decided that the file would be coded XX82 which indicates an internal complaint against a RCMP member. He chose this classification because Insp. Jagoe had brought some concerns to him regarding Mr. Merrifield's participation in the radio talk show. The form shows that the complaint was "taken by Supt. Marc Proulx". In the details section, two allegations are set out being, "S-1 alleged to seek federal election nomination seat without prior authorization" and "S-1 alleged to have appeared on TV and radio talk shows discussing national security terrorism without prior authorization". Mr. Proulx stated that he provided this information to Ms. Robson. At the bottom of the form on the left is a due date, September 14, 2005. This is a diary date for the file to come up for review.

- [272] Mr. Proulx stated that his initials are on the file jacket. In the middle at the bottom it says "05-10-05" and there is a slash across it. Mr. Proulx stated that this shows the date that the file was concluded. This was the day after Supt. Proulx had given Mr. Merrifield the administrative memo setting out his expectations.
- [273] "Secret" is written in the centre of the file jacket. Mr. Proulx stated that secret files can be accessed by only certain people. He did not know why this file was considered secret. He stated that he did not write this word on the file. He was not aware of any special coding for a Code of Conduct investigation. There were no Occurrence Reports (16-24) in the file because it was not an investigation file. Mr. Proulx explained that this was an administrative file and was used to hold documents in order to keep track of them.
- [274] Mr. Proulx stated that he did not know why the file was marked secret. Mr. Proulx then stated that he did know why the file was marked secret. A security classification on a file is related to the highest document in the file. If there was a top secret document in a file, even if it was only one out of five documents, then the file has to be classified as top secret. Mr. Proulx then stated that there were a few pages in this file that were classified as secret and this is why the notation Secret was placed on the file.
- [275] Although Mr. Proulx initially testified that the Secret file was simply a file to hold documents and that he had advised Mr. Merrifield that he was not under investigation, he subsequently stated that he had carried out a fact-finding investigation. He denied that he interviewed Mr. Merrifield at the London meeting on May 27, 2005. He described it as a discussion between a boss and an employee.
- [276] Mr. Proulx did not know that the Secret file was not produced until 2014, on the eve of trial. He had no explanation for this. He never indicated to Mr. Smith, the person in charge of gathering the documents for this action, that a document might be missing.
- [277] Sgt. Verecchia examined file XX82 and the related occurrence report. She stated that XX82 means there was an internal complaint made by Supt. Proulx and that one of the allegations was "alleged to seek federal election and nomination seat without prior authorization". In her view, this meant that a Code of Conduct investigation was underway.
- [278] Sgt. Nicota reviewed the Occurrence Report with respect to the Secret file. He recognized it and stated that it is a form that commences an investigation. It shows that there was an internal complaint against a member. Supt. Proulx had opened the file and Mr. Merrifield was the subject of the investigation. Mr. Nicota also reviewed the file jacket. He stated

that he was familiar with it. He said that it was curious that the file had an access restriction. Sgt. Nicota was familiar with the classification of documents for the RCMP. He testified that a secret file denotes a national security investigation. An investigation against a member should fall within the administrative or criminal side. An "A" file is a confidential file, a "B" File is a secret file and a "C" file is a threat to life file. Sgt. Nicota stated that the fact that "Secret" was written on the file folder shows that someone believed the allegations were a threat to national security. It indicates a very sensitive investigation. Sgt. Nicota stated that he would expect to see occurrence reports, exhibit reports, surveillance, investigators' comments and evidence in a file like this. An investigative report (Form 16-24) outlines every action taken by an investigator. It is a mandatory form. Without it, one does not know what has occurred in the investigation.

- [279] Supt. Jagoe stated that he would expect to find investigative reports and exhibit reports (Form 16-24) in this type of file. These types of allegations are investigated by the Professional Standards unit. They maintain the documents and hold them separately.
- [280] C.O. Seguin testified that he was not familiar with the Secret file and did not recall if Supt. Proulx had told him that he had opened such a file. C.O. Seguin stated that he had never previously seen the related Occurrence Report. The purpose of such a report was to collect data for the opening of an operational file. He had no involvement in the opening of this file and did not know to what it related. He did not know whether Supt. Proulx had initiated a Code of Conduct investigation. If Supt. Proulx had done so, it would not have come to C.O. Seguin's office because Supt. Proulx would be within his authority to order it. If a Code of Conduct investigation was referred to a disciplinary hearing it, would come to his office. He stated that he was not aware of the action that Supt. Proulx was taking.
- [281] Commr. Paulson stated that if he saw a document like the Occurrence Report in a file, it would suggest that a Code of Conduct investigation was underway. He said a member should be notified as soon as possible of a Code of Conduct investigation. Commr. Paulson stated that the allegations on the Occurrence Report were poorly written explanations. They seemed to be significant suggestions of misconduct. He stated if an individual ordered a Code of Conduct investigation, he would expect that it would be appropriately documented.
- [282] Commr. Paulson testified that a person could use a document such as an Occurrence Report and assign a file number to it without having an issue move forward as a Code of Conduct matter. This could happen because, in an early assessment, there might be a determination that it is no longer a Code of Conduct matter or it might be informally resolved. He stated he would expect that the person who was making these determinations would document them in the file. Subject to canvassing alternative explanations for where some documented analysis and accounting considerations were placed, Commr. Paulson said he would be concerned if there were no Occurrence Reports or evidence lists in file 2005-1117. He would still expect to see a record of the investigation maintained in some form. This would include detailed notes as to statements or investigative steps taken and the provenance of exhibits.
- [283] Mr. Smith stated that in 2008, he started requesting documents for production in this action. He generated a document list in 2010. The first supplementary document list was provided on June 16, 2010 in advance of examinations for discovery. The second supplementary document list was provided on February 21, 2014. The third supplementary document list was provided on September 30, 2014. The fourth supplementary document list was provided on October 31, 2014. From June 2010 up to the pre-trial conference in June 2014, the AG produced no additional documents. No additional documents were produced until the trial began.

- [284] Mr. Smith stated that he received the Secret file between 2008 and 2010. Access to it was restricted to himself as S/Sgt., C.O. Seguin, Supt. Proulx, Sgt. Gilchrist and the office manager Ms. Robson.
- [285] Mr. Smith stated that he was not privy to the contents of the file. When he received it, he skimmed through the file to see if any information should be redacted before disclosure. He stated that hand writing on the file jacket states, "conclude file" Oct 12, 2005.
- [286] Mr. Smith then referred to a different copy of the file jacket that has a further notation on it. It shows a further entry in 2010, under the 2005 "conclude file" entry. The day and month next to 2010 are illegible. The writing next to this date appears to be "Annual Review by civ lit" although the entry has a line through it and is difficult to read. The word "Secret" is not on this copy of the file jacket with the 2010 entry.
- [287] The copy of the file jacket with the word "Secret" written on it predates the copy of the file jacket with the 2010 entry and without the word "Secret" on it. "Secret" could not have been easily removed later on because there is a background pattern on the document that is intact. No explanation was provided for the fact that the word "Secret" is not on the copy of the file jacket that contains the 2010 notation "Annual Review by civ lit".
- [288] Mr. Smith stated that the copy of the file jacket with the word "Secret" was made prior to 2010. He provided it to the Department of Justice prior to 2010. It was not produced in this action until 2014.
- [289] Mr. Smith reviewed the related Occurrence Report. He said that it could have been attached to the inside cover of the file. He did not recall when it was produced. He did recall that Mr. Merrifield's counsel requested the documents in file jacket. The Occurrence Report was provided only after that request was received. Mr. Smith stated that he did not see the Occurrence Report on his initial review because it was produced by someone else. He assumed the contents of the file had been produced to the Department of Justice.
- [290] Mr. Smith stated that by looking only at "occurrence 2005-1117" on the file jacket, he could not determine the nature of the file. He stated that prior to becoming the file manager, he was not aware of the details of allegation S1 (alleged – seeking election without authorization, on TV). Between 2008 and 2010, before the commencement of the trial, he was aware that Supt. Proulx had made these allegations against Mr. Merrifield and that there was an internal investigation. Mr. Smith stated that someone identified that there was a "wallet", which was like an accordion file that would contain the contents of the file 2005 – 1117. He became aware of the wallet in 2010. He stated that he went through it briefly and sent it to the Criminal Intelligence branch. He asked them to review it prior to disclosure to determine if any redactions were required. Criminal Intelligence returned the wallet. He then provided the wallet and its contents to the Department of Justice. Mr. Smith could not recall whether he thought that the wallet, its contents and a cassette were produced before November 2014.
- [291] Mr. Smith stated that file 2005 – 1117 was reviewed in 2014 because it related to Mr. Merrifield's political activities and speaking to the media on several occasion. It was relevant to this action. He did not know that the file number was provided in response to an access to information request made by Mr. Merrifield.
- [292] Mr. Proulx stated that he received an email from Cpl. Dunn on September 22, 2005, which contained references to policy. He stated that he thought that this email was in response to his June 7, 2005 memo to C/Supt. Brown in which he set out the four specific questions. Mr. Proulx stated he assumed that the issue regarding the appropriate type of leave had been resolved internally. He was not privy to it. With respect to the question of whether

Mr. Merrifield had contravened RCMP Regulation 58.4(1), the answer was not clear. There was no answer regarding whether Mr. Merrifield had placed himself in a conflict by stating his public views on topics outlined in his campaign brochure. There was no response as to whether Mr. Merrifield had contravened the Regulation. There was no ruling on anything. Mr. Proulx stated that he still wanted to resolve this “for Mr. Merrifield”. There were new chapters regarding the policy. He had not made a final decision.

[293] Mr. Proulx testified that he received an email from Mr. Merrifield dated September 23, 2005, in which he had stated that 19 weeks had passed without any resolution as to whether he had violated the *RCMP Act*. Supt. Proulx took offence to this follow up email from Mr. Merrifield because he was Mr. Merrifield’s superior. His view was that superior officers do not respond to diary date inquiries from junior officers. Mr. Merrifield asked whether he was the “subject of an internal investigation”. Supt. Proulx responded and advised Mr. Merrifield that he was not under investigation. He had not interviewed anyone. He said, “I sent some documents to HQ in Ottawa (as I told you) because the “conflict of interest” is not in the manual as of yet and wanted to get guidance from the policy center.” Mr. Proulx stated that in his mind he was not investigating. He just wanted direction so he could he could make the right decision.

[294] Although Mr. Proulx stated that he was not “investigating”, at a minimum, he was doing research regarding Mr. Merrifield’s public speaking. The Coran show and the B’nai Brith event preceded the Barrie nomination meeting. The Pritchard show occurred after Mr. Merrifield had been transferred to Criminal Intelligence.

[295] Mr. Proulx stated that Mr. Merrifield sent him a response dated September 23, 2005 indicating that he meant no offence by his follow up email. He said he was operating under a cloud with the stress of not knowing the result of a serious allegation. He had been suffering from symptoms that he believed were stress related. Mr. Proulx stated that he was not aware of Mr. Merrifield’s stress before he received the email. He thought he acted as quickly as he could and was waiting for Ottawa to respond.

[296] SRR Nicota sent an email to Supt. Proulx in which he stated:

Five months is a long time to wait living under the gun or a very dark cloud. He [Cst. Merrifield] was the subject of rumour and inuendo [sic] despite your trip to INSET-TAG to deal with his situation. When his investigations were turned over to another Unit, further questions arose as to his character and work ethic. I am suggesting your reaction to his message was an overreaction.

[297] Sgt. Nicota said that he was under the impression that Mr. Merrifield was being investigated.

[298] Mr. Proulx stated that he did not respond to Sgt. Nicota’s email.

[299] On September 23, 2005 at 11:30 a.m., right after he had sent his email to Mr. Merrifield, Supt. Proulx spoke to Supt. Trueman about how to close the matter. Supt. Trueman said that the policies were not clear in the past. The best way to close out the matter was to write an administrative memo to go into Mr. Merrifield’s file which would set out Supt. Proulx’s expectations as to media relations, conflict of interest and how not to get into a conflict. Supt. Trueman did not state that Mr. Merrifield had any conflict.

[300] Supt. Proulx took Supt. Trueman’s advice and provided a memo to Mr. Merrifield dated September 28, 2005. It is entitled “Potential Conflict of Interest relevant to Political Activities/Outside Activities”. It states:

This memorandum is prepared in order to address certain concerns I have with your “outside activities”. More specifically, I am concerned you may have unwittingly placed yourself in a conflict of interest position relevant to your political activities. Your participation at various TV/Radio shows as a guest speaker or panelist when dealing with sensitive issues, such as terrorism, clearly has the potential to place you in contravention of existing policy.

Sections 56 to 58.7, *RCMP regulations* outline your rights and obligations when contemplating engaging or participating in political activities. I encourage you to carefully read those sections prior to engaging in any further activities. Prior approval must be sought by the appropriate officer before engaging in a “*political campaign*”.

In so far as your participation at various TV/Radio talk shows or discussion panel, I would refer you to A.M. XII.12 *Secondary employment/Outside activities* published 2005-08-12. Furthermore, all media releases, media interviews or press conferences which are likely to be controversial and are of *National Interest* must be pre-approved by the Commanding Officer of the Division (O.M. – Divisional policy, 27.1).

While you are conducting those activities, concerns for conflict of interest will ensure:

1. that the member is not representing himself as an RCMP member to the public while doing the activity
2. that he is not providing a service that competes with the RCMP
3. that it is the member’s responsibility to ensure that he avoids any actual, apparent or potential conflict of interest

While this serves only as a reminder of your obligations and rights as a member of the RCMP, I am confident that if you keep those guidelines in sight while conducting outside activities, you will continue to be a valuable member of the RCMP and contribute to our organizational goals and mission.

Be assured of my continued support with your future career endeavors, and I remain available to further discuss these issues should you wish.

[301] It should be noted that A.M. XII.12 was published on August 12, 2005, a month after Mr. Merrifield’s appearance on the Pritchard show. C.O. Seguin said it was actually a new administrative chapter.

[302] Mr. Seguin stated that he did not order anything to be done regarding Mr. Merrifield’s participation in the radio show on terrorism. Insp. Schmidt had already directed Supt. Proulx to follow up and get the details. Mr. Seguin stated that when something was in the media, normally a briefing note would be provided to Ottawa. As of July 12, 2005, he was not aware of any other media appearances. He never listened to the radio interview or read a transcript of it. He said that the radio address was not a big deal.

- [303] C.O. Seguin stated that he reviewed the memo dated September 28, 2005 from Supt. Proulx to Mr. Merrifield. C.O. Seguin stated that Supt. Proulx was within his authority to prepare this. He did not provide any direction to Supt. Proulx regarding the specific steps that he was to take.
- [304] Mr. Brown stated that on December 12, 2005, he and Sgt. Sim met in a boardroom with Supt. Proulx. He and Sgt. Sim were trying to make a bid to have Mr. Merrifield stay in Criminal Intelligence. He was fun to work with and they were getting things done. They questioned why Mr. Merrifield was leaving Criminal Intelligence. Mr. Brown recalled that Supt. Proulx said that someone had it out for Mr. Merrifield but it was not him. Mr. Brown said that he prepared a statement setting this out. Supt. Proulx said that Mr. Merrifield's transfer from Criminal Intelligence was out of his hands.
- [305] Mr. Proulx's recollection of the meeting confirmed Mr. Brown's testimony.
- [306] Mr. Proulx stated that he had no involvement in the ultimate staffing process for Mr. Merrifield once he determined that Mr. Merrifield could no longer be in TAG. Mr. Proulx stated he did not have any positions available in Newmarket.
- [307] A/Sgt. Crane stated that honesty is a core value in the RCMP and that a breach of it is reportable. He told Supt. Proulx that Mr. Merrifield lied to him and that he did not believe Mr. Merrifield. This was not reflected in Mr. Merrifield's performance report dated October 11, 2005. There are no comments in the report that say Mr. Merrifield was dishonest and a liar.
- [308] Commr. Paulson reviewed Mr. Merrifield's performance evaluation for the period August 1, 2004 to August 1, 2005. He understood that the document was signed by A/Sgt. Crane, Insp. Jagoe and Supt. Proulx. Commr. Paulson stated that if a line officer thought that a junior that he was evaluating had lied to him about the use of leave without pay or unauthorized public speaking, he would expect it to be set out in the performance review. He stated that appraisals are supposed to be evidence-based, accurate and actionable. They were to help people improve rather than to criticize and punish them. If the writer of a performance evaluation felt that someone was not truthful, the reference in the performance review should be linked to some work related issue that might have some consequences for the work.
- [309] Mr. Proulx stated that by the time the performance report was written, the issues were concluded. He had given Mr. Merrifield the memo dated September 28, 2005. Mr. Proulx felt that the issues were dealt with on October 4, 2005 when he gave Mr. Merrifield the memo.
- [310] Mr. Merrifield stated that after the summer of 2005, he submitted multiple search warrants, production orders, one-party consents and 540 affidavits containing evidence with respect to nuclear proliferation prosecutions. The Public Prosecution Service elected to proceed based on his 540 sworn submissions. He was the chief witness in this prosecution.
- [311] In January 2006, Mr. Merrifield was transferred to a permanent position in the Customs and Excise section at the airport.
- [312] Mr. Proulx said that he could not keep Mr. Merrifield in TAG "because he was a candidate in a federal election".
- [313] Mr. Seguin stated that Supt. Proulx prepared a Briefing Note to the Commissioner dated January 17, 2006. It was written on the recommendation of C/Supt. Mazerolle in order to

provide a review of Mr. Merrifield's transfers from INSET to TAG and then to the Criminal Intelligence Branch. C.O. Seguin approved the Briefing Note. It states:

During the summer, while this review was ongoing, Cst. Merrifield participated in a radio talk show where he identified himself as a "Security and Counter-terrorism consultant". Although Cst. Merrifield did not reveal any classified information or his affiliation with the RCMP, his line officer once more brought the issue of a potential conflict of interest to his attention. The review of this matter revealed that the new conflict of interest policy came into effect in September 2005. It was therefore determined by Supt. Proulx that an administrative memorandum would resolve any ambiguity regarding this issue with Sgt. Merrifield, specifically regarding his behaviour and demeanour. In October 2005, he was given an administrative memo outlining clearly the expectation of his line officer and a copy of the appropriate related policies.

[314] Mr. Seguin noted that the recommendation section of the Briefing Note to the Commissioner states:

It is clear that the member has placed himself in a position of at least a perceived conflict of interest which jeopardizes the effectiveness and reputation of both the RCMP and the member. As a result, measured and reasonable steps have been taken to minimize the conflict and ensure the effectiveness of the RCMP.

[315] Supt. Proulx concluded that Mr. Merrifield had a conflict issue even though Supt. Trueman, who was an expert on these issues, did not concur. He said the policy was unclear.

[316] Mr. Seguin signed the Briefing Note. It was forwarded to Ottawa. He did not recall receiving any response from the Commissioner's office to the briefing note. He knew that Mr. Merrifield had been removed from TAG and had been transferred to Toronto North Customs and Excise. He did not make the decision. Rather he was briefed on it. The decision was made by the Criminal Intelligence branch.

[317] Mr. Proulx stated that Mr. Merrifield was not disciplined regarding his participation at the Barrie nomination meeting without LWOP or his participation on the radio show.

[318] Mr. Proulx's evidence that he had nothing to do with Mr. Merrifield's transfer is contradicted by Mr. Seguin's evidence. The Criminal Intelligence branch was under Supt. Proulx's command.

The Special Operations Center - October 23, 2005

[319] Mr. Merrifield testified that on September 11, 2005, he received a call from Sgt. Sim. A terrorist threat had been made against Toronto. Accordingly, the Special Operations Center (SOC) was "stood up." The SOC was a large room with a number of TV screens and twenty desks for use by various police agencies across Toronto. Each agency would have one or two desks to use during national security events. The purpose of the SOC was to facilitate information sharing. The situation required "all hands on deck". Mr. Merrifield was directed to report to the SOC. While he was en route, Sgt. Sim called him and told him to turn around and go home.

[320] Mr. Merrifield stated that he was the only member in the Division ordered to not attend the national emergency. He testified that this meant he was not trusted by the organization and

his days were numbered. He could not comprehend why, in the middle of efforts to thwart a national terrorist attack, Insp. Van Doren, the incident commander, would have the presence of mind to direct that he be ordered to not attend the SOC. This would mean that two other members would have to work twelve hour shifts rather than eight hour shifts. Mr. Merrifield contacted SSR Bohus about this. Mr. Merrifield had the highest of security clearance.

- [321] Mr. Merrifield requested an explanation from Supt. Proulx. The response was that Insp. Van Doren believed that he was “not the appropriate resource.” He said this response was essentially “none of your business.”
- [322] Mr. Merrifield stated that he felt destroyed after he was called back from the SOC and was told that he was not the appropriate asset when “all hands on deck” were required for a national emergency.
- [323] Sgt. Sim was in charge of the SOC investigators. Sgt. Penny told him to stand up the unit and staff the desks. He contacted Mr. Merrifield and Cst. Brown to tell them that he was doing this. Subsequently, Sgt. Penny told him that Mr. Merrifield was not allowed to go to the SOC and be part of the team. Sgt. Sim believed that Mr. Merrifield was not allowed to go because of perceived conflicts with politics. He was a black sheep among the higher ups. He had been blackballed. Sgt. Sim stated that when this type of thing happens, you are not going anywhere in the force. He recalled that Mr. Merrifield was extremely upset when he was told he could not work at the SOC.
- [324] C/Supt. Mazerolle was overall commander of a project known as Obolt. It concerned the bomb threats to various locations in the Greater Toronto Area. This was the reason why the SOC was stood up. C/Supt. Mazerolle stated that on one day, during the evening, Insp. Van Doren came into his office and said he had dealt with a minor issue. He said that Mr. Merrifield had been called into work in the SOC and Insp. Van Doren had decided to stand him down. C/Supt. Mazerolle stated that he had no reason to question Insp. Van Doren. It was his call to make these decisions.
- [325] Mr. Van Doren is retired. He explained that the RCMP was responding to what appeared to be a serious threat to the country. They had information that there were two stashes of explosives and that the first people on the scene would be subject to car bombs. This required a multi-jurisdictional response involving chiefs of police from various police forces. Insp. Van Doren stated he was second in command and was looking after the national security part. He was in the London headquarters when all of this was happening.
- [326] Insp. Van Doren’s notes show that on October 23, 2005, Sgt. McIntyre contacted him for relief for the overnight shift. Sgt. Penny, Mr. Merrifield’s supervisor, had recommended him. Insp. Van Doren requested that someone else be selected instead of Mr. Merrifield. He knew that Mr. Merrifield had been removed from INSET and felt that it was not fair to him or to the organization that he be at the SOC. He believed that if something bad happened and if Mr. Merrifield had been responsible for it by either doing something or not doing something, the RCMP would be blamed for it. Insp. Van Doren agreed that a decision to not allow someone to work at the SOC was significant. He stated that this was a critical situation and he did not think that Mr. Merrifield should be put in the situation because he had recently been removed from INSET.
- [327] On the next day, October 24, 2005, SRR Bohus, came to his office and wanted to talk about Mr. Merrifield. Insp. Van Doren stated that he took time to speak to SRR Bohus because he felt that Mr. Merrifield deserved an explanation as to why he had been stood down. He told SRR Bohus that his decision was based on the fact that it was a national security incident. He was aware that Mr. Merrifield had been removed from INSET and did not feel

it was appropriate for Mr. Merrifield or the RCMP to “force him back into the situation.” He believed that Mr. Merrifield “was not the appropriate resource”.

[328] Insp. Van Doren recalled a conversation with Supt. Proulx on the same day. Supt. Proulx came into his office and stated that Sgt. Penny had told him the previous night that Mr. Merrifield believed that the decision to exclude him from the SOC was workplace harassment. Insp. Van Doren stated that his discussions with Insp. Jagoe did not have any bearing on his decision that Mr. Merrifield should not report to the SOC.

[329] The inquiry about Mr. Merrifield’s working at the SOC would not normally have come to Insp. Van Doren’s attention. Generally, he did not make decisions as to who manned the SOC but Sgt. McIntyre had called him. It was unusual for someone to request staffing advice from him. Insp. Van Doren said he knew that Mr. Merrifield had been removed from INSET but he did not know how that information had come to him. He stated that probably Insp. Jagoe or Supt. Proulx told him.

[330] Mr. Van Doren stated that he received an email from SRR Bohus on December 14, 2005 in which he requested a meeting with Supt. Proulx, the C.O. and himself to clear the air. In the email, SRR Bohus stated:

I also believe it prudent at this time to request a meeting between yourself, Supt. Proulx, the C.O. and the SR/OPS officer with myself and my client to clear up once and for all any misinformation that might be floating about in regards to my client’s past political activities. In my view, there has been a great deal of innuendo that is circulating about and I strongly believe we have to have a roundtable discussion to clear the air once and for all.

[331] Insp. Van Doren sent an email to SRR Bohus in response on December 19, 2005. He stated:

I was managing an “O” Division response to a N.S. incident that had the potential for serious consequences for Canada and her citizens.

As a line officer O INSET, I was aware the Constable Merrifield was recently transferred from the O INSET (TAG) site. That decision was based on concerns about his suitability to carry out O INSET work. Supt. Proulx as the line officer for CID was dealing with that aspect.

Further to my responsibility to manage the O INSET response to the above noted N.S. incident, I directed that Constable Merrifield be advised not to report for duty at the SOC. My decision was based on the need to select the most appropriate resources for that assignment. I concluded, based on the information available at the time, the Constable Merrifield was not the most appropriate resource.

As regards your request to arrange a meeting with division senior management, that request should be directed to Supt. Proulx, as Constable Merrifield’s line officer, for his consideration and response.

[332] Insp. Van Doren stated that he was not asked to attend a meeting with Mr. Merrifield after this.

- [333] Even though Supt. Proulx's memo to Mr. Merrifield dated September 28, 2005 resolved all outstanding issues, no one ever told Insp. Van Doren that there were no concerns about Mr. Merrifield.
- [334] Mr. Proulx stated that he had a conversation with Mr. Merrifield about his being stood down from the SOC. Mr. Merrifield was concerned and wanted a reason for why this had happened. Mr. Proulx stated that he had spoken with Insp. Van Doren about it. Insp. Van Doren told him that he was aware that Mr. Merrifield had been pulled from TAG and had said that he would wait until that was resolved before he put him back in the SOC.
- [335] Mr. Proulx stated that he did not tell Insp. Van Doren that the election and radio program issues were resolved because he did not know whether Insp. Van Doren was aware of them. Insp. Van Doren never asked him about Mr. Merrifield's working at INSET or at the SOC. Supt. Proulx only learned of Mr. Merrifield's callback from the SOC after it happened. Mr. Proulx said that he did not tell Insp. Van Doren that the matter was resolved because there was still a Human Resources question as to where Mr. Merrifield was going to be posted. Insp. Van Doren thought the matter was not resolved and Supt. Proulx did not correct him.
- [336] C/Supt. Mazerolle recalled Insp. Van Doren's briefing him about standing down Mr. Merrifield from the SOC. The reason was something about a conflict of interest. By that time, C/Supt. Mazerolle had read Supt. Proulx's September 28, 2005 memo to Mr. Merrifield. He did not tell Insp. Van Doren that Mr. Merrifield had done nothing wrong. He did not make inquiries as to what the conflict was. He did not want to know why Mr. Merrifield was stood down from the SOC. Insp. Van Doren had made the decision. C/Supt. Mazerolle did not question it. He was not aware of the information Insp. Van Doren had when he made the decision.
- [337] C/Supt. Mazerolle stated that a couple of days later, Insp. Van Doren told him that he had been questioned about his decision by SSR Bohus and he gave him the reason for it. C/Supt. Mazerolle did not ask about the reason. The issue had been addressed by Insp. Van Doren and he had confidence in his abilities. C/Supt. Mazerolle stated that even though the SRR had spoken to him about concerns with respect to Mr. Merrifield and he knew that Mr. Merrifield had been stood down from the SOC, he was not concerned. He stated he had no contact with Mr. Merrifield. The decision had been made by others. Even though he knew that Mr. Merrifield had been cleared, he did not inform Insp. Van Doren.
- [338] C/Supt. Mazerolle had the authority to intervene in a decision made by a Superintendent who reported to him, when that Superintendent was within his authority to make the decision. He could have told Insp. Van Doren that Mr. Merrifield was cleared of conflict issues.
- [339] There is no logical explanation for the fact that both Supt. Proulx and C/Supt. Mazerolle neglected to tell Insp. Van Doren that all concerns about Mr. Merrifield had been resolved a month earlier. Mr. Proulx said that a decision still had to be made about Mr. Merrifield's transfer. This was an excuse. The transfer was an administrative matter resulting from Supt. Proulx's decision that Mr. Merrifield could not work in TAG. It had no bearing on whether Mr. Merrifield was suitable to work in the SOC. C/Supt. Mazerolle chose to ignore the matter. He knew that Supt. Van Doren had made a decision based on incorrect information. C/Supt. Mazerolle was indifferent. Both Supt. Proulx and C/Supt. Mazerolle had opportunities to set the matter straight but they neglected to do so. They allowed the perception of Mr. Merrifield's tarnished reputation to continue.
- [340] Supt. Jagoe stated that in the early fall of 2005, SRR Bohus called him one day. He asked him whether he would accept Mr. Merrifield as a transfer to INSET from TAG. Supt. Jagoe

stated that he could not accept Mr. Merrifield as a transfer because of his involvement in the media. He stated that INSET had to be able to investigate all threats to national security. It was clear to him that he needed people to follow procedures and protocols in everything they did. At that time, he was thinking only about the radio interview that Mr. Merrifield had done. Supt. Jagoe stated that this was Supt. Proulx's decision to make as he was Mr. Merrifield's line officer.

[341] Supt. Jagoe stated that he did not typically use words such as "Merrifield had burned his bridges"; however, SRR Bohus could have understood him to say that. Mr. Merrifield's public speaking and political activities caused him to have this view; however, he did not consider his refusal to have Mr. Merrifield at INSET as discipline. When he spoke to SRR Bohus in the fall of 2005, he did not know what had become of his concerns with respect to the nomination meeting. He assumed that they had been dealt with. He also assumed that the matter regarding the Pritchard radio show interview was concluded. Nevertheless, he remained concerned enough to tell SRR Bohus that he was not going to have Mr. Merrifield back at INSET.

[342] Supt. Jagoe stated, "he did not demonstrate to me that it was appropriate for him to come back." Supt. Jagoe stated that he made this determination without knowing the outcome of any steps that Supt. Proulx might have taken. Even as of the date of his testimony, Supt. Jagoe's view of Mr. Merrifield's appearance on the Pritchard show was that he went too far and disclosed sensitive issues. He knew that Supt. Proulx's memo to Mr. Merrifield dated September 28, 2005 did not result in any discipline.

[343] Supt. Jagoe stated that he knew Mr. Merrifield had been temporarily transferred to Criminal Investigations and ultimately, about six months later, that he was formally transferred to Customs and Excise under the command of Insp. Johnson. He was aware [v] that the Customs and Excise unit did some counter proliferation work. He knew that Mr. Merrifield had been the lead on one case that had an excellent result. This did not surprise Supt. Jagoe. Mr. Merrifield was a talented investigator. Supt. Jagoe stated that he knew that this type of work would require access to sensitive information. He was not aware that Mr. Merrifield's security clearance was ever reduced nor did he ask for it to be. He knew that the work in Customs and Excise touched on international security. The unit would prepare affidavits for search warrants and mutual legal assistance treaties. Members, including Mr. Merrifield, would give evidence give at preliminary inquiries, trials and before administrative tribunals. He was not concerned about Mr. Merrifield's believability. Counter proliferation investigations fell under Border Integrity which was under the command of Insp. Van Doren. Supt. Jagoe stated that he never advised Insp. Johnson about his concerns regarding Mr. Merrifield's judgment. He never advised Insp. Andy White, who was in charge of Serious Organized Crime, of his concerns about Mr. Merrifield's judgment. He knew that Insp. White ran counter proliferation investigations.

[344] C/Supt. Mazerolle recalled that SRR Bohus had approached him about Mr. Merrifield. He said that senior management was missing an opportunity because Mr. Merrifield was a good member and should be moving up the ranks. C/Supt. Mazerolle recalled that SRR Bohus mentioned this a number of times while Mr. Merrifield was still at TAG. When he went to Customs and Excise, SRR Bohus mentioned it. He was a strong supporter of Mr. Merrifield. SRR Bohus said that Mr. Merrifield was not happy with how he was being treated.

[345] In October, 2005, Supt. Proulx sent an email to Insp. Brine in Human Resources to request a staffing interview so that Mr. Merrifield could be re-posted. He stated, "I am convinced at this moment that Cst. Merrifield cannot work within the TAG...it would be in the best

interest of the RCMP and of Cst. Merrifield if he was assigned to other duties not related to “politics”.”

- [346] Mr. Merrifield stated that staffing interviews are usually conducted to determine a member’s interests and abilities and to provide an opportunity for the member to learn about vacancies. A recommendation is made. Everyone knew about his participation in the 2004 federal election. He had been posted to TAG less than three months after he stood for election. He believed that his work relating to Liberal Prime Minister Martin after he had stood for the election showed that he did not have a conflict.
- [347] Mr. Merrifield had a personnel interview with Sgt. McCann on November 7, 2005. He stated that he wanted to work on the investigative side of INSET which had vacancies. In fact, a workshop was held on October 18, 2005, the topic of which was how to attract and retain qualified members to work in national security because there were many vacancies. There were retention issues. Working on the investigative side of INSET would involve investigating terrorists. Mr. Merrifield’s previous political activities would have been irrelevant because the work did not involve VIPs with political affiliations. Mr. Merrifield would not consider a posting that required moving because he had a young family. Sgt. McCann told him that he would make an inquiry “through the back door” about the possibility of Mr. Merrifield’s working at INSET.
- [348] When Supt. McCann began the staffing interview, he knew that Supt. Proulx had decided that Mr. Merrifield could not work in TAG. He could not recall whether he contacted Insp. Jagoe to see if Mr. Merrifield could be transferred to INSET. His notes dated November 23, 2005 show that he had a conversation with Insp. Jagoe and that Insp. Jagoe was familiar with Mr. Merrifield. His notes also state, “INSET inquiry.” Based on this, Supt. McCann stated that he likely made the inquiry.
- [349] Mr. Merrifield stated that he believed he was well qualified to do investigative work at INSET. His performance evaluation that covered the period from August 1, 2004 to August 1, 2005 was drafted by A/Sgt. Crane. Insp. Jagoe and Supt. Proulx added comments. They were extremely positive. He had been doing community outreach because he thought that the RCMP was relying on dated information. Mr. Merrifield explained that doing community outreach was essential if you wanted people to provide information. He attended various events outside of his shifts. He went to communities that he thought could provide the most useful information. He recruited sources. Some of this was an extension of the relationships that he had through politics. It allowed him to collect information from a wider spectrum of human sources. His performance evaluation noted that his planning and organization skills were good and that he had worked a lot of voluntary overtime on Operation Bridgeout to the disadvantage of his family. Regarding his interpersonal skills, he was noted to be a popular and respected member of INSET. A/Sgt. Crane signed this evaluation on September 12, 2005.
- [350] Mr. Merrifield stated that he was told Insp. Jagoe would not have him back at INSET, given the security level required for their work. This made no sense because Mr. Merrifield had the top secret security level which was required to work at INSET. No additional security level would have been required to do the work.
- [351] Mr. Merrifield said that “unofficially, the wall had gone up.” He stated that Sgt. McCann made every effort for him. He was candid. A transfer to Customs and Excise, which had a vacancy, was going to happen whether Mr. Merrifield wanted it or not. There was nothing else.
- [352] Supt. McCann disagreed that if Insp. Jagoe had agreed to have Mr. Merrifield at INSET, he likely would not have been transferred to Customs and Excise. He stated that Customs and

Excise was an appropriate fit for Mr. Merrifield.

- [353] This is completely illogical. Supt. McCann knew that Mr. Merrifield's interest was in national security work. He had received high praise for the work that he had done at TAG. The fact that Supt. McCann contacted Insp. Jagoe shows that Supt. McCann thought that transferring Mr. Merrifield to the investigative side of INSET made sense. It had a number of vacancies.

The Promotion Process

- [354] Insp. MacKinnon was the Promotion Co-ordinator. He introduced a new promotion system in 2006. The new promotion system had five stages: 1) a job simulation exercise exam (JSE exam), 2) line officer/supervisor support, 3) advertisement, 4) validation/competency and 5) line officer selection. Insp. MacKinnon explained that the job simulation exercise JSE exam would typically be held in February. Usually in November of each year, there would be a publication alerting members interested in promotion regarding when the next JSE exam would be held. It was a voluntary system. Members had to identify their interest to Insp. MacKinnon's office regarding which exam they wanted to write and state how many years of service they had within the RCMP.
- [355] Sometime in 2005, a notice went out entitled "NCO Promotion Exams Job Simulation 2006." Insp. MacKinnon stated that this would alert members that they had to register to write an exam. Members had to have seven years of service by April 1, 2008 before they could write the JSE exam in 2006. This was because the RCMP adopted a two year cycle for writing the exam. Members were allowed to write the exam without having to wait for the two years if they would have the amount of service before the expiry of the two year period.
- [356] Mr. Merrifield expressed an interest in writing the Corporal exam. He sent an email to Insp. MacKinnon's office dated December 8, 2005 to register to write the JSE exam in February 2006.
- [357] Insp. MacKinnon explained that a member who was interested in writing the JSE exam would submit a competency resume. For example, a position might require the ability to develop resources and obtain judicial authorizations. Candidates would have to supply examples of their work in that area. If appropriate, these examples would be validated as sufficient for the requirements of a promotion.
- [358] Various job vacancies with required ranks and relevant criteria were listed on the Force's intranet. If Mr. Merrifield wanted to apply for one of these jobs, he would have to pass the JSE exam and submit a package outlining his various competencies to show that he had the ability to do the job. Then, the application would be forwarded to the line officer for selection. Insp. MacKinnon stated that initially, only three validated candidates were forwarded. The line officer would determine which one was the best for the position.
- [359] Under the new promotion system, the line officer who had the vacancy would be the person to select the best candidate for it. If the line officer felt that there was any conflict, he could ask another line officer to make the selection. That would be up to him or her.
- [360] If Mr. Merrifield had wanted to move into a promotion in INSET in 2006, he would have had to go to the line officer of INSET to be selected. This was Insp. Jagoe. If Mr. Merrifield was in one position and wanted to go into another, there was a way to do it without a staffing interview but it was not the correct process. A secondment could have accomplished this back in 2005 and 2006.

Loss of Income due to Delayed Promotional Opportunities

- [361] Mr. Merrifield stated that he wanted to write the JSE exam as soon as possible. He obtained some practice exams to help him prepare. He explained that once he passed the JSE exam, he would receive a four percent pay raise to the level of a senior Constable even if he was not yet promoted.
- [362] Mr. Merrifield explained that he was not eligible to write the exam until his seventh year of service. He had to write it to be promotable in his eighth year. Mr. Merrifield provided a list of his competencies up to December 2013. Effective April 30, 2009, he had the following competencies: “prepare/present testimony; develop/manage human sources; obtain judicial authorizations; conduct invest-general; concern for safety; and records/information management”. As of December 16, 2013, he had additional competencies: “legis-no specific context and legis-border integrity-IBET”. Competencies are rated on a scale from 1 to 4. Mr. Merrifield’s rating for prepare/present testimony was rated two. All of the rest were rated three. In addition, Mr. Merrifield had firearms training. He was a top level marksman.
- [363] Mr. Merrifield was unable to write the JSE exam in 2006 because he was off duty sick. He claims that as a result, he has suffered a loss of income. If he had been able to write the exam, he should have been promoted to Corporal effective July 1, 2006. Instead, he was actually promoted to Corporal on July 1, 2009. Similarly, if he had been promoted to Corporal on July 1, 2009, he should have been promoted to Sergeant effective July 1, 2008. Instead, he was actually promoted to Sergeant on March 1, 2014.
- [364] Stephen Raine was the chair of the National Staffing Committee for the RCMP. He is now retired. He was qualified as an expert in the RCMP’s hiring process, including the means by which potential candidates demonstrate their credentials and methods by which potential candidates are identified and qualified in relation to promotions. A Statement of his Expert Opinion dated May 8, 2014 was filed.
- [365] Mr. Raine was provided with a list of twelve job postings for Corporal positions for the period April 2007 to January 2013. He was also provided with a list of nine job postings for Sergeant positions for the period April 2007 and January 2013. These are found in Appendix 1 of his Statement of Expert Opinion.
- [366] Mr. Raine was asked to make the following assumptions:
- a. Mr. Merrifield would have applied for these positions had he been able to;
 - b. Mr. Merrifield would have had the qualifications set out in his NCO application dated November 2013 with the exception of rank when he applied for the Corporal positions;
 - c. Mr. Merrifield would have had the qualifications including the rank of Corporal when applying for Sergeant positions;
 - d. Mr. Merrifield would have applied for each of the positions identified;
 - e. The job summary, job requirements and competency profile for each position were as set out in each of the Corporal and Sergeant postings; and,
 - f. Mr. Merrifield was not subject to any Code of Conduct investigations.

[367] Mr. Raine was asked to provide his opinion regarding whether Mr. Merrifield would have been qualified for the above noted positions. He was not asked to provide an opinion as to whether Mr. Merrifield “would have been awarded the position but simply whether, all else being equal, he would not have been disqualified.”

[368] Mr. Raine’s expert opinion, set out on page 4 of his Statement of Expert Opinion, is:

Based on the items I received, I am satisfied that Peter Merrifield had all the necessary qualifications and Competencies required to perform the positions as set out in Appendix 1 and that, providing his *[sic]* submitted his application on time, and to the right location and with the assumption that he was not under any discipline investigation or formal sanction, he would have been able to compete for the positions noted.

[369] Mr. Raine noted that he could not make an assessment of whether Mr. Merrifield would have been successful in his application for any particular position because he did not have access to the packages of other applicants who applied for those positions. Nevertheless, he stated that Mr. Merrifield’s application would have been competitive.

[370] Ian Wollach is a member of the Canadian Institute of Chartered Accountants and is designated as a specialist in forensic and investigative accounting. He was qualified as an expert in quantifying damages. His Income Loss Report regarding Mr. Merrifield dated March 24, 2014 was filed.

[371] Mr. Wollach stated that initially, he was provided with certain documents including a series of Mr. Merrifield’s T4 slips, the RCMP pay scale and Mr. Merrifield’s pension statement. He was asked to determine Mr. Merrifield’s income losses due to delayed promotional opportunities. In doing so, he made certain assumptions that are set out on pages two and three of his report. They are the following:

- a. Mr. Merrifield’s income losses commence effective July 1, 2006 (when he should have been promoted to a Corporal), and cease as of March 1, 2015 (the projected date he will reach the top pay step on the salary scale for Sergeants);
- b. The difference between his post-incident earnings (per his T4 slips) and his annual salary (per salary scales provided) is assumed to be additional income earned primarily through overtime opportunities;
- c. his pre-incident earnings should be determined as the sum of his annual salary and estimated overtime income; and,
- d. His pre-incident overtime income was estimated assuming he would have worked the same amount of overtime as he did in the past (for example, in 2011, his overtime income as a Corporal was estimated at approximately 11.7% of his salary, and therefore, we assume his pre-incident earnings as a Sergeant in 2011 should be 11.7% greater than his applicable salary).

[372] Mr. Wollach compared Mr. Merrifield’s pre-incident earnings (the amount he would have earned had he been promoted to Corporal on July 1, 2006 and to Sergeant on July 1, 2008) to his post-incident earnings (the amount he actually earned given his promotion to Corporal on July 1, 2009 and to Sergeant on March 1, 2014). A number of charts are contained in Mr. Wollach’s report showing how he considered the amounts set out in Mr. Merrifield’s T4 slips, the RCMP pay scale and Mr. Merrifield’s pension statement and how

he applied the above noted assumptions to calculate Mr. Merrifield's loss of income due to delayed promotional opportunities. His opinion is that Mr. Merrifield's loss is \$71,913.

Transfer to Customs and Excise - January 2006

- [373] Mr. Merrifield left Supt. Proulx's chain of command on January 16, 2006 when he was transferred to Customs and Excise.
- [374] Mr. Merrifield stated that from January to July 2006, he was on sick leave supported by his family doctor. He was suffering from stress, dizziness, nausea. He was angry and frustrated. He inappropriately lashed out at his family. He feared that he would lose his job. He was ill, depressed and scared. It was a very dark spot in his life. He turned in his service pistol. The RCMP Health Services unit did not challenge his need for sick leave.
- [375] Mr. Merrifield could not write the JSE examination.
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Mr. Merrifield's American Express Card

- [376] In January 2006, Supt. Proulx ordered a Part IV Code of Conduct investigation against Mr. Merrifield alleging disgraceful conduct regarding the use of his American Express (Amex) credit card. To understand the very serious allegations that Supt. Proulx made against Mr. Merrifield, a detailed review of the communications and events leading up to the investigation is necessary.
- [377] Mr. Merrifield explained that he was issued a RCMP covert Amex credit card in 2002 or 2003 when he was in the Air Marshalls program. These cards were "covertly backstopped" meaning that they could not be linked to the RCMP. If someone had possession of the card, he would not know that the user was an RCMP officer. Mr. Merrifield stated that as an Air Marshall, he would use the Amex card to purchase clothes if his luggage was delayed.
- [378] When Mr. Merrifield was seconded to INSET, he had to move to Ontario. Nevertheless, the statement for the Amex card continued to be sent to his former address in Saskatchewan. Accordingly, he was receiving delayed statements.
- [379] Mr. Merrifield stated that he had an outstanding balance on his card of approximately \$1,200. He acknowledged that ultimately, he was personally responsible for all the expenses incurred on the card. At that time, he had significant expenses on the card for travel and various items for Operation Bridgeout. Nevertheless, he was owed reimbursement for expenses and payment for overtime work. At one point, the gas card for police vehicles was not working. He used his Amex for gas. He had to use it once for gas for his personal vehicle when no police vehicles were available. Mr. Merrifield explained that he would fill out an expense report based on his receipts. It would be submitted to his supervisor for review and approval. Then the line officer would sign off. Then it would go to the pay office where a cheque would be issued for reimbursement.
- [380] Mr. Merrifield stated that he completed all of his expense claims and left them with A/Sgt. Crane before he was temporarily transferred to Criminal Investigations.
- [381] On November 7, 2005, Mr. Merrifield received an email from John Steeves, Manager of Accounting Services, stating that he had been sent a duplicate payment for certain expenses that he had submitted for a trip to Ottawa in the spring of 2005. Mr. Steeves described the

manner in which the administrative error had been made and said an account receivable would be issued to cover the overpayment.

- [382] Mr. Merrifield replied to Mr. Steeves on the same day, advising him that would be on two RTOs (Regular Time Offs) and would address the matter when he returned. He pointed out that he had not received payment for overtime claims submitted in June, 2005 exceeding \$1,400. He stated that the amount identified by Mr. Steeves was part of a claim that had not been paid in a reasonable time.
- [383] Mr. Merrifield stated that he spoke to a public servant in the RCMP and said that he would pay the balance if the card was going into default but he did not want to pay the amount from his personal funds when he was owed money.
- [384] Supt. Proulx sent an email to Mr. Merrifield on November 8, 2005. It referred to an earlier conversation between them on October 24, 2005. Supt. Proulx wrote:

In our first conversation, you made reference to two things that struct [sic] my attention:

1. You said that the "missing money" were [sic] from the expenses claims [sic] related to your trips to SSM regarding the training exercise "Rouge [sic] Tanker. You submitted two expense claims related to this. The first one was submitted on the 19 April for \$713.13. A cheque was issued on June 9. The second claim was submitted on May 18 and a cheque was issued on June 10 for \$722.30. So I take from this that by June 13th or 14th you had received both payment [sic] and should have cleared your Amex.
2. The second fact was that during our conversation of Oct. 24th when I brought to your attention the present mater, you stated that this was "all" resolved and that you had made payment two weks[sic] ago and that the cheque had cleared your bank account. When I dealt with Corporate on this issue the next day, they had your cheque in hand, which they had received a few days prior and it wasn't cashed as of yet.
3. Now, it appears corporate claims you have been inadvertently paid twice for the same claim in the amount of \$838.35. As you say, it is bizarre. I will ask Corporate to conduct a complete review/reconciliation of your Amex - 1393 accounts for the past two years in order to ascertain that you are treated fairly and that you do not over pay the RCMP.

- [385] Mr. Merrifield sent an email response to Supt. Proulx on November 10, 2005. It stated:

The claims were from Rogue Tanker (2) and TA Course Ottawa (1) so there should [be] a total of three cheques payable to me in addition to the OT.

As I stated previously two cheques were issued to Amex by my wife both in excess of \$1100.00 in order to clear the bill. The second cheque was ordered not to be issued by London and was reissued to the Receiver General and forwarded to John Steeves as per his request. The first cheque had indeed cleared and the second was sent

to John Steeves on the 13th of October by interoffice mail. At that point I believed the matter [was] resolved. You and I spoke on the 24th and I informed you of these details. As of the 24th I believed that I had no balance owing to Amex or the Receiver General and believed that both cheques had cleared. Upon arriving home [on] the 24th my wife checked on internet banking and the second cheque to the RG had not cleared some 11 days after being forwarded to London. I would have gladly informed you of this had you called me back...I appreciate that you are very busy and I am also aware that you were off sick but I believe that these details should clarify the issues that "struck your attention" and were available by the morning of the 25th.

I also believe that much of the confusion was caused by claims that were forwarded to the incorrect offices for signing by INSET. The TA claim went to London then back to INSET instead of to Ottawa causing a delay. The Rogue Tanker claim was sent by INSET to CSIS attn: the facilitator of the TA course who contacted me regarding the confusion and advising that he had not received the correct claim. The third claim which was a Rogue Tanker claim was the only one paid in a timely fashion. These three claims total nearly \$2,400.00 which was the amount owing on Amex.

I will complete a review from my end as well which should provide a clearer picture of what the status of payments is. At the end of the day the Amex should be clear and the expense issue is being resolved.

[386] Supt. Proulx sent another email to Mr. Merrifield dated November 10, 2005. It stated:

You are absolutely right, there were three claims (2 for Rouge [sic] Tanker and one for a course in Ottawa) totalling over \$2300. I also noticed that one claim took over 52 days to be resolved, however all those payments were made from the RCMP to you prior to mid-June 2005. Therefore, your Amex should have been cleared around the end of June 2005, not in October 2005. It appears [sic] that you have had an outstanding balance with Amex prior to those claims, hence the reason I asked for an audit of your expenses/Amex card payments. Once corporate have [sic] completed this review, I will bring the finding to your attention and we can discuss then what happened.

[387] Mr. Merrifield replied on November 10, 2005 as follows:

One other factor to mention was that when I was transferred to INSET from CACPP my AMEX bill did not follow for a couple of months, the same thing happened in June when I was transferred from TAG to TNDICIS and despite changing the address it still goes to the INSET building to date.

[388] Mr. Merrifield stated that he understood that Supt. Proulx was going to have a two year audit done. He was waiting for Supt. Proulx's response.

[389] On January 4, 2006, Mr. Merrifield received an email from Mr. Steeves which said, "the A/R issued to you for the duplicate payment you received is now 30 days past due. Please advise of your intentions."

[390] On January 5, 2006, Mr. Merrifield responded, "I was advised that a two year audit/review was under-way of my 1393's and Amex as ordered by Supt. Proulx. Awaiting results." Mr. Steeves responded on the same day and said:

The review was completed and Supt. Proulx was advised. I suspect that if you have not heard any different then things were fine. Supt. Proulx is aware of the duplicate payment.

I have also CCd him on this message.

It was during this review that the duplicate payment was discovered. I have a copy of the RG cheques and the claims involved if you wish to see then. It would appear that the same claim was faxed twice to Ottawa in error but this was not caught by the DBA unit and payment was issued to you on both occasions.

The invoice issued to you is for the exact amount of the second payment. [Emphasis added]

[391] On January 5, 2006, at 12:07 pm, Mr. Merrifield sent an email to Mr. Steeves requesting the date that the audit was ordered and the date when it was completed. On January 5, 2006 at 12:10 pm, Mr. Steeves sent an email to Supt. Proulx stating, "How do you wish me to handle this?"

[392] On January 5 at 3:33 pm, Supt. Proulx sent an email to Mr. Merrifield stating:

I sent you an email on November 8th and informed you I was requesting a review of your Amex...I sent the request to John Steeves the same day...He gave me a reply at the end of November...it did not provide the information I wanted and asked John Steeves this morning for further clarification. As a manager, I have to be certain that your Amex is used in relation to your work and not for personal expenses. In a nut shell, if you take a cash advance, there should be an expense account submitted shortly thereafter to offset the use of the money. If not then why was the cash advance used for...Once John Steeves completes this review I will address his findings with you accordingly.

[393] On January 5, 2006 at 5:07 pm, Mr. Merrifield sent Supt. Proulx an email which stated:

My request of John Steeves which has gone unanswered by him and now responded to by you is in relation to the following details.

Mr. Steeves stated in his e-mail to me that the audit he conducted revealed an overpayment. This overpayment was brought to my attention in writing on November 07 by Mr. Steeves. Your e-mail to me stating your intention to order an audit was not issued until Nov. 08. I am therefore confused as to how this audit found an overpayment before it had been ordered.

In your e-mail to me of Nov. 08, you stated that you ordered the audit to “ensure that I was treated fairly by the RMCP” and not overpay the RCMP. You also stated at that time that you would contact me with the results to discuss. It would appear that the audit was completed at the end of November. Your attached message today states a completely different reason for the audit.

My request today of Mr. Steeves was for Mr. Steeves. It was not “regarding your actions” sir it was to clarify dates of request and actions by Mr. Steeves office which I believe I am entitled to.

With regards to your message today I believe that you are already in possession of the information you are seeking. My AMEX balance at the time of the expense submissions was approximately \$2300.00. The amount of expenses submitted was approximately \$2300.00 I am now confused as to your reasoning explained today for the audit. It is an accusation of improper use of AMEX/Expenses? Is there reason to believe that my AMEX was used for anything other than RCMP business?

I will treat the lack of response by Mr. Steeves and his decision to involve you as the choice by him not to respond to my request. I must state for the record that I am very concerned by the actions of “O” division HQ personnel in my treatment over the last year. I have responded quickly and honestly to every request made of me. I have provided responses to every person who made requests of me in this matter and other more serious matters. I am more than disappointed with the treatment I have received, the lack of answers to my requests and the clandestine like investigation of my activities in and outside the RCMP. These investigations have been intrusive, harassing and stressful. They impacted negatively on my home life as well as my professional life.

I have until now attempted to deal with matters informally and at the lowest level.

- [394] Supt. Proulx replied on January 6, 2006 and stated, “If you have any concerns, you know where I am and I have never refused to meet with you and whoever you wanted to bring along.”
- [395] Supt. Proulx did not tell Mr. Merrifield that he had in fact prepared a memorandum to order a Part IV investigation to be carried out by Professional Standards.
- [396] Mr. Proulx stated that the first time he became aware of any issues regarding Mr. Merrifield’s credit card was on October 24, 2005. Claude Caron, Director General of Finance, sent a letter dated October 13, 2005 to Mr. Merrifield advising him that the outstanding balance on his Amex card had been paid by the RCMP pursuant to its agreement with Amex. Supt. Proulx received a copy of it. He understood from that letter that Mr. Merrifield had failed to make a payment on his Amex corporate card in the amount of \$1,223.74 and that the RCMP had cancelled his card. The RCMP had paid the Amex balance and now Mr. Merrifield was supposed to reimburse the RCMP by way of a certified cheque to the Receiver General. Mr. Proulx understood that the Amex balance was 90 days past due.

[397] Mr. Proulx stated that he called Mr. Merrifield to speak to him about it. His response was that everything had been resolved two weeks ago. His cheque had been cashed. His explanation was that the Amex account was not paid on time because the RCMP had not paid him some expenses on time.

[398] Mr. Proulx stated that the next day, he went to see John Steeves because he figured that if the RCMP was late in paying Mr. Merrifield and there was a mix-up in the payment of the credit card, maybe the Amex card should not have been cancelled. Mr. Steeves advised Mr. Proulx that he had just received Mr. Merrifield's cheque the previous day. Mr. Proulx stated that he was surprised by this because when he spoke to Mr. Merrifield, he said that the cheque had been cashed. There was an obvious inconsistency. Mr. Proulx asked Mr. Steeves to check to see if the RCMP had been late in paying Mr. Merrifield and if so exactly how late the payment was.

[399] Mr. Proulx recalled receiving a copy of an email that Mr. Merrifield had sent to Mr. Steeves. It stated:

Following up on our dealings regarding Amex. I had spoken with Bev Scott in Ottawa prior to the RCMP paying the AMEX. When the period of time had expired and the Force paid Bev was not working on that Monday and I had directed my wife to pay Amex on that date before the Force would have to.

You then forwarded me an e-mail to Not pay Amex but instead forward a cheque to your office. I did that on the week of October 10-14 on the 13th to ensure it would leave Newmarket by interoffice mail. It was sent to your attention. I received a phone call from Supt. Proulx on October 24 advising that he had been contacted by Ottawa to look into this. A review at my bank on the 24th October did not show the cheque clearing. Have you received it and is this matter concluded?

[400] Mr. Proulx received a copy of an email dated October 28, 2005, which was Mr. Steeves' reply to Mr. Merrifield that the cheque had been received.

[401] Mr. Proulx recalled that he next saw Mr. Steeves on November 2. Mr. Steeves stated that he had sent an email to Mr. Proulx which showed that Mr. Merrifield had no outstanding expense account and that everything had been paid for. Then Mr. Steeves sent Supt. Proulx an email dated November 2 and stated that Cst. Merrifield had been paid a double payment of an expense account and that the amount was \$800. (The actual amount of the double payment was \$838.35.) Mr. Proulx stated that Mr. Merrifield had not submitted any expense accounts after the May 8 to 12 period, for Operation Rogue Tanker. Mr. Merrifield had submitted a claim in May for the week of April 11 to 15 but the RCMP took 52 days to pay this amount. Mr. Proulx stated that this was unusually long. It was paid in June. He called Mr. Merrifield and told him he had received some information from Mr. Steeves who had uncovered double payment for an expense account. Mr. Merrifield stated that he did not recall receiving two cheques for the same expense and said he would look into it.

[402] Mr. Proulx stated that he thought all of a sudden there were a lot of inconsistencies in Mr. Merrifield's story regarding whether the cheques had been cashed and about the fact that the RCMP had paid him late. Mr. Steeves had sent Mr. Merrifield an email dated November 7 notifying him about the duplicate payment. Mr. Merrifield responded to Mr. Steeves stating that he had not received payment for an overtime claim that he had submitted in June which exceeded \$1400. Mr. Proulx stated that there was no relationship

between overtime and payment of expense accounts. They come from different pockets of the RCMP. Mr. Proulx responded to Mr. Merrifield by email dated November 8, 2005. In that email, he said that he was going to ask the corporate department to conduct a complete review reconciliation of Merrifield's Amex account for the past two years in order to ascertain that Merrifield was treated fairly and that he did not overpay the RCMP. Mr. Proulx stated that there were a lot of inconsistencies with respect to Mr. Merrifield's account. He believed that Mr. Merrifield had not recognized the fact that he had received double payment even though Mr. Steeves had been clear with both cheque numbers. Mr. Proulx stated that his only purpose at that time in requesting the complete review reconciliation for the past two years was to make sure that Mr. Merrifield was not being overcharged and that he received the money that he was entitled to receive. Mr. Proulx forwarded the email to Mr. Steeves asking him to do the review.

- [403] Mr. Proulx said that Mr. Steeves replied to him on November 28 and said everything was fine. Mr. Proulx sent an email to Mr. Steeves dated December 1, 2005 in which he stated that Insp. Josey (Mr. Merrifield's supervisor when he was in the Air Marshall program) had authorized a payment from relocation funds. Accordingly, the issue was fully resolved as of December 1, 2005. As of November 2, 2005, he knew that it was not an account receivable. In his email to Mr. Steeves, Mr. Proulx said if Mr. Steeves had not uncovered any irregularities, then he was satisfied.
- [404] Mr. Proulx stated that subsequently, Mr. Steeves came into his office and said that there was something else that he did not want to put in writing. There were two back-to-back \$500 cash advances and a gas purchase. He was concerned that there was no matching expense for it. Mr. Proulx stated that this might be indicative of kiting or fraud, serious criminal offences. He thought Mr. Merrifield had deceived him about the duplicate payment. He told Mr. Steeves to stop the work that he was doing and that this would be a matter for a formal Part IV Code of Conduct investigation.
- [405] He described the internal investigation as simply a method for getting to the bottom of the issues and to give both parties an opportunity to set out in writing their sides of the story. Mr. Proulx recalled speaking to S/Sgt. Babinko who was in charge of internal investigations. In December, Mr. Proulx started to prepare a memo to order the Part IV investigation. If a cash advance had been taken, there should be an expense account to offset the use of the money. Mr. Proulx stated that prior to that, Mr. Merrifield had not been informed that there was a concern regarding potential cash advances without proper expense claims.
- [406] Mr. Proulx stated that he was not prepared to tell Mr. Merrifield about it because he was just finalizing the memorandum to order the Part IV investigation. Mr. Proulx stated that he was hinting to Mr. Merrifield that some cash advances were uncovered.
- [407] Mr. Proulx had no notes of the date that Mr. Steeves came to see him or of any details of the conversation with Mr. Steeves.
- [408] Mr. Proulx agreed that the information that he obtained later with respect to the cash withdrawals showed that they were not taken back-to-back. In fact the dates were September 22, November 23 and November 30, 2005. Mr. Proulx did not recall the purpose of September 22 cash advance. He did not receive any other dates regarding the cash withdrawals.
- [409] His note dated 2006-01-06 states:

Cash adv Sept 22nd

SW 2004
SW Nov 23th
Nov 30th
?
A/R
\$3637.66

- [410] Mr. Proulx stated that he did not investigate the matter himself because he might have been required to make a decision on discipline and he had to stay independent.
- [411] Mr. Proulx stated that at no time did he ask Mr. Merrifield for an explanation regarding the cash withdrawals. He did not know that expense claims had been submitted for two cash withdrawals relating to Mr. Merrifield's eye surgery and that the surgery was required for an injury on the job.
- [412] Mr. Steeves sent an email to Cpl. DuPuy dated January 9, 2006 requesting copies of documents supporting payment requests. It states, "the issue I am dealing with is somewhat urgent." Mr. Proulx stated that he told Mr. Steeves to do nothing further after January 5, 2006 because he had already sent the memorandum ordering the Part IV investigation. (The memorandum was dated January 6, 2006 but he did not sign it until January 13, 2006.) Mr. Proulx had no explanation for why Mr. Steeves would be contacting Cpl. DuPuy on January 9, 2006. Mr. Steeves had completed his review by January 5, 2006. Mr. Proulx had told Mr. Merrifield that he would get back to him after the review was completed. He did not do this.

Code of Conduct Part IV Investigation – Preceding Events

- [413] Mr. Proulx sent a memorandum to S/Sgt. Wally Babinko dated January 6, 2006 ordering the Part IV investigation. He acknowledged that in the memorandum, he raised the issue that the Amex account was over 90 days due but it had already been paid. He did not identify two cash withdrawals without offsetting expense claims. In the memorandum, he stated that several cash advances were suspected to be for personal reasons. He stated:

Cst. Merrifield is suspected of having contravened administrative policy concerning the use and payment of his Corporate American Express Card. As a result of his non payment [sic] and misuse of Corporate American Express Card he may have engaged in disgraceful conduct that could bring discredit to the Force contrary to Section 39(1) of the RCMP Act.

- [414] Mr. Proulx stated that he was reporting Mr. Merrifield for disgraceful conduct that could bring discredit to the force.
- [415] Mr. Proulx said that he had earlier told Mr. Merrifield to hold off paying the \$837 until he had a chance to investigate. A mistake had been made in an account receivable showing that it was outstanding but Insp. Josey had authorized payment. When he sent the memorandum, he knew that this was cleared up. Mr. Proulx stated that he was concerned that Mr. Merrifield's activities might constitute kiting and fraud. Cashing the second cheque was deceitful. He wanted the matter investigated. He felt Mr. Merrifield was deceiving him about the payments. Mr. Proulx did not ask Mr. Merrifield for a written explanation before he ordered the Part IV investigation. He stated that this was not a requirement in 2006. Mr. Proulx stated that he was not concerned that he had inaccurate information when he ordered the investigation. Mr. Steeves had given it to him.

- [416] Mr. Proulx had no explanation as to why Mr. Steeves was communicating with Cpl. DuPuy urgently on January 9, 2006. He said he did not know about it.
- [417] Mr. Proulx received an email from Mr. Merrifield on January 5 at 3:30, one day before the date of the memorandum. He knew that Mr. Merrifield had made a complaint about him.
- [418] Mr. Steeves explained that an Amex card would be issued to anyone in the Force who wanted one. No credit application was required because the card was protected against loss. The RCMP guaranteed payment.
- [419] Mr. Steeves stated that Mr. Merrifield sent an email to Lynn Huard dated August 3, 2005 with respect to his Amex account. In that email, he stated that he was not getting his Amex statements in time because he had moved to a different section. This was causing a lag of two to three months before he received the statements. There was an issue about his balance on the card. In the email he stated that he had paid \$1,000 a short time ago and that the balance was now around \$1,200.
- [420] Mr. Steeves stated that this did not resolve the issue because Amex does not allow outstanding balances. When you receive a statement, the entire amount is due. Mr. Steeves stated that the corporate Amex card could be used to pay for expenses related to travel, hotels, airfare, and car rentals. Cash advances could be taken for small amounts such as taxi fares. A member was required to keep the receipts and submit them with an expense claim. The card could not be used for anything else.
- [421] On September 16, 2005, the RCMP had issued an invoice to Mr. Merrifield indicating that his Amex account was 138 days past due in the amount of \$1,223.74. The copy of the invoice shows Mr. Merrifield's handwriting and states "cheque attached 2005/10/11" along with his signature. Mr. Steeves stated he did not know when Mr. Merrifield had received the invoice. On October 28, 2005, Mr. Steeves sent an email to Merrifield which stated, "cheque received." Mr. Steeves stated that he sent a copy of this email to Supt. Proulx.
- [422] Mr. Steeves stated that he carried out that review requested by Supt. Proulx and sent it to him along with an email dated November 2, 2005. In that email, he stated that his review showed that Mr. Merrifield had received a duplicate payment of \$838.35. An account receivable would be issued in the next few days to recover that amount. Mr. Steeves stated that two claims had been submitted by two different authorities for the same cost. This resulted in two payments of \$838.35 made on June 6, 2005 and June 21, 2005.
- [423] Mr. Steeves stated that he had never previously dealt with a situation where the entire balance on an Amex card was paid by the RCMP. He stated that late submission of expense claims and late processing of the claims can result in a card's going into arrears. Mr. Steeves said that there was no relationship between outstanding pay for overtime and a balance owing on an Amex card except that the card holder would have funds to pay the amount.
- [424] Mr. Steeves stated that he was not copied on the email that Supt. Proulx sent to Mr. Merrifield on November 8, 2005 which said that Supt. Proulx was going to ask Corporate to conduct a review.
- [425] Mr. Steeves sent an email to Mr. Merrifield dated January 4, 2006 commenting that the account receivable issued to him regarding the duplicate payment was thirty days past due and asking him to advise of his intentions. Mr. Merrifield responded on January 5, 2006 stating that he was awaiting the results of the two year review as ordered by Supt. Proulx. Mr. Merrifield stated he was not aware of the results or the outcome of the audit. He commented that if the amount was paid twice then he had no problem paying that amount

to the Receiver General. He requested some time to receive the outstanding overtime payment which would more than provide him with funds to cover the amount owed for the duplicate payment. Mr. Steeves did not have any concerns about this.

- [426] Mr. Steeves sent an email to Mr. Merrifield on the same day and said, "The review was completed and Supt. Proulx was advised. I suspect that if you have not heard any different then things were fine."
- [427] On January 9, 2006, Mr. Steeves sent an email to Cpl. DuPuy asking for copies of the supporting documentation for specific payment requests made by Mr. Merrifield. The email concluded as follows: "The issue I am dealing with is somewhat urgent so I am soliciting your earliest response." Mr. Steeves stated that he was not sure why he determined the issue to be urgent or why he was contacting Cpl. DuPuy after Supt. Proulx told him to hold off on pursuing the matter. He received the documents. They were placed in the file.
- [428] Mr. Steeves stated he received an email from S/Sgt. Babinko on January 19, 2006, about a Part IV investigation. Mr. Steeves said that this was the first time that he knew that a Part IV investigation had been ordered regarding Mr. Merrifield's use of his Amex card.
- [429] S/Sgt. Babinko requested Mr. Merrifield's Amex statements from January 2005 to January 2006, his expense statements for that time, any documents signed by Mr. Merrifield for the use of the card, and any related policy. Mr. Steeves provided all of this.
- [430] Six months later, Mr. Steeves received an email from Insp. Block dated July 31, 2006 regarding the duplicate payment. Supt. Proulx was being transferred and was discussing some outstanding issues with Insp. Block before he left his position. Mr. Steeves himself was also leaving the Division. Mr. Steeves replied the same day and stated, "There were some internal activities (code) being conducted and I was advised not to aggressively pursue this until that had been settled."
- [431] Mr. Steeves stated that he would not have told Mr. Merrifield that "things were fine" in his email dated January 5, 2006 if he had thought that there was a problem. If Supt. Proulx had told him that there was a problem, he would not have said this. He simply wanted the duplicate payment to be repaid. His review showed just some late payments. Everything was fine. Mr. Steeves pointed out that misuse and tardiness are two different things.
- [432] Mr. Merrifield sent an email to Mr. Proulx dated January 5, 2006, and asked whether there was an "accusation of improper use of AMEX/Expenses? Is there reason to believe that my AMEX was used for anything other than RCMP business?" Mr. Proulx responded by inviting Mr. Merrifield to meet with him if Mr. Merrifield had any concerns.
- [433] On January 6, 2006, Supt. Proulx finalized the memorandum and spoke to Supt. Trueman before sending it. This was the first Part IV investigation that he had ordered. He understood that it would be a fact-finding mission so that he could make an appropriate decision as to whether there should be discipline or whether Mr. Merrifield should simply be cautioned about how he should manage his matters. Mr. Proulx stated at that time that he was not certain that Mr. Merrifield had improperly used his credit card. He had doubts. He stated that this is what the investigation was all about.
- [434] Mr. Proulx stated that around this time, Mr. Merrifield was about to be transferred to a different unit. He did not know the date when this would occur. He had no further involvement in the credit card issue after he ordered the investigation.

- [435] Mr. Proulx stated he sent a briefing note to the Commissioner dated January 17, 2006. On page 2 under current status it states: "On 2006-01-13, after a review of Cst. Merrifield's use and mis-payment of his AMEX card, his line officer directed a Part IV investigation alleging that Cst. Merrifield has repeatedly used his Corporate Amex for personal reasons."
- [436] Mr. Proulx could not say why he stated January 13, 2006 in the briefing note when the memorandum to S/Sgt. Babinko was dated January 6, 2006. He thought maybe he had missed it. He believed he had signed the memorandum on January 13, 2006. Mr. Proulx agreed that his notes contained material errors regarding the dates of the withdrawals and the payments. He thought they were back-to-back withdrawals at the time. Now he knows that they were not. He agreed that Mr. Steeves had sent an email to Cpl DuPuy in which he said he required information on an urgent basis regarding Mr. Merrifield. This email is dated January 9, 2006. The briefing note dated January 17 states that the Part IV investigation was ordered on January 13, 2006. He agreed that the memo to S/Sgt Babinko ordering the investigation shows a receipt stamp date of January 18, 2006.
- [437] Mr. Proulx testified that shortly after ordering the Part IV investigation of Mr. Merrifield, he himself was engaging in disgraceful conduct that could have brought discredit to the Force.

The Investigation

- [438] Sgt. Dickinson testified that he was in the Complaints and Internal Investigation Section (CIIS), now called the Professional Standards Unit, in 2006. His duties at CIIS included carrying out Part IV investigations and occasionally doing an administrative review.
- [439] Sgt. Dickinson stated that a Part IV proceeding is initiated by a mandate letter. CIIS was asked to conduct a Part IV investigation into Mr. Merrifield's conduct. He was suspected to have contravened administrative policy with respect to the use and payment of his Amex card. Sgt. Dickinson was assigned to carry out the investigation on January 24, 2006.
- [440] He received a file that had been opened by S/Sgt. Babinko. It contained a few documents including a form 1624 that detailed the steps that had already been taken. S/Sgt. Babinko had made inquiries of John Steeves and Bev Scott in Ottawa, regarding the Amex user agreement. No agreement existed. The file also contained the policy regarding use of corporate credit cards, the mandate memorandum and a letter to Mr. Merrifield advising him that the RCMP had paid the outstanding balance on his Amex card.
- [441] The file was coded "XX82 Intern COM-RCMP Member". The occurrence date set out was October 13, 2005. Sgt. Dickinson stated that when the investigation started, there was nothing payable on the Amex card. Mr. Merrifield was hoping that Ms. Scott would alert him before the RCMP paid off the amount owing on card. The RCMP had paid the account before they alerted him. At no point did Mr. Merrifield say he would not pay the account. Mr. Merrifield was waiting for documents to confirm that he had received a double payment. This did not form part of the Part IV investigation.
- [442] Sgt. Dickinson stated that in the mandate memorandum, Supt. Proulx did not identify any specific transactions of concern nor did he set out a date range or a timeframe. From Sgt. Dickinson's perspective, when he conducted the review, regardless of whether there was a \$1 item or a \$10,000 item, it was within his purview to investigate it. In fact, Sgt. Dickinson reviewed Mr. Merrifield's expenditures and reimbursements back to 2004, one of which was \$6.00 for parking when Mr. Merrifield was in the Air Carriers program.
- [443] Sgt. Dickinson stated that a number of people could have known that this Part IV investigation had been ordered. They would include the line officer, likely the Conduct

Advisor, the C.O. through monthly reports and members in the CIIS. He stated that this group would be advised of the investigation. When he would go out to interview other people they would learn some of the details. Anyone he spoke to would know that he was from CIIS. He spoke to more than ten people in the course of the investigation.

- [444] Sgt. Dickinson's first step in the investigation was to contact Mr. Steeves and obtain copies of the Amex bills and the expense claims. When he met with Mr. Steeves, Sgt. Dickinson took notes on a scratch pad. They state, "While on travel status can use card for almost anything."
- [445] Sgt. Dickinson testified that he did not know that Mr. Merrifield's card was a covert American Express card. The statements showed that they were being sent to the INSET office after Mr. Merrifield had left there. The statement for February 14, 2005 is addressed to 345 Harry Walker Drive which is the Toronto North detachment. This was not Mr. Merrifield's address either. Sgt. Dickinson was aware that Mr. Merrifield's transfer from TAG was in progress. He agreed that if Mr. Merrifield had moved in May 2005 he would not be receiving the statements on time. There would be some delay. Mr. Merrifield told him that this had occurred.
- [446] Sgt. Dickinson stated that a version of s. 5.1.1 of the Financial Management Manual would have been in effect from January 2005 to 2006. It states that, "If suspected misuse of the DTC [Designated Travel Card] is identified, ask the employee to provide a written explanation for the transaction in question." The file that S/Sgt. Babinko had opened did not contain a written explanation for the cash withdrawals.
- [447] Mr. Merrifield stated that he contacted Sgt. Dickinson in May 2006. Sgt. Dickinson told him that there were concerns about cash withdrawals and expenses on the card that were not within the authorized use. There were ten cash advances totalling \$3,000. At this point, Mr. Merrifield did not have any information as to which cash withdrawals were in issue. He was off work on sick leave at the time. He said that he thought the cash advances were taken out to make human source payments.
- [448] Sgt. Dickinson followed up on the issue of human source payments by contacting Supt. Proulx and Sgt. Christiansen in London. He could not substantiate Mr. Merrifield's statement that he had taken money out to pay sources.
- [449] With respect to the cash withdrawals, Mr. Merrifield stated that RCMP members are not covered for health insurance by OHIP. Rather, they are covered by Blue Cross. On July 19, 2006, Mr. Merrifield sent a detailed, two page email to Supt. Dickinson setting out explanations for entries on his Amex account. For example, Mr. Merrifield explained that on July 3, 2005, he took a \$500 cash advance from Amex to attend a walk in clinic after complications from knee surgery. He did not believe that the clinic would accept Blue Cross. He needed an X-ray, crutches and a prescription. When he arrived at the clinic, it accepted his Blue Cross coverage so he returned the cash advance to his Amex account on July 29, 2005. On April 29, 2005, he took a \$300 cash advance to purchase supplies and props for Operation Bridgeout. On March 3, 2005, he took a \$300 advance for a TA course in Ottawa. He was not required to use it so he put it back into his Amex account. On October 5, 2004, he took a cash advance of \$400 which he paid to Bell Mobility because the RCMP had agreed to pay for three months of his plan. It was submitted and approved as an expense.
- [450] Mr. Merrifield stated that on September 22 and 23, 2004, he took a cash advance of \$500 on each day to pay for eye surgery which had been approved by the RCMP. The surgeon would not accept Blue Cross, only cash or a cheque. Mr. Merrifield stated that when he received a call the day prior to the surgery to confirm the time, he was advised that

payment had not been received from the RCMP. He spoke to Health Services. They said it was an oversight and that he should cover it. He would be reimbursed quickly. Mr. Merrifield stated that he could not cover the amount. He advised Health Services that he would use RCMP funds. They said that he should complete a 1393 expense report with the surgeon's receipt and he would be reimbursed as soon as possible. Mr. Merrifield stated that he took these steps. These amounts were submitted and approved by Health Services. He was reimbursed by Blue Cross and he applied the funds to his Amex account.

[451] In his July 19, 2006 email to Sgt. Dickinson, Mr. Merrifield stated:

I must state at this time that on at least two occasions in writing prior to the ordering of a Code of Conduct, Supt. Proulx stated clearly that he would meet with me to discuss the outcome of the audit. Had he done as he stated, you may have indeed been spared your valuable time in an agency which seems continually short staffed. As I have mentioned from the beginning, I have never used the RCMP Amex card for non-RCMP business. I maintain at least two or three personal credit cards and a personal line of credit for a total available credit limit to me exceeding \$40,000.

I wish to go on the record as very concerned about the actions of Supt. Proulx and Mr. John Steeves in relation to this audit and Code of Conduct. One day prior to the ordering of the Part IV by Supt. Proulx, I questioned Mr. Steeves about details relating to the audit. When a clear contradiction of the timing and reason surrounding the audit appeared between the facts claimed by Supt. Proulx and those of Mr. Steeves, this process went to Part IV. The inconsistencies between the facts presented in writing by Mr. Steeves and Supt. Proulx can only be described as "suspect" of Discreditable Conduct on behalf of the two aforementioned individuals. Mr. Steeves refused to answer my queries on January 05, 2006 and forwarded my e-mail addressed only to him on to Supt. Proulx for a response. Supt. Proulx responded on January 06, 2006 by ordering a Part IV investigation against me contrary to his twice written statement that he wished to discuss the findings of the audit with me first.

Please advise me of further requirements in this matter as I will continue to assist in any way that I can.

[452] Sgt. Dickinson stated that he contacted Crystal Cane at O Division Health Services to ask whether Mr. Merrifield had submitted a claim for the eye surgery medical expense. She confirmed that Mr. Merrifield had submitted an expense claim for \$900. Nevertheless, Sgt. Dickinson believed that this was not an authorized use of the Amex card.

[453] With respect to some other cash advances, Mr. Merrifield had stated that they were used to purchase gas. Sgt. Dickinson concluded that this was not an authorized use of the card.

[454] The expense claim for Mr. Merrifield's phone shows an amount of \$525 and that it was approved. Sgt. Dickinson agreed that if Mr. Merrifield took out \$400 to pay the account, he did not take out enough. It was definitely a business expense.

[455] Sgt. Dickinson stated that he requested a credit report on May 18. There was nothing remarkable on the credit report. It showed some short-term debt but payments were being made.

- [456] Mr. Merrifield stated that he met with Sgt. Dickinson on September 11, 2006. He could not provide an interview any earlier because he was off sick. In the interview, he provided emails to Sgt. Dickinson showing that he had been told to hold off on making Amex payments. Sgt. Dickinson commented that it was already overdue and had been paid by the RCMP.
- [457] Mr. Merrifield voluntarily provided personal financial information to show that he had significant credit available. He stated that it would be impossible to kite payments on an Amex card. Based on his professional experience, he believed that only credit cards that permit minimum payments can be kited.
- [458] Sgt. Dickinson confirmed that when he met with Mr. Merrifield, he produced his personal credit card statements which he was under no obligation to do. He was forthright and cooperative.
- [459] During the September 11, 2006 meeting, Mr. Merrifield provided a recorded statement. He listed the names of 11 officers because they would be able to support his explanation for certain expenses. Sgt. Dickinson stated that he did not speak with them. There was nothing preventing him from doing so. Sgt. Dickinson said there were unresolved issues in his mind but he did not see the point of making further inquiries.
- [460] With respect to the two \$500 cash withdrawals, Sgt. Dickinson did not make an inquiry past the Health Services document. He stated he did not obtain the document. The people at Health Services said it showed that the amount was paid in full. He did not make inquiries to see if it had been submitted to the insurer. Nothing prevented him from doing this except that he needed Mr. Merrifield's consent. He did not request it.
- [461] Sgt. Dickinson stated that he could not recall whether Mr. Merrifield told him that no one ever asked him for an explanation with respect to the cash withdrawals. He recalled Mr. Merrifield said that Supt. Proulx told him there would be meetings and discussions about it. It never happened to his knowledge. He saw nothing to document that a meeting had ever taken place.
- [462] When he had finished his investigation, Sgt. Dickinson prepared a final report. He stated that Mr. Merrifield's failure to pay the balance due on the Amex card had contravened the administrative policy regarding the use of the card. Mr. Merrifield said that he had not read the agreement and did not know that the balance had to be paid immediately.
- [463] Sgt. Dickinson suspected that Mr. Merrifield was kiting payments. His understanding of kiting was that a person would take cash from one card to make a payment on another. When a suggestion was made to him that a person could not kite an Amex card which required the full balance to be paid at the end of each month, Sgt. Dickinson stated that he did not fully understand the concept of kiting. On the last page of his report, he stated that Mr. Merrifield "allowed me to view the monthly statements from one of his two personal credit cards. This was done to address any suspicion that he was "kiting" money from one card to the next in order to make his payments. Sgt. Dickinson stated at the end of this report, "I noted that regular monthly payments were being made and there was no apparent correlation between the dates of the payments and any cash withdrawals take out against his AMEX card."
- [464] Sgt. Dickinson did not make any recommendation as to discipline as this was not his role. This was within the line officer's authority.
- [465] On September 20, 2006, Mr. Merrifield received a Performance Log from Sgt. Brown (who was acting officer in charge because Insp. Johnson was ill) with respect to the Part IV

investigation. It states:

1. Use of RCMP issued Designated Travel Card (DTC). I understand that at present you do not have a DTC, but should one be issued to you in the future, you are to comply with Admin Manual VII.11, which deals with Travel Credit Cards and Accounts. That the DTC will only be used for "Authorized Business Travel". That prior to your using a DTC, you will also read and sign the Agreement between you and the Government of Canada" card that comes with it. That you will pay the DTC account on time.
2. That you will maintain an up-to-date police notebook while you are in Customs and Excise.
3. That you will not use your personal motor vehicle for any RCMP business unless you have prior approval from your supervisor as per RCMP policy. That you will then forward an expense claim for mileage as per policy.
4. That you will promptly forward any expense claims and/or over time. That as with all members of the GTA, C&E, you require prior approval from your supervisor for overtime. That without this prior approval you risk not being paid for it.

Peter having had an opportunity to read one of your performance appraisals on another matter, I am sure you are an extremely capable member. Our section will only benefit from your transfer to it. I look forward to working with you in moving ahead from this point.

A copy of this 1004 will be forwarded to CIIS to be placed on file so that it may be concluded.

- [466] Mr. Merrifield referred to the Financial Management Manual that sets out policy regarding travel credit cards and accounts. Section 5.1.1 under the heading "Misuse of Designated Travel Cards" states "If suspected misuse of the DTC [designated travel card] is identified, ask the employee to provide a written explanation for the transaction in question."
- [467] Mr. Merrifield stated that he was never asked to provide a written explanation with respect to the transactions that formed the basis of the Part IV investigation ordered by Supt. Proulx. Mr. Merrifield said the action taken by Supt. Proulx was retaliatory. There was no reason for it. The cash withdrawals were legitimate and easily explained. The Part IV investigation was ordered 14 hours after Mr. Merrifield had said that he would be seeking process for harassment.
- [468] Mr. Merrifield testified that the investigation took 11 months. The Performance Log was served on him. The outcome was that the allegations were unfounded.
- [469] After he finished his report dated September 15, 2006, Sgt. Dickinson sent an email on October 19, 2006 to Supt. Hebert. He was responsible for the CIIS units. Sgt. Dickinson could not explain why he was communicating with Supt. Hebert with respect to the investigation. It appeared that he had read the file and was asking some questions. The initial email refers to, "Our phone conversation from a couple of weeks ago..." Sgt. Dickinson stated that there was nothing in his notebook about this phone conversation. It

was undocumented. He agreed that it would be out of the ordinary for him to be communicating with Supt. Hebert because Mr. Merrifield was not in his chain of command. Supt. Hebert would have been aware of the inquiry because Sgt. Dickinson had asked him questions about payments to human sources. Supt. Hebert was a senior officer to him.

[470] Sgt. Dickinson's email to Supt. Hebert dated October 19, 2006, reported on the outcome of the investigation. It states:

1. All AMEX expenses and cash withdrawals of consequence were confirmed as being work and/or medical related. For some minor expenses (\$20 – 25 range – meals, parking etc), there was no documentation or notes to support but the member did have a credible explanation.

2. Cst. Merrifield said that he had always been advised by supervisors (and believed them) that any expense that could be claimed on a 1393 could be charged on the AMEX card.

[471] Sgt. Dickinson stated that his final report was never produced to Mr. Merrifield until this action was commenced. In the ordinary course he would not have received it or seen it unless he accessed it through an Access to Information and Privacy (ATIP) request.

[472] In June 2006, in the middle of the investigation, Supt. Proulx was transferred to a different position at the police college in Aylmer.

[473] C/Supt. Mazerolle stated that he was aware of the Amex issue in late fall of 2005 because Supt. Proulx had told him about his concerns. He would meet with someone from corporate finance every four to six weeks to discuss any issues as his budget was 93% of the entire division budget. John Steeves had brought the Amex issue to his attention.

[474] C/Supt. Mazerolle stated that he did not take any action or provide any directions to Supt. Proulx, who he thought had things under control. He stated that Part IV investigations were not a regular occurrence. If any officer under his authority requested one, he would usually be advised of it. He could not override it. He agreed that a Part IV investigation is a more formal step against a member. Ordinarily, he would learn of approximately two Part IV investigations per year.

[475] C/Supt. Mazerolle stated that he believed that the allegations regarding the Part IV investigation relating to Mr. Merrifield's use of the Amex card were substantiated but not the allegations that Mr. Merrifield had failed to follow the related policy. He did not receive a copy of Sgt. Dickinson's concluding report regarding the investigation. He never spoke to Sgt. Dickinson. He was not aware of the outcome.

The Administrative Review - Ottawa Citizen Article January 17, 2006

[476] On January 17, 2006, one week before Sgt. Dickinson was assigned to the Part IV investigation, the *Ottawa Citizen* Newspaper published an article written by Gary Dimmock entitled, "RCMP Demotes Officer over Political Bid". The article quoted from Mr. Merrifield's performance evaluations. Mr. Merrifield stated that he did not know about the article before it was published.

[477] On January 19, 2006, Mr. Merrifield's lawyer at the time, Raj Anand of Weir Foulds, wrote a letter to Commissioner Zaccardelli stating that Mr. Merrifield had not provided any documents to the *Ottawa Citizen*. Mr. Anand also stated:

...Constable Merrifield is very concerned about the reprisals and harassment that he has suffered and continues to experience as a result of exercising his employment, statutory and [Charter](#) rights to engage in political activity...

- [478] C.O. Seguin wrote a letter to Mr. Anand dated February 24, 2006, in response to his letter dated January 19, 2006. He stated:

The RCMP is committed to providing a safe and respectful work environment, free of discrimination, offensive behaviour and harassment. In support of its commitment, it has several internal mechanisms that deal with any form of reprisals and harassment in the work place. These mechanisms are at Constable Merrifield's disposal and they can be accessed by him or, if he requires advice, counseling or assistance, through his Staff Relations Representative.

- [479] C/Supt. Mazerolle stated that he was familiar with the *Ottawa Citizen* article. He received an email from Insp. Petit, of the National Security Branch in Ottawa, before 9:00 a.m. on January 17, 2006 regarding a media summary. C/Supt. Mazerolle explained that senior executives within the RCMP received one of these every Monday about anything of concern in the media. He stated that Insp. Petit asked him to prepare a briefing note to the Commissioner regarding some of the statements in the article. Chief Supt. Mazerolle stated that he asked Supt. Proulx and others to prepare the response for the Commissioner. He received a draft and edited it. It is dated January 17, 2006. Among other things, it states:

All reasonable steps were taken to ensure that Cst. Merrifield was allowed to participate in the political process. However, it is clear that the Member has placed himself in a position of at least a perceived conflict of interest which jeopardizes the effectiveness and reputation of both the RCMP and the Member. As a result, measured and reasonable steps have been taken to minimize that conflict and ensure the effectiveness of the RCMP.

The media reports are fundamentally flawed in that they erroneously report that Cst. Merrifield has been demoted. In addition it must be noted that a Part IV investigation has recently been commenced and this may be a contributing factor.

- [480] C/Supt. Mazerolle stated that he spoke to District Commander Davis in the GTA district. Customs and Excise reported to him. C/Supt. Mazerolle stated that he sent him a copy of the article and discussed the requirement for an administrative review to determine how the information got the *Ottawa Citizen*.

- [481] Mr. Proulx stated that on January 17, 2006 C/Supt. Mazerolle called him. He wanted an explanation as to what had happened and where the information had come from. Paragraph two of the article stated, "Const. Peter Merrifield, who unsuccessfully sought the Conservative nomination in Barrie, Ont., in May 2005, was told months later that it would be in the best interests of the RCMP... if he was assigned to other duties not related to politics."

- [482] Mr. Proulx stated that he was concerned that someone had released an email. The comment was almost the same as the comment he had made in the email to Insp. Brine. That was a protected document and should not have been disclosed. Mr. Proulx stated that on January 17, 2006, he wrote a briefing note to C/Supt. Mazerolle on the topic. By this

time, he had already requested the Part IV investigation. He sent the first draft of the briefing note to C/Supt. Mazerolle. He and the C.O. made some changes to it.

- [483] C.O. Seguin stated that he had read the article in the paper. The statement that Mr. Merrifield was demoted was inaccurate. His rank was not lowered. Rather he received a lateral transfer. C.O. Seguin was aware that the transfer was going to happen.
- [484] C/Supt. Mazerolle stated that he signed off on the briefing note. He agreed that the policy that had been brought to Mr. Merrifield's attention was a new policy in September of 2006. When he prepared the briefing note, he was aware that Supt. Proulx had ordered a Part IV investigation.
- [485] After the briefing note went out, C/Supt. Mazerolle's next step was to discuss the matter with C.O. Seguin. He wanted to know how the information was leaked. C/Supt. Mazerolle stated he contacted District Commissioner Davis. They concluded that in an administrative review would be appropriate to determine the details. This was communicated to Insp. Johnson.
- [486] On January 25, 2006, Insp. Johnson sent a memorandum to CIIS requesting the administrative review into the "unauthorized release of Protected and Classified Information and/or documents relating to Cst. Peter Merrifield" which were quoted in the *Ottawa Citizen* article.
- [487] Sgt. Dickinson was assigned to conduct the administrative review in addition to the Part IV investigation. He explained that an administrative review involves a wide range of people and is an investigation of a situation to obtain the facts whereas a Part IV investigation is an investigation of an allegation against a member. An administrative investigation is not a disciplinary process.
- [488] The administrative review consisted of interviewing eight witnesses including Mr. Merrifield. He advised Sgt. Dickinson that he had given certain documents to four or five lawyers that he had consulted with respect to a civil suit. Sgt. Dickinson stated that these types of documents cannot be disclosed without going through RCMP policies. Mr. Merrifield stated to him that he was not aware of the policy and felt he had the right to do what he wanted with any documents relating to him.
- [489] Mr. Merrifield testified that this comment was taken out of context. It was related to something that he had said to his lawyer.
- [490] Mr. Merrifield stated that the administrative review was concluded in October 2006. He received a document stamped "Received Oct 25, 2006" which stated, among other things, the following:

A review of this investigation indicates that he [Sgt. Dickinson] was unable to determine who had released the information to Mr. DIMMOCK. However in your interview you indicate that you gave copies of documents, that the quotes in question come from, to several lawyers and/or law firms. That you also stated that you were unaware of the policy concerning the release of information. You went on to further state "but I believe as an employee of the RCMP I'm fully entitled to use reports of my performance however I see fit".

Documents that are protected and/or classified are property the RCMP and must be treated as such.

You are to review Informatics Manual IV.1.C.8^[vi] and A.T.I.P. procedures. In the future please comply with these regulations and procedures prior to releasing any Protected and/or Classified RCMP materials.

A copy of this 1004 will be forwarded to “O” Division CIIs to be placed on file so that it may be concluded.

- [491] Regarding the comments set out in the Performance Log, Mr. Merrifield stated that he did not have a DTC at the relevant time. Members in the Air Marshalls Unit had been instructed not to keep notes. They travelled with covert Amex cards. They were not to have anything that might identify them with the RCMP.
- [492] With regard to the direction that personal vehicles were not to be used for RCMP business, Mr. Merrifield recalled that while he was at INSET, TAG had contacted him regarding death threats that had been made against a notable Canadian. They were the same as threats that had been made against the citizens of the Netherlands. They came from a similar address and had similar language. A person had been murdered in the street by an Islamic terrorist. Mr. Merrifield stated that he believed this to be a “risk to persons”. He and his partner were armed. INSET had 15 police vehicles. He stated that he requested keys but none could be found. Neither Supt. Jagoe nor S/Sgt. King were in the office. Mr. Merrifield felt that the matter was urgent. He and his partner took his personal vehicle and drove to the residence of the person to conduct business.
- [493] C/Supt. Mazerolle stated that he recalled receiving Insp. Johnson’s report with the findings. No disciplinary step was taken against Mr. Merrifield but he thought that there was something about unlawfully disclosing documents to his lawyer that he did not have authority to do.
- [494] C/Supt. Mazerolle also thought the allegations in the Part IV investigation and in the administrative review had been substantiated. He did not recall who told him this but thought it was the C.O. He still believes this to be true. In other words, he still believes that Mr. Merrifield leaked confidential information to the media and committed fraud in dealing with his Amex account, activities that constituted disgraceful conduct that could bring discredit to the Force.
- [495] Sgt. Dickinson stated that at the end of the review, he could not substantiate who released the documents to the *Ottawa Citizen*.

Mr. Merrifield’s work at Customs & Excise

- [496] In July 2006, Mr. Merrifield returned to work. At that time, there was one other officer in Customs & Excise, Cpl. McEachern. Subsequently, another officer, Cst. Schuliakewich joined the department. Mr. Merrifield stated that he and Cst. Schuliakewich wanted to do significant investigations. They started with responding to Crime Stoppers tips about variety stores selling tobacco. Subsequently, they investigated importing of counterfeit tobacco and illegal sales of native tobacco. This led them to the Outlaw motorcycle gang. They undertook a significant investigation regarding cross-border weapons smuggling including assault rifles with armour piercing ammunition and grenade launchers. Mr. Merrifield stated that he continued to recruit human sources.
- [497] Cpl. McEachern prepared a performance evaluation for Mr. Merrifield that covered the period January 16, 2006 to August 17, 2007. The following are some excerpts from Cpl.

McEachern's comments:

Cst. Merrifield brought with him a number of years' experience within General Duty policing, Canadian Air Carrier Protection Section and intelligence work with INSET and CIS. He is also a trained Range Officer & Basic Firearms Instructor. The skills he brought to the Unit in the area of intelligence led policing, source handling, and tactical operation have proven to be a valuable asset...

His strong work ethic was most evident in Project OSPENCELY, and ongoing weapons investigation where he is the lead investigator. In this matter there was little information, however he utilized several different sources of information and enlisted others to assist in the investigation has expanded into a major u/c operation...

Constable Merrifield is capable of effectively adopting his behaviour to changing circumstances in order to reach a goal. He demonstrates perseverance and takes the initiative. He shows enthusiasm to doing an outstanding job and will adjust his work and personal schedule in order to achieve same...

Cst. Merrifield since arriving in the Toronto North C & E Unit has displayed an eagerness to learn everything he can to allow him to properly fulfil his role within the C & E Unit... He is motivated to gain the expertise and has reached out to our partner agencies such as the CBSA, Department of Homeland Security to gain this knowledge. He is not hesitant to seek advice from any senior experienced members to assist him in his work...

Cst. Merrifield initially found he had a sharp learning curve relating to many of the Operational, Administrative and Court documents used in the Federal Policing environment...His written work...can now be described as complete, concise and presented in a timely manner. This is very evident in the recent files where he has prepared numerous documents such as C – 237 Reports, Form 2350 Operational Plans, Search Warrants, Production Orders and briefings for fellow members. These documents have been processed through the chain of command, courts and found to be clear, concise and easily understood.

Cst. Merrifield has expertise in the area of Weapons & Gangs and developed a presentation in this regard to present to law enforcement personnel. In this past year he has given the presentation at an Ontario National Gang Investigators Conference, a Gang & Weapons Conference for Municipal and Regional Police Forces in southwestern Ontario and also to a GTA Customs & Excise Workshop. Comments from officers attending have stated that the information provided was very timely, knowledgeable and appropriate for the personnel given to...

Cst. Merrifield interacts with all individuals in a respectful manner. He gets along well with other members and is respectful of the chain of command. Since his arrival to the Unit he has undertaken to develop contacts within the regional police services, Toronto Police

Service, CBSA, OPP National Firearms Centre, Chief Provincial Firearms Office and foreign agencies such as ATF and Department of Homeland Security. He has also been active in developing Human sources and this is a strong aspect of his abilities. He has worked with both as a Primary and Secondary handler of several Human sources.

[498] Sgt. Pettipas, Mr. Merrifield's intermediate supervisor, made the following comments on the performance evaluation:

He has expertise in firearms that no one else possesses. He is enthusiastic in the performance of his duties and is extremely successful in recruiting human sources which is the backbone of police work. I consider Cst. Merrifield to be an asset to the unit. He is respected by his coworkers and readily assists whenever needed.

[499] Insp. Johnson stated: "Cst. Merrifield has developed into a tremendous asset for this unit. Keep up the great work!"

[500] Mr. Merrifield explained that subsequently, the RCMP changed its reporting period for performance reports to the fiscal year from the date that a member joined the Force. Another performance report was completed which covered the period April 28, 2007 to April 28, 2008. Sgt. Pettipas made the following comment:

Cst. Merrifield has encountered numerous incidents involving the RCMP which would weigh heavily on anyone. In spite of this he approaches his job with honesty and integrity and a commitment to do the best job he is able. Constable Merrifield is well respected by his peers. They look to him for advice as well as observing how he handles challenging situations. They learned by his example and follow his lead.

[501] Insp. Johnson stated:

Cst. Merrifield has been instrumental in national security/counter proliferation files. He is quickly establishing himself as an expert and is a critical resource for GTA CES. He is fully capable of assuming greater responsibility at the supervisory/mgmt level and expect him to be a strong candidate for the OCDP [officer candidate development program]. This mbr [member] is a truly exceptional performer!

[502] Through the relationships he built with other agencies, Mr. Merrifield carried out an intelligence probe with respect to the procurement of dual use, controlled items regarding Iran's advancement of its nuclear program. He described this as national security, counter-espionage work. Items were sought by enemy states for advancement of weapons of mass destruction including biological weapons. He stated that he learned from another enforcement agency that there was an opportunity to stop, in transit, items required for uranium enrichment that were going from the U.S. and Canada to Iran via the United Arab Emirates.

[503] A subsequent performance report covering the period April 28, 2008 to April 28, 2009, notes that, "In Nov 08, Cst. Merrifield conducted a Powerpoint presentation on topics

surrounding Counter Proliferation to the participants from across Canada. This was the first course on Counter Proliferation conducted in Canada.”

Meeting with C.O. Seguin – October 3, 2006

[504] On August 15 2006, Mr. Merrifield sent a two page email to C.O. Seguin, It states the following:

Sir,

I respectfully request your consideration in reviewing this message. I respect that it is perhaps unorthodox to make direct contact with the Division C.O. but I believe that the circumstances warrant a clear line of communication to avoid any misrepresentation of the information contained within.

There is a misconception that I am “constantly” in the media. Nothing could be further from the truth. In the last 10 months I have been inundated with media requests and contacts. I have never once cooperated, gone on the record or willingly provided comment regarding my involvement in politics and possible sanctions by the RCMP or any issue that would reflect negatively upon the RCMP. Any involvement that I have had with the media has been in my capacity with the Mounted Police Association of Ontario. My involvement there was born out of the unfair treatment that I received for my political involvement by certain officers in this Division.

I have been a loyal and hard-working member since joining the RCMP and serving in “F” Div. in 1997. My service/personnel records clearly show a consistent pattern of hard work and of being a team player. Since transferring to “O” Div. my annual assessments continue to show that willingness to go the extra distance, attain results, and be a team player. While I appreciate that my decision to become involved in Politics makes certain individuals in the RCMP uncomfortable it is my right both legally and by RCMP policy. I have been cautious and prudent to never mix my career in the RCMP in my outside interest or activities in politics. This worked very successfully in 2004 when I participated in a number of nominations and the Federal election.

In 2005 while working in a different section with different management I again exercised my rights in accordance to policy which I had received in writing. I was truthful and forthright in answering questions to managers regarding my intentions and involvement. While intrusive and none of their business I firmly went on the record with Cpl. Crane and Insp. Jagoe prior to the May 2005 nomination informing them both that I would not be participating in the election of 2005. My involvement in a nomination for personal reasons followed guidelines provided to me by NHQ. Insp. Jagoe’s response and subsequent repeated false allegations have far surpassed harassment guidelines and have effectively destroyed my reputation and career. Superintendent Proulx’s handling of the situation only served to mitigate the

circumstances, was unprofessional and abusive. The actions of both officers broke constitutional rights and practices as well as the RCMP Act.

When I attempted to bring these issues to the attention of the Commissioner, the CHRO and yourself you were the only one to respond. Unfortunately you only responded to the mention of harassment and did not reply to the constitutional violations. As a result I had legal representatives research and prepare an opinion based the materials and evidence I had gathered. Much of the statements and documents collected reflect poorly on certain officers involved in this situation. I am now in the possession of a legal opinion which recommends a course of action which would be favourable to me but perhaps reflect poorly on the reputation and image of the RCMP. To this point I am writing to you for intervention in resolving the situation in the best interest of all parties. In the legal opinion it is a recommended course of action to request a Ministerial Investigation of the circumstances by the Office of the Minister of Public Safety and Emergency Planning followed by Constitutional challenges and Statements of claim.

Beginning in the autumn of 2005 I have received repeated requests from a National Newspaper and a City newspaper regarding my situation and the possibility of Political interference by the RCMP. I have refused comment. This past Friday I received a phone call from a National television news magazine requesting my cooperation for a news story. They informed me of a second RCMP member suspended for political involvement as well as actions/statements by the former Commissioner of Public complaints for the RCMP and the British Columbia Civil Liberties Association. Mention was made last December by reporters who contacted me about my situation in reference to the McDonald Royal Commission of Inquiry into certain actions of the RCMP. At no time have I ever gone on the record or cooperated with the media in any capacity that would harm the reputation of the RCMP.

At this point my level of frustration and the lack of forward momentum to resolve the situation leaves me in the position of acting in my own best interest as the RCMP seems uninterested in resolving the situation.

I would request Sir that an attempt be made to clearly communicate with me to review and resolve the outstanding issues. I am and hope to continue to be a proud member of the RCMP however I hold my values and reputation highly. I am not one to shy away from a fight or accept undo discredit to my character and reputation. I am certain that if you were presented with all of the facts from day one you would form a much different opinion than you currently hold of the situation.

I extend this offer against the advice of my lawyers in the hope of saving undue negative attention to the RCMP from Inquiries and lawsuits. It is my hope that common sense and a shared interest in

the reputation of our organization will prevail over preconceived and incorrect opinions.

Very Best regards
Cst. Peter Merrifield

- [505] Mr. Seguin stated that he was brought in to the Commanding Officer position to bring RCMP values into O. Division which included maintaining a respectful workplace. Mr. Seguin wrote a “commanding officers communique” dated December 13, 2005 which announced mandatory harassment course online which all RCMP employees were required to do. The third paragraph of the communique states:

The Royal Canadian Mounted Police is committed to a harassment free workplace for all employees. Within O. Division, we will be undertaking the initiatives over the next year to ensure all managers and supervisors have the training they need to be effective leaders. Managers and supervisors are expected to be respectful in their dealings with all employees and to provide appropriate and developmental directions and feedback. At the same time, employees are expected to accept direction that is provided in a respectful manner and to treat their managers/supervisors and co-workers with respect.

- [506] The email that C.O. Seguin received from Mr. Merrifield dated August 15, 2006, resulted in a meeting that took place on October 3, 2006. Mr. Seguin stated that Mr. Merrifield’s decision to become involved in politics did not make him uncomfortable at all. In his position as Ethics Advisor he had dealt with this previously. Mr. Seguin understood from the email that Mr. Merrifield was making it clear that he was going to be proceeding with legal action.
- [507] Mr. Seguin’s point in meeting with Mr. Merrifield was to listen to his concerns. Mr. Seguin stated that at the meeting, Mr. Merrifield took him through his experience at INSET, the 2004 election and talked about a second attempt for nomination in 2005. He spoke of the Barrie nomination meeting, Cpl. Frith’s attendance and the backlash that happened afterwards. He said that Insp. Jagoe knew Mr. Merrifield would be seeking a nomination ahead of time and said nothing. Now, Insp. Jagoe was raising an issue after the fact which constituted entrapment. Mr. Merrifield felt that if something was not right, it should have been raised earlier. He thought Cpl. Frith had been ordered by Insp. Jagoe to attend the meeting and that was not right. He then spoke about the Stronach investigation, his transfer from TAG to Customs and Excise and that he was upset that he had been taken off the Stronach investigation. He felt he could do the job effectively and did not feel there was a conflict. He stated that Supt. Proulx had spoken to him disrespectfully and in a harsh manner. He said he had statements from other members to this effect. Mr. Merrifield said that Supt. Proulx told him he would never work in Criminal Intelligence again. Mr. Merrifield provided to C.O. Seguin some emails he had received from Supt. Proulx.
- [508] Mr. Seguin read these emails. He did not find anything disrespectful in them. Supt. Proulx used a very businesslike tone. Mr. Merrifield reviewed the SOC incident and was upset that his participation had been denied. This was tied to TAG. Mr. Merrifield said he felt he had been singled out by an audit of his Amex card and the Part IV investigation which had been completed. Mr. Seguin told Mr. Merrifield that if Cpl. Frith had done something illegal, it would be looked into and dealt with. He made this commitment to Mr. Merrifield. Mr. Seguin stated that he was going to look into the issue of why Cpl. Frith had been at the nomination meeting. There was nothing more for him to do.

- [509] According to Mr. Merrifield, C.O. Seguin said to him at the end of the meeting, “Based upon some of the things you’ve told me, I may be left with no choice but to call a code of conduct investigation [with respect to Insp. Jagoe and Supt. Proulx].”
- [510] A week after the meeting with Mr. Merrifield, on approximately October 10, 2006, C.O. Seguin met with C/Supt. Mazerolle. He asked C/Supt. Mazerolle to follow up on the Cpl. Frith issue and specifically whether he had been ordered to attend the nomination meeting. He wanted to get to the bottom of the matter. Supt. Panchuk was asked to do an administrative review to determine the facts behind the situation.
- [511] Mr. Seguin reviewed a memorandum dated January 17, 2007. Attached to it were statements provided by Sgt. Park and Cpl. Frith which Supt. Panchuk had obtained. In addition, there was a statement from Insp. Jagoe that had been provided on January 18, 2007. In it, he stated:
- I drew the conclusion that when we spoke [at the dinner] he [Mr. Merrifield] would have known that he was running as a candidate and not just ‘considering running.’ I base this conclusion on the timing of the pamphlet and upon reflection when I read the pamphlet I recalled Constable Merrifield had told me it was expensive to run a campaign as it required a lot of money. I believed that he would not commit finances to the publishing of a pamphlet unless he was serious about running.
- [512] On October 25, 2006, Mr. Merrifield sent a follow up email to C.O. Seguin. He reiterated one of his concerns, that Cpl. Frith had attended a political nomination meeting to obtain campaign literature at the direction of Insp. Jagoe. He referred to a Ministerial Directive regarding sensitive sector operations, one of which is legitimate political functions. He stated, “please accept my deepest appreciation for your attention in these matters, it has been my hope to address these issues in a satisfactory manner resulting in the best possible outcome for both the RCMP and my own personal interests.”
- [513] During the October meeting, Mr. Merrifield showed C.O. Seguin two statements from regular members in which they said that Supt. Proulx had commented that Mr. Merrifield would never work in Criminal Intelligence again. Mr. Seguin stated that he did not assign anyone to investigate Mr. Merrifield’s allegations against Supt. Proulx. He said that when he met with Mr. Merrifield, he already had management’s perspective regarding everything that Mr. Merrifield told him. He did not perceive at that point that there was harassment. Mr. Merrifield was complaining about how management did their job and he presented emails in support of his complaints. Mr. Seguin said he read the emails and did not see anything confrontational in them. He agreed that Mr. Merrifield told him that the meeting with Supt. Proulx was confrontational and aggressive. Nevertheless, the emails were businesslike. He did not make any inquiries of third parties about the meeting. He did not read Cst. Brown and Sgt. Sim’s statements nor did he take their names or follow up on the statements, even though he agreed that the best people to ask about an issue would be third parties with no interest. Despite the diametrically opposed views, he was satisfied that Mr. Merrifield had been treated fairly. Aside from looking into the Cpl. Frith issue, he did not request that anything else be investigated.
- [514] Mr. Seguin stated that he could not recall specific conversations about any further investigations or fact finding arising from the October 3, 2007 meeting but if complaints were made against officers, he would have “looked around and got a feel for it.” He probably would have had a conversation with C/Supt. Mazerolle as he was closer to operations. Mr. Seguin stated that he felt he had both sides of the story. He had Mr.

Merrifield's view and he also had the perspective from the chain of command. He had officers saying that a Member was not following policy and an officer saying that other officers were treating him badly. His expectation was that if Mr. Merrifield felt that he was being harassed, there was an appropriate mechanism within the organization to deal with it, being the internal grievance procedure. Mr. Merrifield could have made a harassment complaint. It would have been fully investigated and all of the facts would have been brought forward. If a complaint had been made, C.O. Seguin would have reviewed it and would have been the decision maker. He would not have been the investigator.

- [515] Mr. Seguin stated that he had received Supt. Proulx's memo to Mr. Merrifield dated September 28, 2005. He had no concerns that Mr. Merrifield had not been inappropriately dealt with by his line officer. He could not recall why Mr. Merrifield had not been transferred to the investigative side of INSET.
- [516] Supt. Davis was working out of the Newmarket building and was responsible for a number of departments including Customs and Excise. Mr. Merrifield was under his command then.
- [517] He attended the meeting on October 3, 2006. He stated that he was not advised of the purpose of the meeting. The C.O. was simply looking for someone to be present.
- [518] It appears that Supt. Davis did have some involvement in the issue prior to the meeting. Initially, he stated that he said he had never previously seen an email from Ms. Robson to Supt. Hebert stating that she had received a call from Supt. Davis about a meeting to take place at 2:00 p.m. and that she had sent a two page letter to him. Supt. Davis asked her to fax the references in the letter, which she had done. Supt. Davis stated that he had no recollection of that transaction and felt that there was a chance that the C.O.'s secretary may have asked for something. He stated he had no reason to doubt the accuracy of the email and stated he must have made the call. He did not recall making the phone call or receiving any of the documents. He agreed that it did look like he had requested the material and received it.
- [519] Supt. Davis stated that prior to the meeting, he was aware that Mr. Merrifield was involved in politics. He did not have any of details. He would receive media summaries on his desk regularly and recalled that Mr. Merrifield had been interviewed by a variety of media outlets. He stated that he did not know about any difficulties between Mr. Merrifield, Insp. Jagoe and Supt. Proulx.
- [520] Supt. Davis recalled that at the meeting Mr. Merrifield spoke first, initially about the reason for the meeting which was to explain the context of events that had occurred so that the C.O. would understand them. He referred to the frequency of media communications and the meeting after the nomination meeting. He spoke about Supt. Proulx and the response of the officers that he reported to regarding the events. Mr. Merrifield's message was that he valued his role in the RCMP. He did not act outside of the scope of policy. He believed that the officers could have handled matters better. He stated Supt. Proulx's reaction was unnecessarily harsh. Mr. Merrifield stated he did not intend to do anything outside of the organization's expectations.
- [521] Supt. Davis recalled that C.O. Seguin asked Mr. Merrifield what he wanted done or solved. Mr. Merrifield said he wanted to inform Supt. Davis and the C.O. of the context around the nomination meeting so that the C.O. would have a favourable impression of him as a member.
- [522] Supt. Davis stated that this single meeting was his only involvement with Mr. Merrifield regarding the issues.

- [523] Mr. Ford retired from the RCMP as a Staff Sergeant. He first encountered Mr. Merrifield in the Air Marshalls Program where he was the watch commander. In February 2006, he was elected to be an SRR. In this position, he met with C.O. Seguin from time to time.
- [524] Mr. Ford stated that his initial contact with Mr. Merrifield was at the request of C/Supt. Mazerolle regarding the duplicate cheque issue. During their discussions, he and Mr. Merrifield discussed what was going on in his life, beginning with Cpl. Frith's speaking to Supt. Jagoe about the Barrie nomination meeting pamphlet.

Mr. Merrifield's Email to C.O. Seguin – January 19, 2007

- [525] Mr. Ford stated that Mr. Merrifield sent him a lengthy email dated January 19, 2007, the subject of which was "Issues of Concern". Mr. Ford could not recall whether Mr. Merrifield offered to write it or whether he asked Mr. Merrifield to send it so that he would have it as a reference in his next meeting with the C.O. The email stated:

Hi Doug,

The following is some information for your discussions regarding my concerns.

Cpl. FRITH attended two political functions in 2005 at which I saw or spoke to him. The Barrie nomination in May 2005 where the campaign literature was present, and a barbecue in Barrie with Stephen HARPER in August 2005 were Frith introduced me to his neighbour.

If Sgt. PARK conducted the interview there may be a conflict as prior to the nomination I worked with Sgt. PARK extensively on Operation Bridge Out up to and including the days before the nomination. He was fully aware of my pending participation as were many members at INSET. No effort was made to conceal my involvement as I was led to believe that I was acting in accordance fully with policy as it had been articulated to me. Sgt. PARK is a close associate of Insp. JAGOE and they socialize outside of the workplace motorcycle riding. Following the scandal post nomination Sgt. PARK provided a very positive 1004 for outstanding efforts on my work during Operation Bridgeout. Sgt. PARK at no point leading up to the nomination expressed any concerns about my activity.

During my discussions regarding the nomination with Cpl. FRITH he advised me that he "may have gotten me in trouble". He stated that Insp. JAGOE and Cpl. CRANE had questioned him about campaign literature which he was in possession of. JAGOE demanded copies from FRITH and FRITH advised that he stated to JAGOE that those copies were his own private belongings. FRITH then advised [that] JAGOE requested campaign material from the nomination meeting which is an order from a superior officer to subordinate. This means that when FRITH attended the nomination he was for all intents and purposes on Duty acting on the Direction of the Inspector.

FRITH provided a statement to me in which he states clearly that JAGOE stated to FRITH after the fact to "not worry, I will protect

your identity". This raises questions as [to] JAGOE'S belief regarding the legality of what he had ordered.

JAGOE, CRANE and a number of "O" Div HQ personnel were all aware of my participation in the nomination on Friday, May 13. JAGOE and CRANE reported it to "O" HQ as a policy violation and RCMP Act offence. JAGOE reported several perceived offences but did not bother to check policy which clearly would have mitigated the perception of wrongdoing. At no time did any member of the RCMP attempt to contact me prior to my participation on Saturday May 14 to clarify the situation.

On Friday, May 13 CRANE stated to Cst.s PAOR and OTT that "Peter is in a lot of trouble, he has overstepped his bounds and won't be with us much longer". This was one day prior to my nomination appearance.

On Monday, May 16 I was confronted by CRANE and asked to meet privately in a closed office. CRANE presented a number of allegations toward me for my participation most of which I dispelled by showing CRANE the appropriate RCMP policy. CRANE stated that allegations/concerns were presented to him by Insp. JAGOE.

During the period May 19-25 Insp. JAGOE again contacted "O" HQ to provide false allegations against me for my activity in an investigation regarding death threats against member of Parliament Belinda STRONACH. JAGOE alleged that I had broken policy by having direct communications with the victim. I took extraordinary measures to avoid any conflict of interest in the file due to my personal relationship with the intended victim. This was twisted and presented to "O" HQ as some kind of policy breach. No section was ever quoted to me. Subsequently I was stripped of all investigation and Intelligence files and removed from INSET TAG.

Following the May 16 meeting with CRANE I was summoned to "O" HQ for a meeting with Supt. PROULX. At this meeting PROULX indicated that I was a liar, that I was using the RCMP, that I must make a decision to have a career in Politics or the RCMP. He made inappropriate comments regarding material in the campaign literature, challenged the truthfulness of my personal resume which had been scrutinized during my application to the RCMP as part of my background investigation. This was a very unpleasant interaction with Supt. Marc PROULX and was witnessed by a number of members present in the room.

In July 2005 while off-duty sick recovering from surgery I participated on a Radio Talk show providing historical information regarding Terrorism, Counterterrorism and National Security efforts globally during the past 60 years. JAGOE reported this activity to "O" HQ as having Disclosed Top Secret Information regarding INSET investigations. This was completely false. JAGOE never even heard the show and acted on information from a third party which he has protected the identity of. He alleged Official Secrets Act offences which carry a serious term of imprisonment. PROULX

contacted me at home and advised that he would be proceeding with formal discipline and that he would obtain a copy of the Radio Show.

MERRIFIELD makes Access to Information Request to begin legal proceedings against the RCMP for Constitutional Rights Violations. JAGOE receives ATI request and contacts S/Sgt. BOHUS who is representing MERRIFIELD. JAGOE states to BOHUS "to tell MERRIFIELD not to burn any bridges".

Members BROWN and SIMM provided statements from a conversation they have with PROULX where PROULX clearly states that "someone has it for Peter" and that it is personal.

From this point on Doug it is a steady pattern of harassment, threats, and at one point I am ordered not to report for duty during a National Security crisis. My reputation has been destroyed based on rumours, false allegations, personal vendettas, harassment, abuse of policy, and repeated transfers. I have missed two opportunities for promotion, expended considerable monies on legal work and suffered significant medical concerns. I have bent over backwards to resolve this without going to court and the media once it becomes public. There are a myriad of instances and actions taken against me during that period that will not stand the test of harassment suit. I appreciate that my activities caused discomfort among some Management personnel of the RCMP but I worked hand-in-hand with the Force in 2004 when I was a full-fledged Candidate in a Federal Election without this type of harassment. I always put the reputation of the force first in anything that I did and was careful to protect it at all cost. There are clear constitutional violations in current RCMP policy which I have offered to address in a constructive manner.

If this was about one isolated incident or one single misunderstanding I would not be pursuing the issue with such vigour. However it was much greater than that and with severe consequences to my reputation and career path. My service file clearly indicates the type of member I have been and wish to continue to be.

Of note is some information that was obtained via my Access to Information request which shows cautions were provided to Supt. PROULX from HQ not to cross constitutional lines and an email between JAGOE and PROULX which refer to "a source, a member" in cryptic fashion. Not much about this situation was above board or founded in fact. It is my strong belief that this was mishandled from the beginning and spun into a tall tale without any concern for the truth. If I was in the C.O.'s shoes and had been told tall tales about a member's activity in the manner he was informed about me I would also have concerns. However because he was not given the facts, improper opinions and actions may have been formed or taken.

The concern I have is over the implications of the perception by the media, government and public of the RCMP in its handling of issues relating to Politics. I wish to correct the damage done over the past

two years internally if possible. I have not ruled out legal action and still retain my law firm and original filings which were prepared.

Hopefully we can get to the truth quickly and correct the situation in a satisfactory manner as quickly as possible.

Thanks again for help Doug,
Very Best regards,
Pete

- [526] SRR Ford stated that the C.O. and others were basing their opinions on distorted facts. He asked Mr. Merrifield if he could share the email with the C.O. Mr. Merrifield agreed to that.
- [527] SRR Ford stated that he was concerned about the last five paragraphs regarding what Mr. Merrifield said had been done to him. He was not sure if any of this information was getting to the C.O. SRR Ford forwarded the email to the C.O. SRR Ford stated that he knew that Mr. Merrifield had met with C.O. Seguin earlier on. When Mr. Merrifield sent him the lengthy email, it was obvious that nothing had been resolved.
- [528] Mr. Merrifield also sent the January 19, 2007 email to Sgt. Nicota who was present at the meeting in London with Supt. Proulx. He asked Sgt. Nicota to provide comments regarding the meeting so that SRR Ford would have them when he was dealing with the situation.
- [529] On January 22, 2007, SRR Nicota sent the following email to S/Sgt. Ford:

Hi Doug, as per Peter MERRIFIELD'S message please be advised of the following: in my 32 years as a member of the RCMP I have never witnessed an "Accused" (let alone a serving member of the RCMP) confronted in the manner as Peter MERRIFIELD was subjected to by Supt. PROULX. This unexpected behaviour by Mr. PROULX was only displayed after then SRR Rick BOHUS had to leave the meeting to deal with another matter. Mr. PROULX made it clear that this examination of MERRIFIELD was at the behest of the CROPS officer Mr. MAZEROLLE and the "C.O." (Asst/Commissioner SEGUIN). Mr. PROULX'S manner of questioning was the epitome of harassment and could be used for classic textbook lecture material example. Supt. PROULX'S questions ridiculed, demeaned and embarrassed MERRIFIELD.

I was angered and dismayed by what I observed and allowed it to continue only because it strengthened MERRIFIELD'S case. MERRIFIELD repeatedly had to explain how a legitimate political nomination process worked and yet Mr. PROULX still failed to comprehend process. All of MERRIFIELD'S campaign material was examined and he was questioned in detail. Regardless of the answers provided to Mr. PROULX, he remained sarcastic, accusatory and made it very clear that MERRIFIELD had to choose between a "political career" or the Force. At no time was there acknowledgement of MERRIFIELD'S Charter rights to allow his name for nomination in the Political office. This meeting only served to exacerbate the problems and failed to resolve the issues under

discussion. It was my conclusion there was no desire to resolve the issues but only to find an excuse to administratively exit MERRIFIELD out of the RCMP.

[530] C.O. Seguin sent a short email to SRR Ford on January 23, 2007 referring only to the issues relating to Cpl. Frith. On February 15, 2007, SRR Ford asked C.O. Seguin whether the investigation covered the harassment issues raised by Mr. Merrifield relating to Supt. Proulx and Insp. Jagoe or whether it covered only the issue regarding Cpl. Frith. C.O. Seguin replied that it only applied to Cpl. Frith and that he was satisfied that Cpl. Frith had attended the meeting on his own.

[531] Mr. Merrifield stated he did not receive any satisfaction from C.O. Seguin. There was no feedback, email or written decision. There was nothing.

Mr. Merrifield's Email to D/Commr. Bourduas – May 11, 2007

[532] Mr. Merrifield decided to send an email dated May 11, 2007 to Pierre-Yves Bourduas, Deputy Commissioner for the Region, to request his assistance with the issues. The email stated:

Sir,

Please excuse me for writing to you directly, however I believe it is incumbent upon myself to share with you some concerns with very serious repercussions to "O" Division and the RCMP. The past several months have been difficult times for our organization. Criticism of certain actions of the RCMP and the actions of some of its personnel have been portrayed in a manner which disrespects the greater membership. I am trying to avoid any further embarrassment or tarnish to our organization but have been presented with repeated obstacles in my efforts to resolve a serious situation at the lowest possible level.

During the past two years I have utilized the DSRR program, personal involvement with several officers in "O" Division and a meeting with the Commanding Officer of "O" Division. All efforts have met with a lack of resolution or understanding of the gravity of the circumstances.

This particular situation arose from my involvement as a candidate in a past Federal election of political involvement in 2004/2005 which was conducted in accordance with the RCMP policy. The two years following that involvement have been filled with repeated and ongoing harassment, the abuse of authority by a number of commissioned officers in O division, abuse of process, constitutional violations by commissioned officers, constitutional conflicts and RCMP policy, conduct unbecoming an officer, possible violation of a ministerial directive in relation to National Security Operations in Sensitive Sectors, possible dereliction of duty. I have written to the former Commissioner, former Deputy Commissioner of Human Resources and current Commanding Officer of "O" Division to this capacity. I have offered evidence and the willingness to resolve this matter in a means agreeable to all concerned. These efforts have yielded no results and have left me with little options other than

formal legal proceedings which would be public and perhaps embarrassing for our organization. I am hopeful that you can intervene in your capacity as Deputy Commissioner for Central Region. I have utilized a law firm to research and provide opinion on my behalf in these matters. It is their position supported by recent court decisions in Ontario and New Brunswick which state that the RCMP is ill equipped to resolve certain issues within its own internal processes. I on the other hand have faith that this can be resolved internally.

All material in my possession in support of this circumstance are at your disposal. I would be willing to provide greater detail of the circumstances to you or your delegate at the Regional level as efforts at the highest level of Division to correct this have failed. Statements made by subject Officers during this ongoing conflict indicated that they were acting at the direction of the Commanding Officer of "O" Division. I questioned A/Commr. SEGUIN to this regard and he denied having provided the questionable direction. I have no cause to take challenge to the remarks of either Officer, however there exists a conflict in resolving this matter at the Division level as the C.O. is named as a possible instigator of questionable actions.

Due to the existence of possible conflict of interest at the Division level I am requesting your involvement from Region to facilitate review and possible resolution of the situation. Attached above you will find some previous correspondence relating to this matter.

Please understand that I am not writing to you in order to "cover my bases" for future legal action. I am not going through processes for the sake of future claim or gain. I truly wish to resolve a situation that does not reflect the Values, Ethics or Integrity of our valued members. I believe in all of the good that that we do as an organization coast to coast and proud of my membership in the RCMP. I take great pride in my work and membership and conduct myself in accordance with Ethics and Integrity in all that I do inside and out of the RCMP.

I wish to take this opportunity to thank you for your attention in this circumstance and express my appreciation for the demands that must be made upon your time as Deputy Commissioner of Central region. Please understand that I would not have burdened you with the situation if I did not believe that the best interest of the RCMP and the members involved could be served under your direction. I look forward to speaking with you or your delegate to reach resolution.

[533] On May 28, 2007, Mr. Merrifield issued the Notice of Action in this matter. On June 27, 2007, the Statement of Claim was issued to protect limitation period.

[534] On June 29, 2007, D/Commr. Bourduas responded to Mr. Merrifield's email and stated, "I have thoroughly reviewed the materials and concluded that your complaints and grievances have been handled appropriately by the C.O. "O" Division. As such it would not be appropriate for me to intervene at this time."

The RCMP's Internal Grievance Procedure

[535] In 2008, an issue arose as to whether Mr. Merrifield ought to have used the RCMP internal grievance procedure for adjudication of his claims. The Attorney General brought a motion to strike the claim which was dismissed. In *Merrifield v. Canada (Attorney General)*, 2009 ONCA 127, the court agreed with the motion judge's decision and stated in paras 9 and 10:

Importantly, the motion judge correctly noted that the RCMP grievance procedure does not have the necessary means to make findings of credibility, as it does not provide for oral hearings, and the factual findings of an investigator need not be followed by the adjudicator. Nor does the grievance procedure allow for independent third party adjudication.

...the grievance procedure mechanism cannot provide the remedies requested, namely, declarations and damages.

[536] Mr. Merrifield stated that his health was good until August 2008. He developed a heart problem, atrial fibrillation, and was off duty sick for a period of time. He had committed to the development of a training program for counter proliferation in Canada so while he was at home, he worked with other agencies to develop the program. In November 2008, he returned to light duties at work and attended the implementation of the training program.

[537] On March 30, 2009, Mr. Merrifield had heart surgery and recuperated at home for two weeks. In April, he returned to work to conduct a raid and arrest on a nuclear proliferation case. He obtained ten pressure transducers configured to be used in nuclear centrifuges for enrichment of uranium. This resulted in the first prosecution and conviction under the *United Nations Act* R.S.C., 1985, c. U-2 for proliferation to Iran.

[538] A Performance Evaluation was prepared for Mr. Merrifield covering the period April 28, 2008 to April 28 2009. It states:

[Cst. Merrifield] has conducted demonstrations and presentations for agencies both within and outside of the RCMP. In autumn of 08, Cst. Merrifield conducted a Powerpoint demonstration on Canadian legislation to the participants of the Strategic Investigation Training seminar in Georgia. In Nov 08, Cst. Merrifield conducted a Powerpoint presentation on topics surrounding Counter Proliferation to the participants from across Canada. This was the first course on Counter Proliferation conducted in Canada. For both presentations, Cst. Merrifield was well-organized and relayed the information in a level that was clearly understood by the audience. Cst. Merrifield is very comfortable in front of an audience and this easy manner comes across with humour and professionalism. Cst. Merrifield has also conducted a demonstration of tight placement, close quarters battle tactics for the Ontario Tactical Association. He has acted as BFI on several occasions. CST Merrifield has been requested by several agencies, both within and outside of the RCMP to provide presentations.

[539] Insp. Johnson's comment on the Performance Evaluation is, "Cst. Merrifield is an operational member thru and thru. He is knowledgeable, competent and a leader. An excellent assessment and well deserved."

[540] In June 2009, Supt. Jagoe became concerned again about Mr. Merrifield's public speaking. He had been the keynote speaker for the Ontario National Gang Investigators Association

in 2006. He spoke as Vice President of the MPA. He did a TV appearance on a show called The Verdict. Supt. Jagoe was concerned about “national security public speaking”. This set off a chain of inquiries. He reported it to C/Supt. Mazerolle who spoke to Dist. Comm. Davis who spoke to Insp. Johnson, who then spoke to Mr. Merrifield. Mr. Merrifield obtained a document from the RCMP website which showed that National Security was within the mandate of Customs & Excise.

[541] On June 30, 2009, Mr. Merrifield was promoted to the rank of Corporal.

[542] In January 2010, Mr. Merrifield was the lead investigator on a project called Owatch regarding nuclear proliferation. It resulted in an arrest and a trial. Mr. Merrifield gave all of the evidence for prosecution. The accused was convicted.

[543] Also, in January 2010, Mr. Merrifield was seconded to the G8 and G20 summits.

Waterloo Police Speaking Event

[544] Supt. Jagoe stated that at some point, he received an email from Sgt. Crol in Kitchener, for his information, to advise him of a presentation that was being hosted by the Waterloo Regional Police. Mr. Merrifield was identified as the key note speaker on terrorism.

[545] Supt. Jagoe stated that he then spoke to Insp. Johnson and told him that he might want to look at the materials because the new RCMP policy required CROPS officer’s approval for presentations.

[546] Section 12.5 of the Operations Manual Ex 223 is entitled Presentation, Conference. It shows a print date of 8/22/2008 and deals with presentations with respect to national security. Section 1.2 deals with the approval for presentations of an operational nature or intended for an international audience. Supt. Jagoe stated that he was involved in policy development in this area. He did not specifically refer to it when he spoke to Insp. Johnson about Mr. Merrifield’s being a key note speaker at the Waterloo Police event. Supt. Jagoe stated that he had the impression that Insp. Johnson was not familiar with it. This document was not produced in this action until May 2015; six months after the trial began. Supt. Jagoe had no explanation for this.

[547] Mr. Merrifield stated that a culmination of events made him feel that he was not being treated fairly. Receiving inquiries stemming from Supt. Jagoe’s further concerns about his public speaking was like being “poked” again. He was frustrated, angry and depressed. From February to May 2010, he was off duty sick. He submitted monthly reports to the Health Services unit to support his status.

[548] Mr. Merrifield returned to work in May 2010. In the following month, he did protective duties for the Queen’s visit.

[549] In the fall of 2010, Mr. Merrifield was assigned to project Overlord. This was the intelligence probe that he had started in 2009 regarding firearms smuggling. In 2011, there were a number of people working on Overlord. Between January and October 2011, Mr. Merrifield travelled extensively and obtained confidential information. He obtained an AK 47 fully automated firearm, hundreds of which had been imported as BB guns. They could be converted in fifteen minutes to a fully functioning AK 47.

Witness X

[550] As noted above, one of Mr. Merrifield’s duties was to cultivate human sources. In his performance logs, his superiors noted that he was extremely good at this.

- [551] Mr. Merrifield was a primary handler for several confidential human sources, one of whom I will refer to as Witness X.
- [552] Witness X stated that s/he had been a social friend of Mr. Merrifield. S/he then became an informant for Mr. Merrifield in 2006/2007. S/he also worked with other RCMP officers. S/he had several conversations with these other officers in which they discussed Mr. Merrifield. One of them said that Mr. Merrifield was not a team player, he had issues and could not be trusted. This officer stated to Witness X that Witness X should not be working with Mr. Merrifield. The officer said that Mr. Merrifield was suing the RCMP. His career was not going anywhere. It was finished. Witness X stated that in 2011, s/he told Mr. Merrifield that he did not have many friends in the RCMP and informed him of the other officers' comments.
- [553] Mr. Merrifield said that there is a sacred trust between an informant and a handler. Telling an informant not to work with a police officer during the course of an investigation was completely inappropriate. It was not in the administration of justice.
- [554] A Performance Evaluation of Mr. Merrifield was carried out for the period September 9, 2010 to March 31, 2011. It states:

... Cpl. Merrifield worked alongside with the crown prosecutor during the trial phase of a national priority investigation that he (Cpl. MERRIFIELD) had been involved with. The crown prosecutor had commented on Cpl. Merrifield [sic] leadership and encyclopedic knowledge of the evidence. As well he was required to attend an International POWPOM on Counter Proliferation Investigations held in New Zealand, representing the RCMP on behalf of HQ C & E Branch...

Cpl. Merrifield is considered a subject matter expert on counter proliferation (CP) investigations. As a result, he often lectures on CP investigations and training seminars held both within and outside Canada. During this reporting period he has lectured at training seminars in "D" Division as well as at the annual CP training seminar held in Ottawa this year. In addition, he was required to travel to New Zealand where he presented a case study based on a successful CP investigation (Project OWATCH). That investigation had been conducted during the previous reporting period by this unit. He maintains recency in CP investigations by regularly conducting research on proliferation activities. These combined efforts speak to Cpl.'s MERRIFIELD [sic] ability to forge ahead with learning and development needs for himself and others. That said, Cpl. MERRIFIELD continues to show flexibility towards re-arranging his personal time with family to facilitate his commitment to CP investigations...

[His immediate supervisor, S/Sgt. Wayne Pupik stated] Cpl. Merrifield has recently taken on the Role of Primary Investigator for Project Overlord. Through his presentation skills, his knowledge with CP investigation and desire to take this project to high levels, I see great things happening in his future.

[Insp. Johnson stated that] Cpl. Merrifield is a high performing knowledgeable member who is more than capable of assuming

career responsibility at the senior NCO level.

- [555] Mr. Merrifield stated that in the fall of 2011, Customs & Excise underwent a number of personnel changes. It became dysfunctional and was falling apart. Given what Witness X had told him, he felt that the damage to his reputation resulting from the harassment had spread significantly within the RCMP. He went off duty sick in November 2011.

Mr. Merrifield's Email to Senior Management

- [556] Mr. Merrifield stated that November 2011 to January 2012 was the worst part of his life. He disengaged from family, stayed on the couch, got bed sores and did not bathe. He started seeing another psychologist.
- [557] While he was at home and in the middle of a deep depression, Mr. Merrifield made another attempt to reach out to senior members of the RCMP. He sent a lengthy email dated January 5, 2012 to a number of people including Commr. Paulson, D/Commr. Graham, Asst/Commr. White, SRR Niebudek, SRR Reed and S/Sgt. Townsend who was on the National executive of the SRR program. The email stated:

Sirs,

I respectfully submit this message with the knowledge that it circumvents the usual chain of Command and for that I apologize.

For nearly seven years I have been engaged in an effort to address unwanted harassment, bullying, abuse of authority and process. This began with the dislike of my standing as a candidate to become a Member of Parliament. I have been [the] subject of false Criminal allegations, subject to punitive transfers, false code of conduct investigations and subjected to threats by Senior Officers of "O" Division. Throughout this period my health has suffered, I [have] been away from duty periodically to deal with serious depression issues as a result of the harassment, I also required surgery for a stress related heart ailment.

I have exhausted every reasonable method to appeal to the common sense of the RCMP to review the evidence in the matter, but to date there has been no in depth review of the [sic] my claims or evidence. I believe that DOJ is not acting in a manner which has the best interest of the RCMP at heart.

Throughout this same time period I have dismantled weapon smuggling rings along the Canadian/US border, identified and began recovery of more than 250 fully automatic AK 47 receivers improperly imported and distributed throughout Canada, and provided the first ever conviction in Counter Proliferation of the Canadian Nuclear Safety Act and the United Nations - Iran Regulations.

My service file prior to the run in with the Officers named in my lawsuit was exemplary, my service record since the run in has also been exemplary.

It baffles me that when I send C237's about Iranian Procurement and Espionage I am believable. I have been asked in the middle of the

night to help prepare a Prime Minister's briefing note on Iranian Nuclear Proliferation investigation and was believable. I was asked to address the World Nuclear Suppliers Group conference in New Zealand in 2010 and brief the combined Enforcement and Diplomatic core on Counter Proliferation Investigations and strategies and was believable. The courts accept my warrants, production orders and one party consents as credible.

Why is it that when I claim that certain Officers bullied me, harassed me and lied I am no longer believable?

I joined the RCMP to catch criminals and work in National Security. I have spent 30 years of my life studying Global Security Issues, International Affairs and Terrorism. I left a comfortable Senior corporate career at age 30 to join the RCMP. I have done everything the RCMP has ever asked of me. I have made my sacrifices in service and posting without question. I have investigated, arrested and prosecuted murderers, rapists, arsonists and just about every other type of criminal you wish to name. I have been assaulted, shot at, stabbed at, and subject of death threats in the performance of my duties. Throughout all of that I believe that the RCMP had by [sic] back, I trusted that we were an organization of truth and values.

As my lawyers are about to file all of our documents with the court and set the matter down for trial the issue will become public. Knowing this and having repeatedly attempted to negotiate settlement in the matter I want to put a couple of things on the table that have been danced around but never dealt with directly because of process.

I name Supt. Marc PROULX (ret) as the primary abuser/bully, my investigation into his history and background require that I ask the following questions:

1. Supt. PROULX was named in retaliation complaint related to sexual harassment in C Division. The matter was settled out of court just short of appearing before the Canadian Human Rights Tribunal. Supt. PROULX was promoted and transferred to "O" Division as DIO to which he joked with us in the program that he knew nothing about. Was he ever disciplined inside the RCMP for this harassment/retaliation incident in "C" Division?

2. In 2006 I advised Supt. PROULX in writing that I intended to file a formal complaint about his harassment and bullying of me, his response within hours was to lodge a false Code of Conduct Investigation against me alleging Criminal Code Offences. When these claims were later proved without merit, was Supt. PROULX investigated or disciplined for abusing process?

3. I have received allegations that during this time period in 2006 when PROULX was abusing me he may have been arrested by London Police Service attempting to procure a prostitute which was an undercover police officer in a "John Sting" operation. There is no criminal conviction of PROULX, he did not attend the diversion

program (John School) in London and the RCMP has no record in the adjudication branch of PROULX being dealt with. He was transferred that year to Canadian Police College after serving only a short period here in "O" Division as DIO. Was PROULX arrested, was he disciplined internally? Lacking criminal conviction if he was arrested then he was the only person of the 59 "johns" arrested in that sting that was not prosecuted.

4. PROULX'S line officers would have been C/Supt Mazerolle and A/Commr Seguin, if PROULX did act in a manner which warranted proper discipline and did not receive it, would the line officers responsible be subject of a Code of Conduct Investigation? It should be noted that DOJ formally requested SEGUIN and MAZEROLLE be removed by name from my Statement of Claim. A few weeks after that request they were nominated as Officer and Member respectively of the Police Order of Merit. Did they request DOJ to make this removal request in order to receive an award? If they did cover up for PROULX in 2006, should they have received an Order of Merit in 2007?

5. In reviewing the CACP rules for nomination it refers to "subject of formal discipline" as grounds to withhold the nomination. Supt. JAGOE was nominated and received the OOM in 2011 while still named formally in my Statement of Claim for his actions as an officer of the RCMP. Should his nomination have been approved at that time? Who approved it?

I wish to apologize again, I hope this is not perceived as confrontational, it is not meant to be. I am frustrated, I have loved my career in the RCMP, there is nothing else as rewarding. I enjoy a 100% conviction rate, I pride myself in being thorough, fair and detailed in my investigations. I try to act in a manner which affords respect to everyone, and I am well aware that I am not perfect. When I find myself off track, I will make the necessary corrections and when required include admitting that I made [a] mistake and apologizing. I have not been afforded the same courtesy, and forcing the truth to be recognized it has affected my health, it has affected my family, it has affected my faith in the RCMP ...

I believe that in my case one officer made errors of judgment in making allegations to his higher-ups before checking policy. Instead of backing up he pushed forward with more false allegations in an attempt to discredit me. My line officer took those fabricated concerns and as a bully he pushed the issue in the only way he knew how, and for which he has a bad track record. Their offences then went ignored or covered up. Which is worse? The crime or the cover up?

I do not expect a response from any of you, as it has been practice to ignore me and cite the "legal process" as grounds. I just wanted you to know the character of those you are standing behind in this matter.

Seven years is a long time, and I am sure for you and your careers and rank many wonderful things have happened. I have worked as

hard as possible to be the best member that I can in accordance with our core values. I just can't do it anymore. These seven years have taken a toll on [me]. I am not the same member I use [sic] to be. Anything that I do now is in the best interest of my family and myself. I can no longer worry about the reputation of the RCMP or individuals involved.

If I had my choice I would be back at work leading Project Overlord, a large proliferation investigation with direct links to foreign governments. I would pursue the source I began to recruit who is linked to the Egyptian protest movements and travels between Canada and Egypt. I would like to do these things because they are police work, because they have value.

I did not join to fight liars and bullies inside the RCMP, I hope the RCMP weathers this current trial in the public eye, but from where I sit we have a long way to go to fix it.

I wish you the best in your efforts to lead and correct the RCMP, I know that none of you were personally responsible in my circumstance. Please do not perceive this message in any other way than respectful. I am demoralized, I believe this has dragged out due to "process paralysis" and a lack of ownership of the issue internally.

Very Best Regards
Cpl. Peter Merrifield

- [558] S/Sgt. Reed stated that he became a full time SRR in 2008. He represented members on typical labour relations issues including conflict management, harassment grievances, complaints and behaviour issues. Regarding harassment issues, he endeavoured to help members find resources and tools to build better relationships between themselves or in a unit. Harassment included demeaning behaviour toward lower ranking members. Some examples included situations where members were spoken down to or disrespected. The effects of harassment included isolation of members from the rest of their group, not being selected for courses and not being selected for overtime work. Sometimes members faced disciplinary proceedings. SRR Reed's goal was always to resolve issues at the lowest possible level to keep officers operating in a friendly, positive environment. He carried out a significant amount of mediation and conflict resolution.
- [559] Mr. Merrifield approached SRR Reed in 2010 and requested assistance. He set up a meeting between Mr. Merrifield and Employee Management Relations Officer, Supt. Boulet to discuss Mr. Merrifield's issues. He recalled that they met and spoke for some time. His impression was that Supt. Boulet had a general concern for Mr. Merrifield's well-being.
- [560] SRR Reed stated that he wanted to meet with Asst/Commr. White. He believed that Asst/Commr. White was an honest, progressive man who was interested in the betterment of people in the RCMP. He requested that Asst/Commr. White meet with him and Mr. Merrifield to try to fix Mr. Merrifield's problems and get him back into the workplace. Asst/Commr. White was somewhat receptive but the meeting never happened.
- [561] SRR Reed recalled receiving Mr. Merrifield's email dated January 5, 2012, which was sent to him and the Commissioner among others. He stated that Mr. Merrifield wrote it because he was frustrated that he was not being dealt with. It was written from an emotional

perspective. It was valuable, strong and clearly written. SRR Reed waited to see what the outcome of the email would be.

- [562] On March 13, 2012, SRR Reed wrote a lengthy email to Commr. Paulson, D/Commr. Graham and Asst/Commr. White. SRR Reed stated that his email to the Commissioner showed his level of frustration. SRR Reed had been dealing with the case for over two years and was very frustrated that Mr. Merrifield was being left in limbo all this time without a clear direction. In his email, SRR Reed stated:

Peter is a very intelligent, productive member who from most people's perspective has potential to be a good leader, commissioned officer and very productive and innovative member of the organization. He leads the way here in "O" Division and perhaps even in the country in the Counter Proliferation world having conducted investigations and been sought and relied upon by US agencies to provide expert evidence and numerous presentations to the US Homeland Security group. They have specifically requested him on numerous occasions.

- [563] SRR Reed stated that the issues that had been brought forward had not been resolved. His purpose was to stimulate interaction between the Force and the member to find a reasonable solution. There had been no response to Mr. Merrifield's email dated January 5, 2012. SRR Reed stated that when he made inquiries, he received only vague answers such as, "We're working on it." The matter had sat in the laps of the Commanding Officer and the Commissioner for two years. In his view, the Force had to either lay a charge, do an investigation and impose sanctions if necessary or put it behind them and move on. Ongoing conflict was not healthy for anyone. If the Force believed that Mr. Merrifield had done something wrong, they should have charged him. Mr. Merrifield was not formally disciplined for participating in the Barrie nomination meeting, for appearing on the Pritchard show or for his political involvement. SRR Reed said that there were "other types" of discipline and that dealing with them was a major aspect of his job as a SRR. He believed that a series of events had occurred that were moving against Mr. Merrifield and upsetting his ability to come to work and perform his job. SRR Reed wanted to put those to rest and move forward.

Follow Up Regarding Mr. Merrifield's Email

- [564] Asst/Commr. Stephen is currently the commander of O Division and has been since 2011. He oversees all RCMP activities in Ontario including civil lawsuits.
- [565] He received the email from Mr. Merrifield dated January 5, 2012. In paragraph three of his email, Mr. Merrifield stated:

I have received allegations that during this time period in 2006 when PROULX was abusing me, he may have been arrested by London Police Service attempting to procure a prostitute which was an undercover police officer in a "John Sting" operation...

- [566] Asst/Commr. White stated that he asked C/Supt. Mazerolle to follow up on this. C/Supt. Mazerolle returned with a document and they had a brief discussion. No action was taken on the issue because Supt. Proulx had retired by then. The RCMP had no jurisdiction to carry out a Code of Conduct investigation.

- [567] C/Supt. Mazerolle saw Mr. Merrifield's email dated January 5, 2012. He knew that Mr. Merrifield's allegations with respect to Supt. Proulx were substantiated because he received a related document. C/Supt. Mazerolle stated that he was not aware that anyone had looked into the various issues and reconsidered what happened to Mr. Merrifield. He turned the document over to Asst/Commr. White and did not know what happened after that. He was training to leave for Afghanistan.
- [568] Commr. Paulson became aware of Mr. Merrifield within the RCMP when he received Mr. Merrifield's email dated January 5, 2012. Commr. Paulson found the depth and breadth of the information in the email unusual and concerning. He was concerned about it. He recalled that he forwarded it to Asst/Commr. White and a Human Resources officer. He expected that the issues would be addressed. He did not recall receiving any response and/or follow up.
- [569] Commr. Paulson stated that occasionally SRRs would communicate with him but it was not a regular occurrence. In SRR Reed's email, he asked that Mr. Merrifield's case be made a priority. Commr. Paulson believed he had a conversation with Asst/Commr. White in which they discussed following up. He stated that he was concerned about the matter but that he was reassured that Asst/Commr. White was on top of it.
- [570] In his email dated January 5, 2012, Mr. Merrifield made an allegation that Supt. Proulx had attempted to procure a prostitute. Commr. Paulson stated that he did not know whether an investigation had been conducted with respect to this allegation. He had not seen a police document. No one had ever discussed the contents of such a document with him. No one suggested to him that those allegations may have had some foundation.

Serious and Organized Crime

- [571] In September 2012, Mr. Merrifield told SRR Reed that he wanted to return to work. He had been off for 16 months. He stated that he had suffered severely. He had post-traumatic stress disorder as a result of past events.
- [572] Mr. Merrifield said that he had an opportunity to go to the Source Development Unit. After he obtained medical permission, he applied and passed the first level of screening. He was interviewed for the second level but was subsequently notified that his application was unsuccessful. Mr. Merrifield stated that people with lower marks were selected. Later, he understood that he was not selected because he was engaged in litigation with the RCMP.
- [573] The RCMP took eight months to facilitate Mr. Merrifield's return to work. He was told that his security clearance level had expired after the usual five year period. If he had applied to renew it before the expiry, the approval would have been a routine matter. Mr. Merrifield had to make a fresh application which took considerable time to process, even though he held the top level of security clearance before he went on sick leave.
- [574] While he was on sick leave, Mr. Merrifield was required to submit certain forms. When he came into the office to do this, he attempted to speak with his former co-workers. Mr. Merrifield believed that they had been instructed to not speak to him.
- [575] On April 1, 2013, the RCMP underwent a substantial re-organization. Customs & Excise was combined with several other units. It became Serious and Organized Crime, under Insp. A. White. The objective of the new combined unit was to investigate the highest priorities regardless of the commodity, such as Customs & Excise. Asst/Commr. S. White stated that counter proliferation could have been a priority. It would depend on the group involved.

- [576] Insp. Johnson, Mr. Merrifield's former superior, wanted Mr. Merrifield to return to counter proliferation investigation because he had previously led the force in that new area.
- [577] SRR Reed had a role in Mr. Merrifield's return to work. He wanted to return to counter proliferation work in a leadership role. SRR Reed made efforts with Insp. A. White as he was the OIC of the new unit. SRR Reed understood Insp. A. White's position to be that Mr. Merrifield would not be returning to counter proliferation work and that "he was not the expert he thought he was". Although the decision regarding the type of work that Mr. Merrifield would do in the new unit was up to Insp. A. White, SRR Reed disagreed with his decision and told him so. He did not know why Insp. A. White refused to have Mr. Merrifield return to counter proliferation work. He challenged the decision because he felt it was punitive. Mr. Merrifield's expertise was in counter proliferation. SRR Reed stated that a member would not be removed from a spot when he was the lone expert on the subject unless there was another reason.
- [578] In May 2013, Mr. Merrifield returned to work. He believed that Insp. A. White did not want someone returning from sick leave to take on a role in counter proliferation work. Mr. Merrifield was assigned to be the file manager for a drug investigation. He worked in this role for three months, from May to July, 2013. He never returned to counter proliferation work.
- [579] Insp. A. White stated that after the units were re-organized, he inherited Project Overlord, which had been handled by staff under Insp. Johnson's command. Mr. Merrifield had worked on this project before he was off duty sick.
- [580] While Mr. Merrifield was on sick leave, a decision had been made in Project Overlord to focus on supporting the prosecution of charges in the U.S. Insp. Johnson knew that Mr. Merrifield had ideas for charges that could be laid in Canada. He sent Insp. A. White an email asking him to hear out Mr. Merrifield on this issue. Mr. Merrifield was also eager to discuss another project proposal.
- [581] Insp. A. White stated that while Project Overlord was not closed, there was minimal activity on it. The resources of the department were focused on two significant drug trafficking investigations. Project Overlord had the staffing that it required so there was no counter proliferation file to which Mr. Merrifield could be assigned. This was the reason why he did not go back into counter proliferation work. Insp. A. White denied stating that he did not want someone returning from sick leave to take a major role in an investigation. The project that Mr. Merrifield had proposed did not go anywhere.
- [582] Insp. A. White stated that he had concerns that Mr. Merrifield was not a competent investigator. A 43 page directed review was done with respect to Project Overlord. There were many concerns about him. A lot of things were found wanting on the investigation. Insp. A. White had concerns about the direction of the file. He believed that statements made by Mr. Merrifield to Insp. Johnson and him were misleading. Project Overlord was the last counter proliferation file that came across his desk. The peer review was done at the end of July 2013. The final report was received in January 2014.
- [583] Insp. A. White stated that there had been conflict in the unit and this was the reason for the directed review. Mr. Merrifield was not subject to any discipline although others were. There were no notes from Mr. Merrifield on the Project Overlord file although he had been the primary investigator for two years. Some interviews had been conducted but they had not been recorded. Some documents had been seized that were not reported to the Justice Department. They were not tracked. There was a continuity problem. Many emails had been received from U.S. authorities. These showed that the investigation was an intelligence probe. No evidence had been obtained. No Mutual Legal Assistance Treaty

had been sent so that the American emails could be used. Financial material had been gathered but no accurate analysis of it was done by Proceeds of Crime. They had determined that there was no action to take.

- [584] Insp. A. White met with Mr. Merrifield only three or four times and in total spent just a few hours with him. Mr. Merrifield worked in Serious and Organized Crime for only a few months because he was then elected as a SRR and left Insp. A. White's command on July 7, 20013. Insp. A. White received the report on Project Overlord in 2014. He never gave a copy of it to Mr. Merrifield. He never sat down with him to discuss the contents. The reason for this was that Mr. Merrifield left his command before the report was received. Nevertheless, Insp. A. White believed that a collective meeting was held, that Mr. Merrifield attended, and that the issues were discussed. Insp. A. White did not attend the meeting.
- [585] Insp. A. White stated that Mr. Merrifield was not disciplined or performance managed as a result of the review. Insp. A. White never actually assessed Mr. Merrifield.
- [586] Cpl. Low-Fowler was the file manager for Project Overlord from August 2009 to May 2013 when Mr. Merrifield was the lead investigator. She worked in Serious and Organized Crime after the units were reorganized, under Insp. A. White.
- [587] Cpl. Low-Fowler stated that she was part of the peer review for the project in August 2013. She was asked to sit with key players in a private meeting room for one day. They were reviewing the file to identify successes, short comings and areas for improvement. No individual's shortcomings were discussed at the meeting. She was not aware that a report was generated but assumed that there would be one. She was never briefed on the outcome of the peer review process and was not aware if others were briefed.
- [588] Cpl. Low-Fowler stated that she did not receive notes from Mr. Merrifield for Project Overlord and was concerned about that. She knew that he had a lot of emails that were logged. She did not see any audio/video for witness interviews. Witness will-say statements had been obtained.
- [589] Cpl. Low-Fowler stated that the speed, flow and direction of the file were good when Mr. Merrifield was the lead investigator. There were regular meetings, people knew what needed to be done and there was follow up. The direction and goal was clear. After Mr. Merrifield left, this was not the case. Things were not being assigned or done.

Senate Standing Committee - May 27, 2013

- [590] As noted above, Mr. Merrifield joined the MPA shortly after he was hired. He was elected to be Vice-President and subsequently President in 2011.
- [591] In 2013, the Senate Standing Committee of Defence and National Security were conducting hearings to explore harassment in the RCMP. Commr. Paulson appeared before the Committee and provided testimony.
- [592] As President of the Mounted Police Association, Mr. Merrifield was invited to appear. In his testimony, he used his own situation as an example of harassment.
- [593] Afterwards, he had lunch with Evan Solomon, the host of a TV show called Power and Politics. He agreed to participate on the show that same day and be interviewed as the President of the MPA. In the interview, Mr. Merrifield spoke about the fact that other officers had told a human source (Witness X) that s/he should not work with Mr. Merrifield.

- [594] Asst/Commr. White learned of Mr. Merrifield's interview on the Solomon show the day after it happened. He sent an email to Commr. Paulson dated May 28 2013, and then had a telephone conversation with him about it. Commr. Paulson wanted to know why Mr. Merrifield had appeared on the Solomon show and made the various statements. Asst/Commr. White testified that he might have told Commr. Paulson that Mr. Merrifield was bitter and frustrated with the organization. He might have told him that the managers were trying to deal with the issue as best as they could. Asst/Commr. White stated that he mentioned C/Supt. Mazerolle's investigation into Supt. Proulx. He said the Commissioner knew that inquiries had been made. He did not know that Mr. Merrifield's statement about Supt. Proulx's involvement with prostitutes had been substantiated to some degree.
- [595] Commr. Paulson recalled the conversation with Asst/Commr. White about the interview. Asst/Commr. White told him that Mr. Merrifield was a very smart, accomplished officer, "who had become solidly and almost irretrievably embittered with the organization...and we were just going to have to let...[the proceedings] play out." Commr. Paulson stated that Asst/Commr. White is a very patient and personable man. He believed that Asst/Commr. White had made every effort to resolve the matter. His assessment was that Mr. Merrifield's performance on the Solomon show was an example of what could be expected until the claim was resolved. There was not much that could be done about it. Commr. Paulson said Asst/Commr. White told him that Mr. Merrifield was locked into a view that the officers he had referred to had harassed him. He was not going to back away from that position. Mr. Merrifield was very determined to have that validated. Commr. Paulson understood that those officers had been trying to respond to Mr. Merrifield but he was recalcitrant and was unresponsive to any direction. Asst/Commr. White told him that that those officers had tried to respond to the circumstances as best they could in the moment and that there was no malfeasance in bringing the Part IV investigation. Commr. Paulson believed that Mr. Merrifield's statement that "Supt. Proulx [was]...attempting to procure a prostitute" was unsubstantiated and unestablished.
- [596] Regarding the actions of the officers toward Mr. Merrifield, Commr. Paulson stated, "their efforts at discipline, failed though they were, were in essence blameless in terms of having to do the right thing to get Mr. Merrifield to ... stay the course as it were." He understood that Asst/Commr. White had tried to speak to Mr. Merrifield but he was not interested.
- [597] Commr. Paulson read the transcript of Mr. Merrifield's TV interview shortly after it occurred. After he read the transcript, he became concerned about whether he was receiving sufficient information about harassment from the officers who were informing him about the case. Commr. Paulson said that he was very concerned after he read the section where Mr. Merrifield spoke of the disparaging comments that had been made to a confidential informant. He said that if the allegation was true, interfering with the handling of an informant is a very serious matter. Commr. Paulson stated that he did not know whether there was any investigation into this issue. He did not order one.
- [598] SRR Reed stated that after Mr. Merrifield's attendance before the Senate Committee, Sgt. Dickinson asked Mr. Merrifield to come in for an interview. This concerned him because Sgt. Dickinson led the Part IV investigation. In SRR Reed's view, it was very unusual for the Professional Standards Unit (formerly the CIIS) to investigate a member without the SRR's involvement. Any officer could have followed up on the matter. Clearly the C.O. asked Sgt. Dickinson to carry out the interview.
- [599] Asst/Commr. White requested Mr. Merrifield's files from the PSU because Mr. Merrifield had raised some issues and no follow up had been done. One issue related to what he described as false Code of Conduct allegations.

- [600] S/Sgt. Dickinson interviewed Mr. Merrifield about the statements he made to the Senate Committee and the press. He said he did not have a mandate to take a statement. He was just asked to take a witness statement and obtain the names of the members that Mr. Merrifield had referred to and the related alleged activity. He was then to check the RCMP records to determine what the RCMP knew. In the meeting for the statement, Mr. Merrifield provided names regarding the allegations as well as additional details. S/Sgt. Dickinson stated that he asked his office administrator to review the records and also to look for criminal records. He did not do any follow up.
- [601] S/Sgt. Dickinson was also asked to provide information with respect to the PSU allegations which Mr. Merrifield raised when he had appeared before the Senate Committee. In an email from S/Sgt. Dickinson to Supt. MacDonald dated May 28, 2013, he stated that he found four PSU files and that Mr. Merrifield had not received any discipline. The second one was the Part IV investigation ordered by Supt. Proulx. The third one was the administrative review. S/Sgt. Dickinson described the fourth one "as an assistance provided to the London Police handled by myself." He described the first one as file 2005-117 (the Secret file). In the email, he stated, "Does not appear to be a PSU handled file." Dickinson stated that although a PSU scoring for a Part IV investigation, XX82, was used on this file, it had not been handled by the PSU. Sgt. Dickinson stated that the XX82 code has been used by others but he believed it should only be used by the PSU for a mandated Code investigation. Once it is used, a member is to be notified unless there is a concern that a member might destroy evidence.
- [602] After Mr. Merrifield's interview with Sgt. Dickinson, Asst/Commr. White received a memo setting out a summary of it. Of the five issues listed, one related to a sexual assault matter involving A/Sgt. Crane and another related to Supt. Proulx. The purpose of the interview had been to identify outstanding issues regarding Mr. Merrifield. He received a document from Sgt. Dickinson, indicating that the PSU located four files. All of them were closed without any discipline. Supt. Proulx had retired.
- [603] A/Sgt. Crane was acquitted of the sexual assault charge. Asst/Comm. White was satisfied that everything had been followed up.
- [604] Commr. Paulson was not aware that Mr. Merrifield had been interviewed. He knew that all of the PSU files involving Mr. Merrifield resulted in no discipline. The only information that he received in response to his request that the matter be looked into was from Asst/Commr. White, on whom he relied entirely.

RCMP Media Release - May 28, 2013

- [605] Commr. Paulson explained that at RCMP headquarters, there is a parliamentary affairs office that co-ordinates appearances at the Senate Committees and House Committees. People from that office sit in on hearings which are relevant to the RCMP and produce documents such as the RCMP Parliamentary Business Bulletin. The Bulletin is not classified and has an unrestricted circulation.
- [606] The Bulletin for the period June 3 to 7, 2013, states, "Amongst other things, Commr. Paulson alluded to disagreements that the Force has had with Cpl. Merrifield in the past, including what Commr. Paulson characterized as him having commented out of turn on national security matters."
- [607] Commr. Paulson stated that the information he received relating to Mr. Merrifield's having commented out of turn on national security matters came from Asst/Commr. White.
- [608] The Parliamentary Business Bulletin goes on to state:

In July 2005, while Merrifield was off duty recovering from surgery, he was asked to speak to Talk 640 Radio about the history of terrorism. During the interview, he did not identify himself as a member of the RCMP or purport to be interviewed as a member of the RCMP. Following the radio program Jagoe alleged that Merrifield had disclosed top secret information regarding RCMP investigations contrary to the *Official Secrets Act*. Jagoe prompted Proulx to take action against Merrifield. Two days after the radio interview, Proulx contacted Merrifield at his home and accused him of violating RCMP policy. He also advised that formal disciplinary proceedings would follow.

- [609] Commr. Paulson stated he would conclude from this portion of the Bulletin that Supt. Proulx had accused Mr. Merrifield of having done this radio talk show without authority and Mr. Merrifield would have been subject to an investigation. The Parliamentary Business Bulletin did not give the impression that the matter was concluded with no discipline.
- [610] In June 2013, Mr. Merrifield stood for election as an SRR and was successful. He served a term which expired in June 2015. At that time he was re-elected.
- [611] On March 6, 2014, Mr. Merrifield was promoted to Sergeant.

Harassment Complaint - July 7, 2015

- [612] On June 24, 2015, Mr. Merrifield attended a mandatory course entitled “Insider Threat and Security Risk Manager”. Cst. Ktabi, one of Mr. Merrifield’s junior officers, also attended the course. Mr. Merrifield had previously dealt with him regarding a performance issue. Part of the discussion in the course was about psychopaths. The instructor asked if anyone could identify psychopaths. Several people stated names. Mr. Merrifield, who is apparently known for his wry sense of humour, stated, “The Commissioner. Just joking. Just a joke.” Cst. Ktabi took offence to this, completed a form known as an A5 on July 7, 2015, and sent it to Insp. Crouch, OIC of INSET. He stated in the form that he considered Mr. Merrifield’s comment to be a form of harassment. The complaint went to the Office for Co-ordination of Harassment Complaints. (OCHC).
- [613] Section 2.8 of the RCMP’s harassment policy defines harassment as follows:

2.8 **Harassment** means any improper conduct by an individual that is directed at, and is offensive to, another individual in the workplace, including at any event or any location related to work, and that the individual knew, or ought reasonably to have known, would cause offence or harm. It comprises an objectionable act, comment, or display that demeans, belittles, or causes personal humiliation or embarrassment, and any act of intimidation or threat. It also includes harassment within the meaning of the *Canadian Human Rights Act*, i.e. based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, and pardon conviction.

2.8.1 Harassment is normally a series of incidents but can be one severe incident which has a lasting impact on the individual.

- [614] The information on the A5 did not meet the requirements of a harassment complaint. There is no provision in the policy for a third party complaint. The person alleging that he has been harassed must make the complaint. He can authorize another person to do so on his behalf if he is unable to make the complaint himself due to medical reasons and if he provides written authorization to the other person.
- [615] Despite the fact that the requirements for a harassment complaint had not been met, staff at OCHC treated the A5 as a harassment complaint.
- [616] Harassment reviewer civilian Ms. O'Neil, of the OCHC, opened ACMT File #2015336749 on July 27, 2015. Mr. Merrifield was the only subject listed on the file and was identified as the "Respondent".
- [617] Ms. O'Neil carried out a review and prepared a "report", OCHC Review – Case #2015336749, in which she set out a synopsis of the allegation.
- [618] S/Sgt. Floyd, an SRR who had extensive involvement in the development of the harassment policy, explained that the complaints policy regarding harassment was modified and came into force on November 28, 2014.
- [619] S/Sgt. Floyd described the process. He explained that a written complaint would usually be prepared on form 3919. A complaint can be written on another document as long as it contains the necessary criteria. It would be submitted to the OCHC intake office where it is reviewed. Within seven days, the complainant will receive an acknowledgment that the complaint has been received. After that, the complaint is processed and forwarded to the Division where the complaint was received. At the OCHC, the complaint goes to a harassment advisor who works with a decision-maker. The decision-maker is usually the C.O. of the Division. In this instance, Cst. Brunet was the advisor, civilian Ms. Paquet was her assistant and Asst/Commr. White was the C.O.
- [620] S/Sgt. Floyd explained a respondent is not notified until the complaint comes to the Division. Typically, the decision-maker notifies the respondent within 14 days. Upon receipt of the complaint, the decision-maker reviews it to ensure compliance with submission deadlines and policy criteria for harassment.
- [621] In this matter, the complaint was made in mid-July. Mr. Merrifield was not notified of it until October. S/Sgt. Floyd stated that this is not his understanding of how the policy is supposed to work. He stated that in his view, the A5 document does not commence a harassment complaint. A third party complainant cannot make a complaint that someone else has been harassed. The essence of the allegation in the A5 was that Mr. Merrifield may have acted inappropriately at a training event. S/Sgt. Floyd stated that this complaint went to the Inspector. There is a process for a supervisor to follow when a matter is not a formal harassment complaint. If steps need to be taken, the subject of the complaint could be considered a performance issue or a Part IV investigation could be initiated.
- [622] S/Sgt. Floyd stated that if a complaint is going to proceed, it is imperative that the respondent knows what the allegations are so that s/he can respond. The respondent is to receive the 3919 form as well as the allegations. This is mandated under the policy. The respondent typically receives the documents after the decision-maker reviews it and considers it to be a formal harassment complaint.
- [623] In s. 5.2.3, the Policy states that if the complaint is determined to not be a harassment complaint but rather a work performance issue, the supervisor or manager must take appropriate steps to determine if a response, consistent with the workplace relations services, would be appropriate. S/Sgt. Floyd stated that on Friday, November 13, 2015,

two days before they were to testify, he and C/Supt. O'Reilly, who was the highest ranking officer responsible for the OCHC, had a conversation. They agreed that this was the process that should have been followed regarding Cst. Ktabi's A5. They agreed that the matter had been handled inappropriately.

[624] In 2015, C/Supt. O'Reilly was the director general of the Workplace Responsibility branch. He was also directly involved in the development of the new policy for harassment complaints and is now responsible as an overseer and policy expert regarding harassment, among other issues, within the RCMP. He is ultimately responsible for the OCHC. He manages and oversees the superintendent who is responsible for conduct and employee relations who in turn oversees the Staff Sergeant for the OCHC. C/Supt. O'Reilly explained the OCHC is responsible for several things including operating the policy centre for oversight of the harassment policy, carrying out investigations and managing the resolution process. It is the central intake for complaints.

[625] C/Supt. O'Reilly testified that he first became aware of the complaint involving Mr. Merrifield on July 23, 2015. It came up during a morning briefing that takes place every day which is held by the Professional Responsibility officer, Asst/Commr. McMillan and attended by three director generals including himself. Asst/Commr. McMillan told him that Asst/Commr. White was looking for advice with respect to the report that he had received. C/Supt. O'Reilly stated that the next day he contacted Asst/Commr. White and told him to forward the A5. C/Supt. O'Reilly received it on July 24, 2015. His next step was to contact the Professional Responsibility officer and provide some recommendations. He stated that Asst/Commr. White did not have a role at that point because the A5 did not initiate a harassment complaint.

[626] On July 27, 2015, C/Supt O'Reilly reported to the Professional Responsibility officer that he had received the A5 and that his recommendation was that it should be treated as a "third party non-complainant process". On July 27, 2015, he sent an email to Supt. MacDonald and Ms. O'Neil which stated that "a third party harassment complaint" was attached. C/Supt. O'Reilly stated that it was very unfortunate that he used this term as a "third party harassment complaint" does not exist in the new policy. In the next paragraph of his email, he directed Ms. O'Neil to open a file and to proceed with "the third party non-complainant process". This was the correct process that should have been initiated. C/Supt. O'Reilly then sent an email to Asst/Commr. White on July 27, 2015 to advise that a file had been opened and that the matter would be addressed through a third party non-complainant process.

[627] C/Supt. O'Reilly stated that he had quite a few concerns with respect to how the OCHC case review was prepared by Ms. O'Neil. It purported to make Cst. Ktabi's document into a harassment complaint. It stated that a complaint had been received and that it would proceed in accordance with the harassment policy process. C/Supt. O'Reilly stated that this occurred because he had referred to the complaint as a "third party harassment complaint" in his email dated July 27, 2015 to Supt. MacDonald and Ms. O'Neil. He stated that he had misrepresented Cst. Ktabi's document when he called it a third party harassment complaint and this led to the analysis of it as a harassment complaint. He stated that the A5 document did not constitute a formal harassment complaint because, pursuant to the policy, Cst. Ktabi did not have the ability to initiate such a complaint on someone else's behalf.

[628] He said he believed that the OCHC had reverted to their standard operating procedure when they contacted the SRR. Rather than treating the complaint as an informal resolution outside of the harassment complaint process, they treated it as a harassment complaint and informal resolution within that process. C/Supt. O'Reilly thought that Mr. Merrifield was not informed that there was an error in the interpretation of the policy and that the matter

should not have been characterized as a harassment complaint. He said that he did not advise Mr. Merrifield of this and he thought that “O” Division also had not advised him. The first cause of the delay in notifying Mr. Merrifield was that the Commissioner was away on holidays until the end of August and was not available to advise as to how he wanted to be engaged. During September, the matter was overlooked. It was not a priority for case reviewers until it was raised by the Professional Responsibility officer.

[629] Even though the A5 was dated July 7, 2015, Mr. Merrifield was not served with it until October 22, 2015. He was asked if he wished to engage in informal resolution. He agreed. When the Commissioner returned from holidays, his stance was that he required a written apology. A copy of it was to be sent to all the other officers who attended the course.

[630] As a result of all of this, Mr. Merrifield’s name was entered into the OCHC’s database which exists to keep track of harassers and identify patterns. Entries into the database are not removed. They can only be revised to show that a matter has been resolved.

[631] On November 23, 2015, C/Supt. O’Reilly directed Ms. O’Neil to change the identification in the Administrative Case Management Tool (AMCT) for Mr. Merrifield from “Respondent” to “Subject of Consultation.”

[632] Since November 23, 2015, access to ACMT File #2015336749 has been restricted to C/Supt. O’Reilly, Supt. MacDonald and Ms. O’Neil.

[633] With respect to the status of the matter, as of November 18, 2015, C/Supt. O’Reilly stated that despite the miscommunication, the matter was still in the “third party complaint process and informal resolution”. He confirmed that there is no harassment complaint at this time.

[634] As a result of the A5 filed by Cst. Ktabi and its mishandling by the RCMP, Mr. Merrifield did not know that a complaint had been made against him until October 22, 2015 when he was served with the A5. He first learned that the RCMP conceded that the matter was handled inappropriately during the testimony of S/Sgt. Floyd and C/Supt. O’Reilly on Tuesday, November 17 and Wednesday, November 18, 2015. In the interval, Mr. Merrifield lived under the shadow of a harassment complaint involving himself and the Commissioner.

[635] No explanation was provided as to why Mr. Merrifield was not advised of this between Friday, November 13, 2015 and the dates of the testimony.

[636] I will now turn to the motion brought by the plaintiff.

Should the statement of defence be struck for late disclosure?

[637] During the trial, plaintiff’s counsel stated their intention to bring this motion. I determined that I could not decide the motion until the end of trial when all of the evidence had been called. Accordingly, this motion was heard on June 2, 2016.

[638] Most of the examinations for discovery in this action were conducted in 2010. This trial proceeded over three trial sittings in November 2015, May 2016 and November 2016. The defendants provided additional documents on 13 different dates during the trial, 9 of which were after the plaintiff testified. Some of the documents provided evidence of the decisions and actions of certain witnesses after they had already testified. The plaintiff conducted examinations for discovery relating to some of the late produced documents on May 28, 2015, during the trial. Several significant documents came into the plaintiff’s possession

only because he made an Access to Information request. The plaintiff states that he was substantially prejudiced by the late production of documents. This prejudice cannot be overcome by an adjournment or costs. Accordingly, the plaintiff requests an order striking the defence.

- [639] The defendants state that the remedy requested by the plaintiff is the most extreme and punitive relief available. The plaintiff has not demonstrated any actual prejudice arising from the late disclosure. Even if there was prejudice, the relief sought is vastly disproportionate to the prejudice.

The Test

- [640] The *Rules of Civil Procedure*: R.R.O. 1990, Reg. 194, set out requirements for production of documents. A party to litigation is required to provide every document relevant to the issues in the action that is in its possession. This is an ongoing obligation throughout the course of the action. According to Rule 53.08, when the issue of late disclosure or production arises at trial, if the evidence is admissible only with leave, leave shall be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay to the conduct of the trial.
- [641] Rule 2 addresses the consequences for non-compliance. Ordinarily, non-compliance is an irregularity which does not render a proceeding a nullity. The court may set aside the proceeding in whole only where necessary and when it is in the interests of justice.
- [642] The plaintiff acknowledges that he seeks a rare and drastic order to strike the defendants' pleading based on non-compliance with their obligation to disclose and produce. The plaintiff relies on *Iannarella v. Corbett*, 2015 ONCA 110, 124 O.R. (3d) 523, *Blatherwick v. Blatherwick*, 2015 ONSC 2606, 8 E.T.R. (4th) 30, *Bishop-Gittens v. Lim* 2015 ONSC 3553, 127 O.R. (3d) 74, *Newlove v. Moderco Inc.*, 2002 CanLII 34748 (ON SC), *McAvan Holdings v. BDO Dunwoody Ltd.*, (2003), 2003 CanLII 64222 (ON SC), 65 O.R. (3d) 247 (Sup. Ct.), and *Leone's Music World v. Jam Industries*, 2008 CanLII 87580 (ON SC).
- [643] In *Iannarella*, surveillance evidence was disclosed and produced for the first time during the cross-examination of the plaintiff at trial. The respondents did not serve an affidavit of documents and did not provide particulars of the surveillance either before or after the appellants set the matter down for trial. The court quoted Howden J. from *Beland v. Hill*, 2012 ONSC 4855, at para. 50, in which he stated, "the discovery rules are to be read in a manner to discourage tactics and encourage full and timely disclosure in order to encourage early settlement and reduce court costs." The court stated in para. 46 of *Iannarella* that "given the interests of fairness and the objectives of efficiency and settlement, the court expects the parties to comply fully and rigorously with the disclosure and production obligations under the *Rules*." The Court of Appeal stated that because the respondent failed to serve an affidavit of documents, the trial judge ought to have considered how the case would have developed if the respondents had complied with the *Rules*: *Iannarella*, at paras 66 – 67. The court found at para. 33 that the prejudice was "baked in" when the trial was underway. The court ordered a new trial for a variety of reasons including the fact that the surveillance had not been disclosed.
- [644] *Bishop-Gittens v. Lim* also concerned the defendant's failure to notify the plaintiff that it had conducted surveillance. The court held that the defendant could rely on the surveillance evidence for purposes of impeachment and that any potential prejudice to the plaintiff could be addressed through the imposition of appropriate terms. The prejudicial effect of the surveillance did not outweigh its probative value. The main difference between this case and *Iannarella* is that the trial was not yet underway when the surveillance issue arose.

The court stated at para. 17 that, “neither party has taken any steps at trial which could result in prejudice by not knowing that this evidence might be referred to at trial.”

- [645] *Blatherwick* is a family law matter. The husband produced documents during trial that would have affected the valuations of certain assets. The court found that the late disclosure resulted in prejudice. It excluded relevant evidence on the basis that there would be no time to investigate, prepare or respond to new documents that were produced not on the eve of trial but at trial. An adjournment would have been prejudicial to the wife. The court held that the documents that the husband produced during trial were not admissible.
- [646] In *Newlove*, a plaintiff failed to produce financial information and then sought to have it admitted at trial to bolster his claim for damages. The trial judge heard a motion before trial brought by the defendant to dismiss the action or for an order preventing the plaintiff from introducing the evidence. The court held that the proper approach was to proceed with the trial without the previous undisclosed documents. The trial judge quoted from *Bascur v. Fernandino*, [1997] O.J. No. 1136 and stated, “the extreme remedy of dismissal of the action with respect to damages may be granted, in a case where no acceptable excuse for the failure to comply is offered, and the documents cannot be produced in time for proper trial preparation.”
- [647] *McAvan* concerned a company’s failure to obtain files from Canada Customs and Revenue Agency (CRA) in an action where it alleged professional negligence against its accountants. The defendant accountants brought a motion to compel production of documents. Master Albert directed the plaintiff’s to obtain their files from CCRA and deliver a further affidavit of documents, failing which the defendant could bring a motion to stay or dismiss the claim.
- [648] In *Leone’s Music World*, the court considered a motion prior to trial to dismiss the plaintiff’s claim for failure to comply with two interlocutory court orders that set out documents that the plaintiff was required to produce. Master Pope determined that the defendant would be severely prejudiced if it was required to go to trial and defend a claim for economic loss without complete documentation to test what the plaintiff’s purchases, sales, inventory, revenue and profits were during the relevant periods. There had been extensive delays in the proceeding of nine years. The court dismissed the plaintiff’s action.
- [649] In the above-noted cases, with the exception of *Leone’s Music World*, the court has dealt with failure to produce documents or producing documents at the last minute by either ordering a new trial or finding that the documents were not admissible at trial.
- [650] The defendants rely on *Glass v. 618717 Ontario Inc.*, [2011 ONSC 2810](#) and *Eloro Resources Ltd. v. Sovereign Capital Group (Ont.) Ltd.*, [2004 CanLII 14047 \(ON SC\)](#). They also rely on *Newlove* set out above.
- [651] In *Glass*, the plaintiffs brought a motion during trial to strike the defendants’ pleadings. They alleged that the defendants failed to produce material documents in a timely fashion. Production of documents was the subject of an earlier motion in which the court ordered the defendants to request certain files from a law firm and provide the plaintiffs with copies of their contents. The defendants reviewed those documents at the law firm and then invited the plaintiffs to review them, which they did. They obtained copies of certain documents from the files. On the motion to strike, the plaintiffs took the position that the defendants had not actually produced the files from the law firm. The court stated that the seriousness of any breach and the related prejudice to the innocent party’s right to a fair hearing had to be considered. At para. 36 of *Glass*, the court considered the principles set out in *Newlove* and *Breslin v. Breslin*, 2006 CarswellOnt 6372 at para. 9 where the court stated that the “interlocutory dismissal of an action is a remedy of last resort, to be invoked

when the litigant has shown a cavalier disregard of his obligations.” The defendants had not failed to produce the documents ordered by the Master. Furthermore, the plaintiffs had not demonstrated any prejudice resulting from their late inspection of the law firm’s files. The court did not accept the plaintiff’s argument that the failure to produce the files deprived them of the opportunity to obtain favourable evidence or admissions on examinations for discovery. The plaintiffs decided not to proceed with the continued examination of the defendant.

[652] In *Eloro*, the defendant had not provided an affidavit of documents and had failed to attend at examinations for discovery, despite the fact that a timetable order had been made. The motion was adjourned several times because the defendant’s solicitor of record had been removed and the principal of the corporation was out of the country. The court stated at para. 6 that “... striking a defence is an extreme remedy and a last resort. It should only be ordered when the defence of the action is no longer viable and appropriate because the defendant has by its failure or refusal to be bound by the rules and orders of the court effectively abandoned its right to participate in the court process or when the breaches have become contemptuous such as to demonstrate an utter disregard by the defaulting party for the court’s orders or when the moving party can demonstrate prejudice.” The court found that the breaches occurred during a brief period when the defendant was without counsel. Therefore, the plaintiff’s motion was denied.

[653] The cases relied upon by the parties fall into three broad categories:

- (a) requests by a party to admit evidence at trial that is helpful to that party (*Blatherwick and Newlove*);
- (b) motions brought prior to trial (*Bishop-Gittens, McAvan and Eloro*); and
- (c) failure to comply with production orders (*Leone’s Music World*).

[654] All of these cases can be distinguished on their facts. Here, the plaintiff requests an order to strike the defence because the defendants failed to locate documents prior to trial and instead produced them during trial. These documents might have been helpful to the plaintiff.

[655] The principles that emerge from these cases indicate that on this motion to strike, the court must consider the seriousness of the failure to produce documents and whether this resulted in prejudice to the plaintiff’s right to a fair hearing. Striking a statement of defence is a remedy of last resort to be used when the defendant has shown a cavalier disregard of its production obligations.

The Plaintiff’s Position

[656] The plaintiff provided two helpful charts. The first one sets out the dates when the defendant provided certain documents and a description of those documents. It also includes the date when the trial began, the two dates when it reconvened and the date when the parties conducted a mid-trial examination for discovery on some of the new productions. In addition, the plaintiff provided a second chart showing the dates when various witnesses testified. Both charts are reproduced below.

REFERENCE NUMBER	WHAT	WHEN PROVIDED	WHAT DOCS
	Original list of documents	April 9/10	Tabs 1-302

	First supplementary list of documents	June 16/10	Tabs 303-311
	Second supplementary list of documents	Feb. 24/14	Tabs 312-331 – Boos, Van Doren and Frank Smith Notes
1	Request for file and reply re file jacket 20015-1117	June 24/14 July 16/14	Enclosing file jacket and list of file contents
	Third supplementary list of documents	Sept. 30/14	Tabs 332-334 enclosing 2005-1117
			Occurrence Report and file jacket (file jacket previously supplied via email July 16/14)
	Fourth supplementary list of documents	Oct. 31/14	Tabs 335-341 (Promotion Exam 2006 registration documents)
	Discovery of Peter Merrifield	Nov. 10/14	
	TRIAL COMMENT	NOV. 17, 2014	
2	Elections Canada Results	Nov. 21/14	Nomination results presented during cross-examination (Exhibits 62,64,66,68)
3	Van Doren Note	Nov. 28/14	1 page
4	2005-1117 file documents	Nov. 30/14	6 documents
5	Boos notes	Nov. 30/14	16 pages (mostly redacted)
6	Continuation reports and Andy White notes	May 13/15	14 pages
7	Crane note and policy	May 14/15	1 page Crane note with printout of policy and regulation
8	Continuation report re BB gun case	May 15/15	4 pages
9	OP manual page	May 18/15	1 page
10	Seguin Notes	May 25/15	2 pgs. re October 2006
11	Proulx Notes	May 25/15	5 new pages plus redacted parts of existing notes – new note for Jan. 6/05 with Trueman reference
12	McCann Notes	Nov. 6/15	6 pages notes redacted (appears to show discussion with J. Jago)

	TRIAL RECONVENES	Nov. 16/15	
13	Personnel report with Proulx comments	Nov. 18/15	Proulx comments added to end of report, handwritten date on front
14	Mazerolle Notes	Nov. 18/15	2 pages (entries for May 13/05 and June 2/05 referencing Jagoe)

DATE(S)	WITNESS
November 17 to November 21, 2014	Peter Merrifield
November 24, 2014	Peter Merrifield, Michael Nicota
November 25, 2014	Peter Merrifield
November 26, 2014	Peter Merrifield, Stephen Raine
November 27 & 28, 2014	Peter Merrifield
December 1, 2014	Peter Merrifield, Jim Brown, Greg Sims
December 2, 2014	Stephen Frith, Mark DuPuy, Tim Petit, Doug Ford
December 3, 2014	Joseph Robert Paulson, Ian Wallach
May 19, 2015	Sealed testimony – Stephen White
May 20 & 21, 2015	Brian John Reed
May 22, 2015	Frank Phillip Smith, Wendy Verecchia
May 26, 2015	Joseph Donat, Michel Seguin
May 27, 2015	Joseph Donat, Michel Seguin John Steeves
May 29, 2015	John Roy Steeves, Stephen Boos
June 1, 2015	Stephen Boos, Don Crane, Jamie Raymond Jagoe
June 2, 2015	Jamie Jagoe
June 3, 2015	Jamie Jagoe, Marc Proulx
June 4 & 5, 2015	Marc Proulx
November 16, 2015	Marc Proulx

November 17, 2015	Kim Floyd, Michael O'Reilly
November 18, 2015	Michael O'Reilly
November 19, 2015	Martien Van Doren, Rod McCann
November 20, 2015	Rod McCann, Norman Mazerolle

[657] The plaintiff states that he has suffered irremediable prejudice in the trial of this action. He takes issue with the production of all of the documents during trial; however, four items are particularly concerning.

[658] Number one on the first chart, being the file jacket and list of file contents for 2005-117, (which has been referred to as the Secret file) were provided on June 24, 2014 and July 16, 2014, four months before the trial began. The plaintiff states that he received these documents pursuant to an ATIP request that he made. They show that the file was coded as an internal investigation with restricted access. Had these documents been provided prior to examinations in 2010, the defendants could have been questioned about them.

[659] Number 11 on the first chart, being five new pages as well as un-redacted parts of Supt. Proulx's notes produced on May 25, 2015 contain a new note dated January 6, 2005 with a reference to Supt. Trueman. This note states as follows:

Tom Trueman

- when misuse of credit card -

code of conduct?

what policy?

which offence

Fact finding in order to [illegible word] the appropriate action based on the actions of Cst. M.

[660] The plaintiff states that this note refers to the Amex inquiry. Mr. Proulx testified after these notes were produced; however, as part of the examination for discovery in 2010, inquiries were made of Supt. Trueman regarding his recollection of events. An inquiry was not made on this specific point because the plaintiff was not aware of it until the notes were produced five years after examinations. An inquiry was made in 2015 after the notes were produced; however, Supt. Trueman had no recollection of a conversation with or contact from Supt. Proulx on January 6, 2006. The plaintiff states that had this note been produced prior to examinations, an inquiry of Supt. Trueman could have been made through examinations, four years after the note was made. Supt. Trueman may well have had a recollection in 2010 of Supt. Proulx's contacting him in 2006 but he had no recollection of it in 2015, nine years later. If Supt. Trueman had told Supt. Proulx that a Part IV investigation was not warranted, this evidence would have been helpful to the plaintiff.

[661] Number 12 on the first chart, being six pages of redacted notes of Supt. McCann, produced November 6, 2015, appear to show a discussion with Insp. Jagoe on November 23, 2005. A significant portion of the notes is redacted. The part that is not redacted states:

very familiar with Merrifield member situation.

- work hard
- good work ethic
- stay under the radar
- similar advice from NCO's
- media interview day after 717
- ATIP request on all correspondence Proulx, CROPS office, Jamie
- media interview (not good)

- [662] Supt. Jagoe testified that he never had a discussion with Supt. McCann regarding the possibility of Mr. Merrifield's returning to work on the investigative side of INSET. Supt. McCann's notes were disclosed after Supt. Jagoe gave evidence in June 2015. The plaintiff states that had these notes been disclosed prior to examinations, Supt. Jagoe could have been questioned on this issue. Had these notes been disclosed prior to trial, Supt. Jagoe could have been cross-examined on the point.
- [663] Number 14 on the first chart, being C/Supt. Mazerolle's notes with entries for May 13, 2005 and June 2, 2005, which refer to Insp. Jagoe, were produced on November 18, 2015. A portion of the notes state, "Jamie called to advise of the Peter Merrifield. Try to advise that he would try to accommodate him in Inset. He stated he was concerned about the review from a policy perspective and that he hoped the C.O. & CROPS knew what they were doing."
- [664] The plaintiff states that these notes were produced five months after Supt. Jagoe had already testified. His evidence was that he would not have Mr. Merrifield at INSET because he lacked judgment.
- [665] The plaintiff states that had these notes been produced prior to examinations, Supt. Jagoe could have been questioned about this conversation. Had the notes been produced prior to trial or even prior to Supt. Jagoe's testimony, he could have been cross-examined on this point.
- [666] In addition to the above, the plaintiff states that had there been proper and timely disclosure, he would have given his evidence at trial informed by an appropriate and complete universe of relevant documents, rather than having documents that included references to him and other incidents unknown to him at the time of his trial testimony being introduced into the trial through later witnesses. The plaintiff states that had there been proper and timely disclosure, both parties would have had informed settlement negotiations based on a fully informed understanding of the case. This would have included an assessment of the problems associated with Supt. Proulx's decision to order a Part IV investigation against the plaintiff in January 2006, which would have been informed by the timely recollections of Supt. Trueman. Further, the parties would have been able to make a fully informed assessment of the risks associated with the existence of a formal investigative file, 2005-1117, notice of which was not given to the plaintiff at the time. The parties also would have been able to make a fully informed assessment of the implications of the reference to the June 2, 2005 communication between Insp. Jagoe, C.O. Seguin and C/Supt. Mazerolle.
- [667] The plaintiff argues that *Iannarella* sets out the court's expectations concerning disclosure and the critical role of discovery. It avoids trial by ambush, encourages early settlement and enhances trial efficiency.
- [668] The plaintiff states that the prejudice arising from the late disclosure cannot be overcome by an adjournment or costs. Given that the evidence in the trial proceeded intermittently

from November 17, 2014 until December 4, 2015, multiple adjournments to investigate, prepare or respond to new documents that were produced in November 2014, May 2015 and November 2015 would not have been feasible. The trial was already lengthy. The plaintiff is an individual bringing an action against well-resourced defendants. No order that could be made now to put the plaintiff back in a position that would approximate how this litigation and trial should have proceeded if the defendants had complied with their disclosure obligations. As a result, the only appropriate remedy is to strike the defendants' pleading.

The Defendants' Position

- [669] Regarding the Secret file 2005 - 1117, the defendants state that the file was the subject of a *Privacy Act* R.S.C. 1985 c. P-21 request made by the plaintiff in 2005. As a result, many of the documents contained in the file were disclosed to the plaintiff in the defendants' initial production of documents in 2010. File 2005 – 1117 is referred to in several other documents in the productions of both parties including Supt. Proulx's email to Supt. Trueman dated July 27, 2005. At discoveries, the plaintiff questioned Supt. Proulx about his memo to Supt. Trueman. Four years later, the plaintiff requested production of file 2005 – 1117. The defendants replied that all of the documents in that file had already been disclosed except for three. Two of them were national security policy documents that could not be disclosed. The third one was an excerpt from the RCMP career management manual relating to the position of Investigator for National Security investigations. The defendants state that a description of this position as well as a copy of the file cover, were provided to the plaintiff four months in advance of trial.
- [670] The defendants state that during the trial, their counsel learned that there was an internal folder/wallet with sixteen additional documents. The defendants had produced ten of them in 2010. Three of them, although not disclosed by the defendants, were listed in the plaintiff's affidavit of documents. The remaining three documents were provided on November 30, 2014, two weeks after the trial began.
- [671] The wallet is listed on a transmittal acknowledgement dated January 17, 2006, attached to Exhibit Q of the affidavit of Diane Dyke, sworn March 7, 2016 and filed by the defendants on this motion.

Analysis

- [672] The case law provided by the parties is helpful only with respect to statements of legal principles. None of the cases concerned a situation where the defendant failed to make timely production of documents that might have been helpful to the plaintiff's case.
- [673] The reason why the plaintiff's counsel requested production of file 2005 – 1117 is because the plaintiff received the file jacket in 2014 pursuant to an ATIP request. The defendants have no basis for saying that because the file was referred to in documents that the plaintiff had in 2010, the plaintiff should have made a specific inquiry for the file jacket and the contents and this somehow lessens the seriousness of the defendants' failure to produce the documents. These documents were relevant to the action.
- [674] Regarding the defendants' obligation to produce documents, the onus is not on the plaintiff to analyse the defendants' productions, look for references to other documents which may not have been produced and then request that they be produced. A plaintiff has no knowledge of the undisclosed documents in a defendant's possession. The defendants should have disclosed all of the documents from the folder/wallet in a timely fashion, not after the trial began.

- [675] Regarding the additional notes of various officers in items three, five, six, seven, ten, eleven, thirteen and fourteen on the first chart, the explanations provided for their late production were dubious. Some of them were produced late because they were misfiled. Some of them were in boxes and envelopes with other unrelated documents at the officers' homes. These officers happened to be looking in those boxes and envelopes during trial and found the notes.
- [676] Police officers take notes on a daily basis. These notes are sometimes used to refresh their memories when they are testifying. Through their training, police officers have a heightened appreciation of the importance of accurate note taking and retention. The authors of most of these notes were Commissioned Officers. The fact that these notes could not be located earlier shows a surprising failure on the part of these officers and/or the RCMP to ensure that the notes were properly filed and retained, and to conduct a thorough search for relevant documents. The court does not condone these failings.
- [677] The plaintiff conducted a mid-trial examination for discovery of Mr. Proulx and Mr. Smith on May 28, 2015. Regarding the late disclosed notes of Supt. McCann and C/Supt. Mazerolle, the plaintiff was put in a difficult position. They were disclosed after the mid-trial examination. The plaintiff could have requested that Supt. Jagoe be recalled for cross-examination on the references to him in these notes; however, a party takes a significant risk in cross-examining on a point when the witness' answer is uncertain. Another mid-trial examination would have been required. The defendants suggest that the solution to any prejudice caused by the late production of notes was to hold further examinations. This is not the way that a trial ought to proceed. A plaintiff should not have to scramble mid-trial to conduct multiple examinations. A plaintiff should not have to forego trial days in order to fit in examinations.
- [678] The reference in Supt. McCann's notes to a conversation with Insp. Jagoe, which Insp. Jagoe said did not occur, calls into question Insp. Jagoe's credibility. While the late disclosure of these notes was proved inconvenient to the plaintiff and this court, I find that the information contained in them is not of sufficient importance that their late production resulted in irremediable prejudice to the plaintiff's right to a fair trial.
- [679] The late production of Supt. Proulx's note dated January 6, 2006, which refers to Supt. Trueman, is a larger issue. Supt. Proulx consulted with Supt. Trueman regarding his concerns that Mr. Merrifield had a conflict of interest and should not continue to work in TAG. The note dated January 6, 2006 appears to show that he consulted Supt. Trueman again before he ordered the Part IV investigation. The only evidence of that contact is Supt. Proulx's note. We will never have Supt. Trueman's evidence regarding that conversation and any recommendations that he made because, due to the late production of the note, Supt. Trueman was unable to recall the event, 10 years after it occurred. Had the note been produced and included in the defendants' productions in 2010, it is reasonable to assume that four years after the event, Supt. Trueman might have been able to recall the conversation. If Supt. Trueman had not concurred with Supt. Proulx's plan to order a Part IV investigation, this evidence would have been quite helpful to the plaintiff; however, Supt. Trueman's advice might have been that investigation was warranted, which would have been helpful to the defendants. We can only speculate.
- [680] It is difficult to conclude that the unavailability of this evidence resulted in irremediable prejudice to the plaintiff's right to a fair trial. The evidence showed that the allegations that formed the basis for the Part IV investigation were unsubstantiated. No wrongdoing was discovered regarding Mr. Merrifield's use of his Amex card. In the plaintiff's best case, if Supt. Trueman's advice to Supt. Proulx was that investigation was not warranted, this would have been one more fact to consider on this issue in assessing Supt. Proulx's actions.

[681] The defendants' failure to locate and produce earlier the documents that were produced during the trial falls below what is expected of a party to an action, especially considering that the defendants employed a file manager, Frank Smith, whose job was to look for relevant documents and provide them to counsel for production. Despite this, I cannot conclude that the seriousness of the failure to produce these documents in a timely fashion detracted significantly from informed settlement negotiations, meaningfully impaired the plaintiff's proper trial preparation or prejudiced a full adjudication of the merits of the action.

Conclusion

[682] The plaintiff notes that striking a statement of defence is a remedy reserved for rare cases where material prejudice is established. Based on the record before me, I conclude that this is not one of those rare cases. The plaintiff has not established material prejudice sufficient to warrant an order striking the statement of defence.

[683] The parties may make submissions regarding the costs of this motion in their trial costs submissions.

Mr. Merrifield's Credibility and the Reliability of his Evidence

[684] The defendants state that Mr. Merrifield is not a credible or reliable witness. His evidence should be approached with caution and given a reduced weight, particularly where there are conflicts with basic facts and/or the testimony of other witnesses.

[685] They say that one of the central issues in this case, which is relevant to both Mr. Merrifield's credibility and to his claims that he was not required to be on LWOP when he "ran for political office in May 2005" (the Barrie nomination meeting on Saturday, May 14, 2005) is whether Mr. Merrifield actually intended not to win the nomination when he stood as candidate. His evidence was that he did not want to win and ran only to have an opportunity to speak to members of the local riding association about his concerns regarding another candidate.

[686] The defendants state that this is inconsistent with the steps of an active campaign that he took or others took on his behalf to ensure that he would win the nomination. For example, he retained a campaign manager, obtained a list of local party members, made audio recorded telephone calls, created a website, campaign cards and pamphlets for distribution, none of which stated that he was not interested in winning the nomination. At the event, he directed party members to place his name first on the preferential ballot. Cpl. Frith testified that he voted for Mr. Merrifield so that he would be the party's candidate.

[687] The defendants state that Mr. Merrifield ran at the nomination event with the intention of being elected to be the party's candidate. His subsequent statements that he did not intend to win the nomination are disingenuous. This shows that Mr. Merrifield's evidence is unreliable. It also undermines Mr. Merrifield's testimony that he believed that he did not require LWOP for the nomination meeting because he did not intend to win.

[688] I do not accept the defendants' position on this issue. Mr. Merrifield testified that he sold no Conservative Party memberships in contrast to the other two candidates. He testified that selling memberships was critical to success at a nomination meeting. During the time leading up to the nomination meeting, Mr. Merrifield was away, organizing and participating in operation Bridgeout. He was not soliciting votes. He explained that any votes that he obtained would result in support for Mr. Broley, Mr. Merrifield candidate of choice, once Mr. Merrifield was eliminated. They would not go to Mr. Brown who was the subject of Mr. Merrifield's concerns. Furthermore, Mr. Merrifield stated that he was offered

an opportunity to run in the Richmond Hill riding in 2005 and could have run in the federal election for that riding if he wished. If he had wanted to be elected, this would have been an easier path than opposing Mr. Brown, in the Barrie nomination meeting, who had sold a lot of memberships.

[689] The defendants state that Mr. Merrifield gave inconsistent evidence at trial in contrast to examinations for discovery. At examinations, he stated that he put his name forth as a candidate in just two ridings prior to the 2004 federal election, being York-Simcoe and Richmond Hill. On cross-examination, he conceded that he put his name forth in five ridings including Mississauga-Brampton South. He attended that nomination meeting and gave a speech. Despite this, Mr. Merrifield still denies that he ran for this nomination.

[690] The various nomination meetings which Mr. Merrifield attended prior to the Barrie nomination meeting in May 14, 2005, are relatively insignificant details, given the lengthy factual matrix of events between 2005 and 2016. It is incorrect to say that “Mr. Merrifield still denies that he ran for this [Brampton-Mississauga South] nomination. In cross-examination, he was asked:

Q: “so in fact the next writing for which you presented yourself as a candidate for nomination was not Richmond Hill, Ontario. It was this Mississauga Brampton riding.”

A: “Correct.”

[691] The defendants state that Mr. Merrifield testified on discovery that he was ineligible to participate in the 2006 promotional process due to the codes of conduct and administrative reviews that had been called against him. He also stated that as a result, he did not submit a written expression of intention to write the February 2006 RCMP promotional exam. At trial, he stated that he did register to write the 2006 promotional exam but has no recollection of it, despite the fact that this alleged ineligibility to write this exam is the central part of his claim for loss of promotional opportunity.

[692] Mr. Merrifield’s evidence is inconsistent with his evidence at examinations on this point; however, a significant part of his testimony regarding this issue is the fact that he was off-duty sick on the examination date, which he stated in his testimony. He believed that he was not eligible to write the exam and participate in the promotional process in 2006 for a number of reasons including the Part IV investigation and the administrative review. Mr. Merrifield may be mistaken in believing that he was not eligible, however; I accept his testimony that he was ill at the time and was unable to write the exam. He was off-duty sick. This was medically supported.

[693] Neither of the two examples offered by the defendants regarding Mr. Merrifield’s inconsistent testimony cause me any concern with respect to Mr. Merrifield’s credibility. His performance review for the period September 9, 2010 to March 31, 2011 stated that Mr. Merrifield had worked with a Crown prosecutor during a trial and that the prosecutor had commented on Mr. Merrifield’s “encyclopedic knowledge of the evidence”. I find that this comment is equally applicable to Mr. Merrifield’s evidence at trial. He testified for three weeks, which included two weeks of cross-examination. He had a remarkable recall of events that happened between 2004 and 2016, the dates of documents and their contents. He testified in an earnest manner. He was quick to point out where he had made errors in the past and stated that he “owned them.” I find that Mr. Merrifield was a credible witness.

Failure to Call a Material Witness

[694] The defendants state that Mr. Merrifield refused to call a material witness to corroborate his testimony that he did not intend to win the Barrie nomination event. He stated that he told only one person within the local riding association, Lois Brown, that he did not intend to win. The defendants' state that this court should draw an adverse inference that Ms. Brown would be unsupportive of Mr. Merrifield's case because he did not call her as a witness.

[695] As noted above, the issue of whether Mr. Merrifield intended to win the nomination meeting or whether he was simply there to address the party members is not a significant issue. The fact that he did not have LWOP when he attended the Barrie nomination event and whether he reasonably believed that he did not require LWOP is the main issue.

Failure to Call Medical Evidence

[696] The defendants state that Mr. Merrifield testified that he received treatment from various medical professionals; however, he declined to call any of his treating physicians to corroborate his claims that he either suffered from the alleged psychiatric and/or physical harms or to testify that the harms are medically and causally linked to the alleged instances of harassment that comprise his claim.

[697] The test for harassment, as set out below, requires the plaintiff to prove that he suffered severe or emotional distress. A plaintiff is not required to provide medical evidence. Mr. Merrifield was off work for significant periods of time in which he suffered from depression among other things. His "off-duty status" was supported by his family physician. The RCMP health services never challenged this.

Unreasonable Perceptions of Harassment

[698] The defendants state that Mr. Merrifield has made sweeping allegations of harassment involving nearly every officer within his chain of command. He even attributes his alleged harassment to people that he never met including Insp. Van Doran. He has unreasonable perceptions of harassment where none exists.

[699] While Mr. Merrifield's emails to various people in positions of authority do state that a number of people have harassed him, in this action, the RCMP, Insp. Jagoe and Supt. Proulx are defendants. One of the tasks of this court is to determine whether Insp. Jagoe and Supt. Proulx harassed plaintiff. The other officers are not defendants in this action.

In Ontario, is harassment recognized as a tort upon which a civil cause of action may be based?

The Plaintiff's Position

[700] The plaintiff and the defendant disagree regarding whether the tort of harassment has been recognized as a cause of action. The plaintiff submits that the tort of harassment does exist and is recognized as a cause of action. The plaintiff relies on several cases to support his position.

[701] *Mainland Sawmills Ltd. v. IWA-Canada, Local 1-3567 Society*, 2006 BCSC 1195, 41 C.C.L.T. (3d) 52, concerned a trespass to property. A number of union members came to the plaintiff's property and forcibly shut down the sawmill operations. Property damage resulted and some employees were assaulted. The plaintiffs made a claim for harassment. The court began its analysis by assuming that the tort of harassment does exist or should exist in Canada. It stated at para. 17 that the elements of the tort of harassment are:

- (a) Outrageous conduct by the defendant;

- (b) Intention on the part of the defendant to cause emotional distress or the defendant's reckless disregard for causing emotional distress;
- (c) The plaintiff's suffering severe or extreme emotional distress; and,
- (d) The defendant's outrageous conduct to be the actual and proximate cause of the emotional distress.

- [702] Regarding the claim, the court found that the plaintiffs had not proved the third element of the tort.
- [703] *Savino v. Shelestowsky*, [2013 ONSC 4394](#), 4 C.C.L.T. (4th) 94, involved neighbours who had been feuding for years. The plaintiffs brought a claim for damages for harassment and malicious prosecution. The defendants brought a motion to strike the claim. The court noted at para. 15 that the debate as to whether the tort of harassment existed as a civil cause of action and stated, "While it is not largely accepted, the door does not appear to be entirely closed on the possibility of this tort's existence." The court refused to strike the claim.
- [704] *McHale v. Ontario*, 2014 ONSC 5179, concerned a counter-protest of residents against a native protest in Caledonia. The plaintiff brought a motion to amend his claim. The defendant brought a motion to strike portions of the claim. The plaintiff attended court as a Crown witness in criminal proceedings. In his civil claim, he alleged that members of the native community had harassed him and his wife both before and after the appearance. He alleged that the police took no steps to prevent this. In para 44, the court adopted the elements that must be established in an action for harassment as set out in *Mainland Sawmills*. Ultimately, the court struck the plaintiff's claim for harassment because the plaintiff had not "set out with sufficient particularity the elements of the tort." (para 49)
- [705] *McIntomney v. Evangelista Estate* [2015 ONSC 1419](#) is a trial decision. The case involved a woman who did bookkeeping and prepared taxes. She assisted her 80 year old neighbour with his tax returns. She alleged that the neighbour had sexually assaulted her when she went to his house to assist him. He then came to her house, banged on doors and looked in windows. At para. 35, the court set out the elements of harassment, as listed in *Mainland Sawmills*, and described harassment as a "still-developing tort". It found that the neighbour's subsequent actions constituted harassment and awarded the plaintiff damages for harassment.

The Defendants' Position

- [706] The defendants state that there is no free-standing tort of harassment. They rely on *Desjardins v. Society of Obstetricians and Gynecologists of Canada et al.* [2012 ONSC 7294](#); in which the court stated at para. 47:

[The plaintiff pleaded that] Lalonde engaged in sexual harassment in the workplace contrary to the [Ontario Human Rights Code](#). Section 46.1(2) states that the Code "does not permit a person to commence an action based solely on an infringement of a right under Part 1." ...there is no freestanding tort of harassment. Even accepting that the conduct alleged in the Statement of Claim is true, that does not give rise to a claim against Lalonde based in harassment.

- [707] The defendants state that this court should decline to recognize a new tort of civil harassment. The proposed elements of this putative tort conflict with clear and established

authority on the scope of compensable tort damages. In particular, because the third element of the putative tort of harassment requires only proof of emotional distress, such a tort would permit recovery for emotional upset, including that which is neither objectively visible nor provable. There is thus a clear and material distinction between the putative tort of harassment and intentional infliction of mental suffering with regard to the degree and subjectivity of compensable injury.

- [708] The expansion of compensable injury into the realm of subjectively assessed emotional upset runs contrary to authority. In *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para 9, the Supreme Court of Canada held that, “[t]he law does not recognize upset, disgust, anxiety or agitation or other mental states that fall short of injury.” In *Healey v. Lakeridge Health Corp.*, 2011 ONCA 55 at para 65, the Ontario Court of Appeal ruled that because of the multifactorial and highly subjective nature of emotional distress, “[t]he law quite properly insists upon an objective threshold to screen such claims and to refuse compensation unless the injury is serious and prolonged.”
- [709] Because the putative tort of harassment does not insist upon an objective threshold for limiting compensable injury, its existence is at odds with this clear line of authority. Moreover, pinning tort compensation to a subjective experience of injury that is not objectively verifiable create serious evidentiary issues that could expose defendants to unforeseen liability. The better view is to link tort liability to objective determinations of injury including that which is verified by the testimony of medical professionals.
- [710] The defendants acknowledge that in *John v. Cusak*, 2015 ONSC 5004 at para 38, the court characterized the existence of the tort as a “live legal issue”.

Analysis

- [711] In *Desjardins*, the plaintiff pleaded four different torts, being intentionally interfering with contractual relations, inducing breach of contract, engaging in sexual harassment in the workplace and deceit. The court considered the motion to strike the claim based on the defendant’s position that it disclosed no reasonable cause of action. Regarding the claims for deceit, intentionally interfering with contractual relations and inducing breach of contract, the court found, among other things, that the statement of claim was not sufficiently pleaded to address the required elements of each tort. This left the tort of sexual harassment to be considered on its own.
- [712] The plaintiff’s pleading regarding sexual harassment appears to have been based specifically on a contravention of the *Ontario Human Rights Code*, R.S.O. c. H.19. Part 1 deals with harassment in employment. The court noted that s. 46.1(2) of the *Code* did not permit the plaintiff to bring an action based solely on an infringement of Part 1. Because of its rulings on the other three torts, it held that the plaintiff could not assert a claim of sexual harassment.
- [713] This case can be distinguished from the case at hand because Mr. Merrifield does not allege a violation of the *Human Rights Code*. He does not claim that he was harassed in employment on any of the grounds set out in s.5(2) of the *Code* (race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability). Accordingly, *Desjardins* does not assist the defendants.
- [714] In *Mustapha*, the plaintiff brought an action for psychiatric injury sustained when he saw dead flies in a Culligan bottle of water. The court stated in para 1 that, “he became obsessed with this and the implications for the health of his family which had been consuming water supplied by Culligan for the previous 15 years. The plaintiff developed a

major depressive disorder with associated phobia and anxiety.” The court went on to say in para 9 that for an injury to be compensable, “it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely if sometimes reluctantly accept.” The court further stated in para 10 that, “On the findings of the trial judge, supported by medical evidence, Mr. Mustapha developed a major depressive disorder associated with phobia and anxiety. This psychiatric illness was debilitating and had a significant impact on his life; it qualifies as a personal injury at law. It follows that Mr. Mustapha has established that he sustained damage.”

- [715] *Mustapha* may be distinguished from the present case. The court dismissed Mr. Mustapha’s appeal because he had not shown that it was foreseeable that a person of ordinary fortitude would suffer serious injury from seeing flies in the bottle of water that he was about to install. Medical experts described his reactions as “highly unusual” and “very individual”. The corollary of this is that if a plaintiff suffers from a serious and prolonged injury which rises above the ordinary annoyances, anxieties and fears that people living in society routinely if sometimes reluctantly accept, it may qualify as a personal injury at law for which compensation might be awarded. The question of whether medical evidence is required to support Mr. Merrifield’s claim will be discussed below.
- [716] The four cases relied upon by the plaintiff show that the tort of harassment was considered as early as 2006 (*Mainland Sawmills*) in which the British Columbia Superior Court defined the elements of the tort. Subsequently, in 2013 (*Savino*), the Ontario Superior Court of Justice allowed for the possibility that the tort did exist. In both 2014 (*McHale*) and 2015 (*McIntomney*) the Ontario Superior Court of Justice adopted the elements of harassment as set out in *Sawmills*. In *McIntomney*, the plaintiff was awarded damages for harassment.
- [717] *Mustapha* (2008) and *Healey* (2011), relied upon by the defendants, were decided after *Sawmills* (2006) and before *Savino* (2013). The law has evolved since 2011 as shown in *McHale* (2014), *McIntomney* (2015) and *John v. Cusack* (2015).
- [718] Based on the jurisprudence before me, I am satisfied that the tort of harassment does exist, that it has been recognized as a cause of action in Ontario and that its elements are those set out in *McHale* and *McIntomney*.

Test for Harassment

- [719] The test for harassment is set out in *McHale* and *McIntomney* above. In this case, there are four questions to be answered.
- (a) Was the conduct of the defendants toward Mr. Merrifield outrageous?
 - (b) Did the defendants intend to cause emotional stress or did they have a reckless disregard for causing Mr. Merrifield to suffer from emotional stress?
 - (c) Did Mr. Merrifield suffer from severe or extreme emotional distress?
 - (d) Was the outrageous conduct of the defendants the actual and proximate cause of the emotional distress?

What constitutes outrageous behaviour in the context of harassment?

- [720] *The Canadian Oxford Dictionary* defines outrageous as follows: 1. Deeply shocking and unacceptable; 2. grossly cruel; 3. immoral, offensive; and 4. highly unusual or

unconventional.^[vii]

- [721] Of the four harassment cases set out above, *McIntomney* is the only trial decision. The court held that the defendant's conduct constituted sexual battery and found that the plaintiff had proved all the elements of the tort, including outrageous behaviour. The plaintiff was awarded damages.
- [722] The tort of intentional infliction of mental suffering has some overlap with the tort of harassment. It requires that a plaintiff prove that the defendant's conduct was outrageous and also flagrant. In *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419, 120 O.R. (3d) 431, para 50, the court found that the plaintiff's supervisor, "... belittled, humiliated and demeaned [Boucher] the plaintiff continuously and unrelentingly, often in front of co-workers, for nearly six months." This constituted flagrant and outrageous conduct.
- [723] The defendants state that the plaintiff has to meet a high threshold to prove outrageous conduct. An objective assessment is required. The term outrageous indicates that the conduct must be grossly offensive.
- [724] In *Prinzo v. Baycrest Centre for Geriatric Care*, (2002), 2002 CanLII 45005 (ON CA), 60 O.R. (3d) 474 (C.A.), Ms. Prinzo worked for the defendant for 17 years and was the manager of the beauty shop. Her management duties occupied approximately 40 percent of her time. The other 60 percent involved hairstyling. Ms. Prinzo was a model employee until a new person, Gates, became her immediate supervisor. In the next year, Ms. Prinzo fell and hurt herself in Baycrest's parking lot. She suffered musculoskeletal injuries and was unable to use her right arm. She was off work and receiving physiotherapy treatment. Her treating physician stated that she was medically unfit for any form of work. Subsequently, Frost, an occupational nurse began calling Ms. Prinzo and asking about her return to work. Gates also called her. The trial judge found that the calls were harassing and suggested that she was malingering. Frost told the treating physician that it was necessary for Ms. Prinzo to return to work so that she could be let go.
- [725] Ms. Prinzo received a letter from Gates which implied that Ms. Prinzo's own physician had agreed that she could return to work. This was false. Ms. Prinzo confirmed that her treating physician had indicated that she was totally disabled. Although Ms. Prinzo's counsel had written a letter to Baycrest requesting that all communication be directed to him, the calls to her continued. Ms. Prinzo later agreed to return to work; however, she was requested to and did attend a meeting in which Baycrest stated that it wanted to talk about her termination. She stated that she was not in a condition to do so. Baycrest said it was concerned that her conduct not cause harm to the residents. The statement was very hurtful and upsetting to her. She subsequently received a letter from Baycrest setting out her last day of employment.
- [726] The trial judge held that the "acts of harassment by the employees of the defendant [Baycrest] were so extreme and insensitive that they constituted a reckless and wanton disregard for the health of the plaintiff". The court commented in para. 60 that the conduct. "may fairly be described as flagrant and outrageous, meeting the first element of the tort."
- [727] These cases inform my interpretation of outrageous conduct.

What constitutes causing emotional stress or having a reckless disregard for causing a plaintiff to suffer from emotional stress?

- [728] In *Prinzo*, the court stated at para. 61 that, "for the conduct to be calculated to produce harm either the actor must desire to produce the consequences that follow, or the

consequences must be known by the actor to be substantially certain to follow.” The court stated that Baycrest employees “were well aware of the physical and emotional health of the plaintiff and would realize the detrimental effect their harassment would have had on the plaintiff and yet they persisted [in] such harassment with almost sadistic resolve.”

- [729] The plaintiff relies on *Piresferreira v. Ayotte*, (2008), 2008 CanLII 67418 (ON SC), 72 C.C.E.L. (3d) 23. Ms. Piresferreira’s supervisor assaulted her. Then, he issued a performance improvement plan (PIP) for the plaintiff. She reported him to the human resources department after which he received a minor disciplinary reproach. The supervisor and the employer immediately attempted to impose the performance improvement plan on the plaintiff which included an onerous schedule of frequent meetings with the supervisor. The plaintiff went on sick leave and then long-term disability due to the depression and anxiety that she subsequently experienced. She did not return to work. The court found in para. 170 that, “Ayotte’s threat of placing Piresferreira on probation or on a PIP immediately after he had assaulted her and then delivering the plan to her the first time she returned to the office – without first having assumed responsibility for his abusive behaviour – was flagrant and outrageous.” The court went on to state that, “conduct will be considered “calculated to produce harm” where the actor desires to produce the consequences that follow from the act or the consequences are known to be substantially certain to follow. It is also been held to include conduct amounting to reckless disregard as to whether or not shock would ensue as a result of the conduct.” The court further stated:

I am satisfied that Ayotte showed reckless disregard for Piresferreira’s emotional well-being when he yelled and swore at her, assaulted her, immediately threatened probation or a PIP, refused to apologize for his conduct, delivered the PIP to her at the first opportunity misled Sylvestre and Shiu [his superiors] as to his conduct on May 12 and attempted to bias them against Piresferreira in advance of her filing a complaint against him. I am satisfied that, in this sense, Ayotte’s conduct was “calculated to produce harm” even though he did not actually intend for her to suffer the injury that she did.

- [730] The court stated in para. 177 that, “it was reasonably foreseeable to Ayotte that every aspect of this behaviour was likely to cause Piresferreira anxiety, stress and emotional upset.

- [731] The plaintiff did not alert me to the fact that *Piresferreira* was overturned in 2010^[viii]; however, I will briefly discuss points that I consider important to my analysis of the issues at hand. The Court of Appeal set aside the trial judge’s ruling that the tort of intentional infliction of mental suffering was established because she erroneously concluded that the impact of Ayotte’s behaviour on Ms. Piresferreira was reasonably foreseeable. The court describes recklessness at stated at para. 75 as “proceeding in the face of subjective awareness that harm of the kind that resulted was substantially certain to follow...[the] consequences must be known by the actor to be substantially certain to follow”. At para. 79, the court stated, “foreseeability, which indicates only that a result may follow, is much less than knowledge that a result is substantially certain to follow”. These definitions affirm that intention does not necessarily stem from or follow foreseeability. Further, the court relied on *Kedia International Inc. v. Royal Bank of Canada*, 2008 BCSC 122 at para. 196 to reiterate the high threshold for constructive intention.

What constitutes severe or extreme emotional distress?

[732] In *Sawmills*, the court stated that although the tort of harassment does not require proof of a visible and provable illness, it does require proof of “severe or extreme emotional distress”. The court quoted from *Graves*, “[s]evere emotional distress means...emotional distress of such substantial quantity or enduring quality that no reasonable person in a civilized society should be expected to endure it”. At para. 20, the court stated:

The requirement of extreme or severe emotional distress is in keeping with the objective of this tort. That is, it is intended to provide a remedy to a plaintiff who is intentionally subjected to outrageous conduct by a defendant. Presumably that a plaintiff prove that he/she has suffered severe or extreme emotional distress as a result of the conduct of a defendant (albeit not to the extent of physical harm or psychiatric illness) is required because it demonstrates a defendant’s conduct as being sufficiently outrageous as to found a cause of action.

[733] In *McIntomney*, the plaintiff experienced anxiety, suffered from nightmares, and had trouble sleeping. She became nauseous when she saw the defendant in the neighbourhood. She had previously coached a team but had to stop doing that. After the defendant sexually assaulted her, she was unable to work. She did not sleep well and therefore could not concentrate on her work.

[734] In *Prinzo*, the plaintiff suffered from stress and anxiety, increased blood pressure, significant weight gain and increased diabetic symptoms.

[735] In *Piresferreira*, the plaintiff suffered from posttraumatic stress disorder and a major depressive order with symptoms of anxiety.

Do the defendants’ actions toward the plaintiff constitute harassment?

Leave Without Pay.

[736] Mr. Merrifield ran in a federal election for political office in the Richmond Hill riding. He was the first RCMP officer to do this. Even though the *RCMP Regulations* provide that a member must obtain LWOP for this purpose, there was significant confusion among various officers regarding the process and the correct type of LWOP to be applied.

[737] Three of Mr. Merrifield’s superiors made errors when they gave him advice and or completed the related forms. Sgt. Verecchia determined that Mr. Merrifield required regular LWOP. This was incorrect because regular LWOP did not exist. It was not one of the six categories. Cpl. DuPuy signed the transfer forms in place of Insp. Josey. This was incorrect because LWOP had to be approved by the C.O.

[738] Sgt. Boos was responsible for administering LWOP. He had the best knowledge of it. He interviewed Mr. Merrifield and recommended personal needs LWOP, even though a member could take only two personal needs LWOPs in his career. Mr. Merrifield required LWOP for three different events. Sgt Boos tried to fit three events into two personal needs LWOPS. He decided to include the nomination meetings for York-Simcoe and Richmond Hill as one LWOP period, even though the dates were not continuous. He decided that the Richmond Hill election would be the second LWOP period. The transfer forms were submitted requesting two personal needs LWOPs for the three dates and were approved by the C.O.

[739] Subsequently, Sgt. Boos learned that his approach was not accepted by the compensation department because there were three different event dates but the system allowed for only

two. After Mr. Merrifield had finished his political activities in 2004, the personal needs LWOPs were re-coded to special LWOPs which were not limited in number.

- [740] Sgt. Boos stated that he told Mr. Merrifield about the re-coding and the fact that his two personal needs LWOPs were still available to him. Mr. Merrifield stated that Sgt. Boos told him that LWOP was being used for only the election and not the nomination meetings. There was obviously confusion and a misunderstanding. Three of Mr. Merrifield's superiors reached incorrect conclusions about the process. Mr. Merrifield did not receive the document that set out the specifics of the re-coding when it occurred. His understanding was based on a conversation. Given the general level of misunderstanding about the matter among his superiors, it is not surprising that Mr. Merrifield also reached an incorrect conclusion after he received information from Sgt. Boos.
- [741] Mr. Merrifield was unsuccessful in the federal election and subsequently returned to work as an Air Marshall. Nobody was concerned about his campaign materials, public perception about an RCMP officer's running in an election or that his activities affected his ability to do his job.
- [742] Mr. Merrifield was transferred to INSET in October, 2004. This was a realization of his goal to work in National Security. Four months later, in February 2005, he was permanently posted to TAG. He had top secret security clearance. He travelled with Liberal Prime Minister Paul Martin's protective detail when he made visits to various places. Nobody was concerned about the fact that Mr. Merrifield had run in a federal election in the previous year as a Conservative candidate. Nobody raised any issue that if something went wrong, there might be a perceived conflict of interest because a former Conservative candidate was providing protection to a Liberal Prime Minister.
- [743] Sgt. Verecchia stated that this would not be a concern because Mr. Merrifield's LWOP status separated him from the RCMP. Accordingly, there would be no real or perceived conflict of interest. Mr. Merrifield investigated death threats against the Prime Minister and U.S. President George W. Bush which resulted in a conviction. He carried out international internet tracing to locate a person who had penetrated the Oval Office internet. This also resulted in a conviction. He demonstrated that his political views did not influence his work. He was bound by his oath that he would, "faithfully, diligently and impartially execute and perform the duties required of [him]".

The Barrie Nomination Meeting

- [744] A/Sgt. Crane said he had an excellent working relationship with Mr. Merrifield. In fact, three months after Mr. Merrifield had been transferred to TAG, A/Sgt. Crane asked him to mentor another member.
- [745] During the dinner at the end of Operation Bridgeout, A/Sgt. Crane asked Mr. Merrifield if he had any ambition to run in another federal election. He was curious. According to A/Sgt. Crane, Mr. Merrifield said, "none whatsoever. It was too expensive."
- [746] Mr. Merrifield participated in the Barrie nomination meeting. A nomination meeting is a private event, open only to members of the related political party. Prior to the meeting, Mr. Merrifield did send out some of the campaign flyers similar to those from his federal election campaign with necessary revisions; however, they were sent only to party members who could vote at the meeting. There was no wide-spread public knowledge of Mr. Merrifield's participation at the meeting.
- [747] Mr. Merrifield stated that winning the nomination would have been a mathematical impossibility. He had not sold many memberships and therefore did not have the required

support. He participated only as a form of protest against the incumbent. He did not obtain LWOP for the nomination meeting because he thought he did not need it based on his conversation with Sgt. Boos and his understanding of how the earlier LWOPs were re-categorized.

- [748] On Friday May 13, 2005, A/Sgt. Crane knew about the nomination meeting to be held the next day and the fact that Mr. Merrifield would be participating. Mr. Merrifield was off work on Friday. A/Sgt. Crane made no effort to contact Mr. Merrifield to express any concerns. He knew that Mr. Merrifield had not applied for LWOP. He had Mr. Merrifield's home phone number.
- [749] When Mr. Merrifield returned to work the following Monday, A/Sgt. Crane and Insp. Jagoe were highly offended. They thought Mr. Merrifield had lied to them. They had an emotional reaction to the situation. A logical explanation of the difference between a nomination meeting and an election fell on deaf ears. Surely, these two higher ranking officers who had management responsibilities were capable of understanding the difference. I find that they chose not to understand it. They adopted a rigid view. In their minds, Mr. Merrifield was dishonest and was not to be trusted. Insp. Jagoe believed that Mr. Merrifield could not continue to work in national security for that reason.
- [750] Mr. Merrifield was taken off the Stronach death threat investigation. Since Ms. Stronach had crossed the floor to become a Liberal, they determined that Mr. Merrifield, a Conservative, should not carry out the investigation. There was a conflict of interest. What if he missed something and there was a negative result? Their view was that it would reflect badly on the RCMP. Mr. Merrifield was also removed from other VIP assignments such as a Royal Family visit. This made no sense whatsoever.
- [751] The stated concern about a perceived conflict was completely at odds with the fact that there was no concern about it after Mr. Merrifield ran in various nomination meetings and had not obtained LWOP for some of them. Granted, he was not doing the type of national security work then as he was doing in TAG. He was an Air Marshall but the nature of his work involved investigating and diffusing potential acts of terrorism. This was covert work done to protect national security.
- [752] Insp. Jagoe took his concerns to Supt. Proulx, who by his own admission, did not follow politics and did not know the difference between a nomination meeting and an election. To him it was all the same thing. In the meeting on May 27, 2005, he was not receptive to Mr. Merrifield's explanation. I find that Supt. Proulx aggressively challenged Mr. Merrifield on his political platform and his campaign materials, which was completely inappropriate. Mr. Merrifield's political views were irrelevant. Mr. Seguin testified that the only question he should have asked was whether Mr. Merrifield obtained LWOP for the Barrie nomination meeting and if not, why not. I accept the evidence of Sgt. Nicota regarding Supt. Proulx's conduct at the May 27, 2005 meeting. Mr. Smith, who was a Staff Sergeant at the time, confirmed that there was an argumentative tone and the discussion became heated. Supt. Davis stated that Supt. Proulx was unduly harsh. A commissioned officer should have sufficient management skills to avoid having a heated, argumentative encounter with a Constable. I find that Supt. Proulx's conduct went beyond all standards of what is right and decent. It was outrageous.
- [753] Within a few weeks, in June 2005, Supt. Proulx temporarily transferred Mr. Merrifield into another unit, Criminal Investigations, while he did some investigating into the alleged conflict issue and whether he had the authority to transfer Mr. Merrifield out of TAG. This took six months. He consulted Sgt. Verecchia who believed that there could be problem with perceived conflict. He consulted the Policy Branch. It took a long time to respond

and when it did, the reply was not responsive to the issue. I find that if there was a significant concern that Mr. Merrifield's attendance at the Barrie nomination meeting had compromised his ability to work in national security, the Policy Branch would have provided Supt. Proulx with direction in a timely manner.

- [754] I find that the potential for a perceived conflict of interest was remote at best; however, Insp. Jagoe and A/Sgt. Crane had decided that they would not work with Mr. Merrifield anymore. They did not want him in TAG. Insp. Jagoe did not want Mr. Merrifield in INSET. Supt. Proulx adopted a view that supported their position. The possibility of a perceived conflict was not a *bona fide* reason to transfer Mr. Merrifield out of TAG. It was the excuse for it.
- [755] When Mr. Merrifield was transferred out of TAG, there were vacancies on the investigative side of INSET. Mr. Merrifield's skills and knowledge would have been an asset in that area. Investigating terrorists did not involve VIPs with political affiliations. Even if a perceived conflict was a real concern, it would not have precluded Mr. Merrifield from working in this side of INSET. He had been doing community outreach and had recruited sources. He had worked a lot of voluntary overtime. He was dedicated to his job.
- [756] Supt. Jagoe agreed that Mr. Merrifield would not have been in a conflict doing this type of work. Supt. McCann stated that his notes reflected that he made an inquiry of Supt. Jagoe on November 23, 2005, two weeks after he had conducted Mr. Merrifield's staffing interview for future placement. Insp. Jagoe did not waiver in his position that he would not have Mr. Merrifield working in national security. He believed that Mr. Merrifield was untrustworthy. I find that this is the real reason why Mr. Merrifield was transferred to Customs & Excise. A/Sgt. Crane said he had "nothing to do with the transfer." This was disingenuous. While he may not have had a role in determining where Mr. Merrifield would be posted, his refusal to have Mr. Merrifield work in TAG had everything to do with the reason why Mr. Merrifield was transferred.
- [757] Even though Insp. Jagoe thought Mr. Merrifield was untrustworthy and lacked judgment, he took no steps to inform the supervisory officers of Criminal Investigations or Customs & Excise of his concerns. Both of those units carried out national security work. Insp. Jagoe's concerns were not noted on Mr. Merrifield's performance evaluations. He said that while Mr. Merrifield was unsuited to do national security work, he could have been well suited to work in another unit. I find that this is incredulous. Being trustworthy is a core requirement for an RCMP officer to do his job. The fact that Insp. Jagoe did not alert his colleagues in other units shows that his decision that Mr. Merrifield could not continue to do national security work was based on his personal view that Mr. Merrifield had lied to him rather than a genuine concern about a political conflict or Mr. Merrifield's ability to do his job.
- [758] Supt. Proulx's stated reason for transferring Mr. Merrifield was because he had a political conflict. Supt. Proulx carried out his own investigation while telling Mr. Merrifield that he was not under investigation. He delved into Mr. Merrifield's activities when he was at INSET, which was not under his command. If there were any issues with these activities, they should have been addressed at the time. Mr. Proulx testified that, initially, he thought that retroactive approval of LWOP would be satisfactory. It was not until he started his investigation into the earlier activities that he concluded that Mr. Merrifield had a conflict.
- [759] In Mr. Merrifield's performance evaluation, which included his work in TAG, both Supt. Proulx and Insp. Jagoe wrote very positive remarks. This was hypocritical, especially on the part of Insp. Jagoe who thought that Mr. Merrifield was a liar and lacked judgment.

- [760] Supt. Proulx knew that other officers would think that Mr. Merrifield was transferred out of TAG because he had done something wrong. Accordingly, Supt. Proulx met with the TAG group, which consisted of approximately ten people, to explain that Mr. Merrifield had not done anything wrong. This was woefully inadequate to address the situation. TAG was imbedded in INSET. A large number of people worked there.
- [761] Sgt. Reed stated that there were “other types” of discipline in the RCMP aside from formal discipline. A major aspect of his job as a SRR was to deal with the “other types” of discipline.
- [762] I find that Supt. Proulx’s decision to transfer Mr. Merrifield out of TAG constituted an “other type” of discipline. It was unjustified and punitive. It resulted in a permanent stain on Mr. Merrifield’s reputation and career. The stain did not fade with time. Rather, it spread. Because of the transfer, other officers took a predictably negative view of Mr. Merrifield based on incorrect assumptions. The repercussions of this transfer followed Mr. Merrifield for years to come.
- [763] I find that this unjustified and punitive transfer would not have occurred if Mr. Merrifield’s failure to obtain LWOP for the Barrie nomination meeting had been considered rationally. C.O. Seguin, who had an objective view of the situation, knew that no action was taken was against Mr. Merrifield for his failure to obtain LWOP. He stated that it was not a big deal. It was just an administrative issue.

Special Operations Center

- [764] After Mr. Merrifield was temporarily assigned to Criminal Intelligence, word got out that he was considered unsuitable to do national security work. When the SOC was stood up in response to a significant terrorist threat against Toronto, Mr. Merrifield was told, en route, to turn around and go home, even though all available personnel were required. I accept his evidence that he was the only member in the Division who was ordered not to attend.
- [765] Sgt. Sim was in charge of the investigators at the SOC. He knew that Mr. Merrifield had been stood down. He believed that this occurred because of perceived conflicts with politics. The commissioned officers’ actions showed that Mr. Merrifield was a “black sheep.” The fact that Mr. Merrifield was stood down showed that that he had been blackballed. He believed that Mr. Merrifield’s career opportunities would be limited as a result of this.
- [766] Insp. Van Doren was the incident commander at the SOC. He was aware that Mr. Merrifield had been removed from TAG. He could not recall how he learned this. He thought that probably Supt. Proulx or Insp. Jagoe had told him.
- [767] It is curious that Mr. Merrifield’s employment status would be at the forefront of Insp. Van Doren’s mind in the middle of a national emergency. Sgt. McIntyre had contacted Insp. Van Doren about relief for an overnight shift. Sgt. Penny, Mr. Merrifield’s supervisor, had recommended him. Insp. Van Doren requested someone else because he thought that since Mr. Merrifield had been removed from TAG, he was not the “appropriate resource” to have at the SOC. Insp. Van Doren believed that there was an issue as to whether Mr. Merrifield was suitable for national security work. Insp. Van Doren stated that he did not know the reason for Mr. Merrifield’s removal from TAG. I find that in order for Insp. Van Doren to have come to his conclusion, he likely assumed that Mr. Merrifield had been removed from TAG as a result of some wrong-doing. If he had made a different assumption, for example that Mr. Merrifield had been removed for an administrative reason, then he would have had no reason to conclude that Mr. Merrifield was not the appropriate resource for the SOC.

Mr. Merrifield's performance reviews noted that he had considerable knowledge and expertise regarding terrorism. The SOC was stood up to respond to a terrorist threat.

- [768] I do not accept Insp. Van Doren's explanation that "it was not fair to Mr. Merrifield or the organization" that he work at the SOC. I find that Insp. Van Doren stood down Mr. Merrifield because he believed that Mr. Merrifield had an unresolved issue that resulted in his removal from TAG. As a result, his trustworthiness was questionable. Insp. Van Doren agreed that standing down Mr. Merrifield was a significant action to take in the context of a terrorist threat.
- [769] What Insp. Van Doren did not know was that all of the issues had already been addressed by the memorandum dated September 28, 2005 from Supt. Proulx to Mr. Merrifield, a month before the SOC was stood up. There was no wrong-doing. There was no formal discipline. Supt. Proulx had a conversation later with Insp. Van Doren about his decision to stand down Mr. Merrifield. Insp. Van Doren told Supt. Proulx that he was aware that Mr. Merrifield had been removed from TAG and wanted to wait until that issue was resolved. Supt. Proulx did not tell Insp. Van Doren that the issue had already been resolved prior to standing up the SOC. He had an opportunity to set the record straight about Mr. Merrifield but he did not do it. Mr. Proulx stated that his reason was because there was still a Human Resources question regarding where Mr. Merrifield would be posted. I do not accept Mr. Proulx's evidence on this point. It was not a legitimate reason. It was illogical. I find that it was an excuse. The issue of where Mr. Merrifield would be posted had nothing to do with Insp. Van Doren's belief that Mr. Merrifield was not the appropriate resource for a very important emergency situation.
- [770] This scenario was repeated when Insp. Van Doren briefed C/Supt. Mazerolle about his decision to stand down Mr. Merrifield from the SOC. C/Supt. Mazerolle recalled that Insp. Van Doren had said something about a conflict of interest. C/Supt. Mazerolle had already read the September 28, 2005 memo from Supt. Proulx to Mr. Merrifield that had concluded all of the issues. Like Supt. Proulx, C/Supt. Mazerolle also had an opportunity to set the record straight. He did not tell Insp. Van Doren that Mr. Merrifield had been cleared. He did not ask why Insp. Van Doren thought there was a conflict or what he thought it was. He did not want to know why Mr. Merrifield had been stood down from the SOC. As far as he was concerned, Insp. Van Doren had made a decision within his authority and that was the end of it.
- [771] Being stood down from the SOC was devastating to Mr. Merrifield. This was evident when he testified about the matter in 2014, nine years later. It showed that the stain on his reputation had spread. It showed that a commissioned officer who had no management responsibility for INSET/TAG knew that he had been removed from national security work. Not surprisingly, this officer assumed the worst of him. As a result of the removal and its negative implication, Mr. Merrifield was not trusted to work in a high-stakes emergency situation.
- [772] The effect that this had on Mr. Merrifield was extreme. He was on sick leave for six months from January to July 2006, which was supported by his family doctor. He was under the care of a psychologist. I accept his evidence regarding his medical condition. He was depressed. He suffered from stress, dizziness and nausea. He was scared that he would lose his job. He took out his emotions on his family. He turned in his service pistol. This period was a very dark period in his life. The RCMP Health Services did not challenge his need for sick leave. I find that Mr. Merrifield was unable to write the Corporal JSE examination. He was suffering from severe or extreme emotional distress.

[773] I find that the failure of Supt. Proulx and C/Supt. Mazerolle to set the record straight when they had the opportunity to do so, with minimal effort, shows a disregard for the detrimental impact of decisions, based on misinformation and the spread of negative impressions and assumptions, on Mr. Merrifield's career. They were recklessly indifferent to the effect of the kind of harm that Mr. Merrifield suffered, which they knew was substantially certain to follow.

The Part IV Investigation

[774] Mr. Merrifield had been back to work for only a few months when he received an email from John Steeves dated October 4, 2005 regarding the outstanding amount on his Amex. Supt. Proulx appears to have become involved on October 24, 2005. Mr. Merrifield sent several lengthy emails to Supt. Proulx to explain the situation.

[775] Supt. Proulx sent an email to Mr. Merrifield in which he stated that he was going to ask for a review of Mr. Merrifield's statements for the past two years. A later email from Mr. Steeves suggested that a review had been done before November 8, 2005 which disclosed the duplicate payment.

[776] Mr. Steeves sent an email to Supt. Proulx on November 28, 2005, advising him that everything was fine. Mr. Steeves sent an email to Mr. Merrifield on January 5, 2006 stating that Supt. Proulx had already been advised of the review and commenting that if Mr. Merrifield had "not heard any different then things were fine." Mr. Steeves stated that he would not have told Mr. Merrifield that things were fine if he had thought that there was a problem. Nevertheless, Mr. Proulx stated that Mr. Steeves personally approached him and told him that there were some issues that he did not want to put in writing. There was evidence that Mr. Merrifield had taken back to back cash advances on his Amex card.

[777] Mr. Proulx's evidence of the conversation that he had with Mr. Steeves about the cash advances is not credible. The memorandum ordering the Part IV investigation is dated January 6, 2006. In it, Supt. Proulx states that he was informed on that same day about the cash advances. If there were any issues with cash advances, Mr. Steeves would have known about them before January 6, 2006. He had already completed his review before then. Mr. Steeves had no reason to withhold this type of information from Mr. Merrifield. He had no reason to not want to put something in writing for Supt. Proulx regarding the Amex account. Mr. Steeves stated that he would not have told Mr. Merrifield that everything was fine on January 5, 2006 if he had known that there was a problem. He said that he first learned of the Part IV investigation when S/Sgt. Babinko contacted him on January 19, 2006.

[778] Mr. Steeves could not recall why he contacted Cpl. DuPuy on January 9, 2006, saying it was an urgent matter. Mr. Proulx said that he signed the memorandum on January 13, 2006. He had no explanation for the delay between January 6, 2006, the date of the memorandum, and the date that he signed it, seven days later. The only explanation for these events is that Supt. Proulx needed more information to substantiate the memorandum, he asked Mr. Steeves to get it and he received it between January 6 and 13, 2006.

[779] Supt. Proulx's note dated January 6, 2006 was produced during the trial, on May 25, 2015, before Mr. Proulx testified. It is curious that this note has the same date as the date on the memorandum ordering the Part IV investigation; yet, none of the dates for the cash withdrawals are back to back. If Mr. Steeves did in fact tell Supt. Proulx that they were back to back cash withdrawals, the note dated January 6, 2006 is inconsistent with this information.

- [780] Supt. Proulx's memorandum ordering the Part IV investigation sets out an issue that had already been addressed. Supt. Proulx raised the issue of the double payment and the fact that an account receivable to recuperate the double payment was still outstanding. When he wrote this memorandum, Supt. Proulx knew that this issue had been resolved. Mr. Steeves stated that he had allowed Mr. Merrifield some additional time to repay the amount. Therefore, the only remaining issue was that Mr. Merrifield's Amex statements showed several cash advances which Supt. Proulx stated were suspected to have been for personal reasons. The memorandum did not provide any information as to when these cash advances might have been taken or which particular advances were in issue, despite the fact that Supt. Proulx's note dated January 6, 2006 sets out some dates.
- [781] Supt. Proulx did not ask Mr. Merrifield to explain the cash advances. In fact, the evidence shows that Mr. Merrifield made a specific inquiry as to whether there was anything to suggest that his Amex card had been used for reasons other than RCMP business. Rather than responding to this, Supt. Proulx proceeded in a clandestine manner and ordered the Part IV investigation. In his testimony, he stated specifically that he did not tell Mr. Merrifield about any concerns regarding these cash advances. Rather, he was "hinting" about them.
- [782] The cash advances were easily explained. Supporting documentation was available. The entire Part IV investigation and its effect on Mr. Merrifield could have been avoided had Supt. Proulx simply asked Mr. Merrifield about the advances. He ought to have done this. By September 2005, Supt. Proulx was aware that when Mr. Merrifield was temporarily transferred to Criminal Investigations pending the outcome of the conflict issue, he was living "under the gun or a very dark cloud," knowing that his conduct was being "subjected to very senior levels of the RCMP for scrutiny and possible disciplinary action." SRR Nicota informed Supt. Proulx of this in his email dated September 27, 2005.
- [783] Mr. Merrifield received the memo from Supt. Proulx on October 4, 2005, clearing him of all of the earlier issues. Nevertheless, Mr. Merrifield was deemed to be unsuitable for national security work. Some of his colleagues took a dim view of him. Within three months, he was off work suffering from severe emotional distress. He had only been back to work for approximately six months before Supt. Proulx ordered the Part IV investigation, alleging that Mr. Merrifield "may have engaged in disgraceful conduct that could bring discredit to the Force." Making an allegation that Mr. Merrifield was essentially taking RCMP funds for his personal use was equivalent to accusing Mr. Merrifield of theft and kiting, criminal offenses. The implications were dire. Mr. Merrifield lived under these allegations for eleven months until he learned the outcome of Sgt. Dickinson's investigation. In the end, there was no evidence that Mr. Merrifield had taken RCMP money for his personal use or that he was kiting payments. Despite this, C/Supt. Mazerolle still believes that the allegations in the Part IV investigation were substantiated and that Mr. Merrifield committed fraud in dealing with his Amex account.
- [784] I find that the actions of Supt. Proulx were the actual and proximate cause of Mr. Merrifield's severe emotional distress.
- [785] I find that when Supt. Proulx ordered the Part IV investigation, he had a reckless disregard of causing Mr. Merrifield emotional distress. He knew that Mr. Merrifield's being subjected to these very serious allegations would cause him significant further emotional distress. Supt. Proulx knew that the kind of harm that Mr. Merrifield suffered was substantially certain to follow. In fact it did. Mr. Merrifield was off work again for 11 months until he was ready to return.

[786] I find that Supt. Proulx's concern that Mr. Merrifield had engaged in disgraceful conduct was disingenuous because he admitted that at approximately the same time that he ordered the Part IV investigation, he himself was engaging in disgraceful conduct that could bring discredit to the Force.

The Ottawa Citizen Article

[787] Sgt. Dickinson was ordered to carry out an administrative review into the "unauthorized release of protected and classified information and/or documents relating to Cst. Peter Merrifield." Mr. Merrifield stated that this was an appropriate step to take in the circumstances. At the end of the review, Sgt. Dickinson could not substantiate who released the documents to the Ottawa Citizen. Despite this, C/Supt. Mazerolle still believes that Mr. Merrifield leaked confidential information to the media.

Mr. Merrifield's Communication with C.O. Seguin and D/Commr. Bourduas

[788] On August 15, 2006, while the Part IV investigation was still underway, Mr. Merrifield sent a lengthy email to C.O. Seguin setting out what had previously happened to him and politely requesting communication to resolve outstanding issues. C.O. Seguin met with Mr. Merrifield on October 3, 2006; however, C.O. Seguin had already obtained management's perspective. Although Mr. Merrifield provided two witness statements to C.O. Seguin to substantiate his views, C.O. Seguin did not find anything disrespectful in the various emails between Supt. Proulx and Mr. Merrifield. He chose not to follow up with the officers who provided the statements and instead preferred the information that he had received from management. In his view, the only issue that required any action was the allegation that Cpl. Frith had been ordered to attend the Barrie nomination meeting. C.O. Seguin had an opportunity to look into the matter further. If he had spoken to the two officers who provided the statements, he might have concluded that Mr. Merrifield's complaints were substantiated to some degree.

[789] Seven months later, Mr. Merrifield sent a lengthy email to D/Commr. Bourduas, who was responsible for the region. This email was similar to the one that Mr. Merrifield had sent to C.O. Seguin. He asked to speak to D/Commr. Bourduas because he "truly wish[ed] to resolve the situation..." Unfortunately, on June 29, 2007, D/Commr. Bourduas declined to become involved because he believed that the issues had been handled appropriately by C.O. Seguin.

[790] Mr. Merrifield's depression returned. In February 2010, he was off duty sick again for approximately eight months. When he returned to work, in the fall of 2010, Mr. Merrifield was assigned to project Overlord. He worked on Overlord for most of 2011. In 2011, Witness X told Mr. Merrifield that two other officers had said to him that Mr. Merrifield could not be trusted and that Witness X should not be working with Mr. Merrifield. Because he was pursuing a civil action against the RCMP, there was a perception that he could not be trusted. Nevertheless, Mr. Merrifield's performance evaluations continued to be extremely positive.

[791] Based on the information that Witness X had provided, I find that Mr. Merrifield justifiably believed that the stain on his reputation resulting from the harassment had spread significantly within the RCMP. His depression returned and he went off duty sick in November 2011.

[792] At that time, which he described as the worst part of his life, Mr. Merrifield sent out a third lengthy email to the highest level of command. He stated, "I am trying to avoid any further embarrassment or tarnish to our organization but have been presented with repeated

obstacles in my efforts to resolve a serious situation at the lowest possible level.” This email goes on to show the depths of Mr. Merrifield’s pain and frustration regarding the fact that nobody in management was prepared to look objectively at the events beginning in 2005 and the impact of decisions that had been made regarding Mr. Merrifield. C.O. Seguin had brushed off his concerns, preferring management’s view of the events when he could have followed up on two statements that Mr. Merrifield provided to him. D/Commr. Bourduas concluded that C.O. Seguin had handled the matter appropriately.

- [793] I find that in his emails to C.O. Seguin, D/Commr. Bourduas and Commr. Paulson, as well as others, Mr. Merrifield was taking extraordinary steps to contact upper management with the hope of resolving his concerns. He was clear about the fact that throughout the period, his health had suffered and that he had been away from duty periodically, “to deal with serious depression issues as a result of the harassment...” Commr. Paulson stated that after he received the email, he referred it to Asst/Commr. White who in addition to being the commanding officer of O division (C.O. Seguin had retired) was also in charge of Human Resources. He expected that the issues would be addressed. He was assured that Asst/Commr. White “was on top of it.”
- [794] Mr. Merrifield received no response to this email. His depression continued. He stated that he suffered severely and had post-traumatic stress disorder resulting from the events that had transpired. Even though Asst/Commr. White and C/Supt. Mazerolle knew that Mr. Merrifield’s statement about Supt. Proulx was substantiated, they took no steps to respond to this email nor did they delegate this task to anyone else. I find that the RCMP’s conduct in ignoring this email went beyond all standards of what is right or decent. I find that it was one of the actual and proximate causes of Mr. Merrifield’s severe emotional distress.
- [795] Ten months later, Mr. Merrifield told SRR Reed that he wanted to return to work. The RCMP took a further eight months to facilitate this. His security clearance level had expired. Even though he held the top level of security clearance before he went on sick leave, there was a significant delay in processing his application.

Serious and Organized Crime

- [796] As a result of a structural reorganization within the RCMP, when Mr. Merrifield returned to work, he was placed in Serious and Organized Crime. Although he was a national expert on counter proliferation, he was not assigned to do this type of work. Insp. White testified that there was minimal activity on project Overlord. The staffing was adequate. The unit was focused on two significant drug trafficking investigations. Mr. Merrifield was assigned to work on one of them.
- [797] Insp. White had some harsh words regarding Mr. Merrifield’s performance. He testified that he was concerned that Mr. Merrifield was not a competent investigator. He believed that Mr. Merrifield had made misleading statements to him and Insp. Johnson. Nevertheless, Insp. White stated that in total he spent just a few hours with Mr. Merrifield when he worked in the unit. Insp. White never assessed Mr. Merrifield’s performance. He was certain that Mr. Merrifield attended a meeting in which issues in project Overlord were reviewed, even though Insp. White himself did not attend that meeting. The issues resulted in a report which Insp. White never provided to Mr. Merrifield. He never discussed the contents of it with Mr. Merrifield because Mr. Merrifield left the unit before Insp. White received the report.
- [798] Cpl. Low-Fowler was the file manager for project Overlord when Mr. Merrifield was the lead investigator. She stated that Mr. Merrifield did not provide her with his notes or other documentation for the project. It appears that he was not good with paperwork.

Nevertheless, her evidence contradicted that of Insp. White. She stated that within the project, there were regular meetings, people knew what needed to be done and it was followed-up. The direction and the goal were clear.

- [799] Insp. White spent only a few hours with Mr. Merrifield during his time at Serious and Organized Crime. I accept Cpl. Lowe-Fowler's evidence where it conflicts with that of Insp. White regarding Mr. Merrifield's work performance. Cpl. Low-Fowler worked directly with Mr. Merrifield, day-to-day, on project Overlord.

Senate Committee

- [800] Commr. Paulson testified that after Mr. Merrifield's appearance before the Senate committee, Asst/Commr. White told him that Mr. Merrifield had become "solidly and almost irretrievably embittered with the organization." He was "recalcitrant and not responsive to any direction." I find that Mr. Merrifield's actions show that he was the exact opposite of this. He contacted a number of commissioned officers to try resolve the issues. In his email to D/Commr. Bourduas, he stated, "I have offered evidence and the willingness to resolve this matter in a means agreeable to all concerned these efforts have yielded no results ...". The various SRRs wrote emails on his behalf requesting that the issues be addressed.
- [801] Commr. Paulson stated that Asst/Commr. White told him that Mr. Merrifield had commented out of turn on national security matters. The June 2013 Parliamentary Business Bulletin, written after Mr. Merrifield's attendance before the Senate committee, referred to Mr. Merrifield's participation in the Pritchard show in July 2005. It stated that Insp. Jagoe alleged that Mr. Merrifield had disclosed top-secret information and that subsequently Supt. Proulx contacted Mr. Merrifield and accused him of violating RCMP policy. The Bulletin went on to state that Supt. Proulx advised Mr. Merrifield that formal disciplinary proceedings would follow. I find that the information in this Bulletin was seriously misleading. The question of whether Mr. Merrifield had disclosed top-secret information when he participated in the Pritchard show was resolved in 2005 with a conclusion that he had not done so. Commr. Paulson stated that this portion of the Bulletin suggests that that Mr. Merrifield would have been subject to an investigation. It did not indicate that the matter had been resolved.
- [802] No explanation was provided for the fact that the 2013 Parliamentary Business Bulletin set out misleading information about Mr. Merrifield relating to an incident that had taken place eight years earlier. The Bulletin was unclassified and had an unrestricted circulation. It perpetuated Mr. Merrifield's tarnished reputation.
- [803] It is clear that the information provided to Commr. Paulson by his subordinates about Mr. Merrifield was wrong and deficient. Commr. Paulson rightly relied on them. He understood that Asst/Commr. White had tried to speak to Mr. Merrifield but he was not interested in having a discussion. All of this resulted in Commr. Paulson's having a negative view of Mr. Merrifield. He understood that Mr. Merrifield was not interested in discussing his issues but rather was focused on proceeding with this action. Commr. Paulson stated that he was never advised that Mr. Merrifield's statement in paragraph number three of his email (that Supt. Proulx had attempted to procure a prostitute at approximately the same time that he had ordered the Part IV investigation) may have had some foundation. Asst/Commr. White confirmed that Commr. Paulson was never advised of this. Both C/Supt. Mazerolle and Asst/Commr. White knew that Mr. Merrifield's statement about Supt. Proulx had been substantiated. C/Supt. Mazerolle stated that he received a related document. Although Mr. Merrifield and the defendants disagree on the date when the defendants knew about this (both dates are after Supt. Proulx retired), the

fact that there was an allegation, which on a first reading seems preposterous but was later substantiated, ought to have alerted management to the possibility that the other statements made in the rest of Mr. Merrifield's email might have been credible.

- [804] In considering the actions that officers had taken regarding Mr. Merrifield, Commr. Paulson stated that they had made efforts to discipline him. Commr. Paulson believed that these efforts were blameless because the officers were trying to get Mr. Merrifield to do the right thing.

Ktabi Harassment Complaint

- [805] The RCMP's handling of Cst. Ktabi's harassment complaint can best be described as an administrative bungle. The complaint was made in July 2015, eight months after a new policy was implemented, but Mr. Merrifield was not notified of it until October 2015. Under the previous policy, a third party could make a harassment complaint on behalf of the person who was the subject of the alleged harassment. This was not retained in the new policy. Under the new policy, Cst. Ktabi's complaint should not have proceeded; however, C\Supt. O'Reilly made the mistake of recommending that the complaint be treated as a "third-party non-complainant process". Mr. Merrifield's name was entered into the database which exists to keep track of harassers and to identify patterns. C\Supt. O'Reilly's mistake set in motion a series of events that should not have occurred. I find that this was an innocent mistake on the part of C\Supt. O'Reilly. It does not meet the test for harassment as set out above. Nevertheless, I find that the RCMP handled this matter poorly. The complaint was dated July 7, 2015. Mr. Merrifield was not notified of it until October 22, 2015. The delay until the end of August can be explained because Commr. Paulson was away on holidays. After that, the matter was overlooked.
- [806] S/Sgt. Floyd and C\Supt. O'Reilly had a discussion on Friday, November 13, 2015, two business days before they were to testify. They agreed that the matter had been handled inappropriately and that it was not actually a harassment complaint. At this point, the matter had been hanging over Mr. Merrifield's head for almost a month. Quite surprisingly, Mr. Merrifield did not learn of the mistake and that management had determined that it was not a harassment complaint until Tuesday November 17, 2015 during S/Sgt. Floyd and C\Supt. O'Reilly's testimony. No explanation was offered as to why Mr. Merrifield was not notified of this earlier.

Conclusion

- [807] For the reasons set out above, I find that the defendants' conduct toward the plaintiff was outrageous. The defendants had a reckless disregard of causing the plaintiff to suffer emotional distress. His emotional distress was severe. The defendants' outrageous conduct was the actual and proximate cause of the plaintiff's emotional distress. The plaintiff has proven the tort of harassment.

Do the actions of the RCMP constitute a breach of Mr. Merrifield's [Charter](#) rights?

The Plaintiff's Position

- [808] The plaintiff does not take the position that s. 58.4(1) of the *RCMP Regulation* requiring a member to be on LWOP if s/he wished to participate in the political process is invalid. No decision was made to deny the plaintiff LWOP for this purpose. Instead, the plaintiff states that the conduct of the individual defendants infringed his rights set out in [ss. 2 and 3](#) of the [Charter](#), being freedom of expression and association and the right to vote and be qualified for membership of a legislative assembly.

[809] The plaintiff's position is that Supt. Proulx's examination of his political literature and criticism of his opinions at the May 27, 2005 meeting conveyed a message that his political views were incompatible with the RCMP's accepted positions. Supt. Proulx told the plaintiff that he would have to choose between his career in the Force or politics. Supt. Proulx then carried out an investigation into whether engaging in political activities without LWOP created a conflict. Subsequently, the plaintiff was punitively removed from TAG for expressing his political views. The punishment constitutes a *Charter* infringement.

The Defendants' Position

[810] The defendants state that the facts of this case do not establish any infringement of the plaintiff's ss. 2 and 3 *Charter* rights. He published his campaign materials and distributed them. He ran in the Barrie nomination meeting on May 14, 2005. There is no evidence that he wanted to run for political office again and was denied LWOP. The plaintiff did not challenge s. 58.4(1) of the *RCMP Regulation*.

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Analysis

[811] I disagree with the plaintiff's submission that steps were taken to punish him for expressing his political views. Any conflict was within management's discretion to resolve simply by a retroactive LWOP approval, which had been granted in the past. Punitive steps were taken against the plaintiff because Insp. Jagoe and A/Sgt. Crane believed the plaintiff had lied to them when he said he would not be running in an election anytime soon. A/Sgt. Crane stated that at this point, "the trust was broken." He refused to continue to work with the plaintiff. Insp. Jagoe refused to have the plaintiff transferred to the investigative side INSET, even though it had vacancies.

Conclusion

[812] The evidence does not support the plaintiff's position that he was punitively transferred for expressing his political views. Accordingly, I find that his *Charter* rights were not breached.

Has the RCMP breached its contract of employment with Mr. Merrifield?

The Plaintiff's Position

[813] The plaintiff states that the RCMP breached its contract of employment with him by failing to provide him with a safe and harassment free work environment. The RCMP has an explicit policy against harassment which includes a Mission, Vision and Values statement. The section entitled "Commitment to the Employees of the RCMP" states:

In the spirit of shared leadership and recognizing all employees as our greatest asset, we commit to: open, honest and bilateral communication; demonstrating leadership through accountability and responsibility at all levels; treating all employees with equal respect and consideration...[and] Ensuring a safe and harassment free work environment" among other things.

[814] The parties disagree as to whether there is an employment relationship between the Crown and regular members of the RCMP.

The Defendants' Position

[815] The defendants rely on several cases in which plaintiffs were terminated and subsequently made claims for wrongful and constructive dismissal. In *Flanagan v. Canada (Attorney General)*, 2013 BCSC 1205 (CanLII), 2013 B.C.S.C. 1205, 55 B.C.L.R. (5th) 139, the trial judge dismissed a constructive dismissal action by a former member of the RCMP on the grounds that the plaintiff's employment relationship was defined solely by statute, concluding in para. 64 that, "the weight of authority is against the existence of a contract law-based employment relationship between the RCMP and its members." The British Columbia Court of Appeal affirmed the decision.

[816] In *Davidson v. Canada (Attorney General)*, 2015 ONSC 8008, 2016 C.L.L.C. 220 – 027, the court struck a proposed class proceeding brought on behalf of all female members of the RCMP alleging breach of contract for sexual discrimination, harassment and bullying. In para. 37, the court stated:

A series of cases from across the country, in which RCMP officers have brought wrongful dismissal claims, are authority that there is no contract of employment between the Crown or the RCMP with RCMP members and that the employment relationship with members of the RCMP is fashioned by statute not contract.

The Plaintiff's Position

[817] The plaintiff states that if the court were to accept the defendants' position that there is no employment contract, based on law that recognizes the primacy of the statutory regime, this would mean that the Court of Appeal's decision, which held that the grievance procedure was inadequate to address this plaintiff's claims, would be meaningless.

Analysis and Conclusion

[818] I disagree. In this action, the plaintiff makes three tort claims, among others, that are properly before the court. In *Flanagan* at para. 76, the court stated:

Indeed, virtually all of the cases I have before me in which the Courts have taken jurisdiction to hear a dispute between a member and the RCMP involve a tort rather than what has been described as a simple "garden-variety" labour dispute over such things as benefits or promotion. It has been said that the Courts are better equipped to deal with that sort of claim than is a grievance scheme, such as that of the RCMP, which, as noted, lacks independent adjudication.

[819] The plaintiff argues that the RCMP was required to act in accordance with its own policy; however, I am not aware of any legislative requirement for compliance with the policy and, therefore, cannot interpret the RCMP's actions as a breach of contract in this respect.

[820] Considering the above, I find that Mr. Merrifield's claim for breach of contract is not supported at law because his relationship with the RCMP is governed by statute, not contract.

Do the actions of the RCMP regarding Mr. Merrifield constitute abuse of/misfeasance in public office?

[821] The requirements for the tort of abuse of/misfeasance in public office are set out in *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 at para. 32 as follows:

- (a) the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer (in the exercise of public functions generally);
- (b) the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff;
- (c) the unlawful conduct must be the cause of the plaintiff's injuries; and,
- (d) the injuries suffered must be compensable in tort law.

[822] In *Odhavji*, the plaintiffs alleged that police officers, who had fatally shot an individual, had failed to cooperate with the Special Investigations Unit during its investigation. Cooperation is a statutory requirement under the *Police Services Act*, R.S.O. 1990, c. P.15. The plaintiffs also alleged that the Chief of Police failed to ensure that the officers cooperated. The defendant brought a motion to strike the claim.

[823] The court stated in para. 23 that, "the tort involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff." In para. 28, the court stated, "the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office." Furthermore, the court commented in para. 30 that, "the underlying purpose of the tort is to protect each citizen's reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions." The court allowed the appeal on this point because it was not plain and obvious that the actions for misfeasance in a public office against the officers and the Chief would fail.

[824] In *O'Dwyer v. Ontario Racing Commission*, 2008 ONCA 446, 293 D.L.R. (4th) 559, a starter at a racetrack was under investigation. The Commission decided that he would not be approved to work in the next racing season. Accordingly, he was not re-hired and suffered damages. The plaintiff had a statutory right to have the Commission's decision reviewed under s. 11(7) of the *Racing Commission Act*, 2000, S.O. 2000 c.20.

[825] The court found that the Commission's conduct frustrated the plaintiff's right to have the decision reviewed. The Commission acted with reckless indifference as to the legality of its acts or the probable consequences to the plaintiff. At para. 42, the court stated:

The state of mind required to establish liability depends on which category the tort [misfeasance in public office] falls into. Category A involves "targeted malice", whereas the requirement of intentional misconduct for Category B may be satisfied by "reckless indifference" as to the legality of the act or its probable consequences. As established in *Odhavji* at para 38, "[a]t the very least.... the defendant must have been subjectively reckless or wilfully blind as to the possibility that harm was a likely consequence of the alleged misconduct".

[826] I interpret these cases to mean that, in the context of misfeasance in public office, any action or inaction that fails to comply with a statutory requirement constitutes unlawful conduct. Where a plaintiff establishes that the defendant failed to comply with a statutory requirement and did so with reckless indifference, wilful blindness or disregard for the legality of such unlawful conduct, s/he has laid the foundation for a claim of abuse of public office.

The Plaintiff's Position

[827] The plaintiff states that Supt. Proulx and Insp. Jagoe were public officials. They deliberately engaged in a course of abusive and harassing conduct knowing that it would cause harm to the plaintiff. Some examples include Supt. Proulx's punitive transfer of Mr. Merrifield from TAG to Criminal Intelligence and his ordering a Part IV investigation. The plaintiff states that Supt. Proulx exercised his powers for an improper purpose and in bad faith. These incidents constitute unlawful conduct. Both Supt. Proulx and Insp. Jagoe were aware that their conduct was unlawful and contrary to the legal obligation to provide a safe and harassment free work environment.

[828] The plaintiff further states that A/Sgt. Crane and Insp. Jagoe were aware that he was going to participate in the Barrie nomination meeting and did not take any steps to stop him, contrary to their responsibility set out in s. 37(e) of the *RCMP Act*. A/Sgt. Crane stated that he did not take any steps because he did not have all of the facts. He then falsely advised Supt. Proulx in his email dated June 3, 2005, that as of May 13, 2005, he did not know the nomination meeting was to be held the following day. The plaintiff states that the defendants' failure to comply with their Code of Conduct obligations constitutes unlawful conduct.

[829] The plaintiff also states that Supt. Proulx and Insp. Jagoe engaged in an unlawful sensitive sector investigation when they took issue with the contents of Mr. Merrifield's political pamphlet and when Supt. Proulx questioned Mr. Merrifield about it. Supt. Proulx exercised his powers for an improper purpose. Supt. Proulx and Insp. Jagoe were aware that their conduct was unlawful and that it was likely to harm the plaintiff.

Analysis

[830] I have already found that Supt. Proulx's conduct was tortious; however, this alone does not make it unlawful. The plaintiff's transfer does not constitute an action or inaction that fails to comply with a statute nor does Supt. Proulx's ordering the Part IV investigation. As noted above, there is no legislative requirement that the RCMP must comply with its harassment policy.

[831] The plaintiff points to s. 37(e) of the *RCMP Act* which states, "It is the responsibility of every member...to ensure that any improper or unlawful conduct of any member is not concealed or permitted to continue." A/Sgt. Crane and Insp. Jagoe testified that they were aware of this statutory obligation. A/Sgt. Crane stated that he did not take any action because he believed that he did not have all of the facts. Supt. Jagoe stated that he was aware of the nomination meeting but did not know the exact date. Both officers decided to take no action. Neither of these reasons prevented the officers from contacting the plaintiff before the nomination meeting to ask if he had LWOP. I find that their failure to contact the plaintiff was deliberate and unlawful.

[832] The next question is whether the officers were aware that their unlawful conduct was likely to harm the plaintiff or whether they were recklessly indifferent to the probable consequences of their conduct. The plaintiff suffered harm, being depression and post-traumatic stress disorder because he was punitively transferred and was subsequently the subject of an unfounded Part IV investigation.

[833] I find that the officers could not have been aware that their failure to contact the plaintiff would likely harm the plaintiff. They could not have foreseen the actions that Supt. Proulx would take which subsequently caused the plaintiff to suffer. For the same reason, I find that they were not recklessly indifferent to the probable consequences of their inaction.

The plaintiff's suffering from depression and post-traumatic stress disorder was not a probable consequence of their failure to act.

- [834] The plaintiff submits that Supt. Proulx and Insp. Jagoe carried out an unlawful sensitive sector investigation when they acquired and reviewed Mr. Merrifield's political brochure and when Supt. Proulx questioned him regarding its contents, I note that sensitive sector investigations are governed by a Ministerial Direction on National Security, found in OPS. Manual Appendix IV-10. It states, "This direction will guide the investigations of the Royal Canadian Mounted Police (RCMP), with respect to matters that fall under [subsection 6\(1\)](#) of the *Security Offences Act* and investigations related to a terrorist offence or terrorist activity as defined in [section 2](#) of the *Criminal Code of Canada*, as they relate to sensitive sectors of Canadian society." [Section 2](#) of the *Security Offences Act* R.S.C., 1985, c. S-7, states generally that the Attorney General of Canada may conduct proceedings with respect to an offence under any law of Canada where (a) the alleged offence arises out of conduct constituting a threat to the security of Canada within the meaning of the *Canadian Security Intelligence Service Act*, R.S.C., 1985, c. C-33 or (b) the victim of the alleged offence is an internationally protected person within the meaning of s. 2 of the *Criminal Code*, R.S.C., 1985, c. C-46.
- [835] [Section 6\(1\)](#) of the *Security Offences Act* states, "Members of the Royal Canadian Mounted Police who are peace officers have the primary responsibility to perform the duties that are assigned to peace officers in relation to any offence referred to in section 2 or the apprehension of the commission of such an offence."
- [836] Supt. Proulx and Insp. Jagoe's actions did not constitute an investigation into a threat to the security of Canada or an investigation related to a terrorist offence or terrorist activity. Mr. Merrifield was not an internationally protected person. I find that the above-noted activities of Supt. Proulx and Insp. Jagoe did not constitute an investigation into a sensitive sector.
- [837] I find that the plaintiff has not proven the tort of abuse of/misfeasance in public office.

Do the actions of the RCMP regarding Mr. Merrifield constitute intentional infliction of mental suffering?

- [838] According to *Boucher v. Wal-Mart Canada Corp.*, [2014 ONCA 419](#), 120 O.R. (3d) 481, the test for intentional infliction of mental suffering has three elements. The defendants' conduct must have been (a) flagrant and outrageous, (b) calculated to harm the plaintiff and (c) it must have caused the plaintiff to suffer a visible and provable illness.
- [839] The test for intentional infliction of mental suffering is similar to the test for harassment. One difference is that in addition to being outrageous, the conduct resulting in intentional infliction of mental suffering must also be flagrant. Another difference is that the plaintiff must show that he suffered a visible and provable illness.

Was the defendants' conduct flagrant

- [840] The defendants state that in order for conduct to be flagrant, its offensiveness must be palpable. The *Oxford English Dictionary* defines palpable as "conspicuously or obviously offensive".
- [841] As discussed earlier, Supt. Proulx ordered the Part IV investigation without asking Mr. Merrifield for an explanation for the cash withdrawals. Before he ordered the investigation, Mr. Merrifield specifically asked him if there was any reason to believe that his Amex card

was being used for anything other than RCMP purposes. Supt. Proulx did not reply to this question. Instead, he ordered the investigation. In his mandate letter, he provided no particulars of the transactions that concerned him nor did he provide a date range in which the investigation was to be conducted. He ordered the investigation alleging discreditable conduct at a time that was contemporaneous to his own discreditable conduct. I find that Supt. Proulx's actions were obviously offensive. Therefore, I find that in addition to being outrageous, his conduct was also flagrant.

Was the defendants' conduct calculated to cause harm?

[842] In *Zoran-Smith v. Bank of Montreal* (2003), [2003 CanLII 28775 \(ON SC\)](#), 31 C.C.E.L. (3d) 267, the court stated in para. 167 that:

In terms of establishing that the conduct was calculated to produce harm, it suffices if there is a reckless disregard as to whether or not harm would ensue from the conduct. Furthermore, the requirement that the conduct be calculated to produce harm is met where the actor decides to produce the consequences that follow from the act, or if the consequences are known to be substantially certain to follow. There is no requirement of malicious purpose to cause the harm or any motive of spite.

[843] I have already determined that the defendants had a reckless disregard of causing the plaintiff's emotional distress. The plaintiff had already been off work for significant periods of time, suffering from stress and depression because Supt. Proulx and Insp. Jagoe determined he was no longer suitable to work in national security. As a result of Supt. Proulx's ordering the Part IV investigation, Mr. Merrifield again suffered from stress, depression and post-traumatic stress disorder. Given Mr. Merrifield's medical history and the fact that Supt. Proulx made unfounded allegations that Mr. Merrifield's conduct was disgraceful, I find that Mr. Merrifield's suffering from emotional distress, was a consequence that was known to be substantially certain to follow.

Is medical evidence required to prove that a plaintiff suffered from a visible and provable illness?

[844] The plaintiff states that he was off duty sick, suffering from depression and post-traumatic stress disorder, among other things, which was supported by his family doctor. The RCMP health services never challenged this. The plaintiff states that he is not required to call medical evidence to prove that he was suffering from an illness.

[845] The plaintiff relies on *Rahemtulla v. Vanfred Credit Union* (1984), [1984 CanLII 689 \(BC SC\)](#), 4 C.C.E.L. 170 (BCSC). The court did not require medical evidence to support a finding that the plaintiff suffered a visible and provable illness.

[846] Ms. Rahemtulla was a bank teller who was accused of theft and was fired. The allegation was not proved and the court found that she was entitled to reasonable notice or pay in lieu of notice. The plaintiff had suffered from severe depression and was unable to leave her house or participate in any of her normal activities. She stopped eating. She had blackouts and headaches. She was hospitalized twice. Ms. Rahemtulla had some pre-incident medical issues; however, the court found that the most significant cause of her depression was the manner in which she was terminated and the impact that it had on her prospects for employment. Notwithstanding the absence of medical evidence, the court was, "... satisfied that the plaintiff suffered depression accompanied by symptoms of physical illness as a result of [her supervisor] Mr. Flack's accusations."

[847] The defendants state that a plaintiff must provide medical evidence to show that he suffered a visible and provable illness. They rely on *Prinzo* where the plaintiff provided medical evidence of her injury and was awarded damages for intentional infliction of mental suffering. On appeal, the court confirmed this aspect of the judgment; however, the court referred to *Rahemtulla* and at para. 46 stated, “concerning the requirement of a ‘visible and provable illness’ it appears that the absence of a medical expert will not necessarily be fatal.”

Conclusion

[848] I have already found that the plaintiff suffered severe or emotional distress. Notwithstanding the absence of medical evidence, I am satisfied that the plaintiff suffered from depression and post-traumatic stress disorder as a result of the RCMP’s actions. I find that the plaintiff has proven the tort of intentional infliction of mental suffering.

Does the RCMP have a fiduciary duty to Mr. Merrifield? If so, do its actions constitute a breach of fiduciary duty?

The Plaintiff’s Position

[849] The plaintiff relies on *Frame v. Smith*, 1987 CanLII 74 (SCC), [1987] 2 S.C.R. 99 for its description of certain characteristics in relationships where fiduciary obligations have been imposed.

[850] In this case, the father brought a civil action against the mother of his children on the basis of a tort for breach of a statutorily authorized order for access on the basis that it was a breach of a fiduciary duty.

[851] When considering whether the mother had breached a fiduciary duty, Wilson J. stated in her dissenting decision at par. 24 that,

[852] Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

1. The fiduciary has scope for the exercise of some discretion or power.
2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests.
3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[853] Ultimately, the court concluded that...“the statute shows a clear disposition not to permit recourse to the courts for civil actions of this nature.”

[854] For this and other reasons, the court determined that there was no possible basis for the cause of action.

[855] Twenty-four years later, the court considered the issue of an *ad hoc* fiduciary duty in *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261. This concerned a motion to strike the plaintiffs’ claim on the basis that the causes of action pleaded were not supportable at law.

[856] Approximately 12,500 residents of Alberta's long-term care facilities sued as a class alleging that the government had unjustifiably raised the amount of their required monetary contribution to subsidize medical expenses, which they alleged was the government's responsibility. The plaintiffs stated that this constituted a breach of fiduciary duty.

[857] The court held that the claim for breach of fiduciary duty disclosed no cause of action. It was struck. In considering whether the government had a fiduciary duty to the plaintiffs in the circumstances, the court stated at para. 36:

In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame*: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[858] In para. 37, the court referred to *Guerin v. R.* [19034] 2 S.C.R. 335, at p. 385 in which the court stated:

It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship.

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[Emphasis added by SCC.]

[859] The plaintiff acknowledges that an employer-employee relationship is presumptively not a fiduciary relationship. The imposition of a fiduciary duty in this type of relationship should be rare.

[860] In *Nadolny v. Peel (Region)*, 2009 CanLII 51194 (ON SC), the plaintiff was a retired employee of the Region of Peel. In order to address an administrative error, the Region decided to increase the premiums payable by its retired non-unionized employees who had received early retirement health benefits. The plaintiff stated that she and the other retirees were vulnerable to the Region because after they had retired, they were no longer employed and were no longer in a position to bargain.

[861] The court considered the indicia of a fiduciary relationship. At para. 40, it stated:

In order for a fiduciary relationship to exist, there must be scope for the exercise of some discretion or power, the ability of that power or discretion to be exercised unilaterally so as to affect the beneficiary's legal or practical interests and a peculiar vulnerability on the part of the claimant to the exercise of that power or discretion. Outside of the established categories of fiduciaries, the case law suggests that there must either be evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party, or evidence of a power dependency.

[862] The plaintiff alleged a power dependency relationship. The court held that her pleadings were sufficient to establish the existence of a fiduciary relationship between herself and the

Region.

The Defendants' Position

[863] The defendants state that in *Elder Advocates*, the court commented on the requirements for the imposition of a fiduciary burden on the Crown. Some of those requirements are set out as follows:

[44] Imposing such a burden on the Crown is inherently at odds with its duty to act in the best interests of society as a whole....

[47] Generally speaking, a strong correspondence with one of the traditional categories of fiduciary relationship – trustee-*cestui qui trust*, executor-beneficiary, solicitor-client, agent-principle, director-corporation, and guardian-ward or parent-child - is a precondition to finding an implied fiduciary duty on the government.

[51] It is not enough that the alleged fiduciary's acts impact generally on a person's well-being, property or security. The interest affected must be a specific *private law* interest to which the person has a pre-existing distinct and complete legal entitlement.

[864] The plaintiff states that the question of whether the employer relinquished its self-interest is the real issue. It makes the imposition of fiduciary duty on an employer an exception to the usual employer-employee obligations.

The Plaintiff's Position

[865] The plaintiff states that the RCMP unilaterally adopted the harassment policy which represents a commitment made by the RCMP as an employer to its employees/members. The employees/members, including Mr. Merrifield, were the beneficiaries of this policy. Management and senior officers had discretion regarding enforcement of the policy. The RCMP explicitly and voluntarily relinquished its self-interest in relationship to the employee/members with respect to harassment in the workplace. It made a unilateral commitment to act in the best interests of its employees/members. The plaintiff states that the RCMP had a fiduciary duty to protect him from harassment in the workplace.

Analysis and Conclusion

[866] The RCMP did adopt a policy to provide a safe and harassment free workplace; however, I find that the policy did not arise from an undertaking by the RCMP to act in the best interests of its employees/members. The RCMP did not have a private law duty to do so. Mr. Merrifield's affected interest was not a specific private law interest to which he had a pre-existing distinct and complete legal entitlement. Accordingly, I find that the RCMP did not have a fiduciary duty to the plaintiff.

Has Mr. Merrifield suffered a loss of income related to the actions taken by the RCMP?

The Defendants' Position

[867] The defendants challenge Mr. Merrifield's evidence that he could not write the Cpl. JSE exam on February 4, 2006. He provided no medical evidence to support this. Mr. Merrifield's evidence was that he was too ill to write the exam on that date. February 25,

2006 was the alternative date for candidates to write the exam. The defendants state that Mr. Merrifield gave no explanation as to why he did not write the exam on the alternative date.

- [868] The defendants state that although Mr. Merrifield claims that he was too sick to write the exam in February, on January 17, 2006, the day that the *Ottawa Citizen* article was published, Mr. Merrifield was well enough to travel to “O” Division headquarters in London for a meeting with C/Supt. Mazerolle and SRR Bohus. He kept in contact with his colleagues while he was off duty sick. The defendants state that Mr. Merrifield has not met the burden of proving that he was too sick to write the exam and that the cause of that sickness was the direct result of actions taken by the defendants.
- [869] The defendants state, in the alternative, that if Mr. Merrifield is entitled to lost wages, the calculation should not take into account any assumptions with respect to overtime. Because the amount of overtime earned by members varies depending on the position and nature of the duties performed, it is not reasonable to assume that Mr. Merrifield would earn overtime at the same rate as was earned in his previous postings. The defendants state that any and all calculations should rely on base salary.
- [870] The defendants also state that Mr. Wollach’s assumption that Mr. Merrifield would have been promoted to Corporal within six months of successfully completing the exam is unreasonable. After Mr. Merrifield did complete the exam, he was promoted to Corporal eighteen months later. This is a more reasonable assumption for both promotions.

Analysis

- [871] I find that Mr. Merrifield’s testimony that he was able to travel to London on January 17, 2006 and that he maintained contact with his work colleagues while on medical leave is not inconsistent with his testimony that he was too sick to write the Cpl. JSE exam on February 4, 2006. I accept his evidence that he was too sick to write the exam. He was on approved medical leave at that time and did not return to work until July, 2006. The RCMP never challenged Mr. Merrifield’s approved medical leave.
- [872] I have already found that the plaintiff has proven the torts of harassment and intentional infliction of mental suffering. I find that the mental distress suffered by the plaintiff in February, 2006 resulted in his inability to write the exam.
- [873] I accept the defendants’ position that the amount of overtime earned by a member varies depending on the position and nature of the duties performed. There was no evidence of an average amount of overtime earned by either a Corporal or a Sergeant across a variety of positions and duties performed. The defendants’ assertion that only a base salary for a Corporal and Sergeant should be used to calculate Mr. Merrifield’s loss assumes that Mr. Merrifield would work no overtime as a Corporal and Sergeant. This is unrealistic. A calculation assuming no overtime would under-compensate Mr. Merrifield.
- [874] Given the lack of evidence regarding a different percentage to be applied, I am satisfied that Mr. Wollach’s use of Mr. Merrifield’s post-event average overtime is appropriate in calculating his loss.
- [875] The defendants’ state that eighteen months is an appropriate interval to use to determine when Mr. Merrifield would have been promoted to Corporal and then Sergeant. In fact, Mr. Merrifield waited considerably longer to be promoted to Sergeant. I accept the defendants’ position on this issue.

Conclusion

[876] If Mr. Merrifield wrote the Cpl. JSE exam in February 2006, and using an eighteen month interval, I assume he would have been promoted to Corporal in August 2007. If Mr. Merrifield wrote the Sgt. JSE exam in February 2008, I assume that he would have been promotable in August 2009 because he had to serve as a Corporal for two years. Using the eighteen month interval, I assume that he would have been promoted to Sergeant in February 2011. Because he would have received these promotions later than the dates shown in Mr. Wollach's report, Mr. Merrifield's loss of income would be less than the amount calculated by Mr. Wollach. Given the promotion dates that I have assumed, I find that Mr. Merrifield's income loss is properly assessed at \$41,000. ^[ix]

What amount should be awarded to Mr. Merrifield for general damages?

Analysis

[877] Amounts awarded for damages for intentional infliction of mental suffering and harassment have increased significantly since the 1990s.

[878] In *Clark v. Canada*, 1994 CanLII 3479 (FC), [1994] 3 F.C. 323, 3 C.C.E.L. (2d) 172, a female member of the RCMP was harassed by her male co-workers. She was told to be a "real woman" and go home and have children. Her co-workers watched pornographic movies while she was in the office. Plastic breasts were left on her desk. When her body armour was delivered, it was set up with a mocking note attached to it. These are a few examples of what the plaintiff endured. When she complained to her supervisors, they were dismissive. These events caused her to have a documented mental health crisis. She resigned her position.

[879] The court reviewed awards for intentional infliction of nervous shock prior to 1994, considered a "reasonable measure of consolation" for her particular mental condition and awarded the plaintiff \$5,000. The defendants' state that based on this decision, if Mr. Merrifield is entitled to damages, the amount should be nominal.

[880] The plaintiff relies on four cases decided between 1997 and 2014. They are *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701, *Tipple v. Canada (Attorney General)*, 2012 FCA 158, 431 N.R. 257, 158, *Joseph v. Tl'azt'en First Nation*, 2013 F.C. 767, 9 C.C.E.L. (4th) 173 and *Boucher v. Wal-Mart Canada Corp.* The defendants state that these cases are not applicable because the plaintiffs were either terminated or constructively dismissed.

[881] I disagree with the defendants' position. In all of these cases, the court considered the events leading up to the termination or constructive dismissal. The defendants' actions caused the plaintiffs to suffer from mental health conditions. Damages were awarded to the plaintiffs for mental suffering. I find that these cases are relevant and helpful on this issue.

[882] In *Wallace*, the Supreme Court of Canada determined that the trial judge had discretion to extend the notice period with respect to the termination. The possibility of recovery for mental health damages remained. It noted that a tort for breach of good faith and fair dealing regarding a dismissal was not yet recognized.

[883] In *Tipple*, the employer alleged that the plaintiff's actions were a form of misconduct. The matter attracted a considerable amount of media attention. The court found that the allegations were unfounded. In the interval, the plaintiff had suffered a significant loss of reputation. He was awarded \$250,000 for the loss of reputation and \$125,000 for the psychological injury that he sustained as a result of the manner of his termination.

- [884] In *Joseph*, an employer made vile and serious allegations of fraud upon the employee's termination. This resulted in significant damage to the employee's reputation. The employee had considerable difficulty in finding other employment. Prospective employers stated that the plaintiff had to be vindicated before they would consider hiring him. The court awarded \$85,000 for damage to the employee's physical health, well-being, integrity, dignity and personal and professional reputation.
- [885] In *Boucher*, the plaintiff was a cheerful and productive employee. When the personal defendant became her supervisor, he belittled, humiliated and demeaned the plaintiff in front of others continuously and relentlessly for approximately six months. She complained of her supervisors actions to management who determined that her complaints were unfounded and told her that she would be held responsible for making them. The plaintiff became broken and defeated. She suffered from a number illnesses including depression. A jury awarded the plaintiff \$100,000 for intentional infliction of mental suffering. The award was upheld on appeal.
- [886] Mr. Merrifield suffered from significant depression and post-traumatic stress disorder as a result of the actions taken by the RCMP. He was unable to work for various periods of time. At one point, he disengaged from his family and spent his days lying on a sofa. He did not bathe and developed bed sores. His depression during these periods deprived him of meaningful interaction with his wife and young children. It deprived him of successful performance in a job that he loved and for which he was acknowledged to be a national expert. It also deprived him of the gratification of positive interaction and collaboration with his colleagues.
- [887] Not only did Mr. Merrifield suffer from significant mental health issues as a result of the actions taken by the RCMP, those actions also stained his reputation. A number of people knew that he had been removed from national security work. They assumed that he had done something wrong. Even Insp. Van Doren, who was not Mr. Merrifield's supervisor, knew that he had been removed from national security work. As a result of this, he considered Mr. Merrifield to be unsuitable to work at the SOC during a national security emergency.
- [888] Supt. Proulx accused Mr. Merrifield of using his Amex card for personal reasons, in other words stealing money from the RCMP. Sgt. Dickinson interviewed a number of people during the Part IV investigation. All of them knew the serious allegations against Mr. Merrifield which were tantamount to criminal conduct. The allegations were insidious. For example, Supt. Jagoe still believes that the allegations were substantiated. Just as the news of Mr. Merrifield's removal from national security work spread among the RCMP management and other members, so too would the allegations of disgraceful conduct. Sgt. Dickinson stated that the members that he interviewed would not have known of the outcome of the Part IV investigation or that the allegations were unfounded.

Conclusion

- [889] Taking all of this into account, I award Mr. Merrifield general damages against the defendants for harassment and intentional infliction of mental suffering in the amount of \$100,000.

Is Mr. Merrifield entitled to punitive and or aggravated damages?

Analysis

[890] Mr. Merrifield's award of general damages is meant to compensate him for the harm he suffered because of the RCMP's conduct. Punitive damages are not compensatory. In *Boucher* at paras. 59 and 60, the court stated:

Punitive damage awards are not compensatory. They are meant to punish the defendant in exceptional cases where the defendant's conduct has been "malicious, oppressive and high-handed" and "represents a marked departure from the ordinary standards of decent behaviour", see *Whiten*, at para 36.

In other words, punitive damages focus on the defendant's conduct, not on the plaintiff's loss. Here, for reasons I have already outlined, Pinnock's misconduct met this exceptional standard of malicious and oppressive conduct. Pinnock deliberately targeted Boucher. He wanted her to resign. He persisted with his mistreatment of her over the course of five months. He forced her to leave a job that meant a great deal to her. His conduct did indeed amount to a marked departure from the ordinary standards of decent human behaviour.

[891] Punitive damages must be rationally required to punish the defendants' misconduct. I find that punitive damages are not required in this matter. The general damages award is sufficient to denounce and deter the defendant's misconduct.

[892] With respect to aggravated damages, in *Boucher* at para. 66, the court stated:

Aggravated damages are compensatory damages. They are part of breach of contract damages. They compensate a plaintiff for the additional harm suffered because of the way the contract was breached. In a wrongful dismissal claim, aggravated damages may be awarded against the employer where "the employer engages in conduct during the course of dismissal that is 'unfair or is in bad faith'". [citation omitted]

[893] The plaintiff states that he was functionally in a contractual relationship with the RCMP. The RCMP breached the conditions of his employment when they allowed him to suffer from harassment.

Conclusion

[894] I have found that Mr. Merrifield's claim for breach of contract is not supported at law because his relationship with the RCMP is governed by statute, not contract. He is not entitled to aggravated damages which flow from a breach of contract.

Summary

[895] The plaintiff is awarded general damages in the amount of \$100,000 and special damages in the amount of \$41,000.

Costs

[896] If the parties cannot agree on costs, they shall contact the trial coordinator to arrange an attendance date. If they cannot agree on a schedule for serving and filing materials, a conference call may be arranged. All materials shall be filed with the Barrie trial coordinator.

Released: February 28, 2017

ENDNOTES

[i] Most of the witnesses in this trial were serving or retired RCMP members. I will refer to a retired member as Mr. regarding his testimony. I will refer to him in the narrative by the rank that he held at the relevant time. The plaintiff was a Constable, Corporal and is now a Sergeant. I will refer to him as Mr. Merrifield for consistency.

[ii] Attached as Schedule 'A' is an organizational chart prepared by the plaintiff.

[iii] At a nomination meeting, a person is selected by other members of the same political party to run as a candidate in the next election.

[iv] HRMIS is the acronym for a computer program that contained information regarding RCMP member's employment and other details

[v] Counter proliferation work includes interrupting shipments to foreign countries of materials that can be used to make nuclear weapons

[vi] This manual was dated 2010. A similar manual for 2006 was not provided

[vii] Katherin Barber, ed. *The Canadian Oxford Dictionary* 2d ed, (Toronto: Oxford University Press Canada, 2004)

[viii] *Piresferriera v. Ayotte*, [2010 ONCA 384](#)

[ix] If my assumptions are incorrect, counsel may address me on this issue

Tab 155

Galea v. Wal-Mart Canada Corp., 2017 ONSC 245 (CanLII)

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SUPERIOR COURT OF JUSTICE – ONTARIO

RE: GAIL GALEA, Plaintiff

v.

WAL-MART CANADA CORP., Defendant

BEFORE: EMERY J.

COUNSEL: Natalie C. MacDonald and Cody Yorke, for the Plaintiff

Jonathan L. Dye, for the Defendant

HEARD: January 4, 5, 6, 7, 8, 25, 26, 27, 29, 2016
February 12, 2016
June 14, 15, 16, 17, 2016
August 30, 31, 2016
September 28, 29, 30, 2016
December 5, 6, 7, 8, 9, 19, 20, 21, 2016
March 14, 2017

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SUMMARY

OVERVIEW

[1] To Gail Galea, her career at Wal-Mart Canada Corp. was taken away from her long before she was terminated from her job as an Associate.

[2] In August, 2002, Ms. Galea was hired by Wal-Mart Canada Corp. (“Wal-Mart”, as distinct from Wal-Mart International, Walmart Corporation or Wal-Mart U.S., or any Wal-Mart corporation or business operating in another country). From the time she started working at Wal-Mart on September 3, 2002, Ms. Galea proved herself to be a rising star in the Wal-Mart firmament. Unfortunately, Ms. Galea’s star was not placed as high, or burned as bright in Wal-Mart’s eyes by January 29, 2010. Her employment was terminated ten months later, on November 19, 2010.

[3] Ms. Galea brings this action to recover damages for all amounts she claims she is owed by virtue of her employment, and resulting from the manner of her termination. She makes her claim for contractual damages under a Covenant Not to Compete Agreement (the “NCA”) she entered with Wal-Mart in 2005 which she considers to be an employment contract. She also seeks moral damages for the manner of how Wal-Mart has dismissed her, and punitive damages.

[4] In its Amended Statement of Defence, Wal-Mart admits that Ms. Galea was terminated from employment without cause, effective November 19, 2010. The case for trial was therefore about damages. However, the trial took much longer

than the initial estimate of seven days as a result of further documents that were produced by Wal-Mart voluntarily or compelled by court order. Those further documents added to the complexity of the claims and defences before the court.

FACTUAL BACKGROUND

[5] The factual background necessary to provide a contextual setting for the issues is based in large part on Ms. Galea's evidence. It is only logical that the context be given through her evidence because she is the only witness to the chronology of facts. Where facts involve a discrepancy with the evidence of Mr. Cheesewright, President and Chief Executive Officer ("CFO") of Wal-Mart or of Bob Hakeem, Vice President, People Division, I shall address those credibility questions when resolving that part of the decision.

[6] Ms. Galea was President and Global Chief Executive Officer for Muffins Canada before she was hired by Wal-Mart. In late 2001 or in early 2002, Ms. Galea was recruited by Wal-Mart. Over the course of 12 months, Ms. Galea negotiated the terms of her employment.

[7] On August 23, 2002, Ms. Galea accepted Wal-Mart's offer of employment for the position of District Manager-in-Training, commencing September 3, 2002. Ms. Galea testified that she agreed to join Wal-Mart to work under the leadership of Mario Piloizzi, President and CEO of Wal-Mart, whom she greatly admired.

[8] The compensation that Wal-Mart agreed to pay Ms. Galea at the time of hire was set out in a letter dated August 14, 2002 (the "employment letter"), and included the following:

1. An annual base salary of \$120,000.
2. Eligibility to participate in the full-range of Wal-Mart's employment benefits as described in the enclosed materials, as they may be amended by Wal-Mart from time to time, and subject to terms of qualification and/or waiting periods. Those benefits included the following:
3. Management incentive bonus program, plan number 7. This incentive bonus would be effective for fiscal year ending January 31, 2003, on a prorated basis.
4. Associate/spouse discount card.

5. Participation in Wal-Mart's deferred profit sharing plan.
6. Three weeks annual vacation.
7. Coverage under Wal-Mart's comprehensive benefits program as those benefits may be amended from time to time.
8. Participation in Wal-Mart's registered retirement plan.
9. A leased company car and mileage reimbursement, pursuant to company policy.

[9] The employment letter stated that Ms. Galea would be a member of management. The employment letter was signed by Paul Ratzlaff, Vice President – People Division.

[10] Wal-Mart recognized Ms. Galea's skills and her long term development potential. Shortly after she was hired, Ms. Galea was promoted to District Manager for District 9. In a letter from Mr. Ratzlaff dated February 19, 2003, Wal-Mart increased her annual base salary to \$125,000 commencing March 3, 2003. She would continue to have a leased company car provided to her. She would continue to be eligible to receive the management incentive bonus (plan number 7) up to 30% of her base salary. So began the long climb.

[11] On October 2, 2003, Ms. Galea was promoted yet again to Regional Manager for Region 2. In a letter dated October 10, 2003, Wal-Mart recognized her 16 years of retail experience, and assigned her seven stores that would report directly to her.

[12] On May 1, 2004, Ms. Galea was promoted to Regional Vice-President, and moved from an M7 to an M8 pay band. She was also eligible for the management incentive bonus that would entitle her to up to 40% of her base annual salary as an annual incentive. All other benefits to which she was entitled as a member of management were carried forward.

[13] Ms. Galea received further accolades for job performance that year. On June 17, 2004, she was selected to join a select group of associates for the Targeted Management Accelerated Program (TMAP). In a letter from John Mensner, then President and CEO of Wal-Mart International, TMAP was described as a high potential program that targets female associates with the capacity and desire for a senior executive role in three to five years. The letter went on to advise

Ms. Galea that selection into TMAP came with great responsibility and high expectations. She was expected to work with the President of Wal-Mart in her country, and with its People Director in order to:

- Create a development plan based on her specific needs to be monitored by her People Director
- Take on a more visible leadership role within her organization
- Prepare to take on the next role within Wal-Mart International

[14] By September 2005, Ms. Galea was considered a high value employee. Wal-Mart transferred Ms. Galea to the position of General Merchandise Manager, on a mutually agreed upon date. In a letter from Mary Alice Vuicic, Vice President – People Division at Wal-Mart dated September 9, 2005, the terms of Ms. Galea's new position of General Merchandise Manager were spelled out as follows:

- (a) She would report to the Senior Vice President, Merchandise and Sales.
- (b) Her annual base salary would be \$215,000, inclusive of a \$15,000 car allowance.
- (c) The annual incentive plan would allow her to earn up to a maximum of 40% of her base salary for the fiscal year ending January 31, 2006.
- (d) Wal-Mart's management would recommend to the stock incentive plan committee under the Wal-Mart Canada Stock Incentive Plan of 1998 (as amended or replaced by Wal-Mart in its sole, absolute and unfettered discretion from time to time) that she be awarded stock options at such committee's discretion under and subject to the terms of the stock option plan.
- (e) She would be required to execute and deliver to Wal-Mart three copies of a covenant not to compete agreement together with one copy of the statement of ethics policy appended to the letter.
- (f) The letter dated September 9, 2005 from Ms. Vuicic provided that the contents of the offer and its attachments must be kept strictly confidential and could not be disclosed to anyone other than Ms. Galea's immediate family, legal advisor and financial advisor.

[15] Ms. Galea accepted the position of General Merchandise Manager by signing a copy of the letter from Ms. Vuicic on September 9, 2005, and by signing the NCA which she delivered back to Wal-Mart.

[16] Ms. Galea's elevation to General Merchandise Manager was a defining event in Ms. Galea's career at Wal-Mart. It was significant to Ms. Galea not only because it moved her to the next echelon in the management structure, but also because Wal-Mart required her to sign the NCA to receive the promotion and related benefits. The NCA restricted Ms. Galea from other employment with mass retailers other than Wal-Mart for a period of two years should her employment at Wal-Mart end, regardless of the cause or the reason for termination. The NCA required Ms. Galea to preserve and keep confidential information she learned during her employment with Wal-Mart.

[17] The terms of the NCA are of central importance to this action because Section 2 provides for "transition payments" that Wal-Mart would be required to pay to Ms. Galea in the event Wal-Mart terminated her employment without cause. Wal-Marts' obligations to make transition payments are therefore set out in their entirety:

2. TRANSITION PAYMENTS. In the event Wal-Mart terminates the Associate's employment without cause, Wal-Mart will, for a period of two (2) years from the effective date of such termination continue to pay the Associate his or her base salary and any incentive payable in accordance with the Annual Incentive Plan in effect on the date of termination, and its portion of health and dental benefits premiums in accordance with such plans as are in effect on the date of termination. The payments described above are referred to in this Agreement as "Transition Payments." The period of time during which Transition Payments are made are referred to in this Agreement as the "Transition Period." The Transition Payments shall be subject to such withholding and/or deductions as may be required by law and subject to the following conditions and offsets:

(A) Transition Payments will not be payable if the Associate's employment is terminated by Wal-Mart for cause.

(B) In the event that the Associate is demoted or reassigned so that he or she ceases to be a key employee, the Associate will no longer be bound by the covenant not to compete set forth in Paragraph 3 below and will cease to be eligible for any of the benefits or payments (e.g., Termination Payments) provided by this Agreement;

(C) No Transition Payments will be payable if the Associate voluntarily resigns or retires from his or her employment with Wal-Mart;

(D) Given the availability of other programs designed to provide financial protection in such circumstances, Transition Payments will not be payable under

this Agreement in the event of the Associate's death or disability. If the Associate should die during the Transition Period, Transition Payments will cease at that time, and his or her heirs will have no entitlement to the continuation of such payments. Transition Payments will not be affected by the disability of the Associate during the Transition Period;

(E) Violation by the Associate of his or her obligations under Paragraph 3 or Paragraph 4 below, or any other act that is materially harmful to Wal-Mart's business interests, during the Transition Period will result in the immediate termination of Transition Payments in addition to any other remedies that may be available to Wal-Mart.

(F) Transition Payments will be payable on such regularly scheduled paydays as may be adopted and instituted by Wal-Mart for its other salaried associates;

(G) Receipt of Transition Payments will not entitle the Associate to participate during the Transition Period in any benefit plans or programs maintained by Wal-Mart which are not specifically mentioned in this paragraph 2.

(H) The Associate acknowledges and agrees that the receipt by the Associate of Transition Payments shall fully satisfy any and all claims of the Associate with respect to his or her employment with Wal-Mart or the termination thereof, including but not limited to notice, pay in lieu of notice, wrongful dismissal, severance pay, termination pay, bonus, overtime pay, incentive compensation, interest, vacation pay, or any claims under applicable employment standards, workers compensation, and human rights legislation, and the Associate hereby releases and forever discharges Wal-Mart with respect to any and all claims relative to same effective upon the Associate's initial receipt of any Transition Payment.

(I) Despite the foregoing, in no event shall the Associate receive less than his or her minimum entitlements, if any, to notice or pay in lieu of notice under applicable employment standards legislation if his or her employment is terminated without cause.

[18] Ms. Galea understood the NCA would operate in absolute terms. Section 3 would make her unemployable because it would virtually shut her out of working at any mass merchandising retailer in Canada or the United States. This was the only business she knew. Although remedies for any breach of the NCA by either party were listed under Section 5, she knew that Wal-Mart was powerful and she would not have the means to fight back.

[19] Ms. Galea also testified that she understood that the term "Transition Payments" under Section 2 under the NCA was a promise that Wal-Mart was making to take care of her if she was ever terminated and required to wait out the two years. Ms. Galea understood from conversations with Ms. Vuicic and Mr. Pillozzi around the time the NCA was signed that if she was ever terminated from

her employment without cause, she would receive the full extent of her compensation package at the time for the two years she did not compete. Ms. Galea stated that this was her understanding of what was intended by the parties when she signed the NCA.

[20] Wal-Mart did not call any evidence about any of the circumstances surrounding the making of the NCA.

[21] Ms. Galea's career trajectory continued upwards after she was appointed as General Merchandise Manager. By spring 2006, she had attracted the attention of the Bentonville executive team and head office of Wal-Mart International. Wal-Mart International is the executive arm of the Wal-Mart organization that oversees all Wal-Mart companies and business worldwide, except for Wal-Mart U.S. Wal-Mart Canada Corp. reports to Wal-Mart International when required. All head office operations for the Wal-Mart organization are generally based in Bentonville, Arkansas.

[22] In a letter dated May 18, 2006, from Craig Herkert, President and CEO of the Americas for Wal-Mart, Ms. Galea was told that she had been selected by Mr. Pillozzi in Canada and the Bentonville executive team to continue her participation in the Accelerated International Management (AIM) program. The AIM program targeted high potential Associates who aspired to senior management roles for development. Ms. Galea was advised that she could expect to receive communications from Mary Alice Vuicic to participate in her development plan. Once the development plan was finalized, it would be shared with Bentonville and communicated to Mike Duke's executive team. Mike Duke was CEO of Wal-Mart International at the time.

[23] Ms. Galea felt honoured by this recognition. She felt her career path was moving in the direction according to her plans. She believed that her inclusion in the AIM program was consistent with her development towards a key management role at Wal-Mart.

[24] To further to her goals, Ms. Galea applied in 2007 for membership in the Leadership Foundation, a division of the International Women's Forum. The Leadership Foundation was composed of women in leadership positions from government and business across the world. It included Hilary Clinton, Condoleezza Rice and Roberta Bondar as faculty members. At trial, Ms. Galea described the application process as intense, quite rigorous and challenging. She

was interviewed by a panel as part of the application process. Ms. Galea was accepted by the Leadership Foundation, which was the first time anyone from Wal-Mart had been recognized in this forum. Ms. Galea believes that it reflected well on Wal-Mart for her to be selected.

[25] Ms. Galea made specific reference to pages 6 and 7 of the application to the Leadership Foundation in her evidence, which were pages completed by Mario Pillozzi, then President and CEO of Wal-Mart Canada. In answer to question 2 on page 7 of the leadership application, Mr. Pillozzi gave the following answer to the reference question:

2. The Leadership Foundation Fellows program is an initiative to help prepare women for top level leadership. Where do you see the applicant in her profession five years from now? What is her potential?

ANSWER: Gail is now the Vice President and General Merchandise Manager over home and seasonal. She is responsible for approximately 25% of the company's business (from a merchandising point of view).

Gail has the potential to move at least two levels (of management) up – Senior Vice President and Chief Merchandising Officer, and with education, experience and coaching, could someday run a Wal-Mart country operation.

[26] On March 20, 2008, Ms. Galea received a note from Mike Huffaker, Chief Operating Officer (“COO”) of Wal-Mart Canada to show his appreciation of her contribution towards the last two and a half years. In that note, he states as follows:

Don't ever forget you are one of the Top Talents not only in Canada but the entire World! I wish you continued success in your WMT career and its truly been great working with you. Take care,

Best regards,

Mike

[27] David Cheesewright became the President and CEO of Wal-Mart Canada in November or December 2007. By the summer of 2008, Ms. Galea was reporting to Sylvain Prud'homme, Senior Vice-President Merchandising, who in turn reported directly to Mr. Cheesewright.

[28] On August 6, 2008, Ms. Galea received a letter from Wal-Mart Canada Corp. signed by Mr. Prud'homme, SVP Merchandising, and David Cheesewright, President and CEO. This letter read:

Dear Gail:

You are a valued part of our leadership team. In your role leading the General Merchandise Team, we have been very pleased with the depth of experience and sound business acumen that you have brought to bear. In recognition of your leadership and your continued contributions, we are pleased to offer you the opportunity as Vice President of General Merchandising for a position upgrade to M9. Effective August 1, 2008, you will be eligible for a lump sum bonus of \$30,000. Additionally, your position at your current salary of \$272,000 will be upgraded to an M9 with improved short-term and performance share program potential. Please see the attached salary worksheet for your consideration.

Gail, we are thrilled to be offering you this upgraded position. We believe that you will find this action that we are taking as an indication of the confidence that we have in your abilities and in the successful contributions that you will make in the future as part of the senior leadership team.

[29] The letter from Wal-Mart Canada dated August 6, 2008 offered Ms. Galea a promotion to Vice-President, General Merchandise, and attached a salary worksheet for her consideration. This worksheet showed that her base salary increased from \$237,000 as General Merchandising Manager to \$272,000 as Vice President, General Merchandise at the M9 level effective August 2, 2008. Together with the addition of a lump sum bonus of \$30,000, the increase to her potential incentive rewards under Wal-Mart's management incentive program and performance share program, her maximum compensation range increased from \$474,000 to \$642,000 if Wal-Mart met specified targets.

[30] Ms. Galea was responsible for general merchandising at Wal-Mart Canada in her new position as Vice President, General Merchandise. She was responsible for sales, financial performance and profit and loss at Wal-Mart Canada. She was responsible for 40% of the sales, and 42% of the total profit for Wal-Mart Canada in the speciality parts of its business. This included pharmacy, electronics, and the home side of the business. She had 16 people reporting directly to her, and 400 people reporting indirectly through them.

[31] Ms. Galea was also responsible for global sourcing for Wal-Mart Canada to purchase products from around the world to sell.

[32] Wal-Mart Canada was part of a global strategy to restructure Wal-Mart over all. The McKinsey Group was a consulting firm hired by head office in Bentonville to develop a merchandising project. Mr. Cheesewright as President and CEO of Wal-Mart Canada made the decision to have the project implemented in Canada first. He therefore struck an internal group to study this restructuring initiative, and to determine how to get higher efficiencies out of Wal-Mart's stores in Canada.

[33] Wal-Mart International continued to recognize Ms. Galea's performance and her leadership potential. On April 9, 2009, Mike Duke sent an email to 14 women across the entire Wal-Mart organization to announce the formation of the President's Global Council of Women Leaders, and to invite those 14 people to be a member of the Council. The email was copied to a number of other people in senior management positions, including David Cheesewright. The email read, in part, as follows:

You were selected to participate in this group of 14 senior women leaders from around the world based on your performance and abilities. As a member of the council, you will advise senior leadership and act as a catalyst in the identification, development, advancement and retention of women to more global, senior leadership roles within our company. We'll also look to you to provide perspectives on critical business and customer issues.

[34] No member of this Council was appointed from Canada other than Gail Galea.

[35] Ms. Galea took this appointment to the President's Global Council as recognition of her abilities by the highest levels of management within Wal-Mart International and Wal-Mart U.S.

[36] Wal-Mart International further recognized Ms. Galea's skills and contribution to Wal-Mart in September 2009, when Doug McMillon created an executive development program for Wal-Mart International. Mr. McMillon had succeeded Mike Duke as CEO of Wal-Mart International. Mr. Cheesewright reported to Mr. McMillon.

[37] Gail Galea and another employee, Sean Clarke were the only two people appointed from Wal-Mart Canada to participate in the new executive development program.

[38] On September 14, 2009, Jim Thompson, Senior Vice-President, Operations and Merchandising made an announcement that the Global Procurement team for

Wal-Mart worldwide would report directly into Canada. This meant that the procurement team would be reporting directly to Ms. Galea. This was the first step in the process of realigning the sourcing function for Wal-Mart globally. Ms. Galea was to report directly to Jim Thompson with respect to developing skills for global procurement.

[39] For the year ending January 31, 2008, Ms. Galea received a performance appraisal that was completed by Jim Thompson. She was given a score of 3.8 overall on this performance appraisal, which falls into the category “exceeds expectations” according to the grading system shown on this document.

[40] Mr. Prud’homme was her immediate supervisor to whom she reported directly at year end on January 31, 2009. The performance appraisal for FYE09 graded her again overall at 3.8 out of 5. The overall grade of 3.8 again fell within the “exceeds expectations” category under the Wal-Mart grading system.

[41] Mr. Cheesewright wrote a letter dated March 6, 2009 to Ms. Galea to thank her for her contribution to the company’s overall performance in FYE09. He advised her that she had made the Management Incentive Bonus plan for the first time in five years and that the home office bonus plan reached a payout level of 83%. The letter continued by advising her that her bonus for FYE09 would be \$113,189.26. Her total bonus, including \$9,055.14 for vacation, pay, would be \$122,244.40, and that payment would be deposited directly to her account.

[42] On October 28 and 29, 2009, Ms. Galea attended a global Chief Merchandising Summit in Tokyo. This summit was attended by Chief Merchandising Officers of Wal-Mart companies in other countries.

[43] Ms. Galea exchanged emails with Doug McMillon of Wal-Mart International on November 2, 2009 after she had returned home from the CMO summit in Japan. Around that time, she met with Duncan McNaughton, who had been hired as Chief Merchandising Officer to replace Mr. Prud’homme. Mr. McNaughton had a background in the food industry and therefore had the insight to assist Wal-Mart in developing its food and grocery lines.

[44] Ms. Galea was assigned to work with Mr. McNaughton for twelve months. She had met Mr. McNaughton in Tokyo. Mr. McNaughton was to groom her to take on the role of Chief Merchandising Officer as his successor.

[45] Upon her appointment to work with Mr. McNaughton, she would report directly to him. Mr. Cheesewright told her that this was part of her “professional development”.

[46] In the second quarter of 2000, Doug McMillon asked Ms. Galea to participate in Wal-Mart’s first Executive MBA (EMBA) program. The EMBA program would take place for eight weeks at Harvard University in the summer of 2010.

Incentive Programs in 2010

[47] In order to follow the metrics for any entitlement under a Wal-Mart incentive plan, it is important to understand that Wal-Mart’s financial performance is measured at the end of each fiscal year. The fiscal year end for Wal-Mart Canada is January 31. A particular year is identified by the year in which the fiscal year ends. For instance, the 12 month period between February 1, 2010 and January 31, 2011 would be known as FYE 2011.

[48] Heading into January, 2010, Ms. Galea was entitled to receive compensation in addition to her base salary from four different incentive programs offered by Wal-Mart:

1. The Management Incentive Program (MIP)
2. The Deferred Profit Sharing Program (DPSP)
3. The Executive Retirement Plan (ERP)
4. The 1998 Stock Option Program, later replaced by the 2008 Long Term Incentive Program (2008 LTIP) that contained terms for the operation of the Performance Share Program (2008 PSP).

[49] The Management Incentive Bonus, or MIP, was part of Ms. Galea’s compensation from the date she was hired. This bonus was described as a benefit that shall be finally determined by Wal-Mart in its sole, absolute and unfettered discretion, for the fiscal year ending January 31, 2003. If the program were to pay out at its maximum, Ms. Galea’s entitlement would be 30 percent of her annual base salary in 2003 based on the measurement criteria which could be amended from time to time.

[50] Ms. Galea gave uncontradicted evidence that she was entitled to an annual contribution towards the DPSP equal to 4 percent of her annual salary, bonus and

vacation pay. Will Wilson, Director, Associate rewards at Wal-Mart admitted at trial that Ms. Galea was entitled to this annual contribution towards the DPSP on her behalf. Mr. Wilson further admitted that Wal-Mart did not pay out the balance of Ms. Galea's DPSP account within 90 days, as required by the plan.

[51] The ERP came into effect on February 1, 2005. Although the ERP did not exist when she was hired in 2002, Ms. Galea gave uncontradicted evidence at trial that Wal-Mart made contributions into the ERP on her behalf annually. Ms. Galea received an ERP statement each year. The statement advises the employee that she will receive the closing balance of her ERP account when her employment with Wal-Mart ends for reasons other than gross misconduct, or total and permanent disability, within 90 days of the date on which her employment ended.

[52] When Ms. Galea was hired in August 2002, she became eligible for the full range of Wal-Mart's employment benefits under the terms of the employment letter. One of those benefits consisted of participation in Wal-Mart's stock option plan. This plan gave Ms. Galea the opportunity to purchase Wal-Mart stock at a reduced price. The Stock Incentive Plan of 1998 clearly provided the opportunity as an incentive to certain Wal-Mart employees. Paragraph 1.1 of the 1998 Stock Option Plan set out its purpose in the following recital:

1.1 Purpose. Wal-Mart Canada, Inc. ("Wal-Mart") believes it is important to provide incentives to Wal-Mart's Associates through participation in the ownership of Wal-Mart Stores Inc. This Wal-Mart Canada Inc. Stock Incentive Plan of 1998 (the "Plan") is established to provide incentives in the form of Stock Options, Restricted Stock Awards to certain Associates of Wal-Mart to enhance their job performance, to motivate them to remain or become associated with Wal-Mart and to increase the success of Wal-Mart by fostering executive ownership in Shares in order to align their interest with those of the Shareholders of Wal-Mart Stores, Inc. The Plan is not limited to executive officers or directors of Wal-Mart, but will be available to provide incentives to any Associate that the Committee believes has made or may make a significant contribution to Wal-Mart.

[53] Mr. Cheesewright wrote to Ms. Galea on July 4, 2008, as the Chief Executive Officer to inform her that Wal-Mart Canada was proposing a new plan, the Wal-Mart Canada Long Term Incentive Plan 2008 (the "2008 LTIP") to replace the 1998 Stock Option Plan. In this letter, Mr. Cheesewright described the benefits which key employees including Ms. Galea would receive:

In place of the stock options previously awarded to you under the Old Plan, as a member of the M8 pay band, you will now be eligible under the Proposed Plan to an annual award of performance shares ("PSPs") in an amount equivalent to 40% of your annual base salary, assuming all performance thresholds are met. In simple terms, this means that rather than simply benefiting from any increase in

the market value of shares for which you hold stock options (as under the Old Plan), under the Proposed Plan you will be granted actual shares that vest within specified periods (less any required statutory deductions), provided that certain pre-determined corporate performance targets are achieved.

[54] Ms. Galea understood this letter to mean that under the 2008 LTIP, she would receive actual shares in Wal-Mart Canada under the Performance Share Plan ("PSP") within the 2008 LTIP instead of the options which required her to actually purchase shares. She further understood from Mr. Cheesewright's letter that she would retain the options she had already been granted, and that she would receive shares issued by Wal-Mart Canada from the time the 2008 LTIP took effect.

[55] According to Mr. Cheesewright's letter dated July 4, 2008, and under the actual terms of the 2008 PSP Plan that came into effect on February 1, 2008, the PSP award for 2008 would be "triple loaded". This meant that Ms. Galea as a Wal-Mart Associate would receive a one-time award that would be the equivalent to three standard awards. The actual shares issued to pay this triple load was contingent upon her continued status as an Associate, and Wal-Mart Canada's achievement of required performance measures over the following three years. Each "load" or "award" would vest respectively at Wal-Mart Canada's year-end on each January 31, 2009, 2010 and 2011 respectively. Mr. Cheesewright's letter provided an example of an award made in February 2009 that would, assuming continued employment and Wal-Mart's achievement of required performance measures, vest in February 2012.

[56] Wal-Mart Canada issued a notice of plan award to Ms. Galea under the 2008 LTIP, which she accepted on November 6, 2008. This notice of plan award granted Ms. Galea a target number of 1,758 PSPs as of September 9, 2008. This grant was subject to the performance measurement for the period February 1, 2008, to January 31, 2009, and was subject to the terms of the 2008 LTIP and the notice of plan award. The notice of plan award also contained paragraph 2.4 that governed how an Associate's continued employment would be determined for the purpose of the plan, and what would occur in the event that an Associate's continued employment status was terminated:

In the event that the Recipient's Continuous Status as an Associate terminates:

As a result of the Recipient's death, a prorated number of PSPs granted hereunder shall become vested as at the Recipient's date of death and the Recipient's beneficiary shall be entitled to receive payment as soon as

practicable thereafter. The prorated number of PSPs to vest under this paragraph shall be calculated by dividing by 365 the number of days in the Performance Period prior to the Recipient's date of death and applying the resulting percentage to the Target Number of PSPs.

For any reason other than the Recipient's death, all PSPs granted hereunder that have not vested on or before the date on which the Recipient's Continuous Status as an Associate ceases and all rights with respect to such PSPs shall be forfeited by the Recipient and shall terminate.

[57] Wal-Mart Canada also issued notice of plan awards for 439 performance shares granted on September 9, 2008; 2,194 performance shares granted on April 9, 2009; and 2,456 performance shares granted on March 30, 2010.

[58] Ms. Galea takes the position that at the end of the triple load, she was entitled to receive 5,274 shares (1,758 shares x 3), and 1,317 shares (439 shares x 3). In addition, Ms. Galea claims entitlement to the shares granted on April 9, 2009 and March 30, 2010.

[59] On January 26, 2010, Ms. Galea received a letter from Will Wilson dated January 26, 2010, regarding the Executive Retirement Plan (ERP) at Wal-Mart Canada. This plan was important to her, and she considered it to be part of her salary package. She considered it a source of funding for her retirement. In this letter, Wal-Mart Canada showed that her balance within the ERP as at November 30, 2009, totalled \$158,872, with a deemed investment in three different investment funds. Deemed earnings from those deemed investments would be credited to her notional ERP account at the end of each month.

January 29, 2010 and after

[60] Anticipating the year ahead, Ms. Galea expected that she would eventually be appointed as Chief Merchandising Officer for Wal-Mart Canada. However, a meeting with Mr. Cheesewright on January 29, 2010 would change those expectations forever.

[61] At around 12:00 noon on January 29, 2010, Ms. Galea was asked to meet with Mr. Cheesewright. As she also reported to Mr. Cheesewright at the time, she thought this was to be a routine meeting. Instead, Mr. Cheesewright informed Ms. Galea that he was removing her from her role as Vice President, General Merchandising, and relieving her of responsibilities associated with that role. Ms. Galea recalls that he told her that he did not know what to do with her. He told her

he was considering an ex patriate assignment for her as one option. This would mean that she could be assigned to a Wal-Mart subsidiary in another country.

[62] Ms. Galea was shocked by this decision. She understood from what Mr. Cheesewright said to her at that meeting that her role did not exist at Wal-Mart Canada any longer. However, she also understood from him that she was still valued by the company..

[63] Mr. Cheesewright discussed how Ms. Galea might be reassigned to the Wal-Mart subsidiary in India, which was a small market for Wal-Mart International at the time. He also discussed how she might be assigned to a Wal-Mart subsidiary in Brazil. This reassignment could take place six to nine months later.

[64] From this meeting, Ms. Galea understood that Wal-Mart Canada was in the process of reorganizing. She understood that Mr. Cheesewright was eliminating her role, and that Wal-Mart was hiring younger talent. Wal-Mart would have to figure out what job she was best suited for, and wanted to do things in sequence. Mr. Cheesewright also advised Ms. Galea that Doug McMillon at Wal-Mart International, Duncan McNaughton and Bob Hakeem all knew about the meeting they were having.

[65] To Ms. Galea, this decision meant that there was no space for her in merchandising at Wal-Mart Canada, as Mr. Cheesewright was making room for younger people to fill merchandising positions.

[66] Ms. Galea began to take notes of meetings she would have with Mr. Cheesewright from that day forward.

[67] Ms. Galea went home and met with her family about her meeting with Mr. Cheesewright. She understood that a huge cultural change was taking place at Wal-Mart Canada. She decided that she would consider a lateral transfer to the Wal-Mart subsidiary in Brazil.

[68] On February 1, 2010, Ms. Galea met with Mr. Cheesewright once again. She informed Mr. Cheesewright that India would not be an appropriate assignment for her family or herself as the culture there was very different and distinct. However, she advised Mr. Cheesewright that she would be interested in pursuing the opportunity in Brazil, and requested a better understanding about the job.

[69] Mr. Cheesewright told her at the meeting on February 1 that he was sorry for making her feel the way she was made to feel, and that the conversation had not gone well on January 29th. He told her that they would have had a different conversation that day if Wal-Mart did not value her performance and abilities. He told her that Doug McMillon had sent him an email stating that he did not want to lose her.

[70] Ms. Galea spoke with Mr. McMillon over the telephone on February 3, 2010. He told her that Wal-Mart International had an international shortage of merchandising talent. He told her that the Wal-Mart associate in Brazil was struggling and he suggested that she reach out to Eduardo Solorzano.

[71] Ms. Galea acted on Mr. McMillon's recommendation and spoke with Mr. Solorzano by telephone. Mr. Solorzano told Ms. Galea that any role she might play would just be a consultant role. Subsequently, Ms. Galea spoke with Hector Nunez, CEO of Wal-Mart's operations in Brazil. He told her that the role would not be progressive. It would have no people reporting directly to her and no responsibility for profit and loss. The position would have her assisting Marcelo Vienna, Chief Merchandising Officer for Wal-Mart Brazil.

[72] On February 3, 2010, Ms. Galea also met with Bob Hakeem. At that time Mr. Hakeem was the Manager of Human Resources of Wal-Mart Canada. Mr. Hakeem asked Ms. Galea what countries she would like to work in if he could arrange an ex patriate assignment for her.

[73] Ms. Galea met again with Mr. Cheesewright on February 4, 2010. He informed her that he intended to continue developing her career. He mentioned there might be an opportunity for her in Chile. In the meantime, she was to continue developing her skills at Wal-Mart Canada.

[74] By this time, Ms. Galea felt like she was floundering because she had the distinct impression Wal-Mart Canada was trying to decide what they were going to do with her.

[75] On February 5, 2010, Mr. Cheesewright advised Ms. Galea that she was being assigned to work with Ed Kolachynski, head of Global Procurement services at Wal-Mart U.S. to support her transition. This would involve working part time with Wal-Mart's head office in Bentonville, Arkansas. This position involved no actual defined duties or responsibilities.

[76] On February 7, 2010, Ms. Galea spoke with Duncan McNaughton, to whom she had reported directly to before she began reporting directly to Mr. Cheesewright. Ms. Galea understood from her discussion with Mr. McNaughton that she was to be appointed as Senior Vice-President Merchandising-Strategic Initiatives, and would resume reporting directly to him. She understood from Mr. McNaughton that the organization was being flattened. She understood from her conversation with Mr. McNaughton that she was still a valued resource and talent at Wal-Mart Canada, and that this was the best way for her to advance in the company.

[77] On February 8, 2010, Mr. Cheesewright announced Ms. Galea's new position at a general meeting for all Associates at head office for Wal-Mart Canada. At the same time, Wal-Mart released an internal memo to all Associates, including those who had not attended the meeting. The announcement described Ms. Galea's new role as Senior Vice-President Merchandising-Strategic Initiatives, and that she would report to Mr. McNaughton. The announcement described how in addition to this new role, Ms. Galea had been offered an opportunity to work with Wal-Mart International in the months to come as part of her career plan to gain global experience. In that role, Ms. Galea would be working with Ed Kolachynski, head of Global Procurement. In addition, Ms. Galea would utilize her operations and merchandising experience in supporting Sean Clarke with new format development.

[78] Ms. Galea testified that she was embarrassed by this announcement in front of five or six hundred people who worked at Wal-Mart Canada. The announcement signified that she had gone from a member of the senior executive team to a supporting position. The five or six hundred people present at the meeting when the announcement was made were members of head office staff. All of the people who had reported directly to Ms. Galea were present, as well as those who reported indirectly to her.

[79] Ms. Galea attended the year beginning meeting ("YBM") and met with Mr. McNaughton to gain clarity about her current role in the Wal-Mart organization. At that meeting, she was asked to spend some time with Mr. McMillon and through him, to develop relationships through global sourcing.

[80] On February 17, 2010, Ms. Galea met again with Mr. Cheesewright. Mr. Cheesewright told her at that time that hers was a complicated situation. He told

her that “her case is so unique it was a Harvard case study in the making”. Ms. Galea did not know what Mr. Cheesewright meant by that comment.

[81] By February 19, 2010, Ms. Galea had not been assigned any further role or responsibilities. Mr. McNaughton told her that he really did not know what her role was to be. He recommended that it was better for her to meet with Mr. McMillon of Wal-Mart International. It was still Wal-Mart Canada’s intention to develop her, although by this time she had no idea what “development” meant.

[82] Between the YBM in February 2010 and mid-June 2010, Ms. Galea had several meetings where she discussed possible opportunities with Wal-Mart affiliates in Brazil, Chile and with Asda, the Wal-Mart affiliate in the United Kingdom. She also travelled to Bentonville to work on global sourcing strategies with Mr. Kolachynski.

[83] In order to expand her horizons in the event that she secured the role in Chile, Ms. Galea took Spanish lessons as she had been informed that the Wal-Mart affiliate would only be interested in someone who spoke fluent Spanish.

[84] Ms. Galea went so far as to visit Chile in June 2010. This showed her interest and commitment to taking the assignment in Chile if it was offered.

[85] In June, the head of resourcing for Asda stores in the United Kingdom reached out to Ms. Galea. Ms. Galea corresponded with Andy Clarke of Asda about the prospects available for her as Chief Merchandising Officer across all lines of business, or a split CMO role for either food or non-food sales.

[86] By the end of June, Ms. Galea was communicating with Mr. William (Bill) Simon, who had just been promoted to President and CEO of Wal-Mart U.S. Ms. Galea informed Mr. Simon that she was interested in working with Asda in the UK. She was interested in the Chief Merchandising Officer role. She told Mr. Simon on June 29, 2010, that she was travelling to the United Kingdom the following week to meet with Andy Clarke, the President and CEO of Asda. She also told Mr. Simon that she had already spent a week with Enrique Ostale in Chile with the hope of acquiring the role of Chief Merchandising Officer there.

[87] Throughout Ms. Galea’s exploration of international opportunities, Mr. Cheesewright was passive in assisting her to find a role. In the meantime, Ms. Galea took the opportunity to develop international contacts when she was in

Bentonville from time to time to work with Ed Kolachynski. On one occasion, she spoke with Doug McMillon about her prospects with Asda.

[88] Ms. Galea wrote to Mr. McMillon on July 19, 2010, to thank him for the guidance and insight that he had provided a week before. In that email, she told him how excited she was about the potential opportunity to work with a great business like Asda, and how she looked forward to further discussions with Andy Clarke in the UK.

[89] Mr. McMillon responded the following day with an email that said “Hi Gail, I’ll help in any way that I can. I look forward to seeing your impact. Doug.”

[90] Mr. Cheesewright and Mr. Hakeem travelled to Bentonville on or about July 22, 2010, for the annual Talent Review meeting for Wal-Mart International. This was the forum where the Presidents and heads of Human Resources from Wal-Mart companies around the world would meet and discuss matters of importance to Wal-Mart worldwide, and to identify those eligible for promotion for Wal-Mart operations and management. This meeting provided an opportunity for Mr. Cheesewright to speak with Mr. Clarke or with Chet Kuchinad who were attending from the UK about a possible role for her at Asda.

The PAR Grid as a Measure

[91] An Associate at Wal-Mart is ranked two ways for promotion potential. One way is the rating given by upper management on a performance grid, known as a People Asset Review, or PAR. After a PAR review, the name of the individual is placed into the appropriate box on a 9 box PAR grid determined by the upper management for the Wal-Mart company in that country. The PAR rating for an Associate is influential for management of the Wal-Mart company in a country to know the skill set and potential of the Associate for advancement.

[92] The second is the Associate Opinion Survey (AOS) score, which is calculated by a complex grading system made up of answers to questionnaires completed by people who report directly and indirectly to the designated Associate.

[93] Ms. Galea was familiar with the nine box grid that had been used by upper management at Wal-Mart since 2008. She knew that she had been rated at the Q1 or Q2 level according to the criteria for those boxes on the 2008 PAR grid the previous year. These ratings made her promotable. The rating of Associates on the grid was the reference guide that upper management would use when making

decisions about that the best people to promote internally, or to make a recommendation to Wal-Mart affiliates in other countries for expatriate assignments. This grid was marked as Exhibit “J” at trial.

[94] Ms. Galea had met earlier with Susan Chambers, Executive Vice President of People at Wal-Mart International on a trip to Arkansas. She had taken the trip to Bentonville to meet with Brian Cornel, President and CEO of Sam’s Club, a Wal-Mart affiliate in the Wal-Mart U.S. organization. She left her meeting with Mr. Cornel expecting to receive a job offer from Sam’s Club.

[95] It was from Susan Chambers that Ms. Galea learned for the first time that she had been moved from a Q1 rating on the 2008 PAR grid that she believed to be applicable at all material times in 2010, to a Q5 rating. She also learned from Susan Chambers that her AOS score had been recorded as 59, instead of the 65 she knew she had been given.

[96] According to the guidelines used to interpret the meaning for each box on the 2008 PAR grid, a Q5 rating meant that she was not currently considered promotable.

[97] In the Amended Fresh as amended Statement of Claim, Ms. Galea has pleaded that Mr. Cheesewright changed her rating on the applicable PAR grid from Q1 to Q5 without her knowledge. Mr. Cheesewright admitted this fact.

[98] The AOS score for Ms. Galea had been recorded at 59 in 2010. Previously, her AOS score had been 65. This was confirmed on her performance review on April 16, 2010. Ms. Galea requested that Ms. Chambers take immediate steps to have her AOS score reviewed and corrected.

[99] Mr. Cheesewright was examined for discovery as the representative produced by Wal-Mart on July 19, 2012. At that examination, Wal-Mart had produced a 9 box grid for 2012 that was marked as Exhibit U3 at trial. The box for the Q5 rating on this 2012 PAR grid reads “Consistent performer with potential for promotion. Need more evidence to show strong results/confirm potential. Action: Targeted development related to current role challenges.”

[100] On December 30, 2015, virtually days before this trial would commence, Wal-Mart Canada provided answers to undertakings. One of those undertakings was to answer a question relating to the production of the PAR grid in effect at

Wal-Mart Canada in 2010. The following question and answer was given as that undertaking:

Q. 1136-1140 Produced "box grids" for years 2007, 2008, 2009 and 2010 if they are different that box grid Canada version 2012 at Exhibit 10.

A. No such documents for those years have been located, but they were likely the same or substantially similar.

[101] When looking at the interpretation guide for the 2012 PAR grid, Ms. Galea noted that the Q5 terms for what the Q5 box signified had been changed from the grid she believed was in place in 2010. In any event, she was not at Wal-Mart Canada in 2012. She did not use this document during her years at Wal-Mart Canada.

Ms. Galea goes to Harvard

[102] The program at Harvard that Ms. Galea attended in 2010 lasted for eight weeks. This program was offered to 110 selected participants representing different industries from all corners of the world. Susan Chambers and Mr. Cheesewright had both suggested that Ms. Galea would find the Harvard program a positive experience.

[103] Before she left for Harvard, Ms. Galea met with Mr. Cheesewright on August 5, 2010 upon returning from Bentonville. She asked him why she had been changed from a Q1 to a Q5 rating on the PAR grid. Mr. Cheesewright did not respond to her question about the change of her PAR rating to Q5. Mr. Cheesewright instead suggested she speak with Mr. Hakeem about the change to her AOS score.

[104] Ms. Galea told Mr. Cheesewright at the time that she had met with Brian Cornel at Sam's Club, and that the meeting had gone well. Mr. Cheesewright told her that she should be ready to go if Sam's Club made an offer to her. He also informed her that the position with Asda Foods in the UK was still a possibility. Mr. Cheesewright then told her that the last six months had not gone the way he had hoped. He undertook to speak to an individual he knew about a possible role for her in the new dot.com business that Wal-Mart was developing.

[105] At this time, however, Ms. Galea felt that eight years of her life had been invested in Wal-Mart Canada, and the respect that had been earned during those

eight years had been taken away. She told the court that this had all been a very difficult time for her physically and mentally, and for her entire family.

[106] Ms. Galea continued as a member of the Presidents Global Council for Women Leaders for Wal-Mart worldwide. Ms. Galea was one of three women who prepared a report that would be presented to Mike Duke and his direct reports at Wal-Mart International on the ex patriate program. This program addressed an issue identified within Wal-Mart that there was no program to repatriate those employees who had relocated to another country to work at a Wal-Mart affiliate.

[107] While at the program at Harvard, Ms. Galea was on a conference call where she learned that Mr. McNaughton would be returning to the United States.

Events in November, 2010

[108] Ms. Galea returned from the program at Harvard on November 1, 2010. Upon returning to the executive offices of Wal-Mart Canada, she discovered that her personal effects had been packed up and moved from her office to another office entirely. From that location, she would not have access to Mr. Cheesewright at all. Even her telephone had been disconnected.

[109] Ms. Galea was also omitted from the hotel room assignment list for a strategic planning meeting for management that Wal-Mart Canada was organizing off site. She had routinely been included in this meeting in past years.

[110] The strategic planning meeting organized by Wal-Mart Canada took place on November 4, 2010. Ms. Galea attended after her name had been added to the room allocation list. At that meeting, she met with Mr. Cheesewright and Mr. Hakeem to determine what her role and responsibilities were to be going forward. At that time, Mr. Hakeem told her to keep an open mind and that Wal-Mart Canada would have an offer to make to her. She was told to meet with Mr. Cheesewright and Mr. Hakeem when they had all returned from the strategic planning meeting.

[111] On November 9, 2010, Ms. Galea attended a meeting with Mr. Cheesewright expecting to receive an offer of a position. According to Ms. Galea, Mr. Cheesewright started the meeting off by telling her that she was one of the best merchandisers, and a high achiever, at Wal-Mart Canada. He stated that he was impressed by the way she had handled the last six months. He then suggested that they not talk about the past, but focus instead on the future.

[112] Mr. Cheesewright explained that although Wal-Mart Canada had replaced the Chief Merchandising Officer twice in three years, he did not feel that she was ready for the job. He told her that he wanted her to run the E-commerce business, and to report to Sean Clarke. Mr. Cheesewright then gave Ms. Galea a letter dated November 9, 2010 that offered her the position of Senior Vice President E-Commerce or the choice of accepting an offer of severance from her employment with Wal-Mart Canada.

[113] Ms. Galea was shocked at this letter. It directly contradicted the comments Mr. Cheesewright had made at the meeting. She considered the position of Senior Vice President E-Commerce to be a position that was not comparable to her experience. It was a job offer extended on a probationary basis, and proposed entirely on terms that favoured Wal-Mart.

[114] Ms. Galea went home and discussed the entire situation with her family. To Ms. Galea, Mr. Cheesewright's behaviour showed that Wal-Mart did not have confidence in her. The letter of November 9, 2010 gave her two options, neither of which she considered acceptable.

[115] Ms. Galea told Mr. Hakeem that she had received this letter. She told him that this turn of events would have an impact on her whole family. Her husband was in poor health, and she was the sole wage earner. Mr. Hakeem gave Ms. Galea his personal telephone number and told her that he was open to discussion.

[116] Mr. Hakeem subsequently sent Ms. Galea a text message and advised her that he would like to talk to her at home. During that call, Mr. Hakeem told her that Sean Clarke would not be staying in Canada with Wal-Mart and was moving to the United States. He told her that Shelly Broader would be her new superior at Wal-Mart Canada. Mr. Hakeem characterized her choice to stay with Wal-Mart as Senior Vice President E-Commerce as a high-risk decision, and told her that Ms. Broader did not want her in the organization.

[117] Ms. Galea understood from speaking with Mr. Hakeem that if she worked under Ms. Broader and reported directly to her, her position of Senior Vice President E-Commerce would be challenging and she would only be delaying the inevitable. Mr. Hakeem discussed these matters with Ms. Galea because he wanted her to have all of the information to make an educated decision. He wanted her to make the best choice between the offers that Wal-Mart extended in the letter dated November 9, 2010.

[118] Throughout this time, Ms. Galea states that Mr. Cheesewright expressed his support, and his commitment to her success. In contrast, Mr. Hakeem was suggesting to her that accepting the position of Senior Vice President E-Commerce would not be a good one because Ms. Broader was not supportive of her. He recommended that she should take the opportunity to bow out gracefully.

[119] Ms. Galea also understood from Mr. Hakeem that her Q5 rating would be a hurdle for her promotion within Wal-Mart Canada or in the Wal-Mart organization, or to her advancement in the company generally.

[120] Ms. Galea made an effort to meet with Mr. Cheesewright and Mr. Hakeem to discuss the developing situation with respect to Ms. Broader and the offer of the Senior Vice President E-Commerce position. That meeting was never arranged because of scheduling difficulties. Mr. Cheesewright and Mr. Hakeem were never available at the same time to meet with Ms. Galea.

[121] On November 19, 2010, Ms. Galea was scheduled to meet again with Mr. Hakeem. She had spent the last nine months performing tasks assigned to her by Wal-Mart. She had on-going concerns about her Q5 rating and what it meant. She wished to speak with Mr. Hakeem about her concerns with the position of Senior Vice President E-Commerce she had been offered, and how it provided no career path forward. She also wished to discuss the NCA to seek clarity about what she was entitled to receive under it.

[122] Ms. Galea told Mr. Hakeem that she had met with Mr. Cheesewright about the job. She told him she was not considering the severance option because Mr. Cheesewright had encouraged her to accept the E-Commerce position whereas Mr. Hakeem had not. She felt conflicted. At this meeting she told Mr. Hakeem that she not only needed clarity, but needed him to make it work for her.

[123] Later that day, Ms. Galea was called into Mr. Cheesewright's office. Mr. Cheesewright informed Ms. Galea in a matter of fact way that she was being terminated from her employment with Wal-Mart Canada.

[124] Ms. Galea was devastated by this statement. She could not understand how she could have spiralled downward from her place as a top performer. She could not reconcile how Mr. Cheesewright would consistently tell her that he supported her, and what Mr. Hakeem had been telling her from a practical perspective.

[125] Mr. Hakeem did not attend this meeting in Mr. Cheesewright's office. Ms. Galea therefore went directly to Mr. Hakeem's office after Mr. Cheesewright had terminated her employment. Mr. Hakeem then gave her a severance letter. Although that letter provides two options with respect to providing severance, it was agreed at trial between counsel because of the "without prejudice" nature of the letter that only the first paragraph was admissible in evidence. This paragraph read as follows:

"This will serve to confirm the details of our meeting today. As we have been unable to come to a mutual decision with respect to the employment options detailed in the letter provided to you on November 8, 2010, we have come to the difficult decision that it is in your best interest and in the best interest of the company that your employment be terminated effective immediately."

[126] Ms. Galea was mortified by what this letter portrayed. First, there had been no letter dated November 8, 2010. If Wal-Mart Canada meant to refer to the letter dated November 9, 2010, no options acceptable to her had been given as both choices were equally detrimental to her career.

[127] Ms. Galea states that she never received a job description for the role of Senior Vice President E-Commerce. Nothing had come of the projects she had been given as Vice-President Merchandising –Strategic Initiatives. There had been no job offers from any Wal-Mart affiliate she had actively pursued. The Company had provided no viable options for her to stay employed. She now realized that Wal-Mart had just taken nine months to make the decision to let her go.

Payments received after Termination

[128] Wal-Mart Canada continued to pay Ms. Galea her base salary for the next 11.5 months, and then stopped. Wal-Mart provided Ms. Galea's record of employment that erroneously recorded her last day of payment as November 4, 2011. Ms. Galea responded through her solicitor's letter dated November 29, 2011, that she required a corrected record of employment with the correct dates. This letter also stated that Wal-Mart had cancelled all of Ms. Galea's medical, dental and life insurance benefits without communicating termination of these benefits to her, or providing her with reasonable notice that it would be taking such steps.

[129] Ms. Galea's lawyers also stated in the letter dated November 29, 2011, that although the executive retirement plan statement provided to Ms. Galea indicated that she had received her incentive bonus for the year end January 2011 in the

amount of \$129,047, she had never received that money. Her lawyers also stated that they expected that amount to be paid immediately, with interest. It is unclear from the evidence given at trial if that bonus was ever paid to Ms. Galea.

[130] On December 19, 2011, Heenan Blaikie wrote a letter on behalf of its client, Wal-Mart Canada, to Ms. MacDonald, counsel for Ms. Galea. Enclosed in that letter were two cheques payable to Ms. Galea for \$18,224.07 and \$3,208.08, respectively for vacation pay, and the corrected record of employment for Ms. Galea dated December 9, 2011.

ANALYSIS

[131] The damages that Ms. Galea claims against Wal-Mart come from two sources. She seeks one set of damages of a contractual nature that flow from the NCA as an employment contract. The NCA provides that Wal-Mart would continue to pay Ms. Galea for two years if she was not dismissed for cause, and she abided by the terms of the NCA not to compete with Wal-Mart. Ms. Galea was not dismissed for cause, and there was no evidence given that she breached any term of the NCA.

[132] Ms. Galea claims another set of damages at law for moral damages, and for punitive damages flowing from Wal-Mart's conduct. She seeks moral damages to compensate her for the mental and emotional distress caused by Wal-Mart's breach of its duty as her employer to treat her as an employee in good faith, and to deal fairly with her in the manner of terminating her employment. Wal-Mart's liability for these damages arises from its conduct on and after January 29, 2010, to the actual date it terminated Ms. Galea's employment on November 19, 2010.

[133] Ms. Galea also seeks moral damages for the mental distress and aggravating circumstances Wal-Mart has caused her over the course of the litigation, including trial.

[134] Finally, Ms. Galea has made a substantial claim for punitive damages to sanction Wal-Mart for its conduct throughout the termination process, including the litigation that followed.

[135] In her Amended Fresh as Amended Statement of Claim, Ms. Galea seeks the following relief:

1. damages in the amount of \$1,750,000;

2. damages in the amount of \$144,282 representing the plaintiff's bonus entitlement for fiscal 2010;
3. an accounting of the value of the performance shares that would have vested over the reasonable notice period, and judgment on that value;
4. an accounting of the value of 4% of the fiscal year end earnings in the plaintiff's deferred profit sharing plan (the "DPSP") for fiscal 2010 as well as the contributions that would have been made over the period of the plaintiff's notice entitlement, and judgment for those amounts;
5. an accounting for the value of 13% of the plaintiff's salary and bonus for fiscal 2010 and judgment on that value in lieu of the plaintiff's entitlement under the executive retirement plan (the "ERP");
6. an accounting of the value of the ERP contributions that the plaintiff would have received over the reasonable notice period, and judgment on that value;
7. moral damages in the amount of \$1,000,000; and
8. punitive damages in the amount of \$1,000,000.

[136] In addition to those damages, Ms. Galea seeks pre-judgement interest under the *Courts of Justice Act*, and costs.

INTERPRETATION OF EMPLOYMENT CONTRACTS

[137] There are few things in the life of a working adult more fundamentally important to a person outside of her or his family than the relationship with her or his employer. Chief Justice Dickson enshrined this importance of a person's work in the judgment of the court in reference *Re Public Service Employee Relations Act (Alberta)*, [1987 CanLII 88 \(SCC\)](#), [1987] 1 S.C.R. 313, at para. 91, where he said:

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

[138] The manner in which a person is terminated from her or his employment is as important as the employment itself. Justice Iacobucci determined that it is on termination of employment that a person is most vulnerable, and it is at that time that a person is most in need of protection: *Wallace v. United Grain Growers Ltd.*, [1997 CanLII 332 \(SCC\)](#), [1997] 3 S.C.R. 701.

[139] The Court of Appeal has recently canvassed the law relating to the interpretation of employment contracts in *Wood v. Fred Deeley Imports Ltd.*, [2017 ONCA 158](#). In *Wood v. Fred Deeley Imports Ltd.*, the court explained that where a termination clause can reasonably be interpreted in more than one way, courts should prefer the interpretation that gives the greater benefit to the employee, citing *Ceccol v. Ontario Gymnastics Federation* (2001), 55 O.R. (3d) 614, [2001 CanLII 8589 \(Ont. C.A.\)](#), as authority.

[140] In this action, Ms. Galea makes a claim for contractual damages for Wal-Mart's breach of the NCA. In effect, Ms. Galea is seeking specific performance of the NCA. However, because Wal-Mart stopped paying under the NCA and has denied certain claims she has made for entitlement under one or more incentive plans over the transition period, Ms. Galea seeks damages for breach of contract. This cause of action is consistent with the conclusion reached by the Court of Appeal in *Love v. Acuity Investment Management Inc.*, [2011 ONCA 130](#), and as discussed in *Lin v. Ontario Teachers' Pension Plan Board*, [2016 ONCA 619](#) at paragraphs [84 to 89](#).

[141] Ms. Galea relied on the NCA as an employment contract at trial. While Wal-Mart did not concede that the NCA operates as an employment contract, neither does it strenuously resist that characterization. Ms. Galea bases her claim for damages on the express language of the NCA that provides that she is entitled to salary and benefits as transition payments for two years if she abides by her obligations not to compete with Wal-Mart.

[142] An employment agreement providing a fixed term contract can be either express or implied. A fixed term can be expressed in words, such as the five year term in *Howard v. Benson Group Inc.*, [2016 ONCA 256](#). A fixed term can be implied from the language of an employment agreement where the essential elements of offer, acceptance and consideration are found. In *Ballim v. Bausch & Lomb Canada Inc.*, [2016 ONSC 6307](#), Justice Lederman found that the parties had entered into a binding agreement giving the employee a one year contract. The

court implied a fixed term based on the provisions in the agreement relating to the number of months the employee would be paid for his work.

[143] I conclude, on considering the principles summarized in *Wood v. Fred Deeley Imports Ltd.*, that the NCA was an employment contract that entitled Ms. Galea to transition payments for a fixed term of two years, provided she complied with her own obligations under the NCA. There was no evidence led at trial that Ms. Galea did anything other than honour those obligations. There is no defence asserted that Ms. Galea had a duty to mitigate any amount she was owed under the NCA. In any event, the Court of Appeal in *Howard v. Benson Group Inc.* has now determined on a definitive basis that an employee with a fixed term contract has no duty to mitigate.

[144] The question at trial with respect to the NCA and Ms. Galea's claim for contractual damages was the basis and amount for that claim.

Covenant not to Compete (The "NCA")

[145] On September 9, 2005, Ms. Galea and Wal-Mart entered into the NCA. In exchange for the covenant given by Ms. Galea not to compete, Wal-Mart agreed that it would, for a period of two years from the effective date of such termination, continue to pay Ms. Galea the following:

- 1) her base salary;
- 2) any incentive payable in accordance with the Annual Incentive Plan in effect on the date of termination; and
- 3) its portion of health and dental benefit premiums in accordance with such plans in effect on the date of termination.

[146] The payments that Wal-Mart agreed to pay were referred to as "transition payments". The period of time for which those transition payments would be made were referred to in the agreement as the "transition period".

[147] Under paragraph 14 of the NCA, Ms. Galea acknowledged that she had received a copy of it, and that she had read the agreement carefully before signing. This acknowledgement also confirmed that Ms. Galea had ample opportunity to ask questions concerning the agreement and had been given the opportunity to discuss the agreement with legal counsel of her choosing. Paragraph 14 provided that she understood her rights and obligations under the

agreement, and entered into the agreement voluntarily. Ms. Galea did not seek legal advice prior to signing the NCA.

[148] The NCA was executed by Mary Alice Vuicic, Vice President, People on behalf of Wal-Mart, and by Ms. Galea.

Principles of Interpretation

[149] The principles of how the court will interpret the terms of an employment contract reaffirmed recently in *Wood v. Fred Deeley Imports Ltd.* are reflected in the trial reasons of this court in *O'Neill v. General Motors of Canada*, [2013 ONSC 4654](#). In *O'Neill*, the court held that employment contracts hold a “special place” in the constellation of contracts, and must be interpreted with the goal of protecting employees. This reflects the inherent power imbalance that is often found in the employment relationship:

[72] The third reason relates to the special place of employment contracts. Courts have recognized that because of the importance of employment to individuals and the need to protect employees who are generally vulnerable in the bargaining relationship, employment contracts are unlike ordinary commercial contracts.[16] Legal commentators have noted that in employment law, these policy goals inform the interpretive process, and as a result, in the absence of “clear language mandating some other result,” employment contracts are interpreted so as to protect employees.”

[150] In my view, there could be no greater power imbalance than Wal-Mart as the employer and Ms. Galea as an employee who not only promised to dedicate herself and her career to Wal-Mart, but also promised to forfeit any opportunity of a competitive position with another mass retailer for two years following her termination from employment, even if it was without cause.

[151] Ms. Galea relies upon the general law for contractual relations enshrined in *Bhasin v. Hrynew*, [2014 SCC 71](#). The Supreme Court of Canada in *Bhasin v. Hrynew* recognized good faith as a primary organizational principle underlying contract law in Canada, a principle that is well-founded in Ontario. This principle of good faith includes a duty of honesty and a duty to act reasonably, and not capriciously or arbitrarily in contractual relations. As the court explained at para. 73:

[73] In my view, we should. I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual

performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step. The requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith: see *Swan and Adamski*, at § 8.135; O'Byrne, "Good Faith in Contractual Performance: Recent Developments", at p. 78; Belobaba; *Greenberg v. Meffert* (1985), [1985 CanLII 1975 \(ON CA\)](#), 50 O.R. (2d) 755 (C.A.), at p. 764; *Gateway Realty*, at para. 38, *per* Kelly J.; *Shelanu Inc. v. Print Three Franchising Corp.* (2003), [2003 CanLII 52151 \(ON CA\)](#), 64 O.R. (3d) 533 (C.A.), at para. 69. For example, the duty of honesty was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts: *Wallace*, at para. 98; *Honda Canada*, at para. 58.

[152] This principle requirement to act in good faith, including the duty to act honestly and reasonably in the performance of a contract, is fundamental in the context of employment relationships: *Styles v. Alberta Investment Management Corporation*, [2015 ABQB 621](#). This organizing principle of good faith is even more pronounced in the setting where an employer is terminating a person's employment, and that termination affects the contractual rights of the departing employee.

Surrounding circumstances

[153] In *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1979 CanLII 10 \(SCC\)](#), [1980] 1 S.C.R. 888, Justice Estey of the Supreme Court of Canada approved the proposition put forth by Mr. Justice Meredith in *Pense v. Northern Life Assurance Co.* (1907), 15 O.L.R. 131, *aff'd* (1908), [1908 CanLII 11 \(SCC\)](#), 42 S.C.R. 246, that meaning must be given to the intention of the parties, gathered from the words they have used.

[154] The Supreme Court of Canada has recently held in *Sattva Capital Corporation v. Creston Moly Corp.*, [2014 SCC 53 \(CanLII\)](#), [2014] S.C.J. No. 53 that the modern approach to the interpretation of a contract is treated as a question of mixed fact and law. The court explained in *Sattva* that the interpretation of contracts has evolved toward a common sense approach where the overriding concern is to determine "the intent of the parties and the scope of their understanding" in the following way:

47 Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, [2006 SCC 21](#), [2006] 1 S.C.R. 744, at para. 27 *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010 SCC 4](#), [2010] 1 S.C.R. 69, at paras. 64-65 *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the

words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum: there is always a setting in which they have to be placed... . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

[155] The Supreme Court also examined the nature of the evidence that a court can reliably consider to reach conclusions about the surrounding circumstances in which the agreement came to be. In paragraph 58, Justice Rothstein wrote:

58 The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (King, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (Investors Compensation Scheme, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

[156] The reference to surrounding circumstances when engaged in the interpretation of contracts, however, comes with a warning. The Supreme Court in *Sattva* recognized that the review of circumstances surrounding the formation of a contract for the purposes of its interpretation must never "overwhelm" the actual language used by the parties. The objective for considering surrounding circumstances is to gain a better understanding of the mutual intention of the parties having regard to the words and phrases used by them in the contract. Nor is the consideration of surrounding circumstance to offend the parol evidence rule.

[157] In view of the different positions taken by the parties with respect to what constituted an Annual Incentive Plan as that term is used in the NCA, I consider the surrounding circumstances relevant to properly interpret and apply the contractual intent of the parties under the NCA.

Plaintiff's position on the evidence

[158] Ms. Galea understood from what Mario Piloizzi and Mary Vuicic told her in 2005 that Wal-Mart had the obligation under the NCA to "make her whole" for the two years of the transition period if she was terminated without cause, provided

she did not compete or otherwise contravene the noncompetition provisions of the NCA. She trusted Mr. Pillozzi and Ms. Vuicic. It was because of quality people like them that she had joined Wal-Mart Canada in the first place. She understood that to be made whole meant that she would participate in all incentives provided to an employee of her level under any annual incentive plan. She read the term Annual Incentive Plan in the NCA as a collective term, and not in reference to a single document.

Defendant's position on the evidence

[159] The position taken by Mr. Dye on behalf of Wal-Mart Canada relies on a literal reading of the term Annual Incentive Plan. It requires a document with that title to provide entitlement to any incentive for Ms. Galea to receive over the transition period.

[160] Wal-Mart Canada further relies upon principles of general application, taken together with rules of contractual interpretation, to argue that Ms. Galea's entitlement to participate under any incentive program is subject to the terms of the governing plan or contract.

[161] In a surprising concession during his examination in-chief, Mr. Cheesewright stated that the NCA supersedes and replaces the terms of the plans with respect to the plans for which Will Wilson was called to testify about at trial. Those plans included the Wal-Mart Canada Inc. stock incentive plan of 1998 in place when Ms. Galea was hired, the Wal-Mart Canada Corp. Executive Retirement Plan that was in effect when she entered the NCA, the FYE 2006 incentive plan in place when Ms. Galea entered the NCA, the 2008 LTIP and the Wal-Mart 2011 incentive plan for Ms. Galea's pay band 9 in effect when she was terminated on November 19, 2010.

Relevance of Surrounding Circumstances

[162] Wal-Mart did not call any witness to testify about the circumstances that prevailed at the time Ms. Galea and Wal-Mart signed off on the NCA in 2005. Mr. Cheesewright conceded that he could not give evidence regarding the NCA because he was not an employee of Wal-Mart when it was entered. Mr. Cheesewright was hired by Wal-Mart Canada in 2007.

[163] Ms. Galea's evidence about her entitlement under the NCA based on what she was told at the time the NCA was signed is uncontradicted. Although Ms.

Galea's recollection of what Mario Piloizzi or Ms. Vuicic told her was ruled inadmissible at trial, her understanding from what she was told goes to the circumstances surrounding the formation and contractual intent behind the NCA . It is therefore relevant, and admissible in evidence.

DAMAGES FOR BREACH OF CONTRACT

Base Salary

[164] Ms. Galea served a Request to Admit on counsel for Wal-Mart pursuant to Rule 51 of the *Rules of Civil Procedure* before trial. Counsel for Wal-Mart served a response to that request to admit. It is admitted as a fact that Ms. Galea was earning \$288,565 a year as a base salary at the date of her termination. Under the NCA, Wal-Mart was to continue paying Ms. Galea her base salary for two years, for a total of \$577,130. Wal-Mart in fact continued to pay Ms. Galea her salary for 11.5 months into the transition period when it ceased making those payments, unceremoniously and without notice.

[165] There is no dispute that Wal-Mart paid Ms. Galea her base salary and benefits for 25 pay periods, representing approximately 11.5 months after the date of termination. Wal-Mart acknowledges that Ms. Galea is owed 54 weeks for the balance of the two year transition period, for a total of \$299,644.

Benefit Plan Premiums

[166] The NCA specified that Wal-Mart would continue paying its portion of the premiums for health and dental benefits to cover Ms. Galea for the transition period. Ms. Galea gave evidence that she participated in the Wal-Mart group benefit plan for coverage of health – family, dental – family, long term disability, basic life, dependent life and basic accidental death and disability coverage. Wal-Mart continued to carry Ms. Galea and her family on the group plan for 11.5 months after termination.

[167] Ms. Galea seeks 10 percent of her base salary to replace the benefit coverage by the group plan that should have continued for 12.5 months, being the balance of the transition period. This compensation would provide Ms. Galea with the funds necessary to purchase similar coverage from a private carrier.

[168] Ms. MacDonald made submissions to the court that the 10 percent used by Ms. Galea for the valuation of this claim is based on the approach taken by this

court in *Camaganacan v. St. Joseph's Printing Ltd.*, [2010 ONSC 5184](#). In that decision, Justice Whitaker held that 10 percent of an employee's base salary is a good approximation of what it would cost to replace group benefits under an employee group benefit plan.

[169] Wal-Mart takes a different approach. First, Mr. Dye submits that the NCA only requires Wal-Mart to continue with payment of its portion of the health and dental benefits extended to Ms. Galea during her employment. Wal-Mart called Joseph Chan to give evidence relating to Ms. Galea's coverage under the group plan for health and dental premiums. Other benefits for which Ms. Galea received coverage during her employment are not mentioned in the NCA. In fact, subsection 2(g) of the NCA expressly excludes any benefits other than those expressly listed. Wal-Mart also refers to the evidence given by Will Wilson and Joseph Chan that Ms. Galea was solely responsible for paying the full premium cost of long term disability insurance benefits.

[170] Wal-Mart paid premiums that were based on a group rate pursuant to an agreement between Wal-Mart and the insurance provider for the employment benefit group plan coverage. No witness for Wal-Mart told the court how much premiums would cost for Ms. Galea to pay for the purchase of health and dental coverage outside of those group rates.

[171] Wal-Mart submits that there is no evidentiary basis for the court to make a finding that Ms. Galea should receive 10 percent of her base salary to compensate her for the loss of group benefits. It has been held that an estimate of the cost to an employer of fringe benefits that is equated to the plaintiff's loss does not satisfy the burden of proof on the plaintiff: *Martin v. Midland-Walwyn Inc.*, 1993 CarswellOnt 957.

[172] Wal-Mart states that the only evidence of the actual value of the benefits that Wal-Mart terminated was given by Joseph Chan. According to Mr. Chan's evidence, Wal-Mart's portion of those premiums for health and dental coverage amounted to \$66.04 per pay. The amount of this premium over 27 pays would therefore be \$1,783.08, plus HST for a total of \$1,925.73.

[173] Ms. Galea has the burden of proof to provide evidence to prove each part of her claim. There was no evidence called to prove the amount she is claiming for Wal-Mart's failure to pay the required premiums.

[174] In view of the evidence given by the witnesses for Wal-Mart and the principle of general application for the court to determine the value of premiums to purchase or replace group benefit plan coverage, I am awarding Ms. Galea double the value of Wal-Mart's cost of the premiums to compensate her for lost health and dental benefits over 12.5 months without the volume discount arranged by Wal-Mart. I have taken the contractual language of the NCA into account that Wal-Mart is only responsible for its portion of the premiums, and not the full cost of the premiums claimed by Ms. Galea. Furthermore, the NCA does not require Wal-Mart to continue paying premiums on any benefits other than health and dental benefits. Therefore, the damages awarded for this claim are \$3,851.46.

What Incentive Plan does the NCA apply to?

[175] Ms. Galea claims damages for Wal-Mart's failure to pay any incentive payable in accordance with the Annual Incentive Plan in effect on the date of termination. She claims that Wal-Mart has failed to pay under those plans known as the Management Incentive Bonus Plan (MIP), the Deferred Profit Sharing Plan (DPSP), Executive Retirement Plan (ERP) and the Long Term Incentive Plan (LTIP), that transformed into the performance share plan (PSP). She claims that she is entitled to any incentive payable in accordance with those plans to make her whole during the transition period.

[176] Wal-Mart takes the position that Ms. Galea is not entitled to any benefits under these plans. Wal-Mart argues that these plans were not in existence when the NCA was signed in 2005. They were not known to the parties, and could not form the basis of agreement between the contracting parties when the NCA was signed. Wal-Mart also relies upon the contractual language used in the relevant agreements, constituting documents and related notices for those plans in effect on Ms. Galea's date of termination. Wal-Mart argues that the language of those plans exclude resulting benefits as transition payments to Ms. Galea under the NCA because her employment was terminated, effective immediately, by the letter dated November 19, 2010.

[177] The Court of Appeal in *Paquette v. TeraGo Networks Inc.*, [2016 ONCA 618](#), confirmed the fundamental principle that damages in a wrongful dismissal case "should place the employee in the same financial position he or she would have been in had reasonable notice of that employee's termination from employment been given." See also *Sylvester v. British Columbia*, [1997 CanLII 353 \(SCC\)](#), [1997] 2 S.C.R. 315. For the purposes of interpreting the NCA, I consider the same

principles should apply to an agreement that provides for the continued payment of salary benefits and other compensation over a prescribed term. The entitlement of an employee in respect of a plan would, of course, be subject to the express language found in a plan, and any other contractual language that applies.

[178] When reading the NCA through the lens provided by the Court of Appeal in *Wood*, I consider the language used in Section 2 to be broad enough to conclude that “any incentive”, which suggests the possibility that there could be more than one incentive available to her, can only mean that the term Annual Incentive Plan should be read in the plural as Plans. A generous interpretation of Section 2 of the NCA supports the conclusion that Ms. Galea as the employee is entitled to the benefit of those Plans in effect at the time of her termination as part of the compensation regime.

[179] Under Ontario law, a dismissed employee is entitled to damages for the loss of compensation plans over the course of a reasonable period of notice as they form part of the employee’s compensation, subject to contractual terms to the contrary: *Kieran v. Ingram Micro Inc.*, 2004, [Canlii 4852](#) (Ont. C.A.) at paragraph 56. In that respect, the focus must be on the language used in the particular plan.

[180] In this case, Wal-Mart and Ms. Galea have agreed to the fixed term of two years under the NCA as the applicable period for compensation.

MIP – Management Incentive (Bonus) Program

[181] The entitlement under the MIP for Ms. Galea’s 10 months of employment during FYE 2011, and during the transition period, raises a number of issues. First, there is the issue that the bonuses are payable in Wal-Mart’s sole, absolute and unfettered discretion each year.

[182] I have already referred to the views expressed by *Paquette v. TeraGo Networks Inc.*, where the Court of Appeal explained that the basic principle in awarding damages for wrongful dismissal is for the parties to recognize that the terminated employee is entitled to compensation for all losses arising from the employer’s failure to give proper notice. The court held, among other things, that damages for wrongful dismissal will “typically include all of the compensation *and benefits* that the employee would have earned during the notice period”. [*emphasis added*]

[183] If the payment of a benefit as an incentive bonus comes down to a matter of discretion, that discretion must be exercised properly, which means the discretion must be exercised honestly and in good faith. In *Greenberg v. Meffert*, 1985 CanLII 1975 (ON CA), 1985 CarswellOnt 727, Justice Robins wrote:

25. Manifestly, in this case the exercise of the discretion was not based on reasoned considerations. Meffert admittedly represented the company in this matter. He, in collusion with Melfi, directed payment of the listing agent's commission to Melfi so that the commission could be divided between them. This kick-back arrangement, or bribe as the trial judge termed it, obviously formed the basis of the purported exercise of discretion on the company's behalf. The company, it is to be noted, did not seek to disassociate itself from the individual respondents but throughout these proceedings has sought to justify their conduct. Its failure to recognize any contractual responsibility to act fairly or reasonably towards the appellant in the exercise of its discretionary power is evidenced by the testimony at trial of its Ontario manager who indicated that the company had no interest in the arrangements between Melfi and Meffert. "What Mr. Melfi does with his share of the commission", he said, "is Mr. Melfi's business and that has nothing to do with the company."

[184] The second issue concerns what ratio to apply to Ms. Galea's base salary to determine the appropriate amount of any bonus payable for the years in question. Ms. Galea claims entitlement to a bonus at 62.5 percent of her base annual salary, or \$180,353.13 a year. She refers to the letter from Mr. Cheesewright dated February 3, 2010 that speaks of changing her status to ensure that Wal-Mart offers a competitive remuneration plan for that year in her position as Senior Vice President – Merchandising. This position placed Ms. Galea in an M9 pay band, and increased her potential bonus under MIP from 50 percent to 62.5 percent. Fifty percent of her salary would equal \$144,282.50, contrasted with the \$180,353.13 she claims.

[185] Ms. Galea also refers to the email from Sean Clarke on November 16, 2010 to a number of his direct reports, including Ms. Galea. In that email, Mr. Clarke reported that the LTIP was tracking at 112% as of the end of October, based on Sales Growth and Return On Investment measurements for Wal-Mart. Although this email was directed at those Associates to advise them of the payout on the LTIP for FYE 2011, the same economics would inform the performance targets under MIP.

[186] Mr. Dye makes the submission that Ms. Galea's claim for a bonus under the MIP in paragraphs 33 and 34 of the Amended Fresh as Amended Statement of Claim is based on a maximum of 50 percent of her base salary. In making that observation, Mr. Dye is correct. The Amended Fresh as Amended Statement of

Claim also seeks damages of \$144,282 representing Ms. Galea's bonus entitlement for fiscal 2010 in the prayer for relief. This amount is equal to 50% of her base salary. I therefore consider 50 per cent of her base salary to be the cap on Ms. Galea's bonus entitlement under the MIP.

[187] Third, Mr. Dye argues that Ms. Galea has not proven the required performance for Wal-Mart in FYE 2011, or in the two subsequent years to qualify her for a 50% of her base salary, let alone 62.5%. I find as a fact that Wal-Mart did not disclose financial information for use as evidence by either party in its disclosure obligations under the Rules. In the absence of that evidence, I consider the information in Sean Clarke's email, together with the statement that Sales is the biggest opportunity over Qtr4 to influence the FYE 2011 payout as proof that Wal-Mart's financial performance would have resulted in the full bonus of 50 per cent to Ms. Galea each year.

[188] I do not accept the evidence given by Peter Vukovich, Director, Internal Audit at Wal-Mart, about the financial performance of the company for FYE 2011 or 2012. His concessions made on cross-examination, while seemingly honest and earnest, illustrated the shoddy paperwork prepared by Wal-Mart to disclose proper financial accounting. The document found at tab 132 of the Joint Book of Documents was prepared for the litigation, and not in the usual and ordinary course of Wal-Mart's business to qualify as a business record. Other documents relating to the PSP were not signed, or not dated properly by International Finance. These deficiencies, when added to Wal-Mart's failure to disclose its financial statements, leads me to doubt Mr. Vukovich's evidence.

[189] Fourth and finally, Mr. Dye also refers to the contractual language found in the Management Incentive Bonus (Plan No. 7), the FYE 2006 Incentive Plan as well as the FYE 2011 Incentive Plan in effect on Ms. Galea's termination. In the FYE 2011 Incentive Plan, the following clause appears:

To be eligible for payment of any incentive, the individual must be employed in the eligible position by Wal-Mart Canada Corp. on the last day of the employment plan year. No incentive will be paid to anyone who has left the company, for any reason, prior to the end of the incentive plan year, or to any individual working through his or her notice period. "For any reason" includes by resignation, by retirement, or by termination, whether lawful or unlawful, with or without cause, or with or without notice.

[190] The Court of Appeal released the appeal decisions in *Lin v. Ontario Teachers' Pension Plan* and in *Paquette v. TeraGo Networks Inc.* on the same day.

Both of these cases provide resounding authority on this issue. The court describes the issue as turning not on the bonus itself, but the damages for the wrongful dismissal, or in Ms. Galea's case, the damages for Wal-Mart's breach of the NCA. Justice van Rensburg explained this distinction for the court in *Paquette* the following way:

[22] In *Taggart v. Canada Life Assurance Co.* (2006), 50 C.C.P.B. 163 (Ont. C.A.), Sharpe J.A. explained the correct approach. In relation to the requirement for active service as a prerequisite for the accrual of pension benefits, and its impact on wrongful dismissal damages, he stated at para. 16:

Assuming that the pension plans can be read as requiring active service as a prerequisite for the accrual of pension benefits, I find unpersuasive the argument that this precludes damages as compensation for lost pension benefits. This argument, it seems to me, ignores the legal nature of the respondent's claim. The claim is not ... for the [benefits] themselves. Rather, it is for common law contract damages as compensation for the [benefits] the [employee] would have earned had the [employer] not breached the contract of employment. The [employee] had the contractual right to work and to be paid his salary and receive benefits throughout the entire ... notice period.

[23] Similarly, in the present case the appellant's claim was not for the bonuses themselves, but for common law contract damages as compensation for the income (including bonus payments) he would have received had TeraGo not breached his employment contract by failing to give reasonable notice of termination.

[191] At paragraph 34 of *Paquette*, Justice van Rensburg reasoned that an employer cannot disentitle the employee to damages for loss of her bonus by reason of its own breach. The same reasoning applies to Wal-Mart in this case.

[192] I conclude on the facts and on the law that Wal-Mart cannot deprive Ms. Galea of her bonus for the proportion of the year she worked during FYE 2011, and over the transition period. However, Ms. Galea must live within the limits of her pleading that claims the annual MIP bonus at 50 percent of her base annual salary. Pleadings matter. Therefore, Ms. Galea is awarded damages for Wal-Mart's breach of the NCA that deprived her the MIP bonus for 9.6 months in 2010, and for the transition period under the NCA at 50 percent of her base salary. This bonus for those timeframes translates into \$115,420 and \$288,552 respectively.

DPSP – Deferred Profit Sharing Plan

[193] Ms. Galea seeks damages for Wal-Mart's failure to pay her under the DPSP in breach of its contractual obligation under the NCA.

[194] I am allowing Ms. Galea's claim for the contribution towards her account in the DPSP that Wal-Mart should have paid for the 9.6 months she provided services in FYE 2011, and the two years she would be entitled to contributions towards the DPSP as an incentive. This claim is allowed for the same reasons I have found that Ms. Galea is entitled to her management bonus under the MIP. The DPSP was part of the compensation package promised to her in the employment letter dated August 14, 2002, and it was in effect on Ms. Galea's date of termination.

[195] The DPSP is 100 percent funded by Wal-Mart. The parties do not dispute that the amount that Wal-Mart would contribute to the DPSP for an employee would be equal to 4% of the sum made up of that employee's base salary, management bonus and vacation pay for that year. As the parties are agreed that Ms. Galea's base salary for FYE 2011 was \$288,565, and as I have found that her annual management incentive bonus is \$144,282.50 and that Ms. Galea was paid \$21,432.15 in vacation pay, the sum total of \$454,279 x 4 percent results in a DPSP contribution of \$18,171.16 a year. Over 33.6 months, that DPSP contribution would be \$50,416 (\$14,534 for FYE 2011 plus \$36,342 over the transition period).

ERP – Executive Retirement Plan

[196] Ms. Galea also claims damages for Wal-Mart's breach of the NCA for failure to pay her the equivalent of 13% of her annual salary and bonus under the ERP.

[197] Mr. Wilson admitted that Wal-Mart did not pay out Ms. Galea's ERP balance within 90 days after the termination of her employment, as required by the plan. I do not know if that balance has since been paid.

[198] The employment letter dated August 14, 2002, makes reference to annual contributions that Wal-Mart would make towards Ms. Galea's personal account under a retirement plan. Ms. Galea takes the position that the ERP qualifies as a retirement plan as contemplated in the employment letter when she was hired. She certainly considered the ERP as an incentive plan in effect when she was terminated.

[199] I agree. A retirement plan is designed not only to provide an employee with security at the end of their working years, it is also a retention tool that provides the

employee with an incentive to stay employed by the employer as a reward for loyalty and service.

[200] Therefore, Ms. Galea claims damages equal to 13% of the subtotal between her annual salary of \$288,565 and her management bonus of \$144,282, which equals \$432,847 for an ERP contribution of \$56,270 per year. Ms. Galea is awarded damages for her entitlement to ERP for two years in the amount of \$112,540, plus payment of her ERP from 2010 in the amount of \$45,014 for the same reasons I found her entitled to receive for the damages for the loss of her MIP bonus.

LTIP/PSP – Long Term Incentive Plan / Performance Shares

[201] Ms. Galea's claim for damages arising from Wal-Mart's refusal to pay her for the stock options she had been granted but had not exercised up to the date of termination, as well as the performance shares she had been issued, totals \$922,315.

[202] The entitlement to stock options, or any plan under which stock options would be granted to an employee at Ms. Galea's level, was not recognized in the employment letter dated August 14, 2002. However, Wal-Mart was operating a stock option program for Wal-Mart associates under the Wal-Mart Canada Inc. Stock Incentive Plan of 1998.

[203] Wal-Mart confirmed Ms. Galea's transfer to the position of General Merchandise Manager in its letter dated September 9, 2005. In that letter, Wal-Mart advised that its management would recommend to the Stock Incentive Plan Committee that she be awarded stock options at the Committee's discretion, subject to the terms of the Wal-Mart Canada Stock Incentive Plan of 1998. At the same time, Wal-Mart required Ms. Galea to execute and deliver the NCA and a Statement of Ethics.

[204] Wal-Mart ultimately enrolled Ms. Galea in the Stock Option Program on the same day that she signed the NCA.

[205] On July 4, 2008, Wal-Mart replaced the Stock Incentive Plan of 1998 with the Wal-Mart Canada Long Term Incentive Plan. Under the LTIP, performance shares would be issued to designated employees, instead of stock options. The award for 2008 was "triple loaded"; Ms. Galea received a one time award equivalent to three standard awards. Those shares would vest over three

consecutive years. PSP awards in 2009 and subsequent years would be the amount equivalent to 40 percent of the employee's base salary. Wal-Mart described the purpose of the new PSP in the letter dated July 4, 2008, in a manner that "allows Wal-Mart Canada to better recognize and reward the significant impact of your efforts and contributions have on both the current and future success of our company".

[206] Ms. Galea was pleased when she was informed that she was entitled to participate in the performance share package in 2008. This development moved her incentive plan from a stock option basis to the award of performance shares.

[207] Between September 9, 2008 and March 30, 2010, Wal-Mart would issue notice of plan awards to Ms. Galea to show the performance shares that she had been granted, and when they would vest. On November 15, 2010, Wal-Mart provided Ms. Galea with an Optionee Statement showing options and performance shares exercisable as of November 15, 2010. The Optionee Statement also showed the number of shares and their date of issue, as well as the dates the shares granted in each award would vest. At the date of her termination, January 31, 2011 was the earliest any shares held by Ms Galea would vest. Shares granted in later awards would vest at later dates.

[208] Ms. Galea gave evidence at trial that she considered this Optionee Statement to be like a bank account statement for the options and performance shares she had been given by Wal-Mart.

[209] The Wal-Mart Canada Long Term Incentive Plan of 2008 sets out the terms of the PSP. The term "Associate" is defined to mean any person employed by Wal-Mart or an affiliate. The "Continuous Status as an Associate" is also a defined term:

2.8 "Continuous Status as an Associate" means, notwithstanding any contrary provisions in any applicable agreement of any nature whatsoever, the uninterrupted period during which an Associate provides services to Wal-Mart or an Affiliate at its request, but does not include any notice or period of payment of an indemnity in lieu of notice given upon termination of employment of an Associate for any reason whatsoever, if the Associate does not provide services to Wal-Mart or an Affiliate during said notice or period. Continuous Status as an Associate shall be considered interrupted in the case of Disability but shall otherwise not be considered interrupted by: (i) sick leave; (ii) military leave; (iii) any other leave of absence approved by the Committee, provided that such leave is for a period of not more than 90 days, unless reemployment upon the expiration of such leave is guaranteed by contract or statute, or unless provided otherwise pursuant to any policy adopted by Wal-Mart or an Affiliate, as the case may be, from time to time; or (iv); in the case of transfers between locations of Wal-Mart or between Wal-Mart, any of its Affiliates or their respective successors.

[210] The Continuous Status of Ms. Galea as an Associate is key to her entitlement to exercise the stock options, or rights to redeem performance shares she had not exercised prior to November 19, 2010. Those stock options and performance shares are shown on the Optionee Statement dated November 15, 2010. Ms. Galea's employment was terminated, effective November 19, 2010.

Her Continuous Status had been interrupted as that status did not include any notice or period of payment in lieu of notice upon termination of employment where the Associate does not provide services to Wal-Mart. The termination of that Continuous Status must be read in to the contractual language of the plan documents to determine if any of Ms. Galea's rights survived termination.

[211] The 2008 LTIP contemplates the effect of the employee's termination of employment in Article 5.8, where it states that:

. . . Notwithstanding the foregoing, unless otherwise determined by the committee and specified in the applicable notice of plan award, upon termination of a recipient's Continuous Status as an Associate any then outstanding options, restricted stock, restricted stock rights, stock appreciate rights or performance shares granted to such recipient in respect of which all restrictions were not satisfied prior to the recipient's date of termination of Continuous Status as an Associate shall immediately be cancelled and forfeited and all rights and interests in respect thereof of the recipient or his or her beneficiary shall thereupon terminate, in all cases, for no consideration.

[212] Each notice of plan award that Ms. Galea received under the 2008 LTIP contains a paragraph that provides that, subject to a provision for the event that a recipient's Continuous Status as an Associate terminates, vesting shall be effective on the last day of the applicable Performance Period, provided that the recipient's Continuous Status as an Associate has not terminated on or before that date. The clause that provides for the event where the recipient's Continuous Status as an Associate terminates states that:

(b) For any reason other than the recipient's death, all PSPs granted hereunder that have not vested on or before the date on which the recipient's Continuous Status as an Associate ceases and all rights with respect to such PSPs shall be forfeited by the recipient and shall terminate.

[213] Each notice of plan award was issued in the form of an offer. Ms. Galea signed each notice of plan award for 2008 on November 6, 2008, as well as the notice of plan award for 2009 on January 22, 2009 and June 16, 2009 to accept those terms.

[214] Wal-Mart takes the position that the terms of the 2008 LTIP, and the provisions of each notice of plan award that Ms. Galea accepted, results in the cancellation for forfeiture of those stock options and performance shares that she has not exercised or that have not vested as of the date of her termination.

[215] In *Veer v. Dover Corporation (Canada)* (1999), [1999 CanLII 3008 \(ON CA\)](#), 120 O.A.C. 394, the Court heard the appeal of an employer who had been ordered by the trial judge to pay damages for stock options held by the dismissed employee over the term of the notice period. On dismissing the appeal, the court determined that entitlement to exercise stock options after dismissal from employment but within the notice period turns on the specific language of the stock option plan.

[216] In *Kieran v. Ingram Micro Inc.*, the court found that the language in the stock option agreement was sufficiently clear to deny an employee entitlement to exercise his stock options over the notice period. *Kieran* was discussed by the Court of Appeal in *Paquette* as follows:

[38] *Kieran* is a stock option case. The issue was whether Mr. Kieran's time for exercising stock options upon the termination of his employment was extended by the common law notice period where he had been dismissed without cause. The stock option plans provided that he had 60 days from the termination of his employment for any reason other than death, disability or retirement to exercise any rights then vested. "Termination of employment" was defined as the date the employee "ceases to perform services for" the employer "without regard to whether the employee continues thereafter to receive any compensatory payments therefrom or is paid salary thereby in lieu of notice of termination."

[217] Justice Lang in *Kieran* found that the language in the Ingram plans was not ambiguous. The court held that Mr. Kieran was bound by the language of the plans, and that his rights were determined by that language. In the result, his right to exercise options was not extended over the period of reasonable notice, and he was therefore not entitled to damages for the stock options he had never exercised.

[218] Similarly, the Court of Appeal in *Love v. Acuity Investment Management Inc.* held that the employer's right to repurchase the shares of a departing employee arose when he "ceases to be an employee". Mr. Love was terminated without notice and the termination date represented the end of his employment:

[51] However, he was given no notice. His termination without notice entitled him as a matter of law to full compensation for this breach of his contract of employment. His entitlement to this remedy arose because his employment was terminated by the employer on May 3, 2005. He would not have had this entitlement had his employment continued beyond that date. The end of his notice period represents the end point of his entitlement to compensation in lieu of notice, not the end point of his employment.

[52] In short, the respondent terminated the appellant on May 3, 2005. That severed his employment relationship as of that date. It cannot be said that, nonetheless, his employment continued until the end of his notice period. He ceased to be an employee on May 3, 2005.

[219] These authorities recognize that where the contractual language specifically contemplates that the right to exercise stock options or to redeem performance shares is not available during the notice period of a terminated employee, the court will give effect to that language to preclude damages for the loss of those stock options or the right to redeem. The terms of the stock option plan or the plan granting performance shares that allow for the cancellation or forfeiture of those stock options or shares upon termination of the employee's employment will be enforced if the language is clear enough to give effect to those terms. These are the terms that the parties agreed upon, and the terms that the employee agreed to, come good times or bad. It is the recognition of the courts that the power to contract includes the power to provide for the cancellation or forfeiture of rights upon the happening of a given event.

[220] I find that the language used in the 2008 LTIP, and in the notice of plan awards that Ms. Galea had accepted are contracts between herself and Wal-Mart that contain specific language that is clear. Once Ms. Galea's Continuous Status as an Associate ceased, she no longer had rights to exercise outstanding stock options or to redeem performance shares that had not vested. By operation of the 2008 LTIP and the several notice of plan awards, all rights under stock options and performance shares were cancelled and forfeited under paragraph 5.8. Therefore, her claim for that relief is dismissed.

MORAL DAMAGES

Governing principles

[221] The recognition of a person's employment by Chief Justice Dickson in 1987 is reflected by the importance the law gives to the manner in which a termination from that employment is made. This importance gave rise to an employer's

implied duty of good faith and fair dealing in the course of dismissing an employee. This duty was established in *Wallace v. United Grain Growers Inc.*, 1997 CanLII 332 (SCC), [1997] 3 SCR 701. After *Wallace*, it was available for the court to award an extended period of notice if a finding was made that an employer had breached that duty.

[222] The Supreme Court of Canada in *Keays v. Honda Canada Inc.*, 2008 SCC 39 introduced the concept of moral damages that took the place of any extended period of notice as a remedy. The court reaffirmed the fundamental nature of the same principles discussed in *Wallace*, but characterized them as deserving of a distinct category of damages known as moral damages. Chief Justice McLachlin defined moral damages at paragraphs 56 to 59 in *Keays* by stating:

[56] We must therefore begin by asking what was contemplated by the parties at the time of the formation of the contract, or, as stated in para. 44 of *Fidler*: “[W]hat did the contract promise?” The contract of employment is, by its very terms, subject to cancellation on notice or subject to payment of damages in lieu of notice without regard to the ordinary psychological impact of that decision. At the time the contract was formed, there would not ordinarily be contemplation of psychological damage resulting from the dismissal since the dismissal is a clear legal possibility. The normal distress and hurt feelings resulting from dismissal are not compensable.

[57] Damages resulting from the manner of dismissal must then be available only if they result from the circumstances described in *Wallace*, namely where the employer engages in conduct during the course of dismissal that is “unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive” (para. 98).

[58] The application of *Fidler* makes it unnecessary to pursue an extended analysis of the scope of any implied duty of good faith in an employment contract. *Fidler* provides that “as long as the promise in relation to state of mind is a part of the bargain in the reasonable contemplation of the contracting parties, mental distress damages arising from its breach are recoverable” (para. 48). In *Wallace*, the Court held employers “to an obligation of good faith and fair dealing in the manner of dismissal” (para. 95) and created the expectation that, in the course of dismissal, employers would be “candid, reasonable, honest and forthright with their employees” (para. 98). At least since that time, then, there has been expectation by both parties to the contract that employers will act in good faith in the manner of dismissal. Failure to do so can lead to foreseeable, compensable damages. As aforementioned, this Court recognized as much in *Fidler* itself, where we noted that the principle in *Hadley* “explains why an extended period of notice may have been awarded upon wrongful dismissal in employment law” (para. 54).

[59] To be perfectly clear, I will conclude this analysis of our jurisprudence by saying that there is no reason to retain the distinction between “true aggravated damages” resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle. Moreover, in cases where damages are awarded, no extension of the notice

period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. Examples of conduct in dismissal resulting in compensable damages are attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance (see also the examples in *Wallace*, at paras. 99-100).

[223] In the course of the trial, Ms. MacDonald brought a motion to amend the statement of claim to increase Ms. Galea's claim to moral damages from \$100,000 to \$1 million. Leave to amend the statement of claim in this respect was granted, on consent. Ms. Galea also sought leave to amend the statement of claim to plead that Wal-Mart's duty of good faith and fair dealing in its manner of dismissal encompassed both pre-termination and post-termination conduct.

[224] After a contested motion, leave to amend paragraph 41 of the Fresh as Amended Statement of Claim was granted, but not to the extent of the allegation "including the defendants conduct throughout the litigation and the trial itself". The statement of claim was further amended to include the following particulars as subparagraph 41(e) regarding the pre-termination and post-termination conduct:

(e) The defendant failed to disclose, or insufficiently disclosed, relevant documents in its possession to the Plaintiff throughout the litigation, when it was reasonably within the contemplation of the Defendant that such failure to disclose, or insufficient disclosure would cause the Plaintiff to suffer mental distress, having regard to the timing and circumstances of the disclosure.

Test for Moral Damages

[225] *Keays v. Honda* relates the availability of moral damages to the requirement that those damages for an employer's breach of good faith and fair dealing must be reasonably foreseeable. The court bases the principle of reasonable foreseeability on the contractual nature of the employment relationship, and on the principles set out in the seminal case from the English courts in *Hadley v. Baxendale*, (1854), 9 Ex. 341; 156 E.R. 145. On this approach, damages are recoverable for a contractual breach if the damages are those that may fairly and reasonably be considered either arising naturally from breach of the contract itself, or those that may have within the reasonable contemplation of both parties.

[226] The reasonable foreseeability of damages would therefore be within the contemplation of the parties having regard to the special circumstances in which the contract or, in the employment context, the employer and employee relationship was formed.

[227] The Supreme Court in *Keays v. Honda* refers to its earlier decision in *Fidler v. Sunlife Assurance Co. of Canada*, [2006 SCC 30](#), where it held that “as long as the promise in relation to state of mind is part of the bargain in the reasonable contemplation of the contracting parties, mental distress damages arising from its breach are recoverable”. The court in *Keays v. Honda* also makes reference to *Wallace*, where the court held that employers were held “to an obligation of good faith and fair dealing in the manner of dismissal” and created the expectation that, in the normal course of dismissal, employers would be “candid, reasonable, honest and forthright with their employees”. The court held that since at least that time, there has been an expectation by both parties to the contract, or in the case of an employment relationship between employers and employees, that the employers will act in good faith in the manner of dismissal, and that failure to do so can lead to foreseeable, compensable damages.

[228] In *Wallace*, the court discussed the duty of good faith and fair dealing in the manner of terminating an employee’s employment. It was recognized that this duty is a legal presumption and a primary obligation of all employers. The court held that employers are expected to be “candid, reasonable, honest and forthright with their employees.”

[229] The court in *Keays v. Honda* reinforced these principles as values to live by. The court held that compensation flows from conduct of an employer in the course of a dismissal that is “unfair or is in bad faith by being, for example, untruthful, or unduly insensitive”.

[230] Where an employer has breached the duty of good faith and fair dealing in the manner of dismissing an employee, the court in *Keays v. Honda* found no reason to retain the distinction between “true aggravated damages” resulting from a separate cause of action, and moral damages resulting from conduct in the manner of termination. Instead, the court found that the damages attributable to the conduct of the manner of dismissal shall always be awarded according to the principles in *Hadley v. Baxendale*.

[231] The manner of dismissal causing an employee mental distress has now been recognized as the basis for moral damages. The court in *Keays v. Honda* concluded that if an employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, an award that reflects the actual damages caused may be made by the court. The court gave examples of such conduct upon dismissal of the employee that could result in compensable damages. Among them are cases where an employer attacks the employee's reputation by making declarations at the time of dismissal, making misrepresentations regarding the reason for the decision, dismissal meant to deprive the employee of a pension or other benefit or right, and those examples given in *Wallace* itself.

[232] From the cases, I consider the following factors to summarize when moral damages may be available to a plaintiff:

1. Where an employer has breached its duty of good faith and fair dealing in the manner in which the employee was dismissed;
2. Conduct that could qualify as an employer's breach of good faith or the failure to deal fairly in the course of a dismissal includes an employer's conduct that is untruthful, misleading or unduly insensitive, and a failure to be candid, reasonable, honest and forthright with the employee;
3. Where it was within the reasonable contemplation of the employer that the manner of dismissal would cause the employee mental distress;
4. The wrongful conduct of an employer must cause the employee mental distress beyond the understandable distress and hurt feelings that normally accompany a dismissal; and
5. The grounds for moral damages must be assessed on a case by case basis.

[233] The fundamental nature of damages for conduct in the dismissal of an employee, including damages for psychological injury, is and remains compensatory. Moral damages relate to foreseeable damages to compensate an employee for injury or harm suffered by an employer's conduct. The award of moral damages is distinct from any award for punitive damages, which are directed

at the employer. The analysis regarding punitive damages relates to the employer's conduct and concerns the disapproval of the court with respect to that conduct.

[234] Moral damages must not be confused with expense caused by another party for the conduct of the action. That expense is not appropriate as a claim to consider for damages. Litigation conduct is a matter properly reserved for submissions on costs. This is a question I dealt with in the reasons given at trial on June 3, 2016 on Ms. Galea's motion for leave to amend her pleadings. On that motion, Wal-Mart referred to the decision of Justice Beaudoin in *Geographic Resources Integrated Data Solutions Ltd. v. Peterson*, [2015 ONSC 4658](#). In *Geographic Resources*, Justice Beaudoin recognized that Canadian courts have held that "where the conduct complained of relates to the conduct of litigation, it should be sanctioned by an elevated costs award and not punitive damages".

[235] The same might be said to exclude matters relating to litigation conduct from a claim for moral damages. That said, it is my view an exception can be made for moral damages to respond where the evidence proves on the balance of probabilities that an employer has acted in bad faith, and that bad faith is manifested by the decisions and conduct of an employer or counsel acting on the employers' instructions to frustrate or deny the rights of an employee.

Manner of dismissal

[236] Ms. Galea claims moral damages based on the pre-termination, and post-termination conduct of Wal-Mart to establish her claim for moral damages under the principles set out in *Keays v. Honda*.

[237] Ms. Galea alleges that Wal-Mart's conduct was unfair or amounts to bad faith, as it was untruthful, misleading and unduly insensitive to her. In terms of pre-termination conduct, Ms. Galea submits that rather than repositioning her for career advancement, the time between January 29, 2010 and November 19, 2010 was simply a long goodbye.

[238] Ms. Galea argues that in view of her career history and level of accomplishment, it was within Wal-Mart's contemplation that the time it took and the manner in which the dismissal was executed would cause her mental distress. Wal-Mart knew that Ms. Galea was the sole income earner in her family, and that she was raising two children who were still in school. Wal-Mart also knew Ms.

Galea had devoted her working life for the last seven years to Wal-Mart and considered Wal-Mart her legacy employer.

[239] Ms. Galea submits that Wal-Mart's conduct after termination entitles her to moral damages. Wal-Mart continued to pay her a base salary, and to pay premiums for her health and dental coverage for 11.5 months after November 19, 2010, only to terminate both without notice. Upon commencing this action in 2011, Wal-Mart acted the unresponsive defendant who did not make full disclosure pursuant to the *Rules of Civil Procedure* to allow Ms. Galea to proceed with her claim in a timely fashion. Wal-Mart did not answer the undertakings that Mr. Cheesewright gave on its behalf at his examination for discovery in 2014 until mere days before the trial was to begin in January 2016.

[240] Ms. Galea argues that this conduct is the personification of an employer acting unfairly and in bad faith. She argues that the termination of her base salary and health and dental benefits, as well as the frustration of the litigation process to have her claims adjudicated, are part and parcel of Wal-Mart's manner of dismissing her. She links this conduct to her claim that Wal-Mart has purposely frustrated her financial health, as well as her ability to pursue her rights as a dismissed employee who has entitlements under an employment contract. Wal-Mart's conduct at termination has been unfair and taken in bad faith, contrary to its duty owed to her.

Pre-termination Conduct

[241] Ms. Galea believed she was enjoying a stellar career at Wal-Mart by January, 2010. She had attained a level in upper management, with deepening experience in sales and merchandising. There was nowhere to go but higher. Little did she know that Wal-Mart would stall her ascent, leaving her to fall with no one there to catch her.

[242] Ms. Galea reported to Duncan McNaughton, her coach and immediate superior for the first quarter of FYE 2011. Mr. McNaughton completed the performance appraisal for Ms. Galea in April 2010 on the form provided for senior management (executive) employees. The performance appraisal consisted of three sections, each broken down into component parts. In Section one for corporate beliefs and values, Mr. McNaughton graded Ms. Galea on the components that added up to overall rating for corporate beliefs and values of 4.1 out of 5. In Section two regarding performance objectives, Mr. McNaughton graded

Ms. Galea on the various components of that part between 3.5 and 4.0, for an overall rating of 4.0. Where Section 3 provided for overall comments, Mr. McNaughton made positive comments, recognized Ms. Galea's achievements, including that she continue to improve her AOS which was improved that year to 65 overall from 59 the previous year, and highlighted various objectives for the coming year. In the overall performance rating, Mr. McNaughton gave Ms. Galea a 4.1 rating that represented the median within the category "exceeds expectations".

[243] The claim Ms. Galea is making for moral damages is based on how Wal-Mart defeated her from taking one of two distinct career paths. One was to earn a promotion to Chief Merchandising Officer for Wal-Mart Canada. The other was to acquire a transfer within the Wal-Mart International structure to a Wal-Mart company in another country. Ms. Galea is recorded as saying that she aspired to an ex patriate assignment in another country in the performance appraisal completed in April 2010 for FYE 2010.

[244] At trial, Ms. Galea gave evidence that she was led to believe that Wal-Mart was grooming her to someday head a Wal-Mart company in the world. This belief was founded on comments made by Mr. Pilozzi in Ms. Galea's application to the Leadership Foundation in 2007, and continued into the years Mike Duke was CEO of Wal-Mart International.

[245] When Wal-Mart removed Ms. Galea from her position as Vice President, General Merchandising on January 29, 2010, she was removed from having people report directly and indirectly to her. She was removed from a position of managing sales representing 7 billion dollars for the Company. This removal and reassignment into an ad hoc position was first announced in front of the staff at Wal-Mart Canada in Mississauga on February 8, 2010, accompanied by a press release. Wal-Mart Canada would go on hire Shelly Broader to become Chief Merchandising Officer for Wal-Mart Canada.

[246] Wal-Mart does not dispute that it unilaterally removed Ms. Galea from her position as Vice President – General Merchandising. Nor does Wal-Mart dispute the fact that this change in position was made effective February 8, 2010. However, Wal-Mart disputes Ms. Galea's assertion that this change in position in itself amounted to bad faith.

[247] I do not view Wal-Mart's decision to remove the role and responsibility of Vice President, General Merchandising from Ms. Galea on January 29, 2010 to

constitute bad faith. Employers in a non-union environment have the right to implement personnel changes within the workplace, and to structure management lines as they see fit. An employee effected by such change may consider herself constructively dismissed if circumstances warrant taking that position.

[248] Although Ms. Galea pleaded a claim of constructive dismissal in her initial statement of claim, the essence of her claim against Wal-Mart and the nature of the action itself was not based on constructive dismissal. An action for constructive dismissal only arises when an employee elects to resign: *Saltsov v. Rolnick*, 2010 ONSC 914. Ms. Galea never elected to resign, and remained an employee of Wal-Mart Canada until a termination letter was given to her on November 19, 2010.

[249] The treatment Ms. Galea received from Wal-Mart between February 8 and November 19, 2010 is another matter. She was made to suffer repeated humiliation, starting with the announcement of her re-assignment from Vice President, General Merchandising to that of a roving vice president of little substance. There was no opportunity provided within Wal-Mart Canada for her, and she received no offers from any Wal-Mart Company in India, Brazil, Chile or the U.K.

[250] Mr. Cheesewright testified that he did not speak with Andy Clarke from Asda about Ms. Galea's prospects at the Talent Review on July 22, 2010 in Bentonville. However, there was nothing to stop him from seeking Mr. Clarke out at the meeting. This would have been something he would do if he was sincere in supporting Ms. Galea's efforts. The fact that he did not and that he had changed her PAR rating that could have enhanced or diminished her prospects in the U.K. amounts to evidence of bad faith.

[251] Wal-Mart takes the position that it was Ms. Galea's responsibility to find the right posting, having regard to her skills and the opportunities available at the time throughout the Wal-Mart International structure. There was no dispute that Mr. Cheesewright told Ms. Galea that she was a valued employee. He told her that the company would pay for a career coach, visits to Chile, the UK and the U.S. to explore opportunities within the Wal-Mart organization outside Canada, and for an eight week executive course at Harvard University.

[252] Mr. Cheesewright testified that the PAR rating given to Ms. Galea of Q5 had been made by him. However, he stated that this did not affect her eligibility for hiring by a Wal-Mart company in another country. Wal-Mart argues that there was

no evidence given at trial that executives in a Wal-Mart company in another country responsible for hiring even knew about Ms. Galea's Q5 rating.

[253] Where the evidence of Ms. Galea and Mr. Cheesewright conflict and credibility is an issue, I prefer the evidence of Ms. Galea. She took notes from January 29, 2010 onwards. Mr. Cheesewright did not. She followed every lead that could open an opportunity for her. Mr. Cheesewright would say he would assist where he could, but there is no evidence he ever did. While I accept his evidence that it is up to the Wal-Mart affiliate in each country to hire its own Associates, Mr. Cheesewright made representations to Ms. Galea that amounted to extending a good faith promise he never kept.

Post-termination Conduct

[254] Ms. Galea extends her claim for moral damages to include post-termination conduct. On her motion for leave to further amend the Fresh as Amended Statement of Claim at trial, Ms. Galea relied upon the decision of Justice Sanderson in *Antidormi v. Blue Pumpkin Software Inc.*, 2004 CarswellOnt 3831, in support of amending her claim for moral damages based on post-termination conduct. In *Antidormi*, Justice Sanderson relied on the reasons in *Gismondi v. Toronto (City)* where Justice Rosenberg acknowledged that "*Wallace*" damages are not limited to a conduct of an employer as of the moment of the dismissal and can include post-termination conduct. She explained that,

[23] In my view, these factors neither individually nor cumulatively justified increased compensation under *Wallace*. I do not disagree with the trial judge's view that *Wallace* damages are not limited to acts of the employer at the very moment of dismissal and can in appropriate circumstances include "the employer's conduct pre- and post-termination . . . and the conduct of the employer in its aftermath" but only, in my view, as a component of the manner of dismissal. None of the conduct referred to by the trial judge reached the level of seriousness justifying increased notice under *Wallace*. Further, the trial judge made no findings that the manner in which the respondent was dealt with caused any injury that was entitled to compensation in accordance with *Wallace*.

[255] Justice Sanderson in fact considered the employer's conduct in *Antidormi* at the time of termination, at the mediation that followed, and at trial to be relevant for the purpose of the plaintiff's claim. Justice Sanderson put it this way:

[155] In my view, Blue Pumpkin's conduct at the time of termination, the mandatory mediation and indeed at the trial, did reflect a blatant disregard, callous and insensitive treatment of Antidormi. Its failure or refusal to address Antidormi's concerns, to treat her fairly, reasonably and decently, taken together, amount to unduly insensitive conduct that has affected her emotionally and professionally and that ought to merit compensation.

[256] The Court of Appeal has recently recognized that post-termination conduct is relevant to the issue of moral damages. In *Doyle v. Zochem*, [2017 ONCA 130](#), Justice Weiler summarized the circumstances that would support an extension of the notice period under *Wallace* that now takes the form of moral damages. The appeal decision in *Doyle* reaffirms that pre-termination and post-termination conduct may be considered for an award of moral damages, provided it is “a component of the manner of dismissal”. Justice Weiler traces that principle back to *Gismondi* by stating that:

[12] Beginning with *Wallace v. United Grain Growers Ltd.*, [1997 CanLII 332 \(SCC\)](#), [1997] 3 S.C.R. 701, at para. 95, the Supreme Court of Canada recognized that there is an obligation of good faith in the manner of dismissal of an employee and, at paras. 88 and 98, specified that damages are available where an employer engages in conduct that is “unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.” Initially the award, now known as moral damages, involved compensation through an addition to the period of notice. However, in *Keays v. Honda Canada Inc.*, [2008 SCC 39 \(CanLII\)](#), [2008] 2 S.C.R. 362, at para. 59, the Court essentially did away with the distinction between aggravated damages and moral damages and held that these damages should be recognized through a fixed monetary award rather than through an extension of the notice period: see S.R. Ball, *Canadian Employment Law*, loose-leaf (2016), vol. 2 (Toronto: Thomson Reuters Canada Ltd., 2007), at § 22: 20.19 (1.1), p. 22-59 and § 22:20.19 (1.2), p. 22-60.

[13] The factors relevant to an award of moral damages are not limited to the examples in *Honda*, at para. 59 and *Wallace*, at paras. 98, 101. Nor, is the time frame limited to the moment of dismissal. Pre and post termination conduct may be considered in an award for moral damages, so long as it is “a component of the manner of dismissal”: *Gismondi v. Toronto (City)*, [2003 CanLII 52143 \(ON CA\)](#), 64 O.R. (3d) 688 (C.A.), at para. 23, leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 312; Ball, at § 22:20.19(1.1), p. 22-50.

Litigation Conduct

[257] The evidence marshalled by Ms. Galea and her counsel at trial with respect to Wal-Mart's post-termination conduct extended the trial beyond its original time estimate of 5 to 7 days in January, 2016. The court heard evidence that a PAR grid for 2010 had been produced after the third day of trial differed from the 2012 PAR grid that Wal-Mart had produced at Mr. Cheesewright examination for discovery in July 2012. This 2010 PAR grid, with a different wording for the Q5 box, was introduced at trial by Mr. Dye when cross examining Mr. Galea. The PAR grid for 2012 and the new 2010 PAR grid differed from the 2008 PAR grid Ms. Galea had produced, albeit late as well, which she believed to be the PAR grid in effect at all material times in 2010.

[258] When I permitted Wal-Mart's motion to introduce the 2010 PAR grid into evidence for Ms. Galea's cross-examination, the trial was adjourned to provide Ms. Galea's counsel the opportunity to examine Mr. Cheesewright on the 2010 PAR grid. This examination for discovery was limited to two hours in duration, and was restricted to the issue of the 2010 PAR grid including, but not limited to facts concerning:

- a) the origin of the 2010 Grid;
- b) where it was located and where it has been located since its inception;
- c) what efforts were made to find it for inclusion in the defendants affidavit of documents, and to answer the undertakings given by Mr. Cheesewright in the chart provided on December 30, 2015;
- d) why it was not produced until Thursday, January 7, 2016 to counsel for Ms. Galea during the first week of trial;
- e) what relevance or application to the facts the 2010 Grid had at any time relating to Ms. Galea's employment with Wal-Mart in 2010, 2011 or 2012; or
- f) his involvement with its application to Ms. Galea's employment.

[259] My ruling permitting the 2010 PAR grid as admissible evidence also provided Ms. MacDonald with generous latitude to re-examine Ms. Galea on any issue relating to grids marked as exhibits at trial or for identification, as to their meaning, effect or as they relate to each other when the trial resumed.

[260] The further examination of David Cheesewright on the PAR grids took place on January 28, 2016. In April 2016, counsel for Ms. Galea brought a motion to enforce undertakings and refusals that had been given by Mr. Cheesewright at that further examination for discovery. This resulted in an order made by Justice Ricchetti on April 8, 2016 for Wal-Mart to provide various answers before the trial continued. Those answers, and supporting documents included a volume of other PAR grids and related material that further complicated Ms. Galea's case. These PAR grids and related materials, including Talent Review guidelines where PAR grids would be used, were produced by Wal-Mart and marked as several exhibits at trial. Exhibits "BB" (then "W" with corrected tabs), "X", "Y", "Z", "AA", "FF", "GG" and "HH" were among those late productions. None of these late arriving

documents were listed in Schedule A to Wal-Mart's affidavit of documents, or in Schedules B or C as documents Wal-Mart would or could not produce.

[261] Ms. MacDonald was careful to advise the court that she did not attribute any fault for the disclosure deficits, or the litigation conduct of Wal-Mart to its counsel. I accept those submissions.

[262] It was the continual production of new PAR grids and related material, much of it compelled through the process of the court during trial, that forms the basis of Ms. Galea's claim for moral damages. Ms. Galea alleges Wal-Mart should have reasonably contemplated that these tactics, and the documents generated from them would cause her mental distress in the course of seeking redress and remedies for the manner of her dismissal.

[263] In the course of his testimony, Mr. Cheesewright gave evidence that he did not use any guidelines to perform a PAR of an Associate at his level. This is inconsistent with his evidence that was read in from his examination for discovery on January 28, 2016. It was Mr. Cheesewright's testimony that he used the 2010 PAR grid to assess Ms. Galea in 2010. However, at trial he could not identify how or when the 2010 PAR grid had been developed.

[264] Upon assessing the evidence of Ms. Galea and of Mr. Cheesewright on the PAR grid that Wal-Mart would use in 2010 for promotions or internal transfers, I prefer the evidence of Ms. Galea. I find as a fact that the 2008 PAR grid marked as Exhibit "J" (and also Exhibit "U2") was the PAR grid in use by Wal-Mart at all materials times in 2010. When Mr. Cheesewright changed Ms. Galea's PAR rating on that grid to Q5, he placed her in a "not currently promotable category".

If medical evidence is required

[265] The cases have been divided between the authorities holding that medical evidence is required to prove mental distress or aggravated damages arising from the manner of dismissal for the court to award moral damages, and those authorities that do not require expert evidence of that nature.

[266] Even the Court of Appeal has provided differing views. In the appeal decision of *Brien v. Niagara Motors Limited*, [2009 ONCA 887](#), the Court expressed the view that a plaintiff must have sought medical attention for the mental distress suffered. The Plaintiff had testified at trial that after being terminated from

employment, her life had been an emotional rollercoaster. With respect to damages for mental distress, the court stated as follows:

[3] The second issue is whether the two months award for Wallace damages (\$8,826.56) can survive the decision of the Supreme Court of Canada in *Honda Canada Inc. v. Keays*, 2008 SCC 39 (CanLII), which was released following argument but before the reasons in this case were released by the trial judge. In our view, the appeal must be allowed on this ground. Although the appellant's conduct in wrongfully alleging misconduct against the respondent was improper, any claim for punitive damages based on that conduct was abandoned before the trial. While the respondent's misconduct in this respect could have led to a proper award of mental distress damages as defined in *Keays*, the mental distress that the respondent suffered upon her termination and the manner of that termination was not of the nature and scope to qualify for compensatory damages in accordance with that decision, as the respondent did not seek any medical attention, professional assistance or undergo any therapy for her mental distress.

[267] In *Slepenkova v. Ivanov*, 2009 ONCA 526, the Court expressed a different view. In *Slepenkova*, the Court upheld the award of damages for mental distress to the plaintiff where the employer's communications to her colleagues at the time of her termination had been found to be unfair and in bad faith. There was a finding that those communications were "unfounded" and damaging to her reputation. There was no mention of any medical evidence given at trial to support her claim for "*Wallace*" damages.

[268] In *Pate Estate v. Galway-Cavendish and Harvey (Township)*, 2009 CanLII 70502 (SCJ), the Court held that the Plaintiff was "entitled to compensation for bad faith conduct in the manner of his dismissal which caused additional humiliation, embarrassment and damage to his self-worth and self-esteem without requiring medical evidence." The appeal decision in *Pate Estate* is found at 2013 ONCA 669, where the award of moral damages was upheld on appeal.

[269] In 2013, Justice McNamara of this Court held in *Middleton v. Highlands East (Municipality)*, 2013 ONSC 763 awarded aggravated damages on the basis of the evidence taken as a whole:

[142] I accept the Plaintiff's evidence that being dismissed in the manner he was caused him embarrassment and damage to his self-worth and self-esteem. I accept that it was belittling, interfered with his sleep, and caused a strain in his relationship with others. I am also satisfied that any employer, including these Defendants, would know that this would be a likely result if an employee was unfairly terminated. The Court in *Honda*, did not comment on the level of mental distress a plaintiff must experience, nor is there any strict requirement for medical documentation, of which there is none in this case. I am satisfied on the evidence as a whole that, in the circumstances, the Plaintiff suffered mental distress beyond normal distress and hurt feelings from dismissal and is entitled to an award of aggravated damages which I assess at \$30,000.

[270] It would appear that the state of the law in Ontario does not require a plaintiff to lead medical evidence to make out a case for damages for mental distress in an employment context. The claim for aggravated or moral damages should be available to a claimant on all of the evidence given, including the subjective evidence of the plaintiff, provided that all other elements under the case law are met.

[271] The question of whether damages are available to a plaintiff for mental injury without expert evidence has been clarified by the Supreme Court of Canada recently in *Saadati v. Moorhead*, [2017 SCC 28](#). *Saadati* is an appeal of a decision from the British Columbia Court of Appeal that reversed the decision of the trial judge. The appeal court held that recovery for mental injury requires a claimant to prove, with opinion evidence from a medical expert, a “recognizable [or recognized] psychiatric illness”. The Supreme Court of Canada, in allowing the appeal and restoring the judgment of the trial judge, summarized the law in Canada with respect to the pre-condition for the recovery of damages for mental injury as follows:

[2] This Court has, however, never required claimants to show a recognizable psychiatric illness as a precondition to recovery for mental injury. Nor, in my view, would it be desirable for it to do so now. Just as recovery for physical injury is not, as a matter of law, conditioned upon a claimant adducing expert diagnostic evidence in support, recovery for mental injury does not require proof of a recognizable psychiatric illness. This and other mechanisms by which some courts have historically sought to control recovery for mental injury are, in my respectful view, premised upon dubious perceptions of psychiatry and of mental illness in general, which Canadian tort law should repudiate. Further, the elements of the cause of action of negligence, together with the threshold stated by this Court in *Mustapha v. Culligan of Canada Ltd.*, [2008 SCC 27](#), [2008] 2 S.C.R. 114, at para. 9, for proving mental injury, furnish a sufficiently robust array of protections against unworthy claims. I therefore conclude that a finding of legally compensable mental injury need not rest, in whole or in part, on the claimant proving a recognized psychiatric illness. It follows that I would allow the appeal and restore the trial judge’s award.

Application of the facts

[272] No evidence was given at trial about why Wal-Mart stopped its payment of Ms. Galea’s base salary or providing health and dental coverage under its group plan to Ms. Galea and her family without notice 11.5 months after she was terminated. There was no evidence given, and no issue made about whether Ms. Galea had complied with the provisions of the NCA not to compete with Wal-Mart for the entire two-year transition period. Wal-Mart could reasonably contemplate

that the stopping of payments and insurance coverage would cause Ms. Galea mental distress.

[273] In terms of other pre-termination conduct, I do not consider facts like Wal-Mart's decision to hire Duncan McNaughton or Sean Clarke as members of management to whom Ms. Galea would report, despite her aspirations to become Chief Merchandising Officer, or even the hiring of Shelly Broader as CMO, as conduct relevant to Wal-Mart's duty of good faith or fair dealing. These decisions are made by an employer in the normal course of running its business and fall outside any consideration of a claim for moral damages. They are therefore irrelevant as factors when determining whether an award of moral damages should be made: *Doyle v. Zochem*.

[274] Having regard to the evidence as a whole, I find as a fact that Wal-Mart breached its implied duty of good faith owed to Ms. Galea between January 29 and November 19, 2010, and that caused her mental distress. It is clear to me from the evidence that Mr. Cheesewright had made the decision by January 29, 2010 to dismiss or denigrate Ms. Galea to the point where she might resign. Thus began the long goodbye that would last until November 19, 2010. Ms. Galea was moved to an ad hoc position that was essentially an international job search. She was, as she puts it, left to "twist in the wind". This conduct was unfair to Ms. Galea, and tinged with bad faith.

[275] The mental distress that Wal-Mart knew its actions would cause Ms. Galea did not stop there. In the course of the litigation, Wal-Mart was either purposely dilatory in instructing its counsel to provide disclosure and to conduct examinations for discovery, including the legal obligation to provide answers and supporting documents to fulfil undertakings on a timely basis. Alternatively, Wal-Mart was indifferent to Ms. Galea's claims. As a result, this purposeful delay or indifference caused mental distress for Ms. Galea that exceeded the normal stress and hurt feelings that accompany a dismissal.

[276] I agree with the submissions of Ms. MacDonald that Wal-Mart's conduct with respect to the pace and disclosure process in the litigation originating from Wal-Mart as the party (as distinct from the instructions given to counsel for the conduct of the action itself) formed part of the manner of dismissal. See *Antidormi*, at para 155. Ms. Galea was entitled to a respectful and responsive approach to defending the action while Wal-Mart defended vigorously, not a deafening silence

where indifference bordered on disdain towards her. Attrition is not friend of justice, nor should it appear to be.

[277] It is for these reasons that I find that Wal-Mart's conduct was misleading at best, and dishonest at worst, in the way the company treated Ms. Galea. Only Wal-Mart knew that Ms. Galea's career was over long before she was actually terminated. To keep her in suspended animation was unduly insensitive conduct. The ten months she was left to seek a new foothold qualifies as a manner of dismissal that caused Ms. Galea mental distress and qualifies her for aggravated damages.

[278] Galea is awarded \$200,000 for moral damages. This amount is consistent with the decision of the Court of Appeal in *Boucher v. Wal-Mart Canada Corp.*, [2014 ONCA 419](#) that upheld an award in that amount for aggravated damages.

[279] I am also awarding moral damages to Ms. Galea for Wal-Mart's post-termination conduct. I consider Wal-Mart's decision to stop the continued payment of her base salary and the health and dental coverage to her and her family to be unduly insensitive, and to have caused her mental distress. I consider Wal-Mart's delay in answering its undertakings until the eve of trial, and the torrent of productions made in the course of the trial, particularly in the face of Mr. Cheesewright's answer to Question 1136 to 1140, capable of causing Ms. Galea prolonged anguish about the case. For these reasons, I award Ms. Galea a further \$50,000 in moral damages for Wal-Mart's post-termination conduct.

PUNITIVE DAMAGES

[280] The discussion about any claim for punitive damages in the modern era begins with the decision of the Supreme Court of Canada in *Whiten v. Pilot Insurance Company*, [2002 SCC 18](#).

[281] A first consideration must be how punitive damages are distinct from aggravated damages. The court explained in *Whiten v. Pilot Insurance Company* that punitive damages are awarded in exceptional cases against a defendant for "malicious, oppressive and highhanded" misconduct that "offends the courts sense of decency": *Hill v. Church of Scientology of Toronto*, [1995 CanLII 59 \(SCC\)](#), [1995] 2 S.C.R. 1130.

[282] The Supreme Court in *Whiten* was dealing with a claim against the defendant Pilot Insurance Company for a fire loss under an insurance policy. On

appeal, Pilot acknowledged that as an insurer, it owed a duty of good faith and fair dealing. However, Pilot argued that this was a contractual duty, and that the principles established by the court in *Vorvis v. Insurance Corp. of British Columbia*, [1989 CanLII 93 \(SCC\)](#), [1989] 1 S.C.R. 1085, and in *Wallace v. United Grain Growers* that punitive damages were only available if, apart from the breach upon which the action was based, the defendant had committed an “independent actionable wrong”. Justice Binnie, writing for the majority in *Whiten*, expressed the view that “a breach of the contractual duty of good faith is independent of and in addition to the breach of contractual duty to pay the loss. It constitutes an “actionable wrong” within the *Vorvis* rule, which does not require an independent tort.”

[283] In *Keays v. Honda*, the court continued the discussion that it started with *Whiten v. Pilot Insurance*. In *Keays*, Justice Bastarache stated at paragraph 68:

[68] Even if I were to give deference to the trial judge on this issue, this Court has stated that punitive damages should “receive the most careful consideration and the discretion to award them should be most cautiously exercised” (*Vorvis*, at pp. 1104-5). Courts should only resort to punitive damages in exceptional cases (*Whiten*, at para. 69). The independent actionable wrong requirement is but one of many factors that merit careful consideration by the courts in allocating punitive damages. Another important thing to be considered is that conduct meriting punitive damages awards must be “harsh, vindictive, reprehensible and malicious”, as well as “extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment” (*Vorvis*, at p. 1108). The facts of this case demonstrate no such conduct. Creating a disability program such as the one under review in this case cannot be equated with a malicious intent to discriminate against persons with a particular affliction.

[284] The Court of Appeal in *Boucher v. Wal-Mart Canada Corp.* provided a comparative analysis for recent awards of the level of punitive damages. Justice Laskin made the following statements when he concluded that the punitive damages awarded by the jury in that case were excessive:

[88] The very high aggravated damages award by itself sends a significant denunciatory and punitive message and likely will have a deterrent effect. Additionally, although the jury was justified in finding Wal-Mart’s misconduct sufficiently reprehensible to warrant an award of punitive damages, its misconduct falls far short of the gravity and duration of the misconduct in other cases that have attracted high punitive damages awards. These cases were extensively reviewed by my colleagues Lauwers J.A. in dissent and Cronk J.A. for the majority in *Pate Estate v. Galway-Cavendish and Harvey (Township)*, [2013 ONCA 669 \(CanLII\)](#), 312 O.A.C. 244. Two of these cases will illustrate the differences: *Whiten* and *Pate Estate* itself.

[89] In *Whiten*, the Supreme Court of Canada upheld the jury’s award of \$1,000,000 in punitive damages. In that case, however, Pilot, the insurer, refused to pay a fire loss claim. Instead:

Pilot acted maliciously and vindictively by maintaining a serious accusation of arson for two years in the face of the opinions of an adjuster and several experts it had retained that the fire was accidental. It abused the obvious power imbalance in its relationship with its insured by refusing to pay a claim that it knew or surely should have known was valid, and even by cutting off rental payments on the Whitens' rented cottage. It took advantage of its dominant financial position to try to force the Whitens to compromise or even abandon their claim. Indeed, throughout the nearly two years that the claim was outstanding, Pilot entirely disregarded the Whitens' rights.

See *Whiten*, at para. 137. In addition to the punitive damages, the plaintiffs in *Whiten* received substantial costs and their out-of-pocket losses from the fire, but no aggravated damages or compensatory tort damages.

[285] The Court of Appeal found the circumstances in *Pate Estate v. Galway-Cavendish and Harvey (Township)*, to provide the basis for a significant award of punitive damages by the trial judge, tempered to a moderate extent on appeal. In *Pate Estate*, the trial judge had awarded \$550,000 in punitive damages in addition to an award of \$75,000 for aggravated damages. On appeal, the court reduced the punitive damage award to \$450,000. Writing for the majority, Justice Cronk agreed with the dissenting opinion of Justice Lauwers with respect to his conclusions regarding the trial judge's application of the applicable principles. However, Justice Cronk concluded that the trial judge erred in his analysis of the punitive damages by fixing those damages in the amount of \$550,000 and reduced them to \$450,000 as the appropriate award for punitive damages in that case.

[286] In *Pate Estate*, Justice Lauwers addressed the factors set out by the Supreme Court of Canada in *Whiten v. Pilot Insurance Company*:

- (a) Proportionality;
- (b) The relationship between punitive damages and compensatory damages;
- (c) Using the same factors twice;
- (d) Failing to take into account the amounts already awarded;
- (e) The award is not out of line with the case law on punitive damages.

[287] Justice Cronk had this to say about the danger of duplication and overlap among the considerations a trial judge must take into the "calculus" of compensatory damages, punitive damages and ultimately, costs:

[236] As is apparent, there was considerable duplication or overlap among the considerations factored by the trial judge into his calculus of compensatory damages, costs and punitive damages. Consequently, in my view, the quantum of punitive damages to be awarded should have been materially discounted to avoid the risk of an inordinately high award and “double-compensation” to Mr. Pate, having regard to the punitive elements of the penalties already imposed on the Township: see *Honda*, at para. 60.

...

[238] The task of a trial judge in quantifying a punitive damages award is not an easy one. It is far from an exact science. It must be guided, however, by the Supreme Court’s repeated cautions to avoid “double-compensation” and that court’s clear warning that, in most cases, a moderate award will generally suffice to adequately punish a defendant for its misconduct. This is especially so where, as here, the total penalties otherwise imposed on a defendant have a clear punitive component: *Whiten*, at para. 94; *Honda*, at paras. 60 and 69.

[288] Justice Cronk concluded that a punitive damages award in the amount of \$450,000 was sufficient to meet the requirement for additional punishment of the Township defendant to denounce its conduct, and to achieve the additional objectives of retribution and deterrence.

[289] I am of the view that Wal-Mart’s conduct when dealing with Ms. Galea between January 29, 2010 and November 19, 2010 was callous, highhanded, insensitive and reprehensible, deserving of an award for punitive damages. Where I have made findings of fact to award contractual damages or moral damages to Ms. Galea leading up to the date of her termination on November 19, 2010, I do not rely upon any findings of fact after that date to award her punitive damages.

[290] All of Wal-Mart’s conduct that justifies an award of punitive damages occurred between January 29, 2010 and November 19, 2010 when Wal-Mart would make representations to Ms. Galea about her career prospects while making decisions that detracted from, or even defeated that purpose. It is not that Wal-Mart set Ms. Galea up to fail; it is that Wal-Mart built her up, only to let her down that much more. That corporate behaviour was not just unduly insensitive, it was mean.

[291] I find as an essential element for an award of punitive damages that Wal-Mart’s breach of its implied duty of good faith and fair dealing towards Ms. Galea. This was an independent wrong within the meaning of *Vorvis*, *Whiten* and *Keays*.

[292] Having regard to all of the evidence given at trial and the submissions of counsel, I am of the view that the amount of punitive damages must be

proportionate to other damages granted, rational to the facts, and appropriate to meet the objectives of denunciation and deterrence. This amount must be a fair and just award for punitive damages based on the factors introduced by the court in *Whiten*, as they were applied by the Court of Appeal in *Pate Estate*. These factors have been established to ensure that the court awards a sufficient amount to meet the objectives of the law in a civil case at the same time while ensuring that the size of the award does not offend the court's sense of reason.

Proportionality

[293] The principle of proportionality relates to the blameworthiness of the defendant's conduct. In order to assess that blameworthiness and maintain the proper perspective, it is equally necessary to assess the degree of vulnerability of the plaintiff, as well as the harm or potential harm directed to her. Other considerations include the need for deterrence and other penalties paid by the defendant. These are the aspects of proportionality identified by the Supreme Court in *Whiten*. In the context of an employment case, these aspects relate to the importance of the employment relationship and the vulnerability of an employee at the time of termination.

[294] The power imbalance, including the ability of Mr. Cheesewright to correct Ms. Galea's AOS score and his arbitrary alteration of her PAR rating from Q1 to Q5, regardless of the PAR grid on which he made that change, and his final act of giving her an ultimatum to choose between a probationary position as Vice President of E-Commerce or taking her severance is beyond doubt. Similarly, Wal-Mart's indifference to the litigation process and the manner of dismissal on termination, and over the course of the action highlight her vulnerability in significant ways. Wal-Mart's conduct both before termination and since termination towards Ms. Galea has been, in a word, deplorable. It is conduct deserving of a higher award for punitive damages.

[295] A higher award for punitive damages is required to deter Wal-Mart from conducting itself in a similar fashion against employees in Ms. Galea's position in the future, in Ontario or elsewhere in Canada. What would be an appropriate amount that is proportionate to the blameworthiness of Wal-Mart's conduct, and the need for deterrence to make this known to Wal-Mart is something of a unique question.

[296] According to Mr. Cheesewright, Wal-Mart is the largest retail company in the world. Wal-Mart earned 135 billion dollars worldwide in 2016. Any award within recognized limits according to Canadian law would be an affordable amount for an award of punitive damages for Wal-Mart to pay. However, that is not the measure. The measure is what the appropriate amount of punitive damages should be to meet the objectives of denunciation and deterrence, in proportion to the other damages the court is awarding to the plaintiff that can be rationally justified.

The Relationship Between Punitive Damages and Compensatory Damages

[297] The Court of Appeal in *Pate Estate* summarized the focus for awarding aggravated damages or damages for mental distress as distinct from the purpose of an award of punitive damages in the following terms:

[107] The purpose for an award of aggravated or mental distress damages is different from the purpose for an award of punitive damages. In fixing mental distress damages, the court focuses on compensating the plaintiff for his or her mental distress relating to the manner of dismissal: *Honda*, at para. 60. In fixing punitive damages, the court focuses on punishing the defendant's wrongful acts "that are so malicious and outrageous that they are deserving of punishment on their own": *Honda*, at para. 62. See also *Hill*, at para. 196, and *Whiten*, at para. 73.

[298] I have considered the focus of punitive damages when making this award to chastise Wal-Mart for its conduct, as opposed to the focus of awarding moral damages to Ms. Galea to compensate her for the aggravation and mental distress arising from the manner of her dismissal.

[299] The level of punitive damages in employment cases has been increasing where the facts merit a significant award to punish a defendant employer for its conduct, provided the award is in proportion to the other damages granted in the case, and the amount of the award can be rationally justified. In *Boucher v. Wal-Mart*, the Court of Appeal reduced the punitive damages awarded by the jury from \$1 million to \$100,000 against Wal-Mart. The troublesome issue the Court had to contend with in *Boucher* was the distinction between the reprehensible conduct of the plaintiff's immediate superior who was the immediate cause of her mental distress, and the inaction of Wal-Mart to intercede, that the jury found reprehensible and deserving of punishment.

[300] In Ms. Galea's case, there is no such distinction. Ms. Galea makes her claim for punitive damages against Wal-Mart for the reprehensible conduct of Mr. Cheesewright as President and CEO of Wal-Mart Canada. The decisions made,

and the conduct to treat Ms. Galea with callous indifference were made on behalf of the company. The fact that those decisions and conduct played out at such a high level within the executive offices and with such visibility amplifies the damages necessary to chastise Wal-Mart. The damages must be in an amount within the range given by the authorities, but sufficient to serve the objectives of denunciation of such conduct, and deterrence to discourage any repeat of it.

Using the Same Factors Twice

[301] Although the same facts form the basis of awarding punitive damages as those for awarding damages of a compensatory nature, the plaintiff is not awarded “double compensation”. As the court in *Pate Estate* explained, the real concern at issue is to avoid over compensating the plaintiff by awarding an excessive amount for punitive damages. An award of punitive damages depends on the specific facts of the case. As the court explained in *Pate Estate*:

[116] Everything turns on the specific facts of the case. The defendant’s misconduct might have caused mental distress that substantiates an award of mental distress damages; that same conduct could well also be deserving of punishment and thus justify an award of punitive damages. This would be true in the cases where both aggravated and punitive damages were awarded. See, for example, *Hill v. Church of Scientology of Toronto*, [1995 CanLII 59 \(SCC\)](#), [1995] 2 S.C.R. 1130 and *McNeil*. On the other hand, the defendant’s conduct might be worthy of punishment even though it might not have been found to have caused mental distress, as in *Whiten*. The same factual matrix is considered in setting all the heads of damages.

The Award is Not Out of Line With the Case Law on Punitive Damages

[302] In *Pate Estate*, the majority of the Court of Appeal reduced the punitive damages awarded by the jury at trial from \$550,000 to \$450,000. In his dissenting opinion, Justice Lauwers found that the jury had awarded damages that was not out of line with the punitive damages awarded by the jury in *McNeil v. Brewers Retail Inc.*, [2008 ONCA 405](#). He found the jury award for punitive damages of \$500,000 in *McNeil* was approved on appeal for conduct that was roughly comparable with the Municipality’s conduct in *Pate Estate*.

[303] Although Justice Cronk reduced the punitive damages award in *Pate Estate*, she observed the facts did not justify an award for punitive damages to exceed those in *McNeil*. *McNeil* was wrongfully accused of theft by his employer so that he was made to endure two criminal trials and an appeal. In my view, Wal-Mart’s conduct to “starve the plaintiff into a trial” is equally reprehensible.

[304] I consider the conduct of Wal-Mart to be more egregious than Wal-Mart as the defendant in *Boucher*. The facts here make the case for punitive damages in the higher range as much as the case against the municipal defendant in *Pate Estate*, where the plaintiff was put to defending himself at a criminal trial to seek vindication. In view of the court's reference to *McNeil*, as a watermark, I conclude that \$500,000 is the appropriate amount to award Ms. Galea for punitive damages.

SUMMARY

[305] For these reasons, judgment is granted to the plaintiff Gail Galea as follows:

1. damages for the annual salary she was receiving at the date of termination for two years, less \$281,755.60 for salary paid: \$299,644;
2. damages for Wal-Mart's portion of the health and dental benefits it was paying her behalf as of date of termination for 12.5 months under the NCA: \$3,851.46;
3. damages for the MIP in the amount she would have received for two years under the NCA: \$288,552;
4. damages for the unpaid MIP she was to have received for FYE 2011 up to November 19, 2010 (\$ \$144,282 divided by 12 x 9.6 months): \$115,420;
5. damages for the contributions to the DPSP she would have received annually for two years under the NCA: \$36,342;
6. damages for the unpaid contribution or balance of the DPSP she was to have received for FYE 2011 (\$18,171 divided by 12 x 9.6 months): \$14,534;
7. damages for payments she would have received under the ERP for two years under the NCA: \$112,540;
8. damages for the unpaid amounts she would have received under the ERP for FYE 2011 (\$56,270 divided by 12 x 9.6 months): \$45,014;

9. payment of any balance remaining in trust, or to the account of Gail Galea at Wal-Mart or any affiliate or agent for amounts granted, paid or redeemed in the MIP, DPSP, ERP or their predecessor plans, to which she was legally entitled to receive upon notice as of November 19, 2010. If there is a dispute about Ms. Galea's prior entitlement under any plan, that issue may be spoken to at the next attendance before the court;
10. Moral damages, including aggravated damages and damages for mental distress: \$250,000;
11. Punitive damages: \$500,000; and
12. Such prejudgment interest as may be ordered.

[306] In view of the nature of this action and the conduct of the trial, I do not consider written submissions to be the appropriate manner to address costs. There may be offers to settle to take into account. There may be nuanced submissions on what factors under Rule 57.01(1) I should consider. I anticipate, based on the argument I heard on the plaintiff's motion to amend the statement of claim during trial, that submissions will be required to make findings of fact that are, or are not, already the basis for damages awarded. These submissions will be important to hear to ensure that costs do not overlap or duplicate relief already granted.

[307] Instead, the parties are invited to contact my judicial assistant, Ms. Melanie Powers, to schedule a further attendance before the court to make submissions on costs. I will also hear submissions on any order for pre-judgment interest that the plaintiff seeks at that time. If counsel are able to come to an agreement with respect to either issue, I would be grateful if they would send me a joint letter to that effect.

[308] In closing, I take this opportunity to commend all counsel on their thoroughness, professionalism and the high standard of advocacy shown throughout this trial. Those qualities, in court and in the written materials filed as part of the submissions made, have been of great assistance to me. I thank them for that assistance. I also want to thank the parties for their patience while waiting for the release of this decision.

Emery J.

DATE: December 7, 2017

CITATION: Galea v. Wal-Mart Canada Corp., 2017 ONSC 245

COURT FILE NO.: CV-11-0901-00

DATE: 2017 12 07

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: GAIL GALEA, Plaintiff v. WAL-MART CANADA CORP., Defendant

BEFORE: EMERY J.

COUNSEL: Natalie MacDonald and Cody Yorke, for the Plaintiff

Jonathan L. Dye, for the Defendant

REASONS FOR JUDGMENT

EMERY J.

DATE: December 7, 2017

Tab 155

R.B. v E.S., 2017 ONSC 7866 (CanLII)

Source: Superior Court of Justice
Date: 2017-01-11
File number: CV-14-501116
Other citation: [2017] CarswellOnt 248
Citation: R.B. v E.S., 2017 ONSC 7866 (CanLII),
<<https://canlii.ca/t/gwv7f>>, retrieved on 2026-03-24

CITATION: R.B. v. E.S., 2017 ONSC 7866
COURT FILE NO.: CV-14-501116
DATE: 20170111

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: R.B., Plaintiff

AND:

E.S., by his litigation guardian M.S., Defendant

BEFORE: Madam Justice Kristjanson

COUNSEL: *Elizabeth Roberts*, for the Plaintiff

Mark Elkin, for the Defendant

HEARD: September 29, 2016

ENDORSEMENT

[1] This is a motion for summary judgment brought by R.B. in a civil claim for sexual assault, battery, breach of fiduciary duty, breach of trust and intentional infliction of mental distress. E.S. was R.B.'s criminal lawyer. They met to prepare for a criminal matter in which E.S. was representing R.B. During this meeting, E.S. engaged in a sexual non-consensual touching of R.B., which took the form of cupping R.B.'s breast, hugging her and touching her under her shirt in the back and attempting to kiss her in the context of a situation where E.S. suggested he had a "hard on." R.B. filed a report with the police on the same day. E.S. was charged with sexual assault, pleaded guilty to the lesser charge of assault, and was given a conditional discharge on the condition that he no longer practice law. The sentencing judge found that at the time of the assault, E.S. was suffering from Alzheimer's.

[2] The defendant filed no evidence on this summary judgment motion. The defendant conceded that he was not in a position to contest liability, given E.S.'s mental state. The defendant asserts that he requires a defence medical to contest issues regarding damages, but failed to take timely steps to arrange a defence medical in light of the court-ordered timetable, which issued on consent. The defendant did not cross-examine the plaintiff on her affidavit, or seek to cross-examine the plaintiff's psychologist on his report. The defendant did not meet the filing dates set out in the CPC order, or seek to amend the consent timetable. As Justice Dunphy stated in *Mazza v. Ornge Corporate Services Inc.*, 2015 ONSC 7785, 2015 CarswellOnt 19531 (Ont. S.C.) at para 50:

Strategic choices, including the choice to bring summary judgment motions and how to respond to them, have strategic consequences. Parties who fail to cross-examine on affidavits or adduce evidence available to them that they require for argument will be held to the consequences of their strategic choices: c.f. *ThyssenKrupp Elevator (Canada) Ltd. v. Amos*, 2014 ONSC 3910 (Ont. S.C.J.) (CanLII). Both parties must assume that the service of a notice of motion starts a train heading down the procedural tracks that will lead to a decision on the merits of *each and every issue* raised by the notice of motion *subject only* to those issues the court determines genuinely require a trial in the interests of justice.

[3] In a post-*Hryniak* world, a party cannot sit back, assert that it will file future evidence, or merely argue that a matter is clearly not suited for summary judgment: *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.). The court is entitled to assume that the parties have placed before it all of the evidence that will be available for trial; the responding party must present its best case or risk losing.

[4] On the evidence before me, I grant judgment in favour of the plaintiff.

Background to the Motion

[5] The chronology of steps taken, or more accurately, which were failed to be taken, are set out below, since the defendant's failure to file evidence on the summary judgment motion and failure to take reasonable steps to respond to this summary judgment motion are critical to the disposition of this case. I set out a detailed chronology of the litigation process in Schedule "A".

[6] The statement of claim was issued in March, 2014. E.S. filed a statement of defence approximately five months later, although he has not yet filed an affidavit of documents. R.B. was examined for discovery in March, 2016. Given E.S.'s mental state, it is likely that he cannot be examined for discovery.

[7] R.B. decided to bring a summary judgment motion. In December, 2015, the plaintiff served a psychological – legal report of Dr. Ronald Seatter together with a notice under section 52 of the *Evidence Act* specifically providing notice that R.B. intended to introduce the Seatter Report into evidence at her motion for summary judgment. On the same day, R.B. sought dates for attendance at motion scheduling court in January and February to obtain a return date for the summary judgment motion.

[8] In April, 2016 a motion scheduling court attendance was adjourned on consent to Civil Practice Court ("CPC") in May, 2016. At that time Justice McEwen set the matter down to be heard for 1.5 days in September, 2016. The order noted that "liability not in issue." The CPC Order set a timetable, signed by counsel for the parties, as follows:

- plaintiff's motion record to be served and filed by June 17, 2016;
- responding record to be served and filed by July 15;

- cross examinations to be completed by August 5;
- plaintiff's factum to be served by August 26;
- responding factum to be filed by September 16.

[9] R.B.'s motion record was filed June 17, 2016 in accordance with the timetable. A supplementary motion record containing transcripts of the criminal sentencing and guilty plea was filed on September 21, 2016. No objection was taken to the filing of that material.

[10] E.S. filed no evidence on this summary judgment motion, although on the return date in late September, counsel for the defendant did hand up a factum together with a responding motion record which appeared to contain an excerpt from defence counsel's submissions in a criminal proceeding against the plaintiff, although there was no affidavit indicating what the transcript excerpt was or the date of the proceeding. The responding factum and motion record were served on plaintiff's counsel on three days before the summary judgment motion. The material filed by defendant's counsel was not in compliance with the timetable and order of Justice McEwen and, in addition, did not comply with the normal deadline for filing motion materials. As a result the court filing office refused to accept the respondent's materials, and they were handed to the court on the return date of the motion, without objection.

Has the plaintiff established that there is no genuine issue requiring a trial?

[11] Rule 20.04(2)(a) of the *Rules of Civil Procedure* provides that the court shall grant summary judgment if: "the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence." The Supreme Court in *Hryniak* held at para. 49:

There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[12] A responding party may not rest solely on the allegations or denials in the party's pleadings, but "must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial": Rule 20.0(2). Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried. A court is entitled to assume that the record contains all the evidence that the parties would present if the matter proceeded to trial: *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200 (ONSC) at paras. 26-27; aff'd 2014 ONCA 878 (Ont. C.A.).

[13] The court should first determine if there is a genuine issue requiring trial based only on the evidence in the motion record, without using the fact-finding powers set out in Rule 20.04(2.1) and (2.2). The analysis of whether there is a genuine issue requiring a trial should be done by reviewing the factual record and granting summary judgment if there is sufficient evidence to fairly and justly adjudicate the dispute and summary judgment would be a timely, affordable and proportionate procedure.

[14] If there appears to be a genuine issue requiring a trial, then the court should determine if the need for a trial can be avoided by using the fact-finding powers under Rule 20.04. Their use will not be against the interest of justice if their use will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[15] Given that the only evidence filed on the proceeding is the evidence of R.B., and that evidence was uncontested, as discussed below I have determined that there is no genuine issue

requiring trial based on the evidence in the motion record. For the reasons set out below I grant summary judgment as there is sufficient evidence to fairly and justly adjudicate the dispute, and a summary judgment is a timely, affordable and proportionate procedure.

Is Summary Judgment Appropriate in Light of the Jury Notice?

[16] In oral argument, the defendant submitted that summary judgment, particularly on the issue of damages, would be “close to unprecedented” in a case such as this where a jury notice has been served. I note that the mandatory wording of Rule 20 requires the court to grant summary judgment if there is no genuine issue requiring a trial.

[17] Summary judgment is a dispute resolution mechanism separate from a trial. A party’s right to have a jury find facts does not arise if a judge finds pursuant to Rule 20.04 that there is no serious issue requiring a trial. The courts have applied Rule 20 to jury cases on a number of occasions: see *Cooke v. Toivonen*, 2011 ONSC 1315 (CanLII) and *Anjum v. John Doe*, 2015 ONSC 5501, 2015 CarswellOnt 13454 (Ont. S.C.).

[18] In this case, the defendant has filed no evidence to show that there is a triable issue. It is open to me to find that summary judgment is most fair, just, efficient and proportional process to determine the litigation as a whole, despite the delivery of a jury notice, and I do so.

Facts Relating to Criminal Assault Conviction

[19] In 2011, R.B. retained E.S. as her criminal lawyer. At the time, E.S. was a criminal defence lawyer with approximately 40 years of experience. R.B. resided in City #1, but came to City #2 with her boyfriend to meet E.S. to prepare for her criminal case.

[20] In 2012 R.B. met E.S. at her hotel. R.B.’s affidavit sets out the following facts, which are uncontradicted in this litigation. R.B. told E.S. she would meet him in the hotel lobby, but instead he proceeded to her room. R.B. was alone in the room as her boyfriend was at the hotel gym. E.S. cupped one of the plaintiff’s breasts and tried to pull her shirt down. E.S. reached under R.B.’s shirt trying to undo her bra and tried to kiss the plaintiff about 3 times. E.S. eventually left. When R.B.’s boyfriend returned, R.B. called the police and filed a report that day.

[21] In his statement of defence, E.S. concedes that at the guilty plea, he “admitted the facts alleged by the Crown Attorney insofar as they support the allegation of a common assault”. I refer to the facts alleged by the Crown Attorney below, in the section on criminal proceedings, since those facts constitute battery of a sexual nature.

1. Criminal Proceedings

[22] E.S. was charged with a sexual assault on R.B. The defendant was represented by counsel. On the record, counsel acknowledged that he had gone through the plea inquiry with the defendant. The defendant pled not guilty to the charge of sexual assault, but guilty to the included offence of simple assault.

(a) Statement of Facts Read In by Crown Attorney

[23] The Crown read in a statement of facts which as noted above, the defendant conceded in the statement of defence insofar as they support the allegation of common assault.

[24] In 2011 the plaintiff retained the accused to represent her on criminal charges arising in City #2. The plaintiff was living City #1 at the time. R.B. and her boyfriend travelled to City #2, for the purpose of meeting with the defendant to review the disclosure in the criminal case and prepare her defence. This was their first meeting in person. The defendant attended at the hotel

where was staying. She had requested that the defendant call her when he arrived at the hotel; instead he came directly to the room. She was alone in the room as her boyfriend had gone down to work out at the gym. E.S. sat on the chair and R.B. sat at the end of the bed to discuss the court matter. The statement of facts includes the following:

During their discussions the accused frequently rubbed R.B.'s arms and asked how she got skin so soft. The accused asked R.B. what size her breasts were and tried to pull her shirt down to expose her breasts. The accused asked R.B. to show him her breasts. She backed away and told the accused, "No". The accused then cupped R.B.'s left breast with his hand over the top of the clothes. Again R.B. said "No." As the meeting went on the accused asked R.B. for a hug and placed his arms around her.

When he did so he reached through the armholes of R.B.'s shirt and slid his hands under her bra and rubbed her back. R.B. responded by backing away. The accused told R.B. that he wanted to hold her for a long time because he had a "hard – on".

The accused then tried to kiss R.B. at which point she told the accused to leave and he did so.

[25] The Crown agreed that reports filed by the defence indicated that E.S. had issues with respect to Alzheimer's disease.

(b) **Conviction - Assault**

[26] Justice M. McLeod of the Ontario Court of Justice presided over the conviction and sentencing. He noted that the defence was in a position where they would not be contesting the facts. The court found, on factual assertions made by the Crown as well as evidence in two reports filed with respect to E.S. , that:

"...obviously there was non-consensual touching which is the essential elements of the offense of assault but, in this case, the non-consensual touching took the form of cupping R.B.'s breast, hugging her and touching her under her shirt in the back and attempting to kiss her in the context of a situation where it's less important in terms of the charge but important in terms of context where there were words uttered involved... Where E.S. suggested he had a "hard on" and those are the findings that are going to be made."

[27] The court found that "on the basis of those findings there will be a finding of guilt on the assault."

(c) **Sentencing**

[28] The sentencing took place in 2014. E.S. was represented by counsel on the sentencing as well.

[29] On sentencing, the court found that E.S.'s behaviour was consistent with the issues of dementia identified in neurological and psychiatric assessments filed.

[30] E.S. was granted a conditional discharge with terms including executing an irrevocable undertaking not to engage in the practice of law.

Liability

[31] The defendant was convicted of assault. He concedes that he was R.B.'s criminal lawyer at the time of the conviction. In his pleading, the defendant admitted the facts read in by the Crown as they supported the assault conviction. In conceding the facts read in by the Crown as they support the conviction for assault, I find that the defendant has conceded the non-consensual touching which took the form of cupping R.B.'s breast, hugging her and touching her under her shirt in the back and attempting to kiss her, which are the non-consensual touching element alleged by the Crown and found by the trial judge to support the finding of guilt on the assault. In any event, the uncontradicted evidence of R.B. is to the same effect.

[32] In the hearing, the defendant's counsel conceded that he was not in a position to contest liability. In the absence of any other evidence, I find that the facts are sufficient to ground liability for battery and breach of fiduciary duty as alleged in the statement of claim.

1. Tort of Battery

[33] The defendant asserts as a matter of law that battery and assault are intentional torts, and the plaintiff has not proved intention.

[34] The tort of battery for sexual assault claims requires the plaintiff to prove, on a balance of probabilities, that the defendant intentionally contacted the plaintiff in a sexual manner. The plaintiff must also demonstrate that the contact was harmful or offensive; this is implied in the context of a sexual battery. The burden then shifts to the defence, to establish either an absence of intention or consent.

[35] The tort of battery is based on a violation of personal autonomy, which protects the right to control who touches your body. It includes physical contact or touching of a sexual nature as happened here. The elements of the tort of battery in the sexual context were considered by the Supreme Court of Canada in *Non-Marine Underwriters, Lloyd's London v. Scalera*, 2000 SCC 24 ([CanLII](#)), [2000] 1 S.C.R. 551 (SCC). McLachlin, J. for the majority held at para. 2:

As Goff L.J. (as he then was) stated in *Collins v. Wilcock*, [1984] 3 All E.R. 374 (Eng. Q.B.), at p. 378, "The fundamental principle, plain and incontestable, is that every person's body is inviolate." The law of battery protects this inviolability, and it is for those who violate the physical integrity of others to justify their actions. Accordingly, in my respectful view, the plaintiff who alleges sexual battery makes her case by tendering evidence of force applied directly to her. "Force," in the context of an allegation of sexual battery, simply refers to physical contact of a sexual nature, and is neutral in the sense of not necessarily connoting a lack of consent. If the defendant does not dispute that the contact took place, he bears the burden of proving that the plaintiff consented or that a reasonable person in his position would have thought that she consented.

[36] On the facts in the record before me, I am satisfied that a battery took place when E.S. touched R.B. in a sexual manner. On the evidence of R.B., the touching was harmful and offensive. In the absence of any evidence being filed by the defendant, the tort is made out.

2. Breach of Fiduciary Duty

[37] R.B. claims that E.S. breached his fiduciary duty as a lawyer, and in her affidavit states that: "I trusted [E.S.] and feel betrayed by him. I am humiliated and degraded by his actions." They were meeting to discuss preparing her criminal defence when the assault took place.

[38] The solicitor-client relationship is by definition a fiduciary relationship, and the defendant has conceded that relationship.

[39] Engaging in sexual touching and comments in the context of a lawyer/client meeting is a breach of fiduciary duty, and a breach of the trust essential to that relationship. It is a unilateral exercise of power or discretion affecting the plaintiff's personal autonomy and personal sense of trust and security. It is a betrayal of the duty of loyalty and betrays the trust which must be reposed in a lawyer. Criminal lawyers must be able to receive a client's darkest secrets. When charged with an offence, the criminal lawyer has a critical role as the only person on a client's side, the one expected to protect the client's interests at a time of great stress and vulnerability, as she faces criminal charges in the legal system. So when E.S. improperly engaged in the sexual touching, and created an atmosphere of sexuality in referring to his hard-on, he breached the trust which is essential to the lawyer-client relationship, injuring the person he was charged to protect.

[40] I find that E.S. breached his fiduciary duty as a lawyer to R.B..

[41] Again, in the absence of any evidence, including the absence of any evidence as to E.S.'s mental capacity at the time, I find that the cause of action is made out. There is no genuine issue for trial, and no need for additional fact-finding powers.

[42] The plaintiff did not pursue intentional infliction of mental distress or breach of trust, and I do not deal with them here.

Summary Judgment and Damages

[43] The next issue is whether the plaintiff has established that there is no genuine issue respecting trial on damages.

[44] R.B. seeks general non-pecuniary damages in the amount of \$60-70,000. In the evidence and in her factum, the plaintiff claims costs for psychological treatment in the amount of \$2,000 to \$5,000, and in oral argument sought leave to amend the claim to include these future care costs. Her counsel stated that she has elected not to seek punitive damages given the health of E.S.

[45] The uncontradicted evidence relating to damages is the affidavit evidence of R.B., who was not cross-examined, and the September, 2015 psychological – legal report of psychologist Dr. Ronald Seatter. The Form 53 Acknowledgment of Expert's Duty dated August 31, 2016 was handed to the Court on the return date of the motion.

1. Evidence of R.B.

[46] In her affidavit sworn in 2016, R.B. swears that she has suffered acute mental distress and loss of enjoyment of life. She says that she "trusted [E.S.] and feel betrayed by him. I am humiliated and degraded by his actions." She states that she has isolated herself socially since the incident, stop communicating with friends and family, has difficulty forming and maintaining relationships with other persons, feels angry, hurt and sad, has difficulty concentrating and suffers from memory loss. She feels as though her situation is hopeless and she will never be happy again. She also states she has recurring dreams about what happened with E.S., or will experience a memory or see an image relating to the incident.

[47] She also states: "I have been unable to work since the incident because of my anxiety and depression." I note that at the time she swore the affidavit in 2016, R.B. was incarcerated, albeit for approximately four months, and the incident happened four years ago.

2. Dr. Seatter Report

[48] Dr. Seatter is a registered psychologist and a member of the College of Psychologists of Ontario. He assessed R.B. on August 26 and September 8, 2015. The Seatter Report states that R.B.'s current condition includes trauma, mood disorders, and relationship stresses that relate directly to the incident involving E.S. He found that R.B. suffers from post-traumatic stress disorder, depression and anxiety: the DSM-5 diagnoses are 309.81, Posttraumatic Stress Disorder, With Dissociative Symptoms of Depersonalization, and 296.23, Major Depressive Disorder, Single Continuous Episode, Severe, with Anxious Distress.

[49] He found: "R.B.'s trauma symptomology, emotional dysregulation, depressed mood, restricted affect, persistent symptom focus, persistent anxiety about said symptoms, and excessive time and energy devoted to these symptoms all indicate a high level of impairment." He found that the current condition is a concinnity of trauma, mood disorders and relationship stresses that relate directly to the incident with E.S. (which he identifies as the [2012] incident.) He found that "the incident itself with its traumtogenic, peri-traumatic, and betrayal factors alone name themselves as the cause of the current difficulties," and stated that: "it is reasonable to conclude that the incident of [2012] is the significant cause of her current psychological difficulties."

[50] He found that a regimen of psychotherapy would be warranted, and she would need "acute psychological intervention for several sessions", likely a block of 10 – 12 sessions initially because of both the severity and the chronicity of her difficulties. He estimated the cost of initial therapy sessions and future assessments ranges from \$2000 - \$5000.

Issues Raised by Respondent re Damages Claim

[51] The respondent raises three main issues with respect to the damages claim. First, he asserts the Seatter report is not properly admissible. Second, he raises an issue with respect to a defence medical which has not yet been conducted allegedly due to the incarceration of the plaintiff. Third, he raises a causation issue based on an extract of a transcript from what he states to be R.B.'s defence counsel's submissions in a criminal proceeding.

Issue #1: Is the Seatter Report Admissible in Evidence?

[52] The defendant takes the position that the Seatter Report is not admissible, since it is not in the form of an affidavit, and "the submitting party may not shield its expert from examination by appending the report to an affidavit of someone completely unqualified to testify to the issue."

[53] The purpose of adducing evidence by way of affidavit on motions is to ensure that the deponent is available for cross-examination. While evidence is to be given by way of affidavit on a motion, Rule 20.01(1) provides that a plaintiff may move "with supporting affidavit material or other evidence" for summary judgment. In this case, the plaintiff served a notice pursuant to section 52(2) of the *Evidence Act* that she intended to rely on the Seatter Report on the summary judgment motion, which I find to be "other evidence" functionally equivalent to an affidavit as Dr. Seatter was available for cross-examination.

[54] As stated in *Kapulica v. Dumancic*, 1968 CanLII 419 (ON CA), [1968] 2 O.R. 438 (Ont. C.A.), when one party tenders a medical report under the provisions of the *Evidence Act*, that party tenders the author of the report as his witness as fully as if the author had testified, and therefore the author is subject to cross-examination by opposing counsel. In this case the section 52 notice served the same purpose as the affidavit: the defendant had nine months' notice, and never sought to cross-examine Dr. Seatter.

[55] The Seatter Report was served on the defendant on December 10, 2015, together with a Notice to Rely on Medical Reports under section 52 of the *Evidence Act*. On December 10, 2015, R.B.'s counsel wrote to say that she intended to introduce the report in evidence at the summary judgment motion pursuant to the section 52 notice. In May, 2016, the parties attended in Civil

Practice Court, where Justice McEwen endorsed the record stating that expert reports will be filed, and the parties waived cross-examination of experts.

[56] The parties thus waived cross-examination of experts at the time that the defendant was in possession of the Seatter Report, and had been given notice that the plaintiff would be relying on the Seatter Report on the summary judgment motion.

[57] Given the service of the section 52 *Evidence Act* notice for the purposes of the summary judgment motion, the Form 53 Acknowledgment, and the waiver of cross-examination, I find that the Seatter Report is admissible for the purposes of the summary judgment motion.

Issue #2: Should the Summary Judgment Motion be Adjourned to Obtain a Defence Medical?

[58] R.B. was taken into custody following conviction on a criminal charge in 2016, with a scheduled release date later in 2016. There is no evidence before me about the date and nature of the charge; it is only relevant with respect to timing of the defence medical.

[59] At the return date of the summary judgment motion, counsel for the defendant raised an issue regarding a defence medical by a psychiatrist or psychologist which he states that he was not able to arrange in time for this motion, as R.B. was incarcerated at the time he sought to schedule the defence medical, and the correctional facility could only schedule two and three hour blocks of time. In August, 2016 defendant's counsel arranged a "triage" call with Justice Wilson on the defence medical issue. I take it this was a case management conference call pursuant to Rule 50.13. There is no endorsement in the file, and Mr. Elkin indicated that Justice Wilson had told him to raise the matter with the motions judge.

[60] I asked whether Mr. Elkin was requesting an adjournment of the argument as to whether or not summary judgment was appropriate in this case until after the defence medical was completed. Counsel for E.S. advised that he was prepared to proceed to argue that this was not an appropriate case for summary judgment without the defence medical. If that argument did not succeed, he submitted that summary judgment on the question of damages should be delayed for the purpose of completing a defence medical and the quantum of damages determination be deferred until that time.

[61] I was concerned with respect to steps taken to schedule the defence medical, and the effect of the plaintiff's incarceration. After the hearing, I circulated two sets of questions to counsel, and received their submissions. On the basis of this information, I find that the defendant has failed to respond to the requirements of a summary judgment motion. He failed to comply with the CPC Order of Justice McEwen, and the consent timetable. Given this delay, there is no basis for adjourning the damages issue to obtain a defence medical. Had defence counsel responded appropriately, the defence medical could have and should have been arranged in time to have the material in his responding motion record.

[62] The litigation was commenced in March, 2014. In March 2015, R.B.'s counsel informed E.S.'s counsel that he would be bringing a summary judgment motion. The Seatter Psychological-Legal Report was served in December, 2015, with a section 52 *Evidence Act* notice, which indicated that the plaintiff would rely on the report on the summary judgment motion. The defendant's first request to schedule discoveries was made on February 18; the discoveries were scheduled five weeks later, on March 24, 2016. In May, 2016, counsel agreed to a consent timetable scheduling the 1.5 day summary judgment motion for September, and requiring the defendant to file his responding record by July 15, 2016.

[63] Thus, the court order and consent timetable required all responding evidence to be completed by July 15, 2016. However, the first phone call from defendant's counsel attempting to

schedule a defence medical was July 14, 2016 – the day before the responding record was due.

[64] In his response to my written questions about scheduling the defence medical, counsel responded as follows:

The defendant consciously and deliberately took no steps to arrange a defence medical until the completion of examinations for discovery. In civil personal injury actions it is the practice of counsel to obtain defence medicals once the plaintiff has testified under oath. This is particularly important in cases where the credibility of the witness is paramount and the injuries are in the psychiatric realm.

[65] Defendant's counsel indicates that after the discoveries he spoke with the defendant and family to obtain instructions, and contacted two psychiatrists on an informal basis to see whether they would be prepared to provide an opinion. He states then called the plaintiff's counsel and learned the plaintiff was incarcerated. It is important to note that the first time defence counsel called to obtain a defence medical was on July 14, 2016 – one day before the responding record was due, and approximately two months before the hearing date. As importantly, both in court and in response to my questions after the hearing, defendant's counsel states that it takes months to obtain a defence medical.

[66] After receiving the July 14 phone call requesting a defence medical, R.B.'s counsel contacted the correctional facility, and informed the defendant's counsel that arrangements could be made to conduct the defence medical at the correctional facility, although in three sessions of two hours over one day, rather than an uninterrupted five hour session. Defendant's counsel took no steps to schedule the defence medical at the correctional facility, and filed no evidence as to why this accommodation would not be sufficient.

[67] The court is generally entitled to assume that the record on a motion for summary judgment contains all the evidence the parties would present at trial. There are exceptions to this; where evidence is missing due to the other party's misconduct, or for reasons beyond the party's control, then this assumption may be rebutted. However, "[i]n these circumstances, a burden of persuasion rests on [the party] to establish that it has taken reasonable steps to obtain the evidence it needs for the motion for summary judgment, and that the missing evidence would be material to the disposition of this motion": *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200, 2014 CarswellOnt 2149, at paras. 27-28.

[68] The steps taken by defendant's counsel in respect of the defence medical were too little, too late. Counsel for the defendant stated in response to my written questions that: "it simply was not practical for him to have obtained instructions and made arrangements for a significant psychiatric examination in the short time period that followed the examinations for discovery up until the incarceration of the plaintiff." I disagree.

[69] The defendant knew in December, 2015 that Dr. Seatter's Report would be relied on in the summary judgment motion. Knowing that it takes months to obtain a defence medical report, he took no steps to arrange a defence medical until the day before his record was due. Accepting that the defence medical is best done after discoveries, in the fact of a pending motion, the defendant took almost four months after discoveries to even call the plaintiff to arrange the defence medical. In this case, the defendant should have taken reasonable steps to schedule the defence medical, even if the timing required it to be completed after discoveries.

[70] He has filed no evidence as to why the alternate accommodation – conducting the defence medical at the correctional facility – was insufficient. In May 2016, before even attempting to schedule a defence medical, his office consented to the timetable – in the face of assertions today that it takes months to get a defence medical. Thus, the defendant has not met the burden of

establishing that he took reasonable steps to obtain the evidence he required for the summary judgment.

[71] The defendant has also not met the burden of establishing that the missing evidence would be material to the motion; he has filed no evidence with respect to the types of information that might be gleaned on a defence medical, for example. He chose not to cross-examine Dr. Seatter, he chose not to cross-examine the plaintiff on her affidavit, and he chose not to file any evidence. In the absence of any evidence, the defendant has not met this burden.

Issue #3: Causation and Defence Counsel's Submissions in a Criminal Proceeding

[72] On the motion the defendant filed a partial transcript of what appears to be R.B.'s defence counsel's submissions in what appears to be a sentencing proceeding. The partial transcript was filed without an affidavit, and without identifying the date of the submissions or the nature of the proceeding. In his factum, defendant's counsel then sought to rely on this extract of defence counsel's submissions in a criminal proceeding to raise an issue with respect to causation of damages.

[73] However, as set out in *R. v. Pahl*, 2016 BCCA 234 (CanLII) at para. 55:

Counsel's podium is not the equivalent of the witness box. In speaking to sentence, counsel make submissions, they do not give "evidence."

[74] The transcript excerpt was not filed with an affidavit, but was handed up in a record on the day of the hearing. It is not properly identified. The submissions have no evidentiary value with respect to raising any issues relating to causation or extent of damages claimed.

Assessment of Damages

[75] The function of non-pecuniary damages in a sexual battery case is to provide solace for the victim's pain and suffering and loss of enjoyment of life, to vindicate the victim's dignity and personal autonomy and to recognize the humiliating and degrading nature of the wrongful acts: *G. (B.M.) v. Nova Scotia (Attorney General)* 2007 NSCA 120, 2007 CarswellNS 552 at para. 132. Crowell, J.A. held at para. 127:

In the context of sexual assault and battery, the cases have recognized that there are fundamental, although intangible, interests at stake: the victim's dignity and personal autonomy. Thus, the award of damages should take a functional approach in relation to these interests in addition to the more familiar ones of pain, suffering and loss of enjoyment of life.

[76] Factors to be considered include:

- (a) The circumstances of the victim at the time of the events, including factors such as age and vulnerability;
- (b) The circumstances of the assault, including number, frequency, violence, and how invasive and degrading they were;
- (c) The circumstances of the defendant, including age and whether he was in a position of trust, and
- (d) The consequences for the victim of the wrongful behaviour, including ongoing psychological injuries: (*G. (B.M.)*, para. 134)

[77] The plaintiff relied on three cases to establish the range of damages.

- (1) In *Evans v. Sproule*, 2008 CanLII 58428 (ON SC), 2008 CarswellOnt 8753(S.C.J.) the defendant police officer sexually assaulted the plaintiff in his police cruiser while on duty. Justice Chapnik awarded \$150,000 for general and aggravated damages, \$40,000 for loss of earning capacity, \$12,342.00 for future therapy costs, and \$25,000.00 in punitive damages. The plaintiff suffered from post-traumatic stress disorder, anxiety and depression requiring medical treatment.
- (2) In *Morgan v. Kent*, 2008 CarswellOnt 1357 (S.C.J.) the plaintiff did not seek counselling, and the defendant was not in a position of trust or a fiduciary relationship; although dismissed on the basis of a limitation period, Justice Matheson would have awarded general damages in the amount of \$25,000.
- (3) In *Pearson v. Mian*, the court awarded general damages in the amount of \$25,000 (2002 CarswellOnt 7286 (S.C.J.))

[78] I have also considered cases set out by Justice Glustein in *Silvera v. Olympia Jewellery Corp.*, 2015 CarswellOnt 9277 2015 ONSC 3760 (S.C.J.), a case in which an employee was inappropriately touched on several occasions by her boss (see paras. 128-139).

[79] I fix general non-pecuniary damages in the amount of \$70,000, on the basis of the uncontested evidence of the plaintiff and Dr. Seatter, and the comparable cases on damages, with pre-judgment and post-judgment interest at the *Courts of Justice Act* rate. Factors I consider include that E.S. was in a position of trust. He was R.B.'s lawyer. The battery took place in the first meeting with the new client, when they were meeting for the purposes of preparing her defence to a criminal charge. The touching was sexual, unwanted, and an invasion of R.B.'s personal dignity and autonomy. As a client, she was vulnerable. There was no violence involved, and took place on one occasion only. On the evidence before me, the consequences for R.B.'s psychological integrity were significant.

[80] I note that although there is much discussion of E.S.'s dementia, no evidence was filed to support the dementia, including the nature and extent, and its effects on E.S. The plaintiff states she is foregoing punitive damages in light of his health.

[81] The plaintiff claims costs of future therapy care in the amount of \$2,000 to \$5,000, based on the evidence of Dr. Seatter, for initial psychological treatment for approximately 10-12 sessions plus future treatment. I award \$5,000 for future therapy costs and psychological counselling, with post-judgment interest at the *Courts of Justice Act* rate.

[82] Paragraph 25 of the Statement of Claim had claimed future care costs, including for therapy and counselling, the details of which would be provided prior to trial. In this matter, she moved for summary judgment on her claim. The basis of and amount for future care costs was included in Dr. Seatter's report, provided in December, 2015. I find that the claim for the therapy and counselling as future care costs is validly made; at the oral hearing plaintiff's counsel requested leave to amend if required, to claim the therapy costs. I find leave to amend is not required, but would have granted if it were. I note that notice of motion sought summary judgment in the amount of \$250,000, which was substantially reduced in the factum and oral argument.

COSTS

[83] If the parties are not able to reach an agreement on costs, they may make costs submissions to me. The plaintiff may make their costs submissions to me in writing by January 18th, and the defendant by January 25th. Each party is restricted to three pages (not including the bills of costs).

[84] I would remind E.S.'s counsel to consider including a bill of costs with the responding submissions. The reasonable expectations of the unsuccessful party are an important factor in determining an amount of costs that is fair and reasonable. However, in order for this factor to be assessed, the court requires the bills of costs of all counsel: *United States v. Yemec* (2007), 2007 CanLII 65619 (ON SCDC), 85 O.R. (3d) 751 (Ont. Div. Ct.) at para. 54. I note that all too often, unsuccessful parties fail to include their bill of costs with submissions, thereby depriving the court of information potentially relevant to the issue.

Kristjanson J.

Date: January 11, 2017

NOTE: This endorsement has been edited subsequent to the release to the parties to anonymize the following information: names, dates, and places.

Schedule "A" – Chronology of Litigation

March, 2014	R.B. issues Statement of Claim
August, 2014	E.S. files Statement of Defence
March 23, 2015	R.B.'s counsel informs E.S.'s counsel that he has instructions to bring summary judgment motion, and requesting dates for motion scheduling court
March 30, 2015	R.B.'s counsel writes to confirm a new lawyer will be taking carriage of the matter
April 7, 2015	E.S.'s counsel acknowledges summary judgment motion request, and requests Affidavit of Documents, R.B.'s psychiatric medical history and moving to examinations for discovery
May 6, 2015	R.B. provides draft Affidavit of Documents with Schedule A productions (sworn copy provided at discovery). Letter again raises R.B.'s intention to proceed with summary judgment motion and stated that the motion requisition form for CPC dates was submitted
May 20, 2015	E.S.'s counsel inquires whether R.B. will be available for examinations for discovery, and requests materials dealing with R.B.'s sentencing, pre-sentencing psychiatric materials, and status of criminal matter.
May 22, 2015	R.B.'s counsel: • confirms R.B. will be produced for discoveries • suggests combining with cross-examinations on summary judgment motion

	• provides motion scheduling court dates in June and July to schedule summary judgment motion • confirms that she does not possess materials submitted at time of R.B. 's sentencing • questions relevance of status of criminal charges, requests to be advised of the relevance, and indicates she will reflect on the request.
After May 22, 2015	Counsel discuss availability to attend CPC
December 10, 2015	R.B. serves Psychological-Legal report of Dr. Seatter together with Notice to Rely on Medical Reports under s. 52, <i>Evidence Act</i> , and notifying that R.B. intends to introduce in evidence at summary judgment motion
December 10, 2015	R.B.'s counsel writes with dates for motion scheduling court in January and February, to set summary judgment motion date
February 18, 2016	E.S.'s counsel leaves voicemail re scheduling discoveries
February 29, 2016	Counsel discuss examinations for discovery, agree to discover R.B. March 24, and E.S.'s counsel informs R.B.'s counsel that E.S. would likely not be available to be examined for discovery
March 24, 2016	R.B. is examined for discovery
March 28, 2016	E.S.'s counsel states he has written to determine the medical condition and whereabouts of client, and that he suspects he is not going to be producible for discoveries but he will confirm
April 15, 2016	On consent, motion scheduling court adjourned to Civil Practice Court in May, 2016
May, 2016	Parties attend in CPC. Matter set for September 29-30. Timetable set and signed by counsel for both parties; Justice McEwen issues order setting September 29-30, 2016 dates and approving of timetable.
June 6, 2016	R.B. incarcerated
June 17, 2016	Deadline for R.B.'s motion record as per CPC timetable; R.B.'s counsel files motion record in compliance with timetable
Sometime between March 24, 2016 and July 14, 2016	E.S.'s counsel speaks with defendant and family discussing costs and funding of psychiatric examination and potential experts. Counsel contacts two psychiatrists on informal basis to conduct examinations. Once counsel received instructions and obtained consent, he telephoned plaintiff's counsel (July 14, 2016) to arrange.
July 14, 2016	E.S.'s counsel telephones R.B.'s counsel for the first time to arrange defence medical, and is informed that R.B. is incarcerated. R.B.'s counsel contacts the correctional facility and informs E.S.'s counsel by e-mail that the correctional facility can accommodate two sessions, rather than a single five hour session, for a defence medical, and p

	roviding details as to how to arrange. No further steps taken by E. S.'s counsel.
July 15, 2016	Deadline for E.S.'s motion record as per CPC timetable; no materials filed.
July 25, 2016	E.S.'s counsel writes to R.B.'s counsel indicating that he does not believe the case is appropriate for summary judgment and suggesting a triage court attendance to obtain directions.
August 4, 2016	R.B.'s counsel returns from holidays and replies to July 25 letter with her availability in August (August 11, 12, 16-19, 22-26).
August 5, 2016	Deadline for completion of cross-examinations as per CPC timetable; no cross-examinations conducted.
August 23, 2016	Case Conference with Justice Wilson. E.S.'s counsel indicates that he arranged the "triage" call to raise issue that defence medical could not be completed due to incarceration; no order issued and no endorsement in the file, and E.S.'s counsel indicates Justice Wilson told him to raise the issue with the motions judge
August 26, 2016	Deadline for R.B.'s factum as per CPC timetable.
September 16, 2016	Deadline for E.S.'s factum as per CPC timetable.
September 21, 2016	R.B.'s counsel files Supplementary Motion Record containing transcripts of E.S.'s criminal sentencing and plea; no objection was taken to the filing of that material
September 29-30, 2016	Summary judgment motion is heard as per CPC timetable E.S.'s counsel hands up factum and responding motion record containing only excerpts from defence counsel's submission in a criminal proceeding involving R.B. No objection taken to handing up material (served on R.B. September 26, but not accepted for filing by civil motions counter as not compliant with <i>Rules of Civil Procedure</i>) E.S. has not provided an Affidavit of Documents or draft Affidavit of Documents by the return date.
October, 2016	R.B. scheduled to be released from incarceration

Tab 157

AA v. BB and CC, 2018 ONSC 4173 (CanLII)

Source: Superior Court of Justice
Date: 2018-07-03
File number: CV-15-109
Other citation: [2018] OJ No 4501 (QL)
Citation: AA v. BB and CC, 2018 ONSC 4173 (CanLII),
<<https://canlii.ca/t/htrr0>>, retrieved on 2026-03-24

WARNING

This case is subject to subsections 87(8) and 87(9) of the *Child, Youth and Family Services Act, 2017*. These subsections and subsection 142(3) of the *Child, Youth and Services Act, 2017*, which deals with the consequences of failure to comply, read as follows:

87(8) *Prohibition re identifying child* — No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child's parent or foster parent or a member of the child's family.

(9) *Prohibition re identifying person charged* — The court may make an order prohibiting the publication of information that has the effect of identifying a person charged with an offence under this Part.

142(3) *Offences re publication* — A person who contravenes subsection 87(8) or 134(11) (publication of identifying information) or an order prohibiting publication made under clause 87(7)(c) or subsection 87(9), and a director, officer or employee of a corporation who authorizes, permits or concurs in such a contravention by the corporation, is guilty of an offence and on conviction is liable to a fine of not more than \$10,000 or to imprisonment for a term of not more than three years, or to both.

CITATION: AA v. BB and CC, 2018 ONSC 4173
COURT FILE NO.: CV-15-109
DATE: 20180703

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

AA

Plaintiff

Self-represented

– and –

BB and
CC

Defendants

Self-represented

Self-represented

HEARD: November 28, 29, 30,
December 1 and 2, 2016

November 21, 22, 23, 28 and
December 4, 2017

AMENDED ENDORSEMENT

Amended decision: The text of the original judgment was amended on July 22, 2020 and a description of the amendment is appended.

CORKERY J.

[1] On April 16, 2013, the Kawartha Haliburton Children's Aid Society received a report from an anonymous caller stating she had witnessed a man abusing children and a woman. BB was the caller. She was a friend of CC. CC is the mother of AA's two children. The report was false. AA has sued CC and BB claiming damages for intentional infliction of emotional distress, conspiracy, slander and libel. He has spent the past five years prosecuting this action and trying to clear his name.

[2] The trial of this matter initially took place in November and December, 2016. Although she had filed a defence, BB did not participate in the trial. No lawyer or agent appeared on her behalf. No communication was received from her as to why she did not attend. The trial proceeded in her absence and AA was allowed the opportunity to prove his claim against her, pursuant to Rule 52.01(2).

[3] On June 5, 2017, I released my initial decision. The plaintiff's claim was dismissed as against CC and judgment was granted against BB for slander with general damages in the amount of \$5,000.00 plus \$5,000.00 for punitive damages.

[4] On July 18, 2017, the plaintiff successfully moved to set aside my original judgment under Rule 59.06(2)(a) on the basis of his discovering new facts. Applying the test set out by the Ontario Court of Appeal in *Mehedi v. 2057161 Ontario Inc.*, [2015 ONCA 670](#), I ordered the trial be re-opened to receive and consider new evidence relating to communication between the defendants, including: texts, emails and telephone conversations.

[5] The re-opened trial proceeded in November and December, 2017. BB did participate in this part of the trial. At her request, she was permitted to participate in the trial by telephone conference call. All three parties were allowed to testify with respect to the new evidence relating to communication between the defendants.

A. Background

[6] AA and CC share custody of their two young children, born in 2008 and 2009. They separated in January, 2011, ending a four-year relationship. On April 21, 2011, AA filed an application seeking custody of his children. CC sought custody, support and a restraining order. After a thirteen-day trial, Gunsolus J. ordered that the parties would have shared custody with the children residing with both parents on a week-about schedule. The order is extensive and includes detailed provisions addressing emergency medical care for the children.

[7] During the course of the litigation, commencing in 2011, there were five referrals to the Society about AA made by someone associated with his children's mother (see *AA v. Kawartha-Haliburton Children's Aid Society*, 2014 CFSRB 63 at paragraph 9). None of the previous referrals were verified.

[8] In 2016, the defendants, BB and CC, were co-workers who provided support to each other as single parents. They helped each other by caring for each other's children.

[9] The April 16, 2013 anonymous report was not the first complaint that the Society had received concerning AA. There had been at least five previous "referrals" concerning him. A "referral" is the word used by the Society for a report they receive about a possible child in need of protection. None of the five previous "referrals" concerning AA were "verified" by the Society, meaning that their investigation of the five previous referrals did not confirm what was reported.

[10] On April 30, 2013, the Society wrote to AA to inform him that the April 16, 2013 allegations against him were not verified and that his file was closed. In that letter, the investigator also stated that there was "some concern that the allegations reported to the Society were malicious in nature...".

[11] AA had more than "some concern" that the allegations were malicious. He was certain they were malicious. He commenced this action as a result of those allegations.

[12] In his Statement of Claim, AA alleges that the defendants, CC and BB, conspired together to make a fabricated complaint to the Society. AA alleges that BB made the malicious call to the Society using information she received from CC. AA further alleges that CC is liable for statements she made to the Society in the course of its investigation.

[13] AA claims damages in the amount of \$70,000 for the loss of his career, his income and pension, aggravated and punitive damages, and costs. He asserts three causes of action:

- a. intentional infliction of emotional distress;
- b. conspiracy; and
- c. slander and libel.

B. The Facts

1. The Pleadings: deemed admissions of BB

[14] By Notice of Action dated April 16, 2015, and Statement of Claim dated July 2, 2015, AA commenced this action.

[15] In paragraph 11 of his Statement of Claim, AA alleges as follows:

11. On or around April 16th 2013 [BB] called the Kawartha Haliburton Children's Aid Society (KHCAS) and made allegations that I harmed my children as well as abused both physically and verbally my girlfriend Kelly Grant in front of my children, Kelly's children, and another friend's children. Among the statements made were the following: 1) That I had thrown my daughter [K.H.], and had thrown a chair and shovel at my partner Kelly Grant; 2) Swore in front of the children saying "You're a cunt", "You're a bitch", "You can't even take care of the kids and this is all you're supposed to do".

[16] In her defence, BB did not deny paragraph 11 of the Statement of Claim nor did she state that she had no knowledge of it. Similarly, she did not deny nor did she state that she had no knowledge of paragraphs 14, 15, 16, 18, 19 or 20 of the Statement of Claim. Under Rule 25.07(2), BB is deemed to have admitted these paragraphs. Her admission of paragraph 11 of the Statement of Claim is consistent with the pleading in her brief defence in paragraph 1:

The defendant is a Duty to Report Mandated Reporter under Ministry of Children Youth services legislation (CFSAS s 72(2) and (CFSA s. 72(3))).

[17] In particular, I note the following deemed admissions by BB:

1. BB was the anonymous female caller person who called the Society on April 16, 2013 and made allegations about AA to Ms. Hill (paragraph 11 of the Statement of Claim);
2. BB repeated those allegations on April 22 to Ms. Cooper and made additional allegations that AA had poisoned the neighbour's dog and that most people in the neighbourhood think there is something wrong with AA (paragraph 15 of the Statement of Claim); and
3. BB knew or ought to have known that making a false allegation to the Society about AA would be "hugely damaging" to him and understands the implications of making a referral to the Society (paragraphs 43 and 45 of the Statement of Claim).

2. Evidence from the initial trial

a) Sunday, April 14, 2013

[18] The evidence of what happened on April 14, 2013 is not contentious. Both AA and his partner, K.G., testified.

[19] In 2013, AA and K.G. were in a relationship. On Friday, April 12, 2013 K.G. travelled from Oshawa to Peterborough with her two older children to spend the weekend with AA and his two children. On the Sunday evening, April 14, 2013, they enjoyed a barbeque with another friend, N.H., and her two children. At the time, AA's and CC's two daughters were 5 and 3 years old. K.G.'s son was 9, one daughter was 6 and her youngest daughter (who was not with her that weekend) was 3 months. N.H.'s daughter was 13, her son was 10.

[20] Just after 7:00 p.m., the three adults were inside AA's house and the six children were outside playing on a trampoline, when K.G.'s son came to the back door to say that AA's daughter,

K.H., was hurt. AA went out to the trampoline and carried K.H. into the house to a couch. She was crying and saying her leg hurt. No bruising or swelling was apparent on her leg. AA and K.G. made her comfortable and put an ice pack on her leg. K.H. fell asleep on the couch around 7:30 and AA carried her to bed. N.H. and her children left for home around 8:00 p.m. AA did not contact CC that evening.

[21] On Monday morning K.H. told her father her leg still hurt and she was unable to put weight on it. AA decided to take her to the hospital to have it looked at. After dropping his other daughter off at the daycare, AA arrived at the hospital at 8:30 a.m. He did not contact CC as he knew that she had would have just arrived home from working a night shift. K.H. was content and AA thought she may have a sprain. Also, either before arriving at the hospital or shortly after arriving, the battery of his cell phone died. Apparently, AA was able to charge it at the hospital.

[22] Around 11:00 a.m. K.H.'s leg was x-rayed. Initially, AA was told by the x-ray technician that there was no break. AA texted CC that he had taken K.H. to the hospital and she was fine. This was the first communication he had with CC about K.H.'s injury. Shortly thereafter, AA was informed by the doctor that the x-ray revealed a fracture. AA immediately informed CC of this new information. CC responded by texting that AA had no authority to authorize medical treatment. AA told the doctor that K.H.'s mother was on her way and that she would provide directions as to treatment. The doctor proceeded to put a splint on K.H. When CC arrived at the hospital, she made the arrangements for K.H. to get a cast the following day. K.H. remained with her father until the next morning. They departed the hospital between 12:00 p.m. and 1:00 p.m.

[23] On Tuesday, April 16, 2013, AA took K.H. to the cast clinic to meet her mother after he dropped his other daughter off at the daycare. AA provided mother with further information about how K.H. injured her leg and then went to work.

[24] At 10:49 a.m., CC emailed AA seeking clarification regarding how K.H. broke her leg. She wanted to know what time the trampoline incident occurred and the details of what occurred on the trampoline. CC also expressed her concern that she had not been informed of the injury until the next morning after x-rays had been taken, although she is the parent with primary responsibility for making medical decisions.

[25] At 4:18 p.m., AA responded to the e-mail, answering CC's questions. As he had been at work, he did not see the e-mail until later in the day. He reported the facts as outlined herein and expressed his view that he had not made any medical decisions and had reported the injury to CC when appropriate.

b) The Referral to the Society

[26] On Tuesday, April 16, 2013, at 1:51 p.m., the Society received a telephone call from an anonymous female. She informed Jennifer Hill, an intake worker at the Society, that she had observed incidents of a man abusing children and screaming at a woman. She reported seeing five or six children playing on a trampoline on the previous Saturday. A woman and a man were outside with the children. One of the children started yelling that her leg hurt and the man got mad and told her to shut up and keep playing. The caller reported that the man then started yelling at his partner: "You're a cunt." "You're a bitch." "You can't even take care of the kids and that is all you are suppose [sic] to do." She said he threw a chair and a shovel toward her. Then the little girl started yelling about her leg and dad again told her to shut up. He then lifted her up off the ground by her right arm and threw her up and across the trampoline. The caller was concerned for the little girl as there was no net on the trampoline. The little girl continued to cry and yell that her leg was hurting.

[27] The anonymous caller stated she observed the incident from the home of a neighbour she was visiting. On the day she was calling, she stated there were no children around. She assumed

they were in school. The same day, before she called, she had heard the man yelling at the woman “Get it fucking cleaned up stupid”.

[28] The caller provided the address of the home she was observing. From its records, the Society determined the address provided was that of AA. The caller was adamant that her identity remain anonymous. She provided only a first name, Marie, and a telephone number where she could be contacted.

c) Society Investigation

[29] As a result of the call, the Society commenced a child protection investigation. Bobbi Cooper, a child welfare worker with the Society, conducted the investigation.

[30] On April 18, 2013, Ms. Cooper conducted a home visit at AA’s home. She interviewed AA and his two children and K.G. and her five-year-old daughter. Her interviews confirmed the facts of the trampoline incident consistent with that described by AA and K.G. outlined above. They all denied that AA was angry or yelling.

[31] On April 19, 2013, Ms. Cooper spoke by telephone with K.G. K.G. expressed her concerns that the call appeared to be malicious.

[32] On April 22, 2013, Ms. Cooper contacted the anonymous caller, leaving a voice message on the number provided by the caller for “Mary”, not “Marie”, to call Ms. Cooper. Ms. Cooper wanted to clarify with the caller information she had provided in the original referral, such as the day of the week when the incident occurred and whether the power was out. Ms. Cooper had already determined that power had been off all weekend at AA’s home due to a local outage. “Mary” returned Ms. Cooper’s call. Mary did not want to identify the neighbor she was staying with, but stated that the house is on the street behind AA’s house and the back yard’s back onto one another. Mary could not recall the exact day of the incident, but believed it occurred on Sunday. She confirmed that she could hear the yelling from her friend’s house.

[33] On April 25, 2013, Ms. Cooper met with N.H. and her two children at the Society office. Her interviews with them also confirmed the facts of the trampoline incident as outlined above. N.H. and her two children stated that AA was not yelling, swearing or angry at anyone. N.H. stated that at no point in her friendship with AA has she heard AA yell or swear at his children or K.G. She would not lie for him or ask her children to cover for him.

[34] On April 25, 2013, Ms. Cooper spoke with CC by telephone. At 4:20 p.m. on April 25, 2013, Ms. Cooper had left two voice messages requesting that CC call her. One message was left on the number Ms. Cooper had on file for CC. The other message was left on the contact number provided by Mary and which Ms. Cooper had used to contact Mary on April 22, 2013. At 5:00 p.m., Ms. Cooper received a telephone call from Mary’s contact number, the caller said nothing and hung up. Two minutes later, Ms. Cooper received the call from CC, from a telephone number Ms. Cooper did not know.

[35] CC told Ms. Cooper she did not know what was going on. Ms. Cooper explained that the Society had received a referral concerning AA and that she was trying to determine if there was any link between the referral source and CC. CC denied any knowledge of a call being made to the Society regarding AA. Ms. Cooper asked CC how she knew to call her. CC explained that she had received a message from her co-worker, BB to call Ms. Cooper.

[36] Ms. Cooper testified that CC discussed with Ms. Cooper the difficulties of her custody litigation with AA. It had cost her a lot of money and it was now difficult to co-parent with AA. She spoke about how AA was abusive and vindictive. CC said she had asked other people not to call the Society about AA, as a judge had told her she would never see her children again if

anybody from her camp contacted the Society again. Ms. Cooper told CC she had no intention of telling AA or K.G. about their conversation. Ms. Cooper told CC that she believed that the referral was made maliciously. CC reacted by becoming upset and stating she had nothing to do with the referral to the Society. CC told Ms. Cooper that at work she has talked about her frustration with AA and the court process and had sought advice from peers on how to manage the situation. She talked at work about the fact that K.H. broke her leg. She has talked at work about how AA is a terrible parent and an abusive person and that AA will spin a conspiracy theory so she will never see her children again. In cross-examination, Ms. Cooper stated she could not recall if CC stated that she used AA's name when she spoke of him at work.

[37] In her evidence, CC acknowledged that she did talk at work about K.H. breaking her leg, she does seek advice from her co-workers but at no time has she used AA's name. During their family litigation many allegations were made by both sides. Referring to Ms. Cooper's case note of the interview between CC and Ms. Cooper, CC stated that she believes that note speaks for itself.

[38] Ms. Cooper's case note of her conversation with CC: notation "She stated that she has talked about how he is a terrible and abusive parent and that she feels he will spin a conspiracy theory and she will never see her children again."

[39] On April 25, 2013, Ms. Cooper visited AA's property without informing AA. She observed that there was no adjacent property from which the anonymous caller could reasonably see or hear the things she claimed to have seen and heard.

[40] On April 26, 2013, Ms. Cooper met with K.G. and her eight-year old son.

[41] On April 29, 2013, Ms. Cooper determined that the allegations made in the referral were unverified.

[42] On April 30, 2013, Ms. Cooper wrote to AA to inform him that the allegations were determined to be unverified and that his file was now closed. She also communicated the Society's remaining concern at the conclusion of the investigation that the allegations reported were malicious in nature.

d) Obtaining Disclosure

[43] AA was shocked when he received Ms. Cooper's letter. Up to that point, Ms. Cooper had provided very little detail to him about the nature of the allegations he was facing. This initial disclosure caused him great stress.

[44] AA testified that he had thought that with the conclusion of his family litigation with CC, the unfounded referrals about him to the Society would end. He explained how those allegations had caused him a great deal of stress and he could not eat or sleep and his doctor telling him not to go to work. False allegations against him had already been the cause of one failed relationship and now he feared it would cause K.G. to leave him. He promised her and himself that he would get to the bottom of this to protect her, their children and himself from any more such allegations.

[45] He committed himself to finding the source of the April 16, 2013 referral and to holding that person accountable.

[46] AA tried to take a sabbatical from work without a doctor's note. Ultimately, he lost his job. AA did not call his employer to provide evidence as to the precise reason he was dismissed.

[47] AA's own investigation began with the Society which led to a process involving the Society's Internal Complaints Review Panel. AA was not satisfied with that process and on November 21, 2013, filed an application with the Child and Family Services Review Board.

[48] In a lengthy decision dated October 30, 2014 (*AA v. Kawartha-Haliburton Children's Aid Society*, 2014 CFSRB 63), the Board ordered, together with other relief, that AA be given full access to his file redacted to exclude identifying information of third parties (*AA v. Kawartha-Haliburton Children's Aid Society*, 2014 CFSRB 63 at paragraph 139, paragraph 1 of the directions therein.)

[49] The Board's decision also included a "Confidentiality Order" that prohibited AA, the applicant, from using any of the information provided and used in the proceeding from being disclosed or relied upon in any other proceeding. Thus, AA was required to commence an application in this court for disclosure of the names of the person or persons who made the referral. That application was granted by MacDougall J. on May 29, 2015.

3. The Plaintiff's Rule 59.06 motion

[50] On July 18, 2017, I heard the plaintiff's motion to re-open the trial under Rule 59.06. It was opposed by CC. I determined that the trial should be re-opened to hear new evidence. I set aside my original judgment and made the following order:

1. The trial of this matter will continue in the fall 2017 sittings commencing November 20, 2017 before me.
2. Only new evidence of communication between the defendants will be received in the continuation of the trial, including: texts, emails and telephone conversations.
3. The defendants shall serve updated affidavits of documents together with any new documents identified for which privilege is not claimed on or before July 31, 2017.
4. The plaintiff may bring any motion with respect to disclosure on August 1, 8 or 29.
5. The parties shall attend for a judicial pre-trial in Lindsay on October 12, 2017.

4. Evidence from the second part of the trial

a) Evidence of AA

[51] On June 13, 2017, AA's daughter arrived at his home after being with her mother, with an iPhone. AA learned from K.H. that her mother had given her the phone. AA checked the contents of this phone and discovered that it had many old text messages, including messages about him. AA transferred the texts to his computer to preserve them. He did not edit the texts or modify them in any way.

[52] Included in these texts AA discovered on the iPhone given to his daughter is an exchange between CC and BB in which BB is reacting to having been served with AA's claim against her in this action. BB is upset that CC's "ex" is suing her.

[53] On October 7, 2015, after BB tells CC she has been served by AA, the following text exchange takes place between BB and CC:

11:42:00 BB: I know you are scared I will not be your scape goat. So your email today saying don't text email or call today. Seriously. You and your mom who is now in violation of privacy is asking someone to set themselves up for lawsuit. You (CC) set this whole issue up. You are abusing the courts with your games. I will not;

11:43:55 CC: *What are you talking about?! You are not a scape goat for anything. I am not abusing the courts for anything.;*

11:44:27 CC: *My mom?!;*

11:47:20 CC: I also never sent you an email today.;

12:00:02 BB: What you don't get is because of you. I am now in the middle of a law suit with your ex.;

12:01:39 CC: *I have no control over my ex. He is emotionally and mentally unstable and unpredictable. I have no idea why you are turning against me all of a sudden.;*

12:07:50 BB: I am not turning against you. Yet your last comment was well you were manated to report it has nothing to do with me. The fuck it doesn't. In case you haven't forgotten it is the holiday season. I lost my nephew and parents at this time. So this year as I am trying to move forward I have your ex with a bs claim my address in a different city and now safety concerns. Happy thanksgiving to me.;

12:09:22 CC: *(BB), I can't control him. It's not fair. He's suing me too. He's psychotic. I know that this is a tough time for you and I hate that he's doing this. I have no control over him and his psychotic actions.;*

12:10:30 BB: I can't and won't do this ;

12:13:26 CC: *He's filed a lawsuit. We have to respond and defend ourselves or it doesn't go away.;*

12:14:40 BB: I shouldn't be in this Shit at all. Period;

12:15:26 CC: *I agree 600%;*

12:16:30 BB: And when you state well you hate report. Nothing to do with me. Sorry all to do with you.;

12:19:24 CC: *I'm sorry that he's doing this.;*

18:43:58 BB: Are friendship was and is done. You threw it away long before today. I won't throw you under a bus but I also won't be thrown there either. I am filing a defence that I reported and legally had to. Do not report that you didn't know me and that I was rogue. Don't just don't. My statement will be the truth protecting me p and the girls. Don't say any different because I won't lie. You decided a long time ago that fuck her and you acted accordingly. I am not nothing and won't be treated as nothing. DON'T REPLY I DON'T WQNT TO HEAR ANY MORE LIES. JUST KNOW I WON'T WRITE THEM.;

18:51:36 BB: Not once in this issue have you said Omg I am sorry. And when you got served and not yesterday did you say a fucking word to me. It isn't and won't be all about you. Not for me and p not this time.;

[54] On October 8, 2015, BB continues:

05:36:25 BB: Hi I drove down and filed today. Said duty to report. Didn't know him. Knew you from work. That is it. Quoted duty to report protection and law. And filed a motion to suppress my address due to safety concerns related to cases I worked on.;

05:41:51 BB: Won't put you or girls in jeopardy

b) Evidence of BB

[55] BB testified that she made the call to the Society because of her “duty to report” although she admitted that she did not witness the incident. She stated that she learned of AA’s address from one of his daughters and that she called the Society to protect his daughter because she was “dealing with a lot of stuff.”

[56] BB said that she received the information she reported to the Society from the girls (AA and CC’s daughters). The were present when BB and CC were having a conversation before CC went off to work. BB was caring for the children that night. BB recalled that the younger one was in a cast. BB was talking with the girls and the information came out. BB confirmed that she received the information when both girls and her own son were present.

[57] BB waited 24 to 36 hours before contacted the Society.

a) Evidence of CC

[58] CC testified that on the night before the call was made to the Society, she was in the hospital due to a miscarriage. She explained that she did not mention this in the original trial because she had no memory of it until now. She is currently receiving psychotherapy to deal with post-traumatic stress disorder. Through therapy she recently discovered that she is blocking out memories and entire blocks of time.

[59] She testified about her efforts to provide AA with complete disclosure. However, she offered no explanation as to why she never disclosed the undeleted texts on the iPhone she gave to her daughter.

[60] Most of her testimony related to explaining the reasons for her sending and receiving so many text messages in 2017.

[61] In cross-examination, CC acknowledged that between April, 2013 and June, 2013 she exchanged over 1,000 texts with BB. She agreed that she attended the hospital on April 15, 2013 and that, when leaving, AA offered that she could take children but she declined. Her memory remained unclear as this was the day after she had spent the evening at the hospital after the miscarriage.

C. The Law

1. Intentional infliction of emotional distress

[62] The Ontario Court of Appeal recently affirmed the elements necessary to prove the tort of intentional infliction of emotional distress: *Prinzo v. Baycrest Centre for Geriatric Care* (2002), [2002 CanLII 45005 \(ON CA\)](#), 60 O.R. (3d) 474 (C.A.). The tort of intentional infliction of mental suffering has three elements. The plaintiff must prove:

1. The defendant's conduct was flagrant and outrageous;
2. The defendant's conduct was calculated to harm the plaintiff;
3. The defendant's conduct caused the plaintiff to suffer a visible and provable illness.

2. Conspiracy

[63] In 1983, the Supreme Court of Canada recognized two categories of civil conspiracy: lawful means conspiracy (or simple motive conspiracy) and unlawful means conspiracy: *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983 CanLII 23 \(SCC\)](#), [1983] 1 S.C.R. 452 at pp. 471-2.

[64] Essential, however, to any civil conspiracy is that two or more persons must act in combination by agreement or common design. As that essential element is lacking in this case, it is unnecessary to review the nuances of the developing law and the more recent decisions of the Supreme Court of Canada and our Court of Appeal with respecting the lawful and unlawful means categories.

3. Slander and libel

[65] To succeed in the tort of defamation the plaintiff must prove three things:

A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words are defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and damages are presumed. The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability. (*Grant v. Torstar Corp.*, 2009 SCC 61 (CanLII), [2009] 3 S.C.R. 640 at para. 28.)

[66] Once the plaintiff proves the three essential elements on a balance of probabilities, the defendant can defend the claim by proving the defamatory words were true or that the words were part of a privileged communication absolute or qualified.

[67] Qualified privilege was explained by the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130, [1995] S.C.J.:

143 Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself. As Lord Atkinson explained in *Adam v. Ward*, [1917] A.C. 309 (H.L.), at p. 334:

... a privileged occasion is ... an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

[68] In *Cusson v. Quan*, 2007 ONCA 771, the Ontario Court of Appeal recognized some of the contexts in which a qualified privilege may arise.

[39] Employment references, business and credit reports, and complaints to police, regulatory bodies or public authorities are classic examples of occasions of qualified privilege. The rationale for qualified privilege is that on such occasions, "no matter how harsh, hasty, untrue, or libelous the publication ... the amount of public inconvenience from the restriction of freedom of speech or writing would far outbalance that arising from the infliction of private injury" (*Huntley v. Ward* (1859), 6 C.B. (N.S.) 514, at p. 517).

[40] The privilege is said to be qualified as it can be defeated upon proof of malice, that is spite or ill-will, ulterior purpose, or, more commonly, proof that the defendant either knew the statement was false or was reckless as to its falsity: see *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130, [1995] S.C.J. No. 64, at para. 145 ("*Hill v. Scientology*"). The privilege can also be lost where the limits of the duty or interest are exceeded by the use of words not reasonably appropriate to the occasion.

D. Analysis

a) Conspiracy

[69] In my original decision, I was not prepared to conclude that BB and CC acted in combination by agreement or common design which is necessary to prove the civil tort of

conspiracy.

[70] Considering the evidence received in the second part of this trial, I am satisfied on a balance of probabilities that BB and CC did act in combination by agreement or common design to make a false report to the Society.

[71] I reject the evidence of BB that she learned of the information that she reported to the Society from one of AA and CC's daughters. The children were never in her company between the time of the injury and the time of the report to the Society. The only possible source for BB learning of the injury was from CC and I find that CC was the source of the information. Considering the texts exchanged between CC and BB and CC's inconsistent and evasive evidence, I find her evidence to be neither reliable or credible.

[72] I am not satisfied that any special damages have been identified or proven by AA that related directly to the conspiracy. Accordingly, the conspiracy claim merges with the two claims addressed below.

b) Intentional Infliction of Emotional Distress

[73] In this case, I am satisfied on a balance of probabilities that the three elements of the tort of intentional infliction of emotional distress have been proved by the plaintiff. In making a false referral to the Society, BB engaged in conduct that was flagrant and outrageous and that was calculated to harm the plaintiff.

[74] My original decision was released without my having the benefit of the very recent decision of the Supreme Court of Canada in *Saadati v. Moorehead*, [2017 SCC 28](#), on the extent to which expert evidence of mental health is required to prove damages. On the evidence of AA alone, I am satisfied that the false referral caused AA to suffer a visible and provable illness.

[75] On his evidence, I am satisfied that the false referral caused him to suffer depression and anxiety beyond "the upset, disgust, anxiety, agitation or other mental states that fall short of injury: *Mustapha v. Culligan of Canada Ltd.*, [2008 SCC 27](#) at para. 9.

[76] On the evidence before me, AA is entitled to general damages for intentional infliction of emotional distress in the amount of \$10,000.00 for which BB and CC are jointly and severally liable.

c) Slander and Libel

[77] The communication that BB had with the Society referred to AA using words that unquestionably would tend to lower the plaintiff's reputation in the eyes of a reasonable person.

[78] AA has proved on a balance of probabilities his claim of slander against both BB and CC who conspired together.

[79] I am not satisfied that AA has made out a separate claim for slander against both CC for the answers she gave to the Society when questioned.

[80] Communication with child welfare agencies responsible for protecting children in the course of their investigations is, in my view, but another "classic example" of an occasion of qualified privilege as referred to by the Court of Appeal in *Cusson v. Quan*. To find otherwise, would make it impossible for such public agencies to carry out their difficult but very necessary responsibility of protecting vulnerable children. I have no doubt that most interviews conducted in the course of such investigations will include statements that tend to lower another's reputation in the eyes of a reasonable person. CC spoke to Ms. Cooper about AA on the promise from Ms.

Cooper that she would not disclose what CC told her. This expectation was reasonable. Her discussion with Ms. Cooper was protected by qualified privilege, even if it included CC making admissions about what she said to others at work.

[81] I was provided with no authorities dealing with the quantum of damages in these circumstances. In determining the appropriate amount, I have considered how long it took the Society to complete its investigation, the nature of the allegation, the number of people and who heard the false allegation and the fact that the Society records show it as an unverified referral noting a concern that it may have been malicious. It impossible to know if this lowers or improves AA's reputation in the eyes of the Society.

[82] On the evidence before me, AA is entitled to general damages for slander in the amount of \$10,000.00 for which BB and CC are jointly and severally liable.

d) Punitive damages

[83] Given the malicious nature of the false referral, AA is entitled to punitive damages in the amount of \$5,000.00 for which BB and CC are jointly and severally liable.

E. Conclusion

[84] Judgment is granted in favour of the plaintiff against both defendants in the total amount of \$25,000.00 for which BB and CC are jointly and severally liable.

[85] I will receive brief submissions, no more than eight pages, to be served and filed on or before July 31, 2018. I will also receive any reply from any party of no more than two pages to be served and filed on or before August 14, 2018.



J.C. Corkery J.

Released: July 3, 2018

Appendix

Amendments made July 22, 2020:

In accordance with the order made June 1, 2020 (*AA v. BB and CC*, [2019 ONSC 3423](#)):

- the endorsement was amended to use the letters AA, BB and CC in place of the names or initials of parties, and
- the warning was added.

Tab 158

R. v. Barry, 2021 BCPC 59 (CanLII)

Source: Provincial Court of British Columbia
Date: 2021-03-26
File number: 26253
Citation: R. v. Barry, 2021 BCPC 59 (CanLII),
<<https://canlii.ca/t/jdzpk>>, retrieved on 2026-03-24

Citation: R. v. Barry
2021 BCPC 59

Date: 20210326
File No: 26253, 26239, 22417,
22587, 22641
Registry: Castlegar
Grand Forks

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

File No: 26253
Registry: Castlegar

REGINA
v.
DARREN ANDREW BARRY

File No: 26239
Registry: Castlegar

REGINA
v.
ALICIA MARIE SIMPSON

File No: 22417, 22587
Registry: Grand Forks

REGINA
v.
MICHAEL VEDOVATO

File No: 22641
Registry: Grand Forks

REGINA
v.
KELLY KEVIN ZIMMERMAN

**RULING ON APPLICATION
OF THE
HONOURABLE ASSOCIATE CHIEF JUDGE P. DOHM**

Counsel for the Crown:	R. Carot
Counsel for the Accused, A. Simpson and M. Vedovato:	B. Suffredine, Q.C.
Counsel for the Accused, D. Barry and Zimmerman:	M. Goulden
Place of Hearing:	Nelson, B.C., via videoconference
Date of Hearing:	November 16, December 18, 2020, and January 29, 2021
Date of Judgment:	March 26, 2021

Introduction

[1] In March and April of 2020, in response to the global COVID-19 pandemic, the Chief Judge of the Provincial Court of British Columbia directed the adjournment of thousands of criminal files without the accused having to attend Court. Some of these adjournments ended up being for more than three months.

[2] The accused, Darren Barry, Alicia Simpson, Michael Vedovato and Kelly Zimmerman, now apply for two declarations. The first is that jurisdiction over them was lost by these adjournments, and the second is that since no process was issued for them within three months of that loss of jurisdiction, their charges are deemed dismissed for want of prosecution pursuant to [section 485\(3\)](#) of the *Criminal Code*.

Background

[3] The onset of the global COVID-19 pandemic caused the BC Provincial Health Officer to declare a public health emergency on March 17, 2020. On that same day, the Provincial Court announced that “all out of custody criminal matters (initial appearances, remands, applications, trials, and sentencings) scheduled to proceed between March 18 and May 16, 2020, are adjourned without the parties attending Court” (COVID-19 March 17, 2020 Update). The following day, the Government of British Columbia declared a provincial state of emergency. Both the public health and provincial state of emergencies have remained in effect since their declarations.

[4] On March 19, 2020, the Chief Judge announced the suspension of:

[the] regular operations of the Provincial Court of British Columbia at all of its locations to protect the health and safety of court users and to help contain the spread of COVID-19. In light of the extraordinary circumstances during the current public health emergency, members of the public who do not have urgent business before the Court are discouraged from attending any courthouse.

[5] This announcement was made in the first release of the Notice to the Profession and Public 19 (“NP 19”) and it was effective March 25, 2020. This suspension did not apply to bail hearings, in-custody trials and sentencings, and criminal matters determined urgent by a judge, as those were able to proceed at specified court locations.

[6] NP 19 incorporated the March 17 direction adjourning all out of custody criminal matters scheduled between March 18 and May 16, 2020. On April 28, the Chief Judge, again through NP 19, directed the adjournment of all out of custody criminal matters scheduled to proceed between May 19 and July 3. These two mass adjournments of thousands of files (the “COVID-19 adjournments”) were directed to occur without the parties having to attend Court. NP 19 further advised that “the Court file will record that these adjournments are due to COVID-19”.

[7] Included within NP 19 were “Adjournment Details” pursuant to which counsel and the accused could determine the next Court date resulting from the COVID-19 adjournments. For many court locations, those next dates were specifically listed and approximately 90 days from the originally scheduled appearance. For other locations, including most Circuit Courts, a scheduling telephone or email contact for a Judicial Case Manager (“JCM”) was provided to contact on the day the Court appearance was originally scheduled in order to set the next appearance date.

[8] NP 19 was amended on many occasions to inform the profession and the public of the steps and measures the Court was taking to address the COVID 19 safety concerns while also ensuring and advancing access to justice. Included within those objectives was the gradual re-opening of courthouses once they had been assessed and safety remediation work carried out by an independent professional entity hired by the BC government to ensure the courts were safe for all who attended to them. While the suspension of regular Court operations ended on July 3, 2020, many courthouses around the province, and particularly Circuit Court locations, were not able to be safely re-opened for several months due to the time and effort required to complete that assessment and remediation process.

[9] With respect to these accused, a judge adjourned their files from a date prior to March 18, to a date covered by the COVID-19 adjournments. Three of the accused’s files were adjourned into the timeframe covered by the first COVID-19 adjournments, then administratively adjourned and re-scheduled by a JCM, without the Crown, the accused or their counsel being present, to a date within the timeframe covered by the second COVID-19 adjournments. Mr. Vedovato’s two files had been adjourned by a judge from a date prior to March 18, to a date covered by the second COVID-19 adjournments.

[10] Prior to the accused’s scheduled Court date within the second COVID-19 adjournments timeframe, a JCM cancelled their upcoming Court dates without the Crown,

accused or their counsel being present, and scheduled their files for September 22, in Grand Forks for Mr. Vedovato and Mr. Zimmerman, and for September 23, in Castlegar for Mr. Barry and Ms. Simpson. By those dates, the courthouses for those Circuit Court locations were able to be re-opened following the assessment and safety remediation process. It is my understanding the JCM advised the Crown and counsel for the accused, but not the accused themselves, of these September dates by electronic communication at the time those dates were scheduled by the JCM.

[11] Although counsel for the accused attended Court on behalf of their clients on those September dates, the Crown does not suggest through those appearances, the accused attorned to the jurisdiction of the Court, or jurisdiction over the accused was “revived”, if there had been an earlier loss of jurisdiction by the COVID-19 adjournments. That is because more than three months had elapsed between the date(s) on which the accused submit jurisdiction over the accused was lost and the September Court dates, such that by virtue of section 485(3), the proceedings would be deemed dismissed.

Position of the Accused

[12] The main submission of the accused is that jurisdiction over them was lost by the COVID-19 adjournments because they were not personally present when their files were adjourned to the next date. They say accused are required to attend Court for scheduled appearances so they will know their next Court date, and jurisdiction over them is lost without personal attendances unless either the accused expressly consents to being adjourned to another date without attending Court, or the accused appears through an agent for summary conviction offences or designated counsel for indictable offences. Since there was no consent, agency or designated counsel appearances when their files were adjourned by the COVID-19 adjournments, jurisdiction over them was lost.

[13] The accused acknowledge that jurisdiction over them would not have been lost if a summons or warrant had been issued for them at the time of the COVID-19 adjournments, but that did not occur. They also acknowledge that jurisdiction over them could have been regained through the issuance of a summons or warrant, provided that process was issued within three months of the COVID-19 adjournments. However, that also did not occur in their cases.

Analysis

[14] [Section 485\(1.1\)](#) of the *Criminal Code* states:

Jurisdiction over an accused is not lost by reason of the failure of the accused to appear personally, so long as the provisions of this Act or a rule made under section 482 or 482.1 permitting the accused not to appear personally apply.

[15] Section 482 permits the Court to make rules that “cannot create substantive law, but rather address matters concerning pleading, practice and procedure in criminal matters and case management” (*R. v. Campbell*, 2008 BCSC 805 at par. 26). This section also stipulates that the rules cannot be inconsistent with the *Criminal Code* or any other *Act of Parliament*, and they “must be published or otherwise made available to the public” (section 482(4)). Section 482.1 specifically addresses case management rules.

[16] The Crown says NP 19, and specifically the COVID-19 adjournments, are rules of the Court under section 482. This position was recently accepted by this Court in *R. v. Bernard*, 2021 BCPC 13, where Judge Harris concluded “that the Notices that resulted in the COVID-19 adjournments were rules of the Court as permitted by the *Code* and that they were not inconsistent with the *Code* or any other *Act of Parliament*” (at para. 25). *Bernard* is a considered decision of the Court and therefore binding on me. The accused’s efforts to convince me *Bernard* is wrongly decided have not been successful. In any event, I agree with the reasoning and conclusions of Judge Harris, but also wish to add the following additional comments.

[17] In his analysis, Judge Harris references and relies on the Court’s Criminal Caseflow Management Rules (“CCFM Rules”). These rules were created pursuant to section 482 and their purpose is set out in Rule 1, which states:

- (1) The purpose of these Rules is to provide simple, effective and efficient management of all proceedings of a criminal nature in order to secure a just and timely determination of every case before the Court.

[18] Rule 3 of the CCFM Rules provides the Chief Judge with the authority to issue practice directions “consistent with these Rules and their purpose”.

[19] In my view, it was not necessary to rely on the CCFM Rules to conclude the provisions of NP 19 relating to criminal matters were rules of the Court made under section 482. A review of those NP 19 provisions indicates they address and provide procedural directions relating to the management of all criminal prosecutions within the Court’s jurisdiction during COVID-19. For example, they specify how files for in-custody and out of custody accused will be dealt with, the procedure for urgent criminal matters, and how applications for judicial authorizations would be processed.

[20] More specifically for these applications, the provisions relating to the COVID-19 adjournments directed the attendance of the accused was not required, set out when the next Court date was or how it could be easily determined, and indicated the Court files would record the adjournments were due to COVID-19. All of these directions were procedural in nature and directed by the Chief Judge as part of the Court’s need “to protect the health and safety of court users and to help contain the spread of COVID-19”.

[21] Moreover, the criminal provisions of NP 19 do not contain any substantive criminal law and they are not inconsistent with the *Code* or any other *Act of Parliament*. In particular, with regards to the COVID-19 adjournments, section 669.1(2) provides the Court with very broad powers to adjourn the proceedings “at any time before or after the plea of the accused or defendant is taken”. No provision in the *Code* specifically states the accused must be present for an adjournment of their file to a “fix date” to schedule another appearance, which is what the COVID-19 adjournments did, so there is no inconsistency between the COVID-19 adjournments and the *Code*.

[22] Section 803(1) applies to summary conviction offences and it does state the Court “may, in its discretion, before or during the trial, adjourn the trial to a time and place to be appointed and stated in the presence of the parties or their counsel or agents”. What is clear from this section is that when a trial is adjourned, the accused, their counsel or agent must be present when the new trial date is fixed or appointed, but not if the trial is adjourned to a “fix date” to schedule a new trial date. The reason for the requirement for the new trial date to be stated in the presence of the accused, his counsel or agent, is because section 803(2) permits the Court to proceed with the trial in the absence of the accused as long as the accused has been notified of the time and place for the trial. While the COVID-19 adjournments did adjourn some summary conviction trials (not in relation to any of these particular accused), the adjournments were not to trial dates. Rather, they were merely to “fix dates” to then schedule new trial dates so there was no essential requirement for the accused to be present for the adjournment of those summary conviction trials pursuant to the COVID-19 adjournments. Accordingly, there was also no inconsistency between the COVID-19 adjournments and section 803(1).

[23] Lastly, NP 19 was published and made available to the public as it was posted on the Court’s public website.

[24] Section 482 does not specify the rules have to be in any specific form or actually even be named “rules”. What matters is that the requirements of section 482 are satisfied and, in my view, they are with the criminal provisions of NP 19. Although NP 19 could also have been called “The COVID-19 Rules” as compared to a Notice to the Profession and Public, the difference would have been merely one of form over substance.

[25] All of the section 482 requirements relating to the making of rules were satisfied with respect to the criminal provisions of NP 19 without the need to rely on the CCFM Rules. While I agree with Judge Harris’ reliance on the CCFM Rules, I also find that reliance was not necessary to conclude the criminal provisions of NP 19, and specifically those relating to the COVID-19 adjournments, were rules pursuant to section 482.

[26] The criminal provisions of NP 19, including those for the COVID-19 adjournments, were rules of the Court and those provisions specifically directed the accused that they

were not required to personally appear for the adjournment of their files for the COVID-19 adjournments. Accordingly, pursuant to section 485(1.1), there was no loss of jurisdiction over the accused as a result of their non-appearance at the COVID-19 adjournments.

[27] While this conclusion is sufficient to dispose of these applications, I will nevertheless address the other two arguments upon which the Crown submitted the COVID-19 adjournments were lawful and did not result in a loss of jurisdiction over the accused.

Jurisdiction by Necessary Implication and Authority to Control its own Process

[28] As a statutory court, the Provincial Court of British Columbia derives its power and authority from statutes including the *Criminal Code* and the *Provincial Court Act*, R.C.B.C. 1996, c. 379. However, the Supreme Court of Canada has also recognized that statutory courts have additional powers:

[19] Likewise in the case of statutory courts, the authority to control the court's process and oversee the conduct of counsel is necessarily implied in the grant of power to function as a court of law. This Court has affirmed that courts can apply a “doctrine of jurisdiction by necessary implication” when determining the powers of a statutory tribunal:

... the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime

(ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board), 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 51)

Although Bastarache J. was referring to an administrative tribunal, the same rule of jurisdiction, by necessary implication, would apply to statutory courts.

(R. v. Cunningham, 2010 SCC 10) (Emphasis added)

[29] Similar conclusions and comments can also be found in that Court's decisions in *R. v. 974649 Ontario Inc.*, 2001 SCC 81 at paras 70 and 71, and *Ontario v. Criminal Lawyers Association*, 2013 SCC 43, at paras 46 and 112.

[30] Based on these and other authorities, the Crown says:

[The COVID-19 adjournments] were made and authorized by powers that flow by necessary implication from the [court's] express statutory jurisdiction to try indictable matters under s. 469 and s. 470 and to try summary matters under s. 785 (see definition of “summary conviction court”) and s. 798. The Crown submits that these statutory powers by necessary implication are synonymous with the [court's] constitutionally entrenched mandate regarding the assignment of judges, the setting of sittings of the court and court lists, the allocation of courtrooms and the direction of administrative staff carrying out these functions: *R. v. Valente*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673, paras 47-49; *Ref re Remuneration of Judges of the*

Prov. Court of P.E.I.; *Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, 1997 CanLII 317 (SCC), [1997] 3 SCR 3, para. 260; and *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, paras. 40-41. Without such constitutional and statutory (by necessary implication) powers, the [court] could not function as a court of law in a global health emergency.

[31] I agree with this position.

[32] In order “to protect the health and safety of court users and to help contain the spread of COVID-19”, the Court had to act quickly and decisively to limit people from attending courthouses as much as possible. It did so in part by mass-adjourning all out of custody non-urgent files without counsel or the accused having to attend Court. These files were adjourned either to specific dates or to a date that could easily be obtained from a JCM. Requiring the accused to physically attend to a courthouse to be informed of their next Court date would have completely defeated the purpose of NP 19.

[33] The “Adjournment Details” in NP 19 provided reasonable and sufficient notice to counsel and the accused to inform them of the status of Court files and more importantly how to determine the next Court date. While I accept that some accused may not have had access to NP 19, they were aware of their outstanding Court file and their need to attend Court at some point to deal with it. For those accused represented by counsel, they could have obtained information about their next Court date from their counsel who obviously had access to NP 19 and also knew how to connect with a JCM to determine the next Court date. For those accused not represented by counsel, they could have found out their next Court date by contacting Court officials by telephone or electronic communication. The Court does not have access to personal contact information for the accused to be able to notify them of the next Court date, but it is not unreasonable to expect an accused to take some minimal steps to find out when their next Court date is.

[34] Moreover, failure by the accused to attend their next Court date arising from the COVID-19 adjournments did not mean that a warrant would automatically be issued for their arrest. Rather, upon failure of the accused to attend Court, a judge would determine what, if any, process would be issued for the accused to compel their attendance to Court. That determination would quite properly be based on the individual circumstances of the accused, the submissions of the Crown, and the Court file. In some cases, and after consideration, a judge may issue a warrant, but there would be a basis for doing so on the Court record. In other cases, a summons may be issued, while for others, the file may simply be adjourned for inquiries to be made by counsel or the police in an effort to have the accused return to Court.

[35] It is important to point out that the COVID-19 adjournments only adjourned files to “fix dates” to schedule a further Court date. They did not impact any substantive rights of

the accused such as the need to be present for their election, plea, trial or sentencing, and, as counsel have conceded, there was no prejudice to the accused as a result of the COVID-19 adjournments. Moreover, the accused had the ability to argue their file should proceed on the basis of urgency, and their *Charter* section 11(b) right to be tried within a reasonable time has not been adversely affected.

[36] The exceptional circumstances presented by the global COVID-19 pandemic and the declarations of provincial and public health states of emergency compelled the Court to take immediate steps to drastically reduce attendances at courthouses for the protection and safety of the public by helping to minimize the spread of the COVID-19 virus. The COVID-19 adjournments were one of those steps by adjourning all out of custody non-urgent files to another date without the accused having to attend Court. Section 669.1(2) of the *Code* provides the Court with the express power to adjourn proceedings “at any time before or after” plea, and, as previously noted, there is no specific requirement in the *Code* that the accused must be present when their file is adjourned to a “fix date”. What the *Code*, or any other statutory provision, does not expressly provide to the Court or the Chief Judge is the authority to mass-adjourn thousands of files and direct the accused were not required to attend personally for those adjournments. However, in the circumstances, the Court had to do so in order to function as a Court of law in this pandemic, and I find the authority for the COVID-19 adjournments lies in the power of the Court by necessary implication to control its process and to manage both Court operations and the administration of justice during COVID-19. Accordingly, in all the circumstances and for the reasons expressed above, the Court acted lawfully with the COVID-19 adjournments based on the “doctrine of jurisdiction by necessary implication”.

The COVID-19 Adjournments were Lawful Because They Comply with the *Code*

[37] The case law is relatively clear that jurisdiction over an accused is lost when a statutory court acts unlawfully in dealing with remands and adjournments (*R. v. Krannenburg*, [1980 CanLII 179 \(SCC\)](#), [1980] 1 S.C.R. 1053) or it does not do anything on a file on a scheduled Court date (*R. v. Hampton*, [2020 ABQB 429](#), and *R. v. Faulkner*, [2002 SKQB 131](#)). If the Court had not adjourned these accused and to another date, then there would have been a loss of jurisdiction over them. However, the case law is not entirely clear on whether jurisdiction is lost over accused by an adjournment of their file to another date when they were not present for that adjournment and no process was issued to maintain that jurisdiction.

[38] As previously noted, the accused say there was a loss of jurisdiction over them by the COVID-19 adjournments because they were not present for the adjournment of their files, they did not provide their express consent to being adjourned to another date, or they did not appear by agent or designated counsel. They also add that no process was

issued to maintain jurisdiction over them. They rely on a number of cases in support of their position including *R. v. Ferreira*, [2014 ONCJ 617](#); *Hampton*; *Faulkner*; *R. v. D'Arcy*, [2015] A.J. No. 112; *R. v. Denny*, [2020] N.S.J No. 148; *R. v. Bowen* (1999) [1999 CanLII 32157 \(ON CJ\)](#), 28 CR (5th) 162 (Ont. C.J.); and *R. v. Millar*, [2012 ONSC 1809 \(CanLII\)](#), [2012] OJ No. 1276 (QL).

[39] I do not agree with this position in so far as it applies to the COVID-19 adjournments.

[40] The Crown has provided two Court of Appeal authorities that stand for the proposition “that adjournments (can) be made in the absence of the accused without a loss of jurisdiction”. Those authorities are the decision of the Ontario Court of Appeal in *R. v. Szoboszloi*, [1970 CanLII 329 \(ON CA\)](#), [1970] 3 OR 485, and the Manitoba Court of Appeal in *R. v. Born*, (1971) [1971 CanLII 1220 \(MB CA\)](#), 6 CCC (2d) 70.

[41] In *Born*, the accused was not brought in to Court from where he was incarcerated for one of his adjournment dates prior to the start of his preliminary inquiry because of an administrative error. The Judge did not issue a warrant for the accused, but simply adjourned the file for a week. The Court concluded there was no loss of jurisdiction over the accused in these circumstances with Dickson J.A. (as he then was) reasoning in part as follows (at para. 8):

If a magistrate is precluded from granting a remand in the absence of the accused, it would seem, if the view of the learned Chambers Judge be accepted, that an accused could cause a Magistrate to lose jurisdiction by the simple expedient of failing to appear unless the Magistrate resorted to the use of a Bench warrant. The accused's absence might be due to illness, accident or even inadvertence. A Magistrate might adjourn the case to the following day in order that appropriate inquiries be made. Has the Court thereby lost jurisdiction? We think not.

[42] Counsel for the accused have not provided any compelling basis to suggest these cases are wrongly decided or distinguishable, or are no longer applicable due to other case law, or amendments or additions to the *Code*. I would also point out that none of the authorities provided by the accused are from the Court of Appeal level.

[43] Moreover, Parliament's enactment in 1985 of section 669.1(2) is significant, not just because it provided Courts with a single comprehensive provision for adjourning proceedings, but also because in doing so, it specifically did not state the presence of the accused, their agent or designated counsel was required when Courts exercised this jurisdiction. This adjournment power is available “at any time before or after” plea, applies broadly to include any “proper officer of the court”, and is not restrictive as to the duration for which an adjournment can be granted so they can be for more than three months. In granting this all-encompassing authority, had Parliament wanted the accused, their agent

or designated counsel to be present for all adjournments in order for jurisdiction to be maintained over them, it could have easily indicated that through this provision.

[44] In my view, this section and the case law establish that there is not an automatic loss of jurisdiction over the accused if they, their agent or designated counsel are not present for an adjournment of their file. Rather, jurisdiction over the accused can be maintained if there has been a lawful adjournment of their file to a “fix date” as the COVID-19 adjournments did. Section 669.1(2) provides the Court with broad powers to adjourn proceedings and it does not mandate the presence of the accused, their agent or designated counsel for adjournments of their proceedings. Also, as previously noted, the *Code* does not require the accused or their agent or designated counsel be present for an interim adjournment of their file to a “fix date”.

[45] I find there is merit to the Crown’s submission that jurisdiction over the accused was not lost by the COVID-19 adjournments specifically because they were interim adjournments to “fix dates” where nothing of substance occurred for the accused. That is to be contrasted with adjournments where something affecting or prejudicing the accused occurs such as fixing a trial or sentencing date, or where there is a failure to comply with a mandatory *Code* provision requiring the presence of the accused (for example, sections 650 and 803). In those situations, jurisdiction would be lost by those adjournments.

[46] Jurisdiction over the accused was not lost by the COVID-19 adjournments because those adjournments were lawful in that they complied with the *Code* and they did not involve anything of substance for the accused. Rather, jurisdiction over the accused was maintained by the lawful adjournment of their file in their directed absence to a “fix date” at which time, if necessary, the Court could issue process for the return of the accused to Court in the event they did not attend Court on that date.

[47] I am also of the view that it was not necessary to issue any process at the time of the COVID-19 adjournments in order to maintain jurisdiction over the accused. In that regard, I agree with the Crown’s submission that “the concept of “preserving” jurisdiction must be tied to the common law rule when jurisdiction over the accused is lost: where a statutory court has acted unlawfully in the course of remands and adjournments, has not done anything in relation to a case, or has proceeded with matters of substance in the absence of the accused. Nowhere in this common law rule or the *Criminal Code* is it mandated that a summons or warrant must be issued in order to “preserve” jurisdiction.” All that is required is that “something lawful was done with the case” and that was accomplished by the COVID-19 adjournments.

[48] I would also point out that in the unique circumstances facing the Court as a result of the COVID-19 pandemic, it was also not practical, desirable or, in some cases, even

lawful for some form of process to be issued at the time of the COVID-19 adjournments in order to maintain jurisdiction over the accused.

[49] Issuing a summons requires a returnable Court date and at the time of the COVID-19 adjournments, it was not known when the Courts would be able to safely resume sitting given the state of the pandemic. What the Court did not want, and needed to prevent as much as possible based on the existing public health directions, was accused returning to courthouses when it was unsafe to do so. Moreover, when that would change was not known at the time of the COVID-19 adjournments. The Court did adjourn many files for a period of approximately 90 days, but that was to retain jurisdiction over them and it was also based in large part on public health information specifically in relation to when the suspension of regular Court operations may end at the time the COVID-19 adjournments were made.

[50] Issuing a bench warrant for the accused to retain jurisdiction over them presented several challenges. First, it is difficult to justify the issuance of bench warrants when there was no basis to establish the accused failed to attend Court, which is the ground upon which bench warrants can be issued. That is particularly so when the accused were directed not to attend Court and no Court was in fact sitting to hear out of custody non-urgent files on the day the accused had been scheduled to attend Court. Second, issuing bench warrants would naturally result in accused being brought back to Court and that was an outcome that was not desired nor intended in the circumstances of the pandemic. Third, section 597(4) of the *Code* does permit a judge when issuing a bench warrant to specify a period before which it should not be executed; however, this option suffers the same difficulty identified with the issuance of summons and not knowing when that period should end at the time of the COVID-19 adjournments. Fourth, there is authority binding on this Court that the *Criminal Code* does not permit a bench warrant to be issued solely to preserve jurisdiction over the accused (*R. v. Peters*, [1972] BCJ. No. 559 (SC), para. 7, upheld at [1973] BCJ. No. 780 (CA). See also *R. v. Sheppard*, 2020 CanLII 43917 (NL PC)).

[51] Public interest warrants pursuant to section 512(1) of the *Code* to compel the attendance of the accused to Court present the same challenges identified above in that their issuance would result in accused being brought back to Court at a time during the pandemic when it was unsafe to do so. Section 511(3) does allow a judge to specify the period before which the warrant shall not be executed, but the same problem identified above with bench warrants and section 597(4) would exist. It is also difficult to comprehend how it would be in the public interest to issue process to compel the appearance of accused to Court when the Court determined it was in the public interest and in the administration of justice for accused not to attend Court. In addition, an application for the Court to exercise its discretion to issue a section 512(1) warrant

requires an examination of the circumstances of each accused and each file. That process would have generated the need for thousands of Court hearings, which at a minimum would have required the participation and assistance of the Crown, court staff and the judiciary. Such a process would not have been consistent with the public safety purposes of NP-19.

[52] It is also important to point out that arrest warrants trigger a substantial interference with an individual's liberty. The person is arrested, removed from their environment, transported and held in-custody until released. To have these deprivations visited on accused persons who did not appear because they were directed not to by the Court would significantly impact the public's confidence in the administration of justice.

[53] Furthermore, with regards to the issuance of process to retain jurisdiction over the accused, it must be remembered that the Court was dealing with thousands of files. Issuing and executing warrants or summons on all of those files during the early stages of the pandemic would have created, rather than reduced, public health risks, and would not have been workable logistically or safety wise for those involved in the administration of justice. Any process or procedure that required the accused to attend Court was contrary to public health and safety recommendations at the time of the COVID-19 adjournments and it was not known when that situation would change.

[54] Also, to address a concern raised by counsel for the accused, issuing process around the time of the COVID-19 adjournments would not have provided a certain Court date for the accused to attend Court. Warrants certainly would not have provided that date. Although summons would have had a returnable date on them, it was not known at that time whether that would in fact be the next Court date due to the uncertainty as to when it would be safe for the Court to end the suspension of regular Court operations including being able to safely open up Circuit Courts.

[55] There was no loss of jurisdiction over the accused by their files being adjourned by the COVID-19 adjournments to a "fix date" without their personal appearance and without issuing any process to retain jurisdiction over them. Rather, jurisdiction over them was maintained by the Court's lawful adjournment of the files to a "fix date" without requiring the accused to attend Court and by recording the adjournments as "due to COVID-19".

Conclusion

[56] The criminal provisions of NP 19 and specifically those in relation to the COVID-19 adjournments were rules of the Court pursuant to section 482 and, since those provisions permitted the accused not to appear personally, section 485(1.1) dictates there was no loss of jurisdiction over them as a result of the COVID-19 adjournments.

[57] Alternatively, the Court had the authority to direct the COVID-19 adjournments by the “doctrine of jurisdiction by necessary implication” to control its process and manage Court operations during the COVID-19 pandemic. Further, the COVID-19 adjournments were lawful as they complied with the *Code* and there was no loss of jurisdiction over the accused by the adjournment of their files to a “fix date” without them being personally present and without process being issued for them.

[58] The COVID-19 adjournments did not result in a loss of jurisdiction over the accused so there is no basis to declare their charges dismissed for want of prosecution pursuant to section 485(3) of the *Code*. Their applications are denied.

The Honourable Associate Chief Judge P. Dohm
Provincial Court of British Columbia

Tab 159

R v Hampton, 2020 ABQB 429 (CanLII)

Source: Court of King's Bench of Alberta
Date: 2020-07-27
File number: 181032418Q1; 190100404Q1
Citation: R v Hampton, 2020 ABQB 429 (CanLII),
<<https://canlii.ca/t/j8vbk>>, retrieved on 2026-03-24

Court of Queen's Bench of Alberta

Citation: R v Hampton, 2020 ABQB 429

Date: 20200727
Dockets: 181032418Q1
190100404Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

Ryan David Hampton

Accused

**Reasons for Decision
of the
Honourable Mr. Justice John T. Henderson**

I. OVERVIEW

[1] Ryan David Hampton (the Accused) applies for an Order confirming that the Court has no jurisdiction to continue with these proceedings. He concedes that the Court had jurisdiction over him for several months, but argues this jurisdiction was lost on August 30, 2019 and was not properly regained. In these circumstances, he argues that in accordance with s 485(3) of the *Criminal Code of Canada*, RSC, c C-46 the proceedings are deemed to have been dismissed for want of prosecution. He asserts that this Court has no jurisdiction to continue with the proceedings.

[2] The Accused was arrested on August 27, 2018 on grounds that he had committed a number of offences including a series of break and enters into dwelling houses, personation of a police officer and use of an imitation firearm. The offences are alleged to have occurred during the period May 2018 to August 2018. Information ending 2418P1 was sworn on August 28, 2018 in relation to those allegations. On the same day, the Accused appeared to speak to bail and was released on judicial interim release on conditions described in a recognizance.

[3] The Accused retained Counsel in relation to the charges described on Information ending 2418P1 and signed an "Appointment of Counsel by Designation" that was filed with the Court pursuant to s 650.01(1) on September 12, 2018. Counsel then appeared for the Accused in Provincial Court on November 1, 2018. At that appearance, after the Crown elected to proceed by Indictment, the Accused, through Counsel, entered an election of trial by Queen's Bench Judge alone and set dates for a preliminary hearing to be held on July 8 to 10, 2019.

[4] On January 10, 2019, the Accused was arrested for possession of and trafficking in identity documents. Those offences were alleged to have been committed on August 27, 2018. The Accused was released on a Promise to Appear on the date of his arrest. The Promise to Appear required the Accused to attend in Provincial Court on February 7, 2019. Information ending 0404P1 was sworn in relation to those charges on January 30, 2019.

[5] On February 7, 2019, the Accused did not appear in Provincial Court as the Promise to Appear required. Instead, Counsel appeared on his behalf and spoke to Information ending 0404P1. The Accused's election was reserved and the matter was put over to join Information ending 2418P1 at the July 8, 2019 preliminary hearing. Because the Accused was not present in the Courtroom and because no Designation of Counsel had been signed by the Accused or filed with the Court in relation to Information ending 0404P1, a warrant was issued to be held until the date of the preliminary hearing.

[6] The Accused appeared with Counsel in Provincial Court on July 8, 2019 in relation to both Informations. He waived his preliminary hearing and consented to committal on all counts on both Informations. On this basis the Provincial Court Judge committed the Accused and directed that he appear in Queen's Bench Appearance Court (QBAC) on August 30, 2019. The warrant to hold that had been issued on February 7, 2019, in relation to Information 0404P1, was vacated on July 8, 2019 because the Accused was personally in attendance in the Courtroom.

[7] Following committal to stand trial at a preliminary hearing, a Provincial Court Judge is required by s 551 to transmit the Information and other relevant documentation to the Clerk of the Court of Queen's Bench. However, in this case, due to an administrative error, the files in relation to both Informations were apparently misplaced and as a result, the matters did not appear on the QBAC list for the return date of August 30, 2019. For this reason, the case was never called and the matter was never spoken to on August 30, 2019. Counsel for the Accused was, however, in the appointed Courtroom ready to make an appearance for the Accused if called upon. The Accused was not present in the Courtroom at that time.

[8] The files in relation to both Informations were ultimately found and the matters were placed on the QBAC list for November 29, 2019. Counsel for the Accused was given notice by email on November 27, 2019 that these matters would be spoken to in QBAC at that time.

[9] Counsel for the Accused appeared in the QBAC Courtroom on November 29, 2019. When the matters were called, Defence Counsel explained to the Court that this was an unusual situation and that the matter had an earlier QBAC date but did not appear on that earlier list due to a mix up. Counsel expressly told the Court that “I can’t make any comments with respect to jurisdiction ... I don’t have any instructions with respect to that”. The Crown explained that there had been an issue with respect to the files having been lost and that Indictments had not yet been prepared. He asked for an adjournment for two weeks so that the Indictments could be prepared. The adjournment was granted.

[10] On December 10, 2019, the Indictments were signed by the assigned Crown Prosecutor and then filed with the Court on December 11, 2019.

[11] The Accused argues that in these circumstances the Court is without jurisdiction to continue these proceedings. For the reasons that follow, I conclude that the Court does have jurisdiction in relation to Indictment ending 2418Q1, but the proceedings that relate to Information ending 0404P1 were deemed to be dismissed for want of prosecution on November 30, 2019 and therefore the Court has no jurisdiction to continue with Indictment 0404Q1, unless the Crown complies with the requirements of s 485.1, which it has not done.

II. JURISDICTION OF THE COURT

[12] The Court can only continue with a criminal proceeding if it has both jurisdiction over the offence and jurisdiction over the accused.

[13] The Accused concedes that jurisdiction over the offence is not an issue in this case. The loss of the Information upon which an accused person is committed to stand trial does *not* result in “loss of jurisdiction over the indictment” preferred in accordance with the committal for trial. This is so where there is independent proof that the accused person had been committed for trial in respect of the charges in the indictment, as the Accused concedes in this case. Furthermore, the failure of a committing justice (in this case the Provincial Court Judge) to transmit the Information to the superior court, in accordance with his duty to do so pursuant to s 551 of the *Criminal Code*, constitutes, at most, a “procedural irregularity”. Section 485(1) applies in respect of the procedural irregularity: E.G. Ewaschuk, *Criminal Pleadings & Practice in Canada*, looseleaf, 2nd ed., vol. 3 (Aurora: Canada Law Book, 2020) (Ewaschuk) at 11:0132; *R v Meng*, 2019 ONCJ 250; and *R v City of Toronto*, 2011 ONCJ 131. The Accused is therefore correct that jurisdiction over the offence is not an issue in this case.

[14] Even though the Court has jurisdiction over the offence, the Defence maintains that the Court does not have jurisdiction over the Accused and that the proceedings have been dismissed for want of prosecution by the operation of s 485(3).

(a) Did the Court have Jurisdiction Over the Accused at One Time?

[15] Any analysis of whether s 485(3) of the *Criminal Code* can result in a proceeding being deemed to be dismissed for want of prosecution must begin with a consideration of whether the jurisdiction of the Court over the accused person was invoked at some point in time.

[16] In *R v Wilson*, 2015 SKCA 58 [Wilson], the Saskatchewan Court of Appeal considered s 485(3) and concluded that before jurisdiction can be “lost” within the meaning of s 485(2), the Court must first have acquired jurisdiction over the Accused. In *Wilson*, the accused was a serving prisoner. An Information was sworn against him in relation to an allegation that he had smuggled marijuana into the penitentiary. Despite the Information being sworn, no process had been issued to compel the accused to appear in Court. More than 3 months later the accused was brought before the Court pursuant to the terms of production order. At that appearance the Court concluded that jurisdiction had been lost for more than 3 months before the granting of the production order and that, in accordance with s 485(3), the proceedings were deemed to be dismissed for want of prosecution.

[17] On appeal, the Saskatchewan Court of Appeal explained that s 470(a) is the starting point for determining whether the Court has jurisdiction over an accused person. That subsection authorizes a Court to try an accused person for an offence if the person “is found, is arrested or is in custody within the territorial jurisdiction of the Court”. The SKCA further explained that the presentation of a sworn Information to a Justice is an administrative act that does give rise to the exercise of jurisdiction over an accused person within the meaning of s 470(a). However, the judicial act of issuing process to compel the accused person to appear in Court does amount to the exercise of jurisdiction over the accused person, as does the accused person attending in court without process having been issued. As a result, because no process was initially issued following the swearing of the Information, the Court had not asserted jurisdiction over Mr. Wilson until the production order that resulted in his first appearance in Court. There was no earlier jurisdiction that could have been lost. Therefore s 485(3) had no application and the proceedings were not deemed to be dismissed. The appeal was allowed and the Court of Appeal reinstated the Information.

[18] In the present case the Court assumed jurisdiction over the Accused in relation to Information 2418P1 when he appeared before a Justice of the Peace and was granted bail. Jurisdiction continued after the bail hearing because the Justice directed the Accused to appear in Provincial Court on a specific date and time. He made this appearance through Counsel by way of Designation. The matter was then put over to the preliminary hearing. Jurisdiction over the Accused was maintained.

[19] With respect to Information 0404P1, the Accused did not appear in Court as required by the Promise to Appear, but Counsel appeared for him and arranged for the preliminary hearing to be held on July 8, 2019. Because no Designation of Counsel was signed and filed in relation to Information ending 0404P1, a warrant to hold was granted. The Court acquired jurisdiction over the Accused at that time.

[20] The Accused appeared at the preliminary hearing and consented to committal on both Informations. The Accused was committed and was directed to appear in QBAC on August 30, 2019. The committal transferred jurisdiction to the Court of Queen’s Bench. Therefore, the Court did have jurisdiction over the Accused as at August 30, 2019.

(b) Did the Court lose Jurisdiction Over the Accused on August 30, 2019?

[21] The Accused arranged for Counsel to appear in QBAC on August 30, 2019 although he was not in the Courtroom personally. He was entitled to appear by Counsel on Information ending 2418P1 because a Designation of Counsel had been filed in relation to that Information. He was required to appear personally in Court in relation to Information ending 0404P1 because no such Designation had been filed in relation to that Information.

[22] Despite the presence of the Accused’s Counsel, neither of the Informations appeared on the QBAC list on August 30, 2019 and neither of the matters were called to be spoken to. The files had apparently been lost in transit between Provincial Court and the Court of Queen’s Bench.

[23] After August 30, 2019, there was nothing that compelled the Accused to appear in any Courtroom at any time to answer to either of the Informations. The Court lost jurisdiction over the Accused in relation to both Informations at that time.

(c) Did the Court Regain Jurisdiction Over the Accused?

[24] The files were ultimately found and the Crown arranged for both Informations to be brought forward to QBAC on November 29, 2019. In accordance with his professional obligations, Counsel for the Accused attended in the Courtroom and advised that there were jurisdictional issues in the case.

[25] The Accused argues that his Counsel had been given very short notice of the need to appear on November 29, 2019 and that this did not give sufficient time for instructions to be given in relation to the jurisdictional issues. He further argues that Counsel’s appearance on November

29, 2019 was an “appearance under protest” and that by advising the Court that there were jurisdictional issues he was not attorning to the jurisdiction of the Court. He therefore argues that nothing that took place on November 29, 2019 resulted in the Court regaining jurisdiction over him.

[26] There are two problems with the Accused’s position on this point. Firstly, at no time during the November 29, 2019 appearance did Counsel advise that he was appearing under protest. Simply advising the Court that there are jurisdictional issues does not amount to an appearance under protest. Secondly, and even more fundamentally, with one exception that is not applicable here, there exists no procedure in criminal law analogous to a conditional appearance in civil litigation. An appearance even under protest in a criminal proceeding will nonetheless constitute attornment to the jurisdiction of the Court unless jurisdiction over the offence never existed: *R v Sinopec Shanghai Engineering Company Ltd*, 2011 ABCA 331 [*Sinopec*], leave to appeal dismissed 2012 CanLII 39728 (SCC); Ewaschuk, at 1:7140; *R v Harnish* (1979), 1979 CanLII 2956 (NS CA), 49 CCC (2d) 190, 38 NSR (2d) 273 (NSCA); *R v Gougeon* (1980), 1980 CanLII 2842 (ON CA), 55 CCC (2d) 218 (Ont CA); and *R v Anderson* (1983), 1983 ABCA 264 (CanLII), 9 CCC (3d) 539, 37 CR (3d) 67 (Alta CA).

[27] The facts in *Sinopec* illustrate the application of this principle. Sinopec Shanghai Engineering Company Limited (SSEC) was a Chinese corporation. It incorporated a Canadian corporation (SSEC Canada) for the purpose of undertaking industrial construction work in Alberta. During the course of that work, an accident occurred that resulted in the deaths of two workers and serious injuries to other workers. Following an investigation into the cause of the accident, proceedings were commenced against both the SSEC and SSEC Canada under the *Occupational Health and Safety Act*, RSA 2000, c O-2.

[28] The Crown purported to serve the summons on both corporations by serving the only employee of SSEC Canada. SSEC retained Alberta Counsel who appeared on 2 occasions in Provincial Court to challenge the validity of the service of the summons upon that corporation. Counsel made it clear on both occasions that he was making only a “conditional appearance” and that he was not attorning to the jurisdiction of the Court. Despite these protestations, the majority of the Court of Appeal agreed with the Summary Conviction Appeal Judge that the mere fact that Counsel appeared in Court for SSEC was sufficient to overcome any shortcomings in the method of service and that by attending in Court there had been an attornment to the jurisdiction of the Court.

[29] The majority in *Sinopec* allowed for only one exception to the general rule that conditional appearances cannot be made in a criminal proceeding. Where the accused challenges the jurisdiction of the Court over the offence a conditional appearance may be made to argue that the Information is invalid, thus depriving the Court of initially acquiring proper jurisdiction over the offence.

[30] The hypothetical example given by the majority in *Sinopec* was of proceedings commenced in Alberta in relation to offences occurring in Saskatchewan. In those circumstances, the Provincial Court of Alberta would have no jurisdiction because its jurisdiction is limited to offences that are committed within the geographical limits of Alberta. In those circumstances, a conditional appearance could be made to challenge the jurisdiction over the offence. However, the exception to the general rule has no application to situations where the lack of jurisdiction over the offence is said to arise due to procedural irregularities, which would in any event be cured by s 485(1) in most cases.

[31] *Sinopec* makes it clear that in a criminal proceeding, an accused person cannot make a conditional appearance, or an appearance under protest, to challenge the jurisdiction of the Court over the accused.

[32] In this case no process or direction of the Court compelled the Accused to appear in Court on November 29, 2019. However, Counsel appeared in the Courtroom after having been advised by the Crown that the matter would be spoken to on the QBAC list that day. The Accused does not

challenge the Court's jurisdiction over the offence. There is nothing to suggest that either of the Informations are invalid. In these circumstances, the Accused was not entitled to make a conditional appearance on November 29, 2019.

[33] The appearance on November 29, 2019 was made on Information ending 2418P1 by Designated Counsel. Where a Designation of Counsel is filed "an appearance by designated counsel is equivalent to the accused's being present, unless the Court orders otherwise": s 650.1(3)(b). As a result, the appearance by Designated Counsel on November 29, 2019 amounted in law to the appearance by the Accused in Court.

[34] The Court's jurisdiction over the accused may be established, or regained once an accused is brought before the Court by any means including the issuance of a summons or a warrant or a voluntary or involuntary appearance, even if the means to secure the attendance are not necessarily in compliance with all procedural requirements: *R v Champion*, 2016 SKCA 125 [*Champion*]; *R v Lindsay*, 2006 BCCA 150 at para 20, leave to appeal to the Supreme Court of Canada dismissed [2011] SCCA No 265; *Wilson*; and *R v Kennedy*, 2019 NBQB 211 at para 10.

[35] In the present case, regardless of how or why the November 29, 2019 appearance was made, Designated Counsel appeared. This appearance resulted in the Court regaining jurisdiction over the Accused in relation to Information ending 2418P1.

[36] However, with respect to Information ending 0404P1, no Designation of Counsel had been filed and the Accused was therefore not permitted to make an appearance by Counsel. His personal appearance in Court was required. Therefore, despite the presence of Counsel purportedly speaking for the Accused, there was no lawful appearance and, in these circumstances, the Court did not regain jurisdiction over the Accused on November 29, 2019 in relation to Information ending 0404P1.

(d) Did s 485(3) Operate to Dismiss for Want of Prosecution?

[37] Pursuant to s 485(3), where jurisdiction over an accused has been lost and not regained, the proceedings are "deemed to be dismissed for want of prosecution" unless a summons or a warrant is issued within 3 months after the loss of jurisdiction.

(i) Information Ending 2418P1

[38] Designated Counsel appeared before the Court on behalf of the Accused on November 29, 2019 on Information ending 2418P1. This was within 3 months from August 30, 2019, the date on which the Court lost jurisdiction over the Accused. The Court regained jurisdiction over the Accused on November 29, 2019. As a result, s 485(3) is not applicable. The proceedings under Information ending 2418P1 were not deemed to be dismissed for want of prosecution.

(ii) Information Ending 0404P1

[39] No lawful appearance was made by the Accused on Information ending 0404P1 on November 29, 2019 because no Designation of Counsel had been filed in relation to that Information. Jurisdiction could have been regained on November 29, 2019 through the issuance of a summons or a warrant in the public interest. The Crown did not seek this remedy. As a result, no process was issued on November 29, 2019 and by the time of the next appearance 2 weeks later, the 3-month time limitation in s 485(2) had expired and it was no longer possible to issue process against the Accused.

[40] The Crown argues that even in these circumstances the proceedings in relation to 0404P1 were not dismissed for want of prosecution because s 485(3) is not applicable to proceedings before superior courts. In support of this position the Crown refers to older case law that discuss an earlier version of the *Criminal Code*. These authorities are not applicable to the interpretation of the current s 485. As is noted by Ewaschuk at 1:7010: "Cases decided prior to 1986 should be viewed circumspectly in view of the amendment to s. 485 in 1985".

[41] By its express terms, s 485 applies to “any court, judge, provincial court judge or justice”. I conclude that s 485 applies to proceedings in all courts including the Court of Queen’s Bench of Alberta.

[42] The Crown also argues that jurisdiction over the Accused was regained when the Crown prepared, signed and filed the Indictment ending 0404Q1 on December 10, 2019. This argument overstates the significance of signing and filing an Indictment with the Court. The filing of an Indictment by an agent of the Attorney General is a purely administrative act. Despite being filed, the Indictment is not preferred “until it is lodged with the trial Court at the opening of the accused’s trial, with the Court ready to proceed with the trial”: *R v Chabot*, [1980] 2 SCR 985, 1980 CanLII 54 and *R v Philbin* (1977), 1977 ALTASCAD 242 (CanLII), 6 AR 506, 37 CCC (2d) 528 at paras 16 to 17. The Indictment becomes a new jurisdictional starting point at that time.

[43] In the present case, the filing of Indictment ending 0404Q1 had no jurisdictional consequence and certainly did not permit the Court to regain jurisdiction over the Accused because 10 days prior to the filing of the Indictment the proceedings were deemed to have been dismissed for want of prosecution pursuant to s 485(3).

[44] While not raised by the Crown, I have considered the *dicta* of the Saskatchewan Court of Appeal in *Champion* at paras 14 to 15, which could possibly be read to suggest that where the Court has lost jurisdiction over the accused and the proceedings are deemed to be dismissed pursuant to s 485(3), jurisdiction may be regained if the accused is later brought before the Court. I do not believe that *Champion* should be interpreted to support this proposition for a number of reasons: first, in *Champion* the Provincial Court had issued a warrant within the 3 months provided for in s 485(2) and the Court of Appeal concluded that jurisdiction had been regained at that time; second, *Champion* was applying the earlier decision of the Saskatchewan Court of Appeal in *Wilson* which does not support the proposition that jurisdiction can be regained after the proceedings have been deemed dismissed for want of prosecution; and third, such an interpretation would be inconsistent with the clear intention of s 485(3) that proceedings are “deemed” to be dismissed where jurisdiction over the accused is not regained within the 3 months prescribed by s 485(2). As a result, I conclude that *Champion* does not assist the Crown in relation to Information ending 0404P1.

[45] I conclude that the proceedings under Information ending 0404P1 were deemed dismissed for want of prosecution on November 30, 2019. The proceedings are at an end and were not properly recommenced through the filing of the Indictment ending 0404Q1. The proceedings in relation to the charges described in Information ending 0404P1 can only be recommenced if the Crown complies with s 485.1 and first obtains the consent of the Attorney General or the Deputy Attorney General. This has not taken place.

III. CONCLUSION

[46] The proceedings under Information ending 0404P1 are deemed to be dismissed for want of prosecution pursuant to s 485(3) of the *Criminal Code* and the Court has no jurisdiction in relation to that Information unless the Crown recommences the proceedings by complying with the provisions of s 485.1

[47] The proceedings under Information ending 2418P1 were not dismissed for want of prosecution and the Crown may proceed in relation to those offences in accordance with the Indictment that has now been filed.

Heard on the 14th day of July, 2020.

Dated at the City of Edmonton, Alberta this 27th day of July, 2020.

John T. Henderson
J.C.Q.B.A.

Appearances:

James Mahon
for the Crown

Dan Nagase
for the Accused

Tab 160

R. v. Denny, 2020 NSPC 14 (CanLII)

Source: Provincial Court of Nova Scotia
 Date: 2020-04-06
 File number: 8375056
 Citation: R. v. Denny, 2020 NSPC 14 (CanLII),
<https://canlii.ca/t/j6bzh>, retrieved on 2026-03-24

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v Denny*, 2020 NSPC 14

Date: 2020-04-06

Docket: 8375056

Registry: Pictou

Between:

Her Majesty the Queen

v

Eric Joseph Denny

CORRECTED DECISION TO ADJOURN

[The text of the original decision has been corrected according to the attached erratum dated April 7, 2020].

Judge:	The Honourable Judge Del W Atwood
Heard:	2020: 6 April in Pictou, Nova Scotia
Charge:	Paragraph 267(b) of the <i>Criminal Code of Canada</i>
Counsel:	Jody McNeill for the Nova Scotia Public Prosecution Service Jade Pictou for Eric Joseph Denny

By the Court:

[1] This sentencing matter along with a number of other trial, sentencing and arraignment matters are being called today and are being adjourned in accordance with the current directive of the Chief Judge: COVID-19: NOTICE TO COUNSEL AND THE PUBLIC RE: MATTERS IN THE PROVINCIAL COURT AND YOUTH JUSTICE COURT, accessed online at

https://courts.ns.ca/News_of_Courts/documents/NSPC_Consolidated_Directive_COVID19_03_31_20.pdf

[2] Unless ordered otherwise, all matters called today will be adjourned for scheduling to 15 June 2020: adult matters will be called at 9h30; youth justice matters will be called at 13h30.

[3] None of the persons with matters before the court is present. Most have counsel. Some do not.

[4] For those with counsel (and I would note that we have received § 650.01 designations where required) the jurisdiction of the court over the person is preserved, and nothing further need be done.

[5] For those persons not present, without counsel, but with in-order, confirmed process on record, I decline to issue bench warrants or new process at this time; in due course, a notification will be posted on courts.ns.ca with a list of adjourned dates.

[6] Following up on this last point, I wish to take this opportunity to address two items of electronic correspondence which the court received last week from justice-system participants which raised concerns with directives issued from the court since the declaration of the state of emergency on 22 March 2020 (the declaration may be accessed online at <https://novascotia.ca/coronavirus/Declaration-of-Provincial-State-of-Emergency-by-Minister-Porter-Signed-March-22-2020.pdf>).

[7] Questions and concerns of this nature should be raised most certainly by justice stakeholders, the public and media over the responses undertaken by the various branches of government to COVID-19. The need for transparency and accountability does not end when a state of emergency begins. In fact, the necessity of accountability is elevated in challenging times such as these, in order to surveil against overreach or other irregularity.

[8] The concerns raised in this case have to do with directives that seek to move cases away from the court over the next two months, until the evolving nature of the public-health risk will have become clearer and the level of risk attenuated.

[9] The directives in question had to get issued quickly, and this necessarily limited the scope of consultation.

[10] It is clear that, in diverting cases from court, it was not the intent of the directives to turn justice centres into antiseptic enclosures. Such a goal would be wholly unattainable.

[11] Rather, the purpose, as set out in the various judicial directives, was primarily to protect public health. This was based on the recognition that:

- the court must adapt its operations to current public-health guidance to limit public gatherings;
- justice centres—much as other government and commercial buildings that are now either closed or excluded from walk-in services—are gathering places for large numbers of members of the public, and so are situated as potential sites for infection transmission, unless strict controls are imposed;
- court-operations policies now in place have reduced the numbers of staff on site at our justice centres, which has made it necessary to regulate daily case loads;
- many Nova Scotians are currently subject to self-isolation and self-quarantine requirements set out in the order of the Medical Officer of Health issued initially 25 March 2020, updated 2 April 2020, accessed online at

<https://novascotia.ca/coronavirus/COVID-19-Global-Order-2020-04-02.PDF>; it would not be possible—and might not be legal—for the court to try to identify those persons, served with compulsory process, who might be subject to the requirements of the order; as such, it is safer and more efficient to divert *all* persons with cases away from court temporarily, except for those deemed essential-to-mission;

- finally, and most significantly, many persons who come before the court are in high-risk-of-infection categories because of underlying conditions; their health and safety must be protected, and that is accomplished best by allowing them to shelter in place to the extent they are able.

[12] This new operational paradigm has placed substantial burdens on all justice-system participants: counsel, policing services, corrections, victim services, witnesses, and persons who face charges.

[13] Particularly affected are our court staffs and sheriff services. We are now working under what has been described as an essential-services model. I would expand that by observing that staff and sheriffs are attaining an exceptional-service level, as they bring innovation, ingenuity, flexibility and resilience in fulfilling their administration-of-justice duties throughout these challenging times.

[14] One of the proposals that has been made—to attempt to reduce the inevitable catchup effect in a few-months’ time, once things will have stabilised—is to have the court issue so-called warrants-to-hold in order to preserve jurisdiction over those persons whose cases are called, but who have stayed home in accordance with the various court directives and public-health orders. This practice has been adopted in a number of judicial centres in Canada.

[15] Regrettably, I am unable to go along with that sort of procedure.

[16] First, I have held in the past that this court, as a statutory court, is unable to issue a bench warrant and then place an administrative or judicial “hold” on it. Section 597 of the *Code*, which provides for the issuance of warrants in default of appearance, does not admit

of holds. Similarly, § 512(2). An order comes into force on the date it is made, unless there is a specific statutory provision otherwise—as in, say, ¶ 732.2(1)(b) & (c). Consider section 719, which states that sentences commence when imposed; this is merely a codification of the common law that applies to all court orders.

[17] Second, although § 511(3) and 597(4) of the *Code* (which, while falling under Part XX of the *Code*, is applicable to summary proceedings in virtue of §795) admit of an issued bench warrant including a condition that it not be executed before a specific date, it is my view that the issuance of any warrant on default of appearance for a person who has been directed—not just induced, but directed officially—not to attend court would be illegal.

Recall what was held in *R v Antic*, 2017 SCC 27 at ¶ 39: any statutory provision—even one that might fall outside the compel-appearance provisions of Part XVI of the *Code*—that allows for the pre-trial detention of an accused person triggers the reasonable-bail protections of ¶ 11(e) of the *Charter*. See also *R v Myers*, 2019 SCC 18 at ¶ 67. In my view, the issuance of a default-of-appearance warrant for the arrest of a person who has been directed, officially, not to attend court would not comport with ¶ 11(e) *Charter* values, particularly where the *Code* admits of a non-custodial-process cure in § 485(2):

(2) Where jurisdiction over an accused or a defendant is lost and has not been regained, a court, judge, provincial court judge or justice may, within three months after the loss of jurisdiction, issue a summons, or if it or he considers it necessary in the public interest, a warrant for the arrest of the accused or defendant.

[18] To be sure, by my not issuing “hold” or delayed-enforcement warrants, there will likely be multiple loss-of-jurisdiction-over-person occurrences (as comprehended in *R v Kranenberg*, 1980 CanLII 179 (SCC), [1980] 1 SCR 1053) in cases involving persons not represented by counsel, as an adjournment effected without the accused person or counsel or an agent present is not authorized statutorily: see § 803(1) regarding summary-proceedings adjournments; and see § 571, 606(3), 645(1)-(2), 669.1(2), which must be read in light of the requirement that an accused person be present—either in person, or by a statutorily approved alternate means—as things proceed, in accordance with § 650 of the *Code*.

[19] A loss of jurisdiction over the person can be cured by the person attorning to the jurisdiction of the court voluntarily, which might happen after reading an online notice; or it might happen if the person is brought into court in custody on some other matter.

[20] Unfortunately, website or letter mail notices to come to court are not process as recognized in the *Code*.

[21] When jurisdiction over the person is lost, the burden reverts to the state to get it reacquired.

[22] This issuance of new process under § 485(2)—and there is likely to be a surge of these—will place demands on policing services, to be sure. However, I would observe two things.

[23] First, no process need be issued or served now, while the state of emergency remains in effect. I should have made this clear in some of the cases I dealt with a couple weeks ago, and I apologise for this oversight.

[24] Second, no process need be issued or served at all. I say this, having had the opportunity last week to have participated in a conference call among international jurists who are dealing—some, on a much larger scale—with the same challenges the justice system in Nova Scotia is facing now. In many foreign jurisdictions, prosecuting and policing authorities are making hard decisions about which cases must continue and which might, in the public interest, be let go.

[25] Further, this hiatus will allow prosecutors ample time to collaborate with defence counsel to attempt to resolve cases that are building up.

[26] These are police-operations and prosecution-operations discretionary decisions to be made by those executive-branch authorities in the exercise of their lawful discretion.

[27] I hope that this provides some clarity to the directions the court has undertaken over the past three weeks. It has been a steep learning curve, but the guidance of the Chief

Judge's office and the executive office of the judiciary has been invaluable, and the cooperation of our justice-system collaborators has been vital.

JPC

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v Denny*, 2020 NSPC 14

Date: 2020-04-06

Docket: 8375056

Registry: Pictou

Between:

Her Majesty the Queen

v

Eric Joseph Denny

ERRATA SHEET

The text of the original judgment issued on 6 April 2020 is corrected on 7 April 2020 with the following corrections made:

¶ [11], fourth bullet, clause corrected to read: “all persons with cases”.

¶ [16] add to the fourth line the sentence: “Similarly § 512(2)”.

¶ [17] add to the first line “511(3)” and in the third line to correct “to including” to “including”.

¶ [17] add to the seventh line the complete citation for *Antic*.

¶ [17] at to tenth line “See also *R v Myers*, [2019 SCC 18](#) at ¶ 67.”

Tab 161



Public Prosecution
Service of Canada

Service des poursuites
pénales du Canada

Public Prosecution Service of Canada

DESKBOOK



Cette publication est également disponible en français sous le titre :
Guide du Service des poursuites pénales du Canada

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This document is available on the PPSC website at the following address:
www.ppsc-sppc.gc.ca

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PREFACE

Prosecutors possess significant discretion in the criminal justice system. To ensure public confidence in its administration, prosecutorial discretion must be exercised in a manner that is objective, fair, transparent and consistent.

The *Public Prosecution Service of Canada Deskbook (PPSC Deskbook)* is a means of achieving this goal. It is a compilation of the directives and guidelines that provide instruction and guidance to federal prosecutors, whether employees of the PPSC or private-sector agents, in the exercise of their prosecutorial discretion. It is therefore essential that the Deskbook be consulted, understood, and adhered to by federal prosecutors.

In applying the Deskbook to the case before them, federal prosecutors make decisions without the fear of political interference or improper or undue influence. They are, however, accountable to the Director of Public Prosecutions and, through the Director, to the Attorney General, Parliament and ultimately, the Canadian public for the way in which they have exercised this important responsibility.

The Deskbook is a permanent work in progress: all federal prosecutors should be conscious of the need to suggest changes where policies are unclear or outdated. PPSC managers are obliged to monitor application of the policies to ensure they are properly applied.

The *PPSC Deskbook* is divided into two parts: Part 1 contains directives of the Attorney General of Canada and guidelines of the Director of Public Prosecutions; Part 2 contains confidential legal memoranda.

Part 1 — Directives and Guidelines. Section 10(2) of the *Director of Public Prosecutions Act* (DPP Act) empowers the Attorney General to issue directives respecting the initiation or conduct of prosecutions generally.

Section 3(3)(c) of the DPP Act provides the Director of Public Prosecutions with a general power to issue guidelines respecting the conduct of prosecutions generally.

As neither the power to issue directives under section 10(2) nor guidelines under section 3(3)(c) extend to *Canada Elections Act* prosecutions, guidelines in respect of those prosecutions are issued by the Director under section 3(8) of the DPP Act.

Part 2 — Confidential Legal Memoranda. These memoranda are issued by the Deputy Directors of Public prosecution and supplement the directives and guidelines by providing legal advice to PPSC counsel. The memoranda are privileged and therefore not made available to the public.

The publication of the *PPSC Deskbook* is the culmination of years of review and consultation. For the first time in nearly a decade, the policy guidance directing federal prosecutors has been completely updated to reflect changes in legislation and in practice. This effort represents a significant step forward, both in respect of the prosecution function specifically and Canada's criminal justice system generally. I would like to thank all those involved in the preparation of this important document. I would like to offer a special word of thanks to Debbie Johnston for her tireless efforts in leading this project and seeing it through to completion.

Brian Saunders, Q.C.
Director of Public Prosecutions

PPSC DESKBOOK

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OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

1.1 RELATIONSHIP BETWEEN THE ATTORNEY GENERAL AND THE DIRECTOR OF PUBLIC PROSECUTIONS

**DIRECTIVE OF THE ATTORNEY GENERAL ISSUED
UNDER SECTION 10(2) OF THE *DIRECTOR OF PUBLIC
PROSECUTIONS ACT***

March 1, 2014

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1. OVERVIEW OF THE RELATIONSHIP BETWEEN THE ATTORNEY GENERAL AND THE DIRECTOR OF PUBLIC PROSECUTIONS

1.1. Creation of the Office of the Director of Public Prosecutions

The [*Director of Public Prosecutions Act*](#)¹ (DPP Act or the Act) established the Office of the Director of Public Prosecutions (ODPP). The DPP Act was designed to strengthen the twin goals of institutional independence and ultimate ministerial accountability.² On one hand, it was intended to enhance integrity in government by statutorily ensuring independence of the prosecution decision-making function from inappropriate political control, direction and influence. It enshrines in legislation the quasi-constitutional principle of independence of the prosecution function from the partisan political process. In this sense, it evokes the oft-quoted 1924 aphorism of Lord Chief Justice Hewart that

¹ [*Director of Public Prosecutions Act*](#), SC 2006, c 9 [DPP Act].

² Government of Canada, *Federal Accountability Act* and Action Plan, "[Creating a Director of Public Prosecutions](#)", online: Treasury Board of Canada Secretariat. As the Minister of Justice put it, in speaking to the Senate on the bill that ultimately became the DPP Act, *supra* note 1: "Mr. Chairman, the government believes that the provisions of this bill strike an appropriate balance between independence and accountability in federal prosecutions. It ensures independence from unwanted control, direction and influence. At the same time, it ensures a substantial measure of accountability for the exercise of prosecutorial discretion." Testimony of the Honourable Vic Toews, Minister of Justice before the Senate Standing Committee on Legal and Constitutional Affairs, 29 June, 2006 [Testimony of the Honourable Vic Toews].

“Justice should not only be done but should manifestly and undoubtedly be seen to be done.”³

At the same time, the DPP Act does not speak of absolute ODPP independence. Because the Attorney General is fully accountable to Parliament for the prosecution function, the Act ensures a measure of oversight for the exercise of prosecutorial discretion.⁴ First, [s. 3\(3\)](#), which outlines the Director of Public Prosecutions’ (DPP) duties and functions, provides that the DPP acts “under and on behalf of the Attorney General.” Second, the Attorney General may issue directives in respect of specific prosecutions⁵ or in respect of prosecutions more generally.⁶ Third, as discussed below, [ss. 13-15](#) of the Act require the DPP to notify the Attorney General about important questions of general interest, and give the Attorney General the power to intervene in proceedings or to assume conduct of prosecutions. In turn, the DPP Act counterbalances the Attorney General’s oversight function and safeguards DPP independence from the Attorney General by requiring that the issuance of [s. 10](#) directives and assuming conduct of a prosecution under [s. 15](#) be in writing and made public.

1.2. Role of the Attorney General

The DPP Act has not changed the Attorney General’s historical role as chief law officer of the Crown. The Attorney General retains jurisdiction to prosecute all non-[Criminal Code](#) federal offences (except those under the [Canada Elections Act](#)⁷) in the provinces and authority to prosecute both *Criminal Code* and non-*Criminal Code* offences in the three territories. Moreover, [ss. 2\(b.1\)-\(g\)](#) of the definition of “Attorney General” in the *Criminal Code* give concurrent jurisdiction to the Attorney General of Canada to prosecute certain *Criminal Code* offences including terrorism offences, organized crime offences, fraud, insider trading, and stock market fraud. However, under [s. 3\(3\) of the Act](#), these powers have been delegated to the DPP, who exercises these general powers “under and on behalf of the Attorney General” independently, subject to directives issued by the Attorney General under [s. 10](#), and subject to the Attorney General’s powers to intervene in⁸ or assume conduct of⁹ criminal proceedings. Because the Attorney General may also defend the constitutionality of federal legislation, the Attorney General may exercise the powers to take charge of a prosecution or intervene and thereby become a

³ *R v Sussex Justices Ex parte McCarthy*, 1924 1 KB 256, 1923 All ER 233; for a thorough consideration of this principle, see Philip C. Stenning, “Prosecutions, Politics and the Public Interest: Some Recent Developments in the United Kingdom, Canada and Elsewhere” (2010) 55 CLQ 449 [P. C. Stenning]; see also Hon. Marc Rosenberg, “The Attorney General and the Administration of Criminal Justice” (2009) 34 Queen’s LJ 813-862 [Hon. M. Rosenberg].

⁴ Testimony of the Honourable Vic Toews, *supra* note 2.

⁵ DPP Act, *supra* note 1, [s 10\(1\)](#).

⁶ *Ibid*, [s 10\(2\)](#).

⁷ See DPP Act, *supra* note 1, [s 3\(8\)](#) which specifies that the DPP initiates and conducts, on behalf of the Crown, prosecutions with respect to offences under the [Canada Elections Act](#).

⁸ DPP Act, *ibid*, [s 14](#).

⁹ *Ibid*, [s 15](#).

party to proceedings as appellant, respondent or, in the case of provincial [Criminal Code](#) prosecutions, intervener where the constitutionality of federal legislation is challenged.

It is a core constitutional tenet that the Attorney General, and by extension the DPP, are bound by the principle of independence in respect of the prosecution function.¹⁰ As the Supreme Court stated in [Law Society of Alberta v Krieger](#):¹¹ “It is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions.” However, it is quite appropriate for the Attorney General to consult with Cabinet colleagues before exercising his or her powers under the DPP Act in respect of any criminal proceedings. Indeed, sometimes it will be important to do so in order to be cognisant of pan-government perspectives. The Attorney General of England, Sir Hartley Shawcross (later Lord Shawcross) in 1951 best described the proper relationship between the Attorney General and Cabinet colleagues (and now, likewise, between the DPP, his or her designated agents and the departments that administer the statutes):

I think the true doctrine is that it is the duty of an Attorney-General, in deciding whether or not to authorize the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other considerations affecting public policy.

In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the Government; and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations, which might affect his own decision, and does not consist, and must not consist in telling him what that decision ought to be. The responsibility for the eventual decision rests with the Attorney-General, and he is not to be put, and is not put, under pressure by his colleagues in the matter.

Nor, of course, can the Attorney-General shift his responsibility for making the decision on to the shoulders of his colleagues. If political considerations which, in the broad sense that I have indicated, affect government in the abstract arise, it is the Attorney-General, applying his judicial mind, who has to be the sole judge of those considerations.¹²

¹⁰ Hon. M. Rosenberg, *supra* note 3 at para 16.

¹¹ [Law Society of Alberta v Krieger](#), 2002 SCC 65, [2002] 3 SCR 372 [Krieger]; see also Binnie J. in [R v Regan](#), 2002 SCC 12, [2002] 1 SCR 297 at paras 157-58 (dissenting on another point) [Regan] and [Miazga v Kvello Estate](#), 2009 SCC 51, [2009] 3 SCR 339 at para 46.

¹² UK, H.C. Debates, vol 483, cols 683-84, (29 January 1951).

Since then, federal and provincial Attorneys General in Canada have adopted this statement, often referred to as the “Shawcross principle”.¹³ Similarly, the judiciary has supported these principles,¹⁴ as have leading authorities on the role of the Attorney General.¹⁵

1.3. Role of the Director of Public Prosecutions

The DPP has the power to make binding and final decisions to prosecute offences under federal statutes, stay proceedings or launch an appeal, unless otherwise instructed by the Attorney General under [s. 10\(1\)](#). The notion of DPP independence relates to the prosecutorial decision-making process – and all steps incidental to it.¹⁶ The DPP is regarded as an independent officer, exercising quasi-judicial responsibilities.¹⁷ [Section 3\(3\)](#) of the Act enumerates the duties and functions that are delegated to the DPP, which include the authority to:

- (a) initiate and conduct federal prosecutions subject to the Attorney General’s [s. 15](#) power;
- (b) intervene in proceedings that raise a question of public interest that may affect the conduct of prosecutions or related investigations, subject to the Attorney General’s [s. 14](#) power;

¹³ In 1978, the Attorney General of Canada, the Hon. Ron Basford referred to the Shawcross principle while explaining to the House of Commons a decision concerning a prosecution under the [Official Secrets Act](#), Canada, HC Debates, vol 4 at 3881 (17 March 1978). One year later, Senator Jacques Flynn, then Attorney General of Canada, affirmed the Shawcross principle with respect to a proposed prosecution under the [Combines Investigation Act](#). The statement was attached as an appendix to Canada, Senate Debates, 28 Elizabeth II at 126 (18 October 1979). Similar views have been expressed by the Hon. Mark MacGuigan in 1983: “The Position of the Attorney General of Canada on Certain Recommendations of the McDonald Commission” (unpublished, August 1983) at 6-9, the Hon. John Crosbie in 1988 (Canada, H.C. Debates, at 18437-38 (17 August 1988) and, in Ontario, by the Hon. Roy McMurtry in 1978 (Ontario Legislature Debates (23 December 1978) and the Hon. Ian Scott in 1987: “The Role of the Attorney General and the Charter”, (1986-87) 29 Crim LQ 187).

¹⁴ *R v Smythe* (1971), 3 CCC (2d) 98 at 110 and 112, aff’d at 122, further aff’d by the Supreme Court of Canada at 3 CCC (2d) 366 esp. at 370; *Gouriet v Union of Post Office Workers*, [1977] 3 All ER 70 (HL); *Re Saikaly and the Queen* (1979), 48 CCC (2d) 192 at 196 (Ont CA); *Re M and The Queen* (1983), 1 CCC (3d) 465 at 468 (ON HC); *R v Harrigan and Graham* (1976), 33 CRNS 60 at 69 (Ont CA); *The Royal Commission on Civil Rights in the Province of Ontario* (Chief Justice McRuer, Chairman) (1968) Report No 1 at 933-4; [Commission of Inquiry into Certain Activities of the Royal Canadian Mounted Police](#) (Mr. Justice D.C. McDonald, Chairman) (1981) at 509.

¹⁵ See generally Hon. M. Rosenberg, *supra* note 3; P. C. Stenning, *supra* note 3; K. Roach “Prosecutorial Independence and Accountability in Terrorism Prosecutions”, 2010 55 CLQ 486 at 496-497 in the context of terrorism prosecutions; D. Stuart “Prosecutorial Accountability in Canada” in P. C. Stenning, ed. “Accountability for Criminal Justice: Selected Essays (Toronto: University of Toronto Press, 1995) at 353; See also [Royal Commission on the Donald Marshall, Jr. Prosecution](#), vol. V [Marshall Inquiry]; “Walking the Tightrope of Justice: An Examination of the Office of the Attorney General”, a series of opinion papers prepared by J.L.J. Edwards (1989) esp. at 128-146; Law Reform Commission of Canada, Working Paper 62, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor* (1990), esp. 8-14.

¹⁶ See the PPSC Deskbook guideline [“2.1 Independence and Accountability in Decision-Making”](#).

¹⁷ See *R v Logiacco* (1984), 11 CCC (3d) 374 (Ont CA).

- (c) issue general guidelines to prosecutors;¹⁸
- (d) advise law enforcement agencies on matters related to prosecutions generally and particular investigations that may lead to a prosecution;
- (e) communicate with the media and the public on prosecution matters; and
- (f) exercise the Attorney General's authority in respect of private prosecutions.

[Section 3\(3\)\(g\)](#) leaves open the possibility that the Attorney General may delegate additional functions to the DPP.¹⁹ It provides that the DPP may exercise any other power, duty or function assigned by the Attorney General that is compatible with the Office of the DPP. In relation to the matters set out in s. 3(3), the DPP is accountable to the Attorney General and is the Deputy Attorney General of Canada for the purpose of performing these duties and functions.²⁰

In Canada, the investigation and prosecution functions are separate and independent. The courts have affirmed this principle repeatedly.²¹ Indeed, several commissions of inquiry into wrongful convictions, most notably the [Royal Commission on the Donald Marshall Prosecution](#),²² have insisted that a clear line of demarcation be drawn between the two functions. The DPP Act upholds this principle and does not confer on the DPP any investigative powers.²³ By the same token, the Attorney General cannot direct the DPP to work with the RCMP on a specific investigation. Police are independent from political control and from control by either the Attorney General or the DPP when investigating

¹⁸ [Section 3\(5\)](#) exempts from the requirements of the [Statutory Instruments Act](#) any guidelines the DPP issues under [s 3\(3\)\(c\)](#). As such, these guidelines need not be approved by a Parliamentary committee.

¹⁹ For example, the [Attorney General assigned to the DPP](#) the responsibility of developing a set of best practices for prosecuting fraud involving governments (21 February 2007), the power, duty or function to conduct prosecutions the Attorney General of Canada is authorized to undertake under agreements with the provincial Attorneys General and to conduct, on the authority of provincial Attorneys General, prosecutions and related proceedings, including appeals, of charges that fall under the exclusive prosecutorial authority of the province (i.e., major-minor agreements) (21 February 2007), and the responsibility of administering the National Fine Recovery Program including initiating and conducting proceedings to enforce the collection of outstanding federal fines (20 September 2007). Other examples of the types of other duties or functions that could be assigned include special inquiries into prosecution-related issues, issue-driven forums with provincial, territorial or international prosecution agencies regarding prosecution-related issues, or reports on the prosecutorial impacts of policy initiatives.

²⁰ See DPP Act, *supra* note 1, [s 3\(4\)](#). Note, however, that where the Attorney General intervenes in a proceeding under [s 14](#) or assumes conduct of a federal prosecution under [s 15](#), the Deputy Minister of Justice assumes the role of Deputy Attorney General in respect of those matters.

²¹ See, notably, the Supreme Court of Canada decisions in [Krieger](#), *supra* note 11; [Regan](#), *supra* note 11; and [R v Beaudry](#), 2007 SCC 5, [2007] 1 SCR 190.

²² [Marshall Inquiry](#), *supra* note 15.

²³ This separation of investigation and prosecution functions is reinforced by [s 3\(3\)\(d\)](#) which states that the DPP "advises law enforcement agencies or investigative bodies in respect of prosecutions generally or in respect of a particular investigation that may lead to a prosecution".

crime.²⁴ In the same manner, the DPP is independent from police in the prosecution function. No investigative agency or investigating body within a government department may instruct the prosecution to pursue or discontinue a particular prosecution or to undertake a specific appeal. These decisions rest solely with the DPP (and his or her delegated agent), subject to the Attorney General's powers under [ss. 10 and 15](#). Although the investigation and prosecution functions are distinct, there is nevertheless a great deal of cooperation and consultation between police, investigative agencies and prosecutors even at the investigative stage.²⁵

1.4. Guiding principles

Given their interconnected responsibilities, an effective relationship between the Attorney General and the DPP is of the utmost importance in ensuring that both can fulfill their important public duties while achieving the legislative goal of an independent, apolitical, and accountable prosecution service. The Attorney General is directly accountable to Parliament, while the DPP is indirectly accountable to Parliament. The DPP is required to report to Parliament annually on its activities through the Attorney General and the DPP may be called to appear before parliamentary committees. Thus, it is crucial that they work in a consultative way so their decisions are fully informed. To ensure prosecutorial independence and accountability, their relationship should be premised on the following principles:

1. Respect for the independence of the prosecutorial function - By virtue of [s. 3\(3\)\(c\)](#) and [s. 10\(2\)](#), the Attorney General and the DPP are jointly responsible for establishing general prosecution policy, but the DPP is responsible for the exercises of prosecutorial discretion pursuant to that policy (subject to the Attorney General's residual powers under [ss. 10 and 15](#)).
2. Notification on matters of significant public interest - The vast majority of prosecutorial decision-making and policy development requires no prior notice. However, the DPP should inform the Attorney General when the exercise of his or her duties raises issues that pertain to the Attorney General's functions. Notification in this regard comes within the DPP's duty to inform under [s. 13](#) of the DPP Act,²⁶ which is designed to assist the Attorney General in deciding whether or not to issue a directive under [s. 10\(1\)](#), to exercise the authority under [s. 14](#) to intervene in first instance or on appeal, or under [s. 15](#) to assume carriage of a prosecution. Additionally, quite apart from the aforementioned DPP Act powers, the Attorney General must be adequately briefed on prosecutorial decisions that

²⁴ In [R v Campbell, \[1999\] 2 SCR 956](#), the Supreme Court of Canada affirmed that police officers are not government functionaries or agents of the Crown in performing law enforcement duties and cannot be directed by the executive to investigate or not investigate someone.

²⁵ See the PPSC Deskbook directive "[1.3 Consultation within Government](#)" and the PPSC Deskbook guideline "[2.7 Relationship between Crown Counsel and Investigative Agencies](#)".

²⁶ Consultation between the PPSC and the Department of Justice generally is dealt with in the PPSC Deskbook directive "[1.3 Consultation within Government](#)", *ibid*; see also the PPSC Deskbook directive "[1.2 Duty to Inform the Attorney General under Section 13 of the Director of Public Prosecutions Act](#)".

are expected to generate significant public interest in order to report to Parliament on the manner in which the prosecution function is exercised in his or her name.²⁷

3. In the same vein, the Attorney General consults with the DPP on policy, legislative or litigation matters which may have a significant impact on prosecutions or police powers. It is understood that consultations with prosecutors from both provincial and federal prosecution services can provide crucial practical perspective on criminal law policy issues.
4. Periodic meetings and discussions -The Attorney General and the DPP are to meet on a regular basis to discuss prosecution-related issues. It is particularly important that this occur with respect to issues which may be the subject of policy directives²⁸ that have a broad operational impact. The DPP Act does not specify a frequency of meetings between the DPP and the Attorney General.²⁹ This allows for flexibility to suit the particular working relationship of successive DPPs and the Attorneys General.

2. POWERS, DUTIES AND FUNCTIONS UNDER THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

2.1. The exercise of the Director's duties and functions

[Section 3\(3\)](#) of the DPP Act sets out most of the duties and functions of the DPP.³⁰ It provides that those duties and functions will be performed “under and on behalf of” the Attorney General, without further defining the words “under and on behalf of”. What this connotes is that the DPP is independent from influence in the decision-making process related to the prosecution function. However, the DPP has only the powers, duties and functions conferred by statute, he or she is accountable to the Attorney General, and, in turn, the Attorney General remains answerable to Parliament for the DPP's activities.

2.2. The power of the Attorney General to issue directives

Prosecutorial decision-making must take place independently of the interests of the government of the day.³¹ The historical practice of successive Attorneys General of

²⁷ The DPP does not brief the Attorney General on [Canada Elections Act](#) matters in light of [s 3\(8\)](#) of the DDP Act, *supra* note 1 which specifies that the DPP initiates and conducts, on behalf of the Crown, prosecutions with respect to offences under the [Canada Elections Act](#).

²⁸ In fact, [s 10\(2\)](#) of the DPP Act, *supra* note 1 requires the Attorney General to consult the DPP prior to issuing directives respecting the initiation or conduct of prosecutions generally.

²⁹ By contrast, [Public Prosecutions Act](#), SNS 1990, c 21, s 6A requires the Nova Scotia DPP and the Attorney General to meet minimally 12 times per year preferably on a monthly basis.

³⁰ Pursuant to [s 3\(8\)](#), the Director also conducts on behalf of the Crown prosecutions under the *Canada Elections Act*; in this regard see the PPSC Deskbook guideline “[2.10 Application of the PPSC Deskbook in Respect of Canada Elections Act Prosecutions](#)”. Pursuant to [s 3\(9\)](#), the Director may also perform work for the Attorney General under the [Extradition Act](#) and the [Mutual Legal Assistance in Criminal Matters Act](#)”.

³¹ See e.g. [Krieger](#), *supra* note 11.

Canada has been to refrain from becoming involved in the day-to-day operational decision making of public prosecutions. In recognition of the Attorney General's powers of superintendence, s. 10 of the DPP Act allows the Attorney General to issue directives on the initiation or conduct of any specific prosecution,³² and with respect to prosecutions generally.³³

[Section 10](#) is one of the hallmarks of independence of the prosecution function.³⁴ To safeguard the DPP's independence, s. 10 requires that directives respecting specific prosecutions and respecting prosecutions generally be in writing and published in the [Canada Gazette](#). Mandatory publication of the directive assures transparency, and enables the Attorney General to be accountable for his or her decisions. Ultimately, this requirement for transparency serves as a strong deterrent against partisan political influence and pressure in prosecution-related decision-making. These directives are not intended to have the force of law and are exempt from review by Parliament's Standing Joint Committee for the Scrutiny of Regulations.³⁵

The power to issue directives has been exercised sparingly in other jurisdictions in which this power exists.³⁶ Such a situation may arise, for example, where there is disagreement between the DPP and the Attorney General as to whether to proceed with certain types of prosecutions or whether to appeal in a particular case, based on divergent assessments of what the public interest demands in the particular circumstances of that case.

[Section 11\(1\)](#) authorizes both the Attorney General and the DPP to delay publication of a directive in a specific prosecution in the interests of the administration of justice. This measure of flexibility recognizes that occasionally the publication rule may have to yield to operational exigencies, for example, to ensure the integrity of an ongoing investigation or to avoid a negative impact on prosecutions or other proceedings that are still before the courts. This delay may not continue beyond the completion of the prosecution or any related prosecution.³⁷

³² DPP Act, *supra* note 1, [s 10\(1\)](#).

³³ *Ibid*, [s 10\(2\)](#).

³⁴ The provinces of Nova Scotia, Quebec and British Columbia all have similar requirements in their legislation. The same is true of many other jurisdictions that have adopted a Director of Public Prosecutions model.

³⁵ [Section 12](#) of the DPP Act, *supra* note 1 makes it clear that the directives issued under [s 11](#) are exempt from the requirements of the [Statutory Instruments Act](#). This exemption means that the directives issued by the Attorney General to the DPP in specific prosecutions and in relation to prosecutions generally need not be approved by a parliamentary committee before they have the force of law.

³⁶ For example, in British Columbia, previous Attorneys General have issued directives (i) to continue with a murder prosecution rather than accepting a guilty plea to the lesser and included offence of manslaughter, (ii) to appeal a manslaughter sentence, and (iii) to the Assistant Deputy Attorney General directing him to appoint a specified special prosecutor to conduct a charge assessment of alleged polygamy in Bountiful, British Columbia. As of March 31, 2010, The Attorney General of Quebec had issued no such directives to its Director of Public Prosecutions.

³⁷ See DPP Act, *supra* note 1, [s 11\(2\)](#).

2.3. The duty to inform

Under [s. 13](#) of the DPP Act, the DPP has a duty to “inform the Attorney General in a timely manner of any prosecution, or intervention that the DPP intends to make, that raises important questions of general interest.”³⁸ This duty is fundamental to the relationship between the Attorney General and the DPP, since the Attorney General may use such information in deciding whether to issue a directive under [s. 10](#), to intervene in proceedings under [s. 14](#),³⁹ or to assume conduct of a prosecution under [s. 15](#).

Although the Act sets out no corresponding duty on the part of the Attorney General, it is essential to a properly functioning relationship that information flow in both directions. For example, many civil cases raise constitutional, evidentiary or privilege issues which can have an important impact on the prosecution practice of the DPP.

2.4. The power of the Attorney General to intervene in proceedings

As the chief legal advisor to Cabinet and to the Government of Canada, the Attorney General has a broad perspective concerning the development of all aspects of law including matters that fall under the [Criminal Code](#) and other federal penal statutes. The legal challenges facing the Government of Canada are complex and multi-dimensional in nature. Their resolution requires that they be viewed through many lenses – whether policy, aboriginal, strategic, division of powers, or the [Canadian Charter of Rights and Freedoms](#) (Charter), to name but a few. As a result, the Attorney General may seek to intervene in criminal litigation, particularly if there is a constitutional challenge to federal laws.⁴⁰

[Section 14](#) of the DPP Act gives the Attorney General the power, after notifying the DPP, to intervene in proceedings at first instance or on appeal that, in his or her opinion, raise questions of “public interest”.⁴¹ In theory, the Attorney General may intervene in prosecutions conducted by the DPP in order to present different views on an issue, for example proceedings that raise issues of informer privilege, broader issues of police conduct or cases that raise both Charter and division-of-powers issues. However, such interventions in federal prosecutions would be rare, in light of the power to take charge of a prosecution.⁴²

³⁸ See the PPSC Deskbook directive “[1.2 Duty to Inform the Attorney General under Section 13 of the Director of Public Prosecutions Act](#)”, *supra* note 26.

³⁹ See the PPSC Deskbook guideline “[3.15 Appeals and Interventions in the Provincial and Territorial Courts of Appeal](#)”.

⁴⁰ For example, the Attorney General may decide that it is in the public interest to intervene in a prosecution that raises a division of powers issue, or that raises an issue regarding the scope of victims’ rights in criminal proceedings, so that the court may have the benefit of hearing the Attorney General’s perspective.

⁴¹ Section 14: “When, in the opinion of the Attorney General, proceedings raise questions of public interest, the Attorney General may, after notifying the DPP, intervene in first instance or on appeal.”

⁴² For a more in depth discussion of interventions, see the PPSC Deskbook guideline “[3.15 Appeals and Interventions in the Provincial and Territorial Courts of Appeal](#)”, *supra* note 39.

The DPP, or the Attorney General, may wish to intervene in a provincial matter. Typically the DPP, or Attorney General of Canada, will intervene in a provincial matter to support the province, since such federal interventions often involve challenges to the constitutionality of [Criminal Code](#) provisions. Like the ODPP, provincial prosecution services prosecute matters only where the prosecution is considered to be in the "public interest". On occasion, however, in view of the multifarious considerations that may come into play in a given case, the two levels of government may assess public interest considerations differently or the federal government may consider it important to advance a particular argument as intervener that may not be advanced by the provincial appellant.⁴³

The Attorney General and the DPP cannot both intervene in a case prosecuted by a provincial Attorney General. [Section 3\(3\)\(b\)](#) of the DPP Act provides that the DPP can intervene unless the Attorney General has decided to intervene. Section 13 imposes a positive duty on the DPP to give advance notice, in a timely manner, of interventions that the DPP intends to make. Moreover, as a practical matter, most interventions at first instance or on appeal result from Notices of Constitutional Question (NCQ). By statute or by court rules,⁴⁴ an applicant who intends to challenge the constitutional validity or applicability of a particular piece of federal legislation or regulation, a common law rule or to claim a remedy under [s. 24\(1\)](#) of the Charter in relation to an act or omission of a federal government institution, must serve a NCQ on the Attorney General.⁴⁵ Thus, in effect, the Attorney General essentially has a "right of first refusal" in deciding whether or not to intervene in cases prosecuted by a provincial Attorney General.

2.5. The power of the Attorney General to assume conduct of proceedings

[Section 15](#) of the DPP Act sets out the power of the Attorney General to take over a prosecution from the DPP. However, the Attorney General must first consult the DPP regarding his or her decision to assume conduct of a prosecution and must publish the notice in the [Canada Gazette](#) "without delay",⁴⁶ unless either the Attorney General or the DPP considers a delay in notice to be justified "in the interests of the administration of justice".⁴⁷ The DPP must turn over the prosecution file to the Attorney General, where

⁴³ See e.g. Robert J. Frater, *Prosecutorial Misconduct* (Aurora: Canada Law Book, 2009) at 12-13.

⁴⁴ [Rules of the Supreme Court of Canada](#), SOR/2002-156 amended by SOR/2006-203, rule 61. Similarly, provincial legislation provides that NCQs must be served on the relevant Attorney General; see e.g. [Courts of Justice Act](#), RSO. 1990, c C-14, s 109; [Nova Scotia Rules of Civil Procedure](#), NS Reg 420/2008, rule 31.19; [Constitutional Question Act](#), RSBC 1996, c 68, s 8; [Quebec Code of Civil Procedure](#), RSQ, c C-25, s 95.

⁴⁵ This requirement applies in respect of Supreme Court of Canada, but is not required in all provincial court rules.

⁴⁶ DPP Act, *supra* note 1, [s 15\(1\)](#).

⁴⁷ *Ibid*, [s 15\(3\)](#). It is anticipated that delays in publication would be exceptional and would only occur where necessary to protect the confidentiality of proceedings (such as proceedings that might compromise the identity of an informer or an ongoing investigation, especially given that by definition, a prosecution includes a prospective prosecution).

the latter assumes conduct of the case, and must provide any information that the Attorney General requires within the time specified by the Attorney General ([s. 15\(2\)](#)).

[Section 15](#) reflects the fact that the Attorney General retains his or her criminal law related powers under the DPP Act. The foregoing power, like the power to issue directives, is one which is to be exercised sparingly in order to preserve the independence of the DPP.⁴⁸ Nevertheless, s. 15 recognizes that the Attorney General is ultimately accountable to Parliament for federal prosecutions. Accordingly, there must be a residual capacity in the Attorney General to ensure that decisions are taken in the public interest.

2.6. The duty to report

[Section 16](#) of the DPP Act requires the DPP to provide the Attorney General with an annual report not later than June 30 of every year. The Attorney General is then required to table that report in the Houses of Parliament within the first 15 sitting days immediately following receipt of the report. The DPP's annual report to Parliament is a key mechanism for ensuring transparency and public accountability for federal prosecutions. The report is required to provide a summary of the DPP's activities⁴⁹ of the year in review, and usually contains a review of the anticipated legal challenges and priorities for the future, and how public money was expended in carrying out the DPP's duties and functions.

2.7. Delegated decision-making

Some offences in the [Criminal Code](#) and in other federal statutes can be prosecuted only with the prior consent of the Attorney General on whose behalf the prosecution will be conducted.⁵⁰ By virtue of [s. 3\(4\)](#) of the DPP Act, the DPP is Deputy Attorney General for the purpose of exercising the bulk of prosecution-related duties, functions and powers, which are set out in [s. 3\(3\)](#).⁵¹ The principal significance of s. 3(4) is that it brings into play [s. 2](#) of the *Criminal Code* which defines the Attorney General to include the Deputy Attorney General. Additionally, [s. 3\(3\)\(a\)](#) delegates to the DPP, as Deputy Attorney General, the Attorney General's power to initiate and conduct prosecutions. Thus, ordinarily, decisions statutorily requiring the "personal consent in writing" of the Attorney General or Deputy Attorney General, will be made by the DPP, being the Deputy Attorney General for the functions set out in [s. 3\(3\)\(c\)](#) of the DPP Act.

⁴⁸ Testimony of Chantal Proulx, before Senate Standing Committee on Legal and Constitutional Affairs concerning Bill C-2, 29 June 2006.

⁴⁹ This excludes PPSC activities related to the [Canada Elections Act](#).

⁵⁰ See the PPSC Deskbook guideline "[3.5 Delegated Decision-Making](#)".

⁵¹ The Deputy Attorney General's authority to act for the Attorney General is recognized in three ways: 1) specifically, in some statutory provisions (such as *Criminal Code*, [s. 577](#)); 2) generally, in s 2 of the *Criminal Code*, through the definition of "Attorney General"; and 3) more generally, for all federal legislation, by virtue of [s. 24\(2\)\(c\)](#) of the *Interpretation Act*.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

1.2 DUTY TO INFORM THE ATTORNEY GENERAL UNDER SECTION 13 OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

DIRECTIVE OF THE ATTORNEY GENERAL ISSUED UNDER SECTION 10(2) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

Revised July 6, 2023

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1. INTRODUCTION

[Section 13](#) of the *Director of Public Prosecutions Act*¹ (DPP Act) provides that the Director of Public Prosecutions (DPP) has a duty to “inform the Attorney General in a timely manner of any prosecution, or intervention that the Director intends to make, that raises important questions of general interest.” This duty arises from the relationship between the Attorney General and the DPP, since the Attorney General may rely upon information provided under section 13 in deciding whether to issue directives to the DPP under [subsection 10\(1\)](#), to intervene in proceedings under [section 14](#),² or to assume conduct of a prosecution under [section 15](#).³

Section 13 is not intended to be the exclusive mechanism for information flow between the DPP and the Attorney General in respect of prosecution matters. Rather, section 13 is intended as a statutory guarantee that the DPP will inform the Attorney General to enable the Attorney General to properly execute their functions as chief law officer of the Crown.

¹ *Director of Public Prosecutions Act*, SC 2006, c 9 [DPP Act].

² See the PPSC Deskbook guideline “[3.15 Appeals and Interventions in the Provincial and Territorial Courts of Appeal](#)”.

³ Although [section 13](#) does not limit the Attorney General’s power to issue directives or assume conduct of a prosecution.

Section 13 notes are issued by the DPP and are intended for the Attorney General personally.

Section 13 does not apply to proceedings conducted by the Public Prosecution Service of Canada (PPSC) on behalf of the Attorney General in relation to the Attorney General's powers, duties and functions under the [Extradition Act](#)⁴ and the [Mutual Legal Assistance in Criminal Matters Act](#)⁵ pursuant to [subsection 3\(9\)](#) of the DPP Act,⁶ nor does it apply to prosecutions under the [Canada Elections Act](#).⁷

2. TYPES OF CASES THAT SHOULD BE REPORTED UNDER SECTION 13

Section 13 notices are required in cases that raise “important questions” that are of “general interest”. The framers opted for the term “general interest” which is broader than “public interest”. As the legislative summary of Bill C-2, [An Act providing for conflict of interest rules, restrictions on election financing and measures respecting administrative transparency, oversight and accountability](#), explained:

A distinction is made between the term “public interest” and the broader term “general interest” (considered to subsume “public interest”) so that the DPP will have a broader duty to inform the Attorney General of important matters. The House Committee removed the need for questions of general or public interest to be “beyond the scope of those usually raised in prosecutions,” as it was considered to be unnecessary and unduly limit the ability of the Attorney General to intervene.⁸

The qualifier “important questions” acts as an additional threshold to distinguish matters of significance from more routine or recurring matters.

Examples of cases that may involve important questions of general interest and thus generally would be subject to a section 13 notice include prosecutions, appeals and interventions as set out below.

⁴ SC1999, c 18.

⁵ RSC 1985, c 30 (4th Supp).

⁶ [Subsection 3\(9\)](#) of the DPP Act authorizes the DPP to exercise, under and on behalf of the Attorney General, any of the Attorney General's powers, duties or functions under the [Extradition Act](#) or the [Mutual Legal Assistance in Criminal Matters Act](#). The [section 13](#) notice requirement is restricted to “prosecutions and interventions” and thus does not cover extradition and MLAT matters.

⁷ [Section 13](#) of the DPP Act requires notice specifically for “prosecutions and interventions”. The definition of “prosecution” in [section 2](#) of the DPP Act expressly excludes [Canada Elections Act](#) (CEA) prosecutions under [subsection 3\(8\)](#) of the DPP Act, which stipulates that the DPP initiates and conducts CEA prosecutions, appeals and other prosecution-related CEA proceedings on behalf of the Crown. In contrast to the DPP's other duties and functions as set out in [subsection 3\(3\)](#), [subsection 3\(8\)](#) prosecutions are not undertaken under and on behalf of the Attorney General.

⁸ [Footnote 45 of Bill C-2 Legislative Summary](#) 1st Sess, 39th Parl.

2.1. Prosecutions

- Cases giving rise to concerns regarding public confidence in the administration of justice, including the manner in which a prosecution is conducted insofar as the impartiality or independence of the PPSC is at issue;
- Cases that may have a significant impact on established jurisprudence;
- National security prosecutions;
- War crimes, crimes against humanity and genocide prosecutions;
- Novel official languages issues in prosecutions;
- Prosecutions that involve novel aboriginal rights issues;
- Criminal organization prosecutions that raise “important questions of general interest” by virtue of the significance or novelty of the issues being litigated, or any broader government concerns such as border security;
- Environmental prosecutions that raise issues of national importance;
- Capital markets fraud cases of national significance;
- Cases with an international dimension;
- Constitutional challenges ([*Canadian Charter of Rights and Freedoms*](#) (Charter) or division of powers) to legislation or to federal government programs that are novel (that is, notices would not be required on routine or recurring constitutional challenges); and
- Cases that give rise to sustained, significant and/or anticipated media interest and that also raise important questions, for example, when a matter puts into question the public’s confidence in the administration of justice.

2.2. Appeals

- Supreme Court of Canada appeals, whether on leave or as of right; and
- Other appeals, to provincial and territorial courts of appeal and summary conviction appeals, which raise “important questions of general interest”. They would include
 - Cases involving constitutional challenges to legislation (Charter, division of powers, Aboriginal rights), official languages rights;
 - Cases that may have a significant impact on police and prosecutorial powers, duties and functions;
 - Cases that raise a significant impact on rules of procedure and evidence; and
 - Cases that raise other significant Charter issues.

2.3. Interventions

- Interventions to be made on behalf of the DPP or the Attorney General,⁹ whether in the Supreme Court of Canada, in any court of appeal or at trial.

⁹ The Attorney General and the DPP cannot both intervene in a case prosecuted by a provincial Attorney General. Paragraph 3(3)(b) of the DPP Act provides that the DPP can intervene unless the Attorney General has decided to intervene. [Section 13](#) imposes a positive duty on the DPP to give advance notice, in a timely manner, of interventions that the DPP intends to make.

3. NOTICE AT THE PRE-CHARGE STAGE AND REGARDING DECISIONS NOT TO PROSECUTE

The [section 13](#) notice requirement is limited to “prosecutions and interventions”. Under [section 2](#) of the DPP Act, the term “prosecutions” is defined to include not only a prosecution under the Attorney General’s jurisdiction, but also “a proceeding respecting any offence where the prosecution or prospective prosecution” comes within the Attorney General’s jurisdiction. Generally, the DPP does not provide section 13 notices in respect of investigations, in recognition of the independent investigative function.¹⁰ However, the section 2 reference to “prospective prosecutions” indicates that the section 13 notice requirement extends to pre-charge “proceedings”. This would include various *ex parte* Crown applications to obtain judicial authorization to use investigative or enforcement techniques (special search warrants, restraint orders and management orders). That said, it is anticipated that section 13 notices in respect of *ex parte* Crown applications would be exceedingly rare at the pre-charge stage in large part because the fundamental principle of police independence at the investigative stage must inform what is an important question of general interest.

In most Canadian jurisdictions, decisions to decline prosecution are made post-charge and dealt with by way of a stay of proceedings or withdrawal of charges. Proceedings to stay or withdraw charges are subject to s. 13. However, by virtue of the s. 2 definition of “prosecutions” which is limited to “proceedings”, s. 13 would not extend to prosecutorial decisions not to prosecute in pre-charge approval jurisdictions (Quebec, British Columbia and New Brunswick) because the prosecutorial decision-making is not a “proceedings”. For the same reason, s. 13 would not apply to decisions of the DPP not to consent to institute criminal proceedings.¹¹ That said, while such decisions to decline prosecution would not constitute “proceedings” and thus would fall outside the scope of s. 13, the DPP will apply the spirit of s. 13 and notify the Attorney General of such pre-charge decisions if they raise important questions of general interest so that the Attorney General may decide whether or not to issue a directive under [subsection 10\(1\)](#) or to assume conduct of a prosecution under [s. 15](#) where the DPP has declined to prosecute. It is conceivable, for example, that the Attorney General could reach a different conclusion in applying the “public interest” criteria of the decision to prosecute test.¹²

¹⁰ The conduct of any investigation is the sole responsibility of the law enforcement agency involved. The law enforcement agency does not require authorization from the prosecution before commencing an investigation nor does the prosecution direct an investigation or prohibit the continuation of an investigation. In practice, of course, investigators may and regularly do consult the prosecution during the investigation.

¹¹ Certain [Criminal Code](#) offences require consent of the Attorney General to institute proceedings. [Paragraph 3\(3\)\(a\)](#) of the DPP Act delegates this consent function to the DPP to “initiate prosecutions”.

¹² See the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”. For commentary on the public interest factor see Robert J. Frater, *Prosecutorial Misconduct* (Aurora: Canada Law Book, 2009) at 9-13: “The ‘guardian of the public interest’ role is particularly noteworthy in a federal state such as Canada, where there are many attorneys general and directors of public prosecution. Determining what the public interest demands in a particular situation is a subject on which reasonable people may sometimes differ, depending on how much weight they choose to attach to objectively relevant factors.”

4. TIMING OF NOTICE

[Section 13](#) requires that notice be given “in a timely manner”. By necessity, the timelines for providing a section 13 notice will vary from case-to-case in accordance with the particular facts, including any applicable time limitation periods.¹³ That said, the section 13 timeliness requirement must be interpreted to uphold the overarching principle that, to the extent possible, the Attorney General must be given sufficient opportunity to react.

Notices should be given in respect of prosecutions that raise important questions of general interest at various milestone stages of the prosecution, notably prior to initiating prosecutions, discontinuing proceedings, staying a prosecution, including a private prosecution, and prior to decisions to appeal or to intervene. The decision of whether to issue a notice (or a follow-up notice) should be made to give effect to the Attorney General’s role as chief law officer of the Crown, including the powers that the Attorney General may exercise pursuant to the DPP Act regarding directions given to the DPP ([s. 10](#)), assuming conduct of a prosecution ([s. 15](#)), and interventions by the Attorney General ([s. 14](#)).

5. CONTENT OF NOTICE

Section 13 notices should include a contextual explanation setting out why the Attorney General is being informed of the matter, as well as details concerning relevant timelines, such as filing deadlines, hearing dates, and trial dates, and other information that would be relevant to inform any decision by the Attorney General.

6. TREATMENT OF NOTICE

Insofar as they contain legal advice and other privileged information, section 13 notices are to be treated as privileged. They are also confidential insofar as they relate to the exercise of prosecutorial discretion. The Attorney General may share section 13 notices with the Deputy Minister of Justice or others for the purpose of obtaining advice as to whether they should exercise their authority to issue a directive or take over a prosecution. The Attorney General may seek additional information from the DPP upon receiving a section 13 notice. As noted above, the Attorney General relies on the information contained in section 13 notices in deciding whether to issue specific directives, intervene in proceedings or take over a prosecution. The Attorney General may issue specific directives or take over a prosecution on public interest grounds or because they are of the view that there is, or is not, a reasonable prospect of conviction.

¹³ All appeals and interventions are governed by mandatory time limitation periods, usually 30 days, except for leave applications in the Supreme Court of Canada, which are 60 days.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

1.3 CONSULTATION WITHIN GOVERNMENT

**DIRECTIVE OF THE ATTORNEY GENERAL ISSUED
UNDER SECTION 10(2) OF THE *DIRECTOR OF PUBLIC
PROSECUTIONS ACT***

March 1, 2014

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1. INTRODUCTION

The independence of the Attorney General of Canada, the Director of Public Prosecutions (DPP), and by extension Crown counsel, in deciding whether to prosecute is an important constitutional principle in Canada.¹ "Prosecutorial independence", however, does not mean regional or institutional isolation and does not exclude the notions of cooperation and consultation. Under the [Director of Public Prosecutions Act](#)² (DPP Act), the independence is that of the DPP who is ultimately accountable to the Attorney General,³ to the public and to the courts for the prosecution function, and not of individual prosecutors. In some instances prosecutorial decision-making, including the determination of whether a prosecution best serves the public interest,⁴ whether charges should be stayed, or a particular position on sentence taken, may warrant consultation with those who can provide Crown counsel with relevant information and expertise.

¹ For a more detailed discussion of this principle, see the PPSC Deskbook directive "[1.1 Relationship between the Attorney General and the Director of Public Prosecutions](#)" and the PPSC Deskbook guideline "[2.1 Independence and Accountability in Decision-Making](#)".

² SC 2006, c 9 [DPP Act].

³ With the exception of [Canada Elections Act](#) matters; see DPP Act, *ibid*, s 3(8).

⁴ See the PPSC Deskbook guideline "[2.3 Decision to Prosecute](#)", for a discussion about the public interest criteria to be considered when deciding whether to prosecute.

The Public Prosecution Service of Canada (PPSC) is responsible for prosecuting offences under numerous federal statutes and for providing prosecution-related legal advice to law enforcement agencies in relation to these statutes. Cases prosecuted by the PPSC include those involving drugs, organized crime, terrorism, tax law, money laundering and proceeds of crime, crimes against humanity and war crimes, all [Criminal Code](#) offences in the territories, and a vast array of other offences under federal statutes. With such wide-ranging prosecutorial responsibilities, PPSC counsel require an effective consultation process.

Interdepartmental consultation is important because of the shared responsibilities among government departments for enforcing federal laws. Specific ministers and departments are responsible for administering and enforcing specific legislation that also contain offence provisions prosecuted by the PPSC. For example, the Minister of National Revenue is primarily responsible for administering and enforcing the [Income Tax Act](#); the Minister of Transport administers and enforces the [Aeronautics Act](#).

This directive describes the consultation process with other departments of the Government of Canada that are involved in the enforcement of federal statutes, and with Department of Justice centres of expertise. Other guidelines describe the consultation process within the PPSC, between PPSC Regional Offices and Headquarters, and with investigative agencies.⁵

2. CASES WHERE CONSULTATION IS HIGHLY RECOMMENDED

Formal consultation may be warranted in cases that are of significant public interest, which raise legal issues of national importance or which involve certain specialized areas of the law. These include, but are not limited to: cases before the Supreme Court of Canada; larger scale environmental prosecutions; challenges to the constitutionality of federal legislation; war crimes, crimes against humanity and genocide prosecutions; and cases involving official language rights, aboriginal law or national security issues.

However, even if a case does not fall into one of the above categories, Crown counsel should consider whether consultation with the Department of Justice and/or other federal departments and agencies is necessary. In deciding whether to consult outside the PPSC on a case, counsel should consider a number of factors including:

- whether other branches of government are likely to have information that could be relevant to the issues arising in the prosecution;
- whether the decision to be made or the case itself is likely to have impact on the broader public interest; and

⁵ For discussion of the types and manner of consultation between Crown counsel and investigators, see the PPSC Deskbook guideline “[2.7 Relationship between Crown Counsel and Investigative Agencies](#)”. For a discussion of consultation within the PPSC, see the PPSC Deskbook guideline “[2.6 Consultation within the Public Prosecution Service of Canada](#)”.

- whether a proposed position is inconsistent with or likely to be inconsistent with the advice given by non-PPSC counsel to other government departments or agencies.

Where consultation is required, Crown counsel are expected to adhere to the process set out in the following paragraphs.⁶

2.1. Cases involving official languages issues

Crown counsel must contact the Chief Federal Prosecutor (CFP) at the earliest opportunity of impending cases in which language rights issues are raised under the [Canadian Charter of Rights and Freedoms](#), the [Official Languages Act](#) or any related legislation.

If warranted, the champion or co-champion of official languages will then consult with the Official Languages Law Section of the Department of Justice. That Section helps ensure government wide consistency and accuracy in positions being advanced respecting official languages.

For further information on the consultation process respecting official languages issues, see the PPSC Deskbook directive "[2.11 Official Languages in Prosecutions](#)".

2.2. Aboriginal law cases

When Aboriginal law issues that are complex or novel arise in the course of a prosecution, Crown counsel must contact PPSC Headquarters counsel responsible for Aboriginal law issues in litigation.

If warranted, the Headquarters counsel will consult with the Aboriginal Law Portfolio in the Department of Justice. That Section provides legal advice on complex and emerging issues in the area of Aboriginal law.

2.3. Cases involving national security issues

Crown counsel must be particularly sensitive to the need to protect information the disclosure of which would be injurious to national security. Any prosecution which involves the possible disclosure of such information requires a special consultative process.

When a national security interest arises, Crown counsel must advise at the earliest opportunity the CFP who, in turn, will advise the Headquarters Senior Counsel, National Security Issues. The latter will contact the head of the appropriate Legal Services Unit

⁶ Such cases frequently require the DPP to inform the Attorney General pursuant to [s 13](#) of the DPP Act, *supra* note 2. For more information regarding [s 13](#) notices, see the PPSC Deskbook directive "[1.2 Duty to Inform the Attorney General under Section 13 of the Director of Public Prosecutions Act](#)".

(for example, CSIS, CSE, or the RCMP), and the Department of Justice National Security Group, and the Privy Council Office as needed. The Senior Counsel, National Security Issues will also consult with the Deputy DPP.

For further information on the consultation process respecting national security issues, see the PPSC Deskbook guideline “[5.1 National Security](#)” and the PPSC Deskbook directive “[4.2 Protecting Confidential Information under Section 38 of the Canada Evidence Act](#)”.

3. CONSULTATION WITH ENFORCEMENT AUTHORITIES

Most federal prosecutions stem from investigations conducted by federal department investigators or by the police. In some situations, Crown counsel will be aware of a case at the investigative stage because of a request for legal advice. Sometimes, Crown counsel will not learn of a case until after investigators have laid charges and sent the Report to Crown Counsel/Crown Brief to the Regional Office. In either situation, decisions will have to be made regarding the charges to pursue, the evidence to call, the legal arguments to make, the recommendations to make on sentence and the decision to appeal. In making these decisions, Crown counsel should consult, where appropriate, with the investigating officers where the investigative agency’s interests are engaged substantively.

Especially in the prosecution of offences under specialized statutes (for example, the [Canadian Environmental Protection Act, 1999](#), [Immigration and Refugee Protection Act](#), [Proceeds of Crime \(Money Laundering\) and Terrorist Financing Act](#) (PCMLTFA), [Aeronautics Act](#) and the [Migratory Birds Convention Act](#), etc.), Crown counsel should review the compliance and enforcement policies developed by the department or agency responsible for the underlying legislation.

Counsel may communicate directly with the appropriate investigating authority.⁷ In cases where consultation is warranted with senior managers of a government department or agency, as for example, where that department’s or agency’s policies or practices are challenged, where legislation is attacked or on the more technical aspects of regulatory statutes, Crown counsel may ask the Department of Justice Legal Services Unit for that department or agency to arrange the consultation. Ultimately however, the DPP is responsible for the conduct of litigation subject to any directives the Attorney General may issue under [s. 10\(1\)](#) of the DPP Act.

⁷ For more detail regarding consultation with investigative agencies, see the PPSC Deskbook guideline “[2.7 Relationship between Crown counsel and Investigative Agencies](#)”, *supra* note 5.

4. CONSULTATION WITH DEPARTMENT OF JUSTICE GENERALLY

In respect of criminal or regulatory offence proceedings, in addition to consulting with police officers and other investigators, it may be important for Crown counsel to consult with other centres of expertise within government, in order to:

- ensure an awareness of national policies and objectives that may be relevant to an individual case;
- be cognisant of broader pan-government perspectives; and,
- to draw on the specialized subject-matter expertise of counsel in specific areas of the law.

This type of consultation gives Crown counsel access to a wide range of viewpoints and expertise and helps ensure that prosecutorial decisions are made with knowledge of all relevant information. It is appropriate where circumstances warrant for Crown counsel to consult with Department of Justice counsel where specialized advice is required. Crown counsel should initiate the consultation process at the earliest possible stage in the proceedings to allow the consultation to be useful.

4.1. Consultation process

All consultation with the Department of Justice Headquarters normally should be routed, at least initially, through PPSC Headquarters counsel, who provide assistance on complex or novel prosecution issues. Crown counsel can identify the appropriate PPSC Headquarters counsel contact by reviewing the subject-matter experts on the PPSC intranet. If no subject-matter expert exists for the issue at hand, Crown counsel should contact their PPSC Headquarters counsel regional contact. PPSC Headquarters counsel will then contact subject-matter experts within the Department of Justice as needed.

4.2. The Human Rights Law Section

Crown counsel conducting prosecutions which raise human rights issues involving the [Canadian Charter of Rights and Freedoms](#), the [Canadian Human Rights Act](#), the [Canadian Bill of Rights](#), or international human rights law may receive assistance from the Human Rights Law Section (HRLS).

4.3. The Constitutional, Administrative and International Law Section

When prosecutions raise legal issues in the areas of constitutional law and the law relating to federal government institutions, such as the extent and level of delegation of authority and due process, Constitutional, Administrative and International Law Section (CAILS) counsel may assist Crown counsel.

4.4. The Information Law and Privacy Section

Crown counsel may wish to consult the Information Law and Privacy Section (ILAP) when litigation questions arise regarding disclosure of personal information in the Crown's possession that may be restricted under the [Privacy Act](#) or when other issues relating to the [Access to Information Act](#) and the protection of privacy under *Privacy Act* arise.⁸

4.5. The Criminal Law Policy Section

The Criminal Law Policy Section (CLPS) develops and implements policies related to the [Criminal Code](#) and other federal statutes involving the criminal law. In cases involving a constitutional challenge to a provision of the Criminal Code or other federal legislation, the CLPS can explain why the provision was adopted in its current form and assist in identifying material, such as transcripts of hearings before Parliamentary Committees that will assist in defending the legislation.

4.6. The National Security Group

The National Security Group (NSG) is the central coordinating office within the Department of Justice for [s. 38](#) of the *Canada Evidence Act*, providing advice, receiving s. 38 CEA notices, and making recommendations to the Attorney General of Canada as to whether to consent to the disclosure of sensitive information in criminal proceedings. NSG counsel also provide legal advice on security and information-related issues under the [Security of Information Act](#), the [Security Offences Act](#), and the [Anti-terrorism Act](#) in general. The NSG must be consulted on issues relating to s. 38 notices.⁹

4.7. The Criminal Litigation Division

The Criminal Litigation Division within the Department of Justice's Litigation Branch conducts criminal litigation on behalf of the Attorney General of Canada. One of its primary functions is the conduct of extradition and mutual legal assistance proceedings.¹⁰ Additionally, because the Attorney General defends the constitutionality of federal legislation, either the Attorney General or the DPP may seek to intervene in provincial [Criminal Code](#) prosecutions.

⁸ Such issues may arise, for example, in cases involving complainants and sexual assault charges.

⁹ See also the PPSC Deskbook directive "[4.2 Protecting Confidential Information under Section 38 of the Canada Evidence Act](#)" and the PPSC Deskbook guideline "[5.1 National Security](#)".

¹⁰ Counsel in the Criminal Litigation Division litigate these matters as agents of the Attorney General of Canada.

4.8. The Department of Justice Legal Service Units

Counsel in the Department's Legal Service Units have specialized subject-matter expertise and can assist PPSC counsel on technical or interpretation issues regarding the regulation or statutes in their respective areas of expertise.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

2.1 INDEPENDENCE AND ACCOUNTABILITY IN DECISION-MAKING

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

March 1, 2014

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1. INTRODUCTION

The principle of the independence of the Attorney General is firmly entrenched in our legal system, widely respected, and carefully safeguarded. Perhaps less well understood is the operation of the independence principle in the day-to-day decision-making of individual Crown counsel. Crown counsel¹ exercise their independence as the representative of the Director of Public Prosecutions (DPP). As such, their “independence” is a delegated independence. This independence is institutional, rather than personal, and is aimed at safeguarding the independence of the Public Prosecution Service of Canada (PPSC). Crown counsel are obliged to make decisions in accordance with the directives of the Attorney General and the guidelines of the DPP,² and they act under the direction of Chief Federal Prosecutors (CFP), who are in turn responsible to the DPP and his or her Deputy DPPs.³ That said, Crown counsel also retain a degree of discretion in individual cases.⁴

Crown counsel, like the Attorney General and the DPP, are accountable for their decisions. Since the Attorney General is accountable to Parliament, the courts and the public⁵ for decisions made on his or her behalf, this means that the Attorney General may

¹ The term “Crown counsel” used in this guideline includes both in-house federal prosecutors and private sector barristers and advocates retained to act as federal prosecutors under [s 7\(2\)](#) of the *Director of Public Prosecutions Act*, SC 2006, c 9 [DPP Act].

² The directives are issued in accordance with [s 10\(2\)](#) of the DPP Act, *supra* note 1, and the DPP guidelines are issued in accordance with [s 3\(3\)\(c\)](#) of the DPP Act (*ibid*). These directives and guidelines constitute the PPSC Deskbook.

³ See the PPSC Deskbook guideline “[2.6 Consultation within the Public Prosecution Service of Canada](#)”.

⁴ Indeed some courts have indicated that policies that completely remove Crown counsel’s discretion are improper: see *R v Catagas* (1978), 38 CCC (2d) 296 (Man CA); *R v Wood* (1983), 31 CR (3d) 374 (NS Prov Mag Ct).

⁵ The Attorney General may take steps to explain decisions to the public, in order to promote public confidence in the administration of justice: see the PPSC Deskbook guideline “[2.9 Communications with the Media](#).”

issue a directive to the DPP in a particular case,⁶ though such situations would be relatively rare and any such directives must be published in the [Canada Gazette](#) in order to maintain transparency.⁷

The independence principle also does not mean that Crown counsel need not consult. Quite to the contrary, responsible prosecutorial decision-making often requires consultation with colleagues, superiors or investigators.⁸ Indeed prosecutorial discretion is not exercised in a vacuum. The principle of independence means that, subject to [s. 10\(1\)](#) of the *Director of Public Prosecutions Act* (DPP Act), the DPP does not take instructions as to how to exercise discretion in prosecution matters. Similarly, Crown counsel do not take instructions as to how to proceed, except from those in the line of authority leading ultimately to the Attorney General, including, the CFP, the Deputy DPPs, and the DPP who, for the purpose of performing the powers, duties and functions under [s. 3\(3\)](#) of the DPP Act, is the Deputy Attorney General.⁹

The interaction of the principles of independence, accountability and consultation mean that what is protected is a system of prosecutorial decision-making in which the prosecutor is an integral component. A large measure of independence is conferred on Crown counsel, but absolute discretion is not.

2. STATEMENT OF POLICY

Crown counsel are obliged to exercise independent judgment in making decisions. Because their decision-making powers are delegated to them by the DPP, whose own powers, duties and functions to act under and on behalf of the Attorney General are delegated under the DPP Act,¹⁰ Crown counsel are accountable for their decisions, and they must consult where required. Prosecutorial independence is not a license to do as one wishes, but to act as the Attorney General and the DPP should act.¹¹

⁶ See DPP Act, *supra* note 1, [s 10 \(1\)](#).

⁷ See the discussion in [Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor](#), Working Paper 62 (Ottawa: Law Reform Commission of Canada, 1990) at 16-17, 53-59.

⁸ See the PPSC Deskbook guideline “[2.6 Consultation within the Public Prosecution Service of Canada](#)”, *supra* note 3.

⁹ See DPP Act, *supra* note 1, [s 3\(4\)](#): Crown counsel act on behalf of the DPP who in turn, as the Deputy Attorney General, acts on behalf of the Attorney General of Canada with respect to all powers, duties and functions of the latter set out in the [Criminal Code](#) except for those that must be exercised by the Attorney General personally.

¹⁰ See DPP Act, *supra* note 1, [s 3\(3\)](#).

¹¹ See Bruce A. MacFarlane, “Sunlight and Disinfectants: Prosecutorial Accountability and Independence through Public Transparency” (2001) 45 Criminal Law Quarterly 272 at 279: “[The] independence of the Attorney General to be free, in the decision-making process, from the partisan political pressures of the day...does not mean that an individual Crown attorney, in the discharge of his or her responsibilities as agent of the Attorney General, is free to do whatever he or she wishes, irrespective of the law, practice or the general guidelines or policies of the Attorney General.”

3. ACCOUNTABILITY

"Prosecutorial independence" is that of the DPP who is accountable to the courts and to the public for the federal prosecution function as explained below. Individual prosecutors are, in turn, accountable to their CFP, the Deputy DPPs and the DPP. Additionally, while the DPP Act creates the Office of the DPP,¹² the Attorney General of Canada remains the chief law officer of the Crown and is ultimately accountable to Parliament, the courts and the public for the federal prosecution function. The DPP's role is distinct from that of the Attorney General; it entails closer oversight and more frequent involvement in files.

This form of public accountability is crucial to a system of open justice, and Crown counsel must be cognizant of this fact. This explains the need to ensure that the DPP is well-briefed in order to fulfill his or her statutory responsibility to inform the Attorney General of prosecutions and interventions that raise important questions of general interest. This duty to inform also allows the Attorney General to provide answers to questions that may be posed in Parliament. The principle of public accountability is clearest in situations where Parliament has required that some prosecutorial decisions be made by the Attorney General (or Deputy Attorney General) personally; an example is the decision to lay war crimes/crimes against humanity charges under [s. 9\(3\)](#) of the *Crimes against Humanity and War Crimes Act*.¹³

An equally important form of accountability is internal accountability. All Crown counsel are accountable to their superiors for decisions taken.¹⁴ The PPSC is organized to foster principled, competent and responsible decision-making. One of the goals of the DPP's guidelines is to assist counsel in making the numerous difficult decisions which arise in criminal litigation. In so doing, they set objective standards against which prosecutorial conduct may be measured.

Individual prosecutors are also subject to a form of public accountability through their membership in provincial law societies.¹⁵ Another form of public accountability occurs through judicial review of a prosecutor's actions, for example, through the abuse of process doctrine, or judicial control of actions which may prejudice fair trial interests, such as inflammatory jury addresses. Accountability is also enhanced because of the availability to the public of the Attorney General's directives and the DPP's guidelines,

¹² The Office of the DPP is known under the applied name of the "Public Prosecution Service of Canada" (PPSC).

¹³ See the PPSC Deskbook guideline "[3.5 Delegated Decision-Making](#)."

¹⁴ See the PPSC Deskbook guideline "[2.6 Consultation within the Public Prosecution Service of Canada](#)", *supra* note 3; see generally the discussion in D. Stuart, "Prosecutorial Accountability in Canada," in P. Stenning, *Accountability in Criminal Justice* (Toronto: University of Toronto Press, 1995) at 336-339.

¹⁵ See e.g. [Krieger v Law Society of Alberta, 2002 SCC 65](#) (CanLII), [2002] 3 SCR 372. For example, law societies have at least some jurisdiction to deal with actions of a prosecutor *qua* lawyer, such as the duty not to engage in dishonourable conduct; see J.L.J. Edwards, "The Office of Attorney General - New Levels of Public Expectations and Accountability" *Accountability in Criminal Justice*, note 6 at 299-304.

since the public is able to assess the actions of Crown counsel against the standards set out in the directives and guidelines. Finally, recognition of the importance of public accountability imposes a duty on Crown counsel in certain circumstances to communicate the reasons for certain decisions to the public through the media.¹⁶

4. DELEGATION OF DECISION-MAKING POWER

As a practical matter, Crown counsel exercise most of the functions assigned by the [Criminal Code](#) to the Attorney General. The DPP exercises delegated powers, duties and functions on behalf of the Attorney General by virtue of the DPP Act and, in turn, has delegated many of these powers¹⁷ to Crown counsel, but retains a discretion to direct that a particular decision be made. Likewise, the Attorney General may direct that a particular decision be made in a specific prosecution under [s. 10\(1\)](#) of the DPP Act. Transparency is assured by making the Attorney General's action a matter of public record for such a directive must be in writing and published in the [Canada Gazette](#).¹⁸

[Sections 14 and 15](#) of the DPP Act recognize the power of the Attorney General both to intervene in criminal proceedings and to assume conduct of particular prosecutions. Where the Attorney General gives notice to the DPP that he or she intends to assume conduct of a prosecution, prosecutorial independence is safeguarded by the DPP Act which requires publication of the notice of intent in the [Canada Gazette](#), making the Attorney General's action a matter of public record.¹⁹

5. CONSULTATION²⁰

Independence of the prosecution service from government does not mean that Crown counsel cannot consult others. They may, and in some cases shall, consult others for the purpose of determining whether it is in the public interest to prosecute a case. Examples of persons with whom counsel can, and in some circumstance should, consult include police officers or other investigators,²¹ victims of crime,²² and government departments or agencies²³.

¹⁶ See the PPSC Deskbook guideline "[2.9 Communications with the Media](#)", *supra* note 5.

¹⁷ As well as duties and functions under [s 9\(1\)](#) of the DPP Act, *supra* note 1.

¹⁸ See DPP Act, *supra* note 1, [s 10\(1\)](#).

¹⁹ Note that [s 3\(8\)](#) of the DPP Act, *supra* note 1, specifies that the DPP initiates and conducts, on behalf of the Crown, prosecutions with respect to offences under the [Canada Elections Act](#).

²⁰ For a more thorough discussion on consultation, see the guideline "[2.6 Consultation within the Public Prosecution Service of Canada](#)", *supra* note 3.

²¹ See the PPSC Deskbook guideline "[2.7 Relationship between Crown Counsel and Investigative Agencies](#)".

²² See the PPSC Deskbook directive "[5.6 Victims of Crime](#)".

²³ See the PPSC Deskbook directive "[1.3 Consultation within Government](#)".

Consultation ensures that Crown counsel have access to a wide range of viewpoints and information so that their decisions are made with full knowledge of all the circumstances. This is particularly useful in regulatory prosecutions. However, prosecutorial independence means that government departments and police officers cannot dictate to Crown counsel that a certain course of action be followed.

Consultation within the PPSC rests on a somewhat different footing. The DPP exercises delegated powers, duties and functions on behalf of the Attorney General.²⁴ In turn, the DPP has delegated authority to Crown counsel under [s. 9](#) of the DPP Act. Because Crown counsel, as a practical matter, act in the DPP's name, it is important that consultation be undertaken internally to ensure that the DPP is made aware of potential problems, and, in some cases, to direct that a particular course of action be undertaken. This is necessary to ensure consistent decision-making, and that the DPP approve of decisions for which he or she is publicly accountable.²⁵ This also allows the DPP to fulfill his statutory obligation under [s. 13](#) of the DPP Act²⁶ to inform the Attorney General of prosecutions and interventions that raise important questions of general interest.²⁷

²⁴ See DPP Act, *supra* note 1, [s 3\(3\)](#).

²⁵ DPP Act, *supra* note 1, [s 16](#) requires the DPP to provide an annual report to the Attorney General for tabling in Parliament.

²⁶ See the PPSC Deskbook directive "[1.2 Duty to Inform the Attorney General under Section 13 of the Director of Public Prosecutions Act](#)."

²⁷ See DPP Act, *supra* note 1, [s 13](#).



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

2.2 DUTIES AND RESPONSIBILITIES OF CROWN COUNSEL

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

Revised September 12, 2023

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1. INTRODUCTION

This guideline describes the duties and responsibilities of Crown counsel¹ in carrying out their delegated functions pursuant to sections 3(3) and 9(1) of the *Director of Public Prosecutions Act*.

2. THE CONDUCT OF CRIMINAL LITIGATION

Crown counsel are vested with substantial discretionary powers² delegated by the Director of Public Prosecutions (DPP).³ These discretionary powers must be exercised with the public interest in mind.⁴

¹ The terms “Crown counsel” and “prosecutor,” as used throughout the *PPSC Deskbook* and are meant to refer to employed federal prosecutors and private sector agents retained to act as federal prosecutors pursuant to s. 7(2) of the *Director of Public Prosecutions Act*, SC 2006, c 9 [*DPP Act*]. The terms also refer to paralegals and articling students when they exercise duties and functions delegated to them by the DPP under ss. 3(3) and 9(1) of the *DPP Act*.

² *R v Cook*, [1997] 1 SCR 1113 at para 19.

³ See Guideline 3.5 “[Delegated Decision-Making](#)” and the delegation of the Director to federal prosecutors pursuant to subsection 9(1) of the *DPP Act*: [Delegation to Federal Prosecutors and Persons Acting as Federal Prosecutors](#).

⁴ *Skogman v The Queen*, [1984] 2 SCR 93.

As *quasi* ministers of justice, Crown counsel's primary interest is not to secure a conviction, rather, it is to pursue justice.⁵ In doing so, Crown counsel represent the public interest. They are not lawyers for the police, the victims, or the accused. The Supreme Court of Canada articulated Crown counsel's role, in the context of a criminal prosecution, in its landmark decision in *Boucher*:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing.⁶

Crown counsel are subject to ethical obligations that differ from those of other litigants.⁷ Fairness, moderation, and dignity should always characterize Crown counsel's conduct during litigation.⁸ At the same time, thorough and vigorous advocacy are important qualities in Crown counsel. The Supreme Court affirmed that vigorous Crown advocacy is a critical element of Canada's criminal law mechanism.⁹ However, Crown counsel should not consider litigation as a personal contest of skill or professional pre-eminence.

Courts generally do not interfere with Crown counsel's exercise of discretion unless it has been exercised for an oblique motive, offends the right to a fair trial, or otherwise amounts to an abuse of process.¹⁰ At all times Crown counsel must exercise their discretion in good faith and in accordance with the highest of ethical standards. In *Regan*, the Supreme Court of Canada listed objectivity, independence, and lack of animus as three major duties of a minister of justice.¹¹ These duties attach to Crown counsel at all times, and in all dealings with an accused person, both before and after charges are laid. They also attach to Crown counsel's dealings with other justice system participants, including victims and witnesses.

⁵ *Boucher v The Queen*, [1955] SCR 16 at 23-24.

⁶ *Boucher v The Queen*, [1955] SCR 16 at 23-24.

⁷ For a foundational discussion of the role of the prosecutor, see Robert Frater, *Prosecutorial Misconduct*, 2nd ed (Toronto: Thomson Reuters, 2017), ch 1 "The Role of the Prosecutor"; Michel Proulx and David Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2011), ch 12 "The Prosecutor"; *Proulx v Quebec*, 2001 SCC 66; *Re Skogman v The Queen*, [1984] 2 SCR 93 at 109, which held that Crown counsel are in a different position from the ordinary litigant, for they represent the public interest in the community at large; *R v McNeil*, 2009 SCC 3 at para 49: where the Supreme Court held: "The Crown is not an ordinary litigant. As a minister of justice, the Crown's undivided loyalty is to the proper administration of justice"; and Marc Rosenberg, "The Attorney General and the Prosecution Function in the Twenty-First Century" (2009) 43:2 *Queen's LJ* 813.

⁸ *Ibid* at paras 151-158; See Rule 5.1-3 of the Federation of Law Societies of Canada Model Code of Professional Conduct. Prosecutors should also refer to their own law society's rules of professional conduct.

⁹ *R v Cook*, [1997] 1 SCR 1113 at para 21.

¹⁰ *R v Nixon*, 2011 SCC 34; *R v Power*, [1994] 1 SCR 601; *Krieger v Law Society of Alberta*, 2002 SCC 65; *Miazga v Kvello Estate*, 2009 SCC 51 at paras 6-7; *R v Anderson*, 2014 SCC 41.

¹¹ *R v Regan*, 2002 SCC 12 at paras 155-156.

The duties also attach to Crown counsel's exercise of prosecutorial discretion when decisions are made leading up to trial. For example, Crown counsel exercise discretion when they decide whether to oppose bail or consent to release, proceed with the case, prefer an indictment, or formulate a resolution position. Every discretionary decision has an impact on both the accused and the administration of justice.

While Crown counsel have many responsibilities, the responsibilities outlined below are among the most important.

3. THE DUTY TO BE FAIR AND MAINTAIN PUBLIC CONFIDENCE

Public confidence in the administration of justice is bolstered by a system where Crown counsel are not only strong and effective advocates, but also ministers of justice, with a duty to ensure the justice system operates fairly for all. Crown counsel must recognize that one can intend to act fairly while unintentionally leaving an impression of secrecy, bias, or unfairness. Crown counsel have a duty not only to act fairly, but also to ensure that their conduct is seen to be fair.¹²

As part of this duty, Crown counsel must consider whether systemic and background factors or systemic racism contributed to bringing an accused to court. Systemic and background factors may also have contributed to certain victims being over-represented as victims of crime. Racism, historical mistreatment, lower socio-economic status, mental illness, substance use disorders, and discrimination¹³ are all factors that increase the likelihood of a person entering the criminal justice system, either as an accused or a victim. Crown counsel must turn their mind to these realities, because these factors may bear on decisions made throughout the course of a prosecution.

Crown counsel must recognize that the exercise of prosecutorial discretion has an impact on an accused, and that impact will be different on each individual accused. For example, decisions can have a more onerous and disproportionate impact on vulnerable and marginalized populations. Therefore, Crown counsel must ensure that their decisions do

¹² For Crown counsel's duties and obligations with respect to allegations of misconduct by persons involved in the investigation of charges, see Guideline 2.13 "[Allegations of Misconduct by Persons Involved in the Investigation of Charges](#)."

¹³ Discrimination is often based on different factors. Intersectional factors are the various facets of a person's social identity including, but not limited to: age, disability, economic status, education, employment, ethnicity, family status, gender, geography, health, indigeneity, language, race, religion, sex, sexual orientation, and social status. While there is no exhaustive list of these factors, legislation identifies some of the prohibited grounds for discrimination. This includes the following prohibited grounds of discrimination: race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. Section 15 of the *Charter* protects the right to equality and lists the following prohibited grounds of discrimination: race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. This list is not closed. Courts have identified additional prohibited grounds analogous to those listed.

not disproportionately impact someone due to their vulnerability.¹⁴ This means that applying the same rules, measures, or standards to every accused may not always be appropriate. Successfully eliminating the unfair, unequal, or discriminatory impact of prosecutorial decisions requires Crown counsel to actively examine all of their choices, in the context of the material placed before them by investigative agencies and information provided by the accused.

Crown counsel also fulfill the duty to be fair by:

- Making disclosure in accordance with the law;¹⁵
- Bringing all relevant cases and authorities known to counsel to the attention of the court, even if they are contrary to the Crown's position;
- Not misleading the court;
- Stating the law accurately;
- Not accepting a plea or alternative measures, in circumstances where there is no reasonable prospect of conviction;
- Being conscious of the factors that can lead to wrongful convictions, for example false confessions or mistaken eyewitness identification;
- Not expressing personal opinions on the evidence, including the credibility of witnesses or the guilt or innocence of the accused, in court or in public. Such expressions of opinion are improper;¹⁶
- Being accurate and dispassionate in presenting evidence or addressing the jury. This includes abstaining from inflammatory rhetoric, demeaning commentary, or sarcasm;
- Not relying on, nor referring to, evidence that has not been admitted at trial, even if that evidence is available but the Crown chose not to adduce it;
- Not discriminating on any prohibited basis;¹⁷

¹⁴ In *R v Gladue*, [1999] 1 SCR 688 and *R v Zora*, 2020 SCC 14 at para 79, for example, the Supreme Court of Canada acknowledged that measures which appear to be neutral, such as a type of sentence or release conditions, may have a disproportionate impact on certain individuals or group of individuals.

¹⁵ See Guideline 2.5 "[Principles of Disclosure](#)"; *R v Stinchcombe*, [1991] 3 SCR 326 at 338-339: "The Crown is under a duty at common law to disclose to the defence all material evidence, whether favourable to the accused or not. Transgressions with respect to this duty constitute a very serious breach of legal ethics." See also *R v McNeil*, 2009 SCC 3, regarding disclosure of police misconduct information and the Crown's duty to make reasonable inquiries.

¹⁶ *Boucher v The Queen*, [1955] SCR 16 at 31; *R v Charest*, (1990) 57 CCC (3d) 312 (QCCA); *R v Regan*, 2002 SCC 12 at para 65; *R v Boudreau*, 2012 ONCA 830 at para 16.

¹⁷ For more information on prohibited grounds of discrimination, see footnote 13.

- Making decisions on files in a timely fashion, in particular when the decisions impact the accused's incarceration, public safety, or confidence in the administration of justice;
- Asking relevant and proper questions during the examination of a witness;
- Not asking questions designed to embarrass, insult, abuse, belittle, attack, or demean the witness. Cross-examination can be skillful and probing, yet still show respect for the witness.¹⁸ The law distinguishes between a cross-examination that is "persistent and exhaustive," which is proper, and a cross-examination that is "abusive";¹⁹
- Acting with civility and respect to all parties whether inside or outside the courtroom;²⁰
- Respecting defence counsel,²¹ the accused, and the proceedings while vigorously asserting the Crown's position, and not publicly and improperly criticizing defence counsel or the defence strategy;
- Remaining open to theories put forward by the defence;
- Respecting the court and judicial decisions, and not publicly disparaging judgments, including jury verdicts; and
- Avoiding engagement in "judge shopping".²²

3.1. The duty to educate oneself on an ongoing basis

The proper exercise of prosecutorial discretion requires Crown counsel to educate themselves on an ongoing basis, not only on the law, but also about the ethical duties of their office and the social realities of the communities in which they prosecute. This may be done through continuing legal education, self-study, or other training.

3.2. The duty to adopt proper language and conduct

Crown counsel must use language that is free of bias, stigmatization, and negative attitudes or beliefs. Crown counsel must recognize that terminology used to label victims of crime, accused persons, or witnesses may have a profound impact. This includes unfairness or further traumatization to the victim (if there is one). Using derogatory or biased language may also cause a mistrial, loss of confidence in the prosecution service, and the expenditure of additional resources.

¹⁸ *R v Robinson*, (2001) 153 CCC (3d) 398 (ONCA).

¹⁹ *R v Lowe*, 2009 BCCA 338 at para 51.

²⁰ *Groia v Law Society of Upper Canada*, 2018 SCC 27 at para 2.

²¹ *R v Mallory*, 2007 ONCA 46 at paras 330-345.

²² *R v Regan*, 2002 SCC 12 at paras 59-61.

Crown counsel must not “engage in inflammatory rhetoric, demeaning commentary or sarcasm, or legally impermissible submissions”.²³ Such conduct undermines trial fairness. While Crown counsel may argue a case forcefully, such behavior must never be used under any circumstances.²⁴ A comment may be determined inappropriate in context with the nature of the comment, the number of times the comment was made, the specific language used, or the overall tone of Crown counsel’s address. Crown counsel are held to a higher standard than counsel for the accused.

4. THE DUTY TO MAINTAIN OBJECTIVITY

Crown counsel fulfill this duty by:

- Being aware of the dangers of tunnel vision, and taking active steps to guard against it, including seeking out the perspectives of other colleagues who may provide a different perspective;
- Ensuring evidence is reviewed in an objective, rigorous, and thorough manner throughout the proceedings;²⁵
- Remaining objective when providing advice to investigators at the pre-charge stage, and ensuring that pre-charge involvement does not impact Crown counsel’s ability to remain objective at the prosecution stage. Active steps, including involving a “fresh eyes” perspective, must be taken to ensure the prosecution is free from actual or perceived biases.²⁶ In some cases, it may not be appropriate for the advisory Crown to also be the prosecuting Crown;
- Taking active steps to set aside their own biases, and identifying biases that may have impacted the investigation. Crown counsel must guard against all forms of conscious and unconscious biases that may perpetuate historical and systemic discrimination. Bias or discrimination can be based on a number of identity factors including race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability, socio-economic status, or political association;²⁷
- Making all necessary inquiries regarding potentially relevant evidence;²⁸

²³ See, e.g., *R v Mallory*, 2007 ONCA 46 at para 340.

²⁴ For a thorough discussion of inflammatory Crown comments see Robert Frater, *Prosecutorial Misconduct*, 2nd ed (Toronto: Thomson Reuters, 2017), ch 7 “Improper Jury Addresses”; *R v Munroe*, (1995) 96 CCC (3d) 431 (ONCA). See also *R v Mallory*, 2007 ONCA 46 at paras 330-345; *R v Boudreau*, 2012 ONCA 830 at para 16; and *R v Clyde*, 2021 ONCA 810 at paras 34-35, 70-77.

²⁵ See Directive 2.4 “[Prevention of Wrongful Convictions](#).” See also *R v Ahluwalia*, (2000) 149 CCC (3d) 193 (ONCA); *R v McNeil*, 2009 SCC 3 at paras 48-51.

²⁶ *R v Regan*, 2002 SCC 12 (victim interviews); *R v Trang*, [2002] 7 WWR 157 (ABQB) (pre-charge advisory role).

²⁷ *R v Le*, 2019 SCC 34 at paras 76 and following.

²⁸ *R v Ahluwalia*, (2000) 149 CCC (3d) 193 (ONCA) at paras 71-72; *R v McNeil*, 2009 SCC 3 at paras 13, 49-51.

- Never permitting personal interests or any political considerations to interfere with the proper exercise of prosecutorial discretion; and
- Not exceeding the scope of appropriate remarks, for example elevating the role of Crown counsel in the eyes of the jury to the custodian of the public interest.²⁹

5. THE DUTY TO ACT WITH INTEGRITY AND DIGNITY

Crown counsel fulfill this duty by:

- Complying with their bar association's applicable rules of ethics;
- Complying with the PPSC's [Code of Conduct](#), Missions and Values, and the PPSC Deskbook;
- Exercising careful judgment in presenting the case for the Crown throughout the course of a prosecution.
- Conducting themselves with civility;³⁰
- Not rushing to judgment in exercising prosecutorial discretion;
- Ensuring that all relevant information is available in order to properly exercise prosecutorial discretion. If relevant information is not available, Crown counsel must make requests to the investigative agency so that they may provide or gather that information;
- Remaining independent of the investigating agency, the victim and the witness(es);
- Adequately preparing for each case; and
- Acting with moderation, fairness, and impartiality.

6. THE DUTY TO MENTOR AND GUIDE

Mentorship is essential to the legal profession. Mentoring relationships facilitate the passing on of skills, knowledge, and wisdom developed through experience. Mentoring not only provides substantive learning opportunities, but can also help a lawyer develop judgement, allowing them to exercise their discretion reasonably, and with confidence. Experienced Crown counsel should mentor junior Crown counsel when they are able to do so.

²⁹ *R v Patrick*, 2007 CanLII 11724 (ONSC) at paras 3-7; *R v McLennan*, 2016 ONCA 732 at paras 61-62.

³⁰ See *R v Felderhof*, (2003) 180 CCC (3d) 498 (ONCA) at para 83; *Groia v Law Society of Upper Canada*, 2018 SCC 27.

7. THE DUTY TO BE INDEPENDENT FROM THE JUDICIARY

Crown counsel fulfill this duty by:

- Not discussing an ongoing case with the presiding judge, or any sitting judge, without the participation of defence counsel (or an accused representing themselves), unless there is a legal justification for such *ex parte* discussions;³¹
- Not dealing with matters in chambers that should properly be dealt with in open court;
- Avoiding personal or private discussions with a judge in chambers or outside the court while presenting a case before that judge;
- Refraining from appearing before a judge on a contentious matter when a personal connection exists between Crown counsel and the judge that would compromise, or appear to compromise, the independent function of either role; and
- Refraining from socializing with a judge outside of court before the case is fully decided.

8. THE DUTY TO AVOID CONFLICT OF INTEREST

The special ethical obligations on Crown counsel, as *quasi* ministers of justice, demand the highest standards of honesty and integrity. Crown counsel's conduct should garner the public's confidence and trust. Thus, it is important that Crown counsel avoid actual, perceived, or potential conflicts of interest.³²

Crown counsel should not participate in any prosecution involving an accused, a victim, a material witness who is a relative or friend, or anyone else in respect of whom there is an objectively reasonable perception of conflict of interest. If the matter is already before the court when the conflict becomes apparent, Crown counsel should notify defence counsel and the court and disqualify themselves from the case.

³¹ For example, in an application under section 37 of the *Canada Evidence Act* or in addressing common law informer privilege.

³² In addition to obligations set out by their respective law societies, Crown counsel must abide by those in the PPSC Code of Conduct which apply to their activities outside their work as well as those which pertain to conflict of interest and conflict of duties.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

2.3 DECISION TO PROSECUTE

GUIDELINE OF THE DIRECTOR ISSUED UNDER THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT* SECTION 3(3)(c)

Revised March 7, 2023

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1. OVERVIEW

Crown counsel must only proceed with prosecutions¹ where two conditions are met:

- (1) There is a reasonable prospect of conviction; and
- (2) The prosecution is in the public interest.

The decision to prosecute is among the most important exercises of prosecutorial discretion undertaken by Crown counsel. The decision can be a difficult one to make, and must be made on a principled basis. Crown counsel must carefully balance the interests of the public, the victim(s) (if any), and the accused. Communities also rely upon and expect Crown counsel to make decisions in a manner that promotes confidence in the administration of justice.

Crown counsel hold a *quasi*-judicial role as a minister of justice.² This means that the Crown does not win or lose, nor does the Crown seek a conviction at all costs. At the same time, Crown counsel must be strong and effective advocates. The adversarial process is an important part of the Canadian judicial system. Therefore, it is permissible for Crown counsel to vigorously pursue a legitimate result to the best of their ability. Public confidence in the administration of justice is bolstered when Crown counsel effectively lay before a trier of fact credible evidence relevant to an alleged crime, firmly and to its legitimate strength, but fairly. At all times, Crown counsel must act fairly, independently, objectively, and without negative or positive *animus* towards the accused or victim(s).³

Crown counsel must also be diligent in all decision-making activities to recognize existing personal conscious and unconscious biases, institutional biases, and stereotypes. Both becoming aware of these biases, and taking active steps to set them aside, are necessary to ensure that the decision to prosecute analysis does not perpetuate any form of systemic discrimination or racism.

Crown counsel must ensure that their assessment of the evidence gathered by the investigating authority, the credibility of the witnesses, the defences brought forth by the accused, or any other relevant fact, is free from bias.

¹ See s. 2 of the *Director of Public Prosecutions Act*, SC 2006, c 9, s 121 [*DPP Act*] for the definition of “prosecution”: A prosecution means “a proceeding respecting any offence, the prosecution — or prospective prosecution — of which is under the jurisdiction of the Attorney General, and any appeal related to such a prosecution or proceeding.”; *Director of Public Prosecutions Act* s 3(8): “The Director conducts prosecutions on behalf of the Crown with respect to any offences under the *Canada Elections Act*, as well as any appeal or other proceeding related to such a prosecution.”

² *Miazga v Kvello Estate*, 2009 SCC 51 at para 47. See also *Boucher v The Queen*, [1955] SCR 16 at 23-24. See the *PPSC Deskbook* Guideline 2.1 “[Independence and Accountability in Decision-Making](#)”.

³ *Krieger v Law Society of Alberta*, 2002 SCC 65 at paras 3, 29-30, 32, 48; and *R v Regan*, 2002 SCC 12 at paras 43, 70, LeBel J and paras 156-57, Binnie J dissenting but not on this point. In the *PPSC Deskbook*, the use of the term “accused” includes persons who have not been formally charged, but Crown counsel must make the decision to prosecute.

For example, Crown counsel must be aware of the existence of different perspectives. Crown counsel should make reasonable efforts to consult with colleagues who have different backgrounds or life experiences to obtain another perspective in assessing the decision to prosecute.

2. PREVENTION OF WRONGFUL CONVICTIONS

Wrongful convictions result in a miscarriage of justice, and significant harm to the convicted person. When the criminal justice system fails, the human cost can be substantial, and public confidence in the justice system is lost. Therefore, Crown counsel must always be scrupulous in their role as ministers of justice to prevent wrongful convictions and to zealously guard against it.

Crown counsel must be mindful of the “environmental” or “predisposing circumstances” that have been identified as fostering wrongful convictions. These circumstances include:

- Tunnel vision (potentially caused by unconscious bias or close contact between Crown counsel, investigative agencies, or victims);⁴
- Decisions influenced by biases, including racial bias, stereotypes, or prejudices of any kind;
- Public pressure to convict in high-profile cases;
- Inadequate or misinterpreted evidence;
- Eyewitness identification error;
- False confessions;
- An unpopular accused;
- A legal environment or culture which focuses on winning; and
- The presence of what has been labelled “noble cause corruption,” or the belief that the end justifies the means.

3. DUTY TO PRESENT A FAIR, CLEAR, AND COMPREHENSIBLE CASE

Crown counsel should be mindful of the principle of moderation in the use of criminal enforcement powers, the accused’s constitutional right to have a trial within a reasonable time, and the appropriate use of state resources. This means that Crown counsel must

⁴ The concept of “tunnel vision” is discussed extensively in: Canada, Justice Canada, [The Path to Justice: Preventing Wrongful Convictions](#) (Ottawa: Federal/Provincial/Territorial Heads of Prosecutions, Subcommittee on the Prevention of Wrongful Convictions, 2011). See also *PPSC Deskbook* Directive 2.4 “[Prevention of Wrongful Convictions](#)”.

structure their case in a manner that allows the trier of fact to understand and digest the evidence effectively and efficiently.

The practice of overcharging is not appropriate, whether it is through the duplication of counts, the laying of additional or heightened charges that are marginal, or laying charges where the evidence barely meets the directed verdict threshold. Overcharging unduly lengthens and complicates a trial.⁵ Charges must always be tailored to focus on the key evidence and the key issues relevant in the context of the individual case.

Crown counsel must carefully consider whether the public interest would be better served by declining to prosecute marginal charges or deciding not to pursue them once the evidence at trial is complete.

4. THE DECISION TO PROSECUTE

As noted earlier, a prosecution should not be undertaken unless there is a reasonable prospect of conviction *and* the prosecution would best serve the public interest.⁶ The test applies to each individual accused, and every charge on the information or indictment.

If the available evidence does not meet the reasonable prospect of conviction standard, the decision to prosecute threshold is not met, and the prosecution should not proceed.⁷ If charges have been laid, those charges should be withdrawn or a stay of proceedings entered. Crown counsel must continue to consider the decision to prosecute criteria throughout all stages of the prosecution, until the exhaustion of all appeals. It is particularly important for Crown counsel to reconsider the criteria when new and credible information comes to light, including from the accused.

4.1 Reasonable Prospect of Conviction

A reasonable prospect of conviction is a standard higher than a bare *prima facie* case. It requires more than sufficient evidence whereby a reasonable jury, properly instructed,

⁵ See *R. v Rodgeron* 2015 SCC 38, at paras 40-46

⁶ See Canada, Department of Justice, *Controlling Criminal Prosecutions: the Attorney General and the Crown Prosecutor, Working Paper 62* (Law Reform Commission of Canada, 1990) at 82 [Controlling Criminal Prosecutions]; *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (Queen's Printer for Ontario, 1993) (Justice G. Arthur Martin, Chair) at 74 [Martin Report]; British Columbia, *Discretion to Prosecute Inquiry*, vol 1 (Queen's Printer for Ontario. Reproduced with permission, 1990) (Stephen Owen, Commissioner) at 104, 117 [Owen Report]. See also the 1951 statement of Lord Hartley Shawcross, then Attorney General of England and Wales, to the House of Commons of the United Kingdom of Great Britain and Northern Ireland, UK, HC Parliamentary Debates, vol 483, col 681, (29 January 1951).

⁷ See Martin Report at 51.

could return a verdict of guilty.⁸ However, a reasonable prospect of conviction does not require a probability of conviction in order to proceed.⁹

Crown counsel must assess the reasonable prospect of conviction standard objectively, and on the assumption that the trial will unfold before an impartial trier of fact acting in accordance with the law.

4.1.1 Application of the Standard

In applying the standard, Crown counsel must make a limited assessment of witness credibility based on the admissibility of evidence, and all available defences. In doing so, Crown counsel must be cautious about making any decision that may have the effect of usurping the ultimate role of the trier of fact.¹⁰

It bears repeating that Crown counsel must set aside their own personal or unconscious biases in assessing the credibility of witnesses, and assessing the impact of any *Charter* breaches. In particular, Crown counsel must consider the evidence from the perspective of the accused, imbued with the background and experiences that accompany their particular circumstances.

With this in mind, Crown counsel must consider the following:

- The evidence likely to be admissible and available at trial;
- The availability, competence, credibility, and reliability of witnesses;
- Credible evidence that may favour the accused, including evidence that supports a defence, whether apparent on the face of the Crown's case, raised by the accused, or otherwise brought to the attention of Crown counsel; and
- The impact of potential *Charter* breaches. This includes *Charter* issues that are apparent from the facts of the case or have been identified by the accused.

Crown counsel must assess whether there is a reasonable prospect of conviction as soon as practicable, following charge referral by the investigative agency or the laying of charges. As the prosecution progresses, new evidentiary information or legal issues often emerge. Crown counsel must continually assess the reasonable prospect of conviction at every stage of the proceeding.

⁸ *Mezzo v The Queen*, [1986] 1 SCR 802.

⁹ For a discussion of the distinction between a reasonable prospect of conviction and a probability of conviction (also known as the “51 per cent rule”) see: Controlling Criminal Prosecutions at 81-82; Martin Report at 51, 58-59, 63; Owen Report at 102-104; and John L. J. Edwards, *The Attorney General, Politics and the Public Interest* (London Street & Maxwell, 1984) at 413-414.

¹⁰ *Miazga v Kvello Estate*, 2009 SCC 51 at para 66; *R v Regan*, 2002 SCC 12 at paras 64, 66, 67, 70 LeBel J and at paras 159-161 Binnie J dissenting; Martin Report at 25-26, 32, 35-39, 42, 51.

4.1.2 Irrelevant Factors

The decision to prosecute must not be influenced by any of the following:

- i. Bias or discrimination based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability, socio-economic status, or political association;¹¹
- ii. Crown counsel's personal views or feelings about the accused, victim(s), or witness(es); or
- iii. The possible effect of the decision on the personal or professional circumstances of Crown counsel, the investigative agencies, or its members, including personal or institutional gain.¹²

4.1.3 Duty to Protect Privileged Information¹³

In assessing reasonable prospect of conviction, Crown counsel must consider whether there is evidence protected by a privilege, and assess the consequences of the Crown's inability to disclose that evidence. This includes evidence that may:

- i. Reveal the identity of a confidential informant;
- ii. Breach solicitor/client privilege;
- iii. Be injurious to national security, international relations, or national defence¹⁴; or
- iv. Breach investigative privilege.¹⁵

A prosecution cannot proceed if the privileged information is essential to the case, and the reasonable prospect of conviction standard is not met without it. Similarly, if Crown counsel is required to disclose this type of information (for example, as a result of a court order), the prosecution cannot proceed in the absence of a waiver or the lifting of caveats. Therefore, Crown counsel must canvass the possibility of a waiver of the privilege or the lifting of caveats that would authorize the disclosure. If this is not possible, Crown counsel must refer the matter to their Chief Federal Prosecutor (CFP). The CFP may consult with the Deputy Director of Public Prosecutions (DDPP) to determine if the appropriate persons

¹¹ This list is non-exhaustive. Many of these identity factors are recognized as prohibited grounds of discrimination pursuant to the *Canadian Human Rights Act*, RSC 1985, c H-6.

¹² Crown counsel may consider criminal and civil forfeiture in their decision, as long as it is not the sole basis for making a decision.

¹³ See *PPSC Deskbook* Directive 4.2 "[Protecting Confidential Information under Section 38 of the Canada Evidence Act](#)".

¹⁴ See Guideline 5.1 of the *PPSC Deskbook* on "[National Security](#)".

¹⁵ For example, the Crown may have a disclosure obligation in a minor case that would compromise an ongoing investigation in a more important or serious case. In this circumstance, Crown counsel would have a duty to protect that ongoing investigation. This may result in the Crown not being able to proceed with the minor case because they cannot fulfill their disclosure obligation.

have been consulted, and whether further steps need to be taken. The DDPP may also consult with the Attorney General of Canada (or their designate) if required.

4.2 Public Interest

Where there is a reasonable prospect of conviction, Crown counsel must determine whether it is in the public interest to continue with the prosecution. “No public interest, however compelling, can warrant the prosecution of an individual if there is no prospect of conviction.”¹⁶ Crown counsel must continuously consider the public interest in light of relevant and emerging developments. There must be a reassessment of the public interest at each stage of the prosecution.

If Crown counsel determines that the reasonable prospect of conviction threshold is barely reached, other public interest criteria may weigh in favour of not proceeding with the prosecution. For example, where the case against an accused is not very strong and they have personal circumstances that are mitigating, Crown counsel should consider not proceeding. These circumstances may include an accused who has been subject to systemic discrimination, has mental health challenges, or has committed the offence(s) because of a substance-use disorder.

The approach set out in this guideline directs Crown counsel to focus on the most serious cases. A serious case is one that involves violence or raises issues of public safety. In cases that are not considered serious, Crown counsel should turn their mind to the availability of alternative measures. For example, diversion must be considered in cases where a person is charged with simple possession of a controlled substance.¹⁷

4.2.1 Factors to Consider

When deciding whether to prosecute or discontinue a prosecution, Crown counsel must consider a number of public interest factors. No one factor is determinative. The significance and influence of each consideration vary from case to case, keeping in mind that the application to the public interest analysis is intended to be flexible and contextually driven.

The non-exhaustive factors are set out below.

a) Nature and Gravity of the Alleged Offence

Aggravating and mitigating circumstances will influence the public interest assessment. Generally speaking, the more serious an alleged offence is, the more likely it is that public interest considerations will weigh in favour of a prosecution. Conversely, the less serious

¹⁶ Martin Report at 76.

¹⁷ *Controlled Drugs and Substances Act*, SC 1996, c 19, s 10.3. See also Guideline 5.13 of the *PPSC Deskbook* “[Prosecution of Possession of Controlled Substances Contrary to s. 4\(1\) of the Controlled Drugs and Substances Act](#)”.

an alleged offence is, the more likely public interest will weigh in favour of discontinuing the prosecution, or pursuing an alternative measure.¹⁸

There are many factors that influence the nature and gravity of the alleged offence. For example:

- The harm, such as serious personal injury, or risk of harm caused by the offence.¹⁹ The public interest generally weighs in favour of proceeding with cases involving serious offences such as terrorism, the trafficking or importation of large amounts of controlled substances, the trafficking of harmful opioids such as fentanyl or carfentanyl, or personal injury offences;
- The amount and nature of the controlled substance, including the prevalence of that controlled substance in the community;
- Any other impact of the alleged offence on communities or individuals, including harm to the environment, a protected species, or the economy;
- The amount of fraud;
- The accused's alleged degree of responsibility;
- Whether the alleged offence is committed by a person acting in a position of authority, trust, or dependence;
- Whether the accused is alleged to be part of a criminal organization or a terrorist group;
- Whether the alleged offence is motivated by racism, bias, prejudice, or hate;
- Whether children or other vulnerable persons are victimized;

¹⁸ *R v Beaudry*, 2007 SCC 5 at para 40.

¹⁹ See also *Criminal Code*, RSC 1985, c C-46, ss: 264 (4) (aggravated criminal harassment); 269.01 (offences against public transportation operators); 320.22 (serious conveyance-related offences); 380.1 (aggravating factors in certain fraud and illicit financial transactions); 348.1 (home invasion type theft, robbery, forcible confinement or extortion); 718.01 (offences against children); 718.02 (offences against peace officers or other justice system participants); 718.04 (the abuse of vulnerable persons, including Indigenous females); 718.2 (crimes motivated by bias, prejudice or hate; offences against intimate partners or family members; the abuse of minors, the abuse of trust or authority, offences against health services providers; criminal organization offences; terrorism offences); 718.04 (offences against vulnerable persons); Part XXIV high-risk offender prosecutions; *Controlled Drugs and Substances Act*, SC 1996, c 19, s 10(2) (drug offences involving violence, weapons, proximity to schools, children under 18); *Canadian Environmental Protection Act*, SC 1999, c 33, s 287.1 (2) (offences involving vulnerable species or areas, impacting human health, causing irreparable damage, financially motivated, failure to mitigate, obstruction, etc.); *Cannabis Act*, SC 2018, c 16, s 15(2) (offences involving violence, weapons, proximity to schools); *Competition Act*, RSC 1985, c C-34; *Immigration and Refugee Protection Act*, SC 2001, c 27, s 121 (human smuggling and trafficking); *WAPPRIITA*, SC 1992, c 52, s 22.08(2) (offences involving vulnerable species, profit motivated, planning, non-compliance history, etc.).

- The prevalence and impact of the alleged offence in the community. For example, prosecutors must consider the over-representation of Indigenous women and girls as victims of crime; and
- Whether the offence targeted a particular individual or group of individuals such as a “justice system participant” as defined in section 2 of the *Criminal Code*.

Crown counsel must consider that the routine prosecution of certain non-serious offences may have a disproportionate impact on over-represented groups. One example is administration of justice offences. Administration of justice offences include failure to appear in court, failure to comply with a bail condition, or failure to comply with a probation order.²⁰ These prosecutions may contribute to a “revolving door” in the justice system. Therefore, if the offence relates to underlying social conditions such as systemic discrimination, homelessness, a substance-use disorder, or mental health challenges, Crown counsel must consider not proceeding.

However, the public interest weighs in favour of proceeding with the prosecution where the administration of justice offence is alleged to be a serious one. For example, where the offence results in harm to a victim, or the accused is charged with failure to comply with a firearm prohibition order. Other circumstances may cause Crown counsel to conclude the alleged offence is serious.

In cases that are not considered serious, Crown counsel must consider resorting to the judicial hearing regime.²¹ Judicial referral hearings are a means of dealing with administration of justice offences as an alternative to charging the accused with a new offence. Judicial referral hearings are available if the offence has not caused harm to a victim. Harm includes physical or emotional harm, property damage, or economic loss. For more on judicial referral hearings, see [Guideline 3.20](#).

b) Circumstances of the Accused

The background and personal circumstances of an accused are relevant to determine whether it is in the public interest to prosecute.

Factors that may influence the public interest analysis include, but are not limited to, the following:

- Indigenous Identity: Crown counsel must consider the ongoing impacts of colonialism, residential schools, over-representation, and systemic discrimination

²⁰ See *PPSC Deskbook* Guideline 3.18 “[Judicial Interim Release](#)”. See also the Supreme Court’s decision in *R v Antic*, 2017 SCC 27 and *R v Zora*, 2020 SCC 14.

²¹ Parliament’s intent in introducing the judicial referral hearing regime was to limit the number of administration of justice offences that result in prosecution, and to address delay in the justice system. See *Criminal Code*, RSC 1985, c C-46, s 523.1 and *PPSC Deskbook* Guideline 3.20 “[Judicial Referral Hearings](#)”.

in the criminal justice system when the accused is First Nations, Métis, or Inuit.²² These factors may shed light on the accused's moral culpability, and may weigh against a prosecution when considered with the totality of the relevant factors.²³

- Systemic and background factors: Crown counsel must consider the impact of systemic racism and the over-representation of certain groups in the justice system, such as members of Black, racialized, or marginalized communities. Crown counsel must also consider any relevant systemic or background factors that may have played a role in bringing the particular accused before the court.
- Underlying issues: Alternatives to prosecution must be considered when the accused's offending behaviour or prior criminal record relates to underlying issues such as homelessness, poverty, or a substance-use disorder.
- Mental health of the accused: Alternatives to prosecution must be considered when the accused's alleged criminal behaviour relates to any significant mental health illness or low cognitive ability.
- Treatment or rehabilitation: Alternatives to criminal prosecution should be considered when the accused has taken significant steps towards treatment or rehabilitation, either before or following the alleged offence.
- Age: The public interest in a prosecution may be diminished when the accused is at an advanced age or is youthful.
- Disability: The public interest in a prosecution may be diminished when the accused is living with a significant disability.
- Criminal Record: When assessing any pre-existing criminal record, Crown counsel must consider the gravity of any prior convictions, the date of those convictions, and the identity of the victim of the prior offence. The existence of a previous criminal record for recent, substantial offences supports the decision to prosecute, while a first-time offender or an offender with a very dated or less serious record invites consideration of alternatives to criminal prosecution.
- Consequences for the accused: The public interest in a prosecution is diminished when the consequences of a prosecution or conviction will be disproportionately harsh or oppressive for the accused.

²² Throughout the *PPSC Deskbook*, the terms First Nations, Inuit and Métis, and Indigenous will be used. Different terms are currently used in treaties, legislation, case law and other Canadian legal texts. For example, s. 718.2(e) of the *Criminal Code* refers to Aboriginal offenders. In *R v Barton* 2019 SCC 33, the Supreme Court of Canada referred to the victim as an "Indigenous woman" (para 2). The United Nations uses the term "Indigenous" in its Declaration on the Rights of Indigenous Peoples. The PPSC Terminology Guide on Equity, Diversity and Inclusion recommends the use of the terms First Nations, Inuit, and Métis.

²³ *R v Gladue*, [1999] 1 SCR 688 and *R v Ipeelee*, 2012 SCC 13.

c) Circumstances and Views of the Victim²⁴

The [Canadian Charter of Rights and Freedoms](#), the [Canadian Victims Bill of Rights](#)²⁵ and the public interest require Crown counsel to consider victims' rights in the decision to prosecute analysis and throughout Crown counsel's conduct of criminal justice matters.

Accordingly, Crown counsel must make diligent efforts to determine and incorporate the views of the victim and/or the victim's family members, where appropriate. In all discretionary decisions involving a victim, Crown counsel must consider the following factors:

- Any serious or adverse impact upon the victim's physical well-being, or mental health.
- The personal circumstances of the victim, including age, cognitive ability, vulnerability, disability, dependence, physical health and mental health;
- An expression or strong interest in holding an accused accountable, either through a prosecution or through alternative measures; and
- A victim's choice to be involved in a prosecution, despite the hardships in doing so, as a useful process to allow the truth to be told in court and to hold the accused accountable.

If the victim is not willing to testify, Crown counsel must consider the underlying reasons along with the victim's particular circumstances. In cases of domestic or sexual violence, a victim's unwillingness to testify weighs in favour of not proceeding with a prosecution, unless there is a reasonable belief that the victim may change their mind.²⁶

Crown counsel must also assess whether there is other admissible evidence sufficient to prosecute the accused in the absence of the victim's testimony. If Crown counsel determines that a material witness warrant is appropriate, they must consult with, and seek the approval of, their CFP.

Where the alleged offence impacts a vulnerable victim, the public interest will weigh in favour of prosecution. For example, there is a strong public interest in the prosecution of cases where the victim is an Indigenous woman or girl. The *Criminal Code* specifically recognizes the disproportionate harm suffered by Indigenous women or girls as victims of

²⁴ See *PPSC Deskbook Directive* "[Victims of Crime](#)".

²⁵ The *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11; *Canadian Victims Bill of Rights*, SC 2015, c 13.

²⁶ The refusal of a witness to testify, who is essential to prove the case, and the corresponding decision whether to seek a material witness warrant, impacts the assessment of both reasonable prospect of conviction and public interest.

crime.²⁷ The *Criminal Code* also includes specific recognition of the impact of crime on victims who are over-represented in the criminal justice system by virtue of their vulnerability on account of race, age, gender identity, poverty, substance-use disorder, mental illness, or any other similar factors.

Some victims may be fearful of the litigation process, in particular testifying. Crown counsel must consider the applicability of procedural tools in the *Criminal Code* that may diminish any potential negative impacts on victims and witnesses.²⁸ The applicability of these procedures may influence the public interest assessment in appropriate cases.

There may be other factors that contribute to a victim's reluctance to participate in the justice process. Those factors may include the community's perception of the justice system, fear of being ostracized in the community, fear of family reprisal, or fear of losing an income-provider or family hunter. Crown prosecutors should discuss these factors with the victim and should consider them in the assessment of the public interest criteria.

While it is important to take into account the views of the victim, Crown counsel must never lose sight of the fact that, like other justice system participants, the victim's views are not determinative with respect to the decision to prosecute. Crown counsel must always remember that prosecutorial independence is a cornerstone of our system of criminal justice and the Crown has a duty to make its decisions dispassionately, without regard to either public sentiment or political pressures.

d) Confidence in the Administration of Justice

Crown counsel must assess whether a prosecution would maintain public confidence in the courts and the administration of justice. For example, prosecuting a case where there is serious state misconduct may lower public confidence in the administration of justice. Examples of serious state misconduct include overt racial profiling, pretext stops, discrimination, abuse by police, or serious *Charter* breaches.²⁹

Evidence of misconduct may not be readily apparent. However, when considered in all the circumstances, after gathering all the relevant information, patterns may emerge showing that over-represented groups, including First Nations, Inuit, Métis, or Black individuals are disproportionately targeted because of racial profiling or systemic discrimination. Despite

²⁷ Statutory aggravating factors include whether the victim was a child (*Criminal Code* s 718.01), an intimate partner (*Criminal Code* s 718.201), a female person, or an Indigenous female person (*Criminal Code* s 718.04).

²⁸ There are many tools Crown counsel can consider. For example, proceeding by way of summary conviction, or making use of various testimonial aids. A victim's privacy may also be protected through the *Criminal Code*: Section 276 (admissibility of evidence of prior sexual activity); s 278.3 (production of records); s 715.1 (admissibility of video-recorded evidence taken from children during an investigation); and s 486.1 (application for a support person). Crown counsel may also refer to the *PPSC Deskbook Directive* 5.6 "[Victims of Crime](#)", section 5.1 "Aids to trial testimony".

²⁹ See *PPSC Deskbook* Guideline 2.13 "[Allegations of Misconduct by Persons Involved in the Investigation of Charges](#)".

the challenges in identifying police misconduct, Crown counsel should be on the lookout for evidence at all stages of a prosecution.

If additional evidence is required to make this determination, Crown counsel should make requests to the investigative agency and potentially the accused.

The CFP or their designate will provide guidance to the assigned Crown and may communicate with the police or investigative agency at the appropriate level to address the evidence of serious state misconduct. The CFP, in consultation with the assigned Crown, must decide independently of the police or investigative agency whether a prosecution properly serves the public interest.

Where Crown Counsel identifies serious state misconduct on a balance of probabilities, the prosecution should not proceed.

Where the charges are serious or a victim is involved, Crown counsel must weigh the evidence of the state misconduct with any impact the discontinuation of the prosecution may have on the administration of justice and the victim. In serious cases, or where there is a victim involved, Crown counsel must consult with the CFP or their designate before making a final determination.

In addition to serious state misconduct, there may be circumstances where the conduct of the investigation may reduce the public interest in carrying out the prosecution. For example, Crown counsel must consider that delay between the commission of the alleged offence and the time of the charging decision may negatively impact the confidence in the administration of justice. Crown counsel should consider the investigative agency's reasons for the delay, the accused's responsibility for the delay, and the complexity and length of the investigation.

e) Harm to the Community

Crown Counsel should take steps to gain knowledge and understanding of the communities in which they prosecute. This includes an understanding of communities that may be under-policed or over-policed. Prosecutors can learn more about their communities by consulting public documents. For example, they can consult reports from commissions of inquiries, reports prepared by police review agencies, or civil lawsuits filed against investigatory agencies or attorneys general.

The public interest analysis must include consideration of the impact of the alleged offence and prosecution on the local community. Potential harms include any loss or injury caused by the alleged offence, and the impact of the alleged offence on public safety, public health, public welfare, the environment, natural resources, and other economic, cultural or societal public interests. The public interest may favour a prosecution if the offence is so serious that not proceeding with the prosecution would have an impact on the local community's confidence in the administration of justice.

Where the impact of the alleged offence contributes to the ongoing trauma and disproportionate victimization already experienced by Indigenous persons and communities because of historic and systemic factors, the public interest will weigh in favour of prosecution.³⁰

Crown counsel should consider whether the prosecution of an offence would maintain public confidence in a regulatory regime or have the opposite effect.

f) Alternatives to Prosecution

Crown counsel must consider the factors below in determining whether the public interest can be satisfied without a prosecution:

- The consequences of a prosecution or conviction would be disproportionately harsh or oppressive;
- The effect on the administration of justice of committing resources to conduct the proceedings when considered in relation to the seriousness or triviality of the alleged offence, the likely sentence that would result from a conviction, and the attendant public benefit(s); and
- The likelihood of achieving the desired result and requisite level of specific and general deterrence and denunciation without a prosecution.

Alternatives to prosecution are designed to serve the public interest by promoting accountability and rehabilitation for the accused while avoiding both the stigma of a criminal conviction and criminal procedures that consume time and resources. There are a variety of alternatives to prosecution. They include alternative measures pursuant to s. 716 of the *Criminal Code*, such as the referral of the investigation or charges to a restorative justice program.³¹ In many First Nations, Inuit, and Métis communities, alternative measures include culturally appropriate restorative justice programs inspired by legal traditions aimed at rehabilitation and community reintegration.

In addition to alternative measures, other alternatives to prosecution may be appropriate to respond to the specific needs of the accused. For example, Crown counsel must consider:

- Extrajudicial sanctions for young persons;³² and

³⁰ These factors have been identified in *R v Gladue*, [1999] 1 SCR 688 and *R v Ipeelee*, 2012 SCC 13, and in the Truth and Reconciliation Commission. See also Canada, National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry Into Missing and Murdered Indigenous Women and Girls* (Vancouver: Privy Council Office, 2019) (Chief Commissioner Marion Buller).

³¹ See *PPSC Deskbook* Directive 3.8 “[Alternative Measures](#)”.

³² See *PPSC Deskbook* Directive 5.4 “[Youth Criminal Justice](#)”.

- Referral to mental health courts or drug treatment courts,³³ where available, for accused with mental health challenges or a substance-use disorder.

Alternatives to prosecutions may be appropriate in light of the nature and seriousness of the offence and the availability of appropriate parallel processes such as:

- Prosecution by a provincial or territorial prosecution service pursuant to another legislation;
- Administrative sanctions; or
- Compliance programs.

4.2.2 Irrelevant Factors

A determination of whether it is in the public interest to prosecute an accused must not be influenced by any of the following:

- i. Bias or discrimination based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability, socio-economic status, or political association;³⁴
- ii. Conviction for an offence where a pardon has been granted or where a record of suspension has been ordered; or
- iii. Possible political or any other advantage or disadvantage to the government or any other political group or party.

4.2.3 Duty to Protect Private or Privileged Information

In assessing whether it is in the public interest to proceed with a prosecution, Crown counsel must consider their duty to protect sensitive or privileged information, as well as the harm that can result from its disclosure.³⁵ This includes information that may:

- i. Reveal the nature and extent of an ongoing investigation;
- ii. Be injurious to national security, international relations, or national defence;
- iii. Negatively impact the privacy interests or safety of a third party or victim; or
- iv. Disclose an investigative technique, thereby compromising future investigations.

³³ See *PPSC Deskbook* Guideline 6.1 “[Drug Treatment Courts](#)”.

³⁴ This list is not exhaustive. Many of the factors listed are prohibited grounds of discrimination under the *Canadian Human Rights Act*, RSC 1985, c H-6.

³⁵ For example, see *PPSC Deskbook* Directive 4.1 “[Protecting Confidential Information under Section 37 of the Canada Evidence Act](#)”.

While this duty to protect exists, the disclosure of sensitive or privileged information may be justified depending on the nature and seriousness of the case. In these circumstances, Crown counsel must determine if it is possible to obtain consent to disclose the protected information or seek a waiver of the privilege. Even with consent or a waiver, Crown counsel must weigh the seriousness of the case with the harm that may result in disclosure. In doing so, Crown counsel must consult with the appropriate individuals (including representatives of the investigative agency) and their CFP. The CFP may consider it appropriate to consult with the DDPP.

5. CONSULTATION³⁶

In some cases, it will be appropriate for Crown counsel to obtain the views of the investigative agency or the victim before making the decision to prosecute. Crown counsel are encouraged to consult to gain knowledge about how the prosecution, or the discontinuation of the prosecution, may impact the victim or the particular community where the alleged offence took place.

The CFP or Deputy Chief Federal Prosecutor (DCFP) must consult with their assigned DDPP when a decision may have a significant impact on other prosecution decisions regarding a class of cases, the enforcement practices or policies of investigative agencies, a regulatory enforcement/compliance regime, or a provincial, territorial, or national practice.³⁷

Consultation between counsel within the federal government may also be warranted, particularly with a Department of Justice Legal Services Unit that advises a federal department or agency with an enforcement mandate.³⁸ Those federal agencies may be particularly attuned to the nature, philosophy, objectives of the enforcement regime, and its remedial options. In prosecutions relevant to regulatory statutes, investigative agencies often have views about the enforcement of their regulatory schemes and should be consulted in the event that the public interest factors weigh against a prosecution.

In the event that the investigative agency disagrees with a decision to not prosecute a charge that has been laid or referred, Crown counsel must advise the CFP or their designate. The CFP, or their designate, may communicate with the police or investigative agency at the appropriate level. In cases of national importance, the CFP must consult with the assigned DDPP.

³⁶ See the *PPSC Deskbook* Directive 1.3 “[Consultation within Government](#)” and the *PPSC Deskbook* Guideline 2.6 “[Consultation within the Public Prosecution Service of Canada](#)”.

³⁷ When dealing with issues and cases involving Indigenous persons, which may have national implications for the PPSC, the PPSC Regional Offices are invited to consult the Indigenous Justice and Reconciliation Committee.

³⁸ See also *PPSC Deskbook* Directive 1.3 “[Consultation within Government](#)”.

6. DOCUMENTING AND COMMUNICATING DECISION-MAKING

Where a decision is made to not institute proceedings or to discontinue an existing prosecution, Crown counsel must document the reasons for that decision to a level of detail appropriate in the circumstances. In sensitive, serious, or complex cases, any consultations made in reaching that decision must also be documented.

Crown counsel must also make reasonable efforts to explain their decision to the police or investigative agency.

Where a decision is made to not prosecute on the basis of racial profiling, any other apparently illegitimate investigative pretext, excessive use of force, or other similar reasons, Crown counsel must record the details of their decision in the file and advise their CFP. The details must include a summary of the facts and the rationale for arriving at the conclusion that the investigation was a result of any of these circumstances.

Crown counsel must know and follow the requirements of the *Canadian Victims Bill of Rights*. This includes a victim's right to request information about the progress and outcome of proceedings in relation to an offence.³⁹

Finally, in some circumstances, the need to maintain public confidence in the administration of justice may also necessitate public communication of the reasons for not prosecuting.⁴⁰ This communication may occur through a statement in court at the time charges are discontinued or a news release. In providing reasons, Crown counsel should consider the privacy interests of victims, witnesses, accused persons, and the need to protect privileged information.

7. PROVIDING ADVICE TO INVESTIGATIVE AGENCIES ON THE DECISION TO PROSECUTE

Public safety and effective prosecutions are promoted when Crown counsel maintain a cooperative relationship with investigative agencies.

Crown counsel should provide timely legal advice to investigating agencies when reasonable and necessary to do so. Upon request, Crown counsel may provide a preliminary confidential legal opinion addressing whether the decision to prosecute analysis would be met on the available evidence. Such requests may be made prior to charges being laid or referred for approval. Generally speaking, it is advisable that such legal advice be given when all the available evidence has been gathered by the investigative agency, after a thorough and complete investigation. Crown counsel should ensure they have all the relevant information to arrive at an informed opinion.

It is Crown counsel, not the investigative agency, who are ultimately responsible for making the decision to prosecute, except where the consent of the Attorney General is

³⁹ *Canadian Victims Bill of Rights*, SC 2015, c 13, ss 2, 7.

⁴⁰ See the *PPSC Deskbook* Guideline 2.9 "[Communications with the Media](#)".

required. Crown counsel must make this decision objectively and independently from the investigative agency.⁴¹ When Crown counsel decides not to proceed with a prosecution, the reasons for this decision should be communicated to the investigative agency, in a timely manner. If the investigative agency has acted contrary to the law, Crown counsel should provide an explanation, along with legal advice, that will assist in conducting investigations moving forward.

8. DELEGATED PROVINCIAL / TERRITORIAL PROSECUTIONS

Where a charge has been delegated from a provincial Attorney General to the DPP for prosecution, Crown counsel makes the decision to prosecute in accordance with the applicable provincial decision to prosecute policies.

⁴¹ See the *PPSC Deskbook* Guideline 2.7 “[Relationship between Crown Counsel and Investigative Agencies](#)”.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

2.4 PREVENTION OF WRONGFUL CONVICTIONS

**DIRECTIVE OF THE ATTORNEY GENERAL ISSUED
UNDER SECTION 10(2) OF THE *DIRECTOR OF PUBLIC
PROSECUTIONS ACT***

March 1, 2014

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1. INTRODUCTION

Crown counsel play an important role in the prevention of wrongful convictions. Crown counsel assess the evidence in a given case to determine if there is a reasonable prospect of conviction, and must continue to assess the evidence on an ongoing basis to determine whether to continue with the prosecution.¹ It is thus crucial that Crown counsel are aware of the factors and circumstances that have been identified as common in wrongful conviction cases, and take all necessary steps within their mandate to help ensure that innocent persons are not convicted of crimes they did not commit.

The primary purpose of this directive is to apprise Crown counsel of the factors that have been identified as contributing causes in wrongful conviction cases,² to highlight best

¹ This directive should be read in conjunction with related PPSC Deskbook guidelines and directives, including: “[2.3 Decision to Prosecute](#)”, “[2.2 Duties and Responsibilities of Crown Counsel](#)” and “[2.7 Relationship between Crown Counsel and Investigative Agencies](#).”

² The research regarding the phenomenon of wrongful convictions is voluminous; scholars have found discussion in the legal commentary dating back to the writings of Sir Edward Coke in 1644 in the *Institutes of the Laws of England*, who documented a 1611 case of a wrongful conviction and execution for murder, as well as the writings of William Blackstone a century later. See Bruce P. Smith, “The History of Wrongful Execution,” (June 2005) 56 Hastings L.J. 1185 at 1189. The study of wrongful convictions in the modern era begins with the research of Yale law professor Edwin Borchard, who wrote *Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice*, (Garden City, New York: Yale University Press, 1932). The book has been reproduced by Nabu Public Domain Reprints.

practices that can assist Crown counsel in preventing miscarriages of justice, and to bring to the attention of Crown counsel the extensive research in this field. Bearing in mind that all cases are different, the following information is intended to provide general guidance to federal prosecutors.

Wrongful convictions are usually the result of a combination of errors; one or more of the following elements may be a contributing factor:³

- Tunnel vision by police and/or the Crown;
- Incomplete disclosure;
- Eyewitness misidentification;
- False confessions, false accusations or perjury;
- Guilty pleas by the factually innocent;
- The false testimony of in-custody informers;
- Faulty or unreliable forensic evidence or expert testimony, including the lack of biological samples suitable for DNA testing; and
- Conduct of police and counsel.

In addition to the above contributing factors, Crown counsel should also be aware that the following four “environmental or predisposing circumstances” have been identified as fostering wrongful convictions:

- Public pressure to convict in high-profile cases;
- An unpopular defendant, who is a member of a minority group and often perceived as an outsider;

³ In his 1932 pioneering study, Borchard observed that the causes of wrongful convictions were most often mistaken identification, circumstantial evidence that resulted in incorrect inferences, perjury, or some combination of these factors, *supra* note 2. See more recently two FPT reports that have surveyed the research, and include individual chapters on all of the perceived common factors in these cases: The 2005 [*Report on the Prevention of Miscarriages of Justice*](#), FPT Heads of Prosecutions Committee Working Group, 2005 [2005 FPT Report], is available online. The 2011 update to this report, [*The Path to Justice: Preventing Wrongful Convictions*](#), is available on the PPSC internet site. These are excellent resource documents, which not only include separate chapters on factors recognized as common in wrongful conviction cases, but set out best practices for police and Crown counsel. The PPSC issued an information bulletin to its prosecutors in January 2005, summarizing the findings of the 2005 FPT Report and the recommendations and best practices of most relevance to Crown counsel. For further reading, see for example Bruce A. MacFarlane, "Convicting the Innocent: A Triple Failure of the Justice System," (2005) 31 Manitoba L.J., No 3 at 443; Jon B. Gould and Richard A. Leo, "One-Hundred Years Later: Wrongful Convictions After a Century of Research," (2010) 100 Journal of Criminal Law & Criminology, No 3 at 825; and Samuel R. Gross and Michael Shaffer, "Exonerations in the United States, 1989-2012, Report by the National Registry of Exonerations," a joint project of the University of Michigan Law School and the Centre on Wrongful Convictions at Northwestern University School of Law. The [Registry](#) can be found online. The US-based [Innocence Project](#) is also a wealth of information, research and statistics regarding the various mistakes and factors that have consistently played a role in wrongful convictions.

- A legal environment or culture that focuses on winning; and
- The presence of what has been labelled “noble cause corruption,” the belief that the end justifies the means and that improper practices are acceptable to ensure a conviction because the accused committed the crime.⁴

2. TUNNEL VISION

Tunnel vision by the police, or the Crown, or both, in a given case, has been identified as a contributing factor in wrongful convictions in Canada and elsewhere.⁵

Experts define tunnel vision as a “single-minded and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably colour the evaluation of information received and one’s conduct in response to that information.”⁶ Police officers and Crown counsel affected by tunnel vision can become so convinced that the correct suspect has been identified and that the theory of the case is correct, that they see only the evidence that supports that theory and ignore facts and information that do not support it.

Crown counsel must not only watch for signs of tunnel vision among the police officers involved in the investigation of the case, but they must also constantly guard against developing it themselves. One of the greatest safeguards for Crown counsel is to bear in mind the key principles regarding the role of the Crown so clearly articulated in the classic case of *Boucher v The Queen*.⁷ In their review of the evidence in a given case, Crown counsel must remain cognizant of their duty to be fair and impartial, and to ensure they review the evidence in an objective, rigorous and thorough manner. Crown counsel fulfil a gatekeeper function by virtue of the Crown’s duty to critically and independently assess the evidence presented by the police.⁸

⁴ See MacFarlane, *supra* note 3 at 435-443.

⁵ 2005 *FPT Report*, *supra* note 3 at c 4 and the 2011 update to c 4. See in particular the paper by Bruce A. MacFarlane, “Wrongful Convictions: The Effect of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System,” released with the 2008 Inquiry Into Pediatric Forensic Pathology in Ontario, “[the Goudge Inquiry](#),”. See also Keith Findlay and Michael Scott, “The Multiple Dimensions of Tunnel Vision in Criminal Cases,” (June 2006) University of Wisconsin Law School, Legal Studies Research Paper Series, Paper No 1023 at 291. Recent illustrations of tunnel vision by the police and the Crown can be found in the [2006 Lamer Commission of Inquiry](#) Pertaining to the cases of Ronald Dalton, Gregory Parsons and Randy Druken, particularly the case of Gregory Parsons. See also [The Commission on Proceedings Involving Guy Paul Morin](#), Toronto: Queen’s Printer, 1998.

⁶ [The Morin inquiry](#), *ibid*. This definition is contained in Recommendation 74.

⁷ [1955] SCR 16. This case is discussed in the PPSC Deskbook guideline “[2.2 Duties and Responsibilities of Crown Counsel](#)”. See, in particular, the discussion of the Crown’s duty to be fair. On the role of Crown counsel, see also an excellent article by Robert J. Frater, “The Seven Deadly Prosecutorial Sins,” (2002) 7 Can Crim L Rev 209.

⁸ See the 2005 *FPT Report*, *supra* note 3 at 39. See also the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”.

While Crown counsel should, where appropriate, encourage co-operation and early consultation with the police during police investigations, it is crucial that Crown counsel understand the distinct and independent role of the Crown vis-à-vis the police.⁹ Although the police are responsible for directing the investigation, during the file review, Crown counsel should not hesitate to question aspects and perceived shortcomings of the police investigation that relate to the sufficiency of the evidence and impact the prospect of conviction. A fair, independent and impartial review of the file by Crown counsel also means remaining open to alternative theories of the case, which may be different from the theory advanced by the police.

Public Prosecution Service of Canada (PPSC) managers and Crown counsel should also strive to create a workplace atmosphere that encourages questions, consultations and frank discussion and debate among Crown counsel and that is receptive to the expression of alternative views regarding a case.¹⁰

During file review and trial preparation, checks and balances through supervision and second opinions should be encouraged. Crown counsel with carriage of the file may consider consulting a fellow Crown counsel who can play the role of a contrarian or devil's advocate. This can be a very useful technique, particularly in the most serious cases.

Mentoring should be encouraged regarding various aspects of Crown counsel's role, such as the importance of the independent role of Crown counsel vis-à-vis the police, and the appropriate limits of Crown advocacy.¹¹

3. INCOMPLETE DISCLOSURE

Incomplete disclosure by the police and/or the Crown has been a factor in some wrongful conviction cases in Canada.¹² Crown counsel must ensure they fully understand the breadth of Crown counsel's disclosure obligations under the law and that they adhere strictly to them.¹³ Crown counsel's disclosure obligations are discussed in the PPSC

⁹ See the PPSC Deskbook guideline "[2.7 Relationship between Crown Counsel and Investigative Agencies](#)", *supra* note 1.

¹⁰ 2005 *FPT Report*, *supra* note 3 at 40.

¹¹ Concerns about the nature of Crown advocacy were discussed at length in the Parsons case, which is one of the three cases examined in the Lamer Inquiry, *supra* note 5.

¹² 2005 *FPT Report*, *supra* note 3 at c 11. See also c 11 in the updated version of this report, which was released in September 2011. While lack of disclosure played a role in a number of historic cases of wrongful convictions in Canada, such as those of [Donald Marshall Jr.](#) and of Thomas Sophonow, see more recently the [Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell](#) (2007) and the [Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard](#) (2008). In the [Lamer Inquiry report](#), *supra* note 5, Lamer identified inadequate disclosure as an issue in two of the three cases examined. See also the discussion of inadequate disclosure as a factor in wrongful conviction cases in Bruce A. MacFarlane, "Convicting the Innocent," *supra* note 3 at 450. This topic is discussed and referenced further in the section on Official Misconduct.

¹³ See [R v Stinchcombe, \[1991\] 3 SCR 326](#); [R v MacNeil \(2009\), SCJ No 3](#).

Deskbook guideline “[2.5 Principles of Disclosure](#)”. Crown counsel must remain mindful that the Crown’s disclosure obligation continues after conviction, including after appeals have been decided or the time for appeal has elapsed. Consequently, whenever Crown counsel receives information suggesting that there may be a reasonable basis to conclude that a miscarriage of justice likely occurred, Crown Counsel should immediately report the matter to the Chief Federal Prosecutor (CFP) for whatever further investigation or action may be required.

4. EYEWITNESS MISIDENTIFICATION

Eyewitness misidentification has been identified as the single most important factor leading to wrongful convictions, indeed the overwhelming factor.¹⁴ Eyewitness misidentification was a key factor in a number of Canadian cases of wrongful convictions.¹⁵ In one American study, eyewitness misidentification, either mistaken or intentional, was a factor in at least 94 per cent of the exonerations for sexual assault, child sexual abuse and robbery.¹⁶

When the identification of the perpetrator is at issue, Crown counsel must assess eyewitness identification evidence carefully, and be cautious regarding its use, despite its potential value.

The Canadian judiciary has acknowledged the inherent frailties of identification evidence, due to the unreliability of human observation and recollection.¹⁷ Honest and confident witnesses, who believe they recall an incident correctly, make convincing witnesses, but they can be wrong. Crown counsel must be wary of eyewitness evidence, particularly single-witness identification where there is no corroboration and be attuned to the fact that confidence does not necessarily equate with accuracy.

Crown counsel should remain mindful that a description of the offender given to the police shortly after the event, when the witness’s memory is fresh and the description is less

¹⁴ Bruce A. MacFarlane, “Convicting the Innocent”, *supra* note 3 at 443 and 447. See also Angela Baxter, “Identification Evidence in Canada: Problems and a Potential Solution,” (February 2007) vol 52, No 2, CLQ at 175, and Gross and Shaffer, *supra* note 3 at 43. See also comments from Justice Rosenberg in [R v Hanemaayer \(2008\), OJ No 3087](#) at para 29 (CA) [*Hanemaayer*].

¹⁵ See e.g. [Hanemaayer, *ibid*](#); [R v Henry \(2010\), BCCA 462](#). See also The [Inquiry Regarding Thomas Sophonow](#), (Winnipeg: Manitoba Justice, 2001), *supra* note 12.

¹⁶ Gross and Shaffer, *supra* note 3 at 52.

¹⁷ 2005 *FPT Report*, c 5, in particular at p 49, as well as the 2011 update to this chapter. See [R v Hay, 2013 SCC 61](#), where the court discussed eyewitness evidence; the majority held at para 51 that a jury may convict on the basis of a single eyewitness’s testimony, notwithstanding the frailties of eyewitness identification, if the witness’s testimony could support a finding of guilt beyond a reasonable doubt. See also [R v Sutton, \[1970\] 2 OR 358 \(CA\)](#); [R v Nikolovski \(1996\), 111 CCC \(3d\) 403 \(SCC\) at 412](#); [Burke v The Queen, \[1996\] 1 SCR 474, \(1996\), 105 CCC \(3d\) 205 at 224](#); [R v Hibbert \(2002\) SCC 39, \[2002\] 2 SCR 445](#) and more recently, [Hanemaayer, supra](#) note 14.

likely to be tainted by suggestions from others or other outside influences, is the most reliable.

Crown counsel must keep current regarding developments in this area and familiarize themselves with the relevant case law,¹⁸ as well as the best practices recommended for police forces and Crown counsel.

The PPSC has endorsed the following best practices, which are explained in greater detail in the 2011 report, *The Path to Justice, Preventing Wrongful Convictions*:¹⁹

- Assume the identity of the accused is always at issue unless the defence admits it on the record. Timely preparation and a critical review of all of the available identification evidence, including the manner in which it was obtained, is required as it will affect the conduct and quality of the trial;
- Be wary of the weaknesses associated with certain types of single-witness identifications, e.g., where there was a poor opportunity to observe or no prior contact with the identified person. While not required by law to secure a conviction, corroboration of an eyewitness's identification can overcome deficiencies in the quality of that evidence;
- Be familiar with the identification procedures used by the police force in the case and critically assess the extent to which these procedures are in line with recognized best practices, and how any shortcomings impact the quality of the identification evidence;
- Do not condone or participate in a "show-up" line-up (presenting a single suspect in person to the witness at some point during the pre-trial investigation and asking if the witness recognizes the individual);
- Never show a witness an isolated photograph or image of an accused during the interview; and
- Always lead evidence of the history of the identification. It is vitally important that the trier of fact be told not only of the identification but all the circumstances involved in obtaining it, i.e., the composition of the photo pack.

5. FALSE CONFESSIONS, FALSE ACCUSATIONS OR PERJURY

Crown counsel must remain alive to the fact that for a variety of reasons individuals sometimes confess to crimes they did not commit.

¹⁸ The PPSC has amassed considerable information on this important topic, including valuable training materials that can be provided upon request. In addition, the two FPT HOP reports, *supra* note 3, have chapters on this subject. Finally, the following cases are of particular relevance to prosecutors regarding the circumstances where out of court statements of identification may be admitted for the truth of their contents. See *R v Starr*, [2000] 2 SCR 144 and *R v Tat* (1997), 117 CCC (3d) 481 (ONCA).

¹⁹ A list of best practices and practical suggestions for Crown counsel can be found in c 5 of the report at 75-76. See the link to this report at *supra* note 3.

The Supreme Court of Canada has acknowledged that false confessions are a problem within the criminal justice system,²⁰ and that innocent people make false confessions more frequently than those unfamiliar with the phenomenon might expect.²¹ False accusations and perjury have also been identified as factors in wrongful conviction cases, and particularly common in homicide and child sex abuse cases,²² although these factors tend to have received less attention in the studies and academic literature to date.

In light of the emerging evidence regarding the existence of false confessions, Crown counsel must critically assess statements from suspects for reliability and admissibility, and should be particularly cautious when assessing the confessions of certain types of suspects, including the young and the intellectually disabled,²³ who may be particularly receptive to police suggestions and more disposed to falsely confess.²⁴ Crown counsel should also remain cognizant of the various reasons a voluntary confession can be false.²⁵

Canadian commissions and inquiries into wrongful convictions have consistently recommended the audio-visual recording of police interviews of chief suspects and witnesses in serious crimes, including the interviews of youthful and other vulnerable witnesses.²⁶ The Canadian judiciary has increasingly encouraged and, in some instances, has stopped just short of insisting on, the recording of statements from suspects.²⁷

²⁰ [R v Oickle, 2000 SCC 38](#) at paras 34-45 [*Oickle*].

²¹ See Binnie J's dissent in [R v Sinclair, 2010 SCC 35, \[2010\] 2 SCR 310](#). Justice Binnie cites *Oickle*, *supra* note 20, on this point at para 90 of *Sinclair*. (The majority decision in *Oickle* discusses at paras 34-45 academic literature that explores the relationship between modern police interrogation techniques and false confessions.)

²² Gross and Shaffer, *supra* note 3 at 40 and at 53. As discussed in note 2, from the earliest studies of the past century, perjury has been identified as among the common factors cited in these cases but it has not been a focus of the academic literature in this area to date.

²³ There is a growing body of research regarding the particular vulnerability of young persons and other vulnerable groups to falsely confess. See for example Christopher Sherrin, "False Confessions and Admissions in Canadian Law," (2005) 30 QLJ at 601; Kent Roach and Andrea Bailey, "The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law from Investigation to Sentencing," (2009) 42 UBCL Rev at 1; Steven Drizin and Greg Luloff, "Are Juvenile Courts a Breeding Ground for Wrongful Convictions?" (2007) 34 Northern Kentucky Law Review at 257, and the USSC in [JDB v North Carolina, 131 S. Ct. 2394 \(2011\)](#).

²⁴ *Oickle*, *supra* note 20 at para 42. See also Sarah Burns, *The Central Park Five* (New York: Alfred A. Knopf, 2011), which examines why five black and Latino teenagers falsely confessed to the beating and rape of a female jogger in Central Park.

²⁵ See for example [Hanemaayer](#), *supra* note 14.

²⁶ The reliability of statements from youthful witnesses was a major issue in various cases of wrongful convictions in Canada, including the cases of Donald Marshall and David Milgaard. In fact, the Milgaard inquiry report recommended that all statements taken from young persons in major cases, whether as suspects or witnesses, be audio and video recorded. See online hyperlinks at note 12.

²⁷ *Oickle*, *supra* note 20 at para 46. Some lower courts have cited lack of a recording of the interrogation as a significant factor in ruling statements of accused inadmissible on the basis that voluntariness had not been proven. See e.g. [R v Wilson \(2006\), 210 CCC \(3d\) 23, 39 CR \(6th\) 345, 213 OAC 207 \(ONCA\)](#); [R v Ah-](#)

Crown counsel should encourage the police to record the statements of suspects and witnesses in serious crimes, including those of youthful and other vulnerable witnesses.

6. GUILTY PLEAS

Members of the Canadian judiciary have expressed concern about cases where defendants have pleaded guilty to serious criminal offences they did not commit to avoid the risk of a potentially lengthier sentence if convicted after trial. In such cases, although the guilty pleas were valid in the legal sense,²⁸ fresh evidence admitted on appeal established that the guilty pleas should be set aside as miscarriages of justice.²⁹ Crown counsel must be fully aware of this risk during plea resolution discussions. Crown counsel is bound by relevant Director of Public Prosecutions' (DPP) guidelines regarding the limits of plea resolution discussions,³⁰ as well as ethical obligations outlined by law societies across Canada. Law society rules of professional conduct, as well as those of the Canadian Bar Association, identify the general duties of prosecutors, which include the duty to act fairly³¹ and honourably.³²

7. IN-CUSTODY INFORMERS

Crown counsel must be particularly cautious when assessing the evidence of jailhouse or in-custody informers, who are notoriously unreliable witnesses.³³ The use of evidence

med (2002), 170 CCC (3d) 27, 7 CR (6th) 308, 166 OAC 254 and *R v Moore-McFarlane* (2001), 56 OR (3d) 737, 160 CCC (3d) 493, 47 CR (5th) 203, 152 OAC 120.

²⁸ Section 606 of the *Criminal Code* states that a court may accept a guilty plea only if it is satisfied that the accused is making the plea voluntarily, that he or she understands that the plea is an admission of the essential elements of the offence, and that he or she appreciates the nature and consequences of the plea. The court is not bound by any agreement made between the accused and the prosecutor.

²⁹ See for example, *Hanemaayer*, *supra* note 14 at para 18, where Rosenberg J. identified the quandary as a "terrible dilemma" faced by the accused: "[T]he justice system held out to the appellant a powerful inducement that by pleading guilty he would not receive a penitentiary sentence." See also *R v Kumar* (2011), OJ No 618 (CA), *R v Sherrett-Robinson* (2009), OJ No 5312 (CA); *R v Brant* (2011), OJ No 2062 (CA) and Joan Brockman, "An Offer You Can't Refuse: Pleading Guilty When Innocent," (2010) 56 CLQ at 116.

³⁰ See the PPSC Deskbook guideline "[3.7 Resolution Discussions](#)."

³¹ See for example the *BC Law Society Professional Conduct Handbook*, c 8, Rule 18, Duties of Prosecutor.

³² *Law Society of Upper Canada, Rules of Professional Conduct*, Rule 4.01(3). See also the PPSC Deskbook guideline "[2.2 Duties and Responsibilities of Crown Counsel](#)", *supra* note 1.

³³ This section of this directive should be read in conjunction with the PPSC Deskbook guideline "[3.3 Immunity Agreements](#)", in particular section 7, which concerns information provided by a jailhouse or in-custody informer, as well as section 8 regarding out-of-custody co-operating witnesses. An in-custody informer, as defined by the Honourable Fred Kaufman, CM, QC, in his report on the case of Guy Paul Morin, *supra* note 5, vol 1, chapter III, section C at 598, is someone who allegedly receives statements from an accused while both are in custody in relation to offences that occurred outside of the custodial institution.

from in-custody informers (which later turns out to be false) has been a contributing factor in wrongful convictions, both in Canada and elsewhere.³⁴ Even experienced police officers and prosecutors can be fooled by such witnesses.³⁵ Crown counsel must assess the evidence of in-custody informers with the utmost care and be satisfied that the evidence of the informer is credible before calling him or her as a witness. If Crown counsel is satisfied that the witness is credible, he or she should recommend to the CFP that the informer be called as a witness. If the CFP believes it is an appropriate case for the use of the in-custody informer, the CFP should seek the advice of the Major Case Advisory Committee before making a final decision. If the Committee and the CFP disagree, the matter should be directed to the appropriate Deputy DPP for a final decision. The role of the Committee is discussed in the PPSC Deskbook guideline “[3.1 Major Case Management](#)”.³⁶

8. FORENSIC EVIDENCE AND EXPERT TESTIMONY

Faulty forensic procedures, unreliable science and/or flawed expert opinion testimony have been factors in a number of wrongful conviction cases in Canada.³⁷ Crown counsel, who deal with experts from a diverse range of disciplines, must be cognizant of the risks associated with the use of forensic evidence and expert testimony. Depending on their practice, Crown counsel may develop a sound understanding of the domain of various experts with whom they interact routinely. However, the ability to remain current on significant developments in forensic science is a challenge, particularly where novel areas of expertise and science are to be relied upon in specific prosecutions.

Crown counsel should not refrain from reliance on a novel scientific theory or technique, provided there is a sufficient foundation to establish the reliability and necessity of these opinions and that the probative value exceeds the potential prejudicial impact. Crown counsel must exercise diligence in obtaining and adducing sufficient evidence to meet the factors in support of reliability (e.g., can the theory or technique be empirically validated? Is there a professional association or society offering continuing education to its recog-

The accused does not have to be in custody for, or charged with, the offences to which the statements relate. This definition does not include informers who allegedly have direct knowledge of the offence independent of the statements of the accused.

³⁴ 2005 *FPT Report* at 75, and its 2011 update, *supra* note 3. See also the inquiries concerning [Sophonow](#), *supra* note 12 and [Morin](#), *supra* note 5 and more recently the [Lamer Inquiry](#), *supra* note 5 and the [Driskell Inquiry](#), *supra* note 12.

³⁵ See [The Inquiry Regarding Thomas Sophonow](#), *supra* note 12.

³⁶ See the PPSC Deskbook guideline “[3.3 Immunity Agreements](#)” for a full detailing of the PPSC Policy concerning the use of jailhouse informers, including the factors Crown counsel should consider when assessing their credibility and the nature of the relationship between the informer and the police.

³⁷ The Morin and Sophonow inquiries are early Canadian examples of this but see more recently the [Goudge Inquiry](#), *supra* note 5 regarding the role of forensic science and forensic scientists in the criminal justice system and problems in this area generally. See also [R v Mullins-Johnson](#), (2007) OJ No 3978 (CA), where the Court held that the wrongful conviction and 12-year imprisonment of [Mullins-Johnson](#) for the murder of his niece was the result of a rush to judgment based on flawed scientific opinion.

nized members? Is there a meaningful certification program? Can the findings be reliably recreated and tested by qualified examiners?) Crown counsel must also be satisfied that the evidence will be used for a proper purpose.³⁸

Crown counsel should also be open to case conferences between Crown and defence experts to try to narrow and/or potentially resolve the scientific issues in a given case.

Ultimately, the key issues Crown counsel must consider are the following:

1. The validity of the science;
2. The qualifications of the expert;
3. The quality and validity of the testing procedures;
4. The objectivity and independence of the opinion;
5. Whether a proper evidentiary foundation can be laid; and
6. The relevance of the evidence to an issue in dispute.³⁹

Crown counsel are encouraged to seek out educational opportunities and resources that will enable them to increase their understanding and knowledge of various forensic disciplines, and to keep abreast of the relevant jurisprudence as well as new procedures and developments in the field of forensic science.⁴⁰ Crown counsel should not hesitate to consult colleagues and superiors, and to seek the support and resources they require in prosecutions involving expert evidence with which they have little professional experience, or in very serious cases where expert evidence is a fundamental component of the case.

Provided Crown counsel exercise due care and diligence in presenting the expert opinion, establishing the sufficiency of the factual underpinning supporting it, with the fairness of the trial process in mind, the possibility of a miscarriage of justice arising from its use can be reduced.⁴¹

³⁸ [R v Mohan, \[1994\] 2 SCR 9](#) continues to be relied upon for its four-part test regarding the admission of proposed expert evidence. See also [R v J-LJ, \[2000\] 2 SCR 600](#), [R v DD, 2000 SCC 43](#), [\[2000\] 2 SCR 275](#) and more recently, [R v Trochym, \[2007\] 1 SCR 239](#) and [Reference re: Truscott, \(2007\) 225 CCC \(3d\) 321 \(ONCA\)](#).

³⁹ Section 7 of this directive is largely an excerpt from the recommendations and guidelines in c 9 of the 2005 *FPT Report*, *supra* note 3.

⁴⁰ In a 2013 report on Forensic Science in Canada under the auspices of the Centre for Forensic Science & Medicine at the University of Toronto, forensic experts from across Canada discuss the state of forensic science in Canada. Among their recommendations is that multidisciplinary cross-training should be encouraged among scientists, police, lawyers and judges, and that judges should receive ongoing training in this field.

⁴¹ Detailed guidelines and best practices for prosecutors can be found in c 9 of the 2005 *FPT Report*, *supra* note 3, and in its 2011 update. [Goudge Inquiry](#), *supra* note 5, vol 3, c 17 also provides advice to Crown counsel.

8.1. DNA evidence

The advent of DNA testing has been a critical development in the field of forensic science generally, both to convict the guilty and exonerate the innocent. The legislation in the [Criminal Code](#) has been expanded and now makes it possible to obtain DNA orders following conviction in relation to more offences.⁴²

Crown counsel should be familiar with the legislation in the *Criminal Code*,⁴³ and relevant case law, and ensure that the DNA data bank provisions are being used to their full potential and that DNA orders are being sought in all appropriate cases.⁴⁴

Crown counsel should also make every effort to work co-operatively with the police and other criminal justice partners to ensure that DNA evidence is available for post-conviction testing in appropriate cases.

9. CONDUCT OF POLICE AND COUNSEL

Official misconduct, which encompasses a broad range of conduct by various criminal justice participants, ranging from abusive investigative procedures that can produce false evidence, to committing or procuring perjury, to concealing exculpatory evidence, has also been cited as among the factors that can contribute to a wrongful conviction.⁴⁵ Regarding Crown conduct, the research suggests the most common transgression is the failure to disclose exculpatory evidence, either because the police did not provide prosecutors with the information, or because prosecutors were unaware that they had such information in the file or intentionally withheld it.⁴⁶

The conduct of defence counsel, which can include conduct that may be perceived in retrospect, to be ineffective, erroneous or missteps, has also been identified as relevant in

⁴² As of 2008, the list of designated offences that qualify for inclusion in the National DNA Data Bank Convicted Offenders Index (COI) has been significantly expanded. More than 150 offences were added to the list. The list captures terrorism offences, criminal organization offences, and drug offences under ss 5, 6, 7 (or an attempt or conspiracy to commit any of the above) under the [Controlled Drugs and Substances Act](#), SC 1996, c 19 that are tried by indictment and carry a maximum sentence of five years or more.

⁴³ [Section 487.051](#).

⁴⁴ See c 8 in the 2005 *FPT Report* and in its 2011 update, *supra* note 3.

⁴⁵ See Gross and Shaffer study, *supra* note 3 at 65-67 and Brandon Garrett, *Convicting the Innocent* (Cambridge, Mass.: Harvard University Press, 2011) at 167-171 and at 205-209.

⁴⁶ See Gould and Leo, *supra* note 3 at 854-855. See also MacFarlane, *supra* note 3 at 450-452, and Kathleen M. Ridolfi & Maurice Possley, "Preventable Error: A Report on Prosecutorial Misconduct in California, 1997-2009," (October 2010), Northern California Innocence Project, Santa Clara University School of Law. This study is characterized as the most in-depth statewide review of prosecutorial misconduct in the United States. See also the discussion in the [Lamer Commission of Inquiry](#), *supra* note 5, concerning the role of the Crown in the case of Gregory Parsons at 134-156, and Robert J. Frater, *Prosecutorial Misconduct*, *supra* note 7.

some wrongful conviction cases in the US and Canada.⁴⁷ In *R v GDB*,⁴⁸ the Supreme Court of Canada held that the right to effective assistance of counsel is a principle of fundamental justice; however this right will be seen to be violated in law only if the conduct is unreasonable and incompetent and results in a miscarriage of justice. If Crown counsel develops concerns in a particular case that an accused is not being effectively represented, Crown counsel should consult his or her CFP or the CFP delegate to discuss the appropriate course of action.

10. CONCLUSION

Like other key criminal justice system participants, Crown counsel should become familiar with the factors that have been widely recognized as contributing factors in wrongful conviction cases, and keep abreast of the relevant jurisprudence and the best practices that have been associated with their prevention. In addition, training in relation to the prevention of wrongful convictions should be provided to federal prosecutors.⁴⁹ Indeed, the education of criminal justice system participants has been identified as a key aspect of the prevention of wrongful convictions.⁵⁰

When a particular file raises concerns, Crown counsel should consult experts, colleagues and superiors.⁵¹

⁴⁷ This issue is discussed in the *Lamer Inquiry*, *supra* note 5. See also MacFarlane, “Convicting the Innocent,” *supra* note 3 at 468-470. The US Innocence Project identifies “bad lawyering” as one of the seven most common causes of wrongful convictions. See also discussion of this issue in Garrett, *supra* note 45 at 205-207 and Gross and Shaffer, *supra* note 3 at 41-43.

⁴⁸ 2000 SCC 22. In the US, see *Strickland v Washington*, 466 US 668 (1984), which is the seminal USSC case on the subject but see more recently *Missouri v Frye*, 132 S Ct 1399 (2012).

⁴⁹ For example, training on this topic is routinely provided at the PPSC annual School for Prosecutors.

⁵⁰ See c 10 in the 2005 *FPT Report*, as well as the 2011 updated c 10, *supra* note 3. A number of the Canadian inquiries, including the recent 2006 Lamer Inquiry and the 2008 Goudge Inquiry, stressed the importance of educating key justice system participants such as police, Crowns and forensic scientists, regarding the many subjects implicated by the wrongful conviction cases in Canada.

⁵¹ A summary of all of the recommendations from the seven Canadian inquiries that relate to wrongful convictions can be found in: Gary Botting, *Wrongful Conviction in Canadian Law*, (Markham, Ont: Lexis Nexis Canada Inc., 2010).



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

2.5 PRINCIPLES OF DISCLOSURE

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

March 1, 2014

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1. INTRODUCTION

In the seminal case on the Crown's disclosure obligations, *R v Stinchcombe*,¹ the Supreme Court of Canada set out the duty on the part of the Crown to provide disclosure to an accused person. The Supreme Court makes it clear that the obligation, though broad, is not absolute, but is subject to Crown counsel's discretion with respect to both the timing of disclosure and the withholding of information for valid purposes, including the protection of police informers, cabinet confidences and national security, international relations and national defence information.² The obligation is also subject to the limitation that the accused has no right to information that would distort the truth-seeking process.³

2. STATEMENT OF POLICY⁴

There is a general duty on the part of the Crown to disclose all material it proposes to use at trial and especially all evidence which may assist the accused⁵ even if the Crown does not propose to adduce it. While the Crown must err on the side of inclusion, it need not produce evidence that is beyond the control of the prosecution, clearly irrelevant, or privileged.

It is the Crown's obligation to disclose all information, whether inculpatory or exculpatory, that could "reasonably be used by the accused either in meeting the case for

¹ [1991] 3 SCR 326.

² See *Canada Evidence Act*, RSC 1985, c C-5, ss 37, 38 and 39. See the PPSC Deskbook directives "[4.1 Protecting Confidential Information under Section 37 of the Canada Evidence Act](#)", "[4.2 Protecting Confidential Information under Section 38 of the Canada Evidence Act](#)" and "[4.3 Protecting Cabinet Confidences under Section 39 of the Canada Evidence Act](#)". See also the PPSC Deskbook guidelines "[3.11 Informer Privilege](#)" and "[5.1 National Security](#)".

³ *R v Mills* [1999] 3 SCR 668; (1999), 139 CCC (3d) 321 at 363-4.

⁴ This guideline assumes that the accused is before a court in Canada charged with an offence in a domestic criminal proceeding. If charges were laid but the accused fled Canada or for some other reason is not before a Canadian court, there is no obligation to provide full disclosure. It may, however, be appropriate to provide counsel with a brief summary of the case. Where an accused absconds during a preliminary hearing or trial, and the hearing is continued in his absence pursuant to ss 475 and 544 of the Code, the obligation to make disclosure to his counsel continues if counsel continues to act.

⁵ Information which "may assist the accused" is not always easily recognizable. It is difficult to provide 'bright line' guidelines respecting disclosure of the 'unused' material in the Crown's file. Counsel are expected to exercise good judgment and consult with senior managing lawyers in assessing what should and what need not be disclosed. The purpose of this requirement is to avoid a miscarriage of justice on the basis of non-disclosure.

the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.”⁶ Information is relevant for the purposes of the Crown's disclosure obligation if there is a reasonable possibility that the withholding of the information will impair the right of the accused to make full answer and defence.⁷

In all cases, whether a request has been received or not, Crown counsel should disclose any information, within their knowledge, tending to show that the accused may not have committed the offence charged. The inability of the Crown to make such disclosure may require a Crown stay or withdraw the charges or request a judicial stay of proceedings.⁸

The purpose of disclosure is two-fold:

1. to ensure that the accused knows the case to be met, and is able to make full answer and defence; and
2. to encourage the resolution of facts in issue including, where appropriate, the entering of guilty pleas at an early stage in the proceedings.

The information to be disclosed need not qualify as evidence; that is, it need not pass all of the tests concerning admissibility.⁹ It is sufficient if the information is relevant, reliable and not subject to some form of privilege. Second-hand information that is unconfirmed may or may not be disclosed, depending on counsel's assessment of the issues in the case.

Crown counsel's disclosure obligation is a continuing one and relates to information that comes to the attention of or into the possession of Crown counsel throughout the process and continues after conviction, including after appeals have been decided or the time of appeal has elapsed.¹⁰

3. INCLUSIONS

Crown counsel shall, as soon as reasonably practicable,¹¹ provide disclosure. In most cases, this will mean that the defence will be given at least the following, subject to

⁶ See *R v Egger*, [1993] 2 SCR 451 at 466-67.

⁷ *Stinchcombe*, *supra* note 1 at 340.

⁸ See *R v Carosella*, [1997] 1 SCR 80 for a discussion of lost or destroyed evidence.

⁹ *R v O'Connor*, [1995] 4 SCR 411; (1995), 103 CCC (3d) 1 at 20 [O'Connor].

¹⁰ *Stinchcombe*, *supra* note 1 at 14. See also the *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions*, (Queen's Printer for Ontario, 1993) at 206-208 [Martin Committee Report]. The purpose of this section is to underscore the proposition that disclosure is not a 'one-shot' deal.

¹¹ The phrase "as soon as reasonably practicable" is intended to provide a degree of flexibility based on the facts in individual cases. The right to disclosure is triggered by a disclosure request made by or on behalf of the accused, though the practice of waiting for the request by defence appears to differ across Canada. Where there has been a timely request, disclosure should be made before plea or election or any resolution

editing for statutory or common law privilege or a determination by Crown counsel that the information is irrelevant:¹²

3.1. Charging Document

A copy of the information or indictment;

3.2. Particulars of the Offence

Particulars¹³ of the circumstances surrounding the offence. This may include a Report to Crown Counsel (RTCC), an analytical document prepared by the investigative agency, which sets out the evidence relating to the elements of the offences and the investigators' theory of the case;

3.3. Witness Statements

Copies of the text of all written statements concerning the offence which have been made to the police or a person in authority by a person with relevant information to give; where the person has not provided a written statement, a copy or transcription,¹⁴ if available, of any notes that were taken by investigators when interviewing the witness; if there are no notes, a 'will-say' or summary of the anticipated evidence of the witness. This requirement includes statements provided by persons whether or not Crown counsel proposes to call them as witnesses;

discussions: *Stinchcombe*, *supra* note 1 at 14. Where the request is not timely, disclosure must be made as soon as reasonably practicable and in any event before trial. See section 4.3 of this guideline, regarding unrepresented accused. Usually, disclosure will occur after the investigators have given Crown counsel the details of the case. In view of the respective roles played by investigators and Crown counsel in the criminal justice system, the investigative agency is in a unique, if not an exclusive, position to give Crown counsel the information required to be disclosed under this guideline. If the agency fails to do so, Crown counsel may need to assess the extent to which the accused is able to have a fair trial and decide whether, in the circumstances, an adjournment, stay of proceedings or other remedy is required or appropriate. The investigative agency, although operating independently of the prosecution, has a duty to disclose to Crown counsel, without prompting, all relevant information uncovered during the investigation of a crime, including information which assists the accused: *Martin Committee Report*, *supra* note 10 at 167. See also *R v T (L.A.)*, (1993) 84 CCC (3d) 90 (Ont CA) at 94; *R v V (W.J.)*, (1992) 72 CCC (3d) 97 (Nfld CA) at 109; *R v McNeil* 2009 SCC 3 [McNeil].

¹² The 'shopping list' of information set out in this section is information that would normally be disclosed in a given case. Subject to the limitations in section 5 of this guideline, it is more in the nature of a minimal statement of disclosure on behalf of the prosecution. It is not intended to be exhaustive, see section 3.18 of this guideline regarding other material. Counsel should take into account the disclosure requirements described by provincial appellate courts and the Supreme Court of Canada when assessing the scope of disclosure required in any given case.

¹³ 'Particulars' is not intended in the sense that it is used in [s 587](#) of the Code. Rather, it contemplates the provision of details or information concerning the circumstances surrounding the offence.

¹⁴ *Stinchcombe*, *supra* note 1 contemplates disclosure of the investigator's notes or copies of notes concerning the interview of a witness. In some instances, it may be helpful to provide a transcription, although that is not required as a matter of law. Additionally, a notebook may contain many references to different investigations. Only those notes relating to the interview should be produced.

3.4. Audio/video evidence statements by witnesses

An appropriate opportunity¹⁵ to view and listen to, in private, a copy of any audio or video recording of any statements made by a witness other than the accused to a person in authority.¹⁶ This does not preclude Crown counsel, in his or her discretion, from providing copies of any video or audio recording or a transcript, where available and appropriate, but with appropriate disclosure conditions that take into account the sensitivity of the material. Where defence counsel is unwilling to accept the disclosure conditions, Crown counsel should seek to impose conditions by court order;

3.5. Statements by the accused

A copy of all written, audio or video recorded statements concerning the offence which have been made by the accused to a person in authority; in the case of oral statements, a verbatim account, where available, including any notes of the statement taken by investigators during the interview; if a verbatim account is not available, an account or description of the statement; and a reasonable opportunity to view and listen to, any original audio or video recorded statement of the accused to a person in authority. Copies of all such statements or access thereto should be provided whether or not they are intended to be relied upon by the Crown;¹⁷

3.6. Accused's criminal record

Particulars of the accused's and any co-accused's criminal record;¹⁸

3.7. Expert witness reports

As soon as available, copies of all expert witness reports in the possession of Crown counsel relating to the offence, whether helpful to the Crown or not, should be disclosed. Counsel should pay close attention to [s. 657.3](#) of the *Criminal Code* (Code), which requires notice to be given where an expert is to be called as a witness at trial;

¹⁵ In most instances, it will be appropriate to provide this access under the supervision of an investigator or Crown counsel.

¹⁶ This section was not intended to require full access to, for instance, intercepted private communications made between co-conspirators, one of whom has now agreed to testify on behalf of the Crown. With respect to intercepted private communications generally, see section 3.11 of this guideline.

¹⁷ Absent unusual circumstances, recordings made by a potential Crown witness through an electronic body pack should be disclosed. Special considerations may apply where counsel for the accused seeks access to intercepted private communications involving the accused. See sections 3.8, 3.9 and 3.11 of this guideline in this regard. *Stinchcombe*, *supra* note 1 requires disclosure of notes prepared during a custodial interview. Absent unusual circumstances, copies of undercover notes outlining conversations involving the accused should similarly be provided.

¹⁸ Foreign convictions, if known, should also be disclosed. In some instances, they may be available through the Interpol office at RCMP Headquarters. In the case of foreign convictions, however, special care must be taken to confirm the proper identity of the person convicted.

3.8. Documentary and other evidence

Where reasonably capable of reproduction, copies of (or access to) all documents, photographs, audio or video recordings of anything other than a statement of a person, should be provided whether or not they are intended to be relied upon by the Crown. Where there exists a reasonable privacy or security interest of any victim(s) or witness(es) that cannot be satisfied by an appropriate undertaking from defence counsel, Crown counsel should seek to impose conditions by court order;

3.9. Exhibits

An appropriate opportunity¹⁹ to inspect any case exhibits,²⁰ i.e., items seized or acquired during the investigation of the offence which are relevant to the charges against the accused;

3.10. Search warrants

A copy of any search warrant, whether relied on by the Crown or not, and, subject to relevance and the limitations in section 5 of this guideline, the information in support unless it has been sealed pursuant to a court order,²¹ and a list of the items seized thereunder, if any;

3.11. Authorizations to intercept private communications

If intercepted private communications will be tendered, a copy of the judicial authorization or written consent under which the private communications were intercepted;²²

¹⁹ As in the case of recorded statements of a witness (see section 3.4 of this guideline), steps should be taken to ensure that access is provided under controlled circumstances which preserve the integrity of the case exhibit. How this can be achieved will depend on the circumstances in each case, although it may be appropriate to provide access only under the supervision of an investigator or employee of the investigating agency.

²⁰ Where a case exhibit is detained by police pursuant to a court order, counsel for the accused may, depending on the circumstances, be required to obtain an order under [s 490\(15\)](#) of the Code before it can be examined.

²¹ Requests for production of the information in support of a search warrant that has been sealed pursuant to a court order under [s 487.3](#) of the Code will be governed by the substantive law and procedure set out in that section, and the case law as it is developing in this area. See the PPSC Deskbook guideline “[3.4 Sealing Orders and Publication Bans](#)”.

²² The wiretap logs and session lists should be a routine part of the disclosure provided to the accused in every wiretap case, subject to editing for privilege and subject to appropriate undertakings or court-ordered conditions.

3.12. Similar fact evidence

Particulars of similar fact evidence that Crown counsel intends to rely on at trial;

3.13. Identification evidence

Particulars of any procedures used outside court to identify the accused;²³

3.14. Witnesses' criminal records²⁴

Information regarding criminal records of material Crown or defence witnesses that is relevant to credibility may have to be disclosed.²⁵ This includes disciplinary records of police witnesses where those records fall within the scope of the Crown's disclosure obligation pursuant to *McNeil*.²⁶ There is no obligation to do a criminal record check on all Crown witnesses.²⁷ Special care must be taken with police agents and other potentially disreputable witnesses, particularly foreign ones. A reliable copy²⁸ of the person's criminal record, and relevant information²⁹ relating to any outstanding criminal charges against the witness, must be disclosed. Crown counsel must request such information in

²³ This is especially important in undercover cases: disclosure should be made of any identification evidence such as license plate numbers, business cards, the post-operation "roundup". Evidence or information of this nature often is not included in the brief to Crown counsel. Counsel should, therefore, ask the investigators to provide a briefing on the means by which the person arrested was identified as the person involved in the impugned transaction.

²⁴ If the accused is seeking access to a youth criminal record, Crown counsel should refer to the *Youth Criminal Justice Act*, SC 2002, c 1 which governs disclosure of youth criminal records.

²⁵ Crown counsel have a discretion (reviewable by the trial judge) to determine whether information regarding a criminal record of a proposed witness is relevant to that witness's credibility. Crown counsel will have to exercise discretion when assessing whether to disclose old criminal convictions or convictions for offences which could not really assist in the impeachment process. For example, a criminal conviction for impaired driving 10 years ago could hardly assist in impeaching the credibility of a witness in a drug trafficking trial. Furthermore, in northern regions, the automatic disclosure of criminal records of victims or witnesses may be problematic as it may stigmatize unnecessarily the witnesses. On the other hand, convictions for offences of dishonesty will almost always be relevant, regardless of when they were entered. The balance to be struck on this issue centers around the privacy interests of the witness, as measured against the accused's right to test the Crown's case.

²⁶ In *McNeil*, *supra* note 11 the Court emphasized that the Crown has a significant role to play as "gatekeeper" with respect to disclosure of police misconduct information. Prosecutors have an obligation to review misconduct material prior to disclosure to the accused. This role does not involve a wholesale turning over of material provided by the police but rather a "studied analysis" to determine if it is relevant to the defence."

²⁷ This obligation is limited to material witnesses whose credibility is in issue. See the *Martin Committee Report*, *supra* note 10 at 243.

²⁸ In Canada, this means a printout of the record held by the Canadian Police Information Centre (CPIC); for foreign witnesses, this means the CPIC equivalent.

²⁹ "Relevant information" means the nature of the charges, the court, and the status of the proceedings.

writing from the relevant police authority³⁰ and place the letter and response on the file. Such information should be adduced by the Crown in the examination-in-chief of the witness.

If, at any point in the proceedings, it becomes apparent that the complete criminal record or the relevant information on outstanding charges was not disclosed, or the witness did not testify truthfully about those matters, defence counsel must be advised and Crown counsel must make immediate efforts to determine the reasons for the non-disclosure or misleading disclosure. Such efforts will include a written request for an explanation to the police officer "handling" the witness and his or her superior officer, and a request that the witness and "handler" be made available to testify on the issue, should the need arise.

3.15. Material relevant to the case-in-chief

Particulars of any other evidence on which Crown counsel intends to rely at trial;

3.16. Impeachment material

Any information in the possession of Crown counsel which the defence may use to impeach the credibility of a Crown witness in respect of the facts in issue in the case;³¹

3.17. Information obtained during witness interviews³²

Crown counsel has an obligation to disclose any additional relevant information received from a Crown witness during an interview conducted by Crown counsel in preparation for trial. Additional relevant information includes information inconsistent with any prior statement(s) provided to the investigative agency, e.g., a recantation. Such information should be promptly disclosed to the defence or an unrepresented accused, subject to any

³⁰ "Relevant police authority" means the investigative agency which has been the primary contact with the witness in relation to the information at issue. For example, where the witness is being "handled" by a foreign investigative agency, the request should be made directly to that agency, and copied to the Canadian investigative agency in charge of the Canadian investigation.

³¹ This is a 'catch-all' provision, intended to require disclosure of (a) any other evidence forming part of the Crown's case and (b) information that could be helpful for impeachment purposes. Counsel is expected to exercise careful judgment in assessing the extent to which background information concerning a witness need necessarily be disclosed. For production to be required, impeachment information must be capable of affecting the credibility of the witness with respect to some fact in issue in the case. Some information may be very invasive of privacy rights, e.g., information concerning a mental disorder which may bear upon the capacity of a witness to be sworn. Disclosure of records containing personal information in the possession of Crown counsel for which there is a reasonable expectation of privacy is governed by [ss 278.1 to 278.9](#) of the Code unless the witness to whom the record relates has expressly waived the application of those sections. In most instances, this section will require disclosure of the basic terms of the arrangement between the Crown and any co-operating accomplice expected to testify on behalf of the Crown, subject to the limitations in section 5 of this guideline. See section 3.14 of this guideline for information regarding criminal records of material Crown or defence witnesses.

³² This section does not require the disclosure of information protected by work product privilege. See section 5.8 in this regard.

limitations contemplated by section 5 of this guideline. To avoid the possibility of Crown counsel being called as a witness, interviews should be conducted in the presence of a police officer or other appropriate third person, where practical to do so;³³

3.18. Information obtained by Crown Witness Coordinators

In Canada's three territories, Crown counsel work closely with Crown Witness Coordinators (CWCs). CWCs are in frequent contact with victims and witnesses throughout the court process and often receive information from these sources between the time of initial contact and the trial or sentencing hearing.

The Crown's disclosure obligation includes any additional relevant information received by CWCs from victims and civilian witness during interviews or other contacts with such persons. Crown counsel and CWCs must always ensure that any additional relevant information provided by victims and civilian witnesses is properly documented and if necessary disclosed. This will also allow Crown counsel to determine if it is necessary to ask police to interview the victim or civilian witness regarding the additional information;

3.19. Other material

Additional disclosure beyond that outlined in sections 3.1 to 3.17 above may be made at the discretion of Crown counsel. In exercising this discretion, Crown counsel shall balance the principle of fair and full disclosure, described in section 1 and 2 of this guideline, with the need, in appropriate circumstances, to limit the extent of disclosure, as outlined in section 5 of this guideline;

4. EXCEPTIONAL SITUATIONS

4.1. Third party information

Information in the possession of third parties such as boards, social agencies, other government departments, rape crisis centres, women's shelters, doctors' offices, mental health and counselling services or foreign law enforcement agencies is not in the possession³⁴ of Crown counsel or the investigative agency for disclosure purposes. Where Crown counsel receives a request for information not in their possession or the possession of the investigative agency, the defence should be advised that these records are in the possession of a third party in a timely manner in order that the defence may take such steps to obtain the information as they see fit. Even where third party records are

³³ Thus, if any new information comes to light, the officer or other third person can make notes to facilitate disclosure, and give whatever testimony may be necessary at trial in relation to that information.

³⁴ The concept of possession, in law, requires control. Without control there is no duty to disclose on the part of Crown counsel or the police. Records held by foreign law enforcement agencies are not in the possession or control of the Crown for disclosure purposes. A Canadian court has no jurisdiction to order anyone in the United States to disclose anything to the RCMP, the Crown or an accused directly: [*R v Lore* \(1997\), 7 CR \(5th\) 190 \(Que CA\)](#) at 200.

physically in the possession of the Crown, disclosure is not automatic. Unless the person to whom the information pertains has waived his or her rights, that person still has a privacy interest in the records.

If the Crown is put on notice or informed of the existence of potentially relevant information in the hands of a third party, including information pertaining to the credibility or reliability of the witnesses in a case, the Crown's duty to make reasonable inquiries of that third party is triggered.³⁵ The third party is not obligated to provide them to the Crown on request. Crown counsel must disclose the request to the defence who may choose to bring an application for disclosure of the third party records.³⁶

4.2. Protecting witnesses against interference

If the defence seeks information concerning the identity or location of a witness, Crown counsel must consider four factors : first, the right of an accused to a fair trial and to make full answer and defence; second, the principle that there is no property in a witness;³⁷ third, the right of a witness to privacy and to be left alone until required by subpoena to testify in court; fourth, the need for the criminal justice system to prevent intimidation or harassment of witnesses or their families, danger to their lives or safety, or other interference with the administration of justice.³⁸

4.2.1. Consent release of information concerning a witness

Where the witness does not object to the release of information concerning his or her identity or location of a witness, and there exists no reasonable basis to believe that the disclosure will lead to interference with the witness or with the administration of justice as described above, the information may be provided to the accused without court order.

4.2.2. Witnesses refusing to be interviewed

Where a witness does not wish to be interviewed by or on behalf of an accused,³⁹ or where there is a reasonable basis to believe that the fourth consideration referred to in

³⁵ See *McNeil*, *supra* note 11.

³⁶ See *McNeil*, *ibid* and *O'Connor*, *supra* note 9.

³⁷ See *R v Gibbons*, (1947) 86 CCC 20 (Ont CA) at 28; *Smith v Jones*, [1999] 1 SCR 455.

³⁸ The Supreme Court of Canada has recognized the right of an individual to be left alone and the appropriateness of preventing the unnecessary invasion of witnesses' privacy: *R v Grant* 2009 SCC 32, [2009] 2 SCR 353 at para 153 per Binnie J. concurring and *R v Rodgers* 2006 SCC 15, [2006] 1 SCR 554 at para 36 per Charron J. for the majority; *R v Duarte*, [1990] 1 SCR 30, (1990), 53 CCC (3d) 1 at 11 and 15; *R v Wong*, [1990] 3 SCR 36, (1990), 60 CCC (3d) 460 esp at 483; *R v Seaboyer*, [1991] 2 SCR 577, (1991), 66 CCC (3d) 321 at 387; *Stinchcombe*, *supra* note 1 at 8-9. The Supreme Court of Canada has also recognized that Crown witnesses are not the property of the Crown whom Crown counsel can control and produce for examination by the defence: *R v Khela*, [1995] 4 SCR 201, (1995), 102 CCC (3d) 1 at 10.

³⁹ While Crown counsel and the investigators may wish to ask if a witness wants to be interviewed by the defence, care should be taken to ensure that the witness understands that he or she is fully entitled to be

section 4.2 (interference with witnesses or their families) may arise on the facts of the case,⁴⁰ Crown counsel may hold back information concerning the identity or location of the witness unless a court of competent jurisdiction orders its disclosure.⁴¹ Nevertheless, defence counsel must be advised of the existence of the witness and his or her relevant information.

4.2.3. Controlled interviews

Where a witness is willing to be interviewed, but there nonetheless exists a reasonable basis to believe that the disclosure of information concerning the identity or location of the witness may lead to interference with the witness or with the administration of justice as described above, including situations where the witness is in a Witness Protection Program, Crown counsel may decide to arrange for an interview by defence counsel at a location and under circumstances that will ensure the continued protection of the witness.⁴² If the witness is protected under a Witness Protection Program, the agreement of the police agency administering the program will be required.

4.3. Unrepresented accused

An unrepresented accused is entitled to the same disclosure as a represented accused in order to make full answer and defence. However, the precise means by which disclosure is provided to an unrepresented accused is left to the discretion of Crown counsel based on the facts of the case.

interviewed or not to be interviewed. It should not be suggested (directly or indirectly) that it would be better not to be interviewed.

⁴⁰ There is a two-pronged test for determining whether information concerning whereabouts or identity should be withheld: first, has the witness expressed a desire not to be interviewed by the defence? Second, is there a reasonable basis to believe that the witness may be interfered with? The basis for the belief in a potential witness must be real, not imagined. The information available in each case should be examined carefully. Wherever reasonably practicable, Crown counsel should request a written threat assessment from the investigators where limits on disclosure are being considered on this basis. An adjournment may be necessary in these circumstances to ensure a fair trial. The threat assessment may, itself, be the subject of a disclosure request. Absent extraordinary circumstances, disclosure of this assessment should be resisted on the basis that confidential information is necessary in order to ensure that the discretion to produce or withhold is exercised properly. If the defence presses with this request, counsel should consult with the Chief Federal Prosecutor who may consult and, ultimately, the appropriate Deputy Director of Public Prosecutions. In some instances, resort may have to be made to [s 37](#) of the *Canada Evidence Act*, *supra* note 2 to protect the confidential nature of this information. See the PPSC Deskbook directive "[4.1 Protecting Confidential Information under Section 37 of the Canada Evidence Act](#)", *supra* note 2.

⁴¹ An adjournment may be necessary in these circumstances to ensure a fair trial.

⁴² In some instances, a controlled interview will provide the necessary balance between the right of the accused to full answer and defence and the need to protect the witness against interference or threats. The circumstances surrounding the interview should be agreed upon by Crown counsel and the investigators in advance of the interview. This could, in some situations, permit the presence of counsel for the witness or Crown counsel, and include a method of recording the interview.

If an unrepresented accused indicates an intention to proceed without counsel, Crown counsel shall advise the accused of the right to disclosure and how to obtain it.⁴³ This requirement does not preclude a guilty plea without disclosure, for example, where the accused simply wishes to dispose of the charge as quickly as possible. Disclosure does not form a condition precedent to the entry of a guilty plea. However, an unrepresented accused must clearly indicate that he or she does not wish disclosure before a guilty plea is entered.⁴⁴

If an unrepresented accused indicates an intention to plead guilty to an offence for which there will likely be a significant jail term, counsel should suggest to the presiding judge that an adjournment may be in order to permit disclosure to the accused. However, an adjournment is not required as a matter of law and much will depend on the circumstances of each case, including whether the accused is in custody.

If there are reasonable grounds for concern that leaving disclosure materials with an unrepresented accused would jeopardize the safety, security, privacy interests, or result in the harassment of any person, Crown counsel may provide disclosure by means of controlled and supervised, yet adequate and private, access to the disclosure materials. Special care may be required where an unrepresented accused personally seeks access to evidence where the integrity of that evidence may be placed in issue at trial, e.g., the drug exhibit, taped private communications.

Counsel should ensure that, where disclosure is made to an unrepresented accused, it is made subject to conditions governing the appropriate uses and limits upon the use of disclosure material. In cases in which there are no sensitive disclosure materials, these basic conditions provide fair warning for accused persons that the disclosure material is not to be disseminated or used for purposes other than to assist them in making full answer and defence in the prosecution. Violations by an accused of the conditions (contained in a cover letter) would likely give rise to a Crown request to impose those conditions on the accused by court order. Any breach of the court order could be dealt with pursuant to the court's contempt powers. Counsel should be particularly mindful of the sensitivity of [McNeil](#) disclosure information, when dealing with self-represented accused persons.

In some cases, there may be sensitive disclosure materials, as well as some basic, non-sensitive, disclosure material. If the latter material can be separated from the rest of the disclosure it can be given to the accused with disclosure conditions. The sensitive portions of the disclosure could be dealt with by providing the accused either with access

⁴³ The precise method by which the accused is informed of the availability of disclosure may vary from region to region. In some instances, the summons or appearance notice may provide this information. In others, Crown counsel may wish to provide the accused with a written or oral notification in court. In some regions, the judge presiding over first appearances may tell the accused that disclosure is available from the Crown.

⁴⁴ See section 3.1 on unrepresented accused in the PPSC Deskbook guideline "[3.7 Resolution Discussions](#)".

to the material in a private room in a police station or with the disclosure material subject to restrictive court-ordered conditions.⁴⁵

Special care may also be required where an unrepresented accused is incarcerated. Incarcerated unrepresented accused persons are entitled to adequate and private access to disclosure materials under the control and supervision of custodial officials. Arrangements can be made with the jail to facilitate adequate and private electronic access to the disclosure materials.

Crown counsel must place a note on the Crown file concerning the nature, extent and timing of disclosure to an unrepresented accused, including any representations about disclosure made to the accused in court. This is especially important given the prospects of a [Stinchcombe](#) review of the decisions made by Crown counsel on the issue of disclosure.

4.4. Voluminous documentary evidence

In document heavy cases, counsel must particularly ensure that the disclosure provided to defence is well organized and capable of being searched. In other words, it must be reasonably accessible. As noted in [Dunn](#),⁴⁶ “the greater the volume of material disclosed, the greater the need for organization and reasonable search capabilities”.

5. EXCLUSIONS

The Crown’s obligation to disclose is not absolute: only relevant information need be disclosed, and information which is relevant to the defence may be withheld on the basis of the existence of a legal privilege.⁴⁷

Where Crown counsel decides not to disclose relevant information on the grounds of privilege, defence counsel should be advised of the refusal, the basis of the refusal (i.e., type of privilege alleged) and the general nature of the information withheld to the extent possible. However, in some circumstances, even the acknowledgement that information exists (i.e., information related to international relations, national defence or security or information regarding a police informer or an ongoing police investigation) would cause the harm that the privilege is seeking to prevent. In such circumstances, counsel are expected to exercise good judgment and consult with their chief federal prosecutor to assess what is an appropriate course of action. If the fact of the existence of the privileged information cannot be disclosed, a stay of proceedings may be required.

⁴⁵ Due to the sensitive nature of the disclosure on some files, Crown counsel should consider whether or not it is appropriate to provide disclosure to an out-of-custody self-represented accused by disk, hard drive or other electronic storage device.

⁴⁶ [R v Dunn, 2009 CanLII 75397 \(ONSC\)](#) at para 59. See also [Beaulieu c R, 2011 QCCS 639 \(CanLII\)](#) at para 32.

⁴⁷ See [Stinchcombe](#), *supra* note 1 at 340.

Where disclosure of information is delayed to protect the safety or security of witnesses pursuant to section 4.2 of this guideline or to complete an investigation pursuant to section 5.3, Crown counsel must disclose the information as soon as the justification for the delay in disclosure no longer exists. The fact that some disclosure is being delayed should be communicated to the defence without revealing the reason for the delay.

5.1. Police informers⁴⁸

Disclosure of information that may tend to identify a confidential police informer is not permitted. The Crown like the Court is under an obligation to protect the identity of a confidential police informer. The privilege cannot be waived unilaterally by the informant or by the Crown. This obligation is not limited to protecting the name of the informer: it extends to any information that may tend to reveal the identity of the person who provided information to the police. The vetting process must be done in close consultation with the police who are better placed to assess the degree of risk in unredacted information. The police informer privilege is subject to only one exception: where the accused's factual innocence is at stake.

5.2. Reply evidence

During trial, Crown counsel must disclose any previously undisclosed information in Crown counsel's possession, as soon as reasonably possible after it becomes apparent that the information is relevant. However, pre-trial disclosure is not required of reply evidence that could be tendered by the Crown in response to issues raised by the accused at trial, where the relevance of that evidence only becomes apparent during the course of the trial itself.⁴⁹

For example, Crown counsel is not generally required to disclose evidence in his or her possession regarding the accused's bad character. However, if the accused indicates that reliance will be placed on good character evidence in support of the defence advanced and the Crown becomes aware of information either rebutting or confirming the defence, the information must be promptly disclosed to the defence.⁵⁰ There is a general obligation to disclose any relevant information resulting from an investigation prompted by an accused's pre-trial disclosure of a defence.

⁴⁸ For a more complete discussion of this issue, see the PPSC Deskbook guideline "[3.11 Informer Privilege](#)", *supra* note 2.

⁴⁹ *Martin Committee Report*, *supra* note 10 at 202. In general, the Crown's obligation is to adduce evidence that is relevant to an element of the offence that the Crown must prove, and not adduce evidence in chief to challenge a defence that an accused might possibly raise: *R v Chaulk*, [1990] 3 SCR 1303; (1990), 62 CCC (3d) 193 at 237 ff. Crown counsel cannot be expected to disclose information relevant to an issue not reasonably anticipated before trial. See also *R v Wilson* (1994), 87 CCC (3d) 115 (Ont CA).

⁵⁰ See *R v Hutter* (1993), 86 CCC (3d) 81 (Ont CA) at 89-90, leave to appeal to the SCC refused and *Martin Committee Report*, *supra* note 10 at 206.

5.3. On-going investigations

Information that may prejudice an ongoing police investigation should not be disclosed.⁵¹ It is important to note that the Crown may delay disclosure for this purpose but cannot refuse it, i.e., withhold disclosure for an indefinite period.

5.4. Investigative techniques

Information that may reveal confidential investigative techniques used by the police is generally protected from disclosure.

5.5. Cabinet confidences⁵²

Information that constitutes a confidence of the Queen's Privy Council for Canada pursuant to [s. 39\(2\)](#) of the *Canada Evidence Act*⁵³ must be protected from disclosure.

5.6. International relations/national security/national defence⁵⁴

[Section 38](#) of the *Canada Evidence Act* creates a scheme for the protection of 'sensitive information' and 'potentially injurious information', as defined in that section, with respect to international relations, national defence or national security.

5.7. Solicitor-client privilege

Information protected by solicitor-client privilege⁵⁵ cannot be disclosed, subject to waiver or any of the exceptions.

⁵¹ See *Stinchcombe*, *supra* note 1 at 9 and 12; *Martin Committee Report*, *supra* note 10 at 214. Thus, in certain circumstances, Crown counsel may have to consider staying a charge in order to avoid the disclosure of information that would prejudice an ongoing investigation.

⁵² For a more complete discussion of this issue, see the PPSC Deskbook directives "[4.1 Protecting Confidential Information under Section 37 of the Canada Evidence Act](#)", "[4.2 Protecting Confidential Information under Section 38 of the Canada Evidence Act](#)" and "[4.3 Protecting Cabinet Confidences under Section 39 of the Canada Evidence Act](#)", *supra* note 2.

⁵³ RSC 1985, c C-5.

⁵⁴ *Ibid.*

⁵⁵ See *R v Campbell*, [1999] 1 SCR 565. See generally *Smith v Jones*, [1999] 1 SCR 455; *Descôteaux v Mierzwiński*, [1982] 1 SCR 860; *Solosky v The Queen*, [1980] 1 SCR 821; *Idziak v Canada*, [1992] 3 SCR 631; *R v Creswell*, [1998] BCJ No 1090 (QL). Note that solicitor-client privilege is waived where the police or the Crown rely on confidential legal advice to defend an abuse of process application even in circumstances where only the existence, and not the contents, of the advice is disclosed: *Campbell*, (*ibid.*).

5.8. Work product privilege⁵⁶

This privilege, whose object is to ensure the efficacy of the adversarial process, protects information or documents obtained or prepared for the dominant purpose of litigation, either anticipated or actual. Thus, Crown counsel generally need not disclose any internal notes, memoranda, correspondence or other materials generated by the Crown in preparation of the case for trial unless the work product contains material inconsistencies or additional facts not already disclosed to the defence.⁵⁷ As a general rule, work product applies to matters of opinion as opposed to matters of fact.⁵⁸ This privilege does not exempt disclosure of medical, scientific, or other experts' reports.⁵⁹ Unlike solicitor-client privilege, this privilege has a limited lifespan and comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege.⁶⁰

6. DISCLOSURE COSTS

An accused person or his or her counsel shall not be charged a fee for 'basic disclosure' materials.⁶¹

"Basic disclosure" materials include the information, a synopsis, copies of witness statements or will-says, the Report to Crown Counsel, if one exists, and copies of documents, photographs and the like, that Crown counsel intends to introduce as exhibits in the Crown's case. Each accused is entitled to one copy of 'basic disclosure' materials. Where an accused person requests an additional copy or copies, the accused may be charged a reasonable fee for this service.⁶²

⁵⁶ Also referred to as 'litigation privilege'. See also section 3.17 of this guideline, regarding information obtained during witness interviews.

⁵⁷ *O'Connor*, *supra* note 9 at 45 (per L'Heureux-Dubé J.) and at 86 (per Major J.). However, the Crown is obliged to turn over drawings and statements made by witnesses to the prosecution during pre-trial interviews, if they are new or contain new information. See also the *Martin Committee Report*, *supra* note 10 at 251.

⁵⁸ *Martin Committee Report*, *ibid* at 252.

⁵⁹ *Martin Committee Report*, *ibid* at 252. But see *R v Petersen* (1997), 155 Sask R 133 (QB) where spreadsheets prepared by the police regarding different theories as to how the accused had committed a complex fraud were held to fall within the work product domain. See also *R v Stewart*, [1997] OJ No 924 (QL) where the court recognized police and Crown work product in a database of electronic documents.

⁶⁰ See *Blank v Canada (Minister of Justice)*, [2006] 2 SCR 319.

⁶¹ *Report of the Criminal Justice Review Committee*, (Queen's Printer for Ontario, February 1999) at 48. See also the *Martin Committee Report*, *supra* note 10 at 272; *R v Blencowe* (1997), 118 CCC (3d) 529 (Ont Ct (Gen Div)) at 537. The rule here is two-pronged: documents and photographs that will form part of the Crown's case should be copied and provided to the accused at the expense of the government or the investigative agency. Documents the Crown does not intend to rely upon need not be copied, although upon request defence counsel should be provided with access to case exhibits not intended to be adduced at trial. See section 3.9 of this guideline regarding access to case exhibits.

⁶² Where defence counsel withdraws from the case, there is a professional obligation to pass disclosure on to new counsel representing the accused, or to return the disclosure to the Crown, if the disclosure

Costs associated with the preparation of copies of materials that are not part of ‘basic disclosure’, e.g., photographs that will not be introduced as exhibits by Crown counsel, should be considered on a case-by-case basis. In instances of unfocused or unreasonable requests involving substantial numbers of documents, it may be appropriate to shift the resource burden to the defence, by requiring that the costs be borne by the accused.⁶³ Failing agreement, simple access without copies may be provided.

7. FORM OF DISCLOSURE⁶⁴

Crown counsel may provide the defence with copies of documents that fall within the scope of ‘basic disclosure’ materials as defined in section 6 of this guideline in either a paper format (e.g., photocopies), an electronic format (e.g., by CD-ROM) or a web-based format. Where the accused is unrepresented, Crown counsel should use his/her judgment as to whether copies of such documents should be provided in a paper format.

Where disclosure is in one of the two official languages, it does not need to be translated.

conditions so direct. Accordingly, disclosure need not be copied a second time. Unusual situations should be discussed with the Chief Federal Prosecutor.

⁶³ *Martin Committee Report*, *supra* note 10 at 273.

⁶⁴ An accused is not entitled to insist upon a particular *form* of disclosure as a constitutional prerequisite: *R v Blencowe*, *supra* note 61 at 539. Nor does an accused have an absolute right to disclosure or production of original material: *Stinchcombe*, *supra* note 1. However, where the original is within the possession of either Crown counsel or the investigative agency, there is an obligation to allow the defence inspection of or access to the original.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

2.6 CONSULTATION WITHIN THE PUBLIC PROSECUTION SERVICE OF CANADA

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

March 1, 2014

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1. INTRODUCTION

This guideline describes the consultation process within the Public Prosecution Service of Canada (PPSC). More specifically, the guideline focuses on consultation between PPSC Regional Offices and Headquarters. Other guidelines describe the consultation process with other federal government departments that enforce federal statutes, with Department of Justice centres of expertise, and with investigative agencies.¹

2. ACCOUNTABILITY FOR THE PROSECUTION FUNCTION

The independence of the Director of Public Prosecutions (DPP), and by extension Crown counsel, in exercising prosecutorial discretion free from partisan political influence is an important constitutional principle in Canada.² Crown counsel act independently of investigative agencies³ and other government departments.⁴ "Prosecutorial independence" is ultimately that of the DPP who is accountable to the courts and to the public for the

¹ For a discussion of the types and manner of consultation between prosecutors and investigators, see the PPSC Deskbook guideline "[2.7 Relationship between Crown Counsel and Investigative Agencies](#)" and the PPSC Deskbook directive "[1.3 Consultation within Government](#)".

² For a more detailed discussion of this principle, see the PPSC Deskbook directive "[1.1 Relationship between the Attorney General and the Director of Public Prosecutions](#)" and the PPSC Deskbook guideline "[2.1 Independence and Accountability in Decision-Making](#)"; see also Hon. Marc Rosenberg "*The Attorney General and the Administration of Criminal Justice*" (2009), 34 Queen's LJ 813.

³ See the PPSC Deskbook guideline "[2.7 Relationship between Crown Counsel and Investigative Agencies](#)", *supra* note 1.

⁴ See the PPSC Deskbook directive "[1.3 Consultation within Government](#)", *supra* note 1 and the PPSC Deskbook guideline "[2.2 Duties and Responsibilities of Crown Counsel](#)".

federal prosecution function. Individual Crown counsel are, in turn, accountable to the DPP. Additionally, while the [Director of Public Prosecutions Act](#)⁵ (DPP Act) creates the Office of the DPP (ODPP), the Attorney General of Canada remains the chief law officer of the Crown and is ultimately accountable to Parliament for the federal prosecution function. The DPP's role is distinct from that of the Attorney General; it entails closer oversight and more frequent involvement in files.

In acting as public prosecutors, Crown counsel exercise a delegated function on behalf of the DPP.⁶ The “independence” of the prosecutor is nothing more, but also *nothing less*, than the institutional independence of the Office of the DPP and ultimately of the Attorney General. Prosecutorial independence must be properly understood as flowing from the offices of the Attorney General and the DPP. For this reason, Crown counsel are accountable to the DPP and the DPP in turn to the Attorney General for their prosecutorial decision-making.⁷

Accountability in federal prosecutions is maintained through the hierarchical management structure within the PPSC. Crown counsel are directly accountable to their team leaders, Deputy Chief Federal Prosecutors (or General Counsel, Legal Operations) and Chief Federal Prosecutors (CFP), for the decisions which they make in prosecutions. The CFPs, in turn, are accountable to the Deputy DPPs who report to the DPP. The DPP is responsible for the manner in which the prosecution function is carried out on behalf of the Attorney General of Canada. The DPP performs the duties and functions set out in [s. 3\(3\)](#) of the DPP Act under and on behalf of the Attorney General.⁸ Finally, the Attorney General is answerable to Parliament for the decisions made on his or her behalf.

3. THE PURPOSE OF CONSULTATION BETWEEN PPSC REGIONAL OFFICES AND HEADQUARTERS

In some instances, prosecutorial decision-making, including the determination of whether the prosecution threshold has been met,⁹ whether or not charges should be stayed, or a

⁵ *Director of Public Prosecutions Act*, [s 121](#) being [Part 3](#) of the *Federal Accountability Act*, SC 2006, c 9 [DPP Act].

⁶ [Section 9\(1\)](#) of the DPP Act, *supra* note 5 permits the DPP to delegate prosecutorial functions to federal prosecutors.

⁷ For a good discussion of the relationship between the prosecutor and the DPP or Attorney General and the appropriate balance between prosecutorial independence and the right of the DPP to direct decision-making on the DPP's behalf, see Robert J. Frater *Prosecutorial Misconduct* (Aurora: Canada Law Book, 2009) at 9-15.

⁸ [Section 16](#) of the DPP Act, *supra* note 5 requires the DPP to provide the Attorney General with an annual report not later than June 30 of every year. The Attorney General is then required to table that report in the Houses of Parliament within the first 15 sitting days immediately following receipt of the Report. The DPP's annual report to Parliament is a key mechanism for ensuring transparency and public accountability for federal prosecutions.

⁹ See the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)” for a discussion about the public interest criteria to be considered when deciding whether to prosecute.

particular position on sentence taken, requires consultation with those who can provide Crown counsel with additional relevant information and expertise.

For the purposes of this guideline, the term “consultation” is used to refer to (i) information briefings from a Regional Office to Headquarters regarding a particular matter, (ii) counsel in a Regional Office seeking advice or support from Headquarters counsel, (iii) Headquarters counsel consulting with Regional Offices regarding operational matters and matters of prosecution policy and (iv) informal consultation within regional offices.

Reciprocal consultation between PPSC Regional Offices and Headquarters counsel is essential for a number of reasons including the need to ensure:

- that the DPP, who is accountable for the prosecution function, is kept abreast of developments in PPSC prosecutions when appropriate (“briefing up”) and on cases that give rise to sustained, significant and/or anticipated media interest or public interest;
- that the Attorney General is briefed on cases of “general interest” requiring notice under [s. 13](#) of the DPP Act;¹⁰
- coordinated and consistent national policy in discharging the DPP’s mandate;
- consistent positions in prosecutions across the country;
- effective legal risk management; and
- that CFPs and Crown counsel in the Regional Offices learn of cases of significant public interest, relevant legal precedents, and emerging legal issues or trends in other parts of the country and internationally.

Communicating a consistent and coordinated message to investigators and Crown counsel in respect of approaches to be applied in the interpretation of legislation, or to types of litigation, is a critical component of the DPP’s role. Achieving this consistency is a challenge that requires cooperation across the organization given that its services are delivered by hundreds of prosecutors across all regions of the country within a diversity of litigation environments.

4. THE ROLE OF THE HEADQUARTERS COUNSEL GROUP

The Headquarters Counsel Group comprises counsel within both the Drug, National Security and Northern Prosecutions Branch and the Regulatory and Economic Prosecutions Branch. Headquarters counsel focus on operational issues arising from federal prosecutions.

¹⁰ See the PPSC Deskbook directive “[1.2 Duty to Inform the Attorney General under Section 13 of the Director of Public Prosecutions Act](#)”.

The work of the Group can be categorized as falling within one of three major areas:

- strategic direction, litigation risk management and support to particular types of litigation or cases;
- general support to frontline prosecutors; and
- support to the DPP, the Deputy DPPs, and to concerned federal departments and agencies.

For the Drug, National Security and Northern Prosecutions Branch, the Group's work includes issues related to the investigation and prosecution of offences under the [*Controlled Drugs and Substances Act*](#),¹¹ proceeds of crime/money-laundering cases, national security matters and [*Criminal Code*](#) prosecutions in the North. The Regulatory and Economic Prosecutions Branch focuses on *Criminal Code* capital market fraud cases and on all other federal offences such as those under the [*Competition Act*](#),¹² the [*Income Tax Act*](#),¹³ the [*Fisheries Act*](#),¹⁴ the [*Immigration and Refugee Protection Act*](#),¹⁵ the [*Canadian Environmental Protection Act*](#),¹⁶ and the [*Copyright Act*](#).¹⁷

Headquarters counsel have responsibility for the coordination of legal advice and the development of prosecutions policy for the ODPP. Along with the National Prosecution Policy Committee (NPPC) and the Major Prosecutions Advisory Committee (MPAC), counsel in this group help ensure consistency in the positions being advanced in federal prosecutions.¹⁸ They do this by tracking similar or related cases, coordinating positions,

¹¹ SC 1996, c 19.

¹² RSC 1985, c C-34.

¹³ RSC 1985, c 1 (5th Supp).

¹⁴ RSC 1985, c F-14.

¹⁵ SC 2001, c 27.

¹⁶ SC 1999, c 33.

¹⁷ RSC 1985, c C-42.

¹⁸ The mandates of these two committees are as follows:

The Major Prosecutions Advisory Committee serves as a senior advisory body whose members have specialized expertise in major prosecutions. The Committee ensures consistency of PPCS approaches regarding major prosecutions throughout the country, including in respect of work done by agents. To this end, the Committee:

- Reviews and recommends for approval by the Deputy DPP prosecution plans for major prosecutions cases;
- Identifies regional practices or approaches that may be of national interest and makes recommendations for their broader diffusion;
- Makes recommendations regarding the need for prosecution policies or practice directives in respect of the management of major prosecutions; and
- Reviews any national policies and practice directives regarding major prosecutions.

developing practice directives, collaborating with regional counsel in the development of facts to address evolving or novel areas of the law, and advising on implementation and interpretation of significant pieces of new legislation affecting federal prosecutors.

Their responsibilities, in ensuring DPP accountabilities and that Headquarters is a useful resource centre for Crown counsel in the regions, for investigative agencies and for senior management, include:

- Offering subject-matter expertise;
- Providing specific prosecution-related advice to Crown counsel, federal investigative agencies, and Department of Justice legal service units;
- Offering coordination and strategic direction, litigation risk management and litigation support to frontline prosecutors conducting litigation that is of national interest, by virtue of the significance of issues being litigated, the magnitude of a case, the emergence of a particular issue nationally, or because of a novel constitutional challenge;
- Ensuring that the DPP and Deputy DPPs are kept informed of cases of importance, which include, but are not limited to those:
 - with novel, complex and/or constitutional legal issues;
 - where there is a national or regional interest in the outcome;
 - where federal legislation is attacked;
 - where the investigative agency's policies, practices or enforcement powers are challenged;
 - where there is significant public or media interest;¹⁹
 - where there is potential for a negative judicial ruling or comment against a Crown counsel personally or the PPSC generally, or a step by the prosecution;

The National Prosecution Policy Committee serves as a senior advisory and decision-making body on matters that affect PPSC nationally and which are not related to a specific on-going prosecution, investigation, appeal or intervention. More specifically, the Committee:

- Reviews proposed confidential advice and guidelines to federal prosecutors and makes recommendations for the Deputy DPP and the DPP approval regarding such directives;
- Occasionally examines legal issues that are not contemplated for a formal practice directive, but for which its views are sought;
- Considers and recommends for the Deputy DPP and the DPP approval revisions to the PPSC Deskbook;
- Monitors emerging trends in federal prosecution practice and makes recommendations as to how the PPSC should adjust to such trends; and
- Provides a forum for resolution of divergent views on legal issues so as to ensure consistency in the arguments advanced by Crown counsel or agents on behalf of the DPP.

¹⁹ See the PPSC Deskbook guideline “[2.9 Communications with the Media](#)”.

- Developing policy with respect to prosecutorial operational issues;
- Liaising and facilitating communication with counsel in the Department of Justice, departmental enforcement officers and investigative agencies on non-case specific matters;²⁰
- Providing prosecutorial perspective and advice on criminal law policy development;
- Providing input on legislative, enforcement and funding initiatives of other departments as these relate to and impact upon prosecutions; and
- Recommending direct indictments and other statutory consent matters.

4.1. Providing advice on prosecutions policy to the DPP and Deputy DPPs

As mentioned, the DPP is ultimately accountable to the public and to the courts for the conduct of Crown counsel who act in his or her name. Yet, because of the sheer volume of cases it would be impracticable for the DPP to be directly involved in all federal prosecutions. The DPP does not typically become involved in routine matters. However, the DPP may become involved in a prosecution matter because the nature of the matter requires closer monitoring of the exercise of prosecutorial discretion for which the DPP is accountable. Some examples of the types of cases that would warrant closer monitoring are listed in the bullets under heading 6.5. Additionally, the DPP may become involved in a prosecution matter because of a statutory consent requirement. For example, the DPP's consent is required to prefer a direct indictment and to institute proceedings in respect of certain types of offences.²¹

When the DPP or a Deputy DPP is involved in the decision-making on a prosecution file, they rely on both regional counsel and Headquarters counsel for advice. In this capacity, Headquarters counsel add a national perspective to a legal issue and, because of their coordination role, in some cases they may be aware of particular interests of other government departments and agencies. Headquarters counsel normally respond to requests for advice from the DPP and Deputy DPPs. Requests for information from Headquarters counsel to the regions are in effect requests from the DPP or a Deputy DPP. Regional offices will normally prepare the materials outlining the nature of the case and key considerations, and may receive requests for additional information or, on occasion, be required to provide some of the original documents upon which their recommendation is made.

²⁰ See the PPSC Deskbook directive "[1.3 Consultation within Government](#)", *supra* note 1.

²¹ For the list of matters requiring DPP consent or some form of delegated consent, see the PPSC Deskbook guideline "[3.5 Delegated Decision-Making](#)".

5. CONSULTATION WITH HEADQUARTERS

Whether or not counsel in PPSC Regional Offices should consult with PPSC Headquarters respecting a particular prosecution will necessarily involve an exercise in judgment. When in doubt, counsel should seek the advice of their Associate or CFP at the earliest opportunity. On some occasions, consultation is mandatory; on others, while not mandatory, counsel may wish to consult PPSC Headquarters.

The following are examples of the types of files on which Crown counsel must consult with Headquarters counsel:

- Cases involving terrorism offences or that otherwise have a national security aspect;
- Cases having precedential value in terms of sentence or legal argument;
- Cases having novel legal arguments;
- Large scale complex prosecutions;²²
- Cases that give rise to sustained, significant and/or anticipated media interest;
- Regulatory prosecutions of a large magnitude, that are complex or that raise issues of national importance or novel issues;
- International assistance requests in respect of proceeds of crime targeting property that, if seized/blocked/forfeited in Canada, would require an undertaking or the approval of the Deputy DPP; and
- Proposals to depart from the PPSC Deskbook.

The following are examples of the types of files on which Crown counsel may wish to consult with Headquarters counsel:

- Legal advice on non case-specific files;
- Proposed decisions respecting appeals to provincial and territorial courts of appeal;²³ and
- Proposed plea resolutions that are especially sensitive including homicide prosecutions wherein the Crown is agreeing to a plea on a lesser count than that which was charged or where there is to be a joint position on sentence;

²² Normally, cases of this nature will be brought to the attention of the Major Prosecution Advisory Committee; see the PPSC Deskbook guideline “[3.1 Major Case Management](#)”.

²³ On routine matters, Crown counsel in the regions should simply inform Headquarters of proposed appeals.

Crown counsel should bring to the attention of Headquarters counsel all such cases at the earliest reasonable opportunity.²⁴ Crown counsel need not consult on more routine prosecutions unless they require advice or precedents.

Crown counsel may contact one of designated subject-matter experts in the Headquarters Counsel Group. Where there is no identified subject-matter expert, counsel in the PPSC Regional Offices should contact the Headquarters Counsel Regional Contact.

6. CONSULTATION WITHIN AND BETWEEN REGIONAL OFFICES

Consultation encompasses not only horizontal consultation within the PPSC and across government, but also includes consultation locally with one's direct colleagues in a particular regional office and between regional offices. Crown counsel should consult regularly with their regional office colleagues. In fact, Crown counsel are not only entitled to consult on difficult questions, they are expected to consult with colleagues who have more experience or who may have grappled with similar issues in the past. Crown counsel should bear in mind that they are not alone, and that consultation does not mean abdication of prosecutorial independence. For example, divining the public interest in cases involving complex social issues can be a challenging task, particularly in the regulatory and economic field. The lone Crown counsel should consult colleagues on such matters.

CFPs are encouraged to develop policies for their offices regarding the types of matters that require consultation in their regional office and the appropriate consultation mechanisms for that office.

²⁴ Crown prosecutors should bring to the attention of a counsel from the Headquarters Counsel Group a criminal, regulatory or economic prosecution that is large-scale, complex or that involves novel issues.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

2.7 RELATIONSHIP BETWEEN CROWN COUNSEL AND INVESTIGATIVE AGENCIES

**GUIDELINE OF THE DIRECTOR ISSUED UNDER
SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC
PROSECUTIONS ACT***

March 1, 2014

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1. INTRODUCTION

Administration of criminal justice is a continuum. At one end, the police investigate criminal offences and arrange for suspected offenders to appear in court. At the other, Crown counsel are responsible for presenting the Crown's case in court. Their roles are interdependent. While both have separate responsibilities in the criminal justice system, they must inevitably work in cooperation to administer and enforce criminal laws effectively. As the Supreme Court of Canada has stated, "the proper functioning of the criminal justice system requires (...) that all actors involved be able to exercise their judgment in performing their respective duties, even though one person's discretion may overlap with that of another person."¹

This guideline describes the respective responsibilities of the investigative agencies and of Crown counsel, emphasizing the role of each in the administration of justice. It should

¹ [R v Beaudry, 2007 SCC 5, \[2007\] 1 SCR 190](#) at para 48.

be read in conjunction with the Public Prosecution Service of Canada's (PPSC) service standards.

2. ROLE OF LAW ENFORCEMENT AGENCIES AND INVESTIGATIVE AGENCIES: THE AUTHORITY TO INVESTIGATE AND TO LAY CHARGES

2.1. The common law principle

Maintaining the independence of law enforcement agencies from direct political control is fundamental to our system of criminal justice. Under the common law, the police could not be directed by the Executive or by Parliament to start an investigation, much less lay charges. As one former Ontario Attorney General said, "No one can tell an officer to take an oath which violates his conscience and no one can tell an officer to refrain from taking an oath which he is satisfied reflects a true state of facts".² In *R v Metropolitan Police Commissioner, ex parte Blackburn*,³ Lord Denning described the principle in this way:

I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.

2.2. Statutory exceptions

For certain offences under the [Criminal Code](#) (Code) and other federal statutes, for example, corruption of judicial officers⁴ or offences on territorial seas,⁵ war crimes,⁶ the [Canada Labour Code](#),⁷ the [Canada Human Rights Act](#),⁸ terrorism offences and offences

² Royal Canadian Mounted Police, *Police Discretionary Powers in a Democratically Responsive Society*, vol 41, no 12 (Ottawa: RCMP Gazette, 1978) at 5-6.

³ [1968] 1 All ER 763 at 769 (CA).

⁴ *Criminal Code*, [s 119](#).

⁵ *Ibid*, [s 477.2](#).

⁶ [Crimes Against Humanity and War Crimes Act](#), SC 2000, c 24, s 9(3).

⁷ RSC 1985, c L-2.

⁸ RSC 1985, c H-6; see the PPSC Deskbook guideline "[3.5 Delegated Decision-Making](#)" for a more complete list.

against non-Canadians committed outside of Canada, the consent of the Director of Public Prosecutions (DPP)⁹ or minister of the Crown is required to lay an information.

3. ROLE OF CROWN COUNSEL BEFORE AND AFTER CHARGES ARE LAID

3.1. Introduction

Crown counsel and investigative agencies play complementary roles in the criminal process. They both have roles to play before and after charges are laid.

While the involvement of the Crown is not required at the pre-judicial stage, the practice is increasingly common. The authors Michael Code and Patrick Lesage have noted this phenomenon and explained it as follows:

There has been a natural evolution towards much closer police and Crown pre-charge collaboration over the past 20 to 30 years. As noted above, criminal procedure had become much more complex than it was in an earlier era. Police investigative procedures are now the subject of pre-trial motions to determine whether there has been a [Charter](#) violation, whether evidence will be admitted under the new "principled approach" and whether a statutory process, such as a wiretap authorization or search warrant, has been properly followed. The police have increasingly turned to Crown counsel for pre-charge legal advice in order to navigate these difficult waters... It is simply not feasible in the modern era to expect the police and Crown to work in entirely separate silos, as they once did.¹⁰

Cooperation and consultation between law enforcement agencies and the Crown are essential to the proper administration of justice, since investigators must gather evidence that is both admissible and relevant. Later, when deciding whether to prosecute, consultation becomes useful for assessing the sufficiency of the evidence and the public interest criteria.¹¹ This cooperation is even more important in complex cases.

Accordingly, Crown counsel should be available for consultation during an investigation and before charges are laid. This will encourage investigators to ask for advice. In complex cases, Crown counsel may be required to work closely with the police to identify and collect cogent and relevant evidence. However, this does not mean that Crown counsel must take on the work of the investigators. At the end of an investigation, the role of Crown counsel is to give the investigators a fair and objective assessment of

⁹ Under [s 3\(3\)](#) of the *Director of Public Prosecutions Act*, SC 2006, c 9 this power to initiate prosecutions was delegated by the Attorney General to the DPP, who exercises this power independently "under and on behalf of the Attorney General".

¹⁰ Ministry of the Attorney General of Ontario, *Report of the Review of Large and Complex Criminal Case Procedures*, (Toronto: 2008) at 25 (Hon. Patrick Lesage and Prof. Michael Code).

¹¹ See the PPSC Deskbook guideline "[2.3 Decision to Prosecute](#)".

the quality of the evidence and the appropriateness of proceeding. In conducting this assessment, counsel must be vigilant and take care to avoid "tunnel vision", meaning the loss of the ability to conduct an objective assessment of the case through contact with the investigators.¹²

3.2. Statutory involvement before charges are laid

In some instances, Crown counsel become involved in an investigation because of statutory requirements. These include:

- Obtaining wiretap authorizations pursuant to [s. 186](#) of the Code;
- Obtaining special search warrants and restraint orders pursuant to [ss. 462.32](#) and [462.33](#) of the Code regarding suspected proceeds of crime;¹³
- Obtaining restraint orders pursuant to [s. 14](#) of the *Controlled Drugs and Substances Act*¹⁴ regarding suspected proceeds of crime;
- Obtaining management orders pursuant to [s. 490.81](#) of the Code, [s. 14.1](#) of the *Controlled Drugs and Substances Act*, and in certain circumstances, [s. 6](#) of the *Seized Property Management Act*;¹⁵
- Obtaining orders for the disclosure of tax information pursuant to [s. 462.48](#) of the Code;
- Enforcing orders on behalf of foreign governments or the Government of Canada when property is found abroad, for the seizure, restraint or forfeiture of offence-related property or proceeds of crime pursuant to [s. 9.3](#) of the *Mutual Legal Assistance in Criminal Matters Act*.¹⁶

In all these situations, Crown counsel may assist in preparing the necessary materials and making the application to court, where applicable.

¹² The concept of "tunnel vision" is discussed extensively in: [FPT Heads of Prosecution Committee, Report of the Working Group on the Prevention of Miscarriages of Justice](#), c 4 (Ottawa: Justice Canada, 2004). The 2011 update to this report, [The Path to Justice: Preventing Wrongful Convictions](#), is available on the PPSC internet site. For more detailed guidance on this issue, see also the PPSC Deskbook directive "[2.4 Prevention of Wrongful Convictions](#)".

¹³ [Section 462.331](#) of the *Criminal Code* also provides that if a management order is needed with respect to property seized under [s 462.32](#) of the *Criminal Code* or restrained under [s 462.33](#) of the *Criminal Code*, the application is to be made by the Attorney General or a person acting with the written consent of the Attorney General. For more details, see the PPSC Deskbook guideline "[5.3 Proceeds of Crime](#)".

¹⁴ SC 1996, c 19.

¹⁵ SC 1993, c 37.

¹⁶ RSC 1985, c 30 (4th Supp).

3.3. Non-statutory involvement

Crown counsel can provide a wide range of assistance to investigators. In most non-statutory roles, Crown counsel play a supporting role by providing advice to ensure the rule of law.

3.3.1. Advice concerning the operational plan

The police have complete autonomy to decide whom to investigate and for what suspected crimes. They also have the discretion to decide how to structure the investigation and which investigative tools and techniques to use.

However, prior to undertaking an investigation or in its early stages, investigators may wish to consult with Crown counsel for advice and guidance as to how the investigation should be structured to ensure a sustainable prosecution. It is best to make structural decisions early in the investigation, rather than waiting until it is too late to take corrective action. For example, if the operational plan contemplates an investigation of a large criminal organization, it may be prudent to consult Crown counsel prior to undertaking the investigation. Decisions can be made early in the investigation that may assist in developing a case that can be put before the courts in an effective manner.

3.3.2. Immunity agreements – Investigative assistance agreements

Crown counsel must be involved in the granting of immunity from prosecution, and any agreement must be in writing.¹⁷

3.3.3. Preparation of search warrant material

Although investigators may apply for certain judicial authorizations without the advice of Crown counsel, Crown counsel can provide advice when requested to do so.

Crown counsel may give advice on various types of warrants and orders,¹⁸ including:

- General warrants;
- Tracking warrants;
- Dialled number recorder warrants;
- DNA warrants;
- Production orders pursuant to [ss. 487.012](#) and [487.013](#) of the Code; and
- Search warrants to be executed in law offices.

¹⁷ See the PPSC Deskbook guideline “[3.3 Immunity Agreements](#)”.

¹⁸ In some jurisdictions, judges only meet with investigators in the presence of Crown counsel. In those jurisdictions, Crown counsel will appear with the investigator.

Crown counsel should be prepared to advise whether a judicial authorization is required, what judicial authorization is required, whether the threshold for the application is met, and whether a publication is appropriate. Normally the police draft the materials in support of a judicial authorization. Only exceptionally will Crown counsel be involved.

3.3.4. Access to sealed packets

In some cases, investigators will obtain an order to seal a search warrant and supporting materials. Occasionally, either the subject of the search or the media may apply for access to the sealed materials. Crown counsel may appear on those applications.

The decision as to whether the sealing order should continue or whether to allow a partial disclosure of information is made jointly by investigators and Crown counsel.

3.3.5. Extensions of the time periods seized items may be detained

Investigations are becoming more complex, and investigators often need to extend the time seized items may be detained or retained under [s. 490\(2\)](#) of the Code. In many cases, the investigation may continue for a lengthy time after the search.

The [Criminal Code](#) provides for three stages of detention:

1. The first three months - ordered by the justice who receives the Form 5.2 report;¹⁹
2. The next nine months;²⁰ or
3. A period longer than one year from the date of seizure.²¹

[Section 490](#) allows Crown counsel or a peace officer to present applications for detention. In the vast majority of cases, peace officers are able to deal with these applications without the involvement of Crown counsel. However, in some cases, the application to extend can be a very complex procedure. Issues regarding the protection of ongoing investigations, informers and other related issues may arise. The individual subject to the search may attempt to use the detention hearing as a means of gaining access to the investigation file long before charges are laid.

Crown counsel may play a role in these hearings, in particular by:

- Reviewing the affidavit prepared by investigators or participating in its preparation (even where Crown counsel will not appear at the hearing);
- Providing advice to investigators concerning the type of information to detain or to return;²² or

¹⁹ *Criminal Code*, [s 490\(1\)\(b\)](#).

²⁰ [Ibid.](#), [s 490\(2\)](#).

²¹ [Ibid.](#), [s 490\(3\)](#).

- Appearing at contested hearings, where it is anticipated that complex issues will arise.²³

3.3.6. Preparation of the Crown brief

The Crown brief is one of the most important documents an investigator will prepare during an investigation.²⁴ It is through this brief that the investigator presents his or her theory of the case and demonstrates the existing evidence to prove that theory.

Crown counsel may assist in the preparation of the brief in a number of ways, including:

- Providing advice on how to structure the brief during the planning stages;
- Providing advice on areas of the brief that should be improved or corrected, in particular, evidence collected to establish grounds regarding the commission of the offence; and
- Providing advice on the use of electronic briefs.

3.3.7. Disclosure management

Except in the most routine cases, disclosure management is key to an effective prosecution. Unless planning and thought is given to developing a disclosure strategy and incorporating it into the operational plan, significant obstacles may arise and prevent the court from hearing the case in a timely manner.

Crown counsel may assist in disclosure management in various ways, including providing advice on:

- the general obligations to disclose as set out in the case law;
- the structure of the disclosure management strategy to ensure that the materials generated and collected by the investigators are presented in a form that meets prosecution needs and legal requirements;
- issues of privilege (for example, police informer privilege) and editing;
- the scope of disclosure that is required in a particular case; and
- the application of the decision in [*R v McNeil*](#)²⁵.

²² The assistance Crown counsel may provide is determined to a large extent by the status of the investigation. If the case is in its early stages, it may be difficult to determine what is relevant and what is not.

²³ Crown counsel would appear in most cases where the application is brought in the superior court. When the case proceeds to another court, Crown counsel's appearance will depend on the nature of the case.

²⁴ The Report to Crown Counsel/Crown Brief (RTCC/CB) guide explains the PPSC's national approach regarding the RTCC/CB and outlines our expectations of the police. It is not about the format the RTCC/CB is to be provided, but on its substantive content.

3.3.8. Interviewing potential witnesses before charges are laid

Generally, Crown counsel do not participate in the interviewing of witnesses before charges are laid.²⁶ Crown counsel assess potential evidence by reviewing the Crown brief,²⁷ documentary evidence and videotaped witness statements.

However, in some circumstances, it may be appropriate for Crown counsel to interview a witness before charges are laid. In these situations, the investigator or the Crown witness coordinator normally should be present during the interview. Situations in which such involvement may be appropriate include:

- Where the prosecution will depend on witnesses with unsavoury backgrounds, such as police agents or jailhouse informers. Given issues of credibility that arise with such witnesses, it is generally prudent to conduct an examination before charges are laid;²⁸
- Where the prosecution will depend on witnesses who may be reluctant to testify, given their lack of familiarity with the court system or the nature of the offence committed. For example, in cases of sexual assaults or in those involving young children, it may be appropriate for Crown counsel to meet with the witness to explain the process and the safeguards for the witness. In these cases, caution must be exercised to avoid Crown counsel taking on the role of investigator, rather than simply providing the witness additional information about the process;²⁹
- Where the case involves particularly problematic [Canadian Charter of Rights and Freedoms](#) issues that require closer examination of the evidence;
- To interview a wiretap application affiant prior to approving the charges; and
- Where there is a statutory requirement for the Crown to consent to the laying of charges;³⁰ and
- When taking « KGB » statements.³¹

²⁵ 2009 SCC 3, [2009] 1 SCR 66.

²⁶ One of the reasons for this is that if the purpose of the interview is to assess the person's credibility, it may be difficult to accurately assess how that person will come across when testifying in the more stressful context of the courtroom. On this, see [R v Regan, 2002 SCC 12, \[2002\] 1 SCR 297](#) [Regan].

²⁷ See PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”, *supra* note 11.

²⁸ See procedure established for “jailhouse informers” set out in the PPSC Deskbook guideline “[3.3 Immunity Agreements](#)”, *supra* note 17.

²⁹ See generally, the PPSC Deskbook directive “[5.6 Victims of Crime](#)”.

³⁰ As set out in the PPSC Deskbook guideline “[3.5 Delegated Decision-Making](#)”, *supra* note 8.

³¹ [R v B\(KG\), \[1993\] 1 SCR 740, 79 CCC \(3d\) 257](#) at 299.

3.4. Charge review

During the investigation, investigators are not only entitled, but are encouraged to consult with Crown counsel about the evidence, the offence and proof of the case in court. At the end of the investigation, investigators are again entitled (and strongly encouraged in difficult cases) to consult with Crown counsel on the laying of charges. This consultation might include discussions about the strength of the case and the form and content of proposed charges. Ultimately, however, the police have the discretion at law to commence any prosecution according to their best judgment, subject to statutory requirements for the consent of the Attorney General, and the authority of the Attorney General to stay proceedings if charges are laid.

In practice, a form of pre-charge screening or "charge approval" occurs in Quebec, New Brunswick and British Columbia. Under these systems, charges can be laid only if Crown counsel reviews and approves them.³²

When the DPP chooses to participate in a process of pre-charge approval of charges, the DPP will apply the charge approval standard established in the PPSC Deskbook guideline "[2.3 Decision to Prosecute](#)" to all proceedings proposed to be commenced at the instance of the Government of Canada. Consideration should be given to whether counsel who advises the investigative agency during the investigation (the pre-charge advisory Crown) should be different from counsel who conducts the screening process (the pre-charge approval or screening Crown). There is no iron clad rule in this respect. Factors to consider in making this decision include the effective and efficient prosecution of the matter, the orderly transition of the file, the length of time and extent of involvement of the pre-charge Crown counsel, the need to avoid preconceived notions, exclusion if called as a witness, and the value of fresh eyes assessing the case.

3.5. After charges are laid

Generally, just as peace officers are independent from political control when laying charges, Crown counsel are independent from the police in the conduct of prosecutions.³³ Crown counsel's independence applies, for example, to assessing the strength of the case,³⁴ electing the mode of trial,³⁵ providing disclosure to the accused,³⁶ assessing the witnesses (including decisions about immunity from prosecution),³⁷ deciding how to

³² Discretion to Prosecute Inquiry, *Commissioner's Report* (British-Columbia, Ministry of the Attorney General of British-Columbia, 1990) (Chair: Stephen Owen) at p 25; *Royal Commission into the Prosecution of Donald Marshall, Jr.*, Inquiry Report, vol 1 at 232.1, D Geoffrey Cowper, QC "A Criminal Justice System for the 21st Century" Final Report of the BC Justice Reform Initiative to the Minister of Justice and Attorney General Honourable Shirley Bond, August 27, 2012).

³³ See the PPSC Deskbook guideline "[2.1 Independence and Accountability in Decision-Making](#)".

³⁴ See the PPSC Deskbook guideline "[2.3 Decision to Prosecute](#)", *supra* note 11.

³⁵ See the PPSC Deskbook guideline "[3.10 Elections and Re-elections](#)".

³⁶ See the PPSC Deskbook guideline "[2.5 Principles of Disclosure](#)".

³⁷ See the PPSC Deskbook guideline "[3.3 Immunity Agreements](#)", *supra* note 17.

present the evidence,³⁸ negotiating and repudiating plea agreements,³⁹ and deciding if the public interest warrants continuing or staying a prosecution.⁴⁰

When charges are laid, full responsibility for the proceedings shifts to the DPP. The police must, on request, carry out further investigations that counsel believes are necessary to present the case fairly and effectively in court. The DPP also has the authority to control the proceedings after charges are laid. This authority extends to conditions of bail, staying or withdrawing charges and representations on sentencing. This role should, whenever reasonably possible, be carried out in consultation with the investigators, but the consultation (much less agreement) is not required by law.

4. RESOLVING DISAGREEMENTS BETWEEN CROWN COUNSEL AND INVESTIGATORS ON WHETHER TO PROCEED

In cases where a disagreement between investigators and Crown counsel on whether to lay charges or not occurs, the issue should be resolved according to any existing agreements between the two organizations or through discussions at successively more senior levels on both sides.

The decision whether a case should commence or continue should be made at the regional level. Disagreements should be referred to the team leader and then, if necessary, to the Deputy Chief Federal Prosecutor (or General Counsel, Legal Operations) and to the Chief Federal Prosecutor (CFP). When the unresolved disagreement is between a Crown agent and the police, the matter should be referred to the agent supervisor at the regional office. If the issue cannot be resolved at this level, it should be referred to the CFP.

In rare circumstances, senior managers at PPSC Headquarters may need to review a case in which there is a disagreement. The CFP should refer the case to the appropriate Deputy DPP for assessment.

³⁸ [R v Cook, \[1997\] 1 SCR 1113](#).

³⁹ [R v Nixon, 2011 SCC 34, \[2011\] 2 SCR 566](#).

⁴⁰ *Criminal Code*, [s 579](#); see also the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”, *supra* note 11.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

2.8 CONTACTS WITH THE COURTS

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

March 1, 2014

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1. INTRODUCTION

The principle of judicial independence is a pillar of our justice system.¹ As a result, Crown counsel must be careful and sensitive when in contact with courts and judges. Counsel, moreover, must be aware of the implications of their unique functions and the concomitant importance of avoiding remarks that would give rise to a suggestion that they have attempted to influence improperly or pressure the judiciary. Most of the time, common sense and professional integrity will be a sufficient guide.

However, ambiguous and complex situations arise. When this occurs, it may be necessary to refer the matter to the Chief Federal Prosecutor (CFP) who will ensure that proper action, if any, is taken, including referring the matter to the Director of Public Prosecutions (DPP).

2. OBJECTIVE

The purpose of this guideline is to help Public Prosecutions Service of Canada (PPSC) officials avoid situations that could give the impression that the PPSC or its prosecutors are improperly attempting to influence or exert pressure on the courts or judges. While all lawyers must be sensitive to the propriety of their contacts with the courts and their relationship with the judiciary, and are expected to act in accordance with their law society codes of conduct, Crown counsel and other PPSC employees, as representatives of the DPP, are in a unique position that requires particular caution in their dealings with the courts.

¹ For a thorough discussion of the principle of judicial independence and the rules of conduct that counsel must follow in order to uphold that principle, see generally [*Canada \(Minister of Citizenship and Immigration\) v Tobiass*, \[1997\] 3 SCR 391](#) at paras 67ff, 118 CCC (3d) 443.

3. GUIDELINES

3.1. Business or personal relationships with judges and judicial officers

Crown counsel shall not appear before a judge or judicial officer when he or she has a business or personal relationship with that person that might reasonably be perceived to affect the impartiality of Crown counsel, the judge or the officer.

3.2. Improper attempts to influence a judge or judicial officer

Crown counsel shall not attempt, or knowingly allow anyone else to attempt, to influence the decisions or actions of a judge or judicial officer, directly or indirectly, except by legitimate means of open persuasion as an advocate.

3.3. Communicating with judges or judicial officers in contested matters

Crown counsel shall not communicate, directly or indirectly, with a judge or any judicial officer except

- in open court;
- with the consent of, or in the presence of, the other parties or their respective counsel;
- in writing, provided a copy is given at the same time to the other parties or their respective counsel; or
- in *ex parte* matters, as permitted by law.

3.4. Meetings in relation to administrative matters

In discussing with judges, judicial officers, and other court officials matters of government policy that could affect the administration of the courts, Crown counsel shall conduct themselves so as to avoid any possible suggestion that they are improperly attempting to influence or exert pressure on the courts or individual judges in the exercise of their judicial functions.

3.5. Referral to the Chief Federal Prosecutors

Where there is doubt about whether a particular contact or action involving a judge or judicial officer is appropriate, counsel shall consult with the CFP.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

2.9 COMMUNICATIONS WITH THE MEDIA

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

March 1, 2014

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1. INTRODUCTION

An informed public is an essential element of a transparent, fair and equitable justice system. By providing accurate and timely information on behalf of the Director of Public Prosecutions (DPP), Crown counsel can help ensure that citizens have a fair opportunity to determine whether the justice system is functioning effectively. Access to full and accurate information on court proceedings, in effect, enhances public confidence in the administration of justice.

As set out in [s. 3\(3\)\(e\)](#) of the *Director of Public Prosecutions Act*¹ (DPP Act), the DPP may communicate with the media and the public on all matters that involve the initiation and conduct of prosecutions. This authority is delegated to Crown counsel, who are accountable for the cases and proceedings in which they are involved.² Crown counsel should be accessible and responsive to the media and the public regarding the cases they prosecute. They are the Public Prosecution Service of Canada's (PPSC) spokespersons

¹ [Director of Public Prosecutions Act](#), SC 2006, c 9 [DPP Act].

² Responsibility is delegated by virtue of [s 9\(1\)](#) of the DPP Act, *supra* note 1. For a brief discussion of Crown counsel's delegated responsibilities, see the PPSC Deskbook guideline "[2.2 Duties and Responsibilities of Crown Counsel](#)".

and the first point of contact in respect of specific prosecutions assigned to them. Crown counsel are considered to be “authorized spokespersons” within the meaning of s. 8.17 of the [PPSC Code of Conduct](#) “on cases for which they are responsible”.³

This guideline applies to contacts initiated by the media and to contacts initiated by Crown counsel.

2. STATEMENT OF POLICY

The PPSC’s media communications policy is founded upon three cornerstone principles: accessibility, transparency and responsiveness. The PPSC strives to enhance public understanding of, and confidence in, the administration of justice by providing accurate and relevant information in a timely manner. Subject to the overriding duty to the administration of justice to ensure that trials are fair, Crown counsel shall provide the media with timely, complete and accurate information on matters relating to the administration of criminal justice in which they are involved.

It must be recognized, however, that in their role as “ministers of justice”,⁴ Crown counsel have a responsibility to relate to the media and the public in a manner that is courteous, dispassionate, free from provocative rhetoric. In making a public statement, Crown counsel must ensure that the privacy interest of third parties are protected, that common law and statutory confidentiality obligations are respected, including publication bans, and that the fair trial rights of an accused are not jeopardized.

3. HANDLING MEDIA ENQUIRIES

Crown counsel should, on cases for which they are responsible, make reasonable efforts to respond directly to media enquiries relating to court proceedings in relation to routine matters (e.g. scheduling), questions relating to the status of a prosecution or appeal and matters of criminal procedure.

When in doubt about any aspect of a media inquiry, including the reasonableness of the request or how to handle a particular media inquiry, Crown counsel should seek the advice of the Communications Group and consult with their Chief Federal Prosecutor (CFP). Crown counsel may also simply refer calls to the Communications Group, which has a coordinating role in these matters. Referring the inquiry to the Communications Group will often be advisable when for example: a) the matter is particularly controversial; b) a PPSC spokesperson has already handled media inquiries regarding the

³ [Section 8.17](#), Publicly Commenting for the PPSC states that “Only authorized spokespersons may issue statements or comments on the PPSC’s position on a given subject. PPSC prosecutors are authorized to act as spokespersons on cases for which they are responsible. If asked for the PPSC’s position, employees who are not spokespersons must refer the inquiries to their manager or to the Communications Group.”

⁴ See the PPSC Deskbook guideline “[2.2 Duties and Responsibilities of Crown Counsel](#)”, *supra* note 2.

same subject; c) Crown counsel is under time constraints, or d) there are security concerns in the case, for example, for the personal safety of Crown counsel.

4. EXPLAINING PROSECUTORIAL DECISION-MAKING

There is no “freestanding principle of fundamental justice” requiring Crown counsel to justify and explain the exercise of prosecutorial discretion to the court and indirectly to the public.⁵ The principle of prosecutorial independence is firmly entrenched in our legal system. Nonetheless, while the Crown is not legally required to give reasons for its core decision-making, it may be advisable in certain circumstances to offer an explanation for decisions in order to help maintain public confidence in the administration of justice. As Doherty JA stated in [R v Gill](#):⁶ “By offering an explanation, the prosecutor clearly enhances the transparency of his or her decision-making process and, hence, the fairness of the proceeding.”

Crown counsel should provide an explanation for a particular decision when it is public interest to do so, for example where (i) the basis is not self-evident and (ii) it is reasonably foreseeable that the lack of an explanation would lead the court or members of the public to draw conclusions that attribute erroneous and improper motives to the Crown’s exercise of prosecutorial discretion. Prior to giving reasons in respect of these decisions, Crown counsel must consult with and seek prior approval of their CFP or supervisors.

5. TYPES OF COMMUNICATION

5.1. Contacts initiated by the media

Media representatives may seek information in various ways, including questioning counsel outside the courtroom. When this occurs, Crown counsel may not have the opportunity to consult before responding. Crown counsel should provide the media with accurate and factual information in a timely manner. When information is not readily available, Crown counsel should make reasonable efforts to gather the required information and answer questions directly, or refer questions to the Communications Group.

5.2. Contacts initiated by Crown counsel

The PPSC may, on occasion, identify a need to correct inaccuracies or to provide information without being contacted by the media. This might be done, for example, by a simple call or message, through a letter to the editor of a media outlet (print, radio, TV or social media) by a handout, or a fact sheet. Depending on the circumstances, it may be

⁵ See e.g. [R v Gill, 2012 ONCA 607](#) at para 75.

⁶ [Ibid](#) at para 77.

appropriate to distribute information more broadly. In those situations, Crown counsel must consult with their CFP, their supervisors, or with the Communications Group with respect to the appropriate means of communication and its content.

5.3. Media requests requiring consultation

From time to time, Crown counsel may be invited to participate in a more lengthy or detailed interview regarding a prominent case or issue. Some of these cases may also be the subject of multiple requests for PPSC comment. Crown counsel must therefore consult with their CFP on these matters. The CFP must bring these requests to the attention of the Communications Group and to the appropriate Deputy DPP, to ensure the matter is appropriately resolved.

Such cases include those in which:

- the prosecution involves significant constitutional questions, federal-provincial or international relations, government operations, or national security;
- the accused is a public figure; or
- the issues raised have previously generated public debate.

5.4. Social media

Social media⁷ has added a new dimension to the way information is disseminated to the public. It is important to note that anything Crown counsel says should be considered “on the record” and may end up in the public domain. A comment to a local blogger may be picked up by a national broadcast media outlet. Therefore, Crown counsel must exercise the same care and attention when dealing with anyone seeking information, and not just traditional media outlets.

5.5. Communications before charges are laid

Before charges are laid, the media may seek to confirm that a specific matter or person is under investigation or that charges are imminent. The PPSC does not comment on such matters.

To deny the existence of an investigation at one time, and to decline to comment later, says as much as an affirmation. It is best not to comment so as to not prejudice a potential or ongoing investigation, or any possible proceedings. The proper response is to state as a matter of policy that the PPSC does not and will not discuss such matters.

⁷ Social media refers to electronic networks or channels where content is exchanged in virtual communities between individuals or organizations, including media or government agencies.

5.6. Investigative agency news releases

Some investigative agencies issue news releases at the time that charges are laid or at a particular stage in the proceedings such as a guilty plea or finding of guilt after trial. Unless they relate specifically to elements of a prosecution or are subject to a general agreement between agencies, these news releases are issued independently of the PPSC and Crown counsel cannot dictate to an investigative agency the content of its announcements.⁸

5.7. Communicating with the media in one's personal capacity

Crown counsel, like all government employees, are subject to certain limitations when communicating with the media in their personal capacity.⁹ This is especially true for those who perform their duties in the public eye. In this respect, Crown counsel must familiarize themselves with ss. 8.16 and 8.17 of the [PPSC Code of Conduct](#). Crown counsel must not make statements that would:

- compromise their ability to do their job in the future by commenting publicly and critically on the wisdom of a particular offence or specific law, a federal government policy, position or proposal;
- discourage public respect for the administration of justice or weaken the public's confidence in legal institutions, for example, by publicly commenting on or criticizing a judge's decision in another case in a manner that could bring about either of these results;
- contravene professional codes of conduct; or
- constitute opinions on matters of public interest where the opinion is sought or is relevant because of the nature of a person's position as Crown counsel.

6. GUIDING PRINCIPLES

The following general principles must govern Crown counsel's approach to communications with the media:

- Give facts, not opinions - Crown counsel should provide information, and they should explain. They should not offer personal opinions about court decisions, or laws or governmental policies. The goal is to foster understanding, not to create sensation.

⁸ See the PPSC Deskbook guideline "[2.7 Relationship Between Crown Counsel and Investigative Agencies](#)".

⁹ See also the [PPSC Code of Conduct](#), at s 8.16 for Public Criticism of the PPSC and the Federal Government and at s 8.17 for Publicly Commenting for the PPSC.

- Speak for attribution - All communications with the media should be considered “on the record”. Crown counsel must assume that any comments they make to journalists can be attributed to them in their names.
- Respect journalists’ needs - It is important to recognize that journalists have a job to do, whether or not you assist them. Because they will pursue the story, it is usually better to respond to their questions. It is also necessary to bear in mind journalists’ deadlines in attempting to respond.
- Be responsive - “No comment” is not an acceptable response to a request for information. If the particular question posed cannot be answered because it calls for an opinion, invites comment on matters under judicial consideration, or attempts to confirm the existence of a police investigation, explain to the questioner why it would be inappropriate to comment.
- Do not express satisfaction or dissatisfaction with an outcome – In response to questions such as “Are you happy with the outcome?” or “How do you feel about the acquittal?”, Crown counsel should respond that the Crown does not express satisfaction or dissatisfaction with particular trial outcomes, our role is to put before the court all available, relevant, and admissible evidence necessary to enable the court to determine the guilt or innocence of the accused.¹⁰
- Educate the public - The media, and the public generally, may not understand the complexities of the justice system. Crown counsel should explain aspects of the system such as the role of the prosecutor or the appeal process, in a clear, concise and comprehensible way.
- Be timely - Misinformation, left uncorrected, can be harmful to people and institutions. Seek to prevent an inaccurate public record by providing information in a timely way, respecting where possible journalists’ needs to meet deadlines. Where comment is to be made after the appearance of a misleading or inaccurate story, a representative of the PPSC should set the record straight as soon as possible.
- Protect the integrity of the trial - Any comment that prejudices the right of an accused to a fair trial must be avoided.

7. SPECIFIC DIRECTION

The following sections are intended to provide, in a non-exhaustive way, guidance to Crown counsel as to how to apply the foregoing general principles.

7.1. Provision of Factual Information

Crown counsel may provide factual information, not opinions, concerning:

¹⁰ [*Boucher v The Queen*, \[1955\] SCR 16](#) at 23-24.

- cases before the courts;
- documents filed in open court and otherwise available to the public;
- the prosecution policies in the PPSC Deskbook (for example, explaining the “reasonable prospect of conviction” standard in the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”);
- the process or procedures of the criminal justice system and how they apply to specific proceedings;
- the role of prosecutors at the PPSC. Crown counsel may also refer to the PPSC Annual Report or www.ppsc-sppc.gc.ca for more detailed explanations;
- the meaning of a court decision, without commenting on whether it is “right”, “wrong”, “good” or “bad”;
- the role and responsibilities of the DPP.

7.2. Information which Cannot be Provided

Crown counsel should not comment on:

- the possibility of charges being laid;
- cases under review or ongoing investigations;
- speculation as to what may happen during any stage of ongoing proceedings;
- privileged information, such as advice given to, or discussions held with, the PPSC, colleagues, foreign officials, or members of an investigative agency, whether or not such advice or discussions are privileged;
- any information the disclosure of which is prohibited by law (e.g. by virtue of the [Privacy Act](#)¹¹, [Youth Criminal Justice Act](#)¹²) or by a court-imposed publication ban;
- policies, procedures or decisions of investigative agencies (such inquiries should be directed to the investigative agency);
- the wisdom or efficacy of federal or provincial policies, programs or legislation;
- the strength or weakness of the Crown or defence case during a trial;
- the appropriateness of a judge's charge to the jury, particular rulings, the verdict of a jury, the sentence or any comments made by the judge;
- whether a decision will be appealed or not (however, the procedure for considering whether or not to appeal may be explained); or
- the guilt or innocence of an accused.

¹¹ RSC 1985, c P-21.

¹² SC 2002, c 1.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

2.10 APPLICATION OF THE *PUBLIC PROSECUTION SERVICE OF CANADA DESKBOOK* IN RESPECT OF CANADA *ELECTIONS ACT* PROSECUTIONS

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(8) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

August 26, 2016

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1. INTRODUCTION

The purpose of this guideline is to provide guidance to federal prosecutors conducting prosecutions under the *Canada Elections Act*.

The Director of Public Prosecutions (DPP) is independent in his or her decision-making with respect to prosecution functions but remains accountable to the Attorney General, who, in turn, is answerable to Parliament for the DPP's activities. That accountability, however, does not extend to the DPP's authority to initiate and conduct prosecutions under the *Canada Elections Act*, which is conferred by subsection 3(8) of the *Director of Public Prosecutions Act* (DPP Act).¹

By virtue of that subsection, these prosecutions are not conducted under the authority of the Attorney General, nor can the Attorney General issue directives with respect to, or take over these prosecutions. As a result, a distinctive regime is required under the DPP's authority to issue guidelines in relation to *Canada Elections Act* prosecutions.

2. THE DPP'S AUTHORITY TO ISSUE GUIDELINES

For all prosecutions other than those under the *Canada Elections Act*, the Attorney General has the authority to issue directives both with respect to the initiation or conduct of prosecutions generally under s 10(2) of the DPP Act. Similarly, s 3(3)(c) of the Act provides the Director of Public Prosecutions with the power to issue guidelines respecting the conduct of prosecutions under the authority of the Attorney General.

As the Attorney General has no authority over *Canada Elections Act* prosecutions, neither the directive or guideline power under ss 3(3)(c) or 10(2) of the DPP Act extends to *Canada Elections Act* prosecutions. Accordingly, the Director's prerogative to issue guidelines in respect of elections prosecutions stems from the Director's supervisory authority over federal prosecutors.

¹ SC 2006, c 9, s 121. Section 3(8) provides: "The Director initiates and conducts prosecutions on behalf of the Crown with respect to any offences under the *Canada Elections Act*, as well as any appeal or other proceeding related to such a prosecution."

3. APPLICATION OF *PPSC DESKBOOK TO CANADA ELECTIONS ACT* PROSECUTIONS

Other than the specific exceptions noted below, federal prosecutors, when initiating and conducting prosecutions on behalf of the Crown with respect to offences under the *Canada Elections Act*,² as well as any appeal or other proceeding related to such prosecutions, are to be guided by the policies and guidelines for the exercise of prosecutorial authority as set out in Volume I of this Deskbook.

Accordingly, for prosecutions under the *Canada Elections Act*, the following chapters of the *PPSC Deskbook*:

(A) do apply (except that references to the Attorney General and to the Attorney General's powers and responsibilities under the DPP Act are not applicable):

- Part II (Principles Governing Crown Counsel's Conduct);
- Part III (Procedural Issues and Trial Practice);
- Part IV (Evidentiary Issues);
- Part V, Chapters 5.4 (Youth Criminal Justice), 5.6 (Victims of Crime); and 5.9 (Private Prosecutions) with the *caveat* that the initiation of *any* prosecution under the *Canada Elections Act* requires the written consent of the DPP: see s 512(1) of that Act;
- Part VI, Chapter 6.6 (Charitable Donations).

(B) do not apply:

- Part I (Roles of the Attorney General and the Director of Public Prosecutions);
- Part V (chapters 5.1 (National Security), 5.2 (*Competition Act*), 5.3 (Proceeds of Crime), 5.5 (Domestic Violence), 5.7 (Impaired Driving Cases), 5.8 (Corruption of Foreign Public Officials) and 5.10 (Parental Child Abduction);
- Part VI, chapters 6.1 (Drug Treatment Courts), 6.2 (Mandatory Minimum Penalties for Particular Drug Offences under the *Controlled Drugs and Substances Act*), 6.2.1 (Supplementary Guideline on Mandatory Minimum Penalties for Certain Drug Offences Under the *Controlled Drugs and Substances Act*), 6.3 (Statutory Restrictions on the Use of Conditional Sentences), and 6.4 (Mandatory Minimum Penalties under the *Criminal Code*), 6.5 Process for Presumptively Eligible Status for a Dangerous Offender or Long Term Offender Designation.

² SC 2000, c 9.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

2.11 OFFICIAL LANGUAGES IN PROSECUTIONS

**DIRECTIVE OF THE ATTORNEY GENERAL ISSUED
UNDER SECTION 10(2) OF THE *DIRECTOR OF PUBLIC
PROSECUTIONS ACT***

April 28, 2017

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1. PURPOSE OF DIRECTIVE

This directive is intended to assist Crown counsel in applying the language provisions of the *Criminal Code* (the Code), in particular, those dealing with the language of the trial (ss 530, 530.01, 530.1, 530.2, 531 and 849(3)). It is intended to apply only to cases governed by Part XVII of the Code: its provisions are not intended to extend or apply to official languages of a court or jurisdiction other than English or French, such as aboriginal languages in certain provinces or territories.

2. PURPOSE OF PART XVII OF THE *CRIMINAL CODE*

The purpose of s 530 of the Code is to provide equal access to the courts to accused persons who speak one of the official languages of Canada.¹ These linguistic provisions are distinct from the principles of fundamental justice such as the right to a fair trial.² Section 530 of the Code sets out the procedure whereby an accused can apply to be tried before a court who speaks the official language of the accused or both official languages. Once an order has been made under s 530 of the Code, s 530.1 of the Code sets out how the proceedings are to be conducted.

The nature of the accused's right and the purpose of this part of the *Criminal Code* is to ensure that accused individuals can have their preliminary hearing and trial in the official language of their choice.

The Supreme Court of Canada underlined in *Beaulac*³ that language rights of accused persons “must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada.”

As the Court of Appeal of Ontario has stated in its *Munkonda* decision:⁴

“The objective of s 530 of the *Criminal Code* is ‘to provide equal access to the courts to accused persons speaking one of the official languages of Canada in order to assist official language minorities in preserving their cultural identity.’”

The Supreme Court of Canada has further established that criminal courts must be institutionally bilingual:⁵

Section 530(1) creates an absolute right of the accused to equal access to designated courts in the official language that he or she considers to be his or her own. The

¹ *R v Beaulac*, [1999] 1 SCR 768 at para 34, 173 DLR (4th) 193 [*Beaulac*]. These language provisions are distinct from the principles of fundamental justice such as the right to a fair trial (*Ibid* at para 41).

² *Ibid*.

³ *Ibid*, para 25.

⁴ *R v Munkonda*, 2015 ONCA 309, 2015 OJ no 2284, 5 May 2015 and *Beaulac*, para 34.

⁵ *Beaulac*, para 28.

courts called upon to deal with criminal matters are therefore required to be institutionally bilingual in order to provide for the equal use of the two official languages of Canada.

3. APPLICATION PERTAINING TO LANGUAGE OF TRIAL UNDER SECTION 530 OF THE *CRIMINAL CODE*

3.1 Accused whose language is one of the official languages

For the language of trial provisions of the *Criminal Code* to be triggered, the accused whose language is one of the official languages of Canada must make an application under s 530(1) of the Code for an order that the accused be tried before a judge or a judge and jury who speak the official language of the accused or, if the circumstances warrant, both official languages of Canada. This is a substantive right and not a procedural one.⁶

3.2 Accused whose language is not one of the official languages

When an accused does not speak one of the official languages, a judge may grant an order under s 530(2) of the Code directing that the accused be tried before a judge or a judge and jury who speak the official language in which the accused, in the opinion of the judge, can best give testimony or, if the circumstances warrant, who speak both official languages.

3.3 Accused must be informed of right to apply for order

The judge, before whom an accused first appears, whether or not the accused is represented, must ensure that the accused is advised of his or her right to apply for an order and of the time before which such an application must be made (s 530(3) of the Code). The judge must be proactive in ensuring the protection of the linguistic rights of an accused person, no matter what position is taken by counsel appearing before the court.⁷

Crown counsel have the duty to promote the integral application of ss 530 and 530.1 of the Code.⁸ He or she needs to be mindful of the obligation of the justice of the peace or provincial court judge before whom the accused first appears to inform the accused of his or her right to apply for an order under s 530(1) and (2) of the Code and of the time before which such an application must be made.⁹ This duty of the Crown prosecutor to remain vigilant encompasses the duty to make sure the accused is made aware by the court of the

⁶ *Ibid* at paras 28 and 31.

⁷ *R v Parsons*, 2014 QCCA 2206, at paras 34-35.

⁸ *Ibid*, para 35.

⁹ *Criminal Code*, RSC 1985, c C-46, s 530(3). Given the nature of language rights, the requirement of substantive equality and the purpose of s 530 of the Code, the violation of the language provisions was characterized by the Supreme Court as a substantial wrong and not a procedural irregularity; see *Beaulac*, *Ibid* at para 54. The violation of s 530 of the Code is not a breach of s 15 or ss 16(1) or 16(3) of the *Charter*. Accordingly, the violation of s 530 of the Code does not give rise to a remedy under s 24(1) of the *Charter*; see *R v MacKenzie*, 2004 NSCA 10, 181 CCC (3d) 485, 221 NSR (2d) 51, 697 APR 51, 116 CRR (2d) 63.

nature and extent of this right¹⁰ as well as the duty to ensure the accused exercises this right at the earliest opportunity in the criminal process in order that arrangements can be made with respect to subsequent proceedings.

3.4 Time frame for making the application

An accused's language of trial application must be made not later than:

- (a) the time of the appearance of the accused at which his trial date is set, if
 - (i) he is accused of an offence mentioned in s 553 of the Code or punishable on summary conviction, or
 - (ii) the accused is to be tried on an indictment preferred under s 577 of the Code;
- (b) the time of the accused's election, if the accused elects under s 536 of the Code to be tried by a provincial court judge or under s 536.1 of the Code to be tried by a judge without a jury and without having a preliminary inquiry, or
- (c) the time when the accused is ordered to stand trial, if the accused
 - (i) is charged with an offence listed in s 469 of the Code,
 - (ii) has elected to be tried by a court composed of a judge or a judge and jury, or
 - (iii) is deemed to have elected to be tried by a court composed of a judge and jury.

The transcript of appearances by the accused may demonstrate that the accused has asserted a right to have the trial in the official language of his or her choice, without a formal application having been made pursuant to s 530.¹¹

3.5 Application made outside time frame

Section 530(4) of the Code applies where an accused's application is made outside the prescribed time frame.

In that case, if the court before which the accused is to be tried is satisfied that it is in the best interests of justice that the accused be tried before a court that speaks the official language of Canada that is the language of the accused or, if the language of the accused is not one of the official languages of Canada, the official language in which the accused can best give testimony, the court may remand the accused to be tried before a court that speaks

¹⁰ *Parsons*, at para 32.

¹¹ *R v Foster* 2015 NLTD(G) 26, para 22. In regions where sections 530 and 530.01 of the *Code* are frequently used, formal applications may be rare or never made as an accused need only state on the record a choice of official language at the time of setting the date of the preliminary hearing or the trial.

that language or, if the circumstances warrant, that speaks both official languages of Canada.

To determine the best interests of justice, the court must consider the reasons for the delay and then the factors that relate to the conduct of the trial. Institutional inconvenience, the ability of the accused to understand the other official language and the fairness of the trial (which is distinct from the language rights granted under s 530 of the Code) must not be taken into account. The additional difficulties caused by an untimely application and the reasons for the delay are relevant factors.¹² The ability of the accused to speak the other official language is not a valid consideration: all that is needed is that the accused be able to instruct counsel in the official language of his or her choice.¹³

The basic principle is that, generally, owing to the importance of language rights and the stated intention of the legislator to ensure the equality of French and English, the best interests of justice will be better served by an order allowing the application by the accused to be tried in his or her official language. The denial of the application is exceptional, and the burden of justifying it falls on the Crown.¹⁴

3.6 Amending the order

Pursuant to s 530(5) of the Code, an order under s 530 of the Code that a trial be held in one of the official languages may, if the circumstances warrant, be varied by the court to require that it be held in both official languages, and vice versa.

3.7 Waiver

The rights provided in ss 530 and 530.1 of the Code may be waived. The accused must know and understand the rights he or she is waiving as well as the consequences of such waiver.¹⁵ The judge and counsel must be vigilant in this regard and the judge may have to question the reasons behind the waiver to ensure that the accused is fully cognizant of its

¹² “... mere administrative inconvenience is not a relevant factor. The availability of court stenographers and court reporters, the workload of bilingual prosecutors or judges, the additional financial costs of rescheduling are not to be considered because the existence of language rights requires that the government comply with the provisions of the Act by maintaining a proper institutional infrastructure and providing services in both official languages on an equal basis. As mentioned earlier, in the context of institutional bilingualism, an application for service in the language of the official minority language group must not be treated as though there was one primary official language and a duty to accommodate with regard to the use of the other official language. The governing principle is that of the equality of both official languages.” *Beaulac*, *supra* note 1 at paras 36-41.

¹³ *Foster*, *supra* note 8 at para 21; see the explanation found in section 4.1 below.

¹⁴ *Ibid* at para 42.

¹⁵ *R v Dow*, 2009 QCCA 478, [2009] RJQ 679, 245 CCC (3d) 368.

consequences.¹⁶ The fact that counsel may have difficulty in speaking the official language of the accused cannot constitute a valid justification for waiver.¹⁷

Crown counsel should ensure that proceedings are conducted in an official language that the accused person understands. Accordingly, Crown counsel should ask that the waiver of one of the rights provided in ss 530 and 530.1 of the Code be noted on the record, especially if the accused is unrepresented.

4. LANGUAGE OF TRIAL

4.1 Trial in one of the two official languages

For the purposes of s 530 of the Code, the language of the accused is the official language with which the accused has a sufficient connection. It does not have to be the accused's dominant language. If the accused has sufficient knowledge of an official language to instruct counsel, the accused may assert that that language is his or her language, regardless of his or her ability to speak the other official language. The onus is on the Crown to show that this assertion is unfounded. The court will satisfy itself only that the accused is able to (i) instruct counsel and (ii) follow the proceedings in the chosen language. The dominant cultural identity and the personal language preferences of the accused are not relevant.¹⁸

It should be noted that ss 530.1(a) and (b) of the Code provide that both the accused and counsel for the accused have the right to use either official language during the preliminary inquiry and trial. Thus, the language used by the accused or his or her counsel may not be invoked by Crown counsel to challenge the accused's choice of language of trial.

As the Court of Appeal for Ontario has noted:¹⁹

“...the rights of the accused and the obligation of the state and the court to provide the service are not reduced or diminished by the fact that an accused understands and speaks the language of the majority. The linguistic ability of the accused [*Beaulac*, at para 45] ‘is irrelevant because the choice of language is not meant to support the legal right to a fair trial, but to assist the accused in gaining equal access to a public service that is responsive to his linguistic and cultural identity.’”

Crown counsel cannot contest the choice of official language of the accused unless the accused clearly has insufficient knowledge of the chosen official language to instruct counsel and to follow the proceedings in that language.

¹⁶ *Parsons*, *supra* note 4 at paras 32 and 35. The judge must enquire directly from the accused whether he is aware of the nature and extent of his rights and thus is able to freely accept the consequences of the claimed waiver. Where the responses provided by the accused are incompatible with free and informed consent, the court must refuse the claimed waiver.

¹⁷ *Ibid.*

¹⁸ *Beaulac*, para 34.

¹⁹ *R v Munkonda* 4, para 59.

Crown counsel cannot contest the accused's statement that he or she will best be able to give testimony in one of the official languages when neither official language is the language of the accused unless the accused clearly has insufficient knowledge of the chosen language to instruct counsel and to follow the proceedings in that language.

4.2 Trial in both official languages (“bilingual trial”)

4.2.1 Single accused

A judge may order that the accused be tried before a judge or a judge and jury who speak both official languages if the circumstances warrant. For example, such circumstances may occur when an accused requests a trial before a judge who speaks only one official language but the evidence is in the other official language or witnesses speak the other official language.

4.2.2 Co-accused

Section 530(6) of the Code is intended to clarify the specific situation of co-accused who are to be tried jointly but who do not have the same official language. Prior to the coming into effect of this provision on October 1, 2008, the courts had taken different approaches regarding separate trials where co-accused exercised their right to be tried in the official language of their choice, which was not the same. Section 530(6) of the Code provides that the fact that two or more accused who are to be tried together are each entitled to be tried before a judge or judge and jury who speak one of the official languages and that these official languages are different may constitute circumstances that warrant that an order be granted directing that they be tried before a judge or a judge and jury who speak both official languages. This order reconciles the language rights of the accused with the principle of one trial for co-accused.²⁰

Where co-accused who do not have the same official language exercise their respective right to be tried before a judge or a judge and jury who speak their official language, Crown counsel should try to avoid separate trials and obtain an order for a bilingual trial. This constitutes circumstances that warrant such an order under s 530(6) of the Code. That said, in exercising its right to join several accused in a single indictment, the prosecution does not escape its linguistic obligations, and the accused do not lose their linguistic rights; the adjustments required by a bilingual trial must not give an advantage to either of the language groups.²¹

In the *Munkonda* decision, the Court of Appeal for Ontario underlined that both official languages must be used and “the principle of equal access must be respected.” Two principles govern the conduct of a bilingual trial or preliminary inquiry. They are as follows:

²⁰ *R v Bellefroid*, 2009 QCCS 3193.

²¹ *Munkonda*, para 63.

1. the accused retain their right to equal access to proceedings in their language even though the proceeding is bilingual; and
2. the court and the prosecution must be bilingual and not favour one or the other official language.

5. EFFECTS OF ORDER PERTAINING TO LANGUAGE OF COURT AND OF CROWN COUNSEL

Once an order has been made under s 530 of the Code, it takes effect immediately, and the scheme created by ss 530 to 530.1 of the Code applies.

The specific rights listed in s 530.1 of the Code also apply where a bilingual trial is ordered.²²

5.1 Judge, judge and jury must speak same official language as accused

The judge or judge and jury must speak the official language of the accused or both official languages, as the case may be, at the preliminary inquiry and the trial.²³ The judge must not only understand and be able to speak the official language of the accused, he or she must in fact use that language during the trial, as well as in interlocutory or final judgments.²⁴ Failure by the judge to ensure that the requirements of ss 530 and 530.1 are met will result in a loss of jurisdiction.²⁵

5.2 Crown counsel must “speak” same official language as accused

5.2.1 Institutional obligation

Section 530.1(e) of the Code imposes a specific obligation on Crown counsel by providing that the accused has the right to have Crown counsel who “speaks” the same official language as the accused or both official languages, as the case may be. This includes an implicit requirement that Crown counsel in fact uses this language.²⁶ Consequently, every time an order is made under s 530 of the Code, Crown counsel responsible for the file must ensure that he or she has sufficient command of the official language stated in the order; in the case of a prosecution team, each prosecutor must be fluent in the official language of the accused and able to fully participate in the trial in the language chosen.²⁷ The same

²² *Beaulac*, *supra* note 1 at para 49.

²³ *Criminal Code*, ss 530(1), 530 (2), 530(4) and 530.1(d).

²⁴ *Wilcox v R*, 2014 QCCA 1744, para 108; *Munkonda*, paras 94 to 97.

²⁵ *Munkonda*, para 133.

²⁶ See *R v Potvin* (2004), 69 OR (3d) 654 (ON CA).

²⁷ *Munkonda*, para 67. See also *R v Sarrazin* (2005), 75 OR(3d) 485, 2005 OJ No 1404, 196 OAC 224, 195 CCC(3d) 257 (CA); *R v Gagnon*, [2013] QJ No 13377, 2013 QCCA 1744, and *R v Dow*, [2009] QJ No 2004, 2009 QCCA 478, JE 2009-591, EYB 2009-156034, [2009] RJQ 679, 245 CCC(3d) 368, 188 CRR (2d) 44,

principle applies to bilingual trials as well, where the prosecutor or, in the case of a prosecution team, the entire team, i.e., all counsel of record appearing for the Crown and taking place at the counsel table, must be bilingual and ensure that one official language is not favoured over the other.²⁸

Section 530.1 of the Code creates an institutional obligation. Thus, if Crown counsel on the file is not fluent in the official language of the accused or does not consent to arguing the case in that language, he or she must inform his or her superior (or, in the case of an agent, the agent supervisor), who then has the responsibility of assigning the case to another counsel who is fluent in the official language of the accused and consents to proceed in the language chosen by the accused.²⁹

5.2.2 When to “speak” the same official language as the accused

The language rights guaranteed by ss 530 and 530.1 of the Code apply at the preliminary inquiry and the trial.³⁰

Where an order is made under s 530 of the Code, Crown counsel must use the official language of the accused in all oral submissions and during any examination of the accused.

Where an order has been made for a trial before a judge or a judge and jury who speak both official languages (“bilingual trial”), the judge presiding over a preliminary inquiry or trial may, at the start of the proceeding, make an order setting out the circumstances in which and the extent to which Crown counsel and the judge may use each official language at the hearing (s 530.2(1) of the Code). Crown counsel must ensure that such an order is made at the earliest opportunity.

This order must, to the extent possible, respect the right of the accused to be tried in his or her official language (s 530.2(2) of the Code).

Crown counsel must use both official languages in a balanced fashion, depending on the unique circumstances of each trial. Accordingly, for example, if the accused or counsel for the accused addresses the court in the official language of the accused, the prosecutor and the judge must use that language in communication with that particular accused and counsel. This means that, generally, accused persons must each be examined in their own official language while oral argument must be divided in a balanced fashion between the two official languages unless the judge has ordered otherwise.

where it is specified that interpretation is meant for the benefit of the witness and not the prosecutor, which leads to the conclusion that all prosecutors in a bilingual proceeding governed by s 530 and 530.1 must be bilingual.

²⁸ *Munkonda*, paras 67, 86 and 87.

²⁹ It may be necessary to seek an adjournment. If another Crown counsel willing to speak the language of the accused is not assigned to the case within a reasonable time, the trial judge may order a stay of the proceedings; see *R v Cross*, [1998] RJQ 2587 at 2594 (QC CA).

³⁰ *Criminal Code*, ss 530.1(d) and (e).

On the other hand, where an order for a “bilingual trial” is made, but there is only one accused or the accused persons all speak the same official language, arguments and examinations must be conducted in that language only unless the judge has ordered otherwise.

Sections 530.1(c) and 530.1(c.1) of the Code, provide that witnesses have the right to give evidence in either official language during the preliminary inquiry and at trial and that the judge may, if the circumstances warrant, authorize Crown counsel to examine or cross-examine a witness in his or her official language even where that language is not the language of the accused or the one in which the accused can best give testimony. In the context of a bilingual trial or preliminary inquiry, when the official language of the witness is that of the accused having asserted the rights conferred by ss 530 and 530.1, the witness must be examined in that language, particularly when this witness is a victim of violent acts that are the basis of the legal proceedings, or when this witness has prepared notes in that language.³¹

Obviously, the criminal process consists of a number of steps, other than the preliminary inquiry and the trial, during which the accused’s rights may be affected, but they are not subject to the language scheme under ss 530 to 531 of the Code.

Nevertheless, once an order is made under s 530 of the Code that the accused will be tried before a judge or a judge and jury who speak the official language of the accused, Crown counsel must use the official language of the accused not only at the preliminary inquiry and trial stages but also in all proceedings at the trial level at which the accused is present unless the parties have agreed otherwise.³²

5.2.3 Written pleadings

Under s 849(3) of the Code, the forms set out in Part XXVIII of the *Criminal Code* (for example: summons, search warrant) must be printed in both official languages.³³

³¹ *Munkonda*, paras 69 and 70.

³² However, this directive is applied only if the relevant provincial or territorial statutes permit the use of the official language of the accused. Since the use of French and English in proceedings other than the trial and the preliminary inquiry is not governed by the *Criminal Code*, the provincial or territorial statutes must be consulted to determine the law on this point. The law may vary considerably from one province or territory to another. In certain provinces and territories, the Constitution or the provincial or territorial statutes provide that English and French may be used in oral and written pleadings in any court of justice in criminal proceedings (Yukon, N.W.T., Nunavut (Court practice directive), Saskatchewan, Alberta, Manitoba, Ontario, Quebec and New Brunswick). On the other hand, others allow only English to be used (British Columbia). Lastly, in some provinces, the law is uncertain or is silent on this point.

³³ Most courts have held that the fact that s 849(3) of the Code is expressed in mandatory terms does not automatically lead to a nullity. If the accused has not been prejudiced, this defect may be corrected by an amendment; see *R v Goodine* (1992), 112 NSR (2d) 1, 71 CCC (3d) 146, 307 APR 1 (NS CA); *Lavoie v R* (1990), 58 CCC (3d) 246, JE 90-874 (QC SC); *R v Cotton* (13 March 1991), Hull 550-36-000038-909, JE 91-735 (QC SC); *R v Sorensen* (1990), 59 CCC (3d) 211, 75 OR (2d) 659 (Ont Gen Div Ct); *R v S(H)* (1995), 87 OAC 114, 27 OR (3d) 97 and 116, 105 CCC (3d) 461 (Ont CA) [*R v S(H)*], leave to appeal to the SCC

Section 530.01(1) of the Code states that, if an order is granted under s 530 of the Code, Crown counsel is required, on application by the accused, to cause the portions of the information or indictment against the accused that are in an official language that is not that of the accused or that in which the accused can best give testimony, to be translated into the other official language and to provide the accused with a written copy of the translated text at the earliest possible time.

Crown counsel must ensure that portions of informations or indictments are in the official language chosen by the accused if such a choice has been made.

If the official language of the accused is not known, Crown counsel should ensure that the accused is clearly informed by the court on the record that a translation may be obtained, within a reasonable time, in the official language chosen by the accused.

As stated above, s 530.1(e) provides that Crown counsel must “speak” the same language as the accused or both official languages, as the case may be. This means that Crown counsel must actually use that language in oral representations, and as mentioned in section 5.2.2 of this directive, in written representations as well, both at the preliminary inquiry and at trial. This also means that Crown counsel must use that language in any correspondence with the accused or accused’s counsel.

Where an order has been made pursuant to s 530 of the Code for a “bilingual trial,” but there is only one accused or the accused all speak the same official language, the documents prepared by Crown counsel must be in the official language of the accused unless the judge orders otherwise.

Where an order has been made pursuant to s 530 of the Code for a “bilingual trial,” and there are Francophone and Anglophone accused, the documents prepared by Crown counsel must be in both official languages unless the judge orders otherwise.³⁴

Crown counsel must file case law, literature and legislation in the official language of the original documents. As well, quotations must be reproduced in the original official language.

Where a version of these texts is available in the official language of the accused, that version must also be filed with the court. Similarly, where a quotation is written in an

dismissed [1996] SCCA No. 86. However, there is a minority view to the effect that failure to comply with s 849(3) of the Code results in a nullity because the provision confers an imperative language right; see *R v Keenan* (1990), 84 Man R (2d) 1 (Man Prov Ct).

³⁴ *Munkonda*, para 72. This obligation extends to notices under s 189(5) and s 540(8) of the Code: paras 74 and 79. This would apply to other written pleadings as well, notably documents prepared for pretrial conferences and case management conferences or hearings.

official language other than the language of the accused, the passage must, where practicable, be translated with the notation [TRANSLATION].³⁵

Where an order has been made under s 530 of the Code, Crown counsel must prepare documents in the official language of the accused not only at the preliminary hearing and trial stages but also in all proceedings at the trial level at which the accused is present unless the parties have agreed otherwise. In a bilingual trial or preliminary hearing, Crown documents must be prepared in both languages.³⁶

6. OTHER EFFECTS OF ORDER

As the Court of Appeal for Ontario has stated in *Munkonda*:³⁷

In conceptual terms, a bilingual trial or preliminary inquiry is a merger of a proceeding in French and a proceeding in English. Whether the accused are francophone or anglophone, they do not lose their language rights; rather, and by necessity, each accused's language rights must be accommodated. Each accused cannot have the right to have all of the evidence presented in his or her own language. Oral evidence can be presented in only one or the other of the two official languages. Similarly, the prosecution and the judge cannot speak both languages at the same time.

Nonetheless, the language rights of each accused must be respected to the extent possible. This would mean, for example, that if an accused or his or her counsel addresses the court in the accused's official language, the prosecutor and the judge should interact with the accused and counsel in that language.

Where an order is made under s 530 of the Code, the court is required to make interpreters available to assist the accused, his or her counsel or any witness during the preliminary inquiry or trial (s 530.1(f) of the Code). The interpreter is present for the benefit of the accused, the jury and witnesses, and not for the judge or Crown counsel. Consecutive interpretation is generally a better solution than simultaneous interpretation, as it allows the quality of interpretation to be monitored. If simultaneous interpretation is provided, it must be done in such a way that the translation can be recorded and transcribed, in order for such monitoring to be made possible.

In certain cases, the trial may be held in another territorial division if an order made under s 530 cannot conveniently be complied with in the territorial division in which the offence would otherwise be tried (s 531 of the Code).

³⁵ See *Charlebois v Saint John (City)*, 2005 SCC 74, 3 SCR 563, 261 DLR (4th) 1.

³⁶ See *supra* note 30.

³⁷ *Munkonda*, paras 56 and 57.

In a trial or preliminary hearing governed by the regime set out in ss 530 and 530.1, all court personnel in the courtroom must be bilingual.³⁸

7. EVIDENCE

7.1 Disclosure

In interpreting the language rights in the *Criminal Code* or of any other constitutional language rights provisions, courts have not imposed a legal obligation on the Crown to provide a translation of evidence disclosed to the accused into the official language of the accused, or into the official language of counsel retained by the accused.³⁹

In exceptional circumstances; however, the right to make full answer and defence may entitle the accused to obtain an order for translation of a portion or summary of the evidence into his or her official language.⁴⁰ Insofar, as the issue is no longer the application of language rights, properly speaking, but the principles of fundamental justice, the approach should be the same whatever the language of the accused may be. This question should be decided on a case-by-case basis, and even exhibit by exhibit.⁴¹

7.2 Documentary evidence

Crown counsel may file any documentary evidence in the official language in which it is supplied to them, without the need for translation. The provisions of s 530.1(g) of the Code require only that the documentary evidence be filed in the record at the preliminary hearing and at trial in the language in which it was tendered. In the context of a bilingual trial, the transcript of intercepted conversations must be prepared in the official language in which the conversation was held and not only in a translated version.⁴² Where the intercepted conversation takes place in a language other than English or French, the transcript must be translated into the official language of the accused if there is only one accused, and into both official languages if there is more than one accused and one or more of the accused have invoked their Part XVII rights, unless there is a clear waiver stated on the record that the translated transcript can be in one official language only. There again, as with

³⁸ *Munkonda*, paras 103 to 107.

³⁹ *R v Rodrigue* (1994) 91 CCC (3d) 455 (YTSC), aff'd on other grounds by 95 CCC (3d) 129, 26 CRR (2d) 175 (YTCA), leave to appeal to the SCC dismissed [1995] SCCA No 83; *R v Breton* (9 July 1995), Whitehorse TC-94-10538 (YTSC); *R v Mills* (1994), 124 NSR (2d) 317, 345 APR 317 (NSSC); *R v S(H)*, *supra* note 17, application for leave to appeal to the SCC dismissed [1996] SCCA No 86; *R v Stockford* 2009 QCCA 1573 (CanLII) at para 13, *R v Potvin* (2004), 186 CCC (3d) 257 (ONCA); *R v Schneider* (2004), 188 CCC (3d) 137 (NSCA); *Deschambault v R*, 2010 QCCS 6851 (CanLII).

⁴⁰ *R v Stadnick*, [2001] QJ No 5226 (QC SC), leave to appeal to the SCC dismissed [2002] SCCA No 413; *R v Hunt* 2007 QCCQ 1405.

⁴¹ Before agreeing to having any evidence translated into English or French, Crown counsel should apply a test that would consist in considering what parts of any evidence that had been obtained in a language other than English or French would have to be translated to enable the accused to be able to make full answer and defense.

⁴² *Munkonda*, para 88.

disclosure of documents, there may be some circumstances that justify a court ordering that an exhibit be translated into the language of the accused, not based on the language rights in the *Criminal Code*, but rather on the principles of fundamental justice.

8. APPEAL PROCEEDINGS

There is no legal obligation on Crown counsel to use the official language of the accused in appeal proceedings. As indicated above, ss 530 and 530.1 of the Code apply only to the preliminary inquiry and the trial.

In appeal proceedings, Crown counsel must use the official language chosen by the defence for the purposes of the appeal, for both oral and written submissions.⁴³

Where the Director of Public Prosecutions (DPP) initiates the appeal, it is assumed that the language of the proceeding will be the same as in the earlier judicial proceeding unless the parties have agreed otherwise.

Where the DPP is an intervener, Crown counsel must also use the official language chosen by the defence for the purposes of the appeal.⁴⁴ In cases involving more than one accused or where there is reason to assume that both official languages will be used, Crown counsel must file written argument in both official languages. In oral pleadings, Crown counsel must use the official language chosen by the defence. If counsel for the accused persons do not all use the same official language in oral argument, Crown counsel must use the language that appears to be most appropriate in the circumstances.

9. OTHER ASPECTS OF OFFICIAL LANGUAGES

Under the Constitution, French and English have equality of status as to their use in all institutions of the Parliament and government of Canada, in federal statutes and in the Federal Courts and, subject to certain limitations, in communications between the public and federal institutions.⁴⁵ The Constitution also guarantees certain language rights with respect to the legislatures and courts of Quebec, Manitoba and New Brunswick.⁴⁶

Certain spheres of federal jurisdiction, the *Official Languages Act*⁴⁷ specifies the rights of the public and the obligations of federal institutions with respect to the use of both official languages in parliamentary proceedings (Part I), in legislative and other instruments (Part II), in the administration of justice (Part III), in communications with and services to the public (Part IV) and in the work environment of federal institutions (Part V).

⁴³ *Supra* note 17.

⁴⁴ *Ibid.*

⁴⁵ *Canadian Charter of Rights and Freedoms, The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 s 16-20; *The Constitution Act, 1867 (UK)*, 30 & 31 Victoria, c 3, s 133.

⁴⁶ See *supra* note 1; *Manitoba Act, 1870*, RSC 1970, App II, No 8, s 23.

⁴⁷ RSC 1985, c 31 (4th Supp).

10. OFFICIAL LANGUAGES LAW TEAM OF THE DEPARTMENT OF JUSTICE (OLLT)

Crown counsel must inform their Chief Federal Prosecutor (CFP) as soon as possible of all imminent matters where language rights are at issue pursuant to the *Canadian Charter of Rights and Freedoms* (Charter), the *Official Languages Act*, Part XVII of the *Criminal Code* or related legislation. The CFP shall then inform the champion or co-champion of official languages of the PPSC.

If needed, the champion or co-champion of official languages of the PPSC will consult the OLLT. The OLLT coordinates policy and legal advice to the federal government relating to official languages and language rights. However, any subsequent dealings with the OLLT will be conducted by Crown counsel who will keep the CFP and champion or co-champion informed of the progress of the file.

11. QUESTIONS TO CONSIDER FOR PART XVII PROCEEDINGS

Official Language of the Accused

- What is the official language requested by the accused?
- Has the accused been informed by the court of his or her language rights?
- Has there been an informed waiver of the accused's right to a trial in his or her official language?
- Does the accused have a sufficient knowledge of the official language selected to instruct counsel and follow the proceedings in that language?
- The following factors are not relevant:
 - o the fact that the accused is able to speak the other official language as well or better;
 - o the official language of counsel for the accused or the ability of counsel to understand the proceedings in the other official language.
- The ensuing steps in the proceeding must take place before a judge who understands the official language of the accused.
- Crown counsel having carriage of the file for any subsequent step of the proceeding must understand and be able to speak the official language of the accused.
- Have co-accused elected to have their trial in different official languages, which would justify an order for a bilingual trial or for separate trials?

Prosecution Plan

- Where required, does the prosecution plan outline:
 - the measures that will be needed by an order made under the provisions of Part XVII of the *Criminal Code*?
 - the steps taken, including the presence of an interpreter?

Disclosure

- Disclosure does not have to be translated. In exceptional circumstances, an accused may, as part of the right to full answer and defense, seek an order providing that portions or a summary of the evidence be translated into his or her official language.
- Documents in the disclosure package are to be provided to the accused in the official language in which they were obtained during the investigation.
- Transcripts of wiretaps, police interviews and interrogations are to be prepared in the official language in which the conversations, interviews or interrogations took place.
- Transcripts of conversations, interviews or interrogations taking place in a foreign language are to be translated into the official language of the accused. If co-accused in a proceeding have each elected a different official language, such transcripts must be translated into both official languages.

Witnesses

- Witnesses have the right to testify in either official language.
- However, in a trial taking place in the official language of the accused, a witness must be examined in the official language of the trial, but the judge can allow the prosecutor to examine or cross-examine a witness in that witness's official language, even if it is not the official language of the accused. An interpreter must be present when a witness does not testify in the official language of the accused, and measures must be taken in the courtroom to monitor the quality of interpretation.
- In a bilingual trial, the prosecutor must examine or cross-examine a witness in the official language of the witness when it is the official language of the accused.
- In the case of bilingual trials with several co-accused, a witness must be examined in his or her official language, even if that official language is not the official language of each co-accused. An interpreter must be present and measures taken in the courtroom to monitor the quality of interpretation.

Interpreters

- Are interpreters available?
- Is interpretation provided in such a way that a transcript can be made of either the interpretation or of the testimony without interpretation?
- Is interpretation provided in such a way that the quality and accuracy of interpretation can be monitored by the court?

Hearings

- In a proceeding governed by Part XVII, the prosecutor must speak and use the official language of the accused. If the file requires that a prosecution team be formed, every prosecutor in the team must speak the official language of the accused.
- The prosecutor must cross-examine the accused in the accused's official language.
- The prosecutor must respond to objections from defense counsel or to comments from the bench in the official language in which the objection or comment was made.

Pleadings

- Have the forms in Part XXVII of the *Criminal Code* been printed and completed in both official languages?
- Has the accused received a translation of those portions of the information or indictment written in the other official language?
- Was the translation provided at the earliest possible time?
- If the official language of the accused is not known, has the accused been informed in writing that a translation could be obtained?

Other documents

- Are letters and other documents addressed to the accused or co-accused by the Crown written in the official language of each accused?
- Is caselaw, legislation and secondary legal sources filed by the Crown in the official language in which they were officially released? Are excerpts cited in the original official language?
- If legal sources are available in the official language of the accused, has this version been filed with the court?

Other questions

- Must the team leader be advised? Does the team leader have to inform the CFP?
- Must the OL co-champions be advised? Should the co-champions seek the advice of counsel on the PPSC OL Committee or the Official Languages Law Team of DOJ?



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

2.12 THE DISCLOSURE OF POLICE MISCONDUCT INFORMATION - *R v McNEIL*

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

Revised April 4, 2018

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1. INTRODUCTION

The Supreme Court of Canada’s decision in *R v McNeil*¹ expanded the scope of disclosure in criminal cases by imposing obligations on both the police and Crown prosecutors.² These obligations “bridge the gap” between first party disclosure under *Stinchcombe*³ and third party production under *O’Connor*.⁴

This directive provides guidance to federal prosecutors to assist them in fulfilling these obligations and ensuring that our disclosure practice is consistent across the Public Prosecution Service of Canada (PPSC). These guidelines also inform the advice that federal prosecutors provide to the police and other law enforcement agencies on the content of *McNeil* first party disclosure packages and “reasonable inquiry” letters to third parties.

2. SUMMARY OF *R v McNEIL*

The Court in *McNeil* found that the police and other investigating agencies must disclose to the prosecuting Crown, as first party disclosure material, findings of serious misconduct by police officers involved in the investigation of the accused. This information may be relevant to their credibility and reliability. Not all such information will necessarily be given to the defence. Crown counsel must perform a gatekeeper role in reviewing this material and withholding or redacting information that is irrelevant or privileged. The gatekeeper function requires that the Crown conduct a “studied analysis” to determine relevance. In the end, if the material has no realistic bearing on the credibility or reliability of the person involved in the investigation, it should not be disclosed to the defence. In addition, where a prosecutor is put on notice or informed of the existence of information potentially relevant to an accused’s case that is held by a Crown entity (or other third party), the prosecutor has a duty to inquire and obtain the information if it is reasonably feasible to do so. The Court recognized that the Crown is not

¹ *R v McNeil*, 2009 SCC 3 (ci-après *McNeil*). The appeal stemmed from a motion for production of third party police disciplinary records and criminal investigation files relating to the Crown’s main police witness in a drug prosecution.

² It has also modified the third party production regime established by *R v O’Connor*, [1995] 4 SCR 411 by recalibrating the balance between privacy interests and relevance to the defence in favour of the latter. The *Mills* regime under ss 278.1 to 278.91 of the *Criminal Code* that applies in sexual offence cases remains unchanged.

³ *R v Stinchcombe*, [1991] 3 SCR 326.

⁴ *R v O’Connor*, [1995] 4 SCR 411.

obliged to make such inquiries if the notice appears unfounded. Moreover, defence still retains the ability to seek the information via an *O'Connor* application.

3. DISCLOSURE OF MISCONDUCT INFORMATION

The disclosures obligations apply to police members and civilian members of a police force or law enforcement agency, such as translators, forensic analysts and wiretap monitors, in addition to any other civilian employees who played more than a peripheral role in the investigation. Information concerning acts of **serious misconduct** by police officers who may be called as witnesses or who were otherwise involved in the investigation of the accused⁵ that is either **“related to the investigation against the accused” or could “reasonably impact” on the case against the accused** has been carved out of *O'Connor* and placed squarely in the first party disclosure package under *Stinchcombe*. Thus, misconduct information that falls into either of these two categories must be provided to the Crown by the police without prompting.

The Supreme Court of Canada recognized that some police officers may have played only a minor or peripheral role in the investigation. Some latitude is given to Crown counsel in determining whether the conduct in question has a realistic bearing on the credibility or reliability of the officer’s evidence. The Supreme Court also stated that not every act or allegation of misconduct needs to be disclosed to defence as first party disclosure,⁶ e.g., discipline imposed for being late for work. Similar disciplinary findings related to neglect of health, improper dress, and untidiness in person, clothing or equipment while on duty need not be disclosed to the Crown.

It is the responsibility of the Crown to review the misconduct material to determine what, if anything, should be disclosed to the accused.⁷ This review includes an assessment of whether the material is clearly irrelevant, whether any vetting is needed to remove personal information, and whether there is privileged or third party information to be held back. The Crown has an obligation to notify the accused if they are holding back privileged information or information in which there is a third party privacy interest. If material received from the police is “clearly irrelevant” it does not need to be disclosed to the defence.

(a) The Contents of the McNeil Disclosure Package

A listing of police misconduct information for all police officers involved in the file should be sent automatically to the Crown who will then determine whether the witness or officer otherwise involved in the investigation is truly a peripheral player. The police should indicate on

⁵ The principles governing the disclosure of misconduct information apply equally to members of other law enforcement agencies involved in the investigation and all Crown witnesses, whether they are Canadian citizens or not.

⁶ *McNeil, supra*, note 1, at para 59.

⁷ It is extremely difficult to determine at the outset of a case what issues will arise in a prosecution – especially in relation to whether a member’s involvement is peripheral and whether credibility or reliability will be in question. For these reasons, it is our opinion that the police should not review material for relevance, but leave that determination to be made by the Crown as part of its continuing obligation to provide full disclosure to the accused.

the form whether they object to the disclosure of any misconduct information included in the list, and, if so, on what grounds.

In addition to the above-mentioned information, the police should provide the Crown with the following information pertaining to each police officer who may be called as a witness or who was otherwise involved in the investigation except those officers who have played a truly peripheral role in the investigation as determined by the Crown:

1. Complaints and investigations into a police officer's actions relating to the same incident that forms the subject matter of the charge against the accused. (The police should provide the Crown with a copy of the investigation file for this particular category of misconduct information);
2. A list of convictions or findings of guilt for an offence under the *Criminal Code* or the *Controlled Drugs and Substances Act* for which a pardon has not been granted (Canadian Police Information Centre (CPIC) record);
3. A list of all outstanding charges under the *Criminal Code* and the *Controlled Drugs and Substances Act*;
4. A list of all convictions or findings of guilt under any other federal or provincial statute (with the exception of convictions or findings of guilt for minor traffic infractions or other minor regulatory offences), including those under the applicable provincial *Police Act* or the *Royal Canadian Mounted Police Act*,⁸ for which a pardon has not been granted;
5. A list of outstanding charges of misconduct under the applicable provincial *Police Act* or the *Royal Canadian Mounted Police Act*, and
6. Any other material that is "obviously relevant" to the credibility or reliability of the police witness should be submitted to the Crown for review and vetting to determine if it is relevant to the issues in the prosecution or defence of the accused.

McNeil does not draw a distinction between a **finding** of misconduct and **records** related to the finding of misconduct. We recommend that the police should initially be required to provide Crown prosecutors with a list of convictions, findings of guilt, and outstanding charges described above without prompting. The prosecutor must then assess whether further particulars, including, where necessary, the entire file underlying the investigation of acts of police misconduct must be produced to the Crown.

With respect to the categories of police misconduct described in 2 to 6 above, if the prosecuting Crown is of the opinion that the circumstances underlying the misconduct information are required to assist in performing their gatekeeper role (see below) he or she should make a separate request for this additional information.

⁸ *Royal Canadian Mounted Police Act*, RSC, c R-10, s 1.

Production of disciplinary records and criminal investigation files in the possession of the police that do not fall within the scope of this first party disclosure package as enumerated above is governed by the *O'Connor* regime for third party production.⁹

(b) The Crown's Gatekeeper Role

The *McNeil* Court emphasized that the Crown has a significant role to play as “gatekeeper” with respect to disclosure of police misconduct information.¹⁰ Prosecutors have an obligation to review misconduct material prior to disclosure to the accused. This role does not involve a wholesale turning over of material provided by the police but rather a “studied analysis” to determine if it is relevant to the defence.¹¹

It is the Crown's responsibility as gatekeeper to determine which police officers played peripheral roles. For example, an officer who would be called to testify at trial or preliminary hearing, or who would testify absent an admission from defence, is not a peripheral player. The Crown must also make a judgment call as to whether a particular type of misconduct qualifies as serious, taking into account, *inter alia*, the circumstances of the misconduct, the date of the misconduct, its impact on the reliability or credibility of the officer, and the subject matter of the current charges against the accused.

The Crown should review the material in the *McNeil* Packages to determine if any of the information received is clearly irrelevant to the prosecution or the defence. If the material has no realistic bearing on the credibility or reliability of the witness it should not be disclosed to the defence. The Crown should also review all the material forwarded by the police in *McNeil* Packages to determine if any material is privileged at common law or statute. Privileged material should not be disclosed.

An investigative file of police misconduct findings or convictions containing some relevant information will also likely contain irrelevant and personal information. The Court in *McNeil* acknowledged the concern that irrelevant disclosure may lead to protracted trials. Therefore, the Crown should review disclosure with an eye to editing all irrelevant information and to placing restrictions on disclosure so that the interference with third party privacy interests is minimized. This may require consultation with the third parties to assess privacy interests.¹² The Court in *McNeil* recognized that police officers may “make submissions”¹³ to the Crown, relating to factual matters to assist the Crown in identifying information in which the officer has a privacy

⁹ *R v McNeil*, *supra*, note 1, at para 15.

¹⁰ *R v McNeil*, *supra*, note 1, at para 58.

¹¹ *Review and Recommendations Concerning Various Aspects of Police Misconduct*, Vol. I, Toronto: Toronto Police Service, 2003. This report, prepared by the Honourable George Ferguson, Q.C. and commonly referred to as the “Ferguson Report” is discussed at paras 55-60 of *McNeil*.

¹² *McNeil*, *supra*, note 1, at para 58.

¹³ *R v McNeil*, *supra*, note 1, at para 58. The police could use a form letter that informs the recipient that he or she may make submissions in writing to the Crown on the issue of the nature of his or her privacy interests, why the information should not be provided to the defence, the need for redaction of irrelevant information, and/or the need for conditions to be attached to the disclosure.

interest, in advising the Crown of the basis of the privacy interest and in discussing what disclosure restrictions may address that privacy interest.

4. CROWN COUNSEL'S DUTY TO MAKE REASONABLE INQUIRIES

- ***McNeil* applies to all third parties, whether in Canada or outside, and whether government or private sector.**

The Court appears to indicate, in *McNeil*, that the Crown's obligation to make inquiries of third parties was intended to extend to all third parties. When making reasonable inquiries of third parties, the appropriate threshold for relevance is potentially relevant information, including information pertaining to the credibility or reliability of the witnesses in a case.¹⁴

- **The Crown's obligation to make reasonable inquiries is triggered if the Crown is "put on notice" or "informed" that a third party may have in its possession potentially relevant information, including information pertaining to the credibility or reliability of a witness.**

If the Crown is put on notice or informed of the existence of potentially relevant information in the hands of a third party, including information pertaining to the credibility or reliability of the witnesses in a case, the Crown's duty to make reasonable inquiries of that third party is triggered. In terms of what constitutes being "put on notice" or "informed," the Crown could either be informed by the investigating agency of the existence of potentially relevant information in the possession of a third party, or could become aware of such information from another source (such as from a review of the Crown brief), or the likelihood of the existence of such information may be apparent from the circumstances of the case. Alternatively, it could come to the Crown's attention that a third party was "involved in the investigation." *McNeil* appears to equate the "involvement" of a third party in the investigation with the reasonable likelihood that the involved third party would as a consequence possess potentially relevant evidence. With respect to the interpretation of the phrase "involved in the investigation," the Crown should satisfy itself that the third party participated in the investigation in some meaningful manner or had some meaningful nexus to the investigation, which would be assessed by the Crown on a case-by-case basis.

- **A mere demand letter from defence counsel, absent any foundation for the existence of the third party materials, would not suffice as "notice" in itself. Proper "notice" requires credible proof of the information's existence and relevance and the third parties' possession of it. It is the Crown's role as gatekeeper to assess whether the notice appears to have any foundation [paragraph 49].**

A bare request for third party materials from defence counsel, without giving any basis for the existence of those materials, does not suffice as "notice." *McNeil* provides some guidance as to when the Crown's duty to make reasonable inquiries would **not** be triggered – see paragraph 49:

¹⁴ *McNeil*, supra, note 1, at para 49-50.

“[u]nless the notice appears unfounded....” The language used in *R v Chaplin*¹⁵ (which was restated in *McNeil* at paragraph 29) in discussing where the existence of material which is alleged to be relevant by the defence is disputed by the Crown, may be helpful in further circumscribing the Crown’s obligation:

“[...] Once the Crown alleges that it has fulfilled its obligation to produce it cannot be required to justify the non-disclosure of material the existence of which it is unaware or denies. Before anything further is required of the Crown, therefore, the defence must establish a basis which could enable the presiding judge to conclude that there is in existence further material which is potentially relevant. Relevance means that there is a reasonable possibility of being useful to the accused in making full answer and defence. The existence of the disputed material must be sufficiently identified not only to reveal its nature but also to enable the presiding judge to determine that it may meet the test with respect to material which the Crown is obliged to produce [...].”

And further at paragraph 32:

“Apart from its practical necessity in advancing the debate to which I refer above, the requirement that the defence provide a basis for its demand for further production serves to preclude speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming disclosure requests.”

- **Once the duty is triggered, the Crown should make the inquiry in writing directly to the third party.**

The reasonable inquiry of a third party should be made directly to the third party by the Crown, with a copy to police. It should also be put in writing to create a record of the Crown’s exercise of its duty to inquire, as it may be the subject of review by a court at some later date. The Crown, should, of course, refrain from giving any legal advice when communicating with third parties. The Crown’s reasonable inquiry function should not be delegated to the investigating agency. Since a less-than-diligent exercise of the Crown’s obligation to make reasonable inquiries of third parties may constitute an ethical breach by the Crown, it is essential that the Crown maintain control over the reasonable inquiry process.

- **The Crown should instruct the third party, in the reasonable inquiry letter, to send the potentially relevant information directly to the investigating agency and to advise the Crown if it objects to the production of that information or any part thereof.**

Since the police are in a better position than the Crown to receive and process evidence, the third parties should be instructed by the Crown in the reasonable inquiry letter to provide any potentially relevant evidence directly to the investigating agency. Any handling of the third party evidence should be left to the investigating agency in order to avoid the possibility of the Crown as a witness in the proceedings. In the event that the third party objects to the production of the

¹⁵ [1995] 1 SCR 727 at paragraph 30

potentially relevant evidence, the Crown should advise defence counsel of the objection. The accused then has the option to pursue an *O'Connor* application.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

2.13 ALLEGATIONS OF MISCONDUCT BY PERSONS INVOLVED IN THE INVESTIGATION OF CHARGES

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

August 12, 2021

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1. CONTEXT

The PPSC as an organization has no tolerance for any form of bias, racism or discrimination, or other practices that may deprive the public of its right of access to a fair and just system. The PPSC has a positive obligation to ensure that the cases it brings forward comply with the rule of law and accord with the fundamental principles of justice and equality and other rights before the law. A prosecution must be undertaken only when the requisite evidence exists and when it would best serve to advance the public interest. It would never be in the public interest to bring forward a case where a finding of guilt depends on evidence that is false, misleading or unreliable.

All PPSC employees must uphold the highest ethical and professional standards. The [PPSC Code of Conduct](#) requires all PPSC employees to immediately report allegations or evidence of misconduct by PPSC employees – even if the allegation is against themselves. Members of the public may also report any misconduct by filing a complaint in accordance with [PPSC's Complaints Policy](#). Once misconduct is reported, the [PPSC Code of Conduct](#) requires PPSC management to ensure that known or suspected misconduct by PPSC employees is both investigated and addressed.¹

In some cases, prosecutors may also become aware of allegations of serious misconduct that relates to the credibility and reliability of those involved in the investigation of charges, such as those who collected evidence and those who may be called as witnesses in a prosecution. The allegation may relate to the actions of a single Crown witness, whether they are a police officer, an investigator, a civilian agent, or a civilian employee of a police, regulatory, investigative, or intelligence agency. The allegation may also relate to a systemic issue going beyond the actions of a single person. This information may have not yet resulted in a finding, conviction, charge, investigation, or formal complaint. Determining whether a particular type of misconduct qualifies as serious is a judgement call that takes into consideration all the circumstances of the misconduct, the date when it occurred, its impact on the reliability and credibility of the Crown witness, and whether it has a realistic

¹ For the purposes of this guideline, “misconduct by PPSC employees” is understood as any act that would constitute “wrongdoing” for the purposes of the PPSC Code of Conduct.

bearing on the case the accused has to meet, having regard to the subject matter of the current charges against the accused.²

A mere allegation does not trigger the same legal obligations as a finding, conviction, or charge.³ This is because there has been no investigation into the merits of the allegation at this stage. Ordinarily, prosecutors do not know if the allegation is well founded, and PPSC does not have the mandate to investigate or adjudicate the merits of an allegation. There may, however, be instances where the nature of the allegations, the basis for the allegations or the manner in which the allegations are investigated may be relevant to the discharge of obligations by prosecutors.

Prosecutors cannot remain passive. Prosecutors have the duty to be fair, impartial, and objective and to make reasonable inquiries to ensure that the matter is dealt with. They must seek to protect the rights of individuals and the rule of law. They must maintain the confidence of the public in the administration of justice. And they know that they can commit or perpetuate an injustice by doing nothing.

This policy assists prosecutors in fulfilling their obligations by establishing a process for the documentation of serious misconduct information and the specific follow-up expected to occur. It assigns clear responsibilities upon those who become aware of such misconduct to report it to their superiors in the PPSC, as well as the roles and responsibilities of supervisors and managers in relation to follow-up with the appropriate investigatory bodies. It also indicates the steps to be taken to ensure that all prosecutors are able to consider such allegations and the results of the determination and investigation of such misconduct in all cases that may be impacted. These steps include compliance with disclosure obligations and consideration of such allegations or results in the assessment of the decision to prosecute in affected cases.

2. STATEMENT OF POLICY

Prosecutors will document, report and track allegations of serious misconduct by persons involved in the investigation of charges when these allegations have not yet resulted in a finding, conviction, charge, investigation, or formal complaint.

² See [Chapter 2.12 The Disclosure of Police Misconduct Information – R v McNeil](#).

³ In [R v McNeil](#), the Supreme Court of Canada confirmed that the police must disclose to the prosecuting Crown, as first party disclosure, findings and charges of serious misconduct by police officers involved in the investigation of the accused where the misconduct arises from the investigation of the charges against the accused or is obviously relevant to the accused's case where the misconduct is extrinsic. Prosecutors will also find guidance on their obligations regarding findings of serious misconduct by Crown witnesses in [Chapter 2.12 The Disclosure of Police Misconduct Information – R v McNeil](#), as well as in [Chapter 2.2 Duties and Responsibilities of Crown Counsel](#), [2.3 Decision to Prosecute](#), and [3.14 Testimony of Police Officers and Police Civilian Agents](#).

3. PROCEDURE

1. Each Chief Federal Prosecutor (CFP) will designate a person who will be responsible for coordinating the implementation of this Guideline (“designated person”).
2. The prosecutor with conduct of the case or who otherwise becomes aware of an allegation of serious misconduct must:
 - a. Inform their supervisor and the designated person of the allegation; and
 - b. Document the allegation and record it in the prosecution file.⁴ For this purpose, the prosecutor will:
 - i. Request a description of the allegation in writing, if the allegation is made by the accused, defence counsel, or a third party;
 - ii. Write a note to file describing what the prosecutor observed, if the prosecutor personally witnessed the serious misconduct or discovered it through their review of the file; or
 - iii. Request a copy of the transcript or decision, if the allegation arose in the course of judicial proceedings.
3. The designated person will:
 - a. Identify outstanding cases that could be affected by the allegation and assign prosecutor(s) to assess the decision to prosecute test;
 - b. Identify the appropriate body that has jurisdiction to investigate the allegation,⁵ inform them of the allegation, and provide them with the relevant information and materials required for their investigation;
 - c. Follow up with the body investigating the allegation to confirm the status and outcome of the investigation;
 - d. Inform the prosecutor who reported the allegation, as well as prosecutors involved in outstanding cases affected by the allegation, of the status and outcome of the investigation; and
 - e. Create and maintain a central repository for records relating to allegations of serious misconduct and a list of files affected by these allegations.

⁴ If security requirements do not allow the recording of the information in the prosecution file, prosecutors should consult their supervisors and the designated person to determine an alternative way to record the information.

⁵ Depending on the circumstances, the appropriate body can be the management of the police or investigative agency itself, their professional standards unit, or an independent review or complaints body. The investigating officer(s) must not be informed if doing so may compromise the integrity of an investigation into the misconduct.

4. If upon further investigation by the appropriate body or otherwise the allegations have been substantiated on credible and reliable information,⁶ or result in a conviction, finding, charge or notice of hearing, the prosecutor with conduct of the case or assigned by the designated person must:
 - a. Prepare a memorandum to the Deputy Director of Public Prosecutions (DDPP) in consultation with the designated person. The memorandum must:
 - i. Describe the allegation(s);
 - ii. Identify the charges and status of the prosecution;
 - iii. Identify other prosecutions that may be affected; and,
 - iv. Describe the PPSC's actions in response to the allegation(s).
 - b. Assess the reasonable prospect of conviction and the public interest test in the case and confirm with the designated person who will assess the decision to prosecute in other outstanding cases impacted by the misconduct, and
 - c. Fulfill the requirements outlined in [Chapter 2.2 Duties and Responsibilities of Crown Counsel](#), [2.3 Decision to Prosecute](#), [Chapter 2.12 The Disclosure of Police Misconduct Information – R v McNeil](#), and [3.14 Testimony of Police Officers and Police Civilian Agents](#).
5. The CFPs (or their delegate) will:
 - a. Provide the memorandum to the DDPP, where one is required;
 - b. Notify the concerned police or investigating agency in writing about the allegation, if the allegation is against one of their officers, investigators, civilian employees, or civilian agents;
 - c. Provide regular status reports to the DDPP on the status of files affected by allegations of serious misconduct;
 - d. Communicate with their counterparts in provincial prosecution services about the handling of files affected by allegations of serious misconduct; and
 - e. Determine the course of action for completed files that could be impacted by the allegation of serious misconduct or the outcome of its investigation.

4. CONCLUSION

Prosecutors should consult their supervisors, the designated person, the CFP or their delegate if they have any question about the procedure described in this Guideline or about whether particular conduct amounts to serious misconduct that must be documented, reported, and tracked.

⁶ There may be cases which warrant a review of the file before the investigation is completed, such as in cases where the allegations are of a particularly pressing and serious nature and have been substantiated on credible and reliable information.

Prosecutors who have concerns about the manner in which the allegation is being addressed may raise their concerns with the DDPP, or the Director of Public Prosecutions, if the allegation had already been raised with the DDPP.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

3.1 MAJOR CASE MANAGEMENT

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

March 1, 2014

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1. INTRODUCTION

The administration of justice may be severely strained by trials that stretch over an extended period of time and involve many accused facing several charges. As the Ontario Court of Appeal has observed, "[u]ntil relatively recently a long trial lasted for one week, possibly two. Now, it is not unusual for trials to last for many months, if not years."¹

While major cases can arise for various reasons and have various characteristics, three features in particular commonly exist. First, they result from lengthy investigations, often involving wiretapping. Second, they generally concern joint enterprises. This usually means that there will be more than one accused, each facing many serious charges. Third, the cases are characterized by voluminous evidence. Because they deal with serious crime committed by persons who use sophisticated methods of avoiding detection and/or are engaged in extensive criminality, proof of the Crown's case may involve production of thousands of pages of wiretap transcripts, surveillance reports, business documents, witness statements and other documentary evidence. Because the Crown's disclosure obligations extend beyond the evidence the Crown intends to lead in proof of its case, the volume of disclosable material will be even greater.

¹ [*R v Felderhof* \(2003\), 180 CCC \(3d\) 498, 68 OR \(3d\) 481 \(ONCA\)](#) at para 40.

For the purpose of the application of this guideline, all cases rated as “High Complexity” are to be considered a major case. At the discretion of the Chief Federal Prosecutor (CFP), the components of this guideline may be applied to cases other than those rated as “High Complexity”.

2. PURPOSE OF THE GUIDELINE

The purpose of this guideline is primarily to function as a legal risk management tool to address the legal, financial and strategic risks associated with major cases. In so doing it will ensure a consistent approach is taken, one that serves to support the Director of Public Prosecutions (DPP) in respect of his or her responsibility for prosecutions by generating specific recommendations as to how particular major cases should be managed. The special challenges posed by these cases must be identified at an early point and a plan of action created and approved to ensure that key strategic choices are made throughout the investigative process in a timely way.

3. THE MANAGEMENT OF A MAJOR CASE

3.1. The relationship with the investigative agency²

The principle of the investigative independence of the police is firmly entrenched in this country.³ That principle seeks to ensure that investigative decisions will not be subject to improper political control. The Supreme Court of Canada has also recognized that both investigative and prosecutorial functions should be exercised independently, but the same court has refused to dictate how the relationship between investigators and prosecutors should be structured.⁴

While prosecutors and investigators continue to be independent when discharging their respective functions, a sense of partnership must permeate the relationship. This is particularly true in major cases. Accordingly, the Public Prosecution Service of Canada’s (PPSC) involvement in major cases should be characterized by early, continuous and close involvement with the investigative agency.

3.2. Providing legal assistance to the investigative agency

As early as possible in the investigation, the CFP should discuss with the investigative agency the need to assign the services of one or more counsel on an ongoing basis to provide advice. These counsel should have the experience necessary to ensure that any advice given is in accordance with best prosecutorial practices. It is important that these ad-

² See also the PPSC Deskbook guideline “[2.7 Relationship between Crown Counsel and Investigative Agencies](#)”.

³ See e.g. [R v Campbell, \[1999\] 1 SCR 565](#) at paras 33-36.

⁴ [R v Regan, \[2002\] 1 SCR 297](#) at para 64; [R v Beaudry, \[2007\] 1 SCR 190](#) at para 48.

visory counsel be experienced, and that they consult with CFPs, team leaders, or senior colleagues (particularly those who may be assigned to conduct the prosecution down the road) on potentially problematic issues, in order to ensure consistency in positions taken throughout the duration of the case.

Crown counsel's assistance to investigators should be offered on several fronts,⁵ such as:

- providing advice on the legality of investigative measures;
- assisting in the development of a strategic plan that will result in a manageable prosecution or prosecutions;
- drafting immunity agreements with co-operating witnesses, where necessary;⁶ and
- reviewing or assisting in the drafting of search warrants or other applications, where appropriate
- disclosure.

It should be emphasized that Crown counsel's role is to provide appropriate legal and strategic advice. This will include advising investigative agencies as to how investigative choices will impact on any future prosecution, and may also involve asking hard questions designed to ensuring the investigation remains focused.

3.3. Input into the formation of the investigative agency's operational plan

The formation and structure of an operational plan is the exclusive responsibility of the investigating agency. Involvement from the very outset of the investigation by Crown counsel can, however, assist the investigators in achieving the ultimate objective of the plan, which will often be to debilitate a criminal organization. Crown counsel can offer insight as to how the choice of particular instruments (e.g., the number of accused, the type of charges, measures other than prosecution) may affect fulfillment of the plan.

Where prosecutions are to proceed, they must be financially and legally manageable.⁷ Crown counsel can assist the investigators by, for example: a) identifying aspects of the operational plan that may present difficult problems of proof, particular disclosure obligations, or lead to unwieldy prosecutions; and b) analyzing whether the operational plan takes account of significant resourcing issues.⁸ While Crown counsel can offer advice to focus the investigation, it is not the role of counsel to make choices such as who should be investigated, and what techniques should be used. It is crucial that the PPSC be alerted

⁵ The type of assistance that may be given at the pre-trial stage is dealt with more fully in the PPSC Deskbook guideline "[2.7 Relationship between Crown Counsel and Investigative Agencies](#)", *supra* note 2.

⁶ See the PPSC Deskbook guideline "[3.3 Immunity Agreements](#)".

⁷ "Legally manageable" includes ensuring that the case that is not so large in terms of number of accused and charges that it becomes incomprehensible to the trier of fact.

⁸ For example, the transcription of wiretaps and appointment of a disclosure co-ordinator.

to the likelihood that significant human and financial resources may need to be allocated to the case. The need to seek additional resources has to be identified as early as possible in order to make sure the projected resource requirement is properly addressed; if the resources will not be available, the investigative agency must be advised.

3.4. Disclosure management

The most effective way of satisfying Crown counsel's ethical obligation to make full disclosure of the Crown's case⁹ is to be involved at an early stage and continue to be involved throughout the investigation.¹⁰

The responsibility for the preparation of disclosure materials should be viewed as a joint one between Crown counsel and the investigative agency. Crown counsel must give the investigative agency advice and direction to ensure that the investigators produce a well-organized package that is as complete as possible and in a user-friendly format before charges are laid.¹¹ The assistance provided should seek to enable the police to produce both excellent Crown briefs and complete disclosure packages for the defence.

Crown counsel can assist the investigative agency in numerous ways,¹² for example, by:

- providing legal advice as to what material is privileged or non-disclosable for any other reason;
- ensuring that the disclosure package contains a summary of the case against each individual (which will be particularly important for charge screening);
- assisting with the preparation of separate disclosure packages to be used for bail hearings; and
- ensuring the investigative agency prepares the package in a user-friendly way by, for example, cataloguing wiretap material according to its relevance to common issues such as investigative necessity, knowns/unknowns.

3.5. Charge management

Effective charge management assumes an ongoing level of cooperation with the investigative agency such that the agency will not be seeking to proceed on a prosecution or prosecutions that are unwieldy in terms of the number of accused or the number of charg-

⁹ [*R v Stinchcombe*, \[1991\] 3 SCR 326](#) at 339.

¹⁰ See in this regard, the Rapport Final du Comité ad hoc du Comité en Droit Criminel sur les Mégaprocès (Barreau du Québec, fev 2004) at 2.

¹¹ Bearing in mind that post-arrest statements and other investigative developments will require vigilant monitoring to ensure that the continuing disclosure obligation is met.

¹² Such assistance would encompass training. The responsibility for file management is that of the investigative agency, but prosecutors can play an important role in training exercises designed to show what a "user-friendly" disclosure package may consist of.

es. Crown counsel and investigators should work at developing a common understanding at as early a stage as the circumstances of the investigation permit as to what charges against which subjects are likely to go forward, so as to permit both parties to work on issues such as disclosure and the preparation of the Crown brief in a meaningful way, as early as possible. The investigative agency has the final say, however, as to all strategic choices on the structure of the investigation itself.

Crown counsel are required, on an ongoing basis, to assess every case according to the reasonable prospect of conviction/public interest test set out in the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#).”¹³ Charge review in the major case context requires strict attention to the difficult choices that must be made, and Crown counsel must objectively review the case to determine whether a prosecution would best serve the public interest, as the “Decision to Prosecute” guideline demands.

First, to the extent possible, charge review should be done before charges are laid. This assumes that there has been co-operation with the investigative agency, particularly with respect to the preparation of a package for Crown counsel that gives a comprehensive overview of the investigation and a detailed summary of the evidence against each individual. Meaningful charge review cannot take place without receiving such information, and prosecutions cannot proceed where a high standard of disclosure is not met.

Second, the consideration of the “public interest” factor in the “Decision to Prosecute” guideline must take into account what will be practically feasible. The fact that many charges meet the “reasonable prospect of conviction” test does not necessarily mean that all criminal acts by all accused must be prosecuted; difficult choices must be made. Counsel must bear in mind the potential number of accused and the evidence available in deciding what combination of accused and charges will give rise to a prosecution or prosecutions that can be successfully mounted and will be most likely to advance the strategic goals of the investigation and prosecution.

The charge review process will also necessitate paying close attention to the desirability of encouraging early resolution discussions, and using other appropriate measures short of prosecution. Crown counsel should have a comprehensive view of appropriate dispositions for each accused, in order to encourage early resolution and reduce the number of accused as appropriate. As set out in other policies,¹⁴ Crown counsel should make, as soon as practicable, a time-limited offer. This offer should reflect that generally a plea of guilty is a mitigating factor on sentence, especially where the accused pleads guilty at the earliest opportunity. Absent a significant change in circumstances, this offer should not be repeated at subsequent stages in the trial process (e.g., after a preliminary hearing, on the day of trial). Due to the substantial public resources typically at stake in major case prosecutions, it is particularly important in such cases that Crown counsel make reasonable efforts to resolve cases at an early stage, in a manner consistent with the public interest.

¹³ See the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”.

¹⁴ See the PPSC Deskbook guideline “[3.7 Resolution Discussions](#)”.

3.6. Composition of the prosecution team

A major case will sometimes require deployment of a multidisciplinary team to address the numerous challenges that will arise. Managers must pay attention to a wide variety of factors in considering the composition of the prosecution team, including the personal compatibility of the individuals selected. Depending on the needs of the particular case, the various parts of the team will include:

- advisory counsel, to work closely with the investigative agency; and
- lead and assisting counsel, to perform the charge screening and conduct preliminary hearings and trials;

And also may include any or all of the following:¹⁵

- bail counsel, to deal specifically with initial bail hearings and subsequent bail reviews;
- counsel with specific expertise, to deal with specific issues such as [*Canadian Charter of Rights and Freedoms*](#) motions, claims of prosecutorial misconduct, or funding of the defence, for example;
- paralegals and other administrative support personnel to assist counsel with all of the foregoing functions;
- a project manager to handle matters like the scheduling and attendance of witnesses, materiel requirements, accommodation, and other logistical issues;
- communications persons, who can assist prosecuting counsel with the demands for information, or provide media training to prosecuting counsel;
- information management experts, to ensure that systems are in place to properly manage electronically-stored information;
- non-departmental personnel, should contracting out of photocopying be necessary, for example.

4. THE CROWN'S PROSECUTION PLAN

Development of a prosecution plan should be seen as an essential part of the prosecution function in major cases. It is incumbent on CFP's to identify potential major cases as early as possible, and ensure that a prosecution plan is developed and approved by the CFP. As noted in section 1 of this guideline, "major cases" include all prosecutions rated as "High Complexity". At the CFP's discretion, prosecution plans may be required in cases not rated as "High Complexity". A prosecution plan helps to focus counsel's and management's attention on potential issues and ensure an understanding of the theory of the

¹⁵ These are intended as examples only. A "team" may include some or all in any given case, and some may be part of the team for a brief time or only for highly specific purposes.

case at an early stage, and also to provide a roadmap for the subsequent conduct of the case.

In addition to review by the CFP, prosecution plans must be referred to the Major Case Advisory Committee (MCAC) in all cases involving national significance, exceptional complexity, or very substantial resource implications. Other cases may be referred to the MCAC for its review at the discretion of the CFP.

4.1. Early warning

In the early stages of the investigation, while it would be unreasonable to expect a detailed prosecution plan, it is nonetheless important for the CFP to provide the relevant Deputy Director of Public Prosecutions (Deputy DPP), as soon as practicable, with a “heads up” when it becomes clear that the investigation will likely develop into a major case involving national significance, exceptional complexity, or very substantial resource implications. This may involve, for example, an assessment of the investigative agency's operational plan and its potential impact on the PPSC. As well, the note should describe what steps the PPSC is taking, or should take, to manage the potential risk.

4.2. Development of the prosecution plan

It is up to the CFP, or the Deputy DPPs, to decide at what stage a prosecution plan should be prepared. As a general rule however, the prosecution plan should be developed within a time frame that will permit the plan to be reviewed effectively by the CFP and/or the MCAC, and the resource requirements to be addressed properly. Accordingly, the prosecution plan should be developed as soon as the unfolding investigation permits a strategy to be defined.

The prosecution plan must be sufficiently descriptive of the nature of the investigation so that it can be objectively reviewed. It must address issues such as:

- the nature of the investigation and the key evidence in the case to the extent known;
- the likely resource demands of the case, including an analysis of whether those demands can be satisfied by the regional office in question;
- the general contours of the prosecution, including the number of potential accused and charges, and the number of prosecutions
- particular legal challenges likely to arise;
- an assessment of how effectively information is being managed, so that disclosure will be able to be made as soon as practicable after arrest.

5. MAJOR CASE ADVISORY COMMITTEE

The DPP has responsibility for prosecutions and needs to be satisfied that resources are being effectively used.

To support the DPP and the Deputy DPPs in this responsibility, the PPSC has created the MCAC, composed of senior prosecutors from across the country with extensive trial and appellate experience and expertise relevant to the key cases. Members are chosen by the Deputy DPPs after consultation with CFPs. The MCAC exercises a review and challenge function in regard to major cases involving national significance, exceptional complexity, or very substantial resource implications. In addition, the MCAC will provide that review and challenge function in regard to other cases referred to it by a CFP or Deputy DPP.

5.1. Recommendation to the Deputy Director of Public Prosecutions

A matter must be submitted in time to allow for meaningful review and ultimate approval by the responsible Deputy DPP. The MCAC exercises a challenge function with respect to strategic planning on major cases; it does not "approve" plans. The MCAC provides advice to the major case team and to the CFP based on its objective assessment of the case, and provides recommendations to the relevant Deputy DPP. As a result of the challenge, the CFP may choose to make modifications to the plan before the committee makes its recommendations to the Deputy DPP.

The lead prosecutor on any major case submitted to the MCAC, and his or her CFP, should present the plan to the Committee. It should be viewed by the prosecution team and the CFP as an opportunity to get advice on the overall approach to the case, or any particularly troublesome aspects of the case. The co-chairs of the MCAC and the CFP will provide written recommendations to the appropriate Deputy DPP with respect to the latest version of the prosecution plan. If the plan is approved, the CFP remains responsible for ensuring the execution of the plan.

Counsel may use the MCAC as a source of advice, for example, in assessing the legal strategy and any significant legal risks as they arise. Requests for assistance may also encompass seeking the advice of the MCAC on particular legal issues. It is up to counsel's CFP to determine when an issue should be referred to the Committee. The MCAC may also provide advice on revisions to the prosecution plan.

5.2. The MCAC's litigation monitoring function

Apart from the specific mandate of the Committee with respect to major cases, the Committee may exercise additional functions in support of the DPPs' responsibility for the prosecution function, and in cooperation with CFP's and HQ Counsel Group, including:

- monitoring emerging trends in federal prosecution practice and making recommendations as to how the PPSC should adjust to such trends;

- ensuring consistency of approaches by the PPSC throughout the country, including in respect of work done by agents;
- identifying regional practices or approaches that may be of national interest and make recommendations for their broader diffusion.

5.3. Post-case assessment

Upon the conclusion of any prosecution arising out of projects which have been reviewed by the MCAC, a debriefing exercise should be conducted. The purpose of this exercise is to assist the Major Case Advisory Committee in assessing the utility of its recommendations, developing a better understanding of the challenges and best practices involved in the conduct of large and complex prosecutions, and providing advice and assistance on future cases.

The report should be completed by the lead prosecutor upon the completion of the prosecution and forwarded to the co-chairs of the MCAC. Upon receipt of the completed report, a teleconference may be scheduled to further discuss counsel's experience with the case and any observations they may have on what worked or didn't work and their suggestions for future cases.

In other cases in which the CFP thinks it is advisable, or in addition to the debriefing referred to above, a "lessons learned" exercise may be conducted after the completion of the prosecution. These post-case assessments should be conducted in cooperation or consultation with the investigative agency.

The CFP, who has the responsibility for ensuring these exercises take place, should consult with the head of the local investigative agency so that they can jointly determine how to conduct an effective post-case assessment.

Questions that should be addressed include: the adequacy of the resources deployed, the effectiveness of the cooperation with the investigative agency before and during the prosecution; the ability of the prosecution team to identify and effectively manage the legal risks presented by the case; the use of the MCAC and support by other areas of the PPSC.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

3.2 DESIGNATION OF THE PARTIES AND THE PROSECUTORS

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

March 1, 2014

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1. INTRODUCTION

When counsel introduce themselves to a court, they also identify the party for whom they act.¹ The purpose of this guideline is to clarify who is the proper party and to explain how federal prosecutors and agents acting as federal prosecutors should identify themselves and whom they represent in all written pleadings² and in court.

The Public Prosecution Service of Canada (PPSC) is a federal government organization, created on December 12, 2006, when Part 3 of the [Federal Accountability Act](#)³ received Royal Assent, bringing the [Director of Public Prosecutions Act](#)⁴ (DPP Act) into force. The applied name of this federal government office under Treasury Board's Federal Identity Program is the Public Prosecution Service of Canada, whereas its legal name is the Office of the Director of Public Prosecutions (ODPP).⁵

¹ Most court rules require court documents to have a “general heading” or “style of cause” which identify the parties before the court; they will often be identified as either applicant or respondent or intervener, or as appellant or respondent. This note is concerned with the proper use of names in the general heading as well as with how counsel identifies themselves in signature blocks and orally in court.

² “Pleadings” is used expansively to include all types of material filed in courts, including, without limiting the generality of it, indictments, applications and motions, affidavits, facts and written submissions, and orders.

³ SC 2006, c 9.

⁴ [Section 121](#) being Part 3 of the *Federal Accountability Act*, SC 2006, c 9.

⁵ An applied title is the approved name used in the signature to identify an institution, program or activity. This title should be used in all communications. By contrast, the legal title is the name that appears in the enabling legislation, proclamation, order in council, or other instrument used to create a branch of government.

In criminal proceedings, the prosecuting party is Her Majesty the Queen,⁶ or the Crown. This title emanates from the concept of state legal authority within a constitutional monarchy whereby the Queen, or “the Crown”, is the legal representative of the executive branch of government. Within the Canadian federation, the Queen, or the Crown, operates both at the federal level as “Her Majesty in Right of Canada” and at the provincial level as “Her Majesty in Right of” each province. The Crown may, in a given case, be an applicant, respondent, appellant or intervener, depending on the nature of the proceeding.

The Director of Public Prosecutions (DPP) is not a party to a prosecution. Rather, the DPP is the legal agent of the Crown, or counsel for the Crown. The DPP may, “under and on behalf of the Attorney General”, initiate and conduct prosecutions “on behalf of the Crown.” When exercising purely prosecutorial functions, federal prosecutors,⁷ in turn, act as “delegated agents” for the DPP.⁸

2. THE CROWN AS PARTY TO THE PROCEEDINGS

Whenever the Crown is the proper party named in the general heading of the court documents, which is the case for prosecutions and related proceedings,⁹ federal prosecutors act as “agents of the DPP”, reflecting the language in [s. 9\(2\)](#) of the DPP Act, or “Counsel for Her Majesty the Queen”, or “Crown counsel”.

Thus, the proper description of counsel in documents which initiate a proceeding, or are a form of pleading, is “counsel for Her Majesty the Queen”, “counsel for the Crown” or “agent for the Director of Public Prosecutions”.¹⁰ Unless the DPP is named as a party to a proceeding, written submissions and facts filed with the court should be signed with the

⁶ Also referred to as “Regina”, hence the use of the abbreviation “R” in criminal styles of cause; e.g. *R v John Doe*.

⁷ This is the expression used by Parliament in [ss 7 and 9](#) of the DPP Act to designate the prosecutors acting on behalf of the Federal Crown; the French version uses the term “procureurs de l’État”.

⁸ [Section 9\(1\)](#) of the DPP Act authorizes the DPP to delegate any of his or her powers, duties or functions (with the exception of the actual power to delegate), to employed federal prosecutors and to agents retained under [s 7\(2\)](#).

⁹ For example, an application for a management order pursuant to [s 6](#) of the *Seized Property Management Directorate Act*, brought on consent of the Attorney General, is a step within the trial process and falls within the purview of [s 3\(3\)\(a\)](#) of the DPP Act (conducting prosecutions). Thus, a federal prosecutor applying for a management order, applies as agent of the DPP or counsel for the Crown because the Crown is the proper party, even though the law specifies that the Attorney General makes the application. Similarly, the Attorney General or the Deputy Attorney General (i.e., the DPP for this function) must authorize in writing a direct indictment under [s 577](#) of the *Criminal Code*. Nevertheless, the proper party is the Crown and the federal prosecutor will sign the direct indictment as “agent of the Director of Public Prosecutions” and not as “agent of the Attorney General of Canada”.

¹⁰ Note that, while the term “agent of the DPP” is technically accurate in pleadings, prosecutors more commonly employ the term “Crown counsel” as it identifies the actual party to the proceeding, rather than the party’s counsel (i.e., DPP and his or her agent).

identifier “counsel for Her Majesty the Queen”, “counsel for the Crown”, or “Crown counsel”, unless “counsel for the appellant” or “counsel for the respondent” is more appropriate and in keeping with the local practice of a particular court. In the same vein, unless the DPP is party to a proceeding, federal prosecutors should introduce themselves to the court as “counsel for the Crown”, “Crown counsel” or “counsel for the federal Crown”,¹¹ or words to the same effect. The cover page of written pleadings should identify counsel as being with the PPSC.

In all written pleadings, counsel should indicate the date and place of signature above or below the signature block. Some court rules require it.

In regulatory matters, some related proceedings are brought at the instance of the investigating agency.¹² Others are brought by persons attacking procedures instituted by the investigating agency. In those situations, where PPSC counsel are acting as advisory counsel to the regulatory agency, the general heading of the court documents will name the person identified by the relevant statute as the applicant. Counsel will identify themselves as “counsel for the applicant” (or respondent, as the case may be). However, the back page and other locations in the court documents requiring identification of the law firm and its address for service, counsel should indicate that they are from the ODPP, with their relevant branch or group and their own business address.

3. THE DPP AS PARTY TO THE PROCEEDINGS

Where the DPP is named as a party to a proceeding, federal prosecutors act as counsel for the DPP. In these circumstances, written submissions and facts should be signed “counsel for the Director of Public Prosecutions” and federal prosecutors should introduce themselves as “counsel for the Director of Public Prosecutions”. Examples of situations in which the DPP is a party to the proceedings are interventions in provincial prosecutions¹³ and appeals made under [s. 3\(3\)\(b\)](#) of the DPP Act; extraordinary remedies sought against the DPP under [Part XXVI of the Criminal Code](#) (i.e., certiorari, habeas corpus, prohibition and mandamus); and judicial reviews of decisions made by the DPP.

¹¹ Note that, while there is no juridical party named the “federal Crown”, federal prosecutors commonly use this vernacular term to introduce themselves to the court, as distinct from their provincial counterparts, and it has been accepted.

¹² See e.g. applications to a superior court by the Commissioner of Competition for search warrants or production orders under [ss 15](#) and [11](#), respectively, of the *Competition Act*, RSC 1985, c C-34, as amended.

¹³ Counsel for the province in these matters represents the Crown, whereas the DPP becomes party to the proceedings as intervener.

4. R V R PROSECUTIONS: A GOVERNMENT DEPARTMENT AS DEFENDANT

A government department or agency does not generally have distinct legal personality and therefore does not have the capacity to be a defendant in criminal proceedings.¹⁴ All prosecutions either commenced by, or taken against, the federal Crown, are conducted in the name of Her Majesty the Queen. Thus, insofar as a statute binds Her Majesty in right of Canada,¹⁵ Her Majesty can be prosecuted under that statute for the criminal conduct of her servants. In these situations the Queen finds herself on both sides of the prosecution. The Queen is represented by her Ministers for different purposes in a “R v R” prosecution. The Queen is represented for the prosecution by her Minister, the Attorney General of Canada, whose prosecution authority is delegated to the DPP by virtue of [s. 3\(3\)](#) of the DPP Act. In her defence, Her Majesty is represented by the Minister who is responsible for the defendant government institution. The defendant is “Her Majesty the Queen as represented by the Minister of [name of the department/agency]”.

Where a defendant in a federal prosecution or a respondent to a government application is a government department or agency whose legislation does not give it the capacity to sue or be sued or otherwise has no legal personality, the proper style of cause is “*Her Majesty the Queen v Her Majesty the Queen*”, “*Regina v Regina*”, or “R v R” for short. Similarly, the same practice applies in respect of certain other government entities that have no governing legislation and merely operate within the legislative mandate of another government department.¹⁶

5. OTHER SCENARIOS

5.1. Direct indictments with both provincial and federal charges

Any direct indictment containing provincial charges must have the consent of the respective provincial Attorney General, or Deputy Attorney General, even if the provincial counterpart delegates the prosecution of those charges to the federal prosecutor.

¹⁴ [Munro v Canada, \(1992\), 11 OR \(3d\) 1 \(Gen Div\)](#) at 10-13. See also [Conseil des ports nationaux v Langelier, \[1969\] SCR 60](#) at 71; [Glaxo Canada Inc v Canada](#) (1987), 11 FTR 121 at 125; [Re Air India](#) (1987), 62 OR (2d) 130 (HC); [Robichaud v Canada \(Attorney General\)](#) (1991), 44 FTR 172 at 177.

¹⁵ [Section 17](#) of the *Interpretation Act*, RSC 1985, c I-21 provides that “No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty’s rights or prerogatives in any manner, except as mentioned or referred to in the enactment.” For example, [s 5](#) of the *Canadian Environmental Protection Act*, 1999, SC 1999, c 33 provides that “This Act is binding on Her Majesty in right of Canada or a province.”

¹⁶ For example, Service Canada operates within the legislative mandate and framework of the [Department of Human Resources and Skills Development Act](#) and the [Department of Social Development Act](#). It has delegated authorities to execute its mandate and functions.

When filing a direct indictment containing both federal and provincial charges, counsel should sign the document as “agent for the Director of Public Prosecutions” with respect to the federal charges, and “agent for the Attorney General of [name of province]” with respect to the provincial charges. When jointly prosecuting federal and provincial charges, counsel should introduce themselves as appearing “for the Crown”, and so indicate in written submissions.¹⁷

5.2. Federal prosecutor as agent of the Attorney General of Canada

A federal prosecutor would almost never act as counsel or agent for the Attorney General, because this would suggest that the prosecutor could take directives directly from the Attorney General. This would go against the underlying purpose of the DPP Act which is to insulate the prosecution function from the Attorney General and the political process. Where the Attorney General intervenes in a prosecution or an appeal under [s. 14](#) of the DPP Act, or assumes conduct of a prosecution under [s. 15](#) of the DPP Act, normally counsel from the Department of Justice would act as agent of the Attorney General in that prosecution, intervention or appeal. The only rare situation where a federal prosecutor would be counsel for the Attorney General would be where the Attorney General appointed a federal prosecutor to act on behalf of the Attorney General in a s.14 intervention or a s. 15 prosecution.¹⁸ This type of appointment would require prior approval of the DPP and, if approved, would involve certain administrative steps in order to formalize the fact that a federal prosecutor (who acts pursuant to [s. 9](#) of the DPP Act) is no longer agent for the DPP when acting on behalf of the Attorney General of Canada in relation to a specific file.

¹⁷ The authority of Crown counsel to prosecute a matter or institute an appeal need not be proved as part of the case at trial or on appeal. There is a presumption that when counsel attends to prosecute matters in a particular court and describes herself or himself as “Crown counsel” or “the Crown” or “agent for the DPP”, they are cloaked with the proper authority to do so. The court is entitled to rely on that presumption unless and until there is an objection taken. In the event of a technical challenge to jurisdiction, Crown counsel, as officer of the court, may confirm his or her authority and file any written documentation purporting to be signed by the relevant authorizing person that confirms that authority. See [R v Chen \(2006\), 209 CCC \(3d\) 534, 205 Man R \(2d\) 157](#) at para 12, *R v Lemay (No 2)* (1951), 100 CCC 365 (BC CA), and [R v Elliott \(2003\), 181 CCC \(3d\) 118 \(ONCA\)](#).

¹⁸ In [R v Marshall, 2002 NSSC 233](#), the Nova Scotia Supreme Court considered the right of the DPP to cross-appoint counsel from the provincial justice department to argue an appeal. The Court dismissed the application for judicial review. It found no conceptual difficulty with the cross-appointment but acknowledged that the situation may have been more difficult if the DPP had appointed counsel to conduct a trial.

APPENDIX A

Sample signature blocks

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at [city, province/territory] this ____ day of _____, 20__.

At first instance

[Name of counsel]
Counsel for Her Majesty the Queen

Or

[Name of counsel]
Crown Counsel

Or

[Name of counsel]
Agent of the Director of Public
Prosecutions

On appeal

[Name of counsel]
Counsel for the Appellant/Respondent

[Name of co-counsel (if applicable)]
Counsel for the Appellant/Respondent

Or

[Name of counsel]
Counsel for Her Majesty the Queen

[Name of co-counsel (if applicable)]
Counsel for Her Majesty the Queen

Or

[Name of counsel]
Agent of the Director of Public
Prosecutions

[Name of co-counsel (if applicable)]
Agent of the Director of Public
Prosecutions

DPP as intervener

[Name of counsel]
Counsel for the Intervener*

[Name of co-counsel (if applicable)]
Counsel for the Intervener

Or

[Name of counsel]
Counsel for the Director of Public
Prosecutions

[Name of co-counsel (if applicable)]
Counsel for the Director of Public
Prosecutions

Note that, in these interventions, counsel for the appellant or respondent Attorney General will be “counsel for Her Majesty the Queen”.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

3.3 IMMUNITY AGREEMENTS

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

March 1, 2014

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1. INTRODUCTION

Those who have violated the law should be held accountable for their crimes. However, some crimes can be proved only by the testimony or cooperation of individuals who are implicated in the same crime or in some other criminal activity and who seek immunity from prosecution in exchange for their testimony and/or their cooperation with the police. Emphasis by investigating agencies on the investigation of the upper echelons of criminal organizations often heightens the need to rely on the evidence or assistance of co-operating accomplices, or other persons with outstanding charges, to prove offences.

While the cooperation of these individuals has been recognized as a very powerful tool in the battle against crime, it brings with it the very real risk that individuals will falsely accuse others and/or minimize their own culpability in the hope of securing immunity. Great care therefore must be taken in dealing with individuals seeking immunity.

2. PURPOSE OF THE GUIDELINE

The purpose of this guideline is to:

1. set out the applicable criteria in determining whether the Crown should enter into an immunity agreement with someone who may otherwise be prosecuted;
2. provide guidelines for Crown counsel on the proper handling of co-operating information-providers¹ both in and out of court;
3. distinguish the role of Crown counsel from that of the investigating agency in the immunity-seeking process.

While the focus of this guideline is on immunity agreements with potential Crown witnesses, the principles, procedures and criteria described here apply, with necessary adaptations, when the Crown is contemplating granting other forms of consideration (including *use immunity*) in exchange for providing testimony, information, assistance or other forms of cooperation with the Crown and/or investigative agency.

This guideline must be applied in conjunction with the PPSC Deskbook guideline “[3.11 Informer Privilege](#)”.²

¹ The term “information-provider” will be used as a generic description of the person seeking some form of immunity, as opposed to “witness” or other description.

² See the PPSC Deskbook guideline “[3.11 Informer Privilege](#)”.

3. DEFINITION OF "IMMUNITY AGREEMENT"

The term "immunity agreement" in this guideline refers to any agreement by the Crown to refrain from prosecuting someone for a crime or crimes or to terminate a prosecution (including appeals), in return for providing testimony or other valuable information, co-operation or assistance.

A checklist of issues to address in the agreement and a sample immunity agreement, are included as Appendices "A" and "B" to this guideline.

4. TYPES OF IMMUNITY

Courts have recognized the legal basis of a power to grant immunity despite the absence of any express provision in the [Criminal Code](#) (Code) authorizing the practice.³ There are various mechanisms by which the Crown can confer immunity under Canadian criminal law.

4.1. Stay of proceedings

Pursuant to [s. 579](#) of the Code, the Director of Public Prosecutions (DPP) or his or her delegate has the statutory power to stay existing criminal proceedings in appropriate cases. If the Crown wishes to recommence the prosecution, the Crown must notify the clerk of the court of the recommencement of the stayed proceedings within a period of one year from the date of the entry of the stay. Crown counsel must be conscious of this time limitation in drafting immunity agreements, particularly where the terms of the agreement require that the information provider do something or refrain from doing something during that period.

The authority of the DPP to stay proceedings does not include the power to stay prosecutions conducted by provincial prosecution authorities, unless there is *ad hoc* or standing delegated authority for the provincial charges (for example a major-minor agreement between prosecution services).⁴ Accordingly, the agreement must be worded carefully so as to make the extent of the immunity clear and unambiguous. Counsel for the information-provider should be referred to the provincial attorney general if his or her client desires immunity from offences prosecuted by a provincial attorney general. Crown counsel may respond to a request for consultation from the provincial representative, or initiate consultation with provincial authorities where appropriate.

³ *R v Edward D* (1990), 73 OR (2d) 758 (ONCA); *Bourrée v Parsons* (1987), 29 CCC (3d) 126 (Ont Dist Ct); *R v Betesh* (1975), 30 CCC (2d) 233 (Ont Co Ct).

⁴ See the PPSC Deskbook guideline "[3.7 Resolution Discussions](#)" at section 5.

4.2. Immunity from future prosecutions

The DPP is also entitled to provide an assurance of immunity against future prosecution⁵ for crimes that the information-provider is known to have already committed, but for which no charges have yet been laid.

4.3. "Use immunity" investigative assistance agreements

Traditionally, requests for immunity were made upon completion of the investigation. In recent years, however, Crown counsel and investigative agencies increasingly have had far greater contact during investigations in an effort to enhance the ability of the state to effectively fight crime, and present prosecution cases that are ready to proceed efficiently from the time charges are laid.

With respect to offers of immunity, this may require that Crown counsel be involved in discussions with the investigating agency before an investigation is complete in order to offer assurances to persons who may have valuable information to provide to the investigating agency. So, for example, persons may be willing to give details of their knowledge of criminal activity in audiotaped or videotaped interviews, where they receive assurances that information provided will not be used directly against them for investigative purposes.

This form of immunity agreement is referred to as "use immunity". It differs somewhat from immunity agreements discussed elsewhere in this guideline in that it focuses on the uses that may be made of the information provided, rather than acts which will not be prosecuted. It is appropriate for Crown counsel to engage in discussions with investigating agencies, and sign formal "Investigative Assistance Agreements" which bind the DPP. A sample is found as Appendix "C".

Investigative Assistance Agreements must be approved by Crown counsel in consultation with their Chief Federal Prosecutor (CFP) or Deputy CFP.⁶ The CFP should retain a copy of such agreements.

4.4. Guarantees of immunity for *Competition Act* offences

Pursuant to the Competition Bureau's *Immunity Program*, persons or corporations with information concerning anti-competitive business practices such as bid-rigging and price fixing are encouraged to make disclosure to the Competition Bureau. The policy respecting immunity agreements in relation to [Competition Act](#) investigations and offences is set out in a separate PPSC Deskbook guideline entitled "[5.2 Competition Act](#)".

⁵ The form of the assurance is an undertaking not to prosecute or to stay any prosecution once initiated.

⁶ In the case of legal agents, the agreement must be approved by the Agent Supervisor in consultation with the Chief Federal Prosecutor (CFP).

5. CRITERIA TO APPLY REGARDING OFFERS OF IMMUNITY

Immunity from prosecution is provided only where the information or co-operation is of such value that it is clearly in the public interest not to hold a person accountable for criminal activity. However, immunity should be the exception rather than the norm. The DPP is responsible for the conduct and supervision of all federal prosecutions in Canada. Thus, only the DPP through Crown counsel, and not the investigating agency, is entitled to confer immunity from prosecution.⁷

In determining whether immunity may be appropriate, Crown counsel should weigh all relevant circumstances, including the following:

5.1. Seriousness of the offence

Generally, immunity should be considered only when the information provided relates to the commission of a serious offence, or when the prosecution of a case is otherwise important in achieving effective enforcement of the law. As a rule, it should not be considered in relatively minor cases.

5.2. Reliability of the person

The dangers associated with reliance upon immunity-seekers are well known.⁸ The person may be attempting to purchase lenient treatment by falsely accusing others. Being familiar with the circumstances surrounding the offence, the witness is in a position to attribute certain acts to innocent persons. The witness may also minimize his or her own role in the transaction and transfer the primary blame to others.

Before offering immunity, Crown counsel should assess the truthfulness and candour of the information-provider. If the person is to testify, Crown counsel should be satisfied that a properly instructed jury would likely view the witness as credible.⁹

However, truthfulness should not be equated with moral character, as Toy J. pointedly observed in *Re Meier*:¹⁰

⁷ This is not to say that investigating agencies do not have the discretion to exercise a form of immunity by deciding not to lay charges.

⁸ See the PPSC Deskbook directive “[2.4 Prevention of Wrongful Convictions](#)”.

⁹ By putting the witness forward, counsel does not vouch for the credibility of the witness on all points. Where counsel has called a witness who has stated facts incorrectly, counsel can call other witnesses to ensure an accurate version of events emerges: *R v Burns*, [1994] 1 SCR 656; *R v Ewert*, [1992] 3 SCR 161; *R v Precourt* (1976), 39 CCC (2d) 311 at 325 (ONCA).

¹⁰ (1 March 1982) (BCSC) [unreported]. The same point was made by Barrette-Joncas, J, in *R v Dubois*:¹⁰ In criminal matters, and particularly in cases of murder, it is not always possible to have a bishop (priest) for a witness as the Crown did in the case of *R v Vaudry*, 500-9-8144-773, also before this court.

The state when it moves in to prosecute those who have allegedly committed crimes does not have the luxury of picking and choosing their witnesses. The state may have to rely on drunks, prostitutes, criminals, perjurers, paid informers as well as solid citizens to prove their case.

Counsel should be cautious in providing immunity to persons with a history of serious criminal activity. While it may sometimes be appropriate to provide immunity to such persons in order to prosecute more serious offenders, counsel must be aware the person's testimony will be viewed with great caution by the trier of fact; in some circumstances, reliance on such a witness may be damaging to the Crown's case.

5.3. Reliability of the anticipated evidence

Crown counsel should be satisfied that the anticipated evidence is reliable. Crown counsel should ensure that the investigating agency has attempted to confirm the reliability of the information provided and that the most knowledgeable investigators on the case have reviewed all the facts and circumstances of the case that are known to the Crown. This usually involves Crown counsel conducting a thorough examination of all documents, exhibits, seizures, surveillance reports and wiretap interceptions, as well as the statements of the other witnesses. The object is to determine the extent to which, if at all, the proposed evidence is consistent with the balance of the case for the Crown. Particular attention should be paid to intercepted communications, to which the potential witness was a party, things that were seized from him or her or from a place under his or her control, and any police surveillance that focused on his or her activities.

5.4. Full and candid disclosure

The information-provider must be candid about his or her involvement in criminal activity.¹¹ When meeting with the information-provider respecting potential immunity, Crown counsel must ask the person whether he or she has been: a) convicted of any criminal offence; b) charged with any criminal offence; and, c) knowingly the object of a criminal investigation. If the person subsequently testifies, Crown counsel will be required to place the person's full criminal record before the court.¹² Crown counsel must also be satisfied that the information-provider has made full and candid disclosure of all information pertaining to the activity in question or likely to affect the credibility of the information-provider. Such disclosure may relate to criminal activity in Canada or to criminal activity abroad, over which the DPP lacks prosecutorial authority. The information-provider must be advised that the DPP cannot bind other prosecutorial authorities.

¹¹ Where the information-provider is the officer of a corporation, "involvement in criminal activity" includes criminal activity of the corporation, of which the officer is aware.

¹² [*R v Ahluwalia* \(2000\), 149 CCC \(3d\) 193 \(ONCA\)](#) [*Ahluwalia*].

5.5. The Importance of the person's testimony or co-operation

Crown counsel should also assess the relative strength of the case for the prosecution with and without the information provider's testimony or other evidence, and should be satisfied that the person is able and prepared to provide reliable evidence on significant aspects of the case. Counsel should also consider whether the same evidence can be obtained from another source not requiring an assurance of immunity. The fact that the information-provider's testimony will corroborate otherwise uncorroborated evidence from other witnesses may make it sufficiently important to warrant immunity.

5.6. The nature and extent of the person's involvement in the offence

Crown counsel should compare the degree of the information-provider's culpability with that of others being prosecuted. In the absence of unusual circumstances, it is generally not in the public interest to rely on the testimony of a high-ranking member of a criminal organization to convict a minor figure in the organization.

A co-operating accomplice is not, by reason only of involvement in the crime, incompetent to testify at the trial of former confederates.¹³ Nor does the fact that the accomplice has been indicted separately for the offence, or for some other offence, render the accomplice non-compellable at the instance of the Crown.¹⁴ The accomplice's evidence is, however, viewed with great caution.¹⁵ Crown counsel must be conscious of the danger that the accomplice's evidence may become tainted during the process of conversion from accomplice to Crown witness.¹⁶

5.7. Other forms of reward

The public interest may not be served by providing immunity against prosecution to a person who has committed a particularly serious offence. Lesser forms of "reward" such as a joint submission for a reduced sentence should also be considered.¹⁷

¹³ *Canada Evidence Act*, RSC 1985, c C-5, s 3; *USA v Sheppard*, [1977] 2 SCR 1067; *R v Cruikshanks* (1990), 58 CCC (3d) 26 (BCCA).

¹⁴ *Jobin v The Queen*, [1995] 2 SCR 78; *R v RJS*, [1995] 1 SCR 451 (SCC); *R v Mazur* (1986), 27 CCC (3d) 359 (BCCA), lv ref 20 May 1986; *Ruben v The Queen* (1983), 24 Man R (2d) 100 (QB); *Re Crooks and The Queen* (1982), 2 CCC (3d) 57 (Ont HC), aff'd 64n (Ont CA); *R v Walters* (1982), 2 CCC (3d) 512 (BCCA). However, see *Praisoody v R* (1990), 3 CR (4th) 91 (Ont Ct J) and *R v Zurlo* (1990), 57 CCC (3d) 407 (Que CA).

¹⁵ *Vetrovec v The Queen*, [1982] 1 SCR 811.

¹⁶ For a discussion of the potential for witness contamination before trial by police and/or Crown, see the Ontario Superior Court decision in *R v Spence*, [2011] OJ No 2051. See also *R v Buric*, [1997] 1 SCR 535, affirming 106 CCC (3d) 97 (Ont CA) [Buric].

¹⁷ In accordance with the PPSC Deskbook guideline "[3.7 Resolution Discussions](#)", *supra* note 4.

5.8. The person's history of co-operation

Counsel should consider whether the person has co-operated with law enforcement officials in the past, either as a witness or an informer, and whether the person has previously entered into immunity arrangements. In particular, counsel should consider whether and to what extent the proposed witness has previously, on being arrested, sought immunity through offers of co-operation. The expectation of immunity should not be allowed to become a license to commit crime.

5.9. Protection of the public

"Public protection" is a concept somewhat narrower than, but certainly related to, "the public interest". The fundamental question is whether the protection of the public would be better served through prosecution (and possible imprisonment) of the proposed information-provider than by relying on that person as a witness in the prosecution of another accused.

5.10. Disclosure prior to detection

In cases that are covert or difficult to detect, full and candid disclosure of conduct before its detection is an important consideration in favour of granting immunity. For example, competition offences such as price-fixing may continue unabated for some time unless one of the parties to the price-fixing scheme comes forward voluntarily. The grant of immunity should reflect the significant benefit to the legislative goals in such circumstances.

5.11. Inappropriate criteria

The decision to confer or withhold immunity should never be improperly influenced by factors such as race, nationality, or religion. Nor may these decisions be influenced by partisan political considerations. Crown counsel must remain objective in deciding whether to grant immunity.

6. THE CONDUCT OF NEGOTIATIONS

In negotiating immunity agreements, Crown counsel have numerous responsibilities. More particularly, Crown counsel should:

1. strongly encourage the immunity-seeker to obtain the assistance of legal counsel before entering into any immunity agreement and negotiate through this lawyer;
2. whenever possible, limit his or her meetings with the person and deal primarily with the other lawyer until the agreement is finalized and ready for signature;
3. never meet the immunity-seeker alone (i.e., the investigating officer should always be in attendance);

4. maintain detailed records of all negotiations with the immunity-seeker and his or her lawyer leading up to the agreement;
5. be diligent not to expose the immunity-seeker to facts or evidence about the prosecution to which his or her testimony, information, assistance or cooperation will apply;
6. canvass the areas usually explored in cross-examination before deciding whether to conclude the agreement;
7. be fully aware of the circumstances, such as who approached whom, the numbers of interviews and the parties attending, whether the interviews were recorded;
8. explore whether, during the debriefing process, the information-provider consciously or unconsciously may have absorbed facts previously unknown to him or her, that investigators had obtained from other sources;¹⁸
9. make it clear that he or she does not have unfettered discretion to approve any immunity agreement that is negotiated; rather any such agreement must be approved in accordance with the procedures outlined in this guideline;
10. be familiar with the PPSC Deskbook guideline "[3.7 Resolution Discussions](#)";¹⁹
11. reduce to writing any immunity agreement that is negotiated and ensure that the written agreement is signed by the immunity-seeker and, if applicable, his or her lawyer;
12. avoid agreeing to grant complete immunity from criminal responsibility unless it is absolutely necessary in order to obtain the required testimony, information, assistance or cooperation. The granting of a limited form of immunity is generally preferred;
13. Crown counsel should explore the following potential, and non-exhaustive, terms of any immunity agreement:
 - a. dropping charges;
 - b. reducing charges;
 - c. dropping or reducing the charges of others, such as family members or friends;
 - d. agreeing to a lesser sentence;
 - e. the timing of dealing with outstanding charges;
 - f. the resolution of pending applications for the return of offence-related property or proceeds of crime;

¹⁸ This danger may arise, for example, where the person was given something by the investigating agency designed to "prompt" memory on certain matters, including investigative aids such as flow charts. This may also include items received by way of Crown disclosure when the person was charged. This is not to suggest it is never proper to show the person business records, for example, but simply to emphasize that care must be taken. As to "witness tainting" generally, see *Buric*, *supra* note 16.

¹⁹ See the PPSC Deskbook guideline "[3.7 Resolution Discussions](#)", *supra* note 4.

- g. reward money; and
- h. the circumstances under which the agreement could be terminated.

Additionally, certain factors over which Crown counsel have no control may be appropriately contained within immunity agreements. Crown counsel should also be aware of certain matters that arise in the immunity agreement negotiations between the investigators and the information-provider, including:

- a. circumstances prompting relocation;
- b. providing of a new identity;
- c. all payments of money (lump sum, monthly allowance, relocation expenses);
- d. assistance in securing employment; and
- e. special privileges while in jail or under the control of the police pursuant to [s. 527\(7\)](#) of the Code;

6.1. Consultation required before concluding an agreement

Granting immunity can be, and usually is, a complex process involving several offices with differing mandates. Consequently, consultation on at least four levels may and often will be required.

First, Crown counsel²⁰ must consult with the CFP before entering into an immunity agreement. In cases of significant public interest, the CFP should consult the appropriate Deputy Director of Public Prosecutions (Deputy DPP) before finalizing an arrangement. As well, before taking recourse in other proceedings against a person who has breached the immunity agreement, CFPs must consult the appropriate Deputy DPP.

Second, in most cases, the immunity process begins with discussions between the information-provider and the case investigators without prior consultation with Crown counsel. Following these discussions, investigators usually approach the prosecutor. Crown counsel rely on the investigating agency's input in weighing the relevant public interest criteria. Crown counsel should be satisfied that the agency's lead investigator responsible for overseeing such agreements has reviewed and approved the proposed agreement. The investigating agency makes a recommendation to Crown counsel. However Crown counsel bears the ultimate responsibility for deciding who is prosecuted and who is called as a witness.

Third, where the offence for which immunity is being offered is alleged to have been committed in multiple provinces or territories, Crown counsel may wish to consult with other Regional Offices either (a) to ascertain whether that office, or the local police

²⁰ Legal agents must always consult the Agent Supervisor, who will in turn consult the CFP.

forces, may have information relevant to the immunity seeker's reliability or (b) to ascertain whether there may be any outstanding charges in iCase.²¹

Fourth, although the agreement signed on behalf of the DPP does not extend to prosecutions that may be commenced by provincial authorities, or to crimes undisclosed by the witness, it will sometimes be desirable to discuss the proposed immunity agreement with provincial authorities if the provincial Attorney General (or DPP) has jurisdiction to prosecute other offences committed by the person. Whether and to what extent Crown counsel should become involved in these discussions, or whether Crown counsel should leave them entirely to counsel for the person should be decided on a case-by-case basis.

7. THE "JAILHOUSE" OR "IN-CUSTODY" INFORMER²²

When the information-provider in question can be categorized as a "jailhouse" or "in-custody" informer, together with all of the other considerations set out in this chapter, it is important to examine additional factors. Notice should be taken of the definition of an "in-custody informer", as set out by the Honourable Fred Kaufman, C.M., Q.C. in his report on the Guy Paul Morin case:²³

An in-custody informer is someone who allegedly receives one or more statements from an accused while both are in custody, and where the statements relate to offences that occurred outside of the custodial institution. The accused need not be in custody for, or charged with, the offences to which the statements relate. Excluded from this definition are informers who allegedly have direct knowledge of the offence independent of the alleged statements of the accused (even if a portion of their evidence includes a statement made by the accused).

The use of in-custody informers has been identified as a significant contributing factor in cases of wrongful conviction.²⁴ There are four issues to which Crown counsel should pay particular attention when dealing with an in-custody informer.

²¹ The prosecuting Regional Office should verify the name of the individual seeking immunity in iCase. If additional files are identified, counsel should consult the regional office where those files are located.

²² For a more thorough discussion of the in-custody informer, see the PPSC Deskbook directive "[2.4 Prevention of Wrongful Convictions](#)", *supra* note 8.

²³ Canada, *Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin*, vol 1 (Toronto: Queen's Printer, 1998) at 601. [*Kaufman Report*].

²⁴ See the PPSC Deskbook directive "[2.4 Prevention of Wrongful Convictions](#)", *supra* note 8. See also F/P/T Heads of Prosecution Committee, Report of the Working Group "[The Path to Justice: Preventing Wrongful Convictions](#)", 2011, ch 7.

7.1. Credibility

As stated in the [*Kaufman Report*](#):

Jailhouse informant evidence is intrinsically, though not invariably, unreliable and many of us have failed in the past to appreciate the full extent of this unreliability. It follows that prosecutors must be particularly vigilant in recognizing the true indicia detracting from, or supporting, [their] reliability.²⁵

At a minimum, Crown counsel should subjectively assess the jailhouse informer's proposed testimony and examine the details of the evidence, possible motives for lying, and the possibility of collusion, where there is more than one in-custody informer."²⁶

In addition to the factors listed in sections 5.1-5.6, in assessing credibility, Crown counsel should consider the following factors:

- The jailhouse informer's background, including
 - o his or her psychological and psychiatric profiles;
 - o any prior claims of having received in-custody statements;
 - o reliability of any previous information;
 - o any prior testimony;
 - o any convictions for offences involving dishonesty;
- The circumstances of the informer's incarceration, including the placement of the informer within the prison facility and access to information about the crime in question;
- Relationship between the informer and the police and the circumstances surrounding the giving of the "confession", including
 - o When, where and how was the statement made?
 - o Did the police solicit the evidence?
 - o Any prior association between the in-custody informer and the police officer involved with the investigation?
 - o Did the police approach the informer prior to "receiving" the "confession"?
 - o Did the police provide information to the informer prior to the making of the statement?
 - o Did the police ask leading questions?

²⁵ [*Kaufman Report*](#), vol 1 at 487, *supra* note 23.

²⁶ [*Kaufman Report, ibid*](#) at 607-609. This part of the *Kaufman Report* was referred to with approval by Major J, dissenting in [*R v Brooks, \[2000\] 1 SCR 237*](#).

- The circumstances surrounding the disclosure of the alleged statement to the Crown;
- The benefits sought or received in return for the information;
- External corroboration
 - o The use of tests to ensure reliability (e.g., polygraph examinations);
 - o The extent to which the statement is corroborated by other evidence.²⁷
- The specificity of the statement; for example, does it contain details or leads known only to the culprit?

7.2. The approval process for the use of the in-custody informer

Where Crown counsel has addressed the factors set out above, and is satisfied that the informer evidence is credible, Crown counsel should recommend to the CFP that the informer be called as a witness.²⁸ The CFP makes the final decision.

7.3. Informer benefits

Crown counsel who is prosecuting the accused should not conduct the negotiation of such benefits. Furthermore, the benefits should never be conditional on whether the Crown obtains a conviction of the accused.²⁹ The benefits ultimately agreed upon are subject to disclosure.

8. OUT-OF-CUSTODY COOPERATING WITNESSES

Out-of-custody cooperating witnesses are not subject to the same pressures and opportunities to seek favourable treatment or special privileges in jail, as are in-custody witnesses. The fact that a cooperating witness is not in jail does not obviate the need for the Crown to exercise a high degree of care in assessing the reliability of the evidence and the other factors outlined above, including those highlighted in respect of in-custody cooperating witnesses. There is always a concern in relation to the potential for the fabrication of evidence whenever any witness is offering information in a context in which he or she may receive a benefit- whether money, privilege, immunity or a reduced sentence- as a result of their cooperation.

²⁷ Where there is more than one in-custody informer, such corroboration should be independent of the other informer's statement.

²⁸ The recommendation might be for immunity or some other benefit, depending on the circumstances. If the CFP believes it is an appropriate case for use of the informer, the CFP should seek the advice of the Major Case Advisory Committee before making a final decision. Should the Committee and the CFP disagree, the matter should be directed to the appropriate Deputy DPP for a final decision. The role of the Committee is discussed in the PPSC Deskbook guideline "[3.1 Major Case Management](#)".

²⁹ [R v Xenos \(1991\), 70 CCC \(3d\) 362 \(Ont CA\)](#); but see [R v Naoufal \(1994\), 89 CCC \(3d\) 321 \(Ont CA\)](#).

While each case will be fact-specific, Crown counsel should consult their CFP where their careful assessment of the out-of-custody cooperating witness' credibility has identified matters of concern. A case in which Crown counsel is uncertain as to whether the testimony of the witness is sufficiently corroborated by other evidence would clearly fall within this category.

The CFP may also refer cases to the Major Case Advisory Committee³⁰ for its consideration.

9. BREACH OF AGREEMENTS

It may become necessary to seek a remedy against a person previously granted immunity where that person:

- withdraws promised co-operation with the Crown;
- fails to be truthful when testifying;³¹
- has wilfully or recklessly misled the investigating agency or Crown counsel about material facts concerning the case including factors relevant to that person's reliability and credibility as a witness; or
- has sought immunity by conduct amounting to a fraud or an obstruction of justice.

Whether the person should be charged if this occurs, either for the offence for which he or she sought immunity or for some other offence, will depend on the circumstances of each case. The terms of the agreement with the person and the manner in which it was breached will be important considerations.³² In some circumstances, the laying of charges against the witness (or the recommencement of proceedings under [s. 579\(2\)](#) of the Code) may amount to an abuse of process.³³

10. FILING OF THE AGREEMENT IN COURT

In all cases in which a Crown witness testifies as part of an immunity agreement, Crown counsel will provide the agreement to the defence as part of pre-trial disclosure, and seek to file the agreement with the Court as an exhibit when the person testifies.

³⁰ For a description of the Committee, see the PPSC Deskbook guideline "[3.1 Major Case Management](#)", *supra* note 28.

³¹ See e.g. *Ahluwalia*, *supra* note 12 where the Crown was criticized for failing to fully investigate the lack of full disclosure of a witness's criminal record. See also the PPSC Deskbook guideline "[2.5 Principles of Disclosure](#)", for Crown Counsel's disclosure obligations in this regard.

³² In one case, the witness deceived investigators concerning his real involvement in the crime. The Ontario Court of Appeal held that he was properly indicted by the Attorney General on the basis of facts subsequently discovered to be true: *R v MacDonald* (1990), 54 CCC (3d) 97.

³³ *R v Kearney*, [1992] 3 SCR 807; *R v Conway*, [1989] 1 SCR 1659, 49 CCC (3d) 289 (SCC); *R v Cutforth* (1987), 61 CR (3d) 187 (Alta CA); *R v TCD* (1987), 61 CR (3d) 168 (Ont CA).

APPENDIX "A" – AGREEMENT CHECKLIST

CONTENTS OF IMMUNITY AGREEMENTS: A CHECKLIST

An immunity agreement must be executed before a witness testifies. It must be in writing, be signed and be given to the witness before testifying, and must include the following information:

1. the names of all parties to the agreement to obtain immunity;
2. the name of any other person intended to benefit from the agreement;
3. the acts or omissions in respect of which the immunity is provided;
4. the scope of the agreement, e.g., that it does not extend to prosecutions that may be commenced by provincial authorities, or to crimes undisclosed by the witness;
5. the form the immunity will take (e.g., staying existing charges, undertaking not to proceed on potential charges);
6. the evidence, information, co-operation, assistance or other benefit to be exchanged for the immunity;
7. any additional commitments made by the parties, including the specifics of any expenditures to be made by the Crown;
8. a general description of what will amount to a breach of the agreement, and the consequences of such a breach; and
9. a stipulation that information or evidence provided under an agreement must be truthful.

APPENDIX "B" – IMMUNITY AGREEMENT

SAMPLE IMMUNITY AGREEMENT

NOTE: The contents of an immunity agreement will vary according to the facts of each case. The following is a sample only; when drafting agreements, counsel should review the issues described in Appendix "A" to ensure completeness. The document should be drafted in a legal format, and not in the form of a letter to the witness.³⁴

John Doe agrees to:

[set out all details of proposed co-operation]

The Director of Public Prosecutions agrees to:

It is understood by John Doe and the Director of Public Prosecutions that:

1. Full and frank disclosure regarding [state in general terms] by John Doe forms an essential term of this agreement;
2. The failure to provide truthful evidence at the trial of the accused results in the termination of this agreement, and may lead to the prosecution of John Doe for perjury, the giving of contradictory evidence, obstructing justice, public mischief, or some related offence. It may also result in charges against John Doe for other offences described above;
3. Immunity from prosecution under this agreement is confined to the offence described above. It does not extend to offences not disclosed in writing by John Doe to [name of Crown counsel] before entering into this agreement. Nor does it extend to offences that John Doe may commit after this agreement is signed, or to any offence that may be prosecuted by the Attorney General of a province.

The understanding described in this memorandum is the complete agreement between the Director of Public Prosecutions and John Doe.

Dated at the City of _____, in the Province/Territory of _____, the ___ day of ___, 201__.

John Doe Counsel agent of the Director of Public Prosecutions and Deputy Attorney General of Canada

Counsel for John Doe

I received a copy of this agreement on the ___ day of ___, 201__.

John Doe

³⁴ Note that there are specialized competition law immunity agreements; see the PPSC Deskbook guideline "[5.2 Competition Act](#)".

APPENDIX "C" – INVESTIGATIVE ASSISTANT AGREEMENT

SAMPLE INVESTIGATIVE ASSISTANCE AGREEMENT

NOTE: The contents of an immunity agreement will vary according to the facts of each case. The following is a sample only; when drafting agreements, counsel should review the issues described in Appendix "A" to ensure completeness. The document should be drafted in a legal format, and not in the form of a letter to the witness.

1. PARTIES TO THE AGREEMENT

THIS AGREEMENT is between

1. the Crown in Right of Canada, as represented by the Director of Public Prosecutions, or his/her delegated agent and by the investigating agency, namely the _____; and _____;
(name of information-provider)

2. RECITALS

WHEREAS the _____ [the investigating agency] have been and are continuing to investigate the following persons or activities, namely _____ [the investigation] and whereas counsel for _____ has advised the investigating agency that [name] is willing to give the investigating agency any and all information in his/her possession concerning the subject-matter of the investigation in return for assurances that this information will not be used against him/her except in the circumstances detailed in writing in this agreement or as may be later mutually agreed; and

WHEREAS the investigating agency, having consulted with the delegated agent of the Director of Public Prosecutions, wishes to receive this information and, together with the Director of Public Prosecutions, is prepared to give these assurances on behalf of the Crown in Right of Canada, in return.

3. OBLIGATIONS

THEREFORE [name] and the Crown in Right of Canada hereby agree as follows:

3.1 [name] agrees to:

3.1.1 attend on the investigating agency at a place of mutual convenience for the purposes of giving them all information (including documents) in his/her knowledge, possession, or control with respect to the acts, statements, and communications of himself/herself and others in all matters about which that investigating agency may inquire;

3.1.2 be sworn or affirmed in any manner that may be binding under Canadian law, to receive and acknowledge all cautions or warnings that may have to be administered under

that law, and to answer all questions that may be posed during the course of one or more interviews that will be videotaped and/or audiotaped;

3.1.3 disclose all information and to produce the original (or a true copy) of any document that is in his/her knowledge, possession or control concerning all matters about which the investigating agency shall inquire, in as true complete, and unequivocal a manner as it is known or available to him/her;

3.1.4 keep confidential and not disclose, except to his or her counsel or a court of law, all questions asked and all answers given during the course of these interviews, including any information pertaining to the state of the investigation or the nature and extent of police knowledge, opinions, and theories about the subjects of the investigation and their activities;

3.1.5 testify fully and truthfully in any proceeding to which he or she is subpoenaed as to all matters within his or her knowledge that arise out of the subject-matter of this investigation; and

3.1.6 notify _____ of the _____ (or any other investigator who may be specified from time to time), in writing within forty-eight (48) hours of the signing by [name] of this agreement, of his or her current residence, postal address, and telephone number, and to advise that police officer in writing and within a similar time period, of any changes in them, as they may occur.

3.2 THE CROWN IN RIGHT OF CANADA agrees that:

3.2.1 No statements made by [name] during the one or more interviews held by virtue of this agreement, will be used in evidence against [name] in any criminal proceedings prosecuted by or on behalf of the Director of Public Prosecutions, in which [name] is charged as an accused person except in the case of:

- a) [name] subsequently giving, in any trial, hearing, or proceeding (including any in which he/she is an accused), evidence that is materially different from that given by him/her under this agreement, or
- b) [name] being charged, as a result of anything said or done by him/her during the course of these interviews, with one or more offences of committing perjury, giving contradictory evidence, fabricating evidence, obstructing a peace officer, obstructing justice, or committing public mischief by false statement.

3.2.2 No original or copy of a document provided by [name] during the course of the one or more interviews held by virtue of this agreement, or given later to the investigating agency as a direct result of any request made by them at such interview(s), will be used in evidence against [name] in any criminal proceedings prosecuted by or on behalf of the Director of Public Prosecutions, in which [name] is charged as an accused person, except in the case of the events set out in paragraphs 3.2.1 (a) or (b) above, occurring. This applies as well to any copy made by the Crown in Right of Canada of any document furnished by [name].

4. LIMITATIONS

4.1 Nothing in this agreement affects the right of the Crown in Right of Canada to make use of any information or document provided by [name] under this agreement in order to discover or acquire derivative information or documents from a source other than [name].

4.2 Nothing in this agreement affects any use that the Crown in Right of Canada may make of any information or document obtained from a source other than [name], notwithstanding:

1. that the form or content of that information or document may be similar or identical to that of any information or document provided by [name] under this agreement, or
2. that any information or document provided by [name] under this agreement led directly or indirectly to the discovery or acquisition of the information or document obtained from the other source.

4.3 Nothing in this agreement affects the right of the Crown in Right of Canada to determine, what, if any, criminal charges may be laid and prosecuted against any person, including [name], in relation to this investigation.

5. BREACH

5.1 It is fundamental to this agreement that [name] disclose to the investigating agency fully, straightforwardly, and truthfully, all the information and documents that [name] knows, possesses, or controls in relation to the subject-matter of the investigation; do so in the form and manner required by this agreement; maintain all confidence imposed by this agreement; and testify fully and truthfully when so obliged in relation to the subject-matter of the investigation. A failure or refusal to do any of these things, or a failure or refusal to do them to the extent or in the manner required by this agreement, will constitute a breach of this agreement.

5.2 It is also fundamental to this agreement that [name] comply in a timely and accurate fashion with the obligations set out in paragraph 3.1.6 of the section **OBLIGATIONS** as well as those contained in any provisions of this agreement governing pleas of guilty, positions to be taken on sentence, compliance with sentences imposed including payment of fines in full within such times as may be allowed or extended by the courts, and the execution of any consent or authorizations as may be requested of [name] in order to permit access by the investigating agency to evidence, interviews, testimony, statements, or documents given to any other person or body in Canada or elsewhere. A failure or refusal to do any of these things, or a failure or refusal to do them to the extent or in the manner required by this agreement, will, at the option of the Crown in Right of Canada, constitute a breach of this agreement.

6. ACKNOWLEDGEMENT BY [NAME]

I acknowledge that I have received a copy of this agreement, have read it, where necessary I have had it explained to me in whole or in part, and I understand it. I further acknowledge that it fully sets forth the terms of my agreement with the Crown in Right of Canada in respect of my providing information and/or documents to the investigating agency in respect to the subject investigation. There have been no promises or representations made to me that are not disclosed in this agreement. I have been fully advised of my rights by counsel of my own choice. I am aware of the legal consequences under Canadian law for those who would knowingly provide false, misleading, or incomplete information under these circumstances. Finally, I acknowledge that I fully understand my rights under Canadian law and I am entering into this agreement voluntarily.

DATED at the City of _____, in the Province / Territory of _____, this _____ day of _____, 20 ____.

for the Director of Public Prosecutions

(name)

for the Investigating Agency

Counsel for (name)



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

3.4 SEALING ORDERS AND PUBLICATION BANS

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

March 1, 2014

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1. INTRODUCTION

The “open court principle” establishes a presumption of public access to court proceedings and court records, and has been described as a “hallmark of a democratic society”.¹ One aspect of the open court principle, freedom of the press, is a constitutional right under [s. 2\(b\) of the Canadian Charter of Rights and Freedoms](#) (Charter). Any restriction on the open court principle must be based on equally sound principles and values accepted in our democracy.

Displacing the open court principle in order to prevent or restrict access to court documents and court proceedings requires a balancing against the countervailing interests. The purpose of this guideline is to identify occasions where this balancing is required and the applicable considerations.

Among the interests which may be taken into account are the need to protect an ongoing covert police investigation, the need to protect informer privilege, and the need to protect the privacy rights of persons affected by the court proceeding in question.

In some areas Parliament has already determined the balance, for example, with respect to wiretap packets, where sealing of the packet is statutorily required, or with respect to proceedings under the [Youth Criminal Justice Act](#),² where publication of the accused’s

¹ [Vancouver Sun \(Re\)](#), 2004 SCC, [2004] 2 SCR 332 at para 23. See also: [A.B. v Bragg Communications Inc](#), 2012 SCC 46, [2012] 2 SCR 567 at para 11.

² SC 2002, c 1.

identity is actually a criminal offence. In other areas the balancing must be done case by case, for example, with respect to a ban on the publication of a complainant's or witness's identity under [s. 486.5 of the Criminal Code](#) (Code), where the court must determine the balance by reference to enumerated criteria.

2. SEALING ORDERS FOR MATERIAL FILED IN SUPPORT OF *EX PARTE* JUDICIAL AUTHORIZATIONS

In the case of court materials filed in support of *ex parte* judicial authorizations such as search warrants, production orders and wiretap authorizations, the presumption of public access applies. However, common law authority and statutory rules exist which may either require or permit sealing of the material in question.

As well, there is a common law rule that the material filed in support of a search warrant or similar judicial authorization should remain sealed from public view until the warrant or order is executed and the police make a “report to justice”.³ Where a search has been executed but nothing has been seized, the common law also establishes that only affected persons may have access to the material in question.⁴

It should be understood that when a sealing order is made, or automatic sealing is required as discussed in the next section in the case of wiretap materials, this does not restrict the ability of law enforcement officials to continue to use and share as necessary the content of the information subject to sealing. The sealing order – or automatic sealing – applies to the actual documents in question and not to the information, which may exist in another form as work product.

2.1. Mandatory sealing of documents supporting a wiretap authorization

[Section 187](#) of the Code mandates that all documents relating to an application under Part VI (which generally deals with wiretaps) must be sealed and kept by the court in a place with no public access, subject only to further order of a court. A specific sealing order is therefore not required.

However where a wiretap authorization includes judicial authority for other investigative measures (e.g. a general warrant or an assistance order) wiretap agents normally should draft the proposed authorization to include a sealing order covering those aspects of the material.

Opening a sealed wiretap packet for the purposes of making *Stinchcombe* disclosure is discussed below.

³ [A.G. \(Nova Scotia\) v MacIntyre, \[1982\] 1 SCR 175.](#)

⁴ [Ibid; Michaud v Québec \(A.G.\), \[1996\] 3 SCR 3.](#)

2.2. Discretionary sealing in other cases of ex parte judicial authorization

[Section 487.3](#) of the Code gives the issuing justice authority to order the sealing of material filed in support of an *ex parte* application for a warrant under the *Criminal Code* or any other federal statute, a production order under [ss. 487.012 or 487.013](#) of the Code, or a *Feeney* warrant under [s. 529](#) of the Code. Sealing is not automatic. The application for the sealing order will usually be made by the peace officer applying for the warrant or order, at the same time, and can be granted on the grounds set out in s. 487.3 of the Code.

The peace officer applying for the warrant or production order in question is therefore expected to provide affidavit material that details how and why one or more of the grounds mentioned in [s. 487.3\(2\)](#) justifies a sealing order. The most common grounds will be: to protect an ongoing police investigation; and to protect informer privilege.

Where the peace officer has neglected to obtain a needed sealing order at the time the warrant was issued, or later decides that a sealing order should now be sought, s. 487.3 is still available as the section specifically says that the sealing order may be granted by the provincial court judge or justice “on application made at the time of issuing a warrant [or other order]...or at any time thereafter”. In such a case, Crown counsel may be consulted to assist in the application.

Different courts across Canada have different procedures in place to handle sealing orders. In every case, however, the sealing order should result in the material being kept in a secure location not subject to public access.

In some jurisdictions the issuing justices grant sealing orders for a limited time, e.g. one year from the date of issuance. This is to be discouraged, as if the grounds for sealing are to protect informer privilege, it may never be safe to unseal the original unvetted material. Crown counsel are encouraged to advise their enforcement agencies to seek sealing orders of unlimited duration.

Procedures for unsealing warrant materials are discussed below.

2.3. Common law authority to seal in other cases of ex parte judicial authorization

[Section 487.3](#) of the Code specifically applies to warrants and the orders mentioned in the section. There are other *ex parte* proceedings not specifically mentioned, and here the court’s inherent jurisdiction (in the case of the superior court) or its ability to control its own process (in the case of a statutory court such as the provincial court) can be engaged.

For example, [s. 462.48](#) of the Code allows for an *ex parte* application by the Crown for an order to obtain tax information in certain cases related to proceeds of crime, money laundering, organized crime, and terrorism. This type of application is usually brought early in the stages of the criminal investigation and is therefore sensitive. A sealing order for the supporting material will invariably be desired in order to protect both the ongoing

investigation and the identity of confidential informers. As this particular application is brought *ex parte* before a judge of the superior court, the inherent jurisdiction of the superior court can be relied upon for the issuance of a sealing order, as the *Criminal Code* is silent on the point. The grounds for the sealing order will no doubt parallel those set out in [s. 487.3](#), discussed above. Again, it is important that the Crown be able to overcome the presumption of public access under the open court principle.

2.4. Unsealing for disclosure purposes: procedure and policy

In the case of wiretap packets, [ss. 187\(1.3\) and \(1.4\)](#) of the Code authorize a provincial or superior court judge to order that the packet be unsealed for the purposes of copying and examination. The section goes on to provide that the Crown has the right to edit the packet materials to protect informer privilege, ongoing investigations, sensitive police techniques, and the interests of innocent persons: [ss. 187\(2\) – \(4\)](#). The section goes on to require the original material to be resealed: [s. 187\(6\)](#).

With respect to informations to obtain search warrants and other orders, [s. 487.3\(4\)](#) of the Code contemplates that the issuing justice, or a judge of the court before which resulting criminal proceedings are underway, may vary the sealing order issued under s. 487.3 as discussed above.

[Section 187\(1.4\)](#) of the Code in relation to the sealed wiretap packet assumes that trial proceedings are underway and that the accused has applied to obtain a (vetted) copy of the affidavit material. Section 487.3(4) is less restrictive. Modern practice, largely in view of the Crown's obligation to make disclosure pursuant to *Stinchcombe*, now usually means that Crown counsel will initiate the unsealing application at the appropriate time, i.e. when the material can safely be vetted and disclosed to the defence.

Unsealing applications can usually be made by Crown counsel *ex parte*, on the ground that unsealing the material for the purpose of making *Stinchcombe* disclosure is in the interests of the accused. Proceeding *ex parte* also gives Crown counsel appropriate control of the application. On the other hand, forcing the accused to bring the application puts the accused in control of the timing and manner of the proceeding and may increase the risk of disclosing sensitive information such as informer privilege or ongoing investigations. This is a particular risk in smaller jurisdictions where court staff may not be familiar with the requirements that the Crown be notified of an application to unseal and be given an opportunity to vet the copied material before it is disclosed, or that the original unvetted material must be resealed.

As a matter of policy, therefore, Crown counsel in an individual case has the discretion to determine when to bring an application to unseal the material filed in support of a wiretap Authorization, search warrant, or other order. In exercising this discretion, and determining whether and when to bring an unsealing application, Crown counsel should consider:

- a. the interests and views of the investigating authority, particularly in respect of the sensitivity of information that may tend to identify a confidential informer or compromise an ongoing investigation;
- b. the timing of the application: there may be a tension between the need to make *Stinchcombe* disclosure and the sensitivity of information, which sensitivity may attenuate as time passes; and
- c. the stage of the proceedings: e.g., on the eve of trial, the accused may force an adjournment if he or she has not received disclosure of sealed material filed in support of a judicial authorization (a wiretap Affidavit, or information to obtain); equally, the accused may decline to make election or plea until sealed material is unsealed, vetted, and disclosed.

As to the last item, the stage of the proceedings, once a matter is set down for preliminary inquiry or trial, Crown counsel should promptly initiate unsealing in order to avert last-minute adjournments.

3. PUBLICATION BANS

3.1. Introduction

As discussed above, the open court principle presumes public access to all court proceedings, and freedom of the press – *i.e.*, the media’s right to publish details of court proceedings – is also engaged. However countervailing interests may justify restrictions on the publication of court proceedings in their entirety or in part.

As with sealing orders, publication bans require a balancing of the open court principle against the countervailing interests. In some cases Parliament has already established the balance – e.g. statutorily requiring a ban on publication of evidence taken at a judicial interim release hearing, or making it a criminal offence to publish the name of the accused in proceedings under the YCJA – while in other cases the presiding judge must make a case-by-case analysis – e.g. a ban on publishing the identity of a juror in certain circumstances.

3.2. Requirement to notify the media

Unless the publication ban is mandatory, as discussed below, Crown counsel must advise the court if necessary of the common law rule that the media must be notified before any publication ban is ordered: [*Dagenais v C.B.C.*, \[1994\] 3 SCR 835](#). This is because any publication ban interferes with the constitutionally protected right to freedom of expression under [s. 2\(b\) of the Charter](#).

In some jurisdictions the courts and/or media have arranged for a procedure where notice of application for a publication ban may be given to a central clearing house.⁵

3.3. Mandatory publication bans

The *Criminal Code* and the YCJA provide for mandatory publication bans in several areas:

- [Criminal Code](#):
 - [s. 276.3\(1\)](#) – ban on publication of proceedings on application by accused to cross-examine regarding complainant’s sexual activity under [s. 276.1](#) – automatic;
 - [s. 486.4\(2\)](#) – ban on publication of the identity of complainant or child witness in sexual offence cases, upon application of the prosecutor, complainant or witness – mandatory;
 - [s. 486.4\(3\)](#) – ban on publication of the identity of a witness under 18 years of age or of any person who is the subject of child pornography, in offences relating to child pornography under [s. 163.1](#), upon application of the prosecutor, complainant or witness – mandatory;
 - [s. 517](#) – ban on publication of evidence, information, submissions and judicial reasons at judicial interim release hearing – mandatory if the accused requests a ban, and discretionary if the prosecutor requests it;
 - [s. 539\(1\)\(b\)](#) – ban on publication of evidence taken at preliminary inquiry – mandatory if the accused requests a ban, and discretionary if the prosecutor requests it;
 - [s. 542\(2\)](#) – ban on publication of the fact of or details of any confession tendered at a preliminary inquiry – automatic;
 - [s. 648](#) – ban on publication of any proceedings in the absence of the jury – automatic.
- [Youth Criminal Justice Act](#):

The YCJA automatically imposes a ban on the publication of, e.g., the identity of a young person ([s. 110\(1\)](#)), so neither the court nor Crown counsel need to do anything for the publication ban to be in place. There are provisions allowing for the youth court to lift such statutory publication bans. See, e.g., [s. 110\(4\)](#) which deals with a

⁵ See e.g. :

- British Columbia, [Publication Ban Notification Project – Expansion to New Westminster](#).
- North West Territories Supreme Court, Practice Direction, « [Publication Bans](#) », July 9, 2004.
- Alberta, [E-File Notice of Application for Publication Ban](#).
- Saskatchewan, [Discretionary Publication Ban Application](#).
- Nova Scotia, [Notice of Applications for Publication bans service](#).

peace officer's application to allow publication of the identity of a young person who is accused of an indictable offence and who poses a danger to others, where publication of the young person's identity is necessary to assist in his or her apprehension. [Section 110\(6\)](#) allows a young person to apply for relief from the statutory ban on publication of his or her identity, if the youth court is satisfied publication would not be contrary to the interests of the young person or the public interest.

[Section 75\(2\)](#) requires a youth court, upon imposing a sentence on a young person for a violent offence, to consider lifting the ban on publication of the young person's identity, where this is necessary to protect the public from further violent offences by the young person.

As a matter of policy, when there is an automatic, mandatory publication ban (e.g. publication of proceedings in the absence of the jury, as in [s. 648](#) of the Code, or publication of the identity of a young person as in [s. 110](#) of the YCJA), Crown counsel need not take any steps since it is the operation of statute that automatically mandates the ban on publication. Where a publication ban only results from a positive order of the court, however, Crown counsel should be aware of those instances. Where a mandatory publication ban is triggered upon application of the defence (e.g. ban on publication of proceedings at show cause hearing or preliminary inquiry), Crown counsel need not take any steps if the accused is represented by counsel. In the case of a self-represented accused, however, it is appropriate for Crown counsel to remind the court that there is such a provision so that the court can discharge its duty to assist the self-represented accused in this regard. As well, Crown counsel should ensure in a prosecution for an offence listed in [s. 486\(1\)\(a\) or \(b\)](#) of the Code – basically, most sexual offences – that the court is aware of its obligation to inform any witness under the age of 18 years and any complainant of his or her right to apply for a publication ban, which ban is automatic upon application by the young witness or complainant, or by the prosecutor.

3.4. Discretionary publication bans

There are also provisions for discretionary publication bans in many instances under the [Criminal Code](#):

- [s. 486.5\(1\)](#) – ban on publication of the identity of any victim or witness, not already covered by the mandatory publication ban in [s. 486.4](#), upon application of the prosecutor, victim or witness, if the ban is “necessary for the proper administration of justice” – discretionary;
- [s. 486.5\(2\)](#) – ban on publication of the identity of any “justice system participant” as defined in [s. 2](#), in any prosecution for an offence listed in [s. 486.2\(5\)](#), i.e. intimidation of a justice system participant, offences related to criminal organizations, terrorism offences, and offences related to the [Security of Information Act](#),⁶ upon application of the prosecutor or a justice system

⁶ RSC 1985, c O-5.

- participant, if the ban is “necessary for the proper administration of justice” – discretionary;
- [s. 631\(6\)](#) – ban on publication of the identity of a juror, upon application of the prosecutor or on the court’s own motion, if the ban is “necessary for the proper administration of justice” – discretionary.

As a matter of policy, when a discretionary publication ban is in issue, Crown counsel should ensure that persons affected by the proposed ban have been given proper notice of the application. Concerning the media, see the discussion above about the need to ensure the media is notified as per [Dagenais](#). Crown counsel also has an obligation to ensure that victims and witnesses are properly notified and advised of their right to make application for a publication ban, usually by informing the presiding judge of this right. If affected persons have been given proper notice, Crown counsel’s position on whether a discretionary publication ban should be imposed is governed by Crown counsel’s general duty to protect the public interest. Crown counsel will normally be initiating or supporting the application for a discretionary ban on publication, and should be able to address the public interest considerations in his or her submissions to the court.

3.5. Common law publication bans

The superior courts have inherent jurisdiction to impose publication bans, and arguably the provincial courts have the same jurisdiction when exercising the authority to control their own process.⁷ Such publication bans are discretionary. In [Mentuck](#), the Supreme Court of Canada propounded the test for a common law publication ban as follows:

A publication ban should only be ordered when:

- (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.⁸

With respect to the first branch of the test, the “serious risk” must be real, substantial, and well grounded in the evidence. As Iacobucci J put it: “it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained”.⁹ The second branch of the test requires a balancing of interests, including constitutional protections for the accused and the press.

⁷ [R v Cunningham, 2010 SCC 10](#).

⁸ [R v Mentuck, 2001 SCC 76](#) at para 32, per Iacobucci J. See also [Toronto Star Newspapers v Ontario, 2005 SCC 41](#).

⁹ [Mentuck](#), *ibid* at para 34.

As a matter of policy, Crown counsel should ensure that affected parties (including the media) are notified of the proposed discretionary ban on publication, and be prepared to speak to the public interest considerations which are engaged. These include:

- o the right of an accused to a fair and public hearing – [s. 11\(d\) of the Charter](#);
- o freedom of expression – [s. 2\(b\) of the Charter](#);
- o the privacy interests of witnesses and other third parties; and
- o the integrity of the administration of justice, including the ability of the police to conduct an investigation without being compromised by publicity, with particular reference to the “serious risk” sought to be avoided by the proposed publication ban.

3.6. Appeal from a publication ban

There is no statutory right to appeal from a publication ban. Any such appeal must therefore fall within [s. 40\(1\) of the Supreme Court Act](#),¹⁰ i.e., pursuant to an application for leave to appeal from the order directing a publication ban.¹¹

¹⁰ RSC 1985, c S-26.

¹¹ [Dagenais v Canadian Broadcasting Corp.](#), [1994] 3 SCR 835; [R v Adams](#), [1995] 4 SCR 707; [Mentuck](#), *supra* note 8.



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OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

3.5 DELEGATED DECISION-MAKING

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

Revised March 25, 2022

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1. PURPOSE

This guideline explains the procedure to obtain approval when a statute requires the consent of the Attorney General before initiating a prosecution or taking a particular step in a criminal proceeding.

2. CONTEXT

Prosecutors make the vast majority of prosecutorial decisions pursuant to authorities delegated by the Director of Public Prosecutions (DPP). The DPP’s prosecutorial powers and functions are codified in the *Director of Public Prosecutions Act* (DPP Act).¹ Pursuant to [s. 3\(3\)](#) of the DPP Act, the DPP exercises these general powers “under and on behalf of the Attorney General” independently, subject to directives issued by the Attorney General under [s. 10](#).² Pursuant to [s. 9\(1\)](#) of the DPP Act, the DPP may authorize federal prosecutors and other employees to exercise the powers and perform the duties and functions related to prosecutions, such as the power to initiate and conduct prosecutions. The DPP has delegated many of these powers, duties, and functions to federal prosecutors, paralegals, and articling students.³

Certain prosecutorial decisions require specific higher-level approval, however. Some offences in the *Criminal Code* and in other federal statutes require the consent of the Attorney General or the Deputy Attorney General before a prosecution can be initiated or before a certain step can be taken in a criminal proceeding. Statutes articulate this requirement in different ways. Some demand the Attorney General’s “personal consent in writing”.⁴ Others require the Attorney General’s “consent

¹ [Director of Public Prosecutions Act](#), SC 2006, c 9, s 121 [DPP Act].

² See the Directive of the Attorney General reproduced in “[1.1 Relationship between the Attorney General and the Director of Public Prosecutions](#)”.

³ The [Delegations to Prosecutors](#), the [Delegations to Paralegals](#) and the [Delegations to Articling Students](#) are available on the PPSC website.

⁴ See e.g. *Criminal Code*, s 485.1 and 577, and *Geneva Conventions Act*, s 3(4).

in writing”⁵ or simply “the consent of the Attorney General”.⁶ Some of these go further and identify a need to obtain consent from a particular Attorney General, federal⁷ or provincial.⁸

The DPP has the authority to provide the required consent as the Deputy Attorney General. Indeed, [s. 2](#) of the *Criminal Code* defines the Attorney General as including the Deputy Attorney General and [s. 3\(4\)](#) of the DPP Act confirms that the DPP is the Deputy Attorney General for the purpose of exercising the powers and performing the duties and functions set out in [s. 3\(3\)](#). In addition, paragraph 24(2)(c) of the *Interpretation Act* confirms that words directing or empowering a minister to do an act or thing also include the minister’s deputy.⁹

Deputy Directors of Public Prosecutions (DDPPs) also have the authority to provide consent. [Subsection 6\(3\)](#) of the DPP Act specifies that a DDPP may, under the DPP’s supervision, exercise any of the powers and perform any of the duties or functions set out in [s. 3\(3\)](#) of the DPP Act, and for that purpose is a lawful deputy of the Attorney General.¹⁰

Pursuant to [s. 9](#) of the DPP Act, the DPP has also authorized Chief Federal Prosecutors (CFPs), Deputy Chief Federal Prosecutors (DCFPs), Team Leaders and prosecutors to provide consent for the purposes of certain statutory provisions. The decision maker remains accountable to the DPP for the decisions taken.¹¹ For statutory provisions that are not listed in the authorization, consent must be sought from:

1. The DPP, if the provision requires the personal consent in writing of either the Attorney General or the Deputy Attorney General; or
2. The DPP or a DDPP, in all other cases.

Prosecutors should identify cases requiring consent at the pre-charge or initial charge review stage, and seek consent from the appropriate decision maker as soon as possible. Where an offence requires the consent of the Attorney General to “institute”, “commence”, or “continue” a prosecution, the consent is an element of the offence that the Crown must be able to prove beyond a reasonable doubt.¹² It is a necessary precondition to the jurisdiction of the court and charges can

⁵ See e.g. *Criminal Code*, s 119(2) and *Special Import Measures Act*, s 77.034(3).

⁶ See e.g. *Criminal Code*, s 7(7) and 172(4).

⁷ See e.g. *Criminal Code*, s 119.

⁸ See e.g. *Criminal Code*, s 342(2).

⁹ *Interpretation Act*, RSC 1985, c I-21, s 24(2) (c).

¹⁰ Subsection 6(4) of the DPP Act, *supra* note 1 provides that the DDPP may also act for and on behalf of the DPP, under the DPP’s supervision, in the exercise of any other powers or the performance of any other duties or functions that the DPP has under the DPP Act or any other Act of Parliament.

¹¹ The [Delegations to Prosecutors](#) is reproduced on the PPSC website. Paralegals and articling students are not authorized to provide this consent, however. See [Delegation to Paralegals](#) and [Delegation to Articling Students](#).

¹² *Re Quinn Contracting Ltd* (1983), 27 Alta LR (2d) 334 (QB); *R v Spicer and Blakely* (1992), 120 AR 139 (CA); *R v Chen* (2006) 209 CCC (3d) 534, 205 Man R (2d) 157 at para 10.

be dismissed for lack of jurisdiction if the Crown cannot prove consent.¹³ Where the statutory language requires consent to “institute” proceedings, consent must be obtained before laying the information, since a prosecution is instituted when a person lays an information before a justice, while a prosecution is commenced when a justice of the peace issues process compelling the attendance of the accused in court.¹⁴

3. PROCEDURE TO OBTAIN CONSENT

In cases where a prosecutor must obtain the consent of a Team Leader, DCFP, CFP, DDPP, or the DPP, the prosecutors must:

1. Prepare a memorandum containing:
 - a. A concise statement of facts showing that there is a reasonable prospect of conviction and that the public interest is best served by a prosecution. If multiple accused are to be charged, the memorandum must demonstrate that there is sufficient evidence to implicate each accused individually. The statement of facts must also include:
 - i. The name of the accused;
 - ii. Their citizenship, if the accused is not a Canadian;
 - iii. A list of the charges sought against the accused;
 - iv. A summary of the evidence; and
 - v. The date by which the consent is required.
 - b. A confirmation that the investigating department or agency has been consulted and a summary of its views about the proposed prosecution.¹⁵
 - c. A recommendation for each element requiring consent.
 - d. An annex containing a draft consent form in the format reproduced at Appendix A.
2. Provide the memorandum to the appropriate decision maker, if consent can be provided by a Team Leader, DCFP or CFP. If consent can only be provided by a DDPP or the DPP, the prosecutor must provide the memorandum to the CFP.

In cases requiring the personal consent of a DDPP or the DPP,

1. The CFP will:
 - a. Review the memorandum prepared by the prosecutor; and
 - b. Endorse the recommendation and send it to the DDPP if the CFP is satisfied that the case meets the criteria set out in the DPP guideline “[2.3 Decision to Prosecute](#)”.
2. The DDPP will review the request and will

¹³ *R v Linamar Holdings Inc.*, [2007] OJ No 4859 [*Linamar*]; *R v Alrifai*, 2008 ONCA 564.

¹⁴ *Alrifai*, *supra* note 13 at para 22 citing *Linamar*, *supra* note 13.

¹⁵ See also Chapter 2.7 “[Relationship between Crown Counsel and Investigative Agencies](#)”.

- a. Inform the CFP that the request for consent has been denied or will not be forwarded to the DPP, if the DDPP concludes that proceedings should not be instituted;
- b. Sign the consent form (Appendix A), for matters where the DDPP is authorized to provide consent; or
- c. Endorse the recommendation and forward it to the DPP, for matters that require the personal consent of the DPP.

4. OBLIGATION TO CONSULT IN CONSENT-BASED PROSECUTIONS

In cases where consent to institute a prosecution was obtained, prosecutors must consult the decision maker before discontinuing a prosecution, making major changes to the charges, or accepting pleas to lesser charges than those for which consent had originally been granted. Prosecutors may consult the decision maker directly in cases where consent was provided by a Team Leader, DCFP, or CFP. In cases where consent was provided by a DDPP or the DPP, consultations should be routed via the CFP.

APPENDIX A – CONSENT FORM

Pursuant to (state section and statute requiring consent), I consent to the (institution, commencement, or continuation) of proceedings against (accused's name, address and, if not Canadian, citizenship) for an offence contrary to (state offence section and statute).

This consent is given in relation to the following allegation(s):

(provide draft charges and a brief description of primary facts alleged including date and location)

This consent is given at (City), Canada, this ____ day of _____ , _____.

(As the case may be, Director of Public Prosecutions of Canada and Deputy Attorney General of Canada; Deputy Director of Public Prosecutions and lawful deputy of the Attorney General of Canada pursuant to subsection 6(3) of the *Director of Public Prosecutions Act*; Chief Federal Prosecutor; Deputy Chief Federal Prosecutor; or Team Leader)



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

3.6 DIRECT INDICTMENTS

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

Revised March 25, 2022

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1. INTRODUCTION

Section 577 of the *Criminal Code* (Code) permits the Attorney General or the Deputy Attorney General to send a case directly to trial without a preliminary inquiry or after an accused has been discharged at a preliminary inquiry. The object of the section has been described by Southin J.A. of the British Columbia Court of Appeal in the following terms:

In my opinion, Parliament intended, by this section, to confer upon the Attorney General or his Deputy the power to override the preliminary inquiry process. It is a special power not to be exercised by Crown counsel generally but only on the personal consideration of the chief law officer of the Crown and his or her deputy.

Such a power is recognition of the ultimate constitutional responsibility of Attorneys General to ensure that those who ought to be brought to trial are brought to trial. There are many reasons why an Attorney General or a Deputy Attorney General might consider a direct indictment in the interests of the proper administration of criminal justice. Witnesses may have been threatened or may be in precarious health; there may have been some delay in carrying a prosecution forward and, thus, a risk of running afoul of s. 11(b) of the Canadian Charter of Rights and Freedoms; a preliminary inquiry, in, for instance, cases essentially founded on wire-tap evidence, may be considered by the Attorney General to be expensive and time consuming for no purpose. These are simply illustrations. It is neither wise nor possible to circumscribe the power of the Attorney General under this section.¹

This guideline outlines the criteria applied by the Director of Public Prosecutions (DPP), acting as the Deputy Attorney General of Canada, when determining whether to consent to the preferring of an indictment pursuant to this provision. It also describes the procedure for Crown counsel and agents to follow when making a recommendation for a “direct indictment”.

2. STATEMENT OF POLICY

The DPP will exercise the discretion vested in the Attorney General under s. 577 of the Code in circumstances involving serious violations of the law and where it is the public interest to do so.

¹ *R v Charlie* (1998), 126 CCC (3d) 513 at 521-522 (BCCA).

A direct indictment may be in the public interest where:

1. The accused is discharged at a preliminary inquiry because of an error of law, jurisdictional error, or a palpable error on the facts of the case;²
2. The accused is discharged at a preliminary inquiry and new evidence is later discovered that would likely have resulted in an order to stand trial if it had been tendered at the preliminary inquiry;
3. The accused is ordered to stand trial on the offence charged and new evidence is later obtained that justifies trying the accused on a different or more serious offence for which no preliminary inquiry has been held;
4. The delay (actual or anticipated) in bringing the matter to trial has led to the conclusion that the right to trial within a reasonable time guaranteed by s. 11(b) of the *Canadian Charter of Rights and Freedoms* may not be met unless the case is brought to trial immediately;
5. There is a reasonable basis to believe that the lives, safety or security of witnesses, witnesses' families, informers, or justice system participants may be in peril, and the potential for interference with them can be reduced significantly by bringing the case directly to trial without preliminary inquiry;³
6. Proceedings against the accused ought to be expedited to ensure public confidence in the administration of justice;
7. A direct indictment is necessary to avoid multiple proceedings, for example, where one accused has been ordered to stand trial following a preliminary inquiry, and a second accused charged with the same offence has just been arrested or extradited to Canada on the offence;⁴
8. The age, health or other circumstances relating to witnesses⁵ require their evidence to be presented before the trial court as soon as possible, or present difficulties in having witnesses testify more than once;
9. The holding of a preliminary inquiry would unreasonably tax the resources of the prosecution, the investigative agency or the court; or

² For a discussion of "palpable error" as a basis for controverting findings of fact made in earlier proceedings, see *MacNeill and Shanahan v Briau*, [1977] 2 SCR 205; *Hoyt v Grand Lake Devl. Corp.*, [1977] 2 SCR 907 at 911-912, adopted in *R v Purves* (1979), 50 CCC (2d) 211 at 222-24 (Man CA); *R v Van Der Peet*, [1996] 2 SCR 507 at 565-566.

³ Wherever reasonably practicable, Crown counsel should first ask the investigators, with the cooperation of the PPSC Security Officer, to prepare a confidential threat assessment where a direct indictment is being considered on this basis.

⁴ See e.g. *R v Cross* (1996), 112 CCC (3d) 410 (QC CA).

⁵ It would be appropriate to consider, for example, the particular circumstances relating to complainants in highly traumatic cases, such as sexual offences or war crimes. This may include consideration of whether requiring the witness to testify about the same matters a number of times will cause harm to that person, or will inhibit the presentation of candid and truthful evidence, or may cause the witness to change their evidence or refuse to testify.

10. A direct indictment is necessary to protect ongoing police investigations, operations and security where the requirement for such protection is of importance and can be significantly demonstrated.

3. PROCEDURE

In cases where a prosecutor intends to seek a direct indictment, the prosecutor must:

1. Inform their Chief Federal Prosecutor (CFP) or Deputy Chief Federal Prosecutor (DCFP) that they intend to seek a direct indictment as soon as possible.
2. Prepare a memorandum containing:
 - a. A concise statement of facts showing that there is a reasonable prospect of conviction and that the public interest is best served by a prosecution. If multiple accused are to be charged, the memorandum must demonstrate that there is sufficient evidence to implicate each accused individually. The statement of facts must also include:
 - i. The name of the accused;
 - ii. Their citizenship, if the accused is not a Canadian;
 - iii. A list of the charges sought against the accused;
 - iv. A summary of the evidence; and
 - v. The date by which the indictment is required.
 - b. An analysis explaining:
 - i. The strengths and weaknesses of the case;
 - ii. Any significant legal issues expected to be encountered and any issues of particular importance to the public interest;
 - iii. The reasons for requesting a direct indictment;
 - iv. The state of disclosure already given to the accused, the extent of the disclosure yet to be made, the anticipated timelines for completion of the disclosure process, and any anticipated disclosure problems or disputes; and
 - v. The factors set out in this guideline, including a reasoned and objective assessment of the factors weighing both for and against a direct indictment.
 - c. A copy of the approved prosecution plan, if any.
 - d. An annex containing an indictment containing all charges for which the indictment is requested, with the following appearing at the end:

I hereby consent to the preferring of this indictment pursuant to section 577 of the *Criminal Code*.⁶

Dated at Ottawa, Ontario, this _____ day of _____, _____.

⁶ A direct indictment should be endorsed to read that consent has been given “pursuant to s 577 of the *Criminal Code*”. This is intended to avoid the erroneous conclusion that the preferment of the indictment by the Attorney General or the Deputy Attorney General was intended to *require* a jury trial under s 568. A requirement of that nature will, as outlined in the PPSC Deskbook guideline “[3.10 Elections and Re-elections](#)”, be expressly endorsed on the indictment.

Director of Public Prosecutions and Deputy Attorney General of Canada

3. Provide this memorandum to the CFP or DCFP.
4. Consider whether and when a section 13 notice pursuant to the [*Director of Public Prosecutions Act*](#) is appropriate⁷, based on the particular circumstances of the matter at hand.

The CFP or the DCFP will:

1. Inform the appropriate Deputy Director of Public Prosecutions (DDPP) of the intention to seek a direct indictment.
2. Review the memorandum prepared by the prosecutor and, if they are satisfied that the factors are met and that a direct indictment is appropriate, endorse the memorandum and send it to the DDPP.

The DDPP will:

1. Review the memorandum and conduct an objective assessment of the request. In this role, the DDPP exercises a challenge function.
2. Advise the CFP or DCFP that no recommendation will be made to the DPP, if the DDPP concludes that a direct indictment is not appropriate in the circumstances.
3. Endorse the recommendation and send it to the DPP, if the DDPP concludes that a direct indictment is appropriate.⁸

Prosecutors must consult the DPP when an indictment has been preferred and they conclude that the charges (or any of them) should be withdrawn, stayed or reduced. These consultations should be routed via the CFP.

4. RE-ELECTIONS

Where an indictment has been preferred under s. 577, the accused is deemed under s. 565(2) to have elected to be tried by a court composed of a judge and jury. Under that same section, however, the accused may re-elect for trial by a judge without a jury. The procedures necessary to give effect to the re-election are described in s. 565(3) and (4), and s. 561(6) and (7).

⁷ See the PPSC Deskbook directive “[1.2 Duty to Inform the Attorney General under Section 13 of the *Director of Public Prosecutions Act*](#)”.

⁸ In *R v Trang*, 2002 ABQB 744 at para 419 (August 15, 2002), it was held that the recommendation is subject to solicitor-client privilege; see also *R v Ahmad*, 2008 CanLii 27470 (ONSC).



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

3.7 RESOLUTION DISCUSSIONS

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

Revised March 4th, 2024

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1. INTRODUCTION

Early and meaningful resolution discussions between Crown counsel and defence counsel are an essential part of the criminal justice system.

Resolution discussions may encompass a variety of topics including the strength of the case, possible defences, *Canadian Charter of Rights and Freedoms* violations, and the appropriate sentence or sentencing range. They may also serve to narrow the issues to focus the trial or avoid litigation altogether.

Crown counsel must not proceed with resolution discussions where there is no reasonable prospect of conviction, or it is not in the public interest to pursue the case. For a detailed analysis on this test, see Guideline 2.3 “[Decision to Prosecute](#).”¹ If this test is not met, Crown counsel must not engage in resolution discussions, pursue resolution discussions, or accept a plea. Rather, Crown counsel must withdraw or stay the charges.

Since resolution discussions occur before trial, and typically before disclosure is complete, Crown counsel must be aware of the circumstances that contribute to wrongful convictions. This includes incomplete disclosure, and guilty pleas entered solely for the purpose of release or to benefit from a time-limited offer from the Crown. These principles are discussed in detail below.

2. PRINCIPLES GUIDING RESOLUTION DISCUSSIONS

Crown counsel must conduct resolution discussions with the public interest in mind, as well as the effective and consistent enforcement of the law. Crown counsel are advocates and *quasi*-ministers of justice. They must represent the public interest as knowledgeable and effective negotiators, while at the same time ensuring that the accused’s constitutional rights are respected.

The principles of openness, fairness, and restraint must govern any resolution discussion.

2.1 Openness

One of the more serious criticisms of resolution discussions (in particular, plea bargaining) relates to the secrecy and lack of accountability of the process, and the related concern that “private deals” occur that are subsequently ratified by the judiciary. This can result in public suspicion and cynicism.²

¹ There may be cases where counsel for a person or organization under investigation initiates plea discussions, before charges are laid. This may occur, for example, in tax evasion or competition matters. In such cases, the appropriate threshold for entering into plea discussions is whether the decision to prosecute test can or could be met. Moreover, Crown counsel must consider the availability of the regime of Remediation Agreements when the accused is an organization. For more on this topic, see part XXII.1 of the *Criminal Code* and Guideline 3.21 “[Remediation Agreements](#)”.

² Canada, Department of Justice, *Plea Discussions and Agreements, Working Paper 60* (Law Reform Commission of Canada, 1989) at 12 [*Plea Discussions and Agreements*].

The principle of openness stems from the concept that “fair and rational decisions are more likely to be perceived as fair and rational if their origins and underpinnings have been fully disclosed.”³

The openness principle has at least three components: (i) consulting, where appropriate, interested parties about a proposed resolution; (ii) upholding the open court principle; and (iii) adequately documenting the prosecution file.

2.1.1 Consulting interested parties

Crown counsel must consult interested parties where it is appropriate to do so.

Absent exceptional circumstances, Crown counsel must seek input from victims (where there is one)⁴ and keep them informed about the nature and extent of resolution discussions.

The *Canadian Victims Bill of Rights* (CVBR)⁵ gives victims the right to information upon request. In addition, the *Criminal Code* imposes obligations on the court to inquire whether the prosecutor has taken steps to:

- inform the victim, if the victim advised the prosecutor that they wanted to be informed of any plea agreement or if the agreement relates to the offence of murder, a serious personal injury offence, or any other indictable offence where the maximum punishment is five years or more;⁶
- provide the victim with an opportunity to indicate whether they are seeking restitution for their losses and damages;⁷ and
- provide the victim with an opportunity to prepare a victim impact statement.⁸

In cases where an accused expresses a desire to plead guilty and the Crown has not yet had an opportunity to consult the victim, Crown counsel must consider seeking an adjournment so that consultation may occur.⁹ Crown witness coordinators may be best positioned to have those communications because they are often in direct contact with victims and their family members.

It is also good practice to seek input from investigative agencies prior to engaging in resolution discussions. This is particularly important in serious or major cases.

³ *Ibid* at 13.

⁴ The discussion with victims of crime is subject to certain statutory limitations. For example, where Crown counsel believes that discussions with a victim may endanger the life or safety of another person, they can rely on s 20(d) of the *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2 [CVBR] to limit, delay or avoid such discussions.

⁵ *Ibid*, ss 6, 7.

⁶ *Criminal Code*, RSC 1985, c C-46, ss 606(4.1), 606(4.2) [*Criminal Code*].

⁷ *Ibid*, s 737.1 (2). See also s 16 of the CVBR and Guideline 6.7 “[Restitution](#).”

⁸ *Criminal Code*, ss 722, 737.1(3).

⁹ *Ibid*, s 722(3), 737.1(3).

It may also be necessary to consult the community in which the offence was committed. For example, Crown counsel may consult First Nations, Métis, and Inuit communities, as well as other community leaders or school representatives. This consultation should occur in cases where the offence or resolution position has a significant impact on the community, and when it is reasonably possible to do so.

Crown counsel may also be required to consult other stakeholders. For example, it may be appropriate to consult the relevant provincial prosecuting service, or PPSC headquarters. PPSC headquarters may connect counsel with a Department of Justice legal services unit, if required.¹⁰

After consultation, the final responsibility for assessing the appropriateness of a plea agreement rests with Crown counsel.¹¹ If a plea agreement is reached, Crown counsel must make reasonable efforts to ensure that victims and investigating agencies¹² understand the substance of the agreement and the reasoning behind it.

2.1.2 Upholding the open court principle

Public access to the justice system helps to ensure that justice is administered in a principled manner and in accordance with the rule of law. Therefore, where an agreement has been reached, Crown counsel should present the proposal to the trial judge in open court and on the record.¹³ Where the agreement is a product of discussions that occurred during a judicial pre-trial conference, Crown counsel must put the relevant details on the court record.

While there is a presumption that courts are open, Crown counsel must be aware of statutory publication bans that may be applicable in a proceeding. For more on mandatory and discretionary publication bans, see Guideline 3.4 [“Sealing Orders and Publication Bans.”](#)

2.1.3 Documenting the prosecution file

Crown counsel must maintain a written record of all issues discussed at a resolution meeting. The record must be dated and kept in the file. The record must include offers made, agreements reached or rejected, and information provided to victims.¹⁴ Maintaining a written record will promote a consistent and informed practice, particularly where multiple Crown counsel successively handle a file, while ensuring proper accountability and transparency.

¹⁰ See Directive 1.3 [“Consultation within Government.”](#)

¹¹ See Guideline 2.1 [“Independence and Accountability in Decision-Making.”](#)

¹² See Guideline 5.1 [“National Security.”](#)

¹³ Publication bans or sealing orders at a sentencing hearing may be required in certain circumstances. The court may order a publication ban where the moving party can demonstrate it is in the best interests of the administration of justice.

¹⁴ For an illustration of the difficulties that may arise where no proper record of discussions is kept, see *R v Rajaeefard*, [1996] OJ No 108 (ONCA).

Even when resolution discussions take place informally, Crown counsel must document the file when they are able to do so.

2.2 Fairness

The principle of fairness must guide Crown counsel's resolution positions for all accused persons, regardless of whether the accused is unrepresented, represented, or may not be effectively represented. For example, Crown counsel should not take a higher sentencing position when dealing with a less experienced defence counsel versus a more experienced or effective defence counsel. Crown counsel must take care to ensure that they are fair to all accused, regardless of their circumstances.

2.2.1 The risk of wrongful convictions

Fairness means that the accused must receive core disclosure prior to any form of resolution discussions so that the parties are on equal footing. However, this may not always be reasonably feasible. For example, the accused may express a desire to plead guilty at an early stage, before disclosure is available.

Should an accused insist on pleading guilty before they receive disclosure, Crown counsel must turn their mind to the following risk factors:

- Guilty pleas entered without the benefit of full disclosure may contribute to wrongful convictions.¹⁵
- An accused may enter a guilty plea only to expedite their release in response to an offer of "time-served," significant credit due to an early plea, or pressure of a looming expiry date.
- Giving too little time to an accused to make a decision may result in unfairness. Accused persons must not face pressure to make a quick decision. They must have sufficient time to discuss the offer with their counsel, consider the resolution offer, and understand the consequences that flow from it.¹⁶

These concerns are particularly important with an unrepresented accused.¹⁷ If the accused is unrepresented, Crown counsel should canvass the availability of a defence counsel or

¹⁵ See Canada, Report of the Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions, *Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada* (Ottawa, Public Prosecution Service of Canada, 2018) (Co-Chairs Stephen Bindman and Eric Tolppanen), specifically [Chapter 8 - False Guilty Pleas](#). Incomplete disclosure has been identified as fostering wrongful convictions. For more detail on this obligation, see Directive 2.4 "[Prevention of Wrongful Convictions](#)".

¹⁶ Generally speaking, time limits should have some connection to an event in the progress of the case. For example, requiring an accused to plead guilty before a date for trial is set may be an acceptable practice, since it is connected to the dedication and expenditure of resources by the court and the Crown.

¹⁷ See Guideline 2.5 "[Principles of Disclosure](#)" on providing disclosure to an unrepresented accused.

duty counsel to speak with the accused.¹⁸ Crown counsel must also be aware that First Nations, Métis, Inuit, Black, and other marginalized groups are overrepresented amongst the wrongfully convicted. Crown counsel must have a heightened awareness of this fact when engaging in resolution discussions.

If Crown counsel develop concerns about the lack of meaningful disclosure or an expedited guilty plea, alternatives to a plea of guilt must be explored. The alternatives must be reasonable in the circumstances. For example, Crown counsel may, if appropriate, revisit their position on bail, encourage consultation with duty counsel, extend the expiry of resolution offers, or offer alternative measures.

Where the accused waives their right to disclosure, and insists on proceeding with a guilty plea, Crown counsel must ensure that the waiver is clear and informed. Crown counsel must confirm on the record that the accused waives their right to disclosure at the time of entering the plea. Crown counsel should also ask the presiding justice to conduct a formal plea inquiry pursuant to s. 606(1.1) of the *Criminal Code*.

Crown counsel must make complete notes of the circumstances and details of the resolution discussions, including any waivers. The notes must be placed in the Crown file.

2.2.2 Honouring communicated positions

Fairness includes the principle that Crown counsel should honour all negotiated agreements unless fulfilling the agreement¹⁹ would bring the administration of justice into disrepute or is otherwise contrary to the public interest.²⁰

Fairness also includes the principle that an accused person is entitled to rely on resolution positions conveyed by the Crown. Therefore, only in a “rare and exceptional” case can Crown counsel repudiate a communicated position.²¹ For example, Crown counsel may not be bound by a communicated position if it is based on misleading or incorrect information about material facts that were provided by the accused.

The decision not to fulfill an agreement and seek a higher penalty can only be made by the Chief Federal Prosecutor (CFP), after carefully considering whether the communicated position is contrary to the administration of justice or the public interest. The following factors will assist in this determination:

¹⁸ For more on unrepresented accused, see section 5 of this Guideline.

¹⁹ The term “agreement” means a Crown offer that the accused has accepted. This should be distinguished from “uncommunicated positions” on file, “communicated offers” that have been communicated to defence counsel or to the accused, but have not yet been accepted, or positions that have been communicated, but the timeline for acceptance has expired. For clarity, a position communicated by one Crown is binding on all Crown counsel.

²⁰ This describes the public interest test that the judge must apply when deciding whether to depart from a joint submission, as described in *R v Anthony-Cook*, 2016 SCC 43 at para 32.

²¹ See *R v Nixon*, 2011 SCC 34.

- (i) The circumstances leading to the plea agreement, and any resulting prejudice to the accused;
- (ii) The seriousness of the offence;
- (iii) The strength of the Crown's case;
- (iv) The range of sentences customarily imposed for the offence;
- (v) The existence of aggravating and mitigating factors, and whether those factors justify a departure from the established range for the offence;
- (vi) Any prejudice to trial fairness that the accused will suffer as a result of the repudiation and whether the accused can be restored to their original position; and²²
- (vii) The timing of the repudiation. If repudiation is to take place, it must be done expeditiously.

In cases where the Crown has communicated a position based on the Crown's incorrect assessment of the evidence,²³ the CFP must consider this factor and not repudiate a communicated position absent exceptional circumstances.

If the CFP determines that repudiation is required, Crown counsel must inform defence counsel of the reasons for the repudiation in writing. These reasons may be disclosed in a court proceeding, should an allegation of abuse of process arise.²⁴

If Crown counsel determines that a more lenient sentence is justified based on facts presented to them, even though another Crown counsel communicated a higher sentence, all reasonable efforts must be made to consult with the counsel who made the original offer before communicating the new offer.

²² In the context of an abuse of process application, the SCC held in *R v Nixon*, 2011 SCC 34 that once it is established that the Crown repudiated a plea agreement, the evidentiary burden shifts to the Crown to explain to the court the circumstances and reasons behind the decision to repudiate the agreement (see para 63). The reasons should be complete and include an assessment of any trial fairness issues or prejudice that the accused might suffer from the repudiation (see paras 56 and 64).

²³ For example, Crown counsel may not have fully reviewed the file before conveying a resolution position. In addition, the investigative agency may not have provided relevant or material facts to Crown counsel in a timely fashion. In both of these circumstances, it is generally not appropriate for Crown counsel to modify their position because they were not aware of information that would have been available to them if they had taken steps to obtain it.

²⁴ Courts do not interfere with prosecutorial discretion unless it has been exercised for an oblique motive, offends the right to a fair trial, or otherwise amounts to an abuse of process. See *R v Nixon*, 2011 SCC 34, at para 68, Charron J. articulated the standard courts should apply to assess if Crown counsel may lawfully renege on a plea agreement: "In the absence of any prosecutorial misconduct, improper motive or bad faith in the approach, circumstances, or ultimate decision to repudiate, the decision to proceed with the prosecution is the Crown's alone to make."

2.2.3 Other principles related to fairness

In addition to the three principles explained above, Crown counsel must also follow the principles outlined below:

- Crown counsel must be diligent to recognize and set aside any existing personal conscious or unconscious biases, stereotypes, or prejudices;
- Crown counsel must ensure that no justice system participant, for example a victim or witness, is prejudiced by any form of bias from any party during resolution discussions or sentencing;
- Crown counsel are encouraged to consult with their colleagues in arriving at a fit and appropriate sentence. Consultation allows Crown counsel to receive diverse perspectives and ensure that consistent approaches are taken. Crown counsel should make reasonable efforts to seek out and consider the views of colleagues who have different backgrounds or life experiences. The more serious the crime, the more important it is to consult;
- Crown counsel should initiate and respond to plea discussions with defence counsel in a prompt manner to ensure timely prosecutions;²⁵
- Crown counsel engaged in resolution discussions should continue their efforts to set trial dates, unless the accused provides an express waiver of the delay. Since the accused is waiving their constitutional right to be tried within a reasonable time, waivers in writing should be confirmed on the court record in the presence of the accused or their counsel; and
- When an accused changes counsel, Crown counsel must advise the new defence counsel of all previous offers and the Crown's present position in light of the known facts.

2.3 Principle of Restraint

When determining the appropriate sentence for an accused, the principle of restraint under s. 718.2(d) and (e) of the *Criminal Code* requires Crown counsel to explore all available sanctions other than imprisonment that are reasonable in the circumstances. Crown counsel must be particularly mindful of the principle of restraint to avoid contributing to the overrepresentation of individuals from First Nations, Métis, Inuit, Black and other marginalized groups in the criminal justice system.

To this end, Crown counsel must avoid recommending “short and sharp” sentences because their utility in achieving the principles and objectives of sentencing is questionable. Short and sharp sentences also contribute to the problem of overrepresentation. Only in

²⁵ See *R v Jordan*, 2016 SCC 27 and Guideline 3.17 “[Ensuring Timely Prosecutions](#).”

exceptional circumstances, may Crown counsel seek a short and sharp sentence. If Crown counsel seeks such a sentence, they must document the file to record their reasons.

3. PLEA DISCUSSIONS

Crown counsel may engage in plea negotiations where all three of these preconditions are met:

- The decision to prosecute test has been met on the charge(s) the accused wishes to resolve;
- The accused is willing to acknowledge guilt unequivocally on the charge(s) they wish to plead guilty to; and
- The accused's decision to plead guilty is both voluntary and informed.

3.1 Charge discussions

Charge discussions may cover the following topics:

- Reducing a count to a lesser or included offence, or including a charge that arises out of the same transaction (see s. 606(4) of the *Criminal Code*);
- Reducing a count to a lesser or included offence to avoid a mandatory minimum penalty (MMP). For example, Crown counsel may determine that a sentence lower than the MMP would assist in addressing overrepresentation, or more adequately reflect the seriousness of the offence and the moral culpability of the accused;
- Withdrawing or staying other charges;
- Agreeing not to proceed with a charge, or to stay or withdraw related charges against another accused who is charged in relation to the same event or transaction;
- Agreeing to reduce multiple charges to one all-inclusive charge; or
- Agreeing to stay certain counts and proceed with others, relying on the material facts that support the stayed counts as aggravating factors for sentencing purposes.²⁶

The following practices are not acceptable:

- Proceeding with unnecessary additional charges to secure a negotiated plea;
- Agreeing to a guilty plea for an offence not disclosed by the evidence;

²⁶ Section 725 of the *Criminal Code* now regulates this practice.

- Agreeing to a guilty plea for a charge that inadequately reflects the gravity of the accused's provable conduct unless, in exceptional circumstances, the plea is justified by the benefit that will accrue to the administration of justice;
- Negotiating plea agreements that involve other government departments' administrative or enforcement processes (e.g., Canada Revenue Agency) without consulting them about the proposed resolution; or
- Negotiating plea agreements with defence counsel representing multiple co-accused where there is reason to believe that counsel is in a conflict of interest.

3.2 Procedural Discussions

Procedural discussions may properly include the following:

- Agreeing to proceed by summary conviction or by indictment;²⁷
- Agreeing to dispose of the case at a specified future date if, on the record and in open court, the accused indicates that they are prepared to waive the delay; or
- Agreeing to waive charges to or from another province or territory, or to or from another judicial district within a province or territory.²⁸

3.3 Scope of Sentencing Discussions

Sentencing discussions may cover the following topics:

- An undertaking to recommend a certain range of sentences or a specific sentence;
- A joint recommendation for a specific sentence (for more on joint submissions, see section 4.6 below);
- An agreement not to oppose a sentence recommendation by defence counsel, so long as Crown counsel is aware what that recommendation will be;
- An agreement not to seek ancillary orders that may attach to a sentence (for example, a forfeiture order or a weapons prohibition order). However, Crown counsel cannot negotiate mandatory sentencing measures required by the law;²⁹

²⁷ See Guideline 3.10 "[Elections and Re-Elections](#)" for more on the Crown's discretion to elect. Note in particular the discussion of the Crown's ability to re-elect from proceeding by indictment to summary conviction when the limitation period has expired.

²⁸ See Guideline 3.9 "[Waiver of Charges](#)" for guidelines and procedures on waivers.

²⁹ See e.g. s 109(1) of the *Criminal Code*, which requires a prohibition order for firearms in certain cases, or s 487.051 of the *Criminal Code*, which requires the judge to order the taking of a DNA sample for forensic analysis upon conviction for a "primary designated offence."

- An agreement not to file a notice of intention to seek greater punishment;³⁰
- An agreement not to oppose the imposition of an intermittent sentence rather than a continuous sentence;
- An agreement to include or not include restitution as part of the sentence; or
- An agreement regarding the type of conditions to be imposed on a conditional sentence or probation order.

Crown counsel must not convey a promise or an undertaking not to appeal the sentence imposed.

3.4 Agreements about the Facts

Where an accused decides to plead guilty, Crown counsel should rely on facts that are provable by admissible evidence. Crown counsel must read these facts into the record, or file an agreed statement of facts.

Crown counsel must not present facts that are of little or no significance to the charges and are presented solely to embarrass the accused.

Agreements respecting facts must not mislead the court and must not give the appearance of misleading the court. The following types of agreements are not acceptable:

- An agreement not to advise the court of any part of the accused's provable criminal record that is relevant or could assist the court;
- An agreement not to advise the court of the extent of the injury or damages suffered by a victim; or
- An agreement to withhold from the court facts that are provable, relevant, and that aggravate the offence, unless there is a clear and reasonable basis for doing so.

3.5 Determining a Fit Sentence

In determining a fit sentence, Crown counsel must consider:

- All relevant objectives and principles of sentencing set out in the *Criminal Code*, other legislation, and case law;
- All relevant aggravating and mitigating circumstances, including those set out in legislation;

³⁰ See Guideline 5.7 "[Impaired Driving Cases: Notice to Seek Greater Punishment](#)", which sets out the policies on seeking greater punishment for this offence.

- Relevant sentencing precedents in the region; and
- Any background and systemic factors relevant to the accused.

Each case must be decided based on its own facts and circumstances. Crown counsel must weigh a person's degree of responsibility against the seriousness of the offence, the impact the offence has on any victim or the community, and other relevant sentencing considerations as set out in the *Criminal Code*. In light of all of these factors, Crown counsel should consider whether:

- alternatives to prosecutions (including alternative measures) would be appropriate;
- incarceration remains appropriate, or if a non-custodial sentence satisfies the purposes and principles of sentencing; or
- the duration of the term of imprisonment should be reduced.

Where the common law has established ranges for a particular offence, Crown counsel must be mindful of the Supreme Court's direction that ranges are guidelines for a starting point and should not be seen as a "straitjacket."³¹

Departures from an established sentencing range may be appropriate depending on the unique circumstances of an individual case. For example, where there are significant mitigating circumstances, or the accused's moral culpability is reduced, a sentence below an established range may be appropriate. Ultimately, any sentencing decision must reflect the particular circumstances of the offence and the accused. If Crown counsel determines that a departure is required, they must consult their team leader before entering into a plea agreement.

Before recommending that a fine be imposed, Crown counsel should take all reasonable steps to ensure that the fine is an appropriate disposition, including the accused's ability to pay the fine, the length of time required to pay it, and the availability of a fine option program.

Crown counsel must be aware of the requirement to consult their CFP in circumstances as outlined in Guideline 2.6 "[Consultation within the Public Prosecution Service of Canada](#)".

3.6 Joint Submissions

A resolution discussion may result in Crown counsel agreeing to present a joint submission as to the exact sentence. Crown counsel may do so if the joint submission will not bring the administration of justice into disrepute, and is not otherwise contrary to the public interest.

³¹ *R v Parranto*, 2021 SCC 46 at paras 33-37; *R v Friesen*, 2020 SCC 9 at paras 36-38, 162; *R v Lacasse*, 2015 SCC 64 at paras 57-61, 67-69; *R v Nasogaluak*, 2010 SCC 6 at para 44.

Crown counsel must put on the record the considerations supporting the joint submission, including all relevant aggravating and mitigating factors.³² The Supreme Court of Canada has held that putting a thorough justification of a joint submission on the record is also important for public perception. This ensures that the court and the members of the public readily understand the reason for the joint submission.

When a joint submission is outside the range established by the common law, Crown counsel must inform the judge of all the circumstances of the case that justify the departure. This may include:

- The circumstances of the accused, including mitigating factors or reduced moral culpability;
- The impact of the charges or sentence on the accused;
- The background or systemic factors that may have contributed to the cause of the underlying offence; or
- The benefits obtained by the Crown (if any).

Judges may depart from joint submissions “only rarely,” and if the joint submission is so “markedly out of line with the expectations of reasonable persons aware of the circumstances.”³³ When a judge indicates a possible departure from a joint submission, Crown counsel should request an opportunity to make further submissions before pronouncing on the sentence.³⁴

4. TAKING INTO ACCOUNT BACKGROUND AND SYSTEMIC FACTORS

Sentencing is highly individualized. Different sentences may be justified for different persons charged with similar crimes depending on the particular circumstances of the case and the accused.

Given that one of the fundamental principles of sentencing is proportionality, Crown counsel must consider whether broad background and systemic factors played a role in the commission of the offence.³⁵ While relevant to the formulation of an appropriate sentence,

³² See *R v Anthony-Cook*, 2016 SCC 43 at para 57. This may include any relevant aggravating or mitigating circumstances, and any of the sentencing objectives listed in s 718 of the *Criminal Code* that are sought to be achieved.

³³ *R v Anthony-Cook*, 2016 SCC 43 at paras 32-34.

³⁴ *R v Anthony-Cook*, 2016 SCC 43 at paras 58-60. See also *R v Abel*, 2011 NWTCA 04 and *R v Hood*, 2011 ABCA 169.

³⁵ The Supreme Court of Canada decisions in *R v Gladue*, [1999] 1 SCR 688 and *R v Ipeelee*, 2012 SCC 13, and the courts of appeal decisions in *R v Anderson*, 2021 NSCA 62 and *R v Morris*, 2021 ONCA 680 held that background and systemic factors must be considered when sentencing an accused. *Gladue* factors must be considered for all self-identified member of a First Nation, Métis or Inuit community unless the individual waives this right. Background and systemic factors are also relevant to other accused. In *R v Anderson*, 2021 NSCA 62, the Nova Scotia Court of Appeal held that systemic anti-Black racism was a relevant factor in sentencing the accused. The Ontario Court of Appeal in *R v Morris*, 2021 ONCA 680, emphasized that

no one factor is determinative. Background and systemic factors must be considered in the context of all the other relevant purposes and principles of sentencing.³⁶

This means that Crown counsel must make reasonable efforts to gather relevant information in order to arrive at an informed resolution position. In particular when prosecuting a member of an overrepresented or marginalized group. This information may come directly from the accused (or their counsel)³⁷, or through pre-sentence reports as discussed below.

Crown counsel must also consider whether the victim (if there is one) is part of a group overrepresented as victims of crime.

Crown counsel must delicately balance all the competing interests fairly before communicating a sentencing position, and be mindful of the paramount principles and objectives of sentencing relevant to a particular case.

4.1 First Nations, Métis, and Inuit Accused

Crown counsel must consider information provided by a *Gladue* Report³⁸, an enhanced pre-sentence report, and information provided by defence counsel in arriving at a sentencing position. This information may include community supports. Crown counsel must also provide the court with any relevant information in their possession about the accused's background or unique circumstances. If the accused or the court requests a *Gladue* report, Crown counsel must not object.

Crown counsel may also seek the assistance of Indigenous court workers when exploring community-based culturally appropriate resources for the accused.

An accused does not need to establish a causal link between their Indigenous background and the offence committed. *Gladue* factors must be considered regardless of whether the accused has status or lives on a reserve. *Gladue* factors may include:

- The impact of colonialism, including residential schools;
- The displacement of Indigenous communities and peoples;
- The impact of the “Sixties Scoop,” where Indigenous children were removed from their homes;

background and systemic factors are relevant to all accused, and endorsed the use of enhanced pre-sentence reports in sentencing Black individuals.

³⁶ *R v Gladue*, [1999] 2 SCR 688, at para 88.

³⁷ If the accused chooses to provide this information.

³⁸ Crown counsel must be guided by the principles enunciated by the Supreme Court of Canada in both *Gladue* and *Ipeelee*.

- The cumulative impact of these factors, including how colonialism and systemic racism translate into:
 - Lower educational attainment;
 - Lower incomes;
 - Higher unemployment;
 - Higher rates of substance use and suicide; and
 - Higher levels of incarceration for Indigenous peoples.³⁹

These factors must form the necessary context for any resolution discussion.

4.2 Other Overrepresented and Marginalized Groups

Enhanced pre-sentence reports, or Impact of Race and Culture Assessment reports (IRCA), may be available for Black and other racialized accused persons. These reports can help the court better understand how poverty, marginalization, racism, or social exclusion has impacted the accused's circumstances and the offence committed.

If the accused or the court requests an IRCA, Crown counsel must not object to the court receiving such reports. The information contained in these reports may serve to attenuate moral culpability, thereby assisting Crown counsel with determining a position on the sentence, and the court with imposing a fit and proportionate sentence.

5. UNREPRESENTED ACCUSED

Plea or sentencing negotiations with an unrepresented accused call for extreme care. In any discussion with an unrepresented accused, Crown counsel must ensure that a witness is present, absent exceptional circumstances.⁴⁰ It is especially crucial for Crown counsel to keep a detailed written record of all discussions in the file.

Crown counsel must inform the accused of their right to retain counsel and, where appropriate, advise them of the availability of legal aid. Crown counsel must also raise potential *Charter* and evidentiary issues that may arise from the facts or circumstances of the case.

Crown counsel may also inform an unrepresented accused of the Crown's initial position on sentence in the event of a guilty plea. However, Crown counsel must not advise the accused whether they should accept the Crown's offer. Discussions can only proceed if

³⁹ *R v Ipeelee*, 2012 SCC 13 at para 60.

⁴⁰ Depending on the jurisdiction, a third person may be a police officer, a Crown Witness Coordinator, or another Crown. The third party may become a witness to the proceeding if the nature of the discussions later becomes in dispute.

Crown counsel is satisfied that the accused is acting voluntarily. Moreover, Crown counsel must not take advantage of the fact that the accused is unrepresented by counsel.

If Crown counsel develop concerns about the accused's ability to understand the extent of their jeopardy or their right to counsel, additional steps must be taken to encourage the accused to consult with counsel. Ultimately, Crown counsel must abstain from negotiating with the accused if they conclude that the accused does not understand sufficiently.

Crown counsel should advise the judge that the accused was encouraged to retain counsel. Crown counsel should ensure that the court record reflects what they said to the accused outside of the courtroom, seeking confirmation or corrections from the accused. This will ensure that the court record accurately reflects the conversation and agreement (if any).

Crown counsel should follow local practices to mitigate the risks regarding dealings with unrepresented accused. For example, Crown counsel may ask duty counsel to speak with an unrepresented accused. In the alternative, Crown counsel may request a pre-trial hearing in open court where a judge may assist in explaining to the accused their rights and options.

If the accused has agreed to plead guilty, Crown counsel must recommend that the presiding judge hold a plea comprehension hearing.

6. NARROWING THE TRIAL ISSUES

Crown counsel must attempt to narrow the litigation issues as much as possible in cases that are proceeding to trial. For example, Crown counsel may identify foreseeable legal issues and seek defence counsel's position on those issues. Crown counsel may also prepare a witness list, a summary of the anticipated evidence, and a list of issues from which defence counsel might make admissions.⁴¹ It may not be possible to narrow the issues in all cases, but Crown counsel must make reasonable efforts to do so.

7. JUDICIAL PRE-TRIAL CONFERENCES

A system of judicially supervised pre-trial conferences exists in most jurisdictions, although the form may differ from one jurisdiction to the next. They are effective not only in encouraging the fair disposition of cases without a trial, but also in narrowing the issues in cases that proceed to trial.⁴² Crown counsel are encouraged to take the initiative with court administrators to hold a pre-trial conference if the court has not done so.

⁴¹ Depending on the jurisdiction, it may be useful for Crown counsel to draft a list of potential admissions and provide it to defence counsel for their consideration and signature.

⁴² Pursuant to s 625.1(2) of the *Criminal Code*, pre-trial conferences are mandatory for cases in which a jury trial is to take place. Pre-trial conferences may also take place in trials before a judge or justice alone pursuant to s 625.1(1) of the *Criminal Code*.

Crown counsel are encouraged to be proactive and take all reasonable measures to ensure that such conferences are productive and useful. Some examples are outlined below:

- Ensuring that sufficient disclosure has been made to defence counsel before the pre-trial conference to enable meaningful discussions about the facts, any possible issues, or a plea resolution;
- Identifying, before the pre-trial conference, areas where agreements can be reached on issues that would shorten the proceedings;
- Discussing the relevant issues with defence counsel prior to the pre-trial conference; and
- Securing the attendance of an investigator on the case, where such attendance would be useful or necessary (depending on the jurisdiction and local practices).

Crown counsel may conduct guilty plea and sentence proceedings before the judge who presides over the pre-trial conference where there is a joint position on sentence or where both defence and Crown counsel consent to the pre-trial judge conducting the sentencing hearing.

If, during the pre-trial, the judge comments that they will impose a particular sentence if the plea proceeds before them, Crown counsel should consider the appropriateness of proceeding with the plea before that judge.⁴³ While the Crown should not participate in judge shopping, the objective is to proceed before a court that has not predetermined the outcome of the sentencing hearing before hearing all the facts.

Crown counsel should also ensure that the court record reflects that a judicial pre-trial conference regarding resolution has been held.

8. DELEGATED AUTHORITY TO PROSECUTE

Different levels of government may have jurisdiction to prosecute when individuals are charged with offences under both the *Criminal Code* and other federal statutes arising from the same incident. Delegation of charges will typically occur in these circumstances to avoid separate trials or conflicting outcomes. It is customary for the prosecuting service having jurisdiction over the less serious offence to delegate authority to prosecute to the prosecution service having jurisdiction over the more serious offence.⁴⁴ The Director of

⁴³ Courts have universally condemned pre-plea participation by the trial judge in charge of sentence negotiations: *R v Wood* (1975), 26 CCC (2d) 100, at 108 (ABCA); *R v Dubien* (1982), 67 CCC (2d) 341, at 346-47 (ONCA); *R v White* (1982), 39 Nfld and PEIR 196 (CA). Generally, see: GA Ferguson, “The Role of the Judge in Plea Bargaining” (1972-73) 15 Crim LQ 26; *Plea Discussions and Agreements* at 12-15, and Recommendation 4; Curran, “Discussions in the Judges Private Room,” [1991] Crim L Rev 79.

⁴⁴ The DPP may enter into agreements with her provincial or territorial counterparts respecting the delegation of authority to prosecute where an accused has been charged on the same information or indictment with federal and provincial/territorial offences. These are commonly referred to as “major-minor agreements.” Alternatively, CFPs may enter into similar agreements with their provincial or territorial counterparts at the

Public Prosecutions (DPP) may also delegate the prosecution of an offence when there is a conflict of interest.

When delegation occurs, the prosecution service that delegated the prosecution retains ultimate control over the prosecution. This means that the prosecution service who has taken delegation remains ultimately accountable to the delegating prosecution service.

Therefore, when the DPP⁴⁵ delegates authority to the province to prosecute a federal charge, the DPP retains the right to be informed of the matter and assume the conduct of the delegated matter if there is disagreement on how the matter should be handled. It is the usual practice for consultation between the prosecution services to continue as needed after the delegation. In practice, this ultimate accountability means that the delegating prosecution service should be consulted on resolution discussions if:

- They give rise to sustained, significant or anticipated media interest;
- There is potential for a negative judicial ruling or comment against a prosecutor personally or the PPSC generally;
- There is potential for a particular resolution agreement to generate significant public criticism;
- They involve a challenge to an investigative agency's policies, practices or enforcement powers; or
- A proposed resolution agreement would depart from this Guideline.

local level. These may take the form of local major-minor agreements signed between the CFP and their counterpart that delegate standing authority to prosecute certain "minor" offences from the other jurisdiction, or *ad hoc* arrangements in individual cases.

⁴⁵ Depending on the jurisdiction, the DPP may have delegated this authority to the CFP, DCFP, or a team leader.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

3.8 ALTERNATIVE MEASURES

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

June 3, 2024

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1. INTRODUCTION

The fundamental principle underlying the use of alternative measures¹ in s. 717 of the *Criminal Code* is that criminal proceedings should be used with restraint. This means that not everyone who is alleged to have committed an offence should be prosecuted. In appropriate cases, the public interest may be best served by resolution through alternative measures. Alternative measures provide an accused with an opportunity to have charges dealt with outside of the criminal process, if they accept personal responsibility and agree to make amends. This allows Crown counsel to take into account both the nature and circumstances of the offence, as well as the accused's personal circumstances.

Section 717 of the *Criminal Code* applies to all federal offences unless the federal statute creating the offence expressly provides otherwise.² Crown counsel must apprise themselves of the federal statutes that have their own alternative measures framework.³

Crown counsel must also be diligent in all decision-making activities to recognize existing personal conscious and unconscious biases, institutional biases, and stereotypes. Both becoming aware of these biases, and taking active steps to set them aside, are necessary to ensure that the decision whether to offer alternative measures does not perpetuate any form of systemic discrimination or racism.

¹ Section 716 of the *Criminal Code* defines alternative measures as measures other than judicial proceedings under the *Criminal Code* used to deal with a person who is 18 years of age or over and alleged to have committed an offence. The term "person" means both individuals and organizations given the definition of "organization" in s. 2 of the *Criminal Code* and "person" in s. 35 of the *Interpretation Act*. Extrajudicial measures for youth are governed by the *Youth Criminal Justice Act* and are addressed in Directive 5.4 "[Youth Criminal Justice](#)."

² *Interpretation Act*, RSC 1985, c I-21, s 34(2).

³ See for example the *Canadian Environmental Protection Act, 1999*, the *Species at Risk Act* and the *Fisheries Act*.

2. AUTHORIZATION OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Pursuant to section 717(1)(a) of the *Criminal Code*, alternative measures may only be used if it is part of a program of alternative measures authorized by the Attorney General or his lawful deputy, the Director of Public Prosecutions (DPP).⁴

The DPP authorizes Crown counsel to use any measures that are consistent with the principles and criteria contained in this Guideline.

Alternative measures do not need to be part of a formal or separate program.

The DPP authorizes the following alternative measures:

- Community service;
- Restitution or compensation in cash or services;
- Mediation;
- Referrals to specialized programs for counselling, treatment or education (e.g. life skills, drug or alcohol treatment, anger management), including those delivered by Indigenous counsellors, elders or community members;
- Referrals to community justice committees and Indigenous, or youth justice committees;
- Victim-accused reconciliation programs and similar measures aimed at restorative justice;
- A letter of apology; and
- Other reasonable alternatives or measures that are consistent with the objectives and criteria in this Guideline.

Crown counsel can also refer an accused to an appropriate alternative measure that is part of a program authorized by a province or territory in accordance with s. 717(1)(a) of the *Criminal Code*.⁵

⁴ See the definition of “Attorney General” under s. 2 of the *Criminal Code*, and s. 3(4) of the *Director of Public Prosecutions Act*, which states that the DPP is the Deputy Attorney General for the purpose of the duties and functions listed in s 3 (3) of the *Director of Public Prosecutions Act*.

⁵ Prosecutors searching for alternative measures programs offered in their community may consult the Department of Justice’s directory of restorative justice programs at the following address:
<https://www.justice.gc.ca/eng/cj-jp/rj-jr/sch-rch.aspx>

3. APPLICABLE PRINCIPLES AND CRITERIA

3.1 General principles

Crown counsel can consider alternative measures before or after charges are laid, and only if the decision to prosecute test is met.⁶ If the test is not met, Crown counsel must withdraw or stay the charges. For more on the decision to prosecute test, see Guideline 2.3, “[Decision to Prosecute](#).”

Section 717(1) of the *Criminal Code* sets out when alternative measures may be used. Section 717(2) specifies that alternative measures cannot be used if a person denies participation or involvement in the offence or expresses a wish to have the charge dealt with by the court.

Other federal legislation may set out specific requirements concerning alternative measures. For example, the *Controlled Drugs and Substances Act* (CDSA)⁷ creates an obligation on Crown counsel to consider alternative measures in prosecutions for possession of drugs for personal use. Section 10.3 of the CDSA states that prosecutions for possession of a controlled substance are only appropriate in light of the principles set out in s. 10.1. Crown counsel must also follow the direction in Guideline 5.13 “[Prosecution of Possession of Controlled Substances Contrary to s. 4\(1\) of the Controlled Drugs and Substances Act](#)”. This Guideline directs that alternatives to prosecution must be considered in all cases where possession for personal use is charged, unless they are inadequate to address the concerns related to the accused’s conduct.

Crown counsel should consider the use of alternative measures in cases where the following objectives are met:

- Instill a sense of accountability in the accused and a recognition of the damage done; and
- Promote public safety, deterrence, denunciation, rehabilitation and restitution to victims and the community while avoiding judicial proceedings, thus sparing the accused the consequences of a criminal conviction and a criminal record.

Crown counsel must assess whether the measures are appropriate in the circumstances. This assessment must take into account the legislative criteria, the nature and seriousness of the offence, and the background and systemic factors of the accused. Crown counsel must adopt a principled, consistent, fair, and flexible approach when making the initial assessment and implementing the alternative measures.

Crown counsel must also become familiar with the alternative measures that are available in the community where the prosecution is being conducted.

⁶ Law enforcement agencies may also use alternative measures by exercising their discretion not to charge and when appropriate, by referring accused to existing programs.

⁷ *Controlled Drugs and Substances Act*, SC 1996, c 19.

3.2 Legislative criteria

Crown counsel who are considering an alternative measure must be satisfied that the following legislative preconditions are met:

- The measure is authorized under s. 717(1)(a) of the *Criminal Code* and complies with s. 2 of this Guideline;
- The alternative measure is appropriate having regard to the needs of the accused, the interests of society, and the interests of the victim (s. 717(1)(b) of the *Criminal Code*);
- The accused consents to participate in the alternative measure fully and freely after being informed of the alternative measure and advised of their right to be represented by counsel (s. 717(1)(c) and (d) of the *Criminal Code*);
- The accused accepts responsibility for the offence charged (s. 717(1)(e) of the *Criminal Code*); and
- There is sufficient evidence to proceed with the prosecution, and the prosecution is not in any way barred by law (s. 717(1)(f) and (g) of the *Criminal Code*).

3.3 Background Systemic Factors of the Accused

Crown counsel must determine whether the measures are appropriate for the particular circumstances of the accused, taking into account the following factors:

- The overrepresentation of First Nations, Inuit, and Métis accused in the criminal justice system;
- The overrepresentation of Black persons and persons from other racialized or marginalized groups in the criminal justice system;
- Specific systemic or historical factors that may have contributed to bringing the accused to court;
- The accused's personal circumstances, including those that led to the commission of the offence and those that affect moral culpability. For example, mental health issues, substance use disorders, age, housing insecurity, racism, or racial inequities;
- The accused's expression of remorse, including fair restitution to victims;
- The potential for a restorative justice response to address the issues that led to the offence;
- Any rehabilitative measures the accused has undergone to avoid reoffending;
- The accused's prior criminal history. The fact that an accused has a criminal record or has previously benefitted from alternative measures does not preclude offering

alternative measures again. Crown counsel should consider all the circumstances surrounding the accused's criminal history;

- Any other criminal charges the accused is facing; and
- The risk the accused poses to the community.

3.4 The Nature of the Offence

As set out in the introduction of this Guideline, the law does not limit the types of offences that can be dealt with by alternative measures. Therefore, all offences are eligible for alternative measures.

At the same time, it is important to note that alternative measures are only appropriate if they are consistent with the protection of society and maintaining public confidence in the administration of justice. It is also important to recognize that alternative measures can enhance public safety and public confidence by addressing the underlying causes of the crime.

In assessing whether alternative measures are appropriate, Crown counsel must consider the following non-exhaustive factors that may be relevant in a particular case:

- The nature and seriousness of the offence;
- Any potential harm to the community, society, or victim (if there is one);
- Whether the harm caused requires the use of the criminal process or can be adequately addressed with an alternative measure;
- The prescribed sentence and the range of sentences for the offence, as established by the common law;
- The relevant sentencing principles and circumstances set forth in the *Criminal Code* and other federal statutes;⁸
- The views of law enforcement; and
- The degree of responsibility of the accused.

3.4.1 Consultation

Depending on the unique and particular circumstances of a case, Crown counsel must consider consultation with the following individuals before making an assessment about

⁸ See, for example, the *Antarctic Environmental Protection Act*, SC 2003, c 20; the *Canada National Marine Conservation Areas Act*, SC 2002, c 18; the *Canada National Parks Act*, SC 2000, c 32; the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33; the *International River Improvements Act*, RSC 1985, c 1-20; the *Saguenay-St. Lawrence Marine Park Act*, SC 1997, c 37; and the *Canada Consumer Product Safety Act*, SC 2010, c 21.

alternative measures:

- Chief Federal Prosecutor (CFP) or Deputy CFP: CFPs or DCFPs must approve the offering of alternative measures in cases where the offence is serious. For example, a serious crime is one that involves significant amounts of a harmful controlled substance, public safety issues, or violence. Crown counsel must determine whether an offence is serious based on the unique facts of each case.
- Victims: The *Canadian Victims Bill of Rights (CVBR)*⁹ gives victims the right to information upon request. Absent exceptional circumstances, Crown counsel should seek input from victims (where there is one)¹⁰ and keep them informed about their intention to use alternative measures.
- The community: Where reasonable and appropriate, Crown counsel may consult community leaders to determine whether an alternative measure is appropriate based on the interests of society and of the victim.
- Law enforcement agencies: Crown counsel should consult the organization concerned to consider the organization's objectives and relevant compliance policies which may include, for example, the protection of human health and the environment and sustainable management of natural resources.
- Defence counsel: Counsel for the accused may be in possession of relevant information that they are willing to provide in order for the Crown to make an assessment about alternative measures. They may also provide suggestions about the type of alternative measures that might be appropriate in the circumstances.
- Colleagues: Consultation with other Crown counsel helps to ensure different perspectives are considered.

4. IMPLEMENTATION OF ALTERNATIVE MEASURES

The completion of alternative measures may lead to the charges being withdrawn or stayed, or to a reduction of the sentence. Crown counsel should ask the court to note on the information that the charges have been withdrawn or stayed as a result of alternative measures.

Crown counsel must decide whether it is appropriate to request that the accused report back to the court in order for the charge to be withdrawn or stayed. If Crown counsel determines that reporting back is not required, the charge should be withdrawn or stayed and the Crown will not be required to monitor the completion of the alternative measures.

⁹ The *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2, ss 6 and 7.

¹⁰ The discussion with victims of crime is subject to certain statutory limitations. For example, where Crown counsel believes that discussions with a victim may endanger the life or safety of another person, Crown counsel can rely on s 20(d) of the CVBR to limit, delay or avoid such discussions.

Crown counsel should ensure that the release conditions of an accused who is participating in diversion are amended as necessary to allow for the full use of the process.

In cases where the accused does not complete the alternative measures within the prescribed time and is charged with a new offence, Crown counsel may consider reinstituting the charges that were dealt with by alternative measures. Crown counsel must consider the public interest before deciding to reinstitute charges and pay particular attention to any special circumstances that would make the prosecution unfair.

In all circumstances, Crown counsel must keep a detailed written record, and must also update the electronic file.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

3.9 WAIVER OF CHARGES

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

Revised March 25, 2022

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1. INTRODUCTION

Offences are normally tried in the judicial district where they are alleged to have been committed.¹ This guideline sets out the policy on when the Director of Public Prosecutions (DPP) will consent to waivers of charges (i) from one judicial territorial jurisdiction to another in the same province (“intra-provincial” waivers of charges pursuant to [s. 479](#) of the *Criminal Code* (Code)) and (ii) from one province to another (“inter-provincial” waivers pursuant to [s. 478\(3\)](#) of the Code).

2. STATEMENT OF POLICY

Both inter-provincial and intra-provincial waivers must meet the following requirements for consent from the DPP:

1. The offence must not be a [s. 469](#) of the Code offence;
2. The proceedings must have been instituted at the instance of the Government of Canada and conducted by or on its behalf;
3. The DPP, a Deputy DPP (DDPP), or the DPP’s delegate must consent to the waiver;² and

¹ See *Criminal Code*, RSC 1985, c C-46, [s 470](#), [478\(1\)](#).

² See the PPSC Deskbook guideline “[3.5 Delegated Decision-Making](#)” and the [Delegation to Prosecutors](#) regarding the delegation of the decision to consent to inter-provincial waivers to Chief Federal Prosecutors, Deputy Chief Federal Prosecutors and Team Leaders, and intra-provincial waivers to Crown counsel. Pursuant to [s 9\(1\) of the Director of Public Prosecutions Act](#), SC 2006, c 9, s 121 [DPP Act], the DPP may delegate this decision-making to Crown counsel. [Sections 478](#) and [479](#) of the Code specify that the “Attorney General” must consent to the transfer of charges. [Section 2](#) of the Code defines “Attorney General” as including their lawful deputy. [Section 3\(4\)](#) of the DPP Act specifies that the DPP is the Deputy Attorney General for the purposes of exercising the prosecution functions set out in [s 3\(3\)](#) of the DPP Act including the conduct of prosecutions. Subsection 6(3) of the DPP Act confirms that Deputy DPPs are also lawful deputies of the Attorney General and may exercise the powers, duties and functions referred to in s 3(3) of the DPP Act under the supervision of the DPP.

4. The accused must have agreed to plead guilty to the charge being waived.

Upon the request of the accused, together with a written undertaking to plead guilty, the DPP or their delegate will generally consent to a waiver of charges from one jurisdiction to another if the transfer of charges is in the public interest.³ The following considerations, among others, are relevant in assessing public interest:

1. Does the accused have substantial ties with the jurisdiction to which the charge would be waived (the “receiving” jurisdiction)?
2. Are the offences of such a nature that we should expect that the victim or members of the victim’s family may want to participate in or attend the sentencing hearing?
3. Would the waiver create inconveniences for the victim or members of the victim’s family to attend or participate in the sentencing hearing?
4. Are the sentencing practices and precedents in the receiving jurisdiction reasonably consistent with those of the jurisdiction from which the charge is to be waived (the “originating” jurisdiction)?
5. Is there a significant public interest in the case such that it ought to be disposed of in the community where the offence occurred?
6. Is a waiver likely to result in undue delay, or has undue delay already occurred?
7. Will splitting up proceedings cause undue complexity, for example where outstanding forfeiture hearings or other ancillary proceedings remain in the originating jurisdiction?
8. Is there a reasonable basis to believe that once the charge is waived the accused may withdraw the undertaking to plead guilty to the offence, thereby requiring the charge to be returned to the originating jurisdiction?
9. Despite the undertaking to plead guilty, are significant aggravating or mitigating facts likely to be at issue, thus requiring the Crown to call *viva voce* evidence from the originating jurisdiction under the rule in [R v Gardiner](#)?⁴

3. PROCEDURE

The following procedure should be followed for both intra-provincial and inter-provincial waivers. An accused requesting a waiver must deliver a signed Application for Waiver,⁵ to the appropriate Public Prosecution Service of Canada (PPSC) Regional Office,⁶ along with a written

³ *R v Fleming* (1992), 72 CCC (3d) 133 (Man QB): The Courts will not interfere with the Attorney General’s refusal to consent to a transfer unless it is arbitrarily exercised.

⁴ *R v Gardiner*, [1982] 2 SCR 368 at 413 ff; 68 CCC (2d) 477 at 513-16. See *Criminal Code*, *supra* note 1, [s 724\(3\)](#).

⁵ A sample waiver application is attached as Appendix “A”.

⁶ Note that accused persons who wish to transfer [Criminal Code](#) charges from a province to a territory must file their requests for waivers of the *Criminal Code* charges with the originating provincial Attorney General’s office or

undertaking to plead guilty in the receiving jurisdiction to the charge(s) for which waiver is sought. The Application for Waiver must state the following:

1. The full name of accused;
2. The current location of the accused;
3. A description of the offence and a copy of the relevant information(s), to make clear which charge(s) is the subject of the request;
4. The name of the originating and receiving judicial districts; and
5. The specific level of court to which the charge(s) is sought to be waived and the specific level of court from which the charge(s) is waived.⁷

If the waiver request is approved, Crown counsel must prepare a written Consent to the Transfer of Charges⁸ which must include the following:

1. A description of the offence, including the name of the substance if an illegal substance is involved;
2. The date and place where the offence is alleged to have occurred;
3. A reference to the accused's undertaking to plead guilty;
4. The name and current location of the accused; and
5. The signature of the Chief Federal Prosecutor (CFP), Deputy Chief Federal Prosecutor (DCFP), or Team Leader of the originating Regional Office for inter-provincial waivers, or the Crown counsel of the originating Regional Office for intra-provincial waivers.

In addition to the Consent to the Transfer, the Regional Office in the originating jurisdiction must transmit to the "receiving" court the following documents:

1. The original information/indictment sworn in respect of the offence(s);
2. A summary of the facts alleged in support of the charge(s);
3. A copy of the accused's criminal record (if any);
4. A copy of the accused's Application for Waiver;
5. A copy of the undertaking to plead guilty;
6. A copy of the Certificate of Analyst and the Notice of Intention, if the charge(s) is under the [*Controlled Drugs and Substances Act*](#) (CDSA) (if necessary); and

provincial prosecution service, rather than with a regional PPSC office. Waiver requests in respect of CDSA or other federal charges are processed through the originating PPSC offices.

⁷ Appendix "B" lists equivalent court levels for each province and territory.

⁸ A sample consent form is attached as Appendix "C".

7. A copy of the Notice to Seek Greater Punishment (if applicable) and other documents associated with impaired driving offences, if the charge(s) is under [s. 320.14\(1\)](#) of the Code.

To ensure that the receiving court receives the above documents, the Regional Office in the originating jurisdiction must:

1. Ask the clerk of the originating court to transfer the information/indictment to the receiving court;
2. Provide Crown counsel appearing in the receiving court with a prosecution brief including sufficient particulars about the offence to support the Crown's case and to enable the court to accept a plea of guilty;
3. Provide Crown counsel appearing in the receiving court with a copy of any correspondence or notes made by the counsel previously handling the file in respect of any agreement with defence counsel on sentencing submissions; and
4. Inform the investigating agency in the originating jurisdiction of the transfer.

The CFP, DCFP, or Team Leader in the originating jurisdiction, or the person the DPP has specifically delegated for this purpose, may consent to the waiver of charges on behalf of the DPP.⁹ Where the waiver request is refused, as a general rule, the Regional Office should provide written reasons to counsel for the accused, or to the accused personally if they have not retained counsel.

For an inter-provincial waiver of charges, the receiving Regional Office should advise the originating Regional Office of the date the accused pleaded guilty and the sentence imposed. Upon receiving this information, the originating office should advise the investigative agency.

In serious cases, the decision-maker should consider the interests of the victims before consenting to the transfer and Crown counsel should notify them in advance of the pending transfer.

Where the waiver of charges involves a provincial prosecution service, the process must respect the protocol adopted by the Federal/Provincial/Territorial Heads of Prosecution on transfer of charges (Appendix "D").

4. OUTSTANDING CHARGES IN DIFFERENT LOCATIONS

It is in the public interest for justice to be administered speedily and that all known charges against an accused be disposed of as early as possible. Whenever practicable, Crown counsel should ask the appropriate police authorities to verify whether an accused has any outstanding charges in other jurisdictions. Where Crown counsel knows that the accused is facing additional charges in another jurisdiction, they should advise defence counsel of the outstanding charges. In the case of

⁹ PPSC Deskbook guideline "[3.5 Delegated Decision-Making](#)" and the [Delegation to Prosecutors](#), *supra* note 2.

interprovincial charges, the accused may wish to take advantage of [s. 478\(3\)](#) of the Code.¹⁰ Where charges to which the accused has not submitted an Application for Waiver are identified, a remand may be necessary so that the accused can consider whether to amend the Application for Waiver to include consent to plead guilty to the additional charges.

Where the accused has outstanding charges in different locations within the same province, waiver may not be appropriate unless the accused agrees to waive all of the charges.¹¹

Crown counsel and defence counsel in the originating jurisdiction are to settle any factual disagreements with respect to the allegations underpinning the offence(s) to which the accused will plead guilty prior to transferring the file. Transfers should not require formal hearings on the facts in the receiving jurisdiction.

5. POST-WAIVER

Where the accused fails to appear in the receiving court or refuses to plead guilty, the Regional Office which authorized the waiver must arrange for the clerk of the receiving court to return the information to the originating court. The accused must then reappear before the originating court. If the accused fails to appear before the originating court, a warrant should be requested.

In the case of an inter-provincial waiver of charges, the receiving Regional Office or prosecuting agent may not reduce the charge to a lesser included offence without first consulting the originating Regional Office. The originating office should advise the receiving office in writing of any discussions with respect to sentencing that took place prior to the waiver; however, the originating office should not dictate a sentence recommendation to the receiving office.¹²

Where an accused who has consented to the waiver of charge to another jurisdiction “refuses to admit the factual allegations” underlying the offence, the indictment should be returned to the province where the offence was committed.¹³

¹⁰ *R v Parisien* (1971), 3 CCC (2d) 433 (BCCA).

¹¹ A partial waiver will not be refused solely on the basis that an accused intends to contest some aspect of their outstanding charges. However, the accused should not be allowed to benefit from a partial waiver where they are in violation of a court appearance order in another jurisdiction.

¹² *R v Lister* 2003 BCCA CanLII 269, 175 CCC (3d) 528 at paras 11-13: The sentencing judge in the receiving jurisdiction cannot entirely ignore cases decided in similar circumstances in the originating jurisdiction. That sentencing judge should give substantial consideration to joint submissions made by counsel where a charge is being waived by consent for disposition from one province to another. However, the sentencing judge is not bound to accept a joint submission from the originating jurisdiction and ultimately must decide what is an appropriate sentence. See also *R v Shaw* 2005 BCCA 380 CanLII, 199 CCC (3d) 93 at paras 11-12. “...upholding a sentence that deviates significantly from the approach in British Columbia runs the risk of allowing the Crown to drive too hard a bargain for the waiver of jurisdiction.”

¹³ *R v Hirt* (1997), 34 WCB (2d) 441 (BCSC).

APPENDIX A – APPLICATION FOR WAIVER OF CHARGES

APPLICATION FOR WAIVER OF CHARGES

UNDER [[SECTION 478\(3\)](#) or [SECTION 479](#)] OF THE *CRIMINAL CODE*
DATE

I, [name of accused] hereby advise that I am in custody in [institution, city, province or territory] (or I presently reside at [street, city, province or territory]). I wish to avail myself of the provisions of [section 478(3) or section 479] of the [Criminal Code](#) in respect of the following outstanding charge(s) against me:

[list charge(s) with full particulars as to date, place, etc.]

I wish to have the above charges transferred to [level of court, name of the receiving judicial district] from [level of court, name of the originating judicial district] in order that I may plead guilty to the charge(s) in accordance with [section 478(3) or section 479] of the [Criminal Code](#).

(Applicant's signature)

APPENDIX B – EQUIVALENT COURT OF EACH PROVINCE AND TERRITORY

EQUIVALENT COURT OF EACH PROVINCE AND TERRITORY

Province/ Territory	Provincial Court	Superior Court	Youth Court
Alberta	Provincial Court (Criminal Division)	Court of Queen's Bench	Provincial Court (Family and Youth Division)
British Columbia	Provincial Court	Supreme Court	Youth Court
Manitoba	Provincial Court	Court of Queen's Bench	Provincial Court (Youth Court)
New Brunswick	Provincial Court	Court of Queen's Bench	Provincial Court (Youth Court)
Newfoundland and Labrador	Provincial Court	Supreme Court, Trial Division	Provincial Court (Youth Court)
Nova Scotia	Provincial Court	Supreme Court	Provincial Court (Family Division)
Ontario	Court of Justice	Superior Court of Justice	Youth Court
Prince Edward Island	Provincial Court	Supreme Court Trial Division	Youth Court
Quebec	Court of Quebec (Criminal and Penal Division)	Superior Court	Court of Quebec (Youth Division)
Saskatchewan	Provincial Court	Court of Queen's Bench	Youth Court
Yukon Territory	Territorial Court	Supreme Court	Youth Court
Northwest Territories	Territorial Court	Supreme Court	Youth Court
Nunavut	Court of Justice	Court of Justice	Court of Justice (Youth Court)

APPENDIX C – CONSENT TO THE TRANSFER OF CHARGES

I have been informed by [name of defence counsel] that [name of accused] has been charged with the following offence[s] in the _____ [name of province or territory]

[list charge(s) with full particulars as to date, place, etc.]

I have further been informed that [name of accused] is [incarcerated/resides] at [location] and desires, in accordance with [section 478\(3\)](#) or [section 479](#) of the *Criminal Code*, to transfer this charge[s] to [level of court, city, province or territory] from [level of court, city, province or territory] in order to plead guilty to the charge[s];

I consent to [name of accused] appearing before a Judge in [level of court, city, province] to signify [his/her/their] consent to plead guilty and to plead guilty to the charge[s].

DATED at the City of _____ in the Province of /or Territory of _____, this ____ day of _____, ____.

[Signature and title of CFP, DCFP, Team Leader or Crown counsel]

APPENDIX D – F/P/T PROTOCOL ON THE INTER-PROVINCIAL TRANSFER OF CRIMINAL CHARGES

This protocol addresses the definition of responsibilities and accountability between transferring and recipient provinces, territories, and the PPSC under [s. 478](#) of the *Criminal Code* (of the Code).

(a) Statement of Principle

It is understood that an originating jurisdiction, in agreeing to transfer of a charge to another, is effectively waiving control over that charge, subject to the provisions of this protocol.

(b) Reduction/Withdrawal of Charges

Reduction of charges or withdrawal of multiple counts should be delineated by the originating jurisdiction prior to transfer. The receiving jurisdiction should consult with the originating jurisdiction regarding any proposed reduction or withdrawal of a transferred charge.

(c) Sentencing Representations to the Court

While the receiving jurisdiction will take into consideration any recommendations as to sentence offered by the originating jurisdiction, the position to be taken on sentencing will be determined by the receiving jurisdiction [in accordance with the sentencing regime of the receiving jurisdiction]. The Crown in the originating jurisdiction should communicate to defence counsel and unrepresented applicants for transfers in the originating jurisdiction that any recommendation on sentence agreed to before transfer will not be binding in the receiving jurisdiction.

(d) The Decision to Appeal

The decision to appeal a sentence rests with the receiving jurisdiction. That jurisdiction may seek input from the originating jurisdiction in this regard, but shall be guided by the principles and ranges, as established by that jurisdiction's appellate courts.

(e) Limitation on Transfer Requests

Generally, only one request for the transfer of charges between jurisdictions will be considered, subject to any exceptional circumstances which may exist. This should be communicated to applicants for transfer by the originating jurisdiction.

(f) Victims/Victim Impact Statements

In considering whether to transfer a charge, the originating jurisdiction must consider the interests of the victim, as well as the offender. Should the Crown in the originating jurisdiction receive an indication from the victim that he/she wishes to participate in person in the sentencing proceeding, this position should be considered prior to transferring the criminal charge. Where a charge is transferred, Victim Impact Statements which have been prepared will be provided in separate

sealed envelopes to the receiving jurisdiction along with the charges and other related documentation.

Where the matter is sensitive and has significant public interest and concern, the originating jurisdiction should advise victims that the matter is being waived and that the ultimate control over the filing of Victim Impact Statements will be subject to the policies and practices of Crown counsel in the receiving jurisdiction. Victims in these circumstances will be provided a telephone number or other contact means to reach the Crown in the receiving jurisdiction in order to express their concerns about the filing of victim impact information. Otherwise, the filing of victim impact information should be at the discretion of the receiving Crown, with the benefit of recommendations from the originating jurisdiction but based on the receiving jurisdiction's policies and practices.

(g) Documentation

All receiving jurisdictions will attempt to provide certified copies of sentencing documentation to the originating jurisdiction.

(h) Determination of the Facts

Crown counsel in the originating jurisdiction should ensure that a summary of the facts is included in the documentation transferred to the receiving jurisdiction. Save in exceptional circumstances, Crown counsel in the receiving jurisdiction, in making representations to a Court, should not vary from the facts as determined by the Crown in the originating jurisdiction. This protocol does not provide for witnesses to travel from the originating jurisdiction to the receiving jurisdiction to establish the facts. Where it is proposed to vary from the facts as submitted by the originating jurisdiction, Crown Counsel in the receiving jurisdiction is encouraged to contact the Crown in the originating jurisdiction. A dispute as to the facts which cannot be resolved by Crown counsel in the receiving jurisdiction will result in the return of the file to the original jurisdiction for its attention.

(i) Charges under the [Controlled Drugs and Substances Act](#) (CDSA)

Where these matters fall within the prosecutorial responsibility of the Director of Public Prosecutions, on behalf of the Attorney General of Canada, prosecutors or standing agents engaged by the PPSC will generally conduct such transferred proceedings in the receiving jurisdiction, unless the PPSC opts to request the involvement of a provincial prosecution service.

(j) Administration

All jurisdictions are encouraged to have one office to coordinate transfers to and from that jurisdiction. In any jurisdiction where this is not feasible, that jurisdiction will provide all jurisdictions with a list of those individuals within that prosecution service who are responsible for transfer of criminal charges.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

3.10 ELECTIONS AND RE-ELECTIONS

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

Revised March 25, 2022

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1. INTRODUCTION

This guideline is designed to direct Crown counsel in the following exercises of prosecutorial discretion:

- Deciding whether to proceed summarily or by indictment in “hybrid” (“dual procedure”) offences;
- Consenting to re-election by an accused; and
- Requiring a trial by a judge and jury under [s. 568](#) of the *Criminal Code* (Code).

Like any exercise of prosecutorial discretion, decisions regarding elections and re-elections must be made in accordance with Crown counsel’s duty to be fair.¹ Such decisions must not be, and must not appear to be, an attempt by the prosecutor to achieve an unfair tactical advantage.

While the Crown is not legally required to give reasons for its elections or its refusal to consent to an accused’s intended re-election, the need to maintain public confidence in the administration of justice may necessitate in some circumstances the giving of reasons. For example, Crown counsel should consider providing an explanation for a particular decision regarding elections and re-elections where the basis is not self-evident and it is reasonably foreseeable that the lack of an explanation would lead the court or members of the public to draw conclusions that attribute erroneous and improper motives to the Crown’s exercise of prosecutorial discretion.² Prior to giving reasons in respect of these decisions, Crown counsel must consult with and seek prior

¹ See the PPSC Deskbook guideline “[2.2 Duties and Responsibilities of Crown Counsel](#)”. For example, Crown counsel’s election decision should not be made for the sole purpose of prohibiting access to conditional sentences under [s 742.1\(f\)](#) of the Code. See also *R v De Zen*, [2010] OJ No 601 (ONSCJ).

² *Ibid* at paras 35–36. See also [R v Gill, 2012 ONCA 607](#) at para 77.

approval of their Chief Federal Prosecutor (CFP) or the CFP's designate. Additionally, Crown counsel should note in the prosecution file the particular factor(s) which influenced their decision.

2. CROWN ELECTIONS IN HYBRID OFFENCES

In hybrid offences, Crown counsel has the discretion to proceed by summary conviction or indictment.³ This discretion allows Crown counsel the flexibility of taking the specific circumstances of a case into account to ensure that the interests of justice, including the public's interest in the effective and efficient enforcement of the criminal law, are best served.

2.1 Statement of policy

Crown counsel should generally elect whether to proceed summarily or by indictment on a hybrid offence before the accused is asked to enter a plea on the charge(s).

When deciding whether to proceed summarily or by indictment,⁴ Crown counsel must examine the circumstances surrounding the offence and the background of the accused. Factors that are of particular importance include whether:

1. The facts alleged make the offence a relatively serious one, for example when:
 - a. The offence caused death or serious bodily harm;
 - b. The offence involves a large number of victims or a large financial loss;
 - c. An innocent third party suffered significant losses because of the actions of the accused or by innocently acting on the advice of the accused;
 - d. The accused, or someone on the accused's behalf, attempted to tamper with important evidence or witnesses; or
 - e. The accused used intimidation to coerce others to assist in or acquiesce in the offence.
2. The accused has a lengthy criminal record or a record of criminal convictions for similar types of offences.

³ For a discussion of the nature of hybrid offences, see [R v Dudley 2009 SCC 58](#), [2009] 3 SCR 570 [*Dudley*]; see generally [R v Smythe, \[1971\] SCR 680](#), (1971), 3 CCC (2d) 366, which held that the discretion given by law to the Attorney General to prosecute by way of summary conviction or on indictment is not discriminatory or contrary to the principles of equality under the [Canadian Bill of Rights](#); [R v Century 21 Ramos Realty \(1987\)](#), 32 CCC (3d) 353 (Ont CA), holding that the authority of Crown counsel to elect the mode of procedure in hybrid offences is not contrary to the [Charter of Rights and Freedoms](#); [R v V.T., \[1992\] 1 SCR 749](#), (1992), 71 CCC (3d) 32 which confirmed [R v Smythe](#)

⁴ Before the Crown elects, a hybrid offence is treated as an indictable offence, pursuant to [s 34\(1\)\(a\)](#) of the *Interpretation Act*, RSC 1985, c I-21. See also [Dudley](#), *supra* note 3 at paras 18, 20. Where the Crown fails to elect the mode of procedure for a hybrid offence and the case proceeds in summary conviction court, the Crown is deemed to have elected to proceed on a summary conviction basis: see E. Ewaschuk, *Criminal Pleadings and Practice in Canada*, 2d ed, Aurora (Ontario: Canada Law Book, 2010) at s 7:2070.

3. In the event of a conviction, the range of sentences at the summary conviction level could adequately address the purpose and principles of sentencing in respect of the particular offender and offence.⁵
4. Having to testify at both a preliminary inquiry and a trial may have an effect on witnesses.⁶
5. The offence is prevalent in the community and requires deterrence.
6. The accused is alleged to be a member of a criminal organization as defined in [s. 467.1\(1\)](#) of the Code.
7. The accused holds themselves out as a member or sympathizer of a criminal organization or of an organization that uses physical violence or intimidation, or wears symbols associated with a criminal organization.
8. It is in the public interest to have a trial by jury.

Where an accused is charged with a number of offences arising out of the same transaction, Crown counsel should also consider making elections that avoid a multiplicity of proceedings. Such a course may benefit the accused, by reducing their court appearances, as well as serve the interests of the administration of justice. This approach will be beneficial not only at the trial level, but also in the event of an appeal.

2.2 Crown re-elections

Where the Crown initially elects to proceed by indictment, Crown counsel normally may re-elect to proceed summarily without the accused's consent, unless the preliminary inquiry or trial has begun.⁷ Crown re-elections may be used, for example, in respect of guilty plea agreements. The factors set out in the previous paragraph apply in respect of re-elections.

2.3 Proceeding summarily or by indictment beyond the six-month limitation period

A summary conviction court has jurisdiction, with the consent of both the Crown and defence counsel, pursuant to [s. 786\(2\)](#) of the Code, over time-limited summary conviction proceedings.⁸ Absent consent, it does not. Where the Crown elects to proceed summarily beyond the statutory

⁵ Note, however, that imposition of the maximum sentence for a summary conviction offence does not require the "worst offence" having been committed in the "worst circumstances". See [R v LM, 2008 SCC 31, \[2008\] 2 SCR 163](#) at paras 18–22.

⁶ If the procedure by indictment is chosen, this may lead to the preferring of a direct indictment or resort to [s 540\(7\)](#) of the Code where the complainant's evidence is considered credible and trustworthy. See the PPSC Deskbook guideline "[3.6 Direct Indictments](#)" and the PPSC Deskbook directive "[5.6 Victims of Crime](#)".

⁷ [R v Sheehan, 2010 NLTD 167 \(CanLII\)](#) at paras 10–16, citing *Abarca v R*, (1980) 57 CCC (2d) 410, (ONCA) at para 17, *R v Graetz*, 2007 QCCS 309 at paras 16–17, [R v Linton, \[1994\], 90 CCC \(3d\) 528, 18 OR \(3d\) 647 \(Gen Div\)](#).

⁸ See [s 786](#) of the Code. For a discussion of the governing principles where a hybrid offence is prosecuted by way of summary conviction beyond the six-month limitation period, see [Dudley](#), *supra* note 3 at paras 2, 24, 29. For example, where an information contains both indictable and straight summary conviction offences, defence counsel may want to avoid an indictable trial and may thus consent to a Crown election to proceed summarily in respect of statute-barred offences.

limitation period, the prosecutor and the defendant must both declare expressly on the record — again, before plea — that they agree to proceed summarily.⁹

The failure of the accused to consent to the prosecution of a hybrid offence by way of summary conviction beyond the limitation period is fatal to the validity of the Crown's election and to the proceedings that ensued.¹⁰ However, the information remains valid, and the Crown may still proceed by indictment, unless "the evidence discloses an abuse of process arising from improper Crown motive, or resulting prejudice to the accused sufficient to violate the community's sense of fair play and decency".¹¹ In some circumstances, the Crown's election may be impugned as an abuse of process if it appears that it was made solely to circumvent a limitation period.¹²

Where, having considered the factors set out in section 2.1 of this guideline, Crown counsel would normally elect to proceed summarily but the limitation period for a summary proceeding has expired and the accused has refused to give consent to have the matter proceed by summary conviction, Crown counsel generally should not elect to proceed by indictment unless:

1. The particular circumstances of the offence did not come to light until shortly before or at some time after the limitation period expired;
2. The accused contributed significantly to the delay;
3. The investigative agency acted with due diligence but the investigation continued beyond the limitation period because of the complexity of the case; or
4. Not proceeding would bring the administration of justice into disrepute.

3. RE-ELECTIONS BY AN ACCUSED

Where the accused is charged with an indictable offence other than those listed in [s. 469](#) or [s. 553](#) of the Code, the accused is permitted to elect their mode of trial (*i.e.*, trial by a provincial or territorial court judge, trial by judge alone or trial by judge and jury). After the initial election, the accused may seek to change the mode of trial by re-electing in accordance with the provisions of

⁹ [Dudley](#), *supra* note 3 at para 19.

¹⁰ *Ibid* at paras 42–44. Prior to [Dudley](#), there was a large and divided body of case law considering the Crown's right to "re-elect" on the original information to proceed by indictment after first electing to proceed summarily; See e.g. [Dudley](#), *supra* note 3 citing *Re Abarca and The Queen*, (1980) 57 CCC (2d) 410 (ONCA) at para 17; [R v Jans](#), (1990), 59 CCC (3d) 398 (Alta CA) [*Jans*]; [R v Burke](#), (1992), 78 CCC (3d) 163 (Nfld CA); [R v Kalkhorany](#), (1994), 89 CCC (3d) 184 (Ont CA); [R v Boutilier](#), (1995), 104 CCC (3d) 327 (NSCA) [*Boutilier*]; See also *R v Phelps*, (1993), 79 CCC (3d) 550 (ONCA).

¹¹ [Dudley](#), *supra* note 3 at para 44.

¹² There are a number of decisions in the area, with each turning on its particular facts; See e.g. [Dudley](#), *supra* note 3 at para 5; [R v Smith](#), 210 NSR (2d) 234; 170 CCC (3d) 315, [R v Quinn](#) (1989), 54 CCC (3d) 157 (Que CA); [Boutilier](#), *supra* note 10 (the first information was laid within the six month limitation period, but charged the wrong offence. On those facts the court was satisfied the second information was an abuse of process and that a stay was the appropriate remedy); *R v Belair* (1988), 41 CCC (3d) 329 (ONCA); [Jans](#), *supra* note 10.

[s. 561](#) or [s. 561.1](#) of the Code (for Nunavut).¹³ In most cases, these re-elections are authorized only with the Crown's consent.

The [Criminal Code](#) provisions authorizing re-election by the accused require that written notice be given to the Crown. They also require the Crown's consent be given in writing. However, ss. 561 and 561.1 of the Code are otherwise silent about the criteria or manner in which Crown prosecutors exercise the discretion to consent or withhold consent to the intended re-election.

This guideline applies to the re-elections described in [ss. 473](#), 561 and 561.1 of the Code that require the consent of Crown counsel, the CFP or the Director of Public Prosecutions (DPP). More specifically, these include re-elections:

1. From judge alone or judge and jury to provincial court judge (ss. 561(1)(a) and (c) of the Code);
2. From provincial court judge to judge alone or judge and jury (s. 561(2) of the Code);
3. From judge and jury to judge alone for offences listed in s. 469 (s. 473 of the Code);
4. To another mode of trial in the Nunavut Court of Justice (ss. 561.1(1) and (3) of the Code).

3.1 Statement of Policy

While the decision to consent or to refuse to consent to a re-election must be made on a case-by-case basis, Crown counsel should generally consent to a timely request for re-election made by an accused or counsel for the accused. The following factors are important in deciding whether to consent. In some instances, one of them may be decisive:

1. The timing of the request for re-election;¹⁴
2. The impact of a re-election on the orderly administration of justice;¹⁵
3. The reasons for the re-election;¹⁶
4. The delay that may result from the proposed re-election and whether this delay could lead to a violation of [s. 11\(b\)](#) of the *Canadian Charter of Rights and Freedoms*;

¹³ [Section 473](#) of the Code is specific to the offences listed in [s. 469](#) (e.g. murder) and allows for a trial without a jury when both the accused and Attorney General consent.

¹⁴ For example, Crown counsel should ask: How soon after the time limit was the request made? Was the request made before a particular trial judge was assigned?

¹⁵ Tardy re-elections may be harmful to the administration of justice for various practical reasons including jury selection proceedings, summons of potential jurors, inconveniencing witnesses, and Crown counsel trial preparation.

¹⁶ For example, the Supreme Court of Canada affirmed the impropriety in trying to influence the outcome of a proceeding by trying to "select" the judge (i.e. "judge-shopping") in [R v Regan, 2002 1 SCR 297](#) at para 60. See also [R v Ng \(2003\), 173 CCC \(3d\) 349, 12 CR \(6th\) 1, \[2003\] 11 WWR 429 \(ABCA\)](#): "Within the constraints of the fair trial process, the defense is entitled to press its case, as is the Crown. However, when the defense re-election to judge alone is firmly tethered to knowing the identity of the trial judge, this belies the assertion that it is the mode of trial which is of primary concern. In these circumstances, it clearly is not. Instead, the choice of mode of trial is being used as a means to maneuver the criminal justice system. If the accused considers the particular assigned judge a better option than the jury, then, and only then, does the preferred mode of trial become judge alone. But a right to select mode of trial, where one exists, is not tied to knowing the name of the trial judge. Indeed, the statutory framework under the [Criminal Code](#) is designed to ensure that the final choice of mode of trial is made before the name of the trial judge is disclosed, failing which Crown consent is required."

5. Any previous re-election by the accused in the same case;
6. The inconvenience caused by a re-election on the court, including prospective jurors and witnesses;
7. The complexity of the legal issues; and
8. The public interest in having a trial by jury.

It should be borne in mind that the interests of the accused and those of the Attorney General are not the same when considering re-election as to mode of trial. The accused is entitled to base their decision to re-elect on purely tactical considerations. Crown counsel's exercise of discretion cannot be for tactical reasons. It must instead take into account a much broader range of interests, including legal, practical and ethical interests.

Absent Crown misconduct amounting to an abuse of process (arbitrary, capricious or improper considerations), the court has no jurisdiction to override the Crown's exercise of discretion not to consent.¹⁷

4. DECISION TO REQUIRE TRIAL BY JUDGE AND JURY

4.1 Statement of Policy

Under [s. 568](#) of the Code,¹⁸ the DPP¹⁹ may require an accused to be tried by a court composed of a judge and jury, even if the accused has previously elected or re-elected otherwise. The alleged offence must be punishable by more than five years' imprisonment.

A requirement to be tried by judge and jury under [s. 568](#) of the Code will be directed only when it is in the public interest to do so. Requiring a trial by judge and jury may be warranted where:

1. Someone who is normally involved in the administration of justice, such as a police officer, lawyer, or judge, is charged with a serious offence. It is important in those cases to ensure that the public has, and continues to have, confidence in the criminal justice system;
2. Community standards are in issue, or where the accused's guilt or innocence is of particular public importance; and
3. Jointly charged accused select different modes of trial, and the provincial court judge chooses not to exercise the power in [s. 567](#) of the Code to decline to record the non-jury elections.

¹⁷ See e.g. [R v Ng \(2003\), 173 CCC \(3d\) 349, 12 CR \(6th\) 1, \[2003\] 11 WWR 429 \(ABCA\)](#) at para 33 "The basis for a court to probe into prosecutorial discretion, therefore, arises in the limited case of an abuse of the court's process where the prosecutor's misconduct threatens either the accused's [Charter](#) right to a fair trial or the public interest in a fair and just trial process."

¹⁸ In *Re Haneson v The Queen* (1987), 31 CCC (3d) 560 (ONHC), it was held that this section is not contrary to the [Canadian Charter of Rights and Freedoms](#).

¹⁹ The DPP makes the decision under and on behalf of the Attorney General of Canada. See the PPSC Deskbook guideline "[3.5 Delegated Decision-Making](#)", as well as the [Delegation to Prosecutors](#), the [Delegation to Paralegals](#) and the [Delegation to Articling Students](#).

In all instances the decision to proceed under s. 568 of the Code must be made personally by the DPP, on the advice of a Deputy Director of Public Prosecutions (DDPP) and the CFP.

4.2 Procedure

In cases where a prosecutor seeks the DPP's approval under [s. 568](#) of the Code, the prosecutor should generally provide notice to the accused or their counsel. The prosecutor should also present their request for approval to the DPP at the earliest stage of the proceeding possible.

To request the DPP's approval under [s. 568](#) of the Code, the prosecutor must:

1. Inform their Chief Federal Prosecutor (CFP) or Deputy Chief Federal Prosecutor (DCFP) of the potential request for approval.
2. Prepare a memorandum containing:
 - a. A concise statement of facts showing that there is a reasonable prospect of conviction and that the public interest is best served by a prosecution. If multiple accused are to be charged, the memorandum must demonstrate that there is sufficient evidence to implicate each accused individually. The statement of facts must also include:
 - i. The name of the accused;
 - ii. Their citizenship, if the accused is not a Canadian;
 - iii. A list of the charges sought against the accused;
 - iv. A summary of the evidence;
 - v. A historical or procedural record of the case;
 - vi. Any representation made by defence counsel in response to being notified that a decision under [s. 568](#) of the Code was being sought; and
 - vii. The date by which a decision under [s. 568](#) of the Code is required.
 - b. An analysis explaining:
 - i. The strengths and weaknesses of the case;
 - ii. Any significant legal issues expected to be encountered and any issues of particular importance to the public interest;
 - iii. The reasons why a trial by a judge and jury would be in the public interest; and
 - iv. The factors set out in this guideline, including a reasoned and objective assessment of the factors weighing both for and against requiring a trial by judge and jury.
 - c. A copy of the approved prosecution plan, if any.
 - d. An annex containing an indictment containing all charges for which requirement for a trial by a judge and jury is requested, with the following appearing at the end:

I hereby require the above-named accused to be tried by a court composed of a judge and jury pursuant to section 568 of the *Criminal Code*.

Dated at Ottawa, Ontario, this _____ day of _____, _____.

Director of Public Prosecutions and Deputy Attorney General of Canada

3. Provide this memorandum to the CFP or DCFP.

The CFP or the DCFP will:

1. Inform the appropriate Deputy Director of Public Prosecutions (DDPP) of the intention to seek the DPP's approval under [s. 568](#) of the Code.
2. Review the memorandum prepared by the prosecutor and, if they are satisfied that the factors are met and that requiring a trial by a judge and jury pursuant to [s. 568](#) of the Code is appropriate, endorse the memorandum and send it to the DDPP.

The DDPP will:

1. Review the memorandum and conduct an objective assessment of the request. In this role, the DDPP exercises a challenge function.
2. Advise the CFP or DCFP that no recommendation will be made to the DPP, if the DDPP concludes that requiring a trial by a judge and jury pursuant to [s. 568](#) of the Code is not appropriate in the circumstances.
3. Endorse the recommendation and send it to the DPP, if the DDPP concludes that requiring a trial by a judge and jury pursuant to [s. 568](#) of the Code is appropriate.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

3.11 INFORMER PRIVILEGE

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

March 1, 2014

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1. INTRODUCTION

This guideline sets out the policy on protecting the identity of informers in prosecutions (“informer privilege”).

2. THE IMPORTANCE OF THE PRIVILEGE

Informer privilege is one of longstanding existence. The modern statement of the privilege dates back to the 19th century English case of *Marks v Beyfus*.¹ In *R v Leipert*² the Supreme Court of Canada stressed the significance of the rule in the following terms:

A court considering this issue must begin from the proposition that informer privilege is an ancient and hallowed protection which plays a vital role in law enforcement. It is premised on the duty of all citizens to aid in enforcing the law. The discharge of this duty carries with it the risk of retribution from those involved in crime. The rule of informer privilege was developed to protect citizens who assist in law enforcement and to encourage others to do the same.³

¹ *Marks v Beyfus* (1890), 25 QBD 494.

² [1997] 1 SCR 281 [*Leipert*]; see also *Bisaillon v Keable*, [1983] 2 SCR 60 [*Bisaillon*] and *R v Scott*, [1990] 3 SCR 979 [*Scott*].

³ *Leipert*, *ibid* at para 9.

In summary, informer privilege is of such importance that it cannot be balanced against other interests. Once established, neither the police nor the court possesses discretion to abridge it.⁴

The policy reasons that underlie this broad and powerful privilege are two-fold: to protect persons who give information related to criminal matters in confidence to the police from possible retribution and to encourage future potential informers to do the same.

The common law imposes a duty on the police, the Crown and the courts to protect informer privilege.⁵ By virtue of the rationale underlying the privilege, police officers, prosecutors and judges cannot weigh, on a case-by-case basis, either the maintenance or the scope of the privilege depending on what risks the informer might face.⁶ While a judge is determining whether the privilege applies, all caution must be taken on the assumption that it does apply.⁷ Once a judge is satisfied that the privilege exists, a complete and total bar on any disclosure of the informer's identity applies.⁸ The non-discretionary nature of the privilege explains why the rule is referred to as "absolute."⁹

3. THE NATURE OF THE PRIVILEGE

Informer privilege is a class privilege. In [R v National Post](#), the Supreme Court of Canada explained the significant features of a class privilege as follows:¹⁰

"At common law, privilege is classified as either relating to a class (e.g. solicitor and client privilege) or established on a case-by-case basis. In a class privilege what is important is not so much the content of the particular communication as it is the protection of the type of relationship. Once the relevant relationship is established between the confiding party and the party in whom the confidence is placed, privilege presumptively cloaks in confidentiality matters properly within its scope without regard to the particulars of the situation. Class privilege necessarily operates in derogation of the judicial search for truth and is insensitive to the facts of the particular case. Anything less than this blanket confidentiality, the cases hold, would fail to provide the necessary assurance to the solicitor's client or the police informant to do the job required by the administration of justice."
[underlining added]

⁴ [Ibid](#) at para 14.

⁵ [R v Barros](#), [2011] 3 SCR 368 at para 37 [*Barros*].

⁶ [Named Person v Vancouver Sun](#), [2007] 3 SCR 253 at para 22 [*Named Person*]; [R v Basi](#), [2009] 3 SCR at 389 [*Basi*].

⁷ [Named Person](#), *ibid* at para 47; [Basi](#), *ibid* at para 44.

⁸ [Named Person](#), *ibid* at para 30.

⁹ [Ibid](#) at para 23.

¹⁰ [2010] 1 SCR 477 at para 42.

4. STATEMENT OF POLICY

Crown counsel has a duty to protect the identity of informers.¹¹ Where the privilege applies, unless there is some other evidentiary basis to make an objection, Crown counsel must object to disclosure of information tending to reveal an informer's identity or status as an informer.

Crown counsel should discuss with the investigative agency whether any informer privilege issues are anticipated to arise in a proceeding. Informer issues not only may arise during court proceedings, but also may affect pre-trial disclosure obligations.

Early discussions with investigators will also be beneficial in that counsel can learn the extent of any risk to the informer if disclosure is ordered by the court, determine whether it may be necessary to have a certificate prepared under [s. 37](#) of the *Canada Evidence Act*,¹² or gather other evidence to support the Crown's objection.¹³

Informer privilege may be invoked under the common law or by relying on s. 37 of the *Canada Evidence Act*.¹⁴ Generally, Crown counsel should advance their objection on the basis of the common law rule first. It is only where a judge has dismissed Crown counsel's common law objection and privileged information tending to reveal the identity of an informer is to be released to an accused that the Crown should invoke s. 37 of the *Canada Evidence Act*.¹⁵ When s. 37 is used the strictness of the informer privilege rule is not relaxed.¹⁶

Sometimes courts may, contrary to the position taken by the Crown, order the informer's identity revealed or order the informer to appear. Crown counsel has a number of options which may vary depending on the facts of the case and the level of court at which the issue arises:

- a) Disclose the information in question in compliance with the judge's ruling but only after fully informed waiver has been provided by both the informer and the Crown, and counsel has determined that it is in the public interest to do so. Before disclosing, counsel must consult with the police to determine if the informer is likely to be subject to retribution if the judge's ruling is followed and, if so, whether the police can provide protection.

¹¹ [Barros](#), *supra* note 5; see also [Leipert](#), *supra* note 2 at para 10; [R v Stinchcombe](#), [1991] 3 SCR 326, 68 CCC (3d) 1 at 14 [*Stinchcombe*].

¹² RSC 1985, c C-5.

¹³ See the PPSC Deskbook directive "[4.1 Protecting Confidential Information under Section 37 of the Canada Evidence Act](#)."

¹⁴ *Supra* note 12.

¹⁵ *Ibid.*

¹⁶ [Basi](#), *supra* note 6 at para 23.

Where disclosure is not feasible, Crown counsel may elect one of the following options;

- b) invoke [s. 37](#) of the *Canada Evidence Act*.¹⁷ Crown counsel can assert this claim personally.¹⁸ However, it is preferable for a senior police officer to do so, as occurred in *R v Archer*;¹⁹
- c) inform the court that counsel declines to comply with the ruling and offer no evidence, as in *R v Leipert*.²⁰ The resulting acquittal can be appealed;
- d) inform the court that counsel declines to comply with the ruling to disclose and invite the court to enter a judicial stay of proceedings, as in *R v Creswell*.²¹ Also, counsel may stay the proceedings under [s. 579](#) of the *Criminal Code* where none of the foregoing options is feasible; in exceptional circumstances, counsel may stay and re-commence proceedings, as in *R v Scott*.²² The Supreme Court of Canada found that this procedure was justifiable in the unusual circumstances of the case, but it is clearly an extraordinary recourse and should be used only in compelling situations. Counsel considering this option must first consult with the Chief Federal Prosecutor (CFP), who, in turn, may wish to consult with the appropriate Headquarters officials.

5. OPERATION OF THE PRIVILEGE

Informer privilege is a non-discretionary rule which binds the police, Crown and members of the judiciary.

Crown counsel cannot waive the privilege without the consent of the informer. Once it is established that the privilege exists, the court is bound to apply the rule.²³ Even if Crown counsel does not assert the rule, the court must apply it of its own motion.²⁴

6. SCOPE OF THE PRIVILEGE

Informer privilege is “extremely broad” in its application.²⁵ It applies to both documentary evidence and oral testimony; and in both criminal and civil proceedings.²⁶ It

¹⁷ *Supra* note 12.

¹⁸ *R v Meuckon* (1990), 57 CCC (3d) 193 (BCCA).

¹⁹ (1989), 47 CCC (3d) 567 (Alta CA); see also *supra* note 12.

²⁰ *Leipert*, *supra* note 2.

²¹ (2000) BCCA 583.

²² *Scott*, *supra* note 2.

²³ *Named Person*, *supra* note 6 at para 23.

²⁴ *Bisaillon*, *supra* note 2 at 93.

²⁵ *Named Person*, *supra* note 6 at para 26.

²⁶ *Ibid.*

is not limited to the courtroom:²⁷ it also protects against revelation of the informer's identity in public.²⁸

The privilege protects not only the informer's name but also any information that might tend to reveal the identity of the informer.²⁹ Because the identification of informers can be revealed by seemingly innocuous pieces of information, scrupulous care must be taken in protecting from disclosure any information that may disclose their identity.³⁰ This includes information that tends to narrow the pool of people who have the same characteristics or identifiers as the informer.³¹ Thus, Crown counsel must object to questions which narrow the field of possible informers in a way that may disclose indirectly the informer's identity.

7. INNOCENCE AT STAKE IS THE ONLY EXCEPTION

The only exception to informer privilege is innocence at stake: In [Leipert, Named Person](#) and [Basi](#), the Supreme Court of Canada confirmed that the only real exception to informer privilege is “when the innocence of the accused is demonstrably at stake.”³² The Court also held that no exception exists for full answer and defence or for disclosure under [Stinchcombe](#).³³ All other purported exceptions were held to be either applications of the innocence at stake exception or examples of situations where the privilege does not apply.³⁴

When the innocence at stake is alleged, the procedure mandated by [R v McClure](#)³⁵ must be followed. [McClure](#) comprises a threshold test and a two-stage innocence at stake test. To satisfy the threshold test, the accused must establish that (1) the information is not available from any other source, and (2) he or she is otherwise unable to raise a reasonable doubt. In [R v Brown](#)³⁶ the Supreme Court stated that the second component of the threshold test was intended to carefully screen requests for access to information that may reveal the identity of an informer. Access is allowed only when (1) the accused has shown that he has no other defence, and (2) the requested information would make a positive difference in the strength of the defence case. If the threshold test is met, the judge must proceed to the following two stages:

²⁷ [Barros](#), *supra* note 5 at para 30.

²⁸ [Bisaillon](#), *supra* note 2.

²⁹ [Ibid.](#)

³⁰ R W Hubbard, S Magotiaux, & S M Duncan, *The Law of Privilege in Canada*, (loose-leaf) at 2.4.

³¹ [R v Omar](#), 2007 ONCA 117 at para 40.

³² [Basi](#), *supra* note 6 at para 37.

³³ [Stinchcombe](#), *supra* note 11.

³⁴ [Named Person](#), *supra* note 6 at para 29.

³⁵ [2001] 1 SCR 445, 2001 SCC 14.

³⁶ [2002] 2 SCR 185, 2002 SCC 32 at para 55.

- Stage 1 – The accused must demonstrate an evidentiary basis to conclude that information exists that could raise a reasonable doubt as to his guilt; and
- Stage 2 – If the stage 1 test is met, the judge should examine the information to determine whether in fact it is likely to raise a reasonable doubt as to his guilt.

In each instance, an accused must show “some basis” to believe his or her innocence is at stake. If that basis is shown, the court should “only reveal as much information as is essential to allow proof of innocence.”³⁷

8. SITUATIONS WHERE THE PRIVILEGE MIGHT NOT APPLY

There are situations where informer privilege does not apply, where the information-provider is a police agent or agent provocateur, when the privilege has been waived, or where a person provides information to the police in the absence of a promise or guarantee of confidentiality, either express or implied.³⁸ In these situations, the information-provider does not have (or, in the case of waiver, no longer has) informer status.

a) Distinguishing Agents from Informers

One of the most difficult problems in this area is determining when the privilege applies to the actions of persons cooperating with the police. Informer privilege does not apply when the information-provider is characterized as a “police agent” or “agent provocateur,” rather than an “informer.”

A helpful explanation of the distinction between informers and agents is found in the Ontario Court of Appeal’s decision in *R v Babes*:³⁹

In general terms, the distinction between an informer and an agent is that an informer merely furnishes information to the police and an agent acts on the direction of the police and goes “into the field” to participate in the illegal transaction in some way. The identity of an informer is protected by a strong privilege and, accordingly, is not disclosable, subject to the innocence at stake exception. The identity of an agent is disclosable.

Generally speaking, passive observers to criminal activities will be considered informers. In contrast, individuals who participate in the criminal activities under investigation as a result of being directed by the police will generally be considered police agents or *agents provocateurs*. A person may

³⁷ [Leipert](#), *supra* note 2 at para 33.

³⁸ [Barros](#) *supra* note 5 at para 31, [R v Named Person B, 2013 SCC 9](#) at para 18.

³⁹ (2002), 146 CCC (3d) 465 at para 10.

have dual status as a confidential informer and police agent in relation to separate investigations or targets.⁴⁰

b) Waiver of Informer Privilege

The privilege belongs jointly to the Crown and the informer. Neither can waive it without the consent of the other.⁴¹ There is no basis for a deemed or implicit waiver of the privilege. To be operative, consent to waive must be clear, express and informed.⁴² Inadvertent disclosure of an informer's identity does not result in waiver or loss of the privilege.⁴³

c) Where Information is Provided in the Absence of a Promise or Guarantee of Confidentiality

Not everybody who provides information to the police thereby becomes a confidential informant. There must be a promise of protection and confidentiality. However, the promise need not be express and may be implicit in the circumstances: [Barros](#), at para 31, [R v Named Person B, 2013 SCC 9](#), at para 18. An implicit promise of informer privilege may arise even if the police did not intend to confer the status or consider the person an informer, so long as the police conduct in all the circumstances could have created reasonable expectations of confidentiality.

In [Basi](#), Fish J. referred to the privilege arising in situations “where a police officer, in the course of an investigation, guarantees protection and confidentiality to a prospective informer in exchange for useful information”.⁴⁴ This passage in [Basi](#) was relied on by the Ontario Court of Justice in [R v Kaboni](#)⁴⁵ where a 911 caller provided information to the police regarding a suspected impaired driver. Only later did she request anonymity. The judge held that the 911 caller did not have the status of an informer because she was never promised or guaranteed confidentiality by the police in

⁴⁰ *Ibid* at paras 29-34. During the course of a wiretap investigation, a person who the Crown claimed to be an informer purchased contraband, using his own money, from individuals unrelated to the wiretap investigation. The police did not direct him to do so nor did they know that he was going to do what he did. The Court of Appeal agreed with the Crown that this activity in the field in respect to an unrelated investigation did not cause the informer to lose his status as such. An informer cannot, by his own actions, i.e., without any direction by the police, make himself a police agent.

⁴¹ [Basi](#), *supra* note 6 at para 40; [Leipert](#), *supra* note 2 at para 15.

⁴² [R v Schertzer, 2008 CanLII 1952 \(ON SC\)](#); [R v Sandham, 2008 CanLII 84098 \(ON SC\)](#).

⁴³ [R v Hazelwood, \[2000\] OJ No 459 \(SCJ\)](#) at paras 18-26; [R v Nicholson, \[2001\] BCJ No 2239 \(SC\)](#) at paras 15-16; [R v Hirschbaltz, 2004 SKQB 17](#) at paras 26-27; [R v Poncellet, \[2005\] SJ No 756 \(Sask QB\)](#) at para 16; [R v Santos, \[2007\] OJ No 5235 \(ONCJ\)](#) at para 16; [R v Beauchamp, \[2008\] OJ No 2647 \(SCJ\)](#) at para 24; A W Bryant, S N Lederman, M K Fuerst, *The Law of Evidence in Canada* (Markham: LexisNexis, 2009) at 1079.

⁴⁴ [Basi](#), *supra* note 6 at para 36.

⁴⁵ 2010 ONCJ 91 (CanLII).

return for her information. See also *R v Chui*⁴⁶ where the court similarly rejected the notion that a person had the status of an informer where there was nothing in the facts to suggest that the information had been provided in confidence. [*Kaboni*](#) and *Chui* illustrate unsuccessful attempts by the police to retroactively confer informer status on persons lacking that status at the time they provided police with a statement or other information.

Since the relationship between the police and the informer/agent is crucial to the determination of the person's status, it is essential that Crown counsel obtain a full understanding of the nature of that relationship from the police. Counsel should discuss the matter with the CFP, or another experienced practitioner.

⁴⁶ 2005 BCSC 353.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

3.12 JURY SELECTION

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

March 1, 2014

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1. BACKGROUND

This guideline outlines the type of information that counsel may request from the police and other justice system participants with respect to prospective jurors and the ensuing disclosure obligations. These inquiries represent the maximum requests that counsel are permitted to make and should not be made, if such inquiries are conducted already by other justice system participants (e.g., sheriffs) or if it does not accord with the practices in counsel's jurisdiction.

2. SUGGESTED APPROACH

Counsel may request that the police conduct Canadian Police Information Centre (CPIC) and provincial/territorial data base system checks only for the purpose of confirming whether or not the juror has:

- 1) a conviction for which he/she was sentenced to a term of imprisonment exceeding 12 months¹ for which a pardon has not been received, as referred to in [s. 638\(1\)\(c\)](#) of the *Criminal Code*; or
- 2) a conviction that disqualifies them under the [Juror's Act](#) in the province or territory in which the trial will take place.

The request should be made in writing and should be specific.

Counsel will not seek out any additional information about the jurors unless so ordered or authorized by the court.

Counsel will not search or seek to have searched iCase for information about jurors.

All information sought and obtained will be disclosed to defence.

If by chance, other information does come to the knowledge of counsel, then this information must be disclosed to defence.

Any disclosure of information shall not include privileged information.

¹A sentence of imprisonment exceeding 12 months includes a conditional sentence.

This guideline applies in all cases except where specific jurisdictional Rules of Court, Court Orders or Court Practice Directives provide otherwise.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

3.13 RELEASE OF EXHIBITS FOR TESTING OR EXAMINATION

**GUIDELINE OF THE DIRECTOR ISSUED UNDER
SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC
PROSECUTIONS ACT***

March 1, 2014

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1. INTRODUCTION

This guideline sets out the procedure for the release of exhibits¹ for testing or examination pursuant to [s. 605](#) of the *Criminal Code*.² Crown counsel are also bound by the applicable criminal proceedings rules of the court in their particular jurisdiction.

Section 605 enables an accused to access original items seized for the purposes of testing or scientific analysis. The purpose of s. 605 is to enable the accused to properly prepare or present a defence.

The s. 605 power is discretionary. In order for a court to order release of an exhibit, an accused must provide a factual foundation demonstrating that there is an “air of reality”³

¹ “Exhibits” refers to items seized that have been filed with a court and does not refer to exhibits that have been seized by the police but that are still in the possession of the investigators.

² Under [s. 605](#) of the *Criminal Code*, either Crown counsel or the accused may request the release of an exhibit for testing:

605 (1) A judge of a superior court of criminal jurisdiction or a court of criminal jurisdiction may, on summary application on behalf of the accused or the prosecutor, as the case may be, order the release of any exhibit for the purpose of a scientific or other test or examination, subject to such terms as appear to be necessary or desirable to ensure the safeguarding of the exhibit and its preservation for use at the trial.

(2) Everyone who fails to comply with the terms of an order made under subsection (1) is guilty of contempt of court and may be dealt with summarily by the judge or provincial court judge who made the order or before whom the trial of the accused takes place.

to the examination sought. The examination sought must have a “meaningful capacity” to advance any available defence.⁴ The request must be reasonable in the sense that it must be founded on something more than mere speculation.⁵ It must relate to a live issue.⁶ “Fishing expeditions” are not permitted.

2. CROWN CONSENT TO DEFENCE REQUESTS FOR RELEASE OF EXHIBITS

Crown counsel may consent in writing to a defence application for the release of exhibits for testing except in the following situations:

- where the analysis by the government analyst is not yet completed;
- where the proposed analysis will unduly delay the trial;
- where the application is brought for an improper purpose;
- where the application clearly amounts to a “fishing expedition”; or
- where there is a reasonable basis to believe that the independent analyst proposed by the defence is not competent to conduct the analysis.

3. CONDITIONS FOR SECURITY, CUSTODY, AND CONTINUITY OF POSSESSION

Crown counsel should request that the judge impose conditions pursuant to [s. 605\(1\)](#) that adequately safeguard the security, custody, and continuity of possession of the exhibit.⁷ Accordingly, Crown counsel should seek to have the following terms included in the order:

- the name of the person who will have custody of the exhibit;
- the means by which the integrity of the exhibit will be safeguarded. This is especially important if the proposed testing is to take place outside of Canada;
- the time and place of the analysis or the length of notice to be given to Crown counsel regarding the time and place; and

³ See [R v Gauthier 2013 SCC 32](#) at para 60 where the Court affirmed the test of “air of reality” in the context of putting a defence to the jury, previously stated in [R v Cinous, 2002 SCC 29](#), [2002] 2 SCR 3. The Court reiterated that “it is not enough to simply identify “some evidence” or “any evidence”; the evidence must be “reasonably capable of supporting the inferences required for the defence to succeed”.

⁴ *R v Rhab* (1985), 21 CCC (3d) 97, cited in [R v W.C.S., 2000 CanLII 28292 \(NS SC\)](#), [R v Hodgson, 1990 CanLII 2106 \(BC CA\)](#); [R c Lawson 2009 QCCQ 7738](#) at paras 23-25 [*Lawson*].

⁵ [R v Eagles, 1989 CanLII 205 \(NS CA\)](#), (1989), 47 CCC (3d) 129 at 136.

⁶ [Lawson](#), *supra* note 4 at para 24.

⁷ *Re Klassen and The Queen* (1976), 31 CCC (2d) 235 (Sask QB).

- the names of the persons entitled to be present during the analysis including the person designated by the Crown.

Additionally, Crown counsel may request that the judge permit analysis of only a portion of an exhibit such as a drug exhibit or a water sample.

4. PROCESS FOR MAKING AN APPLICATION

The application must be made to a judge of a superior court of criminal jurisdiction or to a judge of a court of criminal jurisdiction in accordance with the applicable court's criminal proceedings rules.⁸ A justice presiding over a preliminary inquiry is not competent to make an order under [s. 605](#).⁹

An application under s. 605 can be made in connection with *Criminal Code* charges or charges under any other act of Parliament, unless the other act contains a complete and exclusive procedure dealing with exhibits in criminal proceedings.¹⁰

5. DRUG EXHIBITS

An applicant may apply to re-analyze a drug exhibit in order to show that the intended analysis can be characterized as quantitatively or qualitatively different from the one initially carried out by the Crown. One example is where the second analysis is designed to assess the purity of the drug exhibit.

Given the nature of drug exhibits, Crown counsel should carefully review the background and professional qualifications of the independent analyst to ensure that the analyst is competent to re-analyze the exhibit.

Wherever possible, only a portion of a drug exhibit should be given to the independent analyst. A sufficient quantity of the drug should be retained in the event that further analysis is ordered by the court on application by the Crown or the accused. Crown counsel should therefore request that the order make provision for the analysis of a part of the drug exhibit only.

⁸ Note as well that [s 683](#) of the *Criminal Code* governs the power of the appellate courts to permit the production of new evidence which could include a scientific analysis.

⁹ [Doyle v The Queen, \[1977\] 1 SCR 597, \(1976\), 29 CCC \(2d\) 177](#), *R v Walsh* (1981), 59 CCC (2d) 554 (Ont Prov Ct).

¹⁰ For example, [s 50](#) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 does not set out a complete and exclusive procedure for drug exhibits in criminal proceedings. Accordingly, [s 605](#) applies to drug exhibits. See *R v Bryers and Mueller* (1975), 28 CCC (2D) 466 at 468 (Ont Gen Sess Peace).

A court order authorizing an analyst named in the order to do an independent analysis should be regarded as authorizing the analyst to possess the drug lawfully for the analysis.¹¹

The presence of an official designated by the Crown during the independent analysis may be warranted, where feasible, to ensure continuity of possession of the exhibit.

The result of the independent analysis may differ from the result of the analysis conducted by the government analyst. If the independent analyst testifies in court, a government analyst should be present in court to assist Crown counsel. This can be arranged through Health Canada.

6. EXHIBITS IN THE POSSESSION OF INVESTIGATORS THAT HAVE NOT BEEN FILED IN COURT

Defence counsel may want to have independent tests done on items that are not deemed to be “exhibits” that have not been filed in court, but that are in the custody of a law enforcement agency (such as handwriting samples, tape recordings, bodily fluids, blood, and computer hardware).

These items may be released for testing in accordance with the [Stinchcombe](#) disclosure principles.¹²

7. REQUESTS BY CROWN COUNSEL FOR THE RELEASE OF EXHIBITS FOR TESTING

Crown counsel should comply with the normal rules of criminal practice in the province or territory regarding application for release of exhibits for testing. Wherever possible, the initiating documents should be accompanied by a supporting affidavit setting out the basis for the application.

¹¹ *Re R v Vales* (1979), 46 CCC (2d) 269 (Ont HC).

¹² See also the pre-[Stinchcombe](#) decision in *R v Savion and Mizrahi*, (1980) 52 CCC (2d) 276 (ON CA).



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

3.14 TESTIMONY OF POLICE OFFICERS AND POLICE CIVILIAN AGENTS

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

December 22, 2016

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1. BACKGROUND

In the prosecution setting, it is the role of the prosecutor to decide which witnesses to call and of the courts to assess the credibility and reliability of the witnesses and determine the weight to be given to their testimony. This guideline provides guidance on the steps prosecutors should take when they become aware that a police officer¹ or a civilian police agent (“police witness”) may give, or has given, sworn evidence, either in the form of an affidavit or as testimony before a court (collectively referred to as “testimony”) that is not credible or is unreliable.²

Credibility is a complex matter. Crown counsel must be mindful that all witnesses including police witnesses may have different opportunities to observe an incident and differing perspectives and may therefore honestly provide inconsistent testimony.

Reliability has to do with the accuracy of a witness’ testimony and may include consideration of a witness’ ability to observe, recall or recount the issue. A Court may reject a police witness’ testimony in whole or in part, or make a finding which is inconsistent with the witness’ testimony without necessarily finding that the witness was dishonest in his or her testimony.

Crown counsel must remain aware that they are not the trier of fact and must not by their decisions prevent the trier of fact from making determinations as to the credibility or reliability of witnesses without a compelling basis.

¹ This guideline also applies to investigators who are not police officers.

² Crown counsel who have concerns regarding statements to be made or made under oath, but which do not rise to the level described in this guideline, should discuss them with their team leader.

These guidelines are based on the principles found in the jurisprudence respecting the role of Crown counsel, the rules of professional conduct governing counsel, and the policies contained in the PPSC Deskbook.

2. BEFORE TENDERING A STATEMENT UNDER OATH (AN AFFIDAVIT OR TESTIMONY)

In determining which witnesses to call, Crown counsel must respect the obligations relating to the conduct of a prosecution. These obligations include ensuring that appropriate disclosure has been made to the accused of any information that relates to the credibility or reliability of a witness. In relation to police officers, these obligations were outlined by the Supreme Court of Canada in *R v McNeil*. Crown counsel must not call as a witness someone, including a police witness, who they reasonably believe, based on compelling information, will mislead the court with their testimony on matters that are material to the proof of the essential elements of the offence and without which the Crown could not satisfy the trier of fact beyond a reasonable doubt.

3. DURING TRIAL

3.1. Misleading or false evidence inadvertently given under oath

Where Crown counsel has a compelling basis for believing that misleading or inaccurate testimony has inadvertently been given by a police witness, Crown counsel must inform the defence counsel and the Court that the Crown does not rely upon the testimony to prove its case. This relates to cases of a serious error/mistake and cases of unacceptable negligence.

Crown counsel must bring the testimony to the attention of their supervisor or manager, in writing.³ If the manager considers that the concern is well-founded, then the manager must bring it to the attention of the appropriate Officer in Charge (OIC) or the OIC's superior, to assess how such a situation can be avoided in the future.

3.2. Misleading or false testimony intentionally given under oath

Where a court makes a finding or where it can be reasonably inferred from judicial comments that misleading or inaccurate evidence has been intentionally given by a police witness, Crown counsel must bring it to the attention of their supervisor or manager in writing⁴ so that the matter will be referred to the police for possible investigation. If Crown counsel otherwise has a compelling basis for believing that inaccurate testimony has been intentionally given by a police witness, they must bring it to the attention of

³ Transcripts of the testimony must be ordered, but the notice to the Crown counsel's manager or supervisor should not await the transcript.

⁴ *Ibid.*

their supervisor or manager, and they must notify defence and the court. For example, where a police officer had testified at trial that the voluntary statement evidence he was giving the court were the exact words of the defendant. In fact, the police officer later indicated that he had reconstructed his notes. In this situation, Crown counsel must inform the team leader, Deputy Chief Federal Prosecutor or Chief Federal Prosecutor and defence counsel and put the witness back on the stand to explain himself.

3.3. Discrimination

Where a court makes a finding or where it can be reasonably inferred from judicial comments that investigative steps were undertaken by the police witness based, in whole or part, on the race, national or ethnic origin, colour, religion, sex, sexual orientation, political associations, activities or beliefs of the accused or any other person involved in the investigation, Crown counsel must bring it to the attention of their supervisor or manager in writing so that the matter will be referred to the police for possible investigation. The supervisor or manager may determine that a review of the other files in relation to which the police witness may be involved is appropriate.

3.4. The assessment of whether the test for continuing a prosecution is met: reasonable prospect of conviction.

In all instances of misleading or inaccurate statements made under oath, Crown counsel must assess the impact of the testimony upon the overall reliability or credibility of the police witness and whether the threshold test for prosecuting continues to exist.

4. AFTER TRIAL

The same steps must be taken where Crown counsel is put on notice by the findings of a court that the court considers that a police witness has given misleading or inaccurate testimony or where the Crown counsel has a compelling basis for believing that it has occurred.

In cases where the findings of the court admit of ambiguity as to whether the testimony was intentionally misleading or inaccurate as opposed to the court simply determining that it will not accept the evidence of the police witness, Crown counsel should consult with their supervisor and manager.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

3.15 APPEALS AND INTERVENTIONS IN THE PROVINCIAL AND TERRITORIAL SUPERIOR COURTS AND COURTS OF APPEAL

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

Revised March 25, 2022

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1. INTRODUCTION

This guideline sets out the factors that must be considered in deciding whether to appeal an acquittal or sentence¹. It also identifies who should make the decision to appeal on behalf of the Crown and the process for deciding.

2. THE DECISION TO APPEAL AGAINST AN ACQUITTAL

The authority to appeal in criminal proceedings comes entirely from statute. Common law appeals against conviction or acquittal do not exist.² In Canada, even accused persons had no effective right of appeal until 1923. In 1930, an amendment to the *Criminal Code* (Code) permitted Crown appeals against a “question of law alone”. While the basis for Crown appeals has since been further defined in the Code, essentially the Crown is still limited to raising legal, not factual, issues.

At the foundation of criminal law lies the cardinal principle that no person shall be placed in jeopardy twice for the same matter and the reasons underlying that principle are grounded in deep social instincts. This principle is reflected in s. 11(h) of the *Canadian Charter of Rights and Freedoms* (Charter). However, s. 11(h) does not preclude the Crown’s right of appeal as the words “finally acquitted” in s. 11(h) have been interpreted to mean after the appellate procedures provided in the Code have been completed.³

¹ A separate guideline exists for appeals and interventions in the Supreme Court of Canada; see PPSC Deskbook guideline “[3.16 Supreme Court of Canada Litigation](#)”.

² *R v Meltzer*, [1989] 1 SCR 1764 [Meltzer]; *R v Robinson* (1990), 51 CCC (3d) 452 at 463 (AB CA) [Robinson].

³ *R v Morgentaler Smoling and Scott*, [1988] SCR 30 at 155-156.

Over the past 60 years, the courts have signalled the need to show restraint in exercising the right to appeal. Only cases where the public interest is best served by pursuing should be appealed.

2.1. The Crown's right of appeal from acquittal is limited

In indictable matters, the Crown's right of appeal against an acquittal is found in s. 676(1)(a), which provides:

676. (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal

(a) against a judgment or verdict of acquittal or a verdict of not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone.

This is a much narrower right of appeal than that conferred upon a convicted person, who may appeal against conviction on any ground of appeal that involves a question of law alone or, with leave of the court of appeal, on any ground of appeal that involves a question of fact or mixed fact and law, or any ground of appeal that appears to the court of appeal to be a sufficient ground of appeal (s. 675(1)(a) of the Code). On an accused's appeal against conviction the court may allow the appeal if it concludes that the verdict of guilty was unreasonable, if the trial judge made an error of law (e.g. in an evidentiary ruling, or in the charge to the jury),⁴ or if there was a miscarriage of justice (s. 686(1) of the Code).

By contrast, the restriction on the Crown's right of appeal to a question of law alone means that the Crown cannot just complain about the verdict, or argue that the trier of fact rendered an unreasonable acquittal.⁵ Justice Lamer (as he then was) explained as follows in *Rousseau*:⁶

The trial judge considered that the accused's guilt was not established beyond a reasonable doubt. I have read the evidence and I believe that he did not, in so concluding, commit an error of law. Indeed, this is an appeal by the Crown from an acquittal, covered by s. 605(1)(a) of the Criminal Code, which limits the appeal to grounds "that involve [...] a question of law alone". For the doubt entertained by the judge to amount to an error of law it must be the result of conjecture and have no basis whatever in the evidence. [Emphasis added]

⁴ Subject to the verdict-preserving "curative provisos" in *Criminal Code*, ss 676(1)(b)(iii) and (iv).

⁵ *R v Schuldt*, [1985] 2 SCR 592.

⁶ *Rousseau v The Queen*, [1985] 2 SCR 38 at 42.

In addition to satisfying the court of appeal that a pure error of law led to the wrong outcome, the Crown must also show that “the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal”.⁷

2.2. No appeal from an interlocutory ruling

There is no right of appeal to a provincial or territorial court of appeal from an interlocutory order or pre-trial ruling.⁸ Appeals are from verdicts. If there is no acquittal (or a judicially entered stay of proceedings, which for appeal purposes is the same as an acquittal),⁹ the Crown has no right of appeal.

Where the trial judge has made a pre-trial ruling that for all practical purposes ends the prosecution, for example, a decision to exclude critical evidence under s. 24(2) of the *Charter*, or a disclosure order with which the Crown cannot comply because it would breach informer privilege, the prosecutor may simply invite an acquittal or a judicial stay, and consider an appeal on the basis of an error of law in the impugned ruling. However, where the impact of the ruling is not so decisive, the prosecutor should continue the prosecution and await the verdict, as otherwise the prosecutor’s decision to invite an acquittal in order to trigger a right of appeal may be seen as an abuse of process.¹⁰

2.3. The public interest

Not every unfavourable ruling or error in law should be appealed. Neither the judiciary nor the Crown has the resources to review every judgment that might be wrong. Still, the public expects and is entitled to a criminal justice system that is applied consistently and is effective in the suppression of crime.

Where the dual thresholds for a Crown appeal against acquittal are met – (1) error of law, (2) that in the concrete reality of the case materially contributed to the acquittal – the Crown will consider whether the public interest is best served by appealing the acquittal.

Factors which may be considered when deciding whether the public interest is best served by an appeal include the following:

1. Is the issue raised by the case of widespread importance for the effective enforcement of the criminal law, or is its impact confined largely to the immediate case?

⁷ *R v Graveline*, 2006 SCC 16 at para 14.

⁸ *Meltzer*, *supra* note 2.

⁹ *R v Jewitt*, [1985] 2 SCR 128. A judicial stay would result e.g. from the Crown’s inability to comply with a disclosure order on grounds of protecting informer privilege.

¹⁰ *R v Power*, [1994] 1 SCR 601; *United States v Fafalios*, 2012 ONCA 365.

2. Does the seriousness of the offence or the circumstances of the offender demand a reconsideration of the case?
3. Have courts differed in interpreting the issue raised?
4. Could the trial decision impair the enforcement or administration of a significant government policy initiative (for instance, confiscating the proceeds of crime, reducing domestic violence) if left unchallenged?
5. Will the resources required to prepare and present the appeal significantly outweigh the value of pursuing the case further?¹¹
6. Would the trial decision or decision to present an appeal have an impact on systemic racism, systemic discrimination, or the overrepresentation of certain groups in the criminal justice system, such as Indigenous accused and victims?

The application of and weight to be given to these and other relevant factors will depend on the circumstances of each case.

A decision whether to appeal must not be influenced by any of the following:

1. The race, national or ethnic origin, colour, religion, sex, sexual orientation, political associations, activities or beliefs of the accused or any other person involved in the case, unless these factors are considered in the analysis of the decision's impact on systemic racism, systemic discrimination, or the overrepresentation of certain groups in the criminal justice system;
2. Crown counsel's personal feelings about the accused, the victim, or the trier of fact;
3. Possible political advantage or disadvantage to the government, special interest group or political party; or
4. The possible effect of the decision on the personal or professional circumstances of those responsible for making the decision to appeal.

3. THE DECISION TO APPEAL AGAINST A SENTENCE

An appeal against a sentence¹² need not be grounded in an error of law (s. 687 of the Code). However, the standard of review – error in principle, or a sentence that is manifestly unfit – nonetheless invites a court of appeal to give considerable deference to the sentencing judge and the Crown should not lightly initiate an appeal against the sentence.

¹¹ On the use of judicial resources, see *Borowski v Attorney General of Canada*, [1989] 1 SCR 342, (1989), 47 CCC (3d) 1 at 14-15; *Robinson*, *supra* note 2; but see the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”.

¹² A sentence may include a number of ancillary orders: *Criminal Code*, s 673.

It may be in the public interest to appeal where the trial judge erred in interpreting or applying a statutory provision or principle concerning the sentence, or where the sentence is clearly below the accepted range of sentences, not merely at the low end of the range, or where the sentence may set a negative precedent.

The Crown must also consider how long it will take to appeal, and whether by then the offender will have served his or her sentence and deserves reincarceration.

4. INITIATING AN APPEAL: THE PROCEDURE

In general, the decision to initiate an appeal to a court of appeal is made by the Chief Federal Prosecutor (CFP) while the decision to initiate an appeal to the superior court can be made by the CFP or the Deputy Chief Federal Prosecutor (DCFP). This decision is made upon the written recommendation of Crown counsel with carriage of the prosecution at trial or, where the trial was conducted by an agent, of the agent supervisor. The CFP or DCFP will consult with the applicable regional litigation committee, and where appropriate the National Litigation Committee, before deciding.

Crown counsel may sometimes need to file a “protective” notice of appeal before consultations are completed and a final decision is taken about proceeding with the appeal. Protective notices should be the exception, not the rule, since counsel are obliged to bring significant adverse decisions to the attention of their superiors so that appropriate and timely action can be taken. Counsel should ensure that a final decision is made as soon after filing the notice as is reasonably practicable.

Finally, Crown counsel, including a legal agent, must not announce that an appeal will or will not be initiated until the decision has been made by the appropriate authority.

4.1. Conceding appeals

The Crown is much more frequently the respondent than the appellant on criminal appeals. On rare occasions, appellate counsel may be placed in a situation in which an error of law committed by the trial court is so clear, or the findings of fact so patently unreasonable, that it may raise the possibility that the appeal ought to be conceded. This may arise, for example, in a case where a decision by the Supreme Court of Canada subsequent to the trial but prior to the appeal completely undermines the basis for conviction.

The decision to concede an appeal or to concede on a particular issue¹³ within the appeal is never one that can be taken lightly. As a general rule, Crown counsel’s duty is to advance all reasonable arguments that may be made to support the decision of the court below, and to leave it to the appellate court to decide whether to allow the appeal.¹⁴

¹³ The Supreme Court has been highly critical of concessions by Crown counsel that it felt should not have been made: see *Schachter v The Queen*, [1992] 2 SCR 679, and *Miron v Trudel et al*, [1995] 2 SCR 418 at 485-486.

¹⁴ Bearing in mind that many legal errors may be regarded as causing an accused no substantial wrong or prejudice: see *Criminal Code*, s 686(1)(b)(iii) and 686(1)(b)(iv).

Generally speaking, it is within the discretion of appellate counsel to concede on a particular issue in an appeal without conceding the appeal itself, where there is no reasonable argument to be made on that issue. Where that issue concerns the constitutional validity of federal legislation, however, instructions must be sought from the Office of the Director of Public Prosecutions (DPP), normally upon the advice of the National Litigation Committee. Where the issue concerns the constitutional validity of provincial legislation, consultation with the appropriate Attorney General's office is in order.

Appellate counsel may also be called upon to exercise a discretion with respect to the admission of fresh evidence on appeal. The admission of such evidence is governed by the well-known four-part test consistently used by the Supreme Court.¹⁵ Counsel may well choose to consent to the admission of such evidence where it raises a substantial concern about an offender's innocence.¹⁶

Further consultations are necessary when counsel is of the view that an appeal ought to be conceded. Before making such a recommendation to the CFP, appellate counsel will seek the views of the trial counsel and, where appropriate, the investigative agency. Where the concession is in a significant case,¹⁷ consultation with the appropriate Litigation Committee will be necessary.

5. THE CROWN AS INTERVENER

Generally, only the parties to a criminal prosecution, Crown and accused, may participate in an appeal before a provincial or territorial court of appeal. Interveners, when allowed, are generally not permitted to add to the issues in dispute, or to enlarge the record.

In deciding whether to exercise its discretion to permit an intervener, the court of appeal will consider whether this will delay the hearing or resolution of the appeal, prejudice the parties including increased costs, whether the intervener has additional submissions to offer not already advanced by the parties, and the prospect of the appeal between the parties being expanded by the intervener's interests.¹⁸ A recognized consideration that is relevant to the Public Prosecution Service of Canada is whether it is desirable to have a national perspective on the issues brought in to the appeal.¹⁹

The decision to intervene in a provincial or territorial court of appeal is made by the DPP. The procedure for applying to intervene is the same as is explained in the PPSC Deskbook guideline "[3.16 Supreme Court of Canada Litigation](#)".

¹⁵ See e.g. *Palmer v The Queen*, [1980] 1 SCR 759, (1979), 50 CCC (2d) 193, *R v Stolar* [1988] 1 SCR 480, (1988), 40 CCC (3d) 1.

¹⁶ In this regard, see *Report of the Commission on Proceedings Involving Guy Paul Morin*, Toronto: Queen's Printer, 1998, vol 2 at 1170-1171.

¹⁷ As defined in the PPSC Deskbook directive "[1.3 Consultation within Government](#)".

¹⁸ John Sopinka & Mark E. Gelowitz, *The Conduct of an Appeal*, 3rd ed (Canada: LexisNexis, 2012) at para 8.98.18.

¹⁹ *R v Regan* (1999), 174 NSR (2d) 1, 1999 CanLII 1855 (NS CA).

6. APPEALS FROM SUMMARY CONVICTION APPEALS

In summary conviction matters, the accused may appeal from the adverse decision of a summary conviction appeal court (normally the superior court of justice) to the court of appeal on any ground of appeal that involves a question of law alone, with leave of the court of appeal or a judge of that court (s. 839 of the Code).

For many years in some jurisdictions the issue of leave to appeal was simply rolled into the main appeal, and was considered at the same time as the oral hearing of the appeal on its merits.²⁰ Leave to appeal to the court of appeal was routinely granted, whether or not the appeal on its merits was allowed or dismissed.

In the 2008 judgment in *R v R.R.*²¹ the Ontario Court of Appeal significantly reinvigorated the requirement of leave to appeal contained in s. 839 of the Code. Doherty JA, writing for the court, reasoned that:

*The requirement that the applicant obtain leave to appeal in s. 839 provides the mechanism whereby this court can control its summary conviction appeal docket. Access to this court for a second appeal should be limited to those cases in which the applicant can demonstrate some exceptional circumstance justifying a further appeal.*²²

Justice Doherty went on to explain that leave to appeal to the court of appeal in a summary conviction matter may be granted: (1) where the merits of the proposed question of law are arguable, even if not strong, and the proposed question of law has significance to the administration of justice beyond the four corners of the case; and (2) where there appears to be a “clear” error even if it cannot be said that the error has significance to the administration of justice beyond the specific case.

The courts of appeal in some other provinces and territories have moved in a similar direction.²³

Therefore, when Crown counsel is facing an appeal to the court of appeal in a summary conviction matter, counsel must consider whether to oppose leave to appeal by reference to the above considerations. In some cases, Crown counsel will want to press the court of appeal to determine the issue of leave in advance, thereby avoiding an investment of time and resources responding to a groundless appeal.²⁴ The application may be made to a single justice (s. 839 of the Code).

²⁰ *R v R.R.*, 2008 ONCA 497 at para 2.

²¹ *Ibid.*

²² *Ibid* at para 27.

²³ See e.g. *R v Winfield*, 2009 YKCA 9; *Petrin v R*, 2013 NWTCA 1; *R v Harper*, 2008 ABCA 325; *R v Oliver*, 2011 MBCA 12; *Bouchard c R*, 2011 QCCA 30; *R v Pottie*, 2013 NSCA 68; *Dorgan and Gavin v R*, 2009 PECA 23; *R v Ralph*, 2008 NLCA 70.

²⁴ See e.g. *R v Metin*, 2013 ONCA 21.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

3.16 SUPREME COURT OF CANADA LITIGATION

**GUIDELINE ISSUED BY THE DIRECTOR UNDER
SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC
PROSECUTIONS ACT***

June 5, 2024

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1. INTRODUCTION

This guideline outlines the procedure applicable to litigation in the Supreme Court of Canada (the Court) that falls within the purview of the Director of Public Prosecutions (the DPP) and addresses the role of the Supreme Court of Canada Litigation Coordination Section (the Section). It also covers the internal procedure for preparing documents to be filed with the Court, i.e., applications for leave to appeal, appeals, interventions, and other motions as well as general correspondence.

Criminal appeals to the Court are primarily governed by the *Criminal Code*, the *Supreme Court Act*, the *Rules of the Supreme Court of Canada*, the *Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada*,¹ the conventions and practices of the Court, as well as the Public Prosecution Service of Canada (the PPSC) internal practices.

Pursuant to s. 34 of the *Interpretation Act*, the provisions of the *Criminal Code* apply to offences under other federal statutes, including appeals to the Supreme Court related to criminal offences prosecuted by indictment.² Other criminal appeals are subject to the *Supreme Court Act*.

¹ Established by the Registrar of the Court pursuant to s. 21 of the *Rules of the Supreme Court of Canada* [Rules].

² *Criminal Code*, ss 691-696.

2. SUPREME COURT OF CANADA LITIGATION COORDINATION SECTION

2.1 Composition of the Section

The Section is comprised of two Supreme Court of Canada coordinators assisted by a paralegal. The Section reports directly to the DPP. Its offices are located at PPSC headquarters in Ottawa.

2.2 Role of the Section

As its name implies, the Section is responsible for coordinating all Supreme Court of Canada litigation conducted on the DPP's behalf, starting with the service of originating documents to all follow-ups necessitated by a judgment of the Court in any case involving the PPSC.

For the Section to properly exercise its functions, prosecutors must promptly report to it reception or service of documents related to litigation before the Court – especially originating documents – so that a proper follow-up can take place within the prescribed periods.

2.3 Role of the Supreme Court of Canada Agent

Parties to appeals or interventions before the Supreme Court of Canada may communicate with the Court through an agent who must be a lawyer practicing in the National Capital Region.³ One of the coordinators acts as agent for the DPP.

In practice, communications with the Court take place between the Section and the Court Registry personnel, although the latter may occasionally liaise directly with assigned prosecutors. In all cases, prosecutors must consult with the Section before communicating directly with the Court personnel.

2.4 Managing the National Litigation Committee

The National Litigation Committee (NLC) advises the DPP on all Supreme Court of Canada litigation and, occasionally for any other court. Consultation with the NLC is ordinarily required for recommendations to the DPP regarding applications for leave to appeal, approval of appeal and intervention factums before the Court, as well as motions for intervention made on the DPP's behalf before all levels of court.

In view of the central role played by the NLC regarding Supreme Court of Canada litigation, the coordinators preside and manage it with the assistance of the paralegal who acts as secretary.

³ *Rules*, ss 2, 16.

2.5 Service and Filing of Documents in the Supreme Court of Canada

The Section is responsible for the finalization, service, and filing of all documents with the Court. This implies that once the content has been approved, the Section sees to the making and formatting of the electronic documents in accordance with the *Rules*, prepares the hard copies, serves and files documents within the prescribed deadlines.

3. APPLICATIONS FOR LEAVE TO APPEAL

A significant proportion of criminal appeals before the Court are heard by leave. The federal Crown, like any other litigant, can be the applicant or respondent, although in practice it is often the respondent.

3.1 Crown as Applicant

3.1.1 Decision-Making Authority: The DPP

It is the decision of the DPP whether an application for leave to appeal will be filed, taking into consideration the non-binding recommendation made by the NLC.

3.1.2 Applicable Test: “Public Importance”

As the highest court of law in the land, the Court is a “court of direction,” the role of which is to rule on legal matters. It is not a “court of revision” the primary role of which is to rectify errors made by lower courts. That role is performed by intermediate provincial and territorial appellate courts. This explains why leave to appeal is granted, pursuant to s. 40(1) of the *Supreme Court Act*, only when “the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it.” This is the so-called “public importance” test (formerly coined as the “national importance” test), which also applies to leave applications made pursuant to s. 693(1)(b) of the *Criminal Code*, governing leave applications on indictable offence verdicts. The DPP applies a similar test in deciding whether to seek leave to appeal.

It is not sufficient for prosecutors recommending an appeal to show that the lower court’s judgment is ill-founded in law since this does not meet the “public importance” threshold. As the Court does not issue reasons in deciding leave applications, there are no judgments to look to for guidance in assessing whether a case meets the threshold. However, without being exhaustive, the following circumstances are generally recognized as justifying the granting of leave:

- where there are conflicting decisions in provincial or territorial appellate courts;
- where a case raises significant constitutional issues (particularly *Canadian Charter of Rights and Freedoms* (*Charter*) or division of powers questions);

- where the scope of police or Crown powers is at issue; or
- where the interpretation of new legislation raises an issue of significant importance.⁴

In assessing the public interest test for seeking leave to appeal, the policy considerations relevant to the decision to prosecute must be taken into account,⁵ as is required for all the stages of a prosecution, including appeals.

3.1.3 Internal Procedure

It is the responsibility of the regional office to decide in the first place whether it is desirable to seek the approval of the DPP to apply for leave to appeal. It is not necessary to refer the case to the DPP when the case does not pass the public interest test.

The regional office concerned, however, can deem it necessary to obtain a decision from the DPP, even when the recommendation is not to apply for leave to appeal. This may arise, for example, when a case has attracted significant media interest or when prosecutors are of the opinion that the court of appeal's decision, although erroneous, falls just short of the public importance threshold. In such circumstances, the coordinator must be consulted as to what direction to take. When the decision is made at the regional level to submit the case to the DPP, the procedure set out below applies.

The decision-making process begins with the preparation in the regional office of a memo for the NLC⁶ explaining why the case should (or should not) be submitted to the Court for leave to appeal. Once approved at the regional level, the memo⁷ is sent to the coordinator who submits it to the NLC for consideration. The NLC may endorse or reject the position set forth in the memo or may make alternate recommendations for correction before being provided to the DPP. The memo must be submitted early enough within the time limit for an application for leave to permit a meeting of the NLC to take place on a week's notice and to allow time for the finalization of the documentation.

Following the NLC consultation, the coordinator reports to the DPP.

If the DPP chooses to apply for leave to appeal, the prosecutors assigned to the case prepare the supporting documentation and submit it to the coordinator for review and approval.

⁴ Justice Sopinka explained in a 1997 address some of the relevant criteria used by the Court in deciding leave applications; the speech is reproduced in L. Watt, J. Beedell, G. Ragan and M. Estabrooks, *Supreme Court of Canada Practice* (Toronto: Thomson Reuters, 2023) at § 4:161.

⁵ See PPSC Deskbook, Guideline "[2.3 Decision to prosecute](#)".

⁶ A template memo can be obtained from the Section.

⁷ The memo should be accompanied by a copy of the relevant decisions from the lower courts and of the factums filed with the lower court, if any.

3.1.4 Timelines

Applicants have 60 days from the date of the lower court's judgment to serve and file an application for leave to appeal.⁸ The month of July is excluded in the computation of time.⁹

It is important to bear in mind the distinction between the judgment and the reasons for judgment as the time limits begin to run as soon as the lower court renders judgment, even if the reasons are released later. Obviously, it may prove challenging to draft an application for leave without the written reasons from the court below. When delay in the release of reasons by the lower court makes it impossible to draft, serve and file more than a bare-bones application, it is appropriate to request from the Court an extension of time. Such extension may be submitted by motion at the same time the application for leave to appeal is filed; in such circumstances, we must inform in writing the respondent or our intent to seek leave to appeal in order to comply with the first factor of the *Roberge* test.¹⁰ Alternatively, a motion can be filed within the 60-day period to obtain in advance leave to file late.

Unless otherwise agreed, a draft leave application must be received by the Section a week before the filing date.

3.1.5 Required Documents

Rule 25 of the *Rules of the Supreme Court of Canada* and the *Guidelines* issued by the Registrar set forth the nature and format of the documentation required in an application for leave to appeal. In a typical case, the following documents are submitted, bound in a single booklet and in the following order:¹¹

- a notice of application for leave to appeal, which cites the legislative provision that authorizes the application;
- a copy of any judgments, orders and relevant reasons issued by the lower courts;
- a memorandum of argument;
- documents to which the application refers, if any, including transcript excerpts, but only when they are essential for the purposes of the application.

A certificate of counsel (Form 23A) must be served and filed with the application, which alerts the Court to any information that should not be publicly disclosed, along with a copy of supporting authority, such as a court order or applicable legislation.

⁸ *Supreme Court Act*, s 58(1)(a).

⁹ *Supreme Court Act*, s 58(2).

¹⁰ *R v Roberge*, 2005 SCC 48, [2005] 2 SCR 469, at para 6.

¹¹ A precedent may be obtained from the Section.

Although affidavits in support of the application may be submitted under Rule 25(1)(d), they are not usually required. The evidentiary basis for the application usually will have been established in the courts below; the public importance of the case does not generally require the filing of additional evidence.

3.1.6 Memorandum of Argument

The memorandum of argument contains seven parts, in the following order:¹²

Part I: a concise overview of the party's position regarding the issues of public importance raised in the application and a concise statement of facts including the judicial history of the case, if required;

Part II: a concise statement of the questions in issue; if the proposed appeal raises an issue in respect of the constitutional validity or applicability of a statute, regulation or common law rule or the inoperability of a statute or regulation, a concise statement of the issue;

Part III: a concise statement of argument;

Part IV: submissions as to costs which generally consist in making no submission;¹³

Part V: the order sought, which is usually that the application for leave to appeal be granted, without costs;

Part VI: a table of authorities — including the relevant provisions of any statute, regulation, rule, ordinance, or by-law being relied on, and, if available, hyperlinks to the provisions — arranged alphabetically and setting out the paragraph numbers where the authorities are cited;

(It should be noted that when doing the last revision, the Section adds hyperlinks in both the argument found in Part III as well as in the table of authorities)

Part VII: any statute, regulation, rule, ordinance, or by-law being relied on for which hyperlinks are not provided in Part VI, in both official languages if they are required by law to be published in both official languages.

Parts I to V of the memorandum must not exceed 20 pages. Note that this is the maximum, not the targeted, length.

¹² *Rules*, s 25(1)(c).

¹³ Save exceptional circumstances, costs are not awarded in criminal matters: see *R v M(CA)*, [1996] 1 SCR 500 at para 97.

3.2 Crown as Respondent

A regional office that is served with an application for leave to appeal (or any other originating document) must promptly inform the Section so that the appropriate response can be planned and coordinated.

3.2.1 Decision-Making Authority: The Coordinator

The coordinator, or their delegate, approves responses to leave applications. The coordinator may choose to refer the draft response to the NLC for consideration and formulation of advice to the DPP who then exercises final decision-making authority. Such a referral is more likely to occur when it is envisaged to concede that leave be granted.

3.2.2 Applicable Test: “Public Importance”

Public importance, as described above when the prosecution seeks leave to appeal, remains the applicable test.

Applicants often, incorrectly, base their applications on a demonstration of errors allegedly committed by the lower courts, rather than on showing the public importance of the issues they raise. A mere showing of legal error does not suffice. A common example is the application of a legal standard to the facts of the case, which is a question of law for appeal purposes.¹⁴ Even if the lower court erred in its conclusion, an issue of public importance is not necessarily raised thereby, insofar as the lower court applied the appropriate legal rule; the standard applicable to the arrest power constitutes a common example of a well-settled legal principle.¹⁵

In its response to a leave application, a respondent is not bound by the questions as framed by the applicant, or by the argumentative structure adopted by the applicant. It may be useful, perhaps even necessary, to reformulate the issues and to adopt a structure that is different to that of the applicant. However, it is important to identify clearly the points raised in the application, while setting out how the application fails to raise an issue of public importance.

3.2.3 Internal Procedure

As noted above, it is important to advise the Section as soon as an application for leave is received or served and to provide a copy. The Section maintains a log of all applications for leave involving the PPSC and ensures that the prescribed time limits are respected, including by providing assigned prosecutors with a timeframe. At this early stage, it is

¹⁴ *R v Shepherd*, 2009 SCC 35, [2009] 2 SCR 527 at para 20.

¹⁵ *Criminal Code*, s 495(1)(a); *R v Storrey*, [1990] 1 SCR 241 at p 249; *R v Zacharias*, 2023 SCC 30 at paras 27-28.

not necessary to prepare a briefing note (which is required for leave applications, as prescribed above).

When opposing leave, which is the position in the vast majority of cases, a final draft of the response, approved by the appropriate authorities within the concerned regional office, must be sent to the Section within the delay, as described in the next subsection.

When any type of response other than opposing leave is considered, the coordinator must be advised promptly to allow sufficient time for a NLC meeting, if required, and for the approval of the DPP. Insofar as the coordinator chooses to refer the matter to the DPP for approval, the procedure to follow is essentially the same as that governs applications for leave to appeal. Once the DPP has agreed with the proposed position, the final approval of the response rests with the coordinator.

3.2.4 Timelines

The respondent has 30 days from the opening of a file by the Supreme Court to serve and file a response to an application for leave to appeal.¹⁶ The operative date is that of the letter sent by the Court to the applicant, with a copy to the respondent, advising that a file has been opened and that a file number has been assigned. A copy of that letter must be provided to the Section.

Where the response opposes the leave application, unless otherwise agreed, a draft of the response must be sent to the Section one week before the filing date to allow for review and approval by the coordinator. In other cases, a timeline should be established with the Section as soon as possible.

3.2.5 Required Documentation

Rule 27 of the *Rules of the Supreme Court of Canada* and the *Guidelines* issued by the Registrar set forth the nature and format of the documentation required in a response to a leave application.¹⁷ The following documents are submitted, bound in a single booklet in the following order:

- a memorandum of argument similar in form to an applicant's memorandum with the necessary modifications;
- documents to which the response refers, if any.

Responses in letter format – Rule 27(3) provides that a response may take the form of a letter of no longer than two pages instead of a memorandum of argument. Letter-format

¹⁶ *Rules*, s 27(1). Prior to January 2014, the 30-day period began as soon as the application for leave was served, except for self-represented claimants, in which case the time to respond began only when the Court opened a file; the Court has extended that procedure to all applications for leave to appeal.

¹⁷ Templates are available from the Section.

responses are the norm within PPSC. A memorandum of argument will only be justified in the rare cases where more than a two-page letter is necessary to properly address the public importance criterion. If the filing of a memorandum of argument is considered, consultation with the coordinator must take place prior to pursuing that approach.

Considering the practice of using letter-format responses, affidavits and other supporting documents are rarely necessary, as is the case for books of authorities, especially since the Section adds hyperlinks, when available, to all sources cited in the letter-format response.

A certificate of counsel (Form 23A) must be served and filed with the response, which alerts the Court to any information that should not be publicly disclosed, along with a copy of supporting documentation, such as a court order or applicable legislation.

4. APPEALS

4.1 Appeals as of Right

Pursuant to s. 693(1)(a) of the *Criminal Code*, the Crown may appeal as of right in an indictable case on any question of law on which a judge of the court of appeal dissents. Sentence and summary case appeals require leave of the Court under s. 40 of the *Supreme Court Act*, even where a judge dissents in the provincial or territorial court of appeal.

Pursuant to s. 37 (10) of the *Youth Criminal Justice Act*, no appeal lies from a judgment of the court of appeal in respect of a finding of guilt or an order dismissing an information or indictment except with leave of the Court.¹⁸ For summary offences, leave must be sought pursuant to s. 40 of the *Supreme Court Act*. There are no appeals as of right to the Court for youth criminal justice matters.

4.1.1 Decision-Making Authority: The DPP

Although it can be argued that the public importance of appeals as of right is implicitly recognized by the *Criminal Code*, it is up to the DPP to decide whether an appeal will be pursued by taking into consideration the recommendation of the NLC.

4.1.2 Applicable Test: “Modified Public Interest”

The DPP’s decision to launch an as of right appeal on the public interest criterion is applied with a flexible perspective, hence the adjective “modified”. It is not necessary to satisfy the public interest criterion proper, but rather to show the usefulness of submitting the appeal to the Court.

¹⁸ Section 37(10) of the YCJA was found to be constitutional by the Supreme Court in *R v CP*, 2021 SCC 19.

Recourse to the modified public interest criterion for as of right appeals flows from the fact that not all such appeals deserve the attention of the Court. For instance, the application of a legal standard to a set of facts, such as whether a particular scenario amounts to reasonable grounds for an arrest or search, is a question of law for appellate purposes which may not require clarification. Nevertheless, it may be in the public interest to take the matter to the Supreme Court; for example, where there is a need to re-establish a guilty verdict for particularly serious offences, or to avoid retrying a mega-case, or to consider a crime that has a substantial impact on the community in which it was committed.

In applying the modified public interest test for appealing as of right, the policy considerations relevant to the decision to prosecute must be assessed,¹⁹ as is required for all the stages of a prosecution, including appeals.

4.1.3 Internal Procedure

The procedure for applications for leave to appeal applies to appeals as of right.²⁰

4.2 Appeals with Leave

When the Court grants the Crown's application for leave to appeal, a notice of appeal must be filed within 30 days from the judgment granting the application.²¹ No internal procedure is required. Consultation takes place with the Section which will serve and file the notice of appeal.

4.3 Notice of Appeal

4.3.1 Time Limits

The time limit to file a notice of appeal is 30 days from the Court's decision to grant leave.

For appeals as of right, the 30-day time limit begins on the date of the appellate court's judgment.²² As noted under section 3.1.4, the distinction between the judgment and the reasons for judgment must be borne in mind as deadlines begin to run from the time the lower court renders judgment, even if the reasons are released later.

¹⁹ See PPSC Deskbook, Guideline "[2.3 Decision to prosecute](#)".

²⁰ See section 3.1.3.

²¹ *Supreme Court Act*, s 58(1)(b).

²² *Supreme Court Act*, s 58(1)(b).

4.3.2 Required Documents²³

For appeals by leave, it is sufficient for the notice of appeal to indicate that the appellant is appealing the lower court's judgment, without having to state the issues on appeal.

In the case of appeals as of right, the notice of appeal must specify the grounds of appeal and must be accompanied by a copy of the judgment and reasons being appealed from.²⁴ The grounds of appeal are limited to those questions of law on which there was a dissent in the court of appeal.²⁵ A party wishing to raise any additional issue must apply for leave.

4.4 Constitutional Questions

It used to be the prerogative of the Chief Justice of Canada, or of a designated puisne judge, to formulate constitutional questions. Since 2016, with the repeal of Rules 60 and 61, this is no longer the case.²⁶ The responsibility to formulate constitutional questions now lies with the parties, without any intervention from the Court.

Such questions are reserved for appeals that involve a challenge to the constitutional validity, applicability or inoperability of federal or provincial laws or regulations, or a challenge to the constitutional validity or applicability of common law rules.²⁷ Generally speaking, in addition to division of powers cases, constitutional questions are appropriate when the remedy sought falls under s. 52 of the *Constitution Act, 1982*, as opposed to s. 24 of the *Charter*. Proposed constitutional questions must clearly identify the impugned provisions or common law rule as well as the general nature of the alleged constitutional deficiency. It is preferable, but not mandatory, to agree with the other parties on the formulation of the constitutional question.

Pursuant to Rule 33(2), a notice of constitutional question in Form 33B shall be filed by the appellant, as a schedule to the notice of appeal, or by the respondent, if the issue has been raised by the respondent, within 30 days after leave to appeal has been granted or after the filing of the notice of appeal in respect of an appeal for which leave is not required.

The purpose of formulating constitutional questions is to ensure that the Attorney General of Canada, the attorneys general of the provinces, and the ministers of Justice of the territories are alerted to constitutional challenges, so that they may decide whether or not to intervene as of right; it also serves to advise the parties and other potential interveners of the constitutional issues before the Court.²⁸ Under Rule 33(3), a copy of the notice of

²³ A notice of appeal template is available from the Section.

²⁴ Form 33 of the *Rules*.

²⁵ *Criminal Code*, s 677 requires that the judgment of the court of appeal specify any grounds in law on which the dissent is based.

²⁶ *Rules Amending the Rules of the Supreme Court of Canada*, SOR/2016-271, s 35.

²⁷ *Rules*, s 33.

²⁸ *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559 at para 57.

constitutional question must be served by email on all other parties to the appeal, as well as on all attorneys general and ministers of Justice who are not already part of the procedure. The email shall contain hyperlinks, if applicable, to the decision granting leave, the judgment below, the provisions attacked and relied upon to mount the challenge. An attorney general who wishes to intervene as of right must serve and file a notice of intervention within four weeks after the service of the notice of constitutional question.

Since no specific rule provides a procedure to oppose an ill-founded or ill-formulated constitutional question, an objection to the filing of a notice of constitutional question should take the form of a *sui generis* motion pursuant to Rule 3 made to a judge of the Court.

The responsibility to formulate a constitutional question, or to take a position on the questions proposed by other parties, rests with the coordinator who shall consult with prosecutors assigned to the appeal.

4.5 Factum on Appeal

4.5.1 Decision-Making Authority: The DPP

All factums on appeal filed with the Supreme Court of Canada must be approved by the DPP following a recommendation by the NLC before being served and filed.

4.5.2 Internal Procedure

Prosecutors assigned to the appeal prepare a draft factum for the NLC's review and the DPP's approval.

Depending on the nature of the issues raised, it may be useful, even required, to consult stakeholders outside the PPSC during the preparation and drafting of the factum; for example, consultations may take place with Justice Canada's Human Rights Law Section for *Charter* issues or the Criminal Law Policy Section with respect to provisions of federal criminal legislation, including the *Criminal Code*.²⁹

It should be noted that a respondent can advance new arguments to defend the judgment appealed from since the respondent is not restricted to the points raised by the appellant. It is not necessary for the respondent to seek leave to cross-appeal to raise new arguments.³⁰ This rule is subject to the availability of a sufficient record to address the new argument, which may require a fresh evidence motion to supplement the record.³¹

²⁹ See PPSC Deskbook, Directive "[1.3 Consultation within Government](#)".

³⁰ *Rules*, s 29(3); *Perka v The Queen*, [1984] 2 SCR 232 at 240; *R v Keegstra*, [1995] 2 SCR 381 at 398-399.

³¹ *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559 at paras 58-59; *R v KRJ*, 2016 SCC 31, [2016] 1 SCR 906 at paras 59-60.

The draft factum, along with supporting documentation,³² is sent to the coordinator within agreed-upon deadlines. The coordinator then submits the draft to the NLC members. Meetings are called by the Section. They are usually held by videoconference. In exceptional circumstances, for instance, where there is insufficient time to hold a meeting, the coordinator may obtain the views of NLC members by other means.

Following the NLC consultation, the coordinator reports to the DPP.

Once approved by the DPP, the Section and assigned prosecutors finalize the factum, as well as the record and the book of authorities. No major substantive change can be made to the arguments after the DPP approval without prior consultation with the coordinator.

4.5.3 Time Limits

Unless otherwise ordered by the Court, appellants have 8 weeks from the filing of the notice of appeal to serve and file their factum, record and book of authorities;³³ the respondent has 8 weeks from the service of the appellant's factum, record and book of authorities.³⁴ The month of July is included in the computation of the time limit,³⁵ but the period from December 23 to January 3 is not.³⁶

Prosecutors are expected to abide by the deadline for submission of the draft factum agreed upon with the coordinator. It usually takes two weeks before the filing deadline to complete the internal procedure described above; that is, one week for the NLC members to prepare for the meeting, and one week for the NLC's suggested changes to be incorporated and for the DPP to review and approve the factum.

4.5.4 Form and Content of Factum

The appeal factum, like the memorandum of argument on leave, is divided into seven parts:³⁷

Part I: the facts, divided into two parts: first, an overview that, in a few paragraphs, summarizes the position adopted in the factum; second, a summary of the relevant facts, including the case's judicial history, if necessary;

Part II: a statement of the questions in issue; for the respondent, their position in response to the questions raised by the appellant;

Part III: a statement of argument;

³² A copy of other parties' factum and of the lower court judgment, if any.

³³ *Rules*, s 35(1).

³⁴ *Rules*, s 36(1).

³⁵ *Rules*, s 5(3).

³⁶ *Rules*, s 5.1.

³⁷ *Rules*, s 42(2).

Part IV: submissions as to costs which generally consist in making no submission;³⁸

Part V: the order sought, without costs;

Part VI: submissions on the impact that any sealing or confidentiality order, publication ban, classification of information in the file as confidential under legislation or restriction on public access to information in the file could have on the Court's reasons, if any, in the appeal;

Part VII: a table of authorities — including the relevant provisions of any statute, regulation, rule, ordinance, or by-law being relied on, and, if available, hyperlinks to the provisions — arranged alphabetically and setting out the paragraph numbers where the authorities are cited.

(It should be noted that when doing the last revision, the Section adds hyperlinks in both the argument and the table of authorities.)

Parts I to V of the factum must not exceed 40 pages.³⁹ Note this is the maximum and not the targeted length.

5. INTERVENTIONS

5.1 General Principles

5.1.1 Power of the DPP to Intervene

The DPP may intervene before any court regarding any matter that raises issues of public interest that may affect the conduct of prosecutions or criminal investigations.⁴⁰ This power extends to interventions before the Supreme Court of Canada, which have become much more common in criminal appeals since the *Charter* came into force in 1982.

5.1.2 Sharing Interventions with the Attorney General

The DPP shares intervention powers with the Attorney General of Canada who also has the authority to intervene in criminal cases.⁴¹ Where the Attorney General has exercised their authority to intervene, the DPP is precluded from doing so.⁴²

³⁸ Save exceptional circumstances, costs are not awarded in criminal matters: see *R v M(CA)*, [1996] 1 SCR 500 at para 97.

³⁹ *Rules*, s 42(4). A template is available from the Section.

⁴⁰ *Director of Public Prosecutions Act*, s 3(3)(b) [DPP Act]. For a review of the general procedure that applies to interventions, see PPSC Deskbook, Guideline “[3.15 Appeals and Interventions in the Provincial and Territorial Superior Courts and Courts of Appeal](#)”.

⁴¹ DPP Act, s 14.

⁴² DPP Act, s 3(3)(b).

Under an informal agreement between the PPSC and Justice Canada, interventions relating to extraditions, or the constitutional validity of legislative enactments are undertaken by the Attorney General. Appeals pertaining to investigative powers, criminal procedure, evidence, and offences are undertaken by the DPP. This division is not rigid and may vary according to the specific circumstances of an appeal.

5.1.3 Two Types of Interventions: As of Right and with Leave

5.1.3.1 Intervention as of Right for Constitutional Questions

Federal and provincial attorneys general and territorial Justice ministers have the power to intervene as of right when a notice of constitutional question is filed in an appeal before the Court.

A party filing a notice of constitutional question must serve it on all attorneys general and ministers of Justice of the territories.⁴³ Attorneys general then have four weeks to serve on all other parties and file with the Registrar a notice of intervention without having to obtain leave to intervene from the Court.⁴⁴

5.1.3.2 Intervention with Leave

All other interventions require leave of a judge of the Court on application made by filing a motion to intervene. Interventions are possible not only in appeals and references, but also at the application for leave to appeal stage.⁴⁵ Motions at the leave stage, however, are rare and the granting of leave rarer still.

5.2 Decision-Making Authority: The DPP

The DPP authorizes all interventions to the Supreme Court of Canada as well as before any other court on the recommendation of the NLC.

5.3 Criteria Applicable: “Interest and Usefulness”

The Court’s justices assess motions for intervention according to two criteria:

- the interest of the applicant in the questions raised;
- the usefulness to the Court of the proposed intervention.⁴⁶

The DPP’s interest in criminal investigations and prosecutions is usually easily demonstrated and poses little difficulty.

⁴³ See rubric 4.4. on constitutional questions.

⁴⁴ *Rules*, s 33(4).

⁴⁵ *Rules*, s 55.

⁴⁶ *Rules*, s 57.

Satisfying the usefulness criterion requires the applicants to set out in general terms their proposed submissions, their relevance, and the fact that they differ from those of the parties to the appeal, to avoid redundancy. The following examples are circumstances in which an intervention may be warranted:

- when one of the parties fails to raise a question of law relevant to the issue or to deal adequately with such question;
- when the intervener proposes a new interpretative approach to constitutional, statutory, or regulatory provisions or common law rules;
- when the intervener proposes a comparative law approach that is useful to the consideration of the questions in issue.

Normally, interveners cannot raise new questions, adduce further evidence, or otherwise supplement the record of the parties; basically, the intervener's submissions must fall within the scope of the appeal as defined by the parties.

5.4 Internal Procedure

5.4.1 Identification of Potential Cases for Intervention

The Section maintains a log of all Supreme Court of Canada appeals directly or indirectly related to criminal law or that may be of interest to the DPP. The Section identifies and tracks cases for possible intervention. Cases are monitored by the Section to abide by the deadlines prescribed for intervention motions. The Section liaises with other prosecution services when considering a possible intervention.

The coordinator and the Justice Canada liaison officer identify potential cases for intervention and determine whether it is more appropriate for the DPP or the Attorney General of Canada to act on the file.

The coordinator considers suggestions made by prosecutors with respect to a potential intervention.

5.4.2 Procedure for DPP Authorization

When the coordinator considers that an application for intervention should be made, the coordinator prepares, or asks prosecutors to prepare, a memo for the NLC justifying a DPP intervention.⁴⁷

The Section calls a meeting of the NLC to consider the memo and to formulate a recommendation to the DPP. The memo and accompanying documents⁴⁸ must be sent to

⁴⁷ A note template is available from the Section.

⁴⁸ The note must be accompanied by a copy of the relevant judgments appealed from and the factums filed with the Supreme Court and the court appealed from, if applicable.

the Section for distribution to NLC members enough in advance to allow sufficient time to consider the recommendation and for the DPP to review the case and decide. Generally, the NLC requires a week's notice prior to the meeting.

In exceptional circumstances, for instance, where timelines do not permit the holding of a NLC meeting, the coordinator may instead select another mode of consultation.

Following the NLC consultation, the coordinator reports to the DPP.

After the DPP approves the filing of a motion for intervention, the Section prepare the relevant documentation for service and filing, with the assistance of assigned prosecutors.

5.5 Time Limits

5.5.1 Intervention as of Right

The Attorney General or the DPP has four weeks from the date of service of a notice of constitutional question to serve and file a notice of intervention. The month of July is included in the computation of time,⁴⁹ but the period from December 23 to January 3 is not.⁵⁰

5.5.2 Intervention by Leave

The DPP has four weeks from the filing of the appellant's factum to serve and file an intervention motion.⁵¹ The month of July is included in the computation of time,⁵² but the period from December 23 to January 3 is not.⁵³

Owing to the short period, the process for NLC consultation and DPP approval must be expeditious. A schedule must be agreed upon with the Section to meet the prescribed time limits.

5.6 Documentation Required

A motion for intervention is comprised of a notice of motion and an affidavit.⁵⁴

The notice of motion can simply refer to the affidavit which contains all the facts and information required to satisfy the two criteria: the interest of the DPP in the appeal and the usefulness of the proposed intervention. The Section in collaboration with the assigned prosecutors prepares the required documentation.

⁴⁹ *Rules*, s 5(3).

⁵⁰ *Rules*, s 5.1.

⁵¹ The time limit is 30 days for a motion for intervention in the case of an application for leave to appeal.

⁵² *Rules*, s 5(3).

⁵³ *Rules*, s 5.1.

⁵⁴ Precedents are available from the Section.

Although a factum in support of the motion may be filed, it is not necessary. Setting out the reasons for the intervention in an affidavit is permitted and is usually sufficient to provide the Court with the needed information to properly rule on the motion.

5.7 Intervener Factums

5.7.1 Decision-Making Authority: The DPP

The intervener factum must be approved by the DPP, on the recommendation of the NLC, before filing with the Court.

5.7.2 Internal Procedure

Prosecutors assigned to the appeal are responsible for preparing a draft factum for review by the NLC and approval by the DPP. Assigned prosecutors must provide the Section with a draft factum, together with the relevant documentation,⁵⁵ by an agreed-upon deadline. The Section distributes the draft factum and documentation to the NLC for review which usually takes place during a meeting called by the Section. In exceptional cases, the coordinator may use other methods of consultation if the circumstances warrant, such as where the time limits prevent a full meeting from being held.

Following the NLC consultation, the coordinator reports to the DPP.

If the DPP approves the draft factum, the Section and prosecutors assigned to the case finalize the factum and the book of authorities, if any. Once DPP approval has been obtained, no substantial changes can be made to the factum without prior consultation with the coordinator.

5.7.3 Time Limits

Unless otherwise ordered by the Court, the intervener has six weeks from the order granting leave to intervene to serve and file their factum and book of authorities, if any; in the case of an intervention for which leave is not required, the time limit is 16 weeks from the filing of the notice of intervention.⁵⁶ The month of July is included in the computation of time,⁵⁷ but the period from December 23 to January 3 is not.⁵⁸

Assigned prosecutors must submit a draft factum within the time limit agreed upon with the Section. It usually takes two weeks before the filing deadline to complete the internal procedure described above, that is, one week for NLC members to prepare for the

⁵⁵ The factum must be accompanied by a copy of the factums of the other parties and the judgment appealed from, if any.

⁵⁶ *Rules*, s 37.

⁵⁷ *Rules*, s 5(3).

⁵⁸ *Rules*, s 5.1.

meeting and one week for the NLC's suggestions to be incorporated and for the DPP to review the file and approve the factum.

5.7.4 Form and Content of the Intervener's Factum

The factum for intervention resembles that on appeal, with a few exceptions described below.

The factum cannot exceed 20 pages for interventions as of right and generally 10 pages for interventions by leave.

Given that the intervention should first and foremost address questions of law, it is generally not necessary to discuss the facts.

The intervener is not allowed to take a position on the outcome of the appeal. Instead, the intervener's contribution to the case is to enlighten the Court on the points of law relevant to the issues.

Part V of the factum is replaced by a request to make oral argument if permission is not already granted in the intervention order.

6. BRIEFING NOTE PURSUANT TO S. 13 OF THE DPP ACT

Under [s. 13](#) of the *Director of Public Prosecutions Act*, the DPP must inform the Attorney General of Canada in a timely manner of any prosecution, or intervention that the DPP intends to make that raises important questions of general interest.

A s. 13 briefing note is required for all appeals, whether on leave or as of right, involving the federal Crown or the DPP as a party or as an intervener to an appeal before the Supreme Court of Canada.⁵⁹ That excludes applications for leave to appeal.

A note must be transmitted sufficiently in advance to allow the Attorney General to consider exercising his or her power to give direction or take over a prosecution.⁶⁰

A draft briefing note is prepared by the Section in collaboration with assigned prosecutors. The Section assumes the responsibility of finalizing the note internally for approval by the DPP.

⁵⁹ See PPSC Deskbook, Directive of the Attorney General of Canada: "[1.2 Duty to Inform the Attorney General under Section 13 of the Director of Public Prosecutions Act](#)", at section 2.2.

⁶⁰ DPP Act, s 15.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

3.17 ENSURING TIMELY PROSECUTIONS

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

August 25, 2016

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1. INTRODUCTION

In *R v Jordan*, 2016 SCC 27, the Supreme Court re-examined the *Morin* framework governing the determination of unreasonable delay. A majority of the Court decided to depart from *Morin* and substituted a new framework for analyzing delay under s 11(b) of the *Charter*. The new framework sets ceilings beyond which delay will be presumptively unreasonable: if the total length of delay from charge to the actual or anticipated end of trial (minus defence delay) exceeds 18 months, in cases going to trial in provincial court, or 30 months for cases going to trial in superior court, the ceilings will have been breached.

The new approach outlined in *Jordan* places an even greater emphasis upon the Crown to avoid, through appropriate case management, reaching the 18/30 month ceilings and in those cases where the ceiling is surpassed, to demonstrate that it did all it could to manage the prosecution. For managers, supervisors and prosecutors, this translates into vigorously following and building upon existing practices and policies relating to file management. Since Crown counsel do not control all of the levers to ensure the timely conclusion of a prosecution, the *Jordan* approach will necessarily implicate our relationships with the police, defence counsel and the Courts.

2. FILE MANAGEMENT

In *Jordan*, the Supreme Court emphasized the significance of the case management of the prosecution, in determining whether a prosecution should be stayed for unreasonable delay:

[70] It is not enough for the Crown, once the ceiling is breached, to point to a past difficulty. It must also show that it took reasonable available steps to avoid and address the problem *before* the delay exceeded the ceiling. This might include prompt resort to case management processes to seek the assistance of the court, or seeking assistance from the defence to streamline evidence or issues for trial or to coordinate pre-trial applications, or resorting to any other appropriate procedural means. The Crown, we emphasize, is not required to show that the steps it took were ultimately successful — rather, just that it took reasonable steps in an attempt to avoid the delay.

Chief Federal Prosecutors must ensure that case management policies and practices to ensure that they are applied in a robust, consistent and effective manner. The following elements bear particular attention.

2.1 Review of Files

There must be timely, competent and effective review of each file to ensure that core disclosure is complete and the charges against each accused meet the test for prosecution. Ordinarily, initial review should occur no later than the second appearance. Each regional office must have a process in place for assigning files for timely review. Undertaking this review, making decisions based upon the review and clearly noting the results of the review will enhance effectiveness and efficiency.

Responsibility for file review at each stage of the prosecution must be clear. Any Crown should be able to quickly and confidently see the results of the review, the actions taken and any changes in circumstances. This is especially important when other Crowns are required to deal with the file due to changed scheduling requirements or opportunities. This information must be clearly recorded and readily accessible in the file.

The nature of the review expected of counsel will intensify as the case advances. Counsel's review at earlier stages of the proceeding will necessarily be less detailed than that required in preparation for the preliminary inquiry or trial. Nonetheless, for the low and medium complexity cases¹, counsel should be clearly identifying which witnesses are required, determining resolution positions and estimated preliminary inquiry or trial time and indicating them on the file and, at the appropriate time, communicating them to defence counsel. The more detailed review in preparation for a preliminary hearing or trial must be outlined in detail in the file to permit transfer of the file to other counsel if required to accommodate scheduling exigencies.

¹ High complexity files must comply with the guideline contained in [Chapter 3.1: Major Case Management](#)

2.2 Disclosure Readiness

Chief Federal Prosecutors must ensure that understandings and practices regarding Crown expectations for the completion of disclosure by investigators reflect the Jordan framework.

Focused communications with the regional management of investigative agencies should occur to reinforce the expectations and emphasize the impact that delays can have on a successful prosecution. The escalation from the line prosecutors and investigators to managers to resolve disagreements about the file should aim for resolution of disagreements at the lowest levels possible.

The need to move more expeditiously with file management decisions must not jeopardize the Crown's ability to fulfill its obligations with respect to providing disclosure and safeguarding sensitive information, including privileged information and privacy interests. Chief Federal Prosecutors must ensure that adequate mechanisms are in place to ensure such obligations can be fulfilled without impeding the expeditious progress of the file.

2.3 Stays of Proceedings or Withdrawal of Charges

In cases where it has been determined on either initial or subsequent review that the Decision to Prosecute² criteria are not met, charges must be stayed or withdrawn in a timely fashion. Supervisors should be available for consultation with counsel especially in relation to files with particular sensitivities relating to disclosure, for example, unusual confidential informant issues.

2.4 Prosecution Plans

Prosecution Plans must be prepared in all cases rated as high complexity, as set out in [Chapter 3.1](#). *Jordan* highlights the importance of strict compliance with this policy in order to anticipate issues and minimize delay, and to be in a position to assert that the Crown has taken reasonable steps to do so. Ideally, Prosecution Plans should be prepared in advance of charges being laid. Prosecution Plans must be approved by the Chief Federal Prosecutor, and the Chief Federal Prosecutor is responsible for ensuring that appropriate cases are referred for review by the Major Case Advisory Committee as set out in [Chapter 3.1](#).

2.5 Advancing Files

Mechanisms must be in place to ensure that files do not languish or move forward without ongoing appropriate follow-up with the police, the defence counsel and the court.

Follow-up must be ongoing with the police on disclosure, witness availability and trial preparation. Communications with the defence should be undertaken in a timely way to determine the suitability and completeness of disclosure, readiness for trial, estimates of time for the trial (or preliminary inquiry) and defence election. These communications should occur in the ordinary course and standardized letters should be developed in each region for this purpose.

² [Chapter 2.3 : Decision to Prosecute](#)

Chief Federal Prosecutors must ensure that a system is in place for requiring supervisors to review the handling of files within their team. Initial responsibility for supervision of the processes remains with the team leader/supervisor. This responsibility includes to ensure consistency, the substantive quality of the decisions in the file, the management of the physical or electronic file itself as well as mentoring and instruction.

In any case where it becomes apparent that the 18/30 month ceilings will be breached (including cases already in the system at the time *Jordan* was decided), Crown counsel must assume that a s 11(b) application will be brought in the absence of a specific undertaking to the contrary by defence counsel. Any necessary transcripts should be ordered in a timely way so as to ensure no additional delay is occasioned.

3. COURT APPEARANCES

3.1 Remand Dates

Crown counsel must be prepared to set preliminary inquiry or trial dates at the earliest opportunity after core disclosure has been completed. At each stage, Crown counsel must ensure that the record will provide an adequate demonstration of the proactive management of the file. In the early stages, Crown counsel would be confirming on the record that disclosure has been made and that the Crown is prepared to set pre-trial dates or even a hearing date. When setting a preliminary inquiry or a trial date, Crown counsel should be prepared to provide some information on the record about the file's complexity, in order to explain the time being sought for the completion of the hearing or trial. Particularly, Crown counsel should indicate on the record the number of witnesses to be called, the expectation that defence will bring a *Charter* application (if you are aware of it), the voluminous material disclosed, and other pertinent matters.

Crown counsel should invite defence counsel to detail any pre-trial applications they intend to bring, including the potential time requirements. Any concessions or narrowing of the issues should be noted on the record as part of explaining the factors considered in estimating hearing time. Crown counsel should note on the record any attempts made with defence counsel to obtain concessions or narrow the issues. This, of course, would be to demonstrate due diligence by the Crown where delay is occasioned by the necessity to secure a large block of time, especially if that block subsequently proves unnecessary because issues are subsequently narrowed.

Where available dates for hearings, particularly for lengthy matters, will exceed the 18/30 month ceilings set by *Jordan*, Crown counsel should consider asking the court to set aside additional time for the hearing of a s 11(b) application, unless defence counsel is prepared to state on the record that no such application will be made. Crown counsel may also consider asking the court to set deadlines for defence to file *Charter* notices in sufficient time to permit the obtaining of any necessary transcripts for the proper hearing of a s 11(b) application.

3.2 Judicial pre-trials

Crown counsel should seek to identify in advance any issues which might be usefully canvassed at pre-trials, and provide any relevant material, including caselaw, to defence counsel. Crown

counsel should be cognizant that matters discussed at pre-trial hearings may form part of the record at a s 11(b) hearing. For this reason, counsel should ensure that a record exists of pertinent matters discussed and positions taken at the pre-trial. This would include resolution positions put forward by either side, time estimates, elections, concessions or admissions made, concessions or admissions suggested by Crown but rejected by defence counsel, witnesses required or waived, and other pertinent matters. Matters which, in any given jurisdiction, are recorded by the pre-trial judge and form part of the court record need not necessarily be recorded separately in the Crown file. Where appropriate, matters discussed at the pre-trial should be reduced to writing and communicated to defence counsel. In some instances, in jurisdictions that permit it, Crown counsel may request that pre-trials be conducted on the record because it is anticipated that the transcript of the pre-trial may be required on a s 11(b) hearing.

3.3 Adjournments

Crown counsel must ensure that it is clearly indicated on the record who asked for the adjournment, the reasons and the effect upon time to trial. Requests for adjournments to accommodate the convenience of police witnesses, for example, vacation not previously indicated when the trial date was set, should not ordinarily be made in the absence of extenuating circumstances, such as miscommunication or innocent mistake. Where extenuating circumstances do exist, counsel must give careful consideration to whether accommodating the request would jeopardize the s 11(b) integrity of the proceeding.

Where the defence requests the adjournment, defence should ordinarily be asked whether resulting delay is waived. Defence requests for adjournments should not be consented to in the absence of such a waiver, unless extenuating circumstances exist such that it would be unreasonable for the Crown to insist on such a waiver – for example, where the reason for the defence request arises from some failure or inaction on the part of the Crown or the police, such as late disclosure.

3.4 Re-elections

Crown counsel should require that accused waive the delay stemming from the re-election from a superior court trial to a provincial court trial as a condition of its consent. The majority in *Jordan* recognized that it would be reasonable to do so. (para 62). This is significant because the change in level of court moves the yardstick from 30 months to 18 months. Before Crown counsel consent, the defence must agree to waive all delay since the date of the original election to Superior Court, in effect re-setting the clock to within the 18 months contemplated at the level of a provincial court trial without a preliminary hearing.

4. ADDITIONAL ISSUES

4.1 Ongoing Prioritization of Cases

Systems should be developed to permit the re-scheduling of preliminary inquiries and trials to accommodate moving up cases of higher priority or which are in danger of exceeding the 18/30 month ceilings. Some jurisdictions may be able to implement such systems within the current

framework used by the court. In jurisdictions where such systems would be a departure from the norm, consultation with the judiciary and defence bar will be required.

4.2 Direct Indictments

The potential that an unreasonable delay will occur and result in a stay is a well-established reason in [Chapter 3.6](#) for seeking a Direct Indictment. While the risk of stays for unreasonable delay may be heightened as a result of *Jordan*, the requirements of [Chapter 3.6](#) will still need to be met.

4.3 Multiple Accused Prosecutions

Ongoing consideration must be given to the question of whether the accused should be tried together or if severance is appropriate. In addition to the ongoing rigorous application of the decision to prosecute standard against all of the accused in a multiple accused prosecution, it will also require a realistic and pragmatic consideration of the delay implications of proceeding against multiple accused, in particular the difficulty of finding dates available to numerous defence counsel. The minimisation of the risk of perverse or contrary verdicts that could result from severance must also be borne in mind.

4.4 Stays of proceedings by the Crown or the Court as a result of the Jordan timelines

When this occurs, the term “Jordan stay” is to be recorded in the note field in iCase so that it can be searched subsequently. Crown stays of proceedings / withdrawals and judicial stays of proceedings must continue to be recorded as separate outcomes.

4.5 Management of s 11(b) litigation

CFP’s may consider assigning s 11(b) applications to a designated group of prosecutors, where feasible, in order to both maximize efficiencies in the handling of such litigation, and to effectively manage the development of the law in this area.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

3.18 JUDICIAL INTERIM RELEASE

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

Revised June 20, 2024

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1. OVERVIEW

Crown counsel's decision whether to oppose bail or consent to release is a challenging and important decision. The exercise of this discretion must focus on the statutory grounds for detention, described below:

The primary grounds: Detention is necessary to ensure that the accused attends court;

The secondary grounds: Detention is necessary for the protection or safety of the public, including victims or witnesses, having regard to all the circumstances including any substantial likelihood that the accused will, if released, commit an offence or interfere with the administration of justice; and

The tertiary grounds: Detention is necessary to maintain confidence in the administration of justice.

The grounds for detention must be balanced with the liberty interests of the accused, the impact that detention may have in a particular case (for example, loss of employment, severing of family ties, or the pressure to plead guilty), and whether any systemic factors resulted in the accused coming before the courts.

It is important that Crown counsel exercise their discretion in a timely fashion. Discretion must also be exercised with objectivity, independence, fairness, and without bias, prejudice, or animus towards the accused. Crown counsel must take active steps to set aside any biases when assessing the allegations and when assessing the appropriateness of a surety who offers to supervise the accused.

Crown counsel must apply the principle of restraint. Codified in s. 493.1 of the *Criminal Code*, the principle of restraint states the following:

In making a decision under this Part, a peace officer, justice or judge shall give primary consideration to the release of the accused at the earliest reasonable opportunity and on the least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practicable for the accused to comply with, while taking into account the grounds referred to in subsection 498(1.1) or (515)(10), as the case may be.

While Crown counsel must seriously consider all relevant factors in exercising discretion, the protection of the public and victims warrants special consideration.

2. THE PRESUMPTION OF INNOCENCE

The presumption of innocence is one of the most fundamental rights in Canadian criminal law. This right is enshrined in s. 11(e) of the *Charter*. Section 11(e) requires that detention occur only in a narrow set of circumstances, for specific purposes, and when it "is necessary

to promote the proper function of the bail system.”¹ The denial of bail cannot be for “any purpose extraneous to the bail system.”² For example, Crown counsel must never seek detention for punishment, retribution, or reform.³

The protection afforded under s. 11(e) encompasses two components: (1) the right not to be denied bail without ‘just cause’; and (2) the right to “reasonable bail” in terms of any conditions imposed, including the quantum of any monetary form of bail.⁴ Both of these concepts are discussed below.

2.1 The Right Not to Be Denied Bail Without Just Cause

The Supreme Court has repeatedly made clear that the right not to be denied bail without just cause is an essential element of an enlightened criminal justice system.⁵ This principle entrenches the presumption of innocence and safeguards the liberty interests of an accused.

Just cause refers to the statutory grounds that justify pre-trial detention enumerated in s. 515(10) of the *Code*, and the reverse onus provisions in s. 515(6).

Section 515(10) sets out the grounds on which bail can be denied. Crown counsel bears the burden to justify detention on a balance of probabilities unless the offence is subject to a reverse onus. In general, there is just cause to deny bail where the accused’s detention is *necessary* on any of the statutory grounds set out earlier and summarized again below:

1. To ensure attendance in court (the “primary grounds”);
2. For the protection or safety of the public (the “secondary grounds”); or
3. To maintain confidence in the administration of justice (the “tertiary grounds”).⁶

Crown counsel must consider each of these grounds in arriving at a decision to consent to release or seek detention. All three grounds are equally capable of justifying a detention order. It is important to note that the tertiary ground is not a residual ground for use only where the primary and secondary grounds are not made out. Nor is this ground limited to exceptional circumstances. “It is a distinct ground that itself provides a basis for ordering the pre-trial detention of an accused.”⁷

Section 515(6) of the *Code* puts the onus on an accused to justify pre-trial release, if charged with certain offences or if certain conditions are met. Since this reverse onus amounts to a presumption of detention, it is an exception to the basic entitlement to bail

¹ *R v Antic*, 2017 SCC 27 at para 40; *R v Pearson*, [1992] 3 SCR 665 at p. 693; *R v Morales*, [1992] 3 SCR 711 at 737; *R v Hall*, 2002 SCC 64 at para 16.

² *R v Antic*, 2017 SCC 27 at para 40; *R v Pearson*, [1992] 3 SCR 665 at p. 693; *R v Morales*, [1992] 3 SCR 711 at 737; *R v Hall*, 2002 SCC 64 at para 16.

³ *R v Morales*, [1992] 3 SCR 711 at 753; *R v Antic*, 2017 SCC 27 at para 67.

⁴ *R v St-Cloud*, 2015 SCC 27 at para 27.

⁵ *R v Antic*, 2017 SCC 27 at para 67.

⁶ *Criminal Code* s. 515(10)

⁷ *R v St-Cloud*, 2015 SCC 27 at para 87. The same paragraph also conveniently summarizes the principles governing the application of s. 515(10)(c).

contained in s. 11(e) of the *Charter*.⁸ In these cases, there is just cause to deny bail where the accused *fails* to prove - on a balance of probabilities - that their detention is not justified on the three grounds for detention. These rules reflect Parliament's intention to make bail more difficult to obtain in certain circumstances.⁹

2.2 The Right to Reasonable Bail

Every accused has the right to reasonable bail.¹⁰ Reasonable bail refers to the terms of bail, the quantum of any monetary amount, and the restrictions or conditions imposed. When seeking to impose conditions on bail, Crown counsel must be mindful of two principles: the principle of restraint and the principle of review.

In applying the principle of restraint, Crown counsel must only seek conditions that are:

- Clearly articulated;
- Minimal in number;
- Necessary;
- Reasonable;
- The least onerous in the circumstances; and
- Sufficiently linked to the specific risks posed by the accused with regard to the grounds for detention in s. 515(10) of the *Code*.¹¹

Bail conditions must be tailored to the individual risks posed by the accused,¹² designed to address specific risks regarding the grounds for detention and imposed only to the extent necessary.¹³

The principle of review requires the Crown to “carefully scrutinize bail conditions at the release stage whether the bail is contested or is on consent.”¹⁴ This means that Crown counsel should consider the necessity of all bail conditions, even those that the accused has suggested or consented to. Crown counsel must also review the bail conditions throughout the course of a prosecution to determine their continued necessity.

The principles of restraint and review are there to ensure the bail system operates fairly for everyone. When the bail system permits the imposition of unnecessary and unreasonable bail conditions, existing inequalities in the justice system tend to become exacerbated. This

⁸ *R v Antic*, 2017 SCC 27 at para 39, citing *R v Pearson*, [1992] 3 SCR 665 at 693.

⁹ The Honourable Justice Gary T. Trotter, *The Law of Bail in Canada* 3rd ed (Toronto: Carswell, 2022), at section 5.9. See also *R v Pearson*, [1992] 3 SCR 665.

¹⁰ *R v Zora*, 2020 SCC 14 at para 20; *R v Antic*, 2017 SCC 27 at para 41.

¹¹ *R v Zora*, 2020 SCC 14 at paras 6, 25, 89, 100; *R v Antic*, 2017 SCC 27 at para 67. This is also articulated in s. 515(2.01) of the *Criminal Code*.

¹² *R v Zora*, 2020 SCC 14 at para 88.

¹³ *R v Zora*, 2020 SCC 14 at paras 25, 89.

¹⁴ *R v Zora*, 2020 SCC 14 at para 6, 100.

is because overrepresented and marginalized groups are disproportionately subjected to these conditions and face more breach of bail charges as a result.¹⁵

For more on bail conditions, see section 4 of this Guideline.

3. THE DECISION TO OPPOSE BAIL

As explained earlier, the principle of restraint requires Crown counsel to seek the least onerous form of release that may be appropriate in the circumstances. This means that a release plan, with or without conditions, should be favoured over detention if the plan addresses the statutory grounds for detention.

Regardless of onus, Crown counsel must not seek detention in the following circumstances:

1. Where the decision to prosecute test has not been met. For more on the factors to consider, see [Guideline 2.3 “The Decision to Prosecute”](#). If Crown counsel determines that there is no reasonable prospect of conviction or it is not in the public interest to prosecute the case, the charges must be withdrawn or stayed.
2. Where a custodial sentence is not appropriate, after considering all the known facts at the time.
3. The length of potential sentence is shorter than the time the accused would be in custody pending trial. Only in exceptional circumstances tied to the primary or secondary grounds can Crown counsel seek detention where the sentence is likely to expire before trial. If detention is ordered, Crown counsel must regularly and diligently review the situation to determine if new circumstances justify taking steps to release the accused.

Where the accused is charged with an offence against the administration of justice, such as a breach of a court order, Crown counsel must refer to specific guidance contained in [Guideline 2.3 “The Decision to Prosecute”](#). That guideline sets out the circumstances in which Crown counsel can proceed with administration of justice offences. If it is appropriate to proceed with the prosecution, Crown counsel must refer to Guideline 3.20 [“Judicial Referral Hearings”](#) and consider whether to pursue a Judicial Referral Hearing if available in their jurisdiction. Judicial Referral Hearings must be strongly considered where the offence has not caused a victim physical or emotional harm, property damage, or economic loss.¹⁶

In cases that involve a spouse or intimate partner, Crown counsel must be conscious of the potential increased risk of harm (including physical, emotional, or psychological) on the victim. Crown counsel must seek a detention order where they consider it necessary for the safety and security of the victim or the public. For more on this issue, refer to [Guideline 5.5 “Domestic Violence”](#).

¹⁵ See e.g., *R v Zora*, 2020 SCC 14 at para 79.

¹⁶ *R v Zora*, 2020 SCC 14, at para 27.

3.1 Crown Onus Offences

Where the onus is on the Crown to justify detention, Crown counsel must not oppose bail unless there is just cause to deny bail under at least one of the three grounds for detention.

When deciding whether to seek detention for a Crown onus offence, Crown counsel must recognize the impact that a detention order would have on an accused. Access to disclosure and support services are limited in custody, and an accused person detained at the bail stage may feel pressure to plead guilty. Crown counsel must not take this decision lightly. The decision to seek detention must only be made where Crown counsel have substantial concerns, based on the circumstances of the particular file, on one or more of the three grounds for detention.

3.2 Reverse Onus Offences

Where the onus is on the accused, there is a presumption in favour of detention. Reverse onus offences reflect the reality that repeated acts of violence and serious offences committed with firearms or other weapons, have a harmful impact on victims and communities. Such offences undermine public safety and confidence in the criminal justice system. Therefore, if Crown counsel develops a genuine concern about public safety based on the information available to them, and these concerns are not addressed by the proposed release plan, the accused must be put to their onus at the bail hearing.

It is important to also note that the principle of restraint continues to apply when a person is charged with a reverse onus offence. This means that Crown counsel must not routinely ask the accused to show cause by way of a bail hearing because they are charged with a reverse onus offence.

For clarity, the reverse onus provisions do not operate to deny bail for all persons charged with these offences, only those persons who are unable to demonstrate that detention is not justified having regard to the grounds for detention. Therefore, Crown counsel must consider the release plan, and any other relevant information offered by the accused, to determine whether that plan alleviates concerns based on the statutory grounds for detention.

3.2.1 Conditional reverse onus provisions

Some offences only become reverse onus when certain conditions are met. Section 515(6)(b.1) makes intimate partner violence a reverse-onus offence if the accused has been previously convicted or discharged for similar offences. Section 515(6)(b.2) makes serious violent offences involving a weapon a reverse-onus offence if the accused has been previously convicted within five years of specific violent offences.¹⁷

Crown counsel must pay special attention to the presence of these conditions when deciding whether to oppose bail. While the decision to oppose bail should always be made

¹⁷ Crown counsel must refer to relevant confidential practice directives that provide guidance on the interpretation of these provisions.

on the totality of the circumstances, the presence of one or more of the conditions in s. 515(6) should generally favour opposing bail.

3.2.2 Offence-based reverse onus provisions

Parliament has enumerated several offences (including drug and firearm offences) as reverse-onus in s. 515(6) of the *Code*.

As noted above, Crown counsel must consider the circumstances surrounding the offence, the circumstances of the accused, and the proposed release plan before asking the accused to show cause. Each case must be considered individually. For example, an accused who is alleged to be marginally involved in a drug-trafficking scheme or is alleged to have trafficked a small amount of drugs may more easily meet their onus.¹⁸

Only after considering all the relevant information, Crown counsel must decide whether it is appropriate to propose a consent release.

3.3 Irrelevant Criteria

In exercising discretion, Crown counsel must not be influenced by any of the following considerations:

- Opposing release or seeking conditions to increase the likelihood of the accused pleading guilty or to expedite the judicial process.
- Making a decision influenced by bias or discrimination based on race, nationality, ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability, socio-economic status, or political association.¹⁹
- Opposing bail to permit the police or an investigative agency to complete their investigation. For guidance on seeking adjournments at a bail hearing, see section 5.1.1 below.
- Opposing bail to prevent further substance use.
- Making a decision to advance one's own personal or professional objectives, or those of the investigative agencies or members.

3.4 Background and Systemic Factors

The PPSC has made a commitment to not exacerbate the problem of overrepresentation of historically marginalized groups, including First Nations, Métis, Inuit, and Black accused

¹⁸ See *R v Pearson*, [1992] 3 SCR 665 at 698.

¹⁹ This list is not exhaustive. Many of the factors listed are prohibited grounds of discrimination under the *Canadian Human Rights Act*, RSC 1985, c H-6.

persons.²⁰ Crown counsel must be aware of the fact of overrepresentation, and educate themselves about the specific overrepresented groups in their local jurisdiction.

Seeking the detention of a person who is a member of any marginalized or overrepresented group will be an exceptional measure in cases where the evidence does not point to a serious concern that their release will endanger the safety and security of the public or a victim.

Sections 493.2 and 515(13.1) of the *Criminal Code* require that particular attention be given to the circumstances of First Nations, Métis and Inuit accused who are more likely to be denied bail and are overrepresented in the remand population.²¹

Crown counsel must consider all available information about background or systemic factors that played a role in the accused's criminal record or their current charges. Crown counsel must be open to receiving informal information from the accused about their background, since a formal *Gladue* report or Impact of Race and Culture Assessment (IRCA) may not be available at the bail stage. Such informal information may include a *Gladue* report or IRCA that was used by the accused in a previous case.

Seemingly neutral factors that might otherwise influence the decision to seek detention, must be carefully scrutinized. Unemployment, lack of stability in housing, or sureties without significant means may simply be reflective of socioeconomic conditions in a given community. These factors are not relevant to the assessment of the suitability of a release plan. An accused's lack of access to accommodation, resources, networks or supports must not prevent them from obtaining bail if they are otherwise releasable, since such support systems are not available to everyone.

Crown counsel must balance these considerations carefully where the victim may also be overrepresented as victims of violence in Canada.

3.5 Consultation

Crown counsel must make reasonable efforts to gather relevant information from the accused before deciding whether to seek detention or concede that the accused has met their onus. Crown counsel must be receptive to any trustworthy or credible information.

Where appropriate, Crown counsel should obtain information from a victim or witness (through Crown Witness Coordinators) about any safety concerns that can be put before the court. This is particularly important in situations where the alleged conduct reflected in the charges may imply a potential threat to the victim or witness.

²⁰ There are many different overrepresented groups in pre-trial detention.

²¹ *R v Gladue*, [1999] 1 SCR 688 at para 65 (Cory and Iacobucci JJ for the Court); *R v Summers*, 2014 SCC 26 at para 67; and *R v Myers*, 2019 SCC 18 at para 26. Section 515(13.1) also requires a justice to include in the record a statement that sets out how they determined whether an accused is from a vulnerable population, and how they considered the accused's personal circumstances.

Information from victims and witnesses may also assist in crafting release conditions necessary to address the secondary ground. This can be important in small or remote communities, where public amenities and alternative housing arrangements are limited. In these communities, bail conditions may need to be explicit about the manner in which potentially threatening interactions will be prevented.

Section 515(12) provides that even when an accused has been detained, the justice may order that the accused abstain from communication with a victim or witness or any other person named in the order. Section 515(13) requires the justice to specifically state that they have considered the safety and security of every victim of the offence, and the security of the community.

Crown counsel must ensure that victims and witnesses are informed about the custodial status of the accused following the bail hearing. Section 515(14) requires the justice to provide a copy of the order to any victim of the offence upon request. For more on this, see [Directive 5.6 “Victims of Crime”](#).

Crown counsel must also communicate with the police to ensure all relevant information that may impact the decision whether to oppose bail has been provided. Crown counsel are also expected to consult, if possible, with the relevant investigative agency regarding the release or detention of the accused, particularly regarding safety concerns for victims and witnesses. In all cases, Crown counsel’s position on bail must be made independently from the police.

4. CONDITIONS OF RELEASE

Criminal charges for violating bail conditions are common. Many historically marginalized groups are set up for a revolving door of charges because unnecessary bail conditions are imposed on them. Therefore, as stated under section 2.2 of this Guideline, Crown counsel must be diligent to ensure that conditions are tailored to the specific risks posed by the accused having regard to the grounds for detention in s. 515(10) of the *Code*.²²

4.1 Least Onerous Conditions in the Circumstances

Crown counsel must take into account the presumption of innocence before imposing any bail condition, and only seek conditions that are connected to the purpose of bail. Conditions that unjustifiably or unreasonably restrict the liberty of the accused must be avoided. For example, rigid curfews may interfere with employment, family gatherings, and daily life. Crown counsel must consider the impact any condition may have on an accused before seeking them.

Sections 515(2)(a) to (e) of the *Code* set out the increasingly restrictive types of release conditions available for the accused. Each provision “involves more burdensome conditions of release for the accused than the one before it.”²³ When read in combination

²² See *R v Zora*, 2020 SCC 14 at paras 6, 25, 89; *R v Antic*, 2017 SCC 27 at para 67. This is also articulated in s 515(2.01) of the *Criminal Code*.

²³ *R v Antic*, 2017 SCC 27 at para 46.

with section 515(2.01), these provisions enshrine the ladder principle. By virtue of section 515(2.01), a justice shall not make an order for a more onerous form of release than the Crown has demonstrated is necessary.

It is important to note that the ladder principle does not apply to reverse onus situations.²⁴ However, the accused is still entitled to reasonable bail.²⁵ In practice, this means any conditions imposed on the accused must be sufficiently linked to concerns around flight risk, public safety or the administration of justice. The conditions must also not be more onerous than necessary.²⁶

4.2 Guidance on Specific Bail Conditions

Crown counsel should not seek conditions that are difficult for an accused to meet unless the conditions are necessary to address the primary or secondary grounds for detention.

The following conditions should only be sought if they are required to protect a victim or the community:

- **Abstinence conditions and prohibitions on the possession of drug paraphernalia:** Individuals with a substance-use disorder will not benefit from such conditions because they set the person up for a subsequent breach charge. Further, abstinence conditions tend to disproportionately affect marginalized groups.²⁷ As indicated in Section 4.4 of this Guideline, these types of conditions can also exacerbate the risk of overdose following the accused's release.

Crown counsel must recognize the impact of imposing these conditions and consider other options. For example, in order to ensure the safety of the public or victims, it may be appropriate to seek a condition that an accused not have contact with a victim or attend a location while under the influence of alcohol or controlled substance. For bail conditions imposed on those participating in Drug Treatment Court, Crown counsel must refer to [Guideline 6.1 "Drug Treatment Courts"](#).

- **Rehabilitation conditions:** Conditions intended to rehabilitate/treat an offender (e.g. "attend school" or "attend counselling") or that require the accused to follow the rules of a treatment facility are inappropriate and tend to disproportionately impact marginalized accused.²⁸ These conditions may also create situations where accused persons do not know what rules they need to follow in order to meet their bail requirements.²⁹

²⁴ See *R v Abdulle*, 2020 ONSC 7324 at para 10.

²⁵ The Honourable Justice Gary T. Trotter, *The Law of Bail in Canada*, 3rd ed (Toronto: Carswell, 2022), at section 6.9.

²⁶ See *R v Kilbride*, 2022 ONSC 1074 at para 23.

²⁷ *R v Zora*, 2020 SCC 14 at paras 92, 97.

²⁸ For matters relating to young persons, see [Guideline 5.4 "Youth Criminal Justice"](#).

²⁹ *R v Zora*, 2020 SCC 14 at para 93-95.

- **"Red zone" or "no-go" conditions:** Broad area restrictions risk isolating people from essential services or their support systems. They should be avoided whenever possible.³⁰ If Crown counsel determines that an area restriction is necessary to protect a victim or the public, the condition must be carefully tailored to the specific offence and to a specific location. Crown counsel must also ensure the restriction does not adversely impact the accused's ability to access services, supports, or employment.

The following conditions should be avoided:

- **Keep the peace and be of good behaviour:** This condition inevitably leads to additional, unnecessary charges.³¹ Although it may be an appropriate condition for peace bonds and probation orders, its breadth means it violates the principle of restraint and has a tenuous link to any of the three grounds to deny bail.³²
- **Conditions that impact additional *Charter* rights:** Crown counsel should avoid seeking any condition that subjects an accused to a lower standard for a search than would be otherwise required under the *Charter*.³³

It bears repeating that Crown counsel must never seek to impose conditions for the purpose of punishing the accused or for the purpose of reforming the accused.³⁴ Doing either is not in keeping with the presumption of innocence.

4.3 Conditions to Protect Victims, Witnesses and Justice System Participants

If an accused will be released on bail, Crown counsel must consider specific conditions that will ensure the safety and security of any victim, witness, or justice system participant. Sections 515(4.2) and (4.3) provide for specific orders for the protection of any person including victims, witnesses or justice system participants in relation to certain offences identified in those sections. See also the *PPSC Deskbook* for more detailed guidance: paragraph 3.2 "Judicial Interim Release" in [Guideline 5.5 "Domestic Violence"](#), and paragraph 4.4 "Bail Hearings" in [Directive 5.6 "Victims of Crime."](#)

4.4 Surety Releases

Crown counsel must only seek a surety release in exceptional circumstances. A surety release is one of the most onerous forms of release and must not be an automatic default or starting position.³⁵ In keeping with the ladder principle, the less onerous forms of release referred to in s. 515(2) must be considered and rejected before seeking a surety release.³⁶

³⁰ *R v Zora*, 2020 SCC 14 at para 97.

³¹ *R v Zora*, 2020 SCC 14 at para 94.

³² *R v Zora*, 2020 SCC 14 at para 94.

³³ *R v Zora*, 2020 SCC 14 at para 98.

³⁴ *R v Zora*, 2020 SCC 14 at para 85.

³⁵ *R v Antic*, 2017 SCC 27 at para 67.

³⁶ See s. 515(2.03) of the *Criminal Code*, which calls for restraint in the use of surety releases.

Many accused will not be able to find a surety.³⁷ Even those who are able to find a surety often have difficulty doing so while in custody. These situations can prolong incarceration or prevent the release of an accused who does not require a detention order. Therefore, if a surety is required, Crown counsel should not routinely require them to be present in court.

While certain jurisdictions have their own practices, the presence of a surety in court is not a prerequisite to release. For many sureties, the process is disruptive, sometimes requiring that they miss work, school, or other responsibilities to attend court. Crown counsel should consider whether there is an alternative to testimony from the surety to assist the court in determining whether the use of a surety, and a particular person as a surety, is appropriate.

Crown counsel must take appropriate steps to satisfy themselves that the proposed surety is suitable and understands their role.³⁸ While it is not the Crown's role to provide legal advice to the proposed surety, Crown counsel may consider providing them with government-supplied information on the role of a surety.

Crown counsel's decision on the suitability of a surety must be free of any conscious and unconscious biases, institutional biases, and stereotypes. Both becoming aware of these biases, and taking active steps to set them aside, are necessary to ensure that conclusions made are objective and fair. Providing reasons is one way to ensure that decisions are made free of bias. Therefore, if a proposed surety is not suitable to the Crown, Crown counsel must convey to the accused the reasons why the surety is not suitable. Crown counsel should also advise what would make a suitable surety in the particular case to determine if such a surety is available to the accused.

4.5 Cash Bails

Cash bails may have the effect of denying bail to those without means. They may also have the effect of leaving the perception that those with significant means may more easily be granted bail. Both of these premises are problematic.³⁹

The *Criminal Code* permits a cash bail in any case. Where a cash bail is combined with a surety, however, sections 515(2)(d) and (e) only permit such an order where the accused is not ordinarily resident within 200 kilometres of the location of the arrest.

Despite these provisions, cash bails are discouraged and should only be used in exceptional cases. In any case where Crown counsel determines that a cash bail is necessary, the effect of such an order must not result in disadvantaging those with limited financial means.

³⁷ This may be particularly difficult in the Northern regions where the accused may be in custody hundreds of kilometers from their home.

³⁸ Appropriate steps should not become so exhaustive where the primary issue on the bail hearing becomes surety suitability. See *R v Tunney*, 2018 ONSC 962 at para 42.

³⁹ As the Supreme Court stated in *R v Antic*, 2017 SCC 27 at para 48, "Parliament included cash in the most onerous 'rungs' of the ladder for added flexibility, not because cash is more effective." The Supreme Court made clear that release with a pledge of money (as opposed to a deposit) has the same coercive power as release with a cash deposit.

These same principles apply when the accused is asked to pledge an amount of money to secure their release.

4.6 The Opioid Crisis

The number of opioid overdoses and deaths has caused a public health emergency in many jurisdictions. Crown counsel must be mindful of bail conditions that may increase the likelihood of short-term detention, thereby contributing to the risk of opioid overdoses. The short-term detention of an accused with a substance-use disorder may lower their tolerance for opioid use, putting them at heightened risk of an overdose upon release from custody.

Crown counsel must also be mindful of the risks posed for an accused with a substance-use disorder when they begin a period of custody because a lack of access to substances may have negative health impacts.

To avoid exacerbating this public health emergency, Crown counsel must avoid putting an accused in the position where they are likely to violate their bail due to a substance-use disorder. This can happen if Crown counsel seeks abstinence conditions or prohibitions against the possession of drug paraphernalia. As set out earlier, Crown counsel must not seek such conditions with an accused who has a substance use disorder. If such conditions have been imposed, Crown counsel must consider seeking a bail variation.

The determination of whether an individual has a substance use disorder can, in some cases, be inferred from the information provided by the investigating authority. This determination may also be based upon reliable information provided by the accused.

Where such conditions have been imposed, and breach charges or new charges are proposed, Crown counsel must take steps to have the new charges dealt with on an out-of-custody basis unless public safety concerns require detention. For example, Crown counsel can refer the accused to Drug Treatment Court, resort to the judicial hearing regime, or use alternative measures.

5. THE BAIL HEARING

In preparing for and conducting a bail hearing, Crown counsel should keep the following considerations in mind.

5.1 The Right to a Timely Bail Hearing

The right to reasonable bail includes the right to a timely bail hearing. If an accused is made to wait for their bail hearing for an unreasonably prolonged time, this can breach their right to reasonable bail.⁴⁰ Therefore, Crown counsel must ensure that the bail hearing proceeds expeditiously and as effectively as possible.

The *Criminal Code* requires a person who is arrested to be brought before a justice within 24 hours of arrest, or as soon as reasonably possible. Crown counsel must ensure that initial

⁴⁰ *R v Zarinchang*, 2010 ONCA 286 at para 39.

appearance proceeds within 24 hours, and that if the accused wants to run a bail hearing, the Crown is ready to proceed.

5.1.1 Seeking Adjournments

Section 516(1) of the *Criminal Code* permits the Crown to seek an adjournment for up to three clear days. The accused must consent to a longer adjournment.

Crown counsel must only seek an adjournment for reasons based on good faith and informed by the requirement for a just cause analysis pursuant to s. 515 of the *Code*.⁴¹ Where a key piece of information is missing, or a key event is pending, it is legitimate to consider whether the accused may interfere with the investigation by destroying evidence, tampering with witnesses, or otherwise interfering with the administration of justice should they be released.⁴²

Crown counsel must never request adjournments for administrative convenience or to pursue evidence that will not have a bearing on the issues relevant to bail.

If an adjournment is sought, it must be for as short a time as necessary. Crown counsel must put the reasons for the request on the record.

5.1.2 Lengthy Bail Hearings and Delay

Crown counsel must be mindful of inherent delays that may occur when scheduling lengthy bail hearings. For example, some jurisdictions may require a date to be set in the future when a bail hearing will require a full day or more. To avoid unnecessary delay, Crown counsel must consider, based on the circumstances of the offence and the accused, whether it is possible to narrow the issues and reduce the amount of court time necessary to conduct the hearing.

For example, Crown counsel may seek admissions on non-controversial matters, limit the evidence tendered, or revise the synopsis into a concise summary.

5.2 Credible or Trustworthy Evidence

Section 518(1)(e) of the *Code* states that the judicial officer hearing a bail matter may receive evidence considered “credible or trustworthy.”⁴³ Depending on the jurisdiction, the Crown may read in a synopsis or present a witness for examination.

In either case, Crown counsel must ensure that the evidence they rely upon to make important decisions about bail, and any evidence presented at a bail hearing, is sufficiently

⁴¹ See *R v Donnelly*, 2016 ONCA 988 at para 80.

⁴² Such concerns may be relevant to the secondary ground for detention as described in section 515(10)(b) of the *Criminal Code*. See *R v Myers*, 2019 SCC 18 at para 41; see also *R v CM*, 2021 ONSC 2948 at para 54.

⁴³ *Toronto Star Newspapers Ltd v Canada*, 2010 SCC 21, at para 28.

credible and trustworthy. Crown counsel must not lead evidence they know is unavailable or unreliable.

5.3 Cross-Examination of Sureties

Crown counsel, through the respectful and vigorous questioning of a surety, may assist the court in determining whether the proposed surety can adequately address a particular ground of detention that is an impediment to the release of the accused.

Before cross-examination, Crown counsel must take steps to identify and set aside any assumptions based on stereotypes or bias (whether conscious or not), about the surety or the nature of the relationship between the surety and the accused. Bias, prejudice, or stereotypes must never play any role in determining the adequacy of a surety.

6. BAIL FORFEITURE (OR ESTREATMENT)

When an accused breaches the conditions of their bail, they (or their sureties) may lose money that was pledged to secure their release. Part XXV of the *Criminal Code*, “Effect and Enforcement of Undertakings, Release Orders and Recognizances”, sets out the legal and procedural framework for the enforcement of recognizances, including forfeiture.⁴⁴ The test at a forfeiture hearing is not rigid. The main principle is to preserve the “moral pressure” or the “pull of bail” to ensure the effectiveness of the bail system.⁴⁵

In the event of a breach, Crown counsel must decide whether to pursue forfeiture proceedings. Not every breach will warrant forfeiture. For example, it may be appropriate to seek estreatment in cases where the accused absconded and remains at large. It may also be appropriate to seek estreatment where the accused fails to attend their trial.

In deciding whether to pursue forfeiture proceedings, Crown counsel must consider the following non-exhaustive factors:

- the need to protect the integrity of the justice system;
- the seriousness of the underlying charge;
- the seriousness of the breach;
- the surety’s diligence in supervising the accused;
- the degree of fault of any surety in the accused’s failure to comply with the order, including any efforts made by that surety to render the accused;
- change in financial circumstances on the part of the surety;
- whether forfeiture is practical in the circumstances of the particular case, including the surety’s ability to pay and the effects of forfeiture on them.⁴⁶

⁴⁴ *Criminal Code* s. 771.

⁴⁵ *Canada (Attorney General) v Horvath*, 2009 ONCA 732 at paras 43-44.

⁴⁶ See *R v Biya*, 2022 ONCA 99 at paras 16, 20.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

3.20 JUDICIAL REFERRAL HEARINGS

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

January 07, 2020

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1. INTRODUCTION

The enactment of Bill C-75 is a Parliamentary initiative to address delay in the justice system. One of the important aspects of Bill C-75 is the introduction of judicial referral hearings as a means of dealing with so-called administration of justice offences, which are offences committed against the integrity of the criminal justice system including alleged breaches of bail. The relevant sections of Bill C-75, which amend the *Criminal Code* to create judicial referral hearings, come into force on December 18, 2019.¹ The purpose of this Chapter is to provide an overview of the new provisions and guidance to prosecutors.

2. OVERVIEW OF THE JUDICIAL REFERRAL HEARING REGIME

The new provisions in the *Criminal Code* allow the police or the Crown to direct administration of justice offences to a judicial referral hearing as an alternative to charging the accused with a new offence and resorting to s. 524 of the *Code*. Judicial referral hearings are available as long as the alleged administration of justice offence has not caused harm to a victim, which includes physical or emotional harm, property damage or economic loss. At a judicial referral hearing, the judge or justice will review any existing conditions of

¹ *An Act to Amend the Criminal Code*, SC 2019, c. 25, s 407 (Bill C-75). The relevant sections creating judicial referral hearings come into force 180 days from Royal Assent, which took place on June 21, 2019.

release and could decide to take no action, release the accused on new conditions or detain the accused, depending on the particular circumstances of the accused and the offence.

It is important to recognize that a judicial referral hearing is initiated when a prosecutor “seeks a decision” under s. 523.1(2) of the *Criminal Code*. The new procedure does not impact police powers in non-charge approval provinces relating to whether or not to lay charges. The provisions operate by enhancing police and prosecutorial discretion by allowing them to compel an accused to appear at a judicial referral hearing as an alternative to laying or pursuing charges where appropriate, and when it is believed that an alleged breach should be brought to the attention of a justice or a judge.

A judicial referral hearing is essentially a review of the individual’s bail status, and the conditions that were imposed when the accused was released after being charged with an earlier offence. Guilt or innocence with respect to the alleged administration of justice offence is not considered. The alleged administration of justice offence will not appear on the accused’s criminal record. Any charges that have been laid regarding the administration of justice offence in question are dismissed by the judge or the justice once a decision is made with respect to the release status of the accused.²

If an accused fails to attend a judicial referral hearing, they cannot be charged with an additional offence for failure to appear. The issue can be dropped, the accused can be offered another hearing, or the accused can be charged for the original breach that was to be addressed through the judicial referral hearing.

3. BACKGROUND AND PARLIAMENTARY INTENT IN ENACTING THE REGIME

The overarching theme of Bill C-75 was to address delay within the justice system.³

The focus on administration of justice offences arose in part from the Standing Senate Committee on Legal and Constitutional Affairs (Senate Committee) who conducted a sweeping year-long study on delay and released its final report in June 2017.⁴ One focus of the Senate Committee study was so-called administration of justice offences. The most common of these offences include failing to comply with bail conditions, failing to appear in court and breaches of probation. The Senate study found that the number of individuals charged with administration of justice offences has been increasing, despite a consistent decrease in the volume and severity of other criminal offences in Canada.⁵

² Legislative Background: *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, (Bill C-75 in the 42nd Parliament), Department of Justice Canada, August 2019, (<https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/c75/c75.pdf>) at 20-21.

³*Ibid*, at 5-14.

⁴ Senate Standing Committee on Legal and Constitutional Affairs, June 2017, [Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada](#).

⁵ According to the Department of Justice, administration of justice offences represent approximately 10 per cent of incidents reported by the police, while 40 per cent of cases in adult criminal courts include at least

Concern over the volume of administration of justice offences in the justice system led the Senate Committee to explore options as extreme as the decriminalization of these offences. However, in the end the Senate Committee settled on the following⁶:

Recommendation 33: “The committee recommends that the Minister of Justice prioritize the reduction of court time spent dealing with administration of justice offences and develop alternative means of dealing with such matters with the provinces and territories.”

The creation of Judicial Referral Hearings represents the government’s response to the Senate Committee recommendation. The intention is to change the way some administration of justice offences are processed in order to reduce the pressure they place on the criminal justice system and thereby reduce delay.⁷ The goal of this approach is to allow for alternative and early resolution of minor breaches in an attempt to ensure that only reasonable and necessary conditions have been imposed. This approach is intended to be a more efficient alternative to laying a new criminal charge in response to a breach.⁸

4. THE LEGISLATIVE CONTEXT IN WHICH JUDICIAL REFERRAL HEARINGS ARE BEING INTRODUCED

Bill C-75 made a number of other amendments and additions to the judicial interim release provisions in the *Criminal Code* which provide some context in which the judicial referral hearing should be interpreted.

First, the principle of restraint has been codified.⁹ Primary consideration is to be given to the release of the accused “*at the earliest reasonable opportunity and on the least onerous conditions ...including conditions that are reasonably practicable for the accused to comply with...*”. The language used closely resembles that used by the Supreme Court of Canada in *R. v. Antic*.¹⁰ In making a decision on release, s. 493.2 specifies that the justice or judge “shall give particular attention to the circumstances of Aboriginal accused,” and “accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part.”

Second, in keeping with the language used in s. 493.1, and “the ladder principle” set out in *Antic*, additional provisions were added to s. 515, further codifying the principle of restraint. For example:

one administration of justice offence, most of which result in a guilty verdict and a jail sentence. See Burczyk, Marta and Christopher Munch, 2015, “*Trends in offences against the administration of justice*,” Statistics Canada Catalogue no. 85-002-X.

⁶ *Supra*, note 2.

⁷ Hansard: Number 300 (42nd Parliament, 1st Session) Thursday May 24, 2019, 1530h, 2nd Reading Speech, Minister of Justice.

⁸ *Ibid.*

⁹ Section 493.1

¹⁰ [2017] 1 SCR 509.

- a. section 515(2.01) requires the prosecution to show cause why any less onerous form of release would be inadequate;
- b. section 515(2.02) provides that a promise to pay shall be favoured over a deposit of money provided the accused or surety has reasonably recoverable assets; and
- c. section 515(2.03) provides that a surety be required only if the justice is satisfied that this requirement is the least onerous form of release possible for the accused in the circumstances.

Third, the reference to the condition that an accused abstain from alcohol or drugs is no longer specifically listed as one of the conditions a peace officer may impose when releasing an accused. This is consistent with the language found in s. 493.1 that conditions should be “reasonably practicable for the accused to comply with.” In order for a peace officer to impose such a condition, he or she would have to demonstrate that the condition was reasonable and necessary to ensure the safety and security of any victim of or witness to the offence.¹¹ A justice can presumably still impose such a condition using the general power to impose “any other reasonable conditions specified in the order that the justice considers desirable.”¹²

5. OVERVIEW OF CROWN APPROACH – BALANCING PUBLIC SAFETY AND PARLIAMENT’S INTENT

In deciding whether to pursue a judicial referral hearing, the Crown must consider the objectives of Parliament and balance them against the safety of the public and any victim of the alleged offence(s). The objectives of Parliament in making these amendments include: (1) decriminalizing non-compliance with bail conditions that is minor or ‘technical’ in nature and non-harmful to victims; (2) reducing the substantial burden that administration of justice offences place on the criminal justice system; and (3) providing a speedy process for amending release conditions to take into account the particular circumstances of the accused, including mental health issues, the existence of neurocognitive disorders such as fetal alcohol spectrum disorder (FASD), substance abuse disorders, and homelessness.¹³

Ideally, release orders under s. 515 will have been fashioned, *ab initio*, to be reasonably capable of being respected, thus reducing the likelihood that a judicial referral hearing will be necessary. However, the circumstances of the accused may change over time, requiring a review of the original order and the accused’s performance on bail.

In most cases, the existence or absence of physical or financial harm to a victim will be evident in the Crown brief, but it may be more difficult for prosecutors to assess whether a victim has suffered emotional harm because of an accused’s failure to abide by release

¹¹ Section 501(3)(k).

¹² Section 515(4)(h).

¹³ *Supra*, note 2.

conditions. If this is not clear from the Crown Brief, the Crown's office should seek further investigation by police.

Where an accused has been issued an appearance notice to appear at a judicial referral hearing, or the prosecutor refers a charged breach to a judicial referral hearing, the prosecutor must consider the guidelines in [Chapter 3.18 of the Deskbook](#) which deal with Judicial Interim Release. The prosecutor should pay particular attention to any circumstances of the accused that have likely contributed to their failure or inability to comply with conditions as well as s. 493.2 of the *Criminal Code* where applicable.

6. HOW WILL JUDICIAL REFERRAL HEARINGS ARISE IN PRACTICE

Judicial referral hearings introduce a new *Criminal Code* process through which certain administration of justice offences may be resolved summarily without the need for an information to be sworn and without the necessity of a trial. Listed offences to which the new provisions apply consist of failing to comply with a summons, appearance notice, undertaking or release order; and failure to attend court as required. The process allows a judge or justice to review the reasonableness of bail or other release conditions and to take appropriate action in keeping with the overall intent of the related legislative changes as outlined above.¹⁴

There are two pathways to the judicial referral hearing process. Peace officers have been given discretion to initiate the judicial referral hearing process. Pursuant to s. 496 of the *Criminal Code*, they may issue an appearance notice to a person to appear at a judicial referral hearing. The officer must have reasonable grounds to believe that a person has committed an administration of justice offence, and that the failure to comply or appear did not cause a victim "physical or emotional harm, property damage or economic loss."¹⁵ Such an appearance notice is issued "without laying a charge," such that all that is under review at the hearing is the accused's status on judicial interim release for the original charge.

The second route to a judicial referral hearing is when an information has been sworn charging the accused with an administration of justice offence, and the Crown exercises a discretion to seek a judicial referral hearing as opposed to pursuing the charge and seeking recourse to s. 524 of the *Code*.

7. JURISDICTION

The jurisdiction for a justice or judge to hear and decide a judicial referral hearing is set out in s. 523.1 of the *Criminal Code*. If the administration of justice offence arises from a bail order of a superior court of criminal jurisdiction under subsection 522(3), it is that

¹⁴ While this outline will focus on adult criminal processes, there are corresponding provisions for administration of justice offence prosecutions pursuant to the *Youth Criminal Justice Act*.

¹⁵ Section 496 of the *Criminal Code*.

court that must hear the judicial referral hearing¹⁶. Otherwise, the hearing may take place before a justice.¹⁷

There is some uncertainty about the extent to which each province and territory will support the implementation of judicial referral hearings, for example, by creating dedicated courts where such hearings routinely take place. It is clear from the legislation, however, that where the prosecutor seeks a decision under s. 523.1(2) it is mandatory for the justice to conduct the matter in the context of a judicial referral hearing. Thus, the Crown should exercise its discretion in accordance with the will of Parliament, with due regard for the needs of public safety, and pursue judicial referral hearings where appropriate.

It should be noted that s. 523.1 does not include a legislative equivalent to s. 518(1) which allows a justice at a judicial interim release hearing to make inquiries “on oath or otherwise,” and consider any evidence “considered credible or trustworthy.” While the amendments creating judicial referral hearings do not specify an exact procedure or what kind of evidence is contemplated, the Crown should bear in mind that the objective of the legislation is to reduce the strain on court resources and reduce delay.¹⁸

8. PRE-CONDITIONS AND PROCESS

In order for a court to hold a judicial referral hearing, certain pre-conditions must be satisfied. First, a peace officer must have issued an appearance notice pursuant to s. 496, or a charge must have been laid. Second, the Crown must exercise its discretion to “seek a decision” under the judicial referral hearings.¹⁹ If the conditions have been met, the purpose of the hearing is to inquire into whether the accused failed to comply with a bail order or failed to attend court, and if so to review the conditions of release.

If satisfied that an administration of justice offence occurred and did not cause a victim physical or emotional harm, property damage or economic loss, the judge or justice shall review the relevant conditions of release and exercise one of the following powers:

- take no action;²⁰

¹⁶ Section 523.1(1)(a) of the *Criminal Code*. In the Yukon and Northwest Territories, it is a judge of the Supreme Court and in Nunavut, a judge of the Nunavut Court of Justice.

¹⁷ A justice is defined under s. 2 of the *Criminal Code* as, “a justice of the peace or a provincial court judge, and includes two or more justices where two or more justices are, by law, required to act or, by law, act or have jurisdiction.”

¹⁸ It is recognized that the specific procedural and evidentiary requirements may differ in accordance with regional practices and the requirements of the judiciary. The Crown should advocate in favour of a procedure that is as streamlined and efficient as possible in accordance with local practices.

¹⁹ Section 523.1(2).

²⁰ Section 523.1(3)(a).

- cancel the summons, appearance notice, undertaking or release order and either make a new release order under s. 515 of the *Criminal Code*²¹ or issue a detention order²² if the Crown shows cause,²³; or
- remand the accused to custody for the purposes of the *Identification of Criminals Act*.²⁴

9. CONSEQUENCES

Certain consequences flow automatically from the completion of a judicial referral hearing. When the court makes a decision at a judicial referral hearing, and a charge has been laid, the judge or justice “shall” dismiss the charge.²⁵ The focus at a judicial referral hearing is on whether the accused did or did not fail to comply with an order or failed to appear. There is no finding of guilt or innocence, and no criminal record arises from the administration of justice offence. If a judge makes a decision at a judicial referral hearing, no charges may be laid by information or indictment in relation to the failure to comply or appear that was the subject of the hearing.²⁶ As noted above, if the accused does not attend their judicial referral hearing pursuant to a s. 496 appearance notice to do so, they cannot be charged with the offence of failure to appear.²⁷ When this happens, the options are to drop the matter, offer the accused another hearing, or charge the accused for the breach that was to have been addressed by way of a judicial referral hearing.

10. ARREST (SECTION 495.1) AND CANCELLING BAIL (SECTION 524)

Peace officers retain the power to arrest without warrant for the purposes of having an accused appear before a judge or justice pursuant to section 524 of the *Code*. Section 495.1 of the *Criminal Code* authorizes a peace officer to arrest an accused without warrant for the purposes of having the accused dealt with under s. 524. The officer must have reasonable grounds to believe that an accused has or is about to contravene a summons, appearance notice, undertaking or release order or reasonable grounds to believe the accused has committed an indictable offence while subject to a summons, appearance notice, undertaking or release order. This power of arrest was formerly set out in s. 524(2) of the *Code* and remains the mechanism by which an accused can be kept in custody for the purposes of a s. 524 application.

²¹ Section 523.1(3)(b)(i).

²² Section 523.1(3)(b)(ii). If the judge or justice makes a detention order, they must provide reasons.

²³ It should be noted that unlike other instances of failure to comply with a release order which place the accused in a reverse onus for the purposes of obtaining release on bail (see ss. 515(6)(c) and 524(4)), the judicial referral hearing process requires the Crown to show cause why a person’s detention in custody is justified pursuant to ss. 515(10) of the *Criminal Code*.

²⁴ Section 523.1(3)(c).

²⁵ Section 523.1(4).

²⁶ Section 523.1(5).

²⁷ This is by operation of ss. 145(3) and 508(b)(i) of the *Code*. Section 145(3) makes it an offence to fail to attend court when required to do so pursuant to an appearance notice which has been confirmed under s. 508. Pursuant to s. 508(b)(i), a justice may confirm an appearance notice when a related information has been laid. Because s. 496 appearance notices do not contemplate the laying of an information, a failure to attend court pursuant to a s. 496 appearance notice cannot be the subject of a charge.

Section 524 of the *Criminal Code* has undergone some amendments, but remains a means by which the Crown may seek revocation of bail. The structure of section 524 is similar to the basic structure in s. 523.1 for judicial referral hearings.²⁸ However, there are important differences as well. Under s. 524(3) it is mandatory for a justice who finds that the accused contravened a bail order (or there were reasonable grounds to believe the accused committed an indictable offence while on bail) to cancel the order.²⁹ That in turn gives rise to a mandatory order that the accused be detained in custody, unless the accused shows cause why their detention in custody is not justified.³⁰ The judicial referral hearing thus provides a more flexible approach for dealing with alleged breaches of bail. The presiding justice may elect to do nothing, may change or modify the bail to prevent further breaches, and though they may detain the accused on the original charge, no reverse onus arises as a result of the alleged breach. It is thus important for the Crown to carefully consider whether to pursue a judicial referral hearing or a s. 524 hearing.

11. EXERCISE OF CROWN DISCRETION TO SEEK A JUDICIAL REFERRAL HEARING

As outlined above, judicial referral hearings are an alternative to charging the accused with an administration of justice offence. The discretion to “seek a hearing” rests with the Crown both when an appearance notice has been issued, and when a charge has been laid. As such, when deciding whether to seek a judicial referral hearing rather than proceeding by way of a charge for an administration of justice offence, the analysis requires the Crown to consider the decision to prosecute test. In this context, the Crown must consider the principles enumerated in [Chapter 2.3 of the Deskbook](#) with particular reference to the nature of the alleged offence.

In considering the public interest branch of the decision to prosecute, the Crown must consider the legislative intent in creating judicial referral hearings. In many cases, judicial referral hearings provide an opportunity to more effectively deal with failures to comply with conditions of release and failures to appear in court. In order to reduce delay, and increase the efficiency of the justice system, the Crown should resolve minor or technical breaches by means of a judicial referral hearing without the necessity of a charge.

In exercising the discretion to direct a judicial referral hearing, consideration should be given to how the offender’s circumstances relate to the particular administration of justice offence at issue. For example, if the allegation is that the accused failed to appear, the existence of an underlying problem or condition of the accused, such as homelessness, substance abuse or mental disorder that affected or contributed to the failure to appear would be a relevant factor. Such considerations may inform the determination as to

²⁸ For example, where the accused was released from custody under section 522(3) by a Superior Court judge, then only a judge of that court can hear the matter, whereas in any other case a justice can hear the matter.

²⁹ Section 524(3).

³⁰ Section 524(4). The requirement of the accused to show cause why their detention is not justified is in contrast to the onus on the Crown to show cause under the judicial referral hearing provisions of the code (see s. 523.1(3)(b)(ii)).

whether a prosecution or a judicial referral hearing is the best means of promoting future compliance with court orders.

Judicial referral hearings provide the Court with an opportunity to review existing conditions of release and are an extension of the bail process. Judicial referral hearings are intended to reduce administration of justice offences. As such, they are an opportunity for a tailored response to breaches that does not involve detention or new charges. The Crown should consider whether the principle of restraint is properly captured by the existing bail, and whether the accused is a member of an overrepresented population such as Indigenous persons. In all cases, the Crown must apply the principles related to judicial interim release outlined in [Chapters 3.18](#) and [3.19 of the Deskbook](#) when considering judicial referral hearings.

In some instances, it may be obvious that the conditions of release imposed on the accused cannot be complied with. For example, if a homeless person has a curfew as part of his or her conditions of release, it may be impossible for the accused to comply with that condition. In these circumstances, Crown counsel are encouraged to immediately exercise their discretion with respect to the administration of justice offence and seek to amend the conditions of release with the consent of the accused.

The fact that police have laid a charge for an administration of justice offence rather than issue an appearance notice may be a relevant factor to the exercise of Crown discretion, but is not determinative. It may be necessary to inquire of the police why an administration of justice offence was laid rather than a referral by police to a judicial referral hearing in the first instance. This further information may provide greater context for the Crown when exercising its discretion under the decision to prosecute test and deciding whether to continue the prosecution or seek a judicial referral hearing.

12. RELEVANT FACTORS THAT SHOULD BE CONSIDERED

In deciding whether to seek a judicial referral hearing prosecutors should take all of the following factors into account:

- the nature of the underlying offence;
- any safety concerns expressed by the police or arising from the facts;
- the accused's criminal record, particularly for violence and non-compliance with court orders;
- the safety concerns of any alleged victim or witness;
- the perspective of the victim regarding whether they expect the relationship to continue, and whether they wish to have contact with the accused;
- the information received from the accused regarding their personal circumstances;
- whether the accused has mental health issues, suffers from a substance abuse disorder, or any other medical condition that would affect their performance on bail; and

- the particular circumstances of an Aboriginal accused or an accused who belongs to a vulnerable and overrepresented population in the criminal justice system;
- whether the accused has been through a number of judicial referral hearings on the same substantive offence;
- whether the accused has demonstrated an unwillingness to participate in a judicial referral hearing;
- whether the accused has failed to appear for the judicial referral hearing;
- whether the breach arises out of a continuation or a re-commission of the offence or new substantive offences;
- whether the breach is part of a pattern of conduct that demonstrates disregard by the accused for his or her conditions of release.

It is important to recognize that despite the importance of resolving alleged breaches in an expeditious fashion, not every situation can be appropriately dealt with by way of judicial referral hearing. In appropriate cases, the Crown can and should continue to rely on s. 524 and seek a revocation of bail. The following are factors that will affect the Crown decision to seek revocation under s. 524(4) rather than by judicial referral hearing:

- whether the breach invokes issues of public safety;
- whether the breach arises out of a continuation or re-commission of the offence or new substantive offences; and
- whether the breach is part of a pattern of conduct that demonstrates disregard by the accused for his or her conditions of release.

Crown counsel should also bear in mind that in some circumstances, revocation under s. 524(4) can be used following a breach to consolidate bail orders, particularly where the accused is having difficulty complying with multiple, conflicting terms of release. While the section requires an accused to show cause why they should be released, the Crown may not oppose release depending on the circumstances.

13. CONCLUSION

Bill C-75 addresses the need to modernize and streamline the bail regime and enhance the effectiveness and efficiency of procedures. The result is the creation of a new and more flexible means of addressing alleged breaches of bail and reducing unnecessary delay. Judicial referral hearings should be used by the Crown where appropriate in order to give due recognition to the will of Parliament, and ensure the efficient use of court resources. Regional differences will arise in practice, particularly between charge approval provinces and non-charge approval provinces, but the existence of the hearings and the jurisdiction and powers of a justice at such a hearing are now clearly set out in the *Criminal Code*, and all Crown lawyers must be prepared to consider, and where appropriate, invoke the new procedures.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

3.21 REMEDIATION AGREEMENTS

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

January 23, 2020

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1. INTRODUCTION

Part XXII.1 of the *Criminal Code* (Code) provides a regime under which the Attorney General (AG) may approve the negotiation of a Remediation Agreement (RA) between a prosecutor and an organization accused of a scheduled offence. Under an RA, the accused would agree to take specified actions in return for the charges against the accused organization being stayed.

Known more widely as “Deferred Prosecution Agreements” in other jurisdictions, agreements of this nature are used in appropriate cases as an alternative to prosecution and serve as a means to hold organizations accountable while putting in place measures to mitigate the risk of future offences and harm to third parties, such as employees, victims and investors.

This guideline outlines the criteria applied by the Director of Public Prosecutions (DPP) in his or her capacity as Deputy Attorney General of Canada when determining whether to consent to the negotiation of an agreement pursuant to section 715.32(1)(d) of the Code. It also describes the procedure for Crown counsel and agents to follow when making a recommendation for an RA as well as the process for the negotiation of an agreement.

2. STATEMENT OF POLICY

Before an RA can be considered, the threshold of reasonable prospect of conviction must be met. An RA is an alternative to a traditional prosecution but should only be applied in cases where a prosecution is viable. Once the threshold test is met and where Crown counsel recommend that an invitation to negotiate an RA should be made, the discretion vested in the Attorney General under section 715.32 of the Code will be exercised only in circumstances where it is in the public interest to issue an invitation to negotiate an RA rather than proceeding with a traditional prosecution.

Factors that must be considered in determining the public interest are set out in subsection 715.32(2) of the Code:

- a. the circumstances in which the act or omission that forms the basis of the offence was brought to the attention of investigative authorities;
- b. the nature and gravity of the act or omission and its impact on any victim;
- c. the degree of involvement of senior officers of the organization in the act or omission;
- d. whether the organization has taken disciplinary action, including termination of employment, against any person who was involved in the act or omission;
- e. whether the organization has made reparations or taken other measures to remedy the harm caused by the act or omission and to prevent the commission of similar acts or omissions;
- f. whether the organization has identified or expressed a willingness to identify any person involved in wrongdoing related to the act or omission;
- g. whether the organization — or any of its representatives — was convicted of an offence or sanctioned by a regulatory body, or whether it entered into a previous remediation agreement or other settlement, in Canada or elsewhere, for similar acts or omissions;
- h. whether the organization — or any of its representatives — is alleged to have committed any other offences, including those not listed in the schedule to this Part; and
- i. any other factor that the Crown counsel considers relevant.

While all of the listed factors must be considered, the weight given to each will be case specific. Note that if the organization is accused of an offence pursuant to the *Corruption of Foreign Public Officials Act*, consideration must not be given to the national economic interest, the potential effect on relations with a foreign state or the identity of the organization or any individual involved.

3. PROCEDURE

As set out in subsection 715.32(1) of the Code, an RA may only be considered in relation to a listed offence where there is a reasonable prospect of conviction. In order to evaluate whether this threshold has been met, a full law enforcement investigation must be undertaken. The RA regime does not alter the manner in which criminal offences are to be investigated. Internal or private investigations by the organization are not a substitute for the independent determination of law enforcement whether to conduct an investigation and their assessment of the results of any investigation of the offence even when it results from a voluntary disclosure.

There are a number of circumstances in which Crown counsel may be asked about the likelihood of negotiating an RA. These include:

- by counsel for an organization in the context of making a voluntary disclosure or considering such a disclosure;
- by counsel for an organization in situations where law enforcement are investigating an offence and the organization is aware of the investigation but charges have not been laid;
- by counsel for an organization following the laying of charges;
- by law enforcement prior to or in the course of an investigation.

In all cases, Crown counsel should refrain from offering any view on the likelihood of an invitation to negotiate an RA being issued. In situations involving potential disclosure of offences, Crown counsel shall refer organizations or their counsel to the appropriate law enforcement agency. In all cases, Crown counsel must avoid any comment on an invitation to negotiate an RA being issued until such time as a final decision is made pursuant to the procedure set out in this guideline.

3.1. Regional offices

Once an investigation has been conducted by law enforcement and once Crown counsel is satisfied that there is a reasonable prospect of conviction involving a scheduled offence and an organization as an accused, Crown counsel shall consider the possible application of the RA regime pursuant to this guideline.

3.1.1. Seeking AG Consent

Following a review of the investigation and having concluded that there is a reasonable prospect of conviction, if Crown counsel is of the view that an invitation to negotiate an RA should be considered, Crown counsel shall recommend to the Chief Federal Prosecutor (CFP) that consent of the AG should be sought.

If the CFP is also of the view that the negotiation of a remediation agreement is in the public interest, he or she shall advise the appropriate Deputy Director of Public Prosecutions (Deputy DPP) of the intention to seek the approval of the Attorney General to issue an invitation to negotiate a remediation agreement and provide a legal memorandum containing a concise description and analysis of the available evidence, demonstrating how that evidence results in a reasonable prospect of conviction with respect to the accused on each count, and addressing how the public interest is met by negotiating a remediation agreement rather than conducting a prosecution.

The memorandum should explain the reasons for requesting the RA with direct reference to the considerations set out in the Code and should include a reasoned and objective assessment of the factors weighing both for and against pursuing an agreement.

3.1.2. Where AG Consent is not sought

Following a review of the investigation and having concluded that there is a reasonable prospect of conviction, if Crown counsel is of the view that an invitation to negotiate an RA is not appropriate, Crown counsel shall notify the CFP in writing, who will in turn notify the Deputy DPP by providing a basic overview of the case and the reasons why an RA is not recommended.

3.2. Headquarters

If the CFP recommends that the negotiation of an RA is appropriate, the Deputy DPP conducts an objective assessment of the request to determine whether the negotiation of an RA will be recommended. In this role, the Deputy DPP exercises a challenge function.

If the Deputy DPP agrees that an invitation to negotiate an RA should be issued, the recommendation will be forwarded to the DPP who, on behalf of the AG, will make a final decision on whether to consent to the issuance of an invitation to negotiate an RA.

If the Deputy DPP concludes that an RA is not appropriate in the circumstances, the Deputy DPP will advise the CFP that no recommendation will be made to the DPP.

Where approval to initiate the negotiation of an RA is given, the procedure set out in the section below is to be followed. Where approval to negotiate an RA is denied the prosecution will proceed in the normal manner pursuant to applicable guidelines and directives.

4. CONDUCT AND IMPLEMENTATION OF NEGOTIATIONS

Where the approval of the DPP is given, the negotiation of the RA shall be conducted by Crown counsel designated by the DPP for this purpose (designated counsel).

Designated counsel shall review the file and issue a written invitation to negotiate to the accused organization pursuant to section 715.33 of the Code. Negotiations with the accused organization shall be conducted by designated counsel in the role of “prosecutor” as set out in Part XXII.1 of the Code.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

4.1 PROTECTING CONFIDENTIAL INFORMATION UNDER SECTION 37 OF THE *CANADA EVIDENCE ACT*

**DIRECTIVE OF THE ATTORNEY GENERAL ISSUED
UNDER SECTION 10(2) OF THE *DIRECTOR OF PUBLIC
PROSECUTIONS ACT***

March 1, 2014

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1. INTRODUCTION

The public interest may require that sensitive or confidential information in the possession of government agencies be protected from disclosure, including disclosure in the litigation process. The need for confidentiality can arise in many ways and can involve information received or generated by government.¹ Public interest privilege protects certain confidential information from disclosure where such disclosure would be contrary to the public interest.² Public interest privilege can be invoked both under the common law and under certain statutory schemes. It typically involves a weighing of the competing public and private interests.

In criminal cases, an accused may seek disclosure of information that the government wishes to keep confidential.³ [Sections 37, 38](#) and [39](#) of the *Canada Evidence Act* (the CEA) establish a regime for objecting to the disclosure of information. This directive sets out the policy and procedures for objections raised under s. 37 during a prosecution.⁴ Separate directives exist in respect of s. 38 and s. 39 of the CEA.⁵

¹ For example, national security agencies sometimes receive information from foreign governments or other sources about terrorist groups in Canada. Similarly, law enforcement agencies receive information on criminal activity, and departments are often made privy to proprietary information concerning corporations.

² For a thorough discussion of law the law of privilege and in particular public interest privilege, see Robert W. Hubbard, Susan Magotiaux & Suzanna M. Duncan, “The Law of Privilege in Canada”, (Aurora: Canada Law Book, 2011) chapter 3 “Public Interest Privilege Under [Section 37](#) of the *Canada Evidence Act* and Common Law”.

³ *Bisaillon v Keable*, [1983] 2 SCR 60 at 97.

⁴ [Section 38](#) sets out the procedure for objecting to disclosure under [s 37](#) on the grounds that the disclosure would be injurious to international relations, or national defence or security. The Federal Court is the forum for determining such objections. Section 39 sets out the right to object to the disclosure of confidences of the Queen's Privy Council for Canada.

⁵ See PPSC Deskbook directives “[4.2 Protecting Confidential Information under Section 38 of the Canada Evidence Act](#)” and “[4.3 Protecting Cabinet Confidences under Section 39 of the Canada Evidence Act](#)”.

These objections are most commonly raised in situations where Crown counsel objects to an application for further disclosure from defence counsel, where a court might otherwise compel its production. Similarly, such objections may arise where defence counsel attempts to elicit confidential information while cross-examining a Crown witness. It is also possible that a federal official (e.g. RCMP, CSIS a government department) or a provincial or municipal official (e.g. a provincial Attorney General, municipal police force) may object to disclosure of confidential information.

2. STATEMENT OF POLICY

[Section 37](#) of the CEA sets out when objections can be made to the disclosure of information on the basis of a specified public interest. Reliance on s. 37 to assert claims of privilege should be the exception, not the rule.⁶ The CEA therefore should be a mechanism of last resort to protect evidence from disclosure. If disclosure of the information can be prevented on some other basis, such as lack of relevance or by asserting a common law privilege, those methods should be pursued first. For example, the common law rules preventing disclosure on grounds such as solicitor/client privilege, investigative privilege technique, location of surveillance post, or police informer privilege⁷ first should be invoked rather than s. 37. Alternatively, steps may be taken to adduce the evidence without endangering the interest at risk (for example, vetted disclosure, delayed disclosure).

However, the assertion of a claim of privilege under the common law does not preclude subsequent resort to s. 37.⁸ Where a trial judge rejects a common law claim of privilege and orders disclosure of confidential information over objections of the party claiming the privilege, the claimant may then invoke the broader s. 37 public interest privilege.

3. CONSULTATION

Where Crown counsel expects that an issue of this nature may arise, it is important to confer with investigators and interested departments or agencies before the proceedings begin. A plan must then be developed that takes into account the following matters, among others:

- the nature of the public interest to be protected;
- whether other objections have been or may be raised;

⁶ [R v Basi, \[2009\] 3 SCR 389](#) at 398.

⁷ See the PPSC Deskbook guideline “[3.11 Informer Privilege](#)”.

⁸ [Basi](#), *supra* note 6.

- the competing public interests in disclosure and non-disclosure for the purposes of the s. 37(5) balancing the court must undertake;⁹
- whether non-disclosure would compromise the prosecution;
- the effect the objection may have on the proceedings;¹⁰
- whether the claim of privilege grounding the objection is justified in the circumstances and not overreaching;¹¹ and
- who should advance the objection.¹²

4. WHO MAKES THE OBJECTION

Objections under [s. 37](#) of the CEA involving a public interest will usually be made by a senior public official from the relevant investigating body or government department or agency which has responsibility in relation to the specified public interest. For example, the official may be a senior police officer concerned about the possible disclosure of police techniques and methods of investigation, such as the location of observation sites or the identity of police informers. The official may be either a federal or provincial government official.

5. PROCEDURE FOR MAKING THE OBJECTION

Objections under [s. 37](#) may be made orally or in writing by certifying that information should not be disclosed on the grounds of a "specified public interest".¹³ Under [s. 37\(5\)](#) of the CEA, the court is required to weigh the public interest in disclosure against the specified public interest. Crown counsel must identify the actual injury or harm that will result from disclosure. Crown counsel will have to offer a convincing rationale, explaining how the information came into existence, why non-disclosure is important, and the nature and gravity of the injury or harm that will occur if it is disclosed. However, when the "specified public interest" at stake is informer privilege, no balancing is required. Crown counsel can simply argue that the information is of a class which, by

⁹ Note that informer privilege is absolute and thus there is no balancing of the public interest in disclosure versus confidentiality in respect of informer privilege claims.

¹⁰ For example, will the objection be determined by a court other than the trial court? Are there concerns regarding resulting delay?

¹¹ If unfounded or overly broad claims of privilege are made, courts may over time begin to accord less weight to certificates filed under s 37 when balancing the competing interests in disclosure and non-disclosure.

¹² Where the interested party is a federal department or agency, typically lawyers from the Department of Justice Civil Litigation Section advance the objection on behalf of that party. If the police advance the claim, typically PPSC counsel advance the objection in court on behalf of the police.

¹³ *Canada Evidence Act*, [s 37\(1\)](#).

definition, merits non-disclosure. Informer privilege is not amenable to the public interest balancing contemplated in s. 37(5).¹⁴

The CEA does not define the nature of the public interest which may be protected. Where the public interest claim must be assessed on a case-by-case basis, Crown counsel should assess the validity of the claim of privilege by measuring it against, among other criteria, those established by Wigmore:¹⁵

1. the communications must originate in a confidence that they will not be disclosed;
2. this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
3. the relation must be one which in the opinion of the community ought to be sedulously fostered;
4. the injury that would ensue to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

6. FORUM FOR THE OBJECTION

A [s. 37](#) application constitutes a proceeding separate from the trial proper and from pre-trial proceedings.¹⁶ Crown counsel may invoke common law privilege and make a claim under s. 37 of the CEA both in provincial and superior courts. However, whereas claims of common law privilege may be determined by both provincial and superior court judges, only superior court judges and the Federal Court have jurisdiction to determine s. 37 claims. By resorting first to the common law privilege in provincial courts, Crown counsel may avoid unnecessary fragmentation of, and delay in, the proceedings. Where the Crown invokes s. 37, the application must be heard before the Superior Court of the same province or territory.¹⁷

7. WHERE THE COURT ORDERS DISCLOSURE

On an objection under [s. 37](#), courts must determine that the public interest in disclosure outweighs the importance of the specified public interest.¹⁸ When the court decides in favour of disclosure, Crown counsel should again consult with the interested parties and determine which of the following options is most appropriate:

¹⁴ [Basi](#), *supra* note 6 at paras 22-23. See also [R v Barros 2011 SCC 51](#) where Binnie J states that the courts will enforce informer privilege without balancing of the competing interests that applies to other forms of privilege such as journalistic privilege.

¹⁵ Wigmore, *Evidence in Trials at Common Law* (McNaughton rev. 1961), vol 8 at 527; cited by the Supreme Court of Canada to assess privilege on a case-by-case basis in [R v National Post, 2010 SCC 16 \[2010\] 1 SCR 477](#); [Globe and Mail v Canada \(Attorney General\), 2010 SCC 41, \[2010\] 2 SCR 592](#).

¹⁶ [Basi](#), *supra* note 6 at para 19.

¹⁷ [CEA, s 37\(3\)\(b\)](#). Alternatively, it can go before the Federal Court.

¹⁸ [CEA, s 37\(5\)](#).

1. Simply comply with the court's ruling. Before doing so, counsel should ascertain from the client department or investigating agency the extent of the harm that will occur on disclosure and assess whether the harm can be minimized in a way that is still consistent with the court's ruling;
2. Appeal the court's ruling. This decision should be made in consultation with the Chief Federal Prosecutor and investigating agency;¹⁹ or
3. Stay the proceedings. This option is to be used when there is no other way to protect the information and the importance of keeping it in confidence outweighs the public interest in pursuing the charges.²⁰

¹⁹ In accordance with the PPSC Deskbook guideline “[3.15 Appeals and Interventions in the Provincial and Territorial Courts of Appeal](#)”.

²⁰ In rare and compelling circumstances, it may be appropriate to stay proceedings and then re-commence them in accordance with [s 579\(2\)](#) of the *Criminal Code*. See for instance, [R v Scott, \[1990\] 3 SCR 979, \(1990\), 61 CCC \(3d\) 300](#). Before taking this approach, however, the matter must be discussed with counsel’s supervisor, and in some instances may need to be raised with the Deputy Director of Public Prosecutions.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

4.2 PROTECTING CONFIDENTIAL INFORMATION UNDER SECTION 38 OF THE *CANADA EVIDENCE ACT*

**DIRECTIVE OF THE ATTORNEY GENERAL ISSUED
UNDER SECTION 10(2) OF THE *DIRECTOR OF PUBLIC
PROSECUTIONS ACT***

March 1, 2014

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1. INTRODUCTION

[Section 38](#) of the *Canada Evidence Act*¹ (CEA) sets out a regime which prevents the disclosure of information or documents that contain what is defined as “sensitive” or “potentially injurious” information in a criminal proceeding without the consent of the Attorney General of Canada (Attorney General), or a court order.

2. OVERVIEW

[Section 38.01](#) requires every participant in a proceeding to advise the Attorney General, as opposed to the Director of Public Prosecutions (DPP), in writing where there is a possibility of disclosure of sensitive or potentially injurious information. The disclosure of this information is prohibited unless authorized by the Attorney General or by a Federal Court judge. References in this directive to the Attorney General relate to the Department of Justice and not to the Office of the DPP.

¹ RSC 1985, c C-5.

Upon receipt of the written notice, the Attorney General has ten days to provide written notice of his or her decision with respect to disclosure of the information.

If disclosure is not authorized within 10 days, disclosure of the information remains prohibited, pending a decision of the Federal Court.

3. APPLICATION

[Section 38](#) applies to all criminal proceedings,² and whether the Public Prosecution Service of Canada (PPSC), a provincial Attorney General or even a private prosecutor has carriage of the prosecution.

4. TIMING

The obligation to notify the Attorney General arises both where disclosure is required to be made and where it may not be required but is nevertheless expected. Under the CEA, the obligation rests with the participant who expects to disclose. However, PPSC counsel must also ensure that the provisions are respected whether or not the Office of the DPP is the custodian of the information. Thus, counsel should raise the issue:

- with opposing counsel where PPSC is a party to the proceedings and it becomes apparent that the defence proposes to call or commences calling evidence that may engage [s. 38](#);
- with the provincial Crown where it comes to counsel's attention that the Crown has disclosure materials in a provincial prosecution that may engage s. 38; and
- with the provincial Crown where it comes to counsel's attention that either the Crown or the defence in a provincial prosecution plan to call a witness or tender evidence that may engage s. 38.

Unless PPSC counsel is satisfied that provincial Crown counsel and/or opposing counsel, as appropriate, have provided notice to the Attorney General of Canada, PPSC counsel should consider appearing in court to raise the matter with the presiding justice.

Although likely to be a rare event in a criminal trial, counsel should also be aware that certain witnesses, who meet the definition of an "official" under [s. 36.1](#) CEA,³ may also

² It also applies to any other proceedings under the *Criminal Code*, such as a sealing order under [s 487.3](#) of the *Criminal Code* or an order for forfeiture under [s 83.14](#) of the *Criminal Code*.

³ [Section 36.1](#) of the CEA adopts the definition in [s 118](#) of the *Criminal Code* of "official", namely a person who (a) holds an office, or (b) is appointed or elected to discharge a public duty.

raise the matter with the court where the witness believes that information covered by the provision are at risk of being disclosed.⁴

5. RELATIONSHIP WITH SECTION 37 OF THE CANADA EVIDENCE ACT

Where Crown counsel determine that both [s. 38](#) and [s. 37](#) may apply, s. 38 takes primacy and Crown counsel should resort first to s. 38.

6. JURISDICTION

Where the PPSC does not have carriage of the prosecution, [s. 38.15](#) CEA allows for the serving of a fiat on the prosecution establishing the exclusive jurisdiction of the Attorney General of Canada to conduct the prosecution. In the alternative, the Attorney General of Canada may choose not to issue a fiat but instead come to an agreement with the provincial prosecutor respecting the manner and substance of disclosure of sensitive information.

Therefore, any counsel who becomes aware of the existence of any non-federal prosecution or potential prosecution, or any other court proceeding that may engage [s. 38](#), must advise their Chief Federal Prosecutor (CFP), as well as the Regional Terrorism Prosecutions Co-ordinator, of the matter.

The Regional Terrorism Prosecutions Co-ordinator in turn will advise the National Terrorism Prosecutions Co-ordinator so he or she may confirm that the Attorney General has been advised of the possibility of disclosure and determine whether a fiat should be issued.

7. PROCEDURE IN PPSC PROSECUTIONS – DOCUMENTS IN THE INVESTIGATIVE FILE

As a practical matter, [s. 38](#) claims are most likely to arise in the context of national security prosecutions. Files that may be reasonably expected to contain documents engaging national security privilege include:

- terrorism offences,⁵ including public bombings under [s. 431.2](#) of the *Criminal Code*;

⁴ See CEA, [s. 38.01\(2\)](#). The official may also raise it with the Attorney General, CEA, [s. 38.01\(3\)](#). The provision is actually broader: the official need not be a witness to raise the matter but may actually not be directly involved in the proceeding at all.

⁵ “Terrorism offences” are defined in [s. 2](#) of the *Criminal Code*.

- offences relating to internationally protected persons under [s. 424](#) and [s. 431](#) of the *Criminal Code* or against a member of the United Nations or associated personnel;
- war crimes;
- human smuggling;
- [Security of Information Act](#)⁶ offences;
- passport or citizenship forgery offences under [ss. 57](#) and [58](#) of the *Criminal Code*;
- files with classified information (generally Secret or above) or documents from CSIS, CSE or RCMP National Security Intelligence; and
- files with information from foreign law enforcement partners.

In many of these cases, the PPSC may be involved in providing legal advice prior to charges being laid.

The first stage in assessing a [s. 38](#) claim is to identify whether or not the information is relevant under [R v Stinchcombe](#).⁷ Information that is not relevant is not subject to disclosure and there is no need to advise the Attorney General of Canada unless there is a risk of disclosure. If information would otherwise be subject to disclosure under [Stinchcombe](#), but is properly the subject of a s. 38 claim, then the prosecutor should inform the National Security Group, and promptly prepare a Notice under [s. 38.01](#) in accordance with this directive.

In complex prosecutions, PPSC counsel may seek and receive input from the investigative agency about both the likely relevance of the information as well as whether or not the information may cause harm to national security, national defence or international relations if disclosed.

Prior to sending a Notice, PPSC counsel shall notify the CFP and the National and Regional Terrorism Prosecutions Co-ordinators. Pursuant to [s. 38.02\(1\)\(b\)](#), the fact that Notice has been given shall not be disclosed.

8. TEST FOR POTENTIALLY INJURIOUS OR SENSITIVE INFORMATION

“Potentially injurious information” is defined in [s. 38](#) as information that could injure international relations, national defence or national security. It should be noted that:

- the information need not be in possession of the Crown nor generated by the Crown;

⁶ RSC 1985, c O-5.

⁷ [1995] 1 SCR 754, 96 CCC (3d) 318.

- the focus is on the potential for harm rather than on any particular subject matter;
- the information need not be in a document, but may also include information known to a witness; and
- the reliability of the information is not relevant to the determination of its sensitivity.

“Sensitive information” is information in the possession of the Government of Canada of a type that Canada is taking measures to safeguard, and relates to international relations, national defence or national security. The information must:

- be in the possession of the Government of Canada; and
- relate to one of the three enumerated interests.

It may not be apparent to counsel whether or not the Government of Canada is taking means to protect the information. Crown counsel should err on the side of caution. If in doubt, counsel must consult the National Security Group (NSG) of the Department of Justice.

The NSG’s guide to [s. 38](#) entitled “An Introduction to Section 38 of the *Canada Evidence Act*” has a non-exhaustive list of some practical examples of sensitive or potentially injurious information, such as:

- confidential diplomatic exchanges or other information about Canada’s relationships with foreign states;
- strategies of the government in foreign affairs;
- information received from third parties such as foreign intelligence services with a caveat against further disclosure;⁸
- capabilities and functions of Canadian forces, details of military operations
- intelligence operation, organizations and sources;
- telecommunications and cipher systems or cryptology, military equipment; and
- the identity of covert employees, confidential sources, or the targets of an ongoing or past investigation that have not been made public.

In assessing whether s. 38 applies, PPSC counsel may have recourse to the following resources:

- the NSG’s Guide is available from the Regional Terrorism Prosecution Co-ordinator through the Terrorism Toolkit;

⁸ In this case, some form of request for further disclosure should usually be made to the foreign source and an answer received prior to relying on the third party rule. However, the claim should be made in the interim until and unless a permissive answer is received.

- the regional Terrorism Prosecution Co-ordinator or the National Terrorism Prosecution Co-ordinator; and
- the NSG.

Where the information may fall within [s. 38](#), counsel shall prepare a Notice, required by ss. [38.01\(1\) to \(4\)](#) and send it to:

Director of the National Security Group
The National Security Group
Criminal Litigation Division
Litigation Branch
284 Wellington Street
Ottawa, Ontario
K1A 0H8

The Notice must contain:

- the name, address and phone number of PPSC counsel acting as the notifier;
- the nature, date and place of the proceeding in which the disclosure may occur;
- a brief procedural history and synopsis of the case;
- an assessment of the relevance of the information;
- a description of the information and, if possible, the information itself; and
- a brief description of the possible injury that disclosure should cause, i.e. the basis upon which it is believed that s. 38 may apply.

Counsel may contact NSG to obtain assistance with respect to the content of the Notice.

The NSG will formulate the Attorney General of Canada's position as to whether a privilege under s. 38 applies and whether to authorize disclosure of the information under [s. 38.03](#) or enter into a disclosure agreement under [s. 38.031](#) CEA.

Note also that the CEA prohibits disclosure of the fact that Notice has been given until authorized by the Attorney General. Counsel should confirm with NSG that permission to disclose the fact of the notice has been granted by the Director of the NSG.

9. APPLICATION TO THE FEDERAL COURT UNDER SECTION 38.04 OF THE CANADA EVIDENCE ACT FOR A DISCLOSURE ORDER UNDER SECTION .06 OF THE CANADA EVIDENCE ACT

The disclosure issue may be taken before the Federal Court on the initiative of the Attorney General, the Crown, the accused (if he or she has been made aware of it), or any other person who seeks the disclosure of the protected information ([s. 38.04](#)).

Applications before the Federal Court are conducted by Department of Justice counsel acting on behalf of the Attorney General and not by PPSC counsel. However, the trial judge in a criminal trial is to be given notice of the hearing, as are the accused and his or her counsel, and PPSC counsel should be vigilant in verifying that this has in fact taken place unless the Federal Court has declined to so order.

PPSC counsel with carriage of the prosecution should also seek to be served with Notice of a Hearing under [ss. 38.04\(i\) or 38.04\(5\)\(c\)\(i\)](#) CEA, and should ask counsel for the Attorney General to seek this order on the DPP's behalf. PPSC counsel must consider whether it is necessary to apply to make representations on the application.

The test for a disclosure order under [s. 38.06](#) requires a Federal Court justice to assess whether or not the disclosure of the information would be injurious to international relations, national defence or national security. If this threshold is met, the justice then must consider whether the public interest in disclosure outweighs the public interest in non-disclosure.

Before undertaking this balancing test, the federal court judge must determine whether the information sought to be disclosed is relevant, with the onus on the party seeking disclosure.⁹ In arguing this aspect of the test, Department of Justice counsel may well benefit from the input of PPSC counsel respecting the relevance of the information to an issue at trial.

The Federal Court justice has the option of crafting conditions on the form of disclosure as well as to order a summary of the information, a part or summary of the information or a written admission of facts relating to the information.

10. IMPACT OF CONFIRMATION OF PROHIBITION OR PROHIBITION CERTIFICATE

[Section 38.14](#) CEA authorizes the trial judge to make any order considered appropriate to protect the right of the accused to a fair trial, including staying the proceedings, dismissing specified counts or an order finding against the Crown on the issue relating to disclosure that has been prohibited.

Lack of disclosure in this context cannot necessarily be equated with the denial of the right to make full answer and defence resulting in an unfair trial. There will be many instances in which non-disclosure of protected information will have no bearing at all on trial fairness or where alternatives to full disclosure may provide assurances that trial fairness has not been compromised by the absence of full disclosure. However, the remedies have been defined very broadly and, according to the Supreme Court of Canada,

⁹ [R v Ribic, 2005 1 FCR 33](#); [Canada \(Attorney General\) v Canada \(Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar\), 2008, 3 FCR 248](#).

“Parliament expected trial judges to be provided with a sufficient basis of relevant information on which to exercise their remedial powers judicially”.¹⁰

Of particular note, a stay of proceedings can be granted even where the “clearest of cases” threshold ordinarily required for a stay has not been met. The Supreme Court held in *Ahmad*,¹¹ that “...the legislative compromise made in [s. 38](#) will require a stay in such circumstances if the trial judge is simply unable to conclude affirmatively that the right to a fair trial, including the right of the accused to a full and fair defence, has not been compromised.”

The Supreme Court has suggested a number of possible “arrangements” to satisfy the trial judge that non-disclosure has not materially affected trial fairness, including:

- “partial or conditional disclosure” to the trial judge alone;
- provision of a summary of the information to the trial judge alone, the trial judge and prosecutor, or all the parties;
- adapting certain facts sought to be established by an accused as proven and true for the purposes of the criminal proceeding;
- where the relevance of the withheld material is in issue, the appointment of a special advocate may be appropriate; and
- allowing defence counsel to access the withheld material on an undertaking not to disclose it to the accused. However, the Supreme Court of Canada urged caution in resorting to this practice.¹²

These arrangements require either the consent of the Attorney General, or a Federal Court order.

If, under the arrangements that are made, there is simply not enough information to decide whether or not trial fairness has been materially affected, the trial judge must presume that the non-disclosure order has adversely affected the fairness of the trial, including the right of the accused to make full answer and defence.

However, in such a case, rather than proceed directly to issuance of a stay, the Supreme Court placed an obligation on the trial judge to give the Crown “fair warning”. PPSC counsel will then have an opportunity to make further and better disclosure to address the trial judge’s concerns. This is an opportunity for PPSC counsel to approach the NSG to determine if there are any conditions that may be devised whereby the Attorney General may consent to release any additional information. If no (or inadequate) additional

¹⁰ [R v Ahmad, 2011 SCC 6, \[2011\] 1 SCR 110](#) [*Ahmad*].

¹¹ [Ibid](#) at para 35.

¹² [Ibid](#) at para 49.

information can be provided to the trial judge, a stay of proceedings will be the presumptively appropriate remedy.¹³

For this reason, PPSC counsel should explore any and all options, in consultation with counsel for the Attorney General, for providing as much material as possible (a) to all parties and (b) failing that, to the trial judge with counsel for the Attorney General acting on the [s. 38](#) hearing.

Outside agencies from which the information originates may seek the prosecutor's views as to the impact that non-disclosure may have on the fairness of the trial. PPSC counsel may provide these views but must remain mindful of the fact that these agencies are not the investigative agency on the file and are third parties for the purposes of the prosecution with their own legal counsel.

If it becomes obvious to Crown counsel that non-disclosure under s. 38 will significantly and irreparably impact trial fairness, then Crown counsel itself ought normally to enter a stay of proceedings.¹⁴ In assessing both the reasonable prospect of conviction and the public interest in a prosecution PPSC counsel will be assisted by the earliest possible identification of material which, the Attorney General is not prepared to disclose. This is another reason for advisory counsel to send early notifications to the NSG where sensitive or potentially injurious information is identified.

¹³ [Ibid](#) at para 51.

¹⁴ [Ibid](#) at para 46.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

4.3 PROTECTING CABINET CONFIDENCES UNDER SECTION 39 OF THE *CANADA EVIDENCE ACT*

**DIRECTIVE OF THE ATTORNEY GENERAL ISSUED
UNDER SECTION 10(2) OF THE *DIRECTOR OF PUBLIC
PROSECUTIONS ACT***

March 1, 2014

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1. INTRODUCTION

Cabinet decision-making is founded on the principle of collective responsibility. In practice, this means that a decision of the Cabinet, or one of its committees, binds all members of the Government, regardless of their personal views on the issues being decided. Cabinet and its committees constitute the forum in which Ministers collectively make decisions on government policy and initiatives. The Cabinet meetings enable Ministers, within a confidential setting, to debate issues vigorously, reconcile different perspectives, participate in and influence deliberations, and collectively reach decisions.

[Section 39](#) of the *Canada Evidence Act* (CEA) constitutes the statutory means for safeguarding that Cabinet confidentiality sets out a regime which prevents the disclosure of information or documents that consist of confidences of the Queen's Privy Council for Canada.

2. OVERVIEW

Although the “Queen’s Privy Council for Canada” referred to in [s. 39](#) of the *Canada Evidence Act* (CEA) has quite an expansive membership, for the purposes of litigation the concern is usually with Cabinet documents. The purpose of “Cabinet Confidence” privilege is to protect from disclosure discussions and deliberations of federal Cabinet Ministers on matters that are, or have been, the subject of discussion at Cabinet meetings or between Cabinet Ministers. Cabinet Confidence privilege exists so that Ministers can have open and frank discussions and not be concerned with public perception of their deliberations. Cabinet Confidence privilege does not extend to the day-to-day administration of federal government departments. [Section 39\(4\)](#) limits Cabinet Confidence privilege to 20 years.

Section 39 of the CEA acts as an absolute bar to the disclosure of Cabinet Confidences as defined in [s. 39\(2\)](#). Whereas a judge assesses and makes the determination regarding disclosure or protection of information under [ss. 37](#) and [38](#)¹ of the CEA, the determination

¹ With the exception of [s 38.13](#) of the *Canada Evidence Act*.

of Cabinet Confidences under [s. 39](#) is made by the Clerk of the Privy Council or a Cabinet Minister. Where a certificate is filed under s. 39 certifying that the information constitutes a Cabinet Confidence, a court must refuse disclosure of that information without examination or hearing of the information.² Objections under s. 39 must be made in writing, certifying that the information constitutes a Cabinet Confidence.

3. DOCUMENT REVIEW

[Section 39\(2\)](#) of the CEA, which defines “confidence of the Queen's Privy Council”, protects the following types of documents from disclosure:³

- a) Final and draft forms of Memoranda to Cabinet and information or preparatory documents that discuss subject matter or input into such Memoranda ([s. 39\(2\)\(a\)](#));
- b) In addition to actual agendas of Cabinet meetings, documents that discuss dates, locations, attendees and details of Cabinet meetings ([s. 39\(2\)\(c\)](#)); while Cabinet decision-making and recorded decisions are secret, the implementation of those decisions is not;
- c) Any record used for or reflecting communications or substantive discussions of any kind between Ministers regarding government policy and decisions ([s. 39\(2\)\(d\)](#));
- d) Final versions of briefings to a Minister on matters to be discussed with another Minister or at a Cabinet meeting ([s. 39\(2\)\(e\)](#)); drafts of these Memoranda, often called a “Briefing Note to the Minister” or “Memorandum to the Minister”, may be circulated widely for input. This wide circulation does not necessarily remove the document from [s. 39](#) privilege; and,
- e) draft legislation ([s. 39\(2\)\(f\)](#)).

Determining whether a document is a Cabinet Confidence as described in s. 39(2)(a) to (f) and thereby protected from disclosure can be challenging in some cases. Documents may also be severed or have portions redacted instead of being entirely protected.

Crown counsel working on a file that may contain Cabinet Confidence documents must identify the relevant documents and the documents must be sent to the Privy Council Office (PCO) for review. It is wise to contact PCO as soon as reasonably practicable so that PCO officials can plan to review the documents and obtain the Clerk's Certificate. Crown counsel shall notify the Chief Federal Prosecutor who will bring the matter to the attention of the appropriate Deputy Director of Public Prosecutions. The latter will consult with the Assistant Secretary to the Cabinet (Legislation and House Planning) to allow the

² [Babcock v Canada \(Attorney General\)](#), 2002 SCC 3, [2002] 3 SCR 3 at para 17.

³ The discussion papers referred to at [s 39\(2\)\(b\)](#) CEA have not been in use since the 1980's. Since the privilege for these documents expires after four years ([s 39\(4\)\(b\)](#)) CEA, no discussion papers are protected.

Minister⁴ or the Clerk of the Privy Council to certify the documents and protect them from disclosure.

Once PCO officials have reviewed the documents and the Clerk has made a final determination of privilege, a Clerk's Certificate will be prepared.

4. CHALLENGE TO A CERTIFICATE

The consultation process described above also applies where an accused seeks disclosure of information which has been certified as a Cabinet Confidence.⁵ The Clerk's Certificate produced in court simply describes the protected documents without revealing their contents. This Certificate is evidence that the listed documents are protected from disclosure. A court may not review the Cabinet documents listed in the Certificate. Although the court is not entitled to go behind a proper certificate filed under [s. 39](#), the court can review the certificate to determine if, on its face, it complies with this section.⁶

⁴ The Minister may also certify the documents, however, this is a rare occurrence.

⁵ In the past, Cabinet Confidences have been released in prosecutions only where a Minister of the Crown has been charged and that Minister had a conventional right of access as a Minister to the information at issue in the prosecution. An Order in Council releasing such information is required. Where, for the purposes of a prosecution, Crown counsel seeks to disclose information which may be a confidence of the Privy Council, permission to do so may be obtained in this manner as well.

⁶ See [Babcock](#), *supra* note 2 at para 28; [Canada \(Privy Council\) v Pelletier, 2005 FCA 118](#) at paras 16-18.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

5.1 NATIONAL SECURITY

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

Revised June 22, 2021

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1. INTRODUCTION

National security prosecutions focus on the security of Canadian society. This notion of security has several facets. Its core element is to protect Canadians from physical harm. It also includes protecting Canadians' sense of well-being, both at home and abroad. Inherent to this well-being is the safeguarding of fundamental rights and freedoms. Another facet of this notion of security is the maintenance of the public institutions of Canadian society.

National security prosecutions have both a national and international significance, whether they involve terrorism, espionage, war crimes, or crimes against humanity. They regularly involve sensitive issues of international relations, national defence and national security, and information associated with those interests.

For the purposes of this guideline, the following are considered national security prosecutions:

- Terrorism offences as defined in s. 2 of the *Criminal Code*, including the offences under Part II.1 of the *Criminal Code* and any inchoate form of these offences;
- Offences as defined in s. 2 of the *Security Offences Act*;¹
- Public bombings under s. 431.2 of the *Criminal Code*;
- Offences against internationally protected persons or members of the United Nations or associated personnel;²
- Offences captured by s. 7(7) of the *Criminal Code* and involving foreign officials or heads of state;
- Offences under the *United Nations Act*;³
- Offences under the *Security of Information Act*;⁴
- The offence under s. 18 of the *Canadian Security Intelligence Service Act*;⁵
- Offences under the *Crimes Against Humanity and War Crimes Act*;⁶
- Offences involving the proliferation or the illegal import, export or sale of nuclear materials; and
- Offences under the *Defence Production Act*.⁷

1.1 Terrorism Offences

The preamble of the *Anti-Terrorism Act* stresses that an effective response to terrorism goes hand-in-hand with a continued commitment to the values and safeguards enshrined in the *Canadian Charter of Rights and Freedoms*. Indeed, it is the guarantee of the exercise of the freedom of expression, religion and political activity that underscores the existential dimension of the harm to Canadian values wrought by someone who seeks to justify advancing political, ideological or religious beliefs through the use of violence.

Parliament has chosen to address terrorism offences as crimes.⁸ The rule of law and the rights and freedoms enshrined in the *Charter* apply to these offences. They govern police investigative

¹ *Security Offences Act*, RSC 1985, c S-7.

² *Criminal Code*, s 7(3) and 7(3.71).

³ *United Nations Act*, RSC 1985, c U-2, s 3.

⁴ *Security of Information Act*, RSC 1985, c O-5, s 4-23.

⁵ RSC 1985, c C-23, s 18.

⁶ SC 2000, c 24.

⁷ RSC 1985, c D-1.

⁸ Parliament did not invoke the notwithstanding clause. In the *Reference re Section 82.28 of the Criminal Code*, the Supreme Court of Canada underlined this parliamentary choice, noting that “the Canadian government opted to

procedures as well as the rights available to an accused person before the courts during the trial and, if convicted, on sentence. Terrorism offences are prosecuted in ordinary criminal courts; the Crown must prove the offences to the same standard of proof as other crimes, namely, proof beyond a reasonable doubt based upon admissible evidence. The accused has the same rights regarding choosing the mode of trial, including trial by judge and jury, as for other crimes.

Terrorism often involves large scale attacks targeting victims indiscriminately. The planning cycle for the commission of terrorism offences may be long or short-term. Perpetrators are often, though not always, motivated by non-financial considerations and are willing to suffer personal consequences to accomplish their purpose. Acts may be planned in conjunction with other persons who share the same political, ideological or religious purposes, objectives or causes, although that is not always the case. Persons involved in these offences may play different roles with varying degrees of involvement and knowledge of the plans and targets. The targets of terrorist activities may be selected based upon opportunities or shifting philosophical priorities. Attacks or threats directed towards public institutions or processes, including political, economic, social and military ones, as well as those that allow Canada to act internationally, are threats to Canadian society as a whole. They seek to undermine the democratic rights and principles that Canadians enjoy through their institutions.

The objective of legislative tools like the terrorism provisions of the *Criminal Code* is to disrupt these offences at the early stages of planning and preparation. The consequences of a terrorist attack can be particularly dire. They require an early, decisive intervention, but they may also be difficult to evaluate given the nature of the activities.

Acts at early stages of preparation can be subject to multiple interpretations. Some purposes may be difficult to differentiate from innocuous ones without clear indications of the objectives, purposes, causes or intentions of the persons involved. Others may be intimately connected to the exercise of fundamental freedoms such as those related to free expression, free association, political activism or religious beliefs. Terrorism offences do not criminalize holding, disseminating or advocating beliefs, even though they may be abhorrent, distasteful or anti-societal/anarchic. Criminal sanction can only be imposed if these beliefs are combined with a criminal act (*actus reus*) and the required intent (*mens rea*) of an offence.

2. PRE-CHARGE LEGAL ADVICE

Prosecutors may be approached to provide pre-charge legal advice in relation to national security matters. When this occurs, prosecutors must inform their Chief Federal Prosecutor (CFP) and the

enact specific criminal law and procedure legislation and did not make use of exceptional powers, for example under the *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.), or invoke the notwithstanding clause at s. 33 of the *Charter*.” See *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42 at para 39.

National Terrorism Prosecutions Coordinator that they have been asked to provide legal advice, even if the investigation is in its infancy.

When providing legal advice, prosecutors must pay particular attention to the protection of information under ss. 37, 38 and 39 of the *Canada Evidence Act*. In applications for judicial authorizations, information of a sensitive nature that may not be disclosable must be handled so that issues of confidentiality can be dealt with effectively in subsequent court proceedings. Prosecutors must also be mindful that some sensitive information provided under caveat may not be disclosable at all, including in an affidavit.

3. COMMENCEMENT OF PROCEEDINGS

3.1 The Decision to Prosecute Test in the National Security Context

National security prosecutions must meet the charge approval standard of the *PPSC Deskbook* guideline “[2.3 Decision to Prosecute](#).” The threshold for commencement of a prosecution applies without modification to national security offences. Specifically, the public interest criteria cannot affect the assessment of the sufficiency of the evidence. Where the evidentiary standard is met, a prosecution will normally best serve the public interest given that national security cases are inherently serious. However, each case requires an individual analysis of the factors in the *PPSC Deskbook* guideline “[2.3 Decision to Prosecute](#).”

3.2 Deciding which Charges Should Be Laid

One of the common issues in national security prosecutions is deciding which charges should be laid. This decision will often be informed by four considerations: the sensitivity of the information, the assessment of the evidence in light of the rights protected by the *Charter*, the public interest, and jurisdictional issues.

3.2.1 Sensitive Information

National security prosecutions usually rely on sensitive information whose disclosure could be injurious to national security, international relations or national defence, or could reveal cabinet confidences. As part of the consideration of the reasonable prospect of conviction, prosecutors must conduct extensive consultations with Government of Canada stakeholders, including the Canadian Security Intelligence Service, the Royal Canadian Mounted Police, Global Affairs Canada, the Department of National Defence, and the National Security Group of the Department of Justice.

These consultations are required to ensure that evidence can be used as well as to establish a litigation strategy addressing the timing, extent and manner of disclosures. Prosecutors must consider not only the disclosure of information that will be used as evidence, but also the disclosure

of information that will be at issue during pre-trial applications challenging investigative steps such as warrants and other judicial orders. Prosecutors must also consider the disclosure of information relating to the initiation of the criminal investigation and to activities that may have been undertaken before the criminal investigation or in parallel. It may not be possible to arrive at a final determination in regard to disclosure given that some elements will require consultations with departments and agencies who are responsible for protection of the information or other court proceedings such as those pursuant to s. 38 of the CEA.

3.2.2 Assessment of the Evidence in Light of the Rights Protected by the *Charter*

Prosecutors must assess evidence related to the commission of a terrorism offence in light of the rights and freedoms protected by the *Charter*. The political, ideological or religious purpose of an act is often an element of a terrorism offence. Section 83.01 of the *Criminal Code* defines “terrorist activity” either as an offence under one of the enumerated international conventions and protocols, or as an act or omission committed in whole or in part for a political, religious, or ideological purpose, objective, or cause. The second definition is met if the activity was committed completely or in part because of a religious, ideological or political purpose. While the motivation need not be the sole or even primary purpose in relation to the activity, it should be a significant one. Determining whether the purpose is political, ideological or religious, or a combination of one or more of these factors, will depend on the evidence. Trying to particularize how they are in fact combined may not be possible.

The treatment of religious purposes requires particular consideration because of the potential that biases and stereotypes may arise. Prosecutors should not be reluctant to inquire into the religious purpose of an act. While it may be convenient to attempt to characterize all beliefs, objectives or purposes as political or ideological rather than religious, Parliament should be assumed to have been familiar with the judicial considerations of religion when it included it as part of the purpose requirement in the definition. Specifically, there is no basis to confine religious beliefs to mainstream or established orthodox manifestations of any particular religious belief system. While the term religious is not defined in the *Criminal Code*, the Supreme Court of Canada has dealt with the term religion in the following terms in the context of the exercise of freedom of religion:

To summarize up to this point, our Court’s past decisions and the basic principles underlying freedom of religion support the view that freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.⁹

⁹ *Syndicat Northcrest v. Amselem*, [2004] 2 SCR 551 at para 46.

The Supreme Court therefore focused on the personal choices that individuals make with respect to religious beliefs. It follows that an individual's religious claims may have very little connection to official religious dogma or to the position of religious representatives. The terminology used to describe a *religious motivation* must be sensitive to the inadvertent effects that too broad a description using terminology that refers to more widely held, non-violent beliefs may cause.

Prosecutors must be mindful, however, about the legitimate expression of beliefs when they assess evidence about the political, ideological or religious purpose of an act. However, violent acts, including threats of violence, are clearly excluded from the ambit of s. 2 of the *Charter*.

Prosecutors must be guided by the interpretative provision enacted at the time of the adoption of the amendments to Part II.1 of *Criminal Code* in the *Anti-Terrorism Act, 2001*. Specifically, s. 83.01 (1.1) provides that:

(1.1) For greater certainty, the expression of a political, religious or ideological thought, belief or opinion does not come within paragraph (b) of the definition terrorist activity in subsection (1) unless it constitutes an act or omission that satisfies the criteria of that paragraph.

The preamble to the *Anti-Terrorism Act* highlights that the provisions are to be interpreted in a manner that continues “[t]o respect and promote the values reflected in, and the rights and freedoms guaranteed by, the [Canadian Charter of Rights and Freedoms](#).” Significant among those rights and freedoms are those guaranteed in s. 2 of the *Charter*, namely,

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

Prosecutors must make a deliberate effort to adequately take into account the possible legitimate exercise of these rights. This may include the thoughts, beliefs, or opinions held or expressed by the accused or by persons alleged to be associated with the accused. A description or characterization of the motivational component of a terrorism offence can inadvertently result in an implicit association with an established ideological, political or religious school of thought or belief. Such an association may negatively affect other persons who share the underlying motivation but condemn any criminal acts and attempts to condone them.

3.2.3 Public Interest

Prosecutors must consider the public interest when deciding which charges should be laid. The choice of charges is sometimes binary: it could either be prosecuted with a national security lens or be prosecuted without such a lens, by applying other *Criminal Code* offences. When confronted with this choice, prosecutors must determine which offences should be prosecuted in the public interest. Besides considering which offences are most clearly supported by admissible evidence, prosecutors must also consider the potential impact of particular charges on national security, international relations and national defence. This includes considering to what extent the disclosure required for the prosecution may have a negative impact on those interests.

Prosecutors must also consider which charges appropriately reflect the nature of the conduct and its gravity, denunciation being a particularly relevant consideration for terrorism offences. In the Report on the Air India tragedy, the Honourable John Major summarized the characteristics of terrorism that distinguish it from other crimes. He noted that “[t]errorism is an existential threat to Canadian society in a way that murder, assault, robbery and other crimes are not. Terrorists reject and challenge the very foundations of Canadian society.”¹⁰ The Supreme Court has affirmed that denunciation and deterrence, both specific and general, will generally be paramount at the sentencing hearing given the seriousness of terrorism offences. Moreover, the attempt to justify or legitimize violent acts by putting a political, ideological or religious gloss over them must be denounced. In other words, prosecutors may underline that the beliefs or purposes in themselves are not criminal even if they are abhorrent, but that the underlying acts are criminal, and are not justified by virtue of the association with a political, ideological or religious belief or purpose.

At the same time, prosecutors should consider if charging a person with a terrorism offence rather than another *Criminal Code* offence would be counterproductive. Prosecutors must assess if a terrorism offence would unduly or unnecessarily stigmatize the accused in a manner disproportionate to the nature of the conduct, the harm it represents, and the needs of deterrence and denunciation. Prosecutors must also assess if charging the accused with a terrorism offence may victimize the accused’s family and their community during the course of the investigation or the trial process, including through stigmatization by association. The nature of the evidence required may be relevant to this consideration. Prosecutors should consider if the alleged offence can be proven with evidence that does not further victimize the family members of the accused, or in a way that helps preserve family or community relationships, which will facilitate the accused’s reintegration and rehabilitation after serving their sentence.

¹⁰ See *Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, Air India Flight 182: A Canadian Tragedy*, vol. 1 (Ottawa: Public Works and Government Services Canada, 2010) at 159.

3.2.4 Jurisdictional Issues

The choice of charges may raise jurisdictional issues between the Attorney General of Canada and provincial Attorneys General. The Attorney General of Canada has a wide jurisdiction to prosecute national security offences. The *Security Offences Act* provides the Attorney General of Canada with jurisdiction to prosecute any offence where:

- (a) the alleged offence arises out of conduct constituting a threat to the security of Canada within the meaning of the [*Canadian Security Intelligence Service Act*](#), or
- (b) the victim of the alleged offence is an internationally protected person within the meaning of [section 2](#) of the [*Criminal Code*](#).¹¹

In addition, s. 2.3 of the *Criminal Code* confers concurrent jurisdiction to the Attorney General of Canada in relation to certain *Criminal Code* offences, including terrorism offences.

Where the conduct under consideration could constitute an offence that is ordinarily or exclusively prosecuted by a provincial Attorney General, however, prosecutors will have to determine if the Attorney General of Canada's jurisdiction should be asserted. For example, the Attorney General of Canada has jurisdiction to prosecute terrorism offences. A terrorism offence includes not only those in Part II.1 of the *Criminal Code*, but also any other indictable offence that could constitute a terrorist activity. In this way, placing an explosive in a place of public use could not only constitute an offence under s. 431.2 of the *Criminal Code*, but also constitute a terrorism offence.

Prosecutors should determine if they should seek jurisdiction through a delegation from the Attorney General of the province. Terrorism offences may require proving additional elements that would not be required to establish guilt of the other *Criminal Code* offence. Prosecutors should consider if the evidence proves these additional elements in any event, even in the absence of any allegation that the conduct constituted a terrorism offence. If that is the case, then prosecutors may consider whether they should seek a delegation from the provincial Attorney General. Such a delegation may also be appropriate when PPSC is already prosecuting other charges within the jurisdiction of the Attorney General of Canada, or when the evidence includes sensitive information that should be handled by prosecutors with established federal relationships and security clearances. Understandings between PPSC and provincial prosecution services are in place to determine if a matter will be the responsibility of the Attorney General of Canada or the Attorney General of a province. These understandings contemplate early communication between interested Attorneys General. Any questions about the application of the understandings should be raised with the National Terrorism Prosecutions Coordinator.

¹¹ *Security Offences Act*, RSC 1985, c S-7, s 2.

3.3 Procedure to Obtain Consent to Commence Proceedings

The consent of the Attorney General is required to commence many national security proceedings such as terrorism proceedings.¹² That consent may be given by the Director of Public Prosecutions (DPP) or a Deputy Director of Public Prosecutions (DDPP).¹³

Requests to obtain consent should be made by the appropriate senior headquarters representative of the concerned law enforcement agency and be directed to a DDPP. Prosecutors must inform their CFP if they anticipate that a police force they are advising will request consent to commence proceedings. Prosecutors, with the approval of their CFP, must also inform the National Prosecutions Terrorism Coordinator.

Once a request is submitted, PPSC Headquarters will request a recommendation from the region in which the investigation originated. Prosecutors in the region must ensure that they possess sufficient information, including documentation from the investigative file, to assess the request according to the applicable standard. Prosecutors must provide their assessment by preparing a memorandum that contains:

1. The name of each accused, the charges, and the date, if any, for which the police are requesting consent;
2. A concise description and analysis of the available evidence, an explanation of how the evidence results in a reasonable prospect of conviction with respect to each accused on each count, and addressing why it is in the public interest to prosecute. The memorandum should highlight the strengths and weaknesses of the case, as well as any significant legal issues expected to be encountered, and any issues of particular importance to the assessment of the public interest;
3. An assessment of the degree to which the prosecution may require the disclosure of information that could be injurious to national security, international relations or national defence;
4. A recommendation on whether the request should be granted;
5. Copies of witness statements and other key pieces of evidence essential to evaluating the strength of the prosecution's case; and
6. The Information containing all charges.

The CFP will review the memorandum and, if satisfied that it adequately considers the factors indicated above, endorse the recommendation and send it to a DDPP. The DDPP will conduct an

¹² *Criminal Code*, s 83.24.

¹³ Section 2 defines the Attorney General as including their lawful deputy, being the Deputy Attorney General. Subsection 3(4) of the *Director of Public Prosecutions Act*, SC 2006, c 9 [DPP Act] designates the DPP as the Deputy Attorney General of Canada for the purposes of exercising the powers and duties under the DPP Act. Subsection 6(3) of the DPP Act designates the DDPPs, under the supervision of the DPP, as lawful deputies of the Attorney General. See also the PPSC Deskbook guideline "[3.5 Delegated Decision-Making](#)".

objective assessment of the request. If consent is granted, the requesting prosecutor must prepare a briefing note to the Attorney General in compliance with s. 13 of the DPP Act.¹⁴ Prosecutors must obtain the consent of the DDPP if they review the evidence and conclude that all or some of the charges should be withdrawn, stayed or reduced.

Less formal communications may be appropriate when an arrest has been made or is imminent and time does not permit a structured memorandum. This may include a combination of written materials and supplementary oral briefings. This may also be done entirely orally in cases of extreme and unanticipated urgency that does not allow the preparation of any written materials. However, any abbreviation is one of form and not of substance. In all cases, the reviewing Crown and the CFP (or their designate) must provide their informed assessments of the file. A written record of the information and analysis provided in the briefing must be made by the reviewing Crown as soon as possible.

Where a request is made to lay criminal charges, but there is no reasonable prospect of conviction and the threshold to commence proceedings is therefore not met, prosecutors should consider if there is nevertheless a reasonable prospect of meeting the threshold for a recognizance under either s. 810.011 or s. 83.3 of the *Criminal Code*.¹⁵ If that is the case, prosecutors should inform the police accordingly so that the police can determine if they want to seek the consent of the Attorney General to commence an application for a recognizance under one of these provisions.

Where the police request consent for a recognizance under s. [810.011](#) or s. [83.3](#) of the *Criminal Code*, prosecutors must follow the same procedures as a request to commence proceedings and determine whether there is a reasonable prospect of meeting the threshold for a recognizance under either provision.

4. MANAGEMENT OF NATIONAL SECURITY PROSECUTIONS

All national security prosecutions are deemed to be Major Cases and the policies contained in the *PPSC Deskbook* guideline “[3.1 Major Case Management](#)” apply to them. In addition, national security prosecutions must follow the following reporting and record-keeping obligations.

Prosecutors must ensure that their CFP, the National Terrorism Prosecutions Coordinator and the DDPP are informed of the developments of national security files. Prosecutors must inform their CFP and the National Terrorism Prosecutions Coordinator from the moment they are asked to provide pre-charge legal advice. Prosecutors must keep their CFP informed of the progress of the

¹⁴ See the *PPSC Deskbook* Directive “[1.2 Duty to Inform the Attorney General under s.13 of the Director of Public Prosecutions Act](#).”

¹⁵ The test under s 810.011 requires reasonable grounds to fear that a person may commit a terrorism offence. The test under s 83.3 requires reasonable grounds to believe that a terrorist activity will be carried out and reasonable suspicion that a recognizance or arrest is necessary to prevent the terrorist activity from occurring. They are prospective.

file in accordance with regional processes and keep the DDPP informed through the National Terrorism Prosecutions Coordinator. Keeping the National Terrorism Prosecutions Coordinator informed of developments in a file is important, notably because it allows the DDPP to determine whether any case is ready to be considered for consent. In particular, prosecutors must consult the National Terrorism Prosecutions Coordinator before providing any advice to law enforcement suggesting that the thresholds have not been met. Once the trial has been completed, the CFP must report the outcome to the DDPP.

Prosecutors must prepare s. 13 briefing notes at several stages of the prosecution to enable the Attorney General to exercise their powers under the DPP Act, should the Attorney General choose to do so. More precisely, prosecutors should prepare a s. 13 briefing note when:

- Consent is granted to commence proceedings;
- Prosecutors conclude that all or some of the charges should be withdrawn, stayed or reduced, and have consulted the DDPP;
- The court discharges the accused on a preliminary inquiry or enters a judicial stay of proceedings;
- The accused is acquitted or convicted;
- The court imposes a sentence; and
- Important questions of general interest are raised such as important constitutional issues.

Information about national security prosecutions must be properly recorded. Each office must maintain records about police requests to commence proceedings in relation to terrorism charges or recognizances under either s. 810.011 or s. 83.3 of the *Criminal Code*, including the date when the request was made. Prosecutors should also confirm with the police when, from an operational perspective, they require a decision, and record this information on the file. Each office should also maintain records about police requests for legal advice regarding thresholds, when the police do not seek consent to commence proceedings but ask for feedback on whether a threshold has been met. Finally, records should be kept respecting whether or not a brief provided by the police was sufficient to permit prosecutors to make an assessment, and any steps that were taken in response to the request.

5. SENTENCING

As in all criminal cases, sentencing is a highly individualized process depending on the particular facts at issue and the circumstances of the offender. Sentences in national security cases are decided under the same set of sentencing principles as other crimes.

National security prosecutions catch a wide variety of conduct, a feature recognized in respect of terrorism offences by the Supreme Court of Canada in *R v Khawaja*. The Supreme Court also held, however, that denunciation and deterrence, both specific and general, would generally be

paramount at the sentencing hearing given the seriousness of national security offences, including terrorism offences.¹⁶

Sentencing remains an individualized exercise that takes into account all of the circumstances of the offender and the offence. When assessing the individual factors of a case, prosecutors should note that courts have so far indicated that life sentences or sentences exceeding 20 years will generally be appropriate when offenders knowingly engaged in a terrorist activity that was designed or is likely to result in the indiscriminate killing of innocent human beings. There may be exceptional circumstances warranting a departure from the ordinary sentencing range, such as when the offender cooperated with the authorities to bring other terrorists to justice.

5.1 Consecutive Sentences

Terrorism offences may require consecutive sentences. Section 83.26 of the *Criminal Code* provides that a sentence imposed for an offence under any of ss. 83.02 to 83.04 and 83.18 to 83.23 must be served consecutively to any other punishment imposed on the person for an offence arising out of the same event or series of events, unless the sentence was one of life imprisonment. In *R v Khawaja*, the Supreme Court held that the requirement of s. 83.26 is not inconsistent with the totality principle. The fact that sentences of 20 years or more may be imposed more often in terrorism cases attests to the particular gravity of terrorist offences and the moral culpability of those who commit them.¹⁷

5.2 Delayed Parole Eligibility

Courts have the power to delay parole eligibility in accordance s. 743.6 of the *Criminal Code*. Prosecutors should consider presenting an application under this section, especially where the offences are serious and there are no exceptional mitigating circumstances.

Certain national security offences may be subject to a presumption for delayed parole eligibility. Pursuant to s. 743.6 (1.2) of the *Criminal Code*, terrorism offences are presumed to be offences for which a delayed parole order is appropriate. If a prosecutor is of the view that exceptional circumstances rebut this presumption, they must prepare a written recommendation to their CFP before the matter is addressed in court. If the CFP is satisfied that the recommendation is appropriate, the CFP endorses the recommendation and sends it to the DDPP for approval.¹⁸

¹⁶ *R v Khawaja*, 2012 SCC 69.

¹⁷ *Ibid* at para 126.

¹⁸ Other national security offences may not be subject to this presumption, for example, the normal rules for delayed parole eligibility apply to offences under s. 4 to 7 of the *Crimes Against Humanity and War Crimes Act*.

5.3 Sentencing under the *Youth Criminal Justice Act*

The *Youth Criminal Justice Act* (YCJA) applies to any young person charged with a terrorism offence or recognizance under s. 810.011 or s. 83.3 of the *Criminal Code*. In considering sentencing for a young person who has been convicted of either a terrorism offence or a breach of a recognizance, the YCJA's provisions regarding the availability of custodial sentences will apply. Subsection 39(1) of the YCJA states that:

(1) A youth justice court shall not commit a young person to custody under [section 42](#) (youth sentences) unless

(a) the young person has committed a violent offence;

(b) the young person has previously been found guilty of an offence under [section 137](#) in relation to more than one sentence and, if the court is imposing a sentence for an offence under [subsections 145\(2\) to \(5\)](#) of the [Criminal Code](#) or [section 137](#), the young person caused harm, or a risk of harm, to the safety of the public in committing that offence;

(c) the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of either extrajudicial sanctions or of findings of guilt or of both under this Act or the [Young Offenders Act](#), chapter Y-1 of the Revised Statutes of Canada, 1985; or

(d) in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in [section 38](#).

Prosecutors should also note that other provisions of the YCJA set out other requirements and considerations before a custodial sentence may be imposed.

5.3.1 Terrorism Offences

A young person with no record who is found guilty of a terrorism offence may be eligible for a custodial sentence pursuant to s. 39(1)(a) of the YCJA. This section provides that custodial sentences may be imposed when the young person has committed a violent offence. Violent offence is defined in s. 2 of the YCJA as:

(a) An offence committed by a young person that includes as an element the causing of bodily harm;

(b) An attempt or a threat to commit an offence referred to in paragraph (a); or

(c) An offence in the commission of which a young person endangers the life or safety of another person by creating a substantial likelihood of causing bodily harm.

Given the broad range of conduct which may be captured by terrorism offences such as facilitation, prosecutors will have to consider whether the conduct at issue in a particular case fits the definition of violent offence, and be prepared to counter defence arguments that it does not.

Paragraph 39(1)(d) would also generally support a custodial sentence for terrorism offences. It provides that in “exceptional cases,” a custodial sentence may be imposed for an indictable offence where the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in s. 38.

5.3.2 Breach of Recognizance

A custodial sentence will generally not be available when a young person has no record, enters into a s. 810.011 recognizance, and is then found guilty of a breach of that recognizance. Section 39(1)(b) provides that a custodial sentence may be imposed if the young person has failed to comply with “non-custodial sentences.” This has been judicially interpreted to mean failure to comply with more than one sentence – in other words, multiple breaches of the same non-custodial sentence are not sufficient.¹⁹ The young person must have been found guilty and sentenced to at least two separate non-custodial sentences, which were then breached.

Prosecutors should state for the record the reason why they are not seeking a custodial sentence in their sentencing submissions for the breach of a s. 810.011 recognizance. Prosecutors should also take the position that a new non-custodial sentence should be imposed for the breach, such that if there is a breach of the new sentence, the young person would be eligible for a custodial sentence under s. 39(1)(b). This places the young person on notice.

The YCJA does not include a specific provision dealing with the breach of a recognizance under s. 810.011. In the event of such a breach, s. 811 of the *Criminal Code* applies.²⁰

If a young person fails or refuses to enter into a recognizance, the court can impose any of the sanctions under s. 42(2) of the YCJA, but a custody and supervision order under s. 42(2)(n) cannot exceed 30 days.²¹

¹⁹ *R v A (E.S.)* (2003) 57 W.C.B. (2d) 461 (Alta Prov Ct).

²⁰ See s 140 of the YCJA, which says that the *Criminal Code* provisions apply regarding offences committed by young persons, with any required modifications, except to the extent that they are inconsistent with or excluded by the YCJA.

²¹ YCJA, s 14(2).



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

5.2 *COMPETITION ACT*

DIRECTOR'S GUIDELINE ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

March 1, 2014

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1. INTRODUCTION

The [Competition Act](#) (Act)¹ is a law of general application that establishes basic principles for the conduct of business in Canada. The Act is designed to, among other objectives, maintain and encourage competition in Canada and provide consumers with competitive prices and product choices.

2. POLICY OBJECTIVE

This guideline sets out the main practices and policies of the Director of Public Prosecutions (DPP) with respect to competition law cases. A Memorandum of Understanding (MOU) has been established between the DPP and the Commissioner of Competition (Commissioner). The purpose of the MOU is to clarify the parties' roles and responsibilities at the investigative and prosecution stages of a case under the Act.²

3. COMPETITION LAW PROSECUTORS

The National Capital Regional Office (NCRO) includes a group of Crown counsel (the Competition Law Section (CLS)) assigned to conduct prosecutions under the Act in the courts of all provinces and before the Federal Court.³

When the Commissioner of Competition requires the services of a prosecutor under [s. 21](#) of the Act or refers evidence to the Attorney General under [s. 23](#), the Chief Federal Prosecutor (CFP) of the NCRO determines whether the case should be assigned to counsel in the NCRO or whether assistance should be sought from Crown counsel in another regional office of the Public Prosecution Service of Canada (PPSC) or from an agent having the appropriate delegation from the DPP.

When a competition law case is assigned to Crown counsel outside the NCR, the counsel should consult with the CFP or the Deputy CFP of the NCRO on any legal decision or issue that may arise in the course of the prosecution.

4. ROLE AND RESPONSIBILITIES OF CROWN COUNSEL IN COMPETITION LAW MATTERS

The responsibilities of the Commissioner⁴ include the investigation of suspected offences under the Act and the referral of evidence to the PPSC. In addition, the Commissioner

¹ RSC 1985, c C-34.

² A copy of the MOU is attached as Appendix A to this guideline and can also be found online: [Competition Bureau \[MOU\]](#).

³ See *Competition Act*, *supra* note 1, [s 73](#).

⁴ The Commissioner discharges his responsibilities with assistance of members of the Competition Bureau.

makes recommendations to the PPSC on matters such as the granting of immunity and leniency, charges to be laid and the appropriate sanctions to be imposed following a conviction.

Crown counsel involved in competition law matters are responsible for providing prosecutorial advice, both general and specific, during an investigation. Under [s. 23](#) of the Act, the Commissioner may remit evidence gathered in the course of an investigation to the PPSC with a request that a prosecution be commenced. The evidence is then assessed in accordance with the principles set out in the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)” for the purpose of determining whether a prosecution is warranted. When a prosecution is approved, Competition Bureau (Bureau) officers swear the information.

4.1. Consultation

In the regulatory prosecution context, “public interest” considerations include the objectives of the regulatory regime in question. Crown counsel should consult the Bureau in order to ascertain those objectives, especially as they relate to the matter being considered, and more particularly, with respect to charges to be laid and arguments to make before the court.⁵ In this regard, see the PPSC Deskbook directive “[1.3 Consultation within Government](#)” in which the importance of consultation and communication is emphasized.

The goal of prosecutions under the Act is to promote compliance with the competition policy entrenched in the Act. Nevertheless, in light of the independence of the DPP, the Commissioner cannot dictate litigation positions to prosecutors or impose specific courses of action.⁶

4.2. Role and responsibilities of Crown counsel prior to the laying of charges

Crown counsel may be called upon from the outset of an investigation to provide legal advice to help ensure that the investigative strategy, techniques and procedures are consistent with the rules of evidence and with the [Canadian Charter of Rights and Freedoms](#). Counsel may also advise Bureau officers on the nature of the evidence required, the use of investigative powers and the sufficiency of evidence.

While Crown counsel may work closely with the investigative team, they must not act as officers themselves by, for example, taking part in searches, participating in the surveillance of suspects or conducting interviews of witnesses. However, in certain circumstances, Crown counsel may interview important witnesses before charges are laid, for example, in the context of the Bureau’s Immunity and Leniency Programs.

⁵ See MOU, *supra* note 2 at para 2.31.

⁶ See the PPSC Deskbook directive “[1.3 Consultation within Government](#)”.

Crown counsel may also provide legal advice on Bureau policies and programs in the criminal field (for example, the Immunity Program) and on practice and advisory notes (for example, search and seizure, disclosure, immunity and plea agreements).

4.3. Role and responsibilities at the prosecution stage

Crown counsel are responsible for the approval and prosecution of charges under the Act and for the conduct of all plea and resolution discussions.

Upon the referral of evidence by the Bureau to the PPSC in accordance with [s. 23](#) of the Act, counsel must exercise his or her discretion independently of the Bureau in determining whether or not the recommended prosecution meets the standards set out in the PPSC Deskbook.⁷

4.4. Plea and resolution discussions

Crown counsel are responsible for conducting all plea and resolution discussions in accordance with the PPSC Deskbook guideline “[3.7 Resolution Discussions](#)”. Crown counsel will consult with Bureau officers regarding the terms of a proposed resolution⁸ and will brief Bureau officers on the terms and supporting rationale of a plea agreement.

4.5. Decision to appeal

In general, decisions as to whether to commence an appeal are made by the CFP of the NCRO after consultation with the Team Leader of the CLS, a representative from the regional office in the province where the appeal is to be commenced and, in matters with significant public interest or national importance, the Deputy DPP, Regulatory and Economic Prosecutions. Crown counsel who has made a recommendation for an appeal must wait to receive instructions from the CFP before commencing an appeal.

5. IMMUNITY AGREEMENT

In respect of serious criminal activity under the Act, it may be in the public interest to offer immunity from prosecution to persons willing to terminate their participation in the illegal conduct and fully cooperate with the Bureau and the PPSC.⁹

Pursuant to the Bureau’s Immunity Program, persons or organizations with information concerning anticompetitive business practices such as bid-rigging and price fixing are

⁷ For the guiding principles regarding independence and pre-charge involvement of Crown counsel in police investigations and the delineation of the respective roles of officers and prosecutors. See [R v Regan, 2002 SCC 12, \[2002\] 1 SCR 297](#).

⁸ MOU, *supra* note 2 at para 2.33.

⁹ See also the PPSC Deskbook guideline “[3.3 Immunity Agreements](#)”.

encouraged to make disclosure to the Bureau.¹⁰ Both organizations and individuals may request immunity. When an organization is granted immunity, the organization may also apply for immunity for its directors and employees, past or present, provided these individuals meet the criteria and commit to the same disclosure and cooperation requirements as the organization.

The decision to grant immunity rests solely with the Crown and, like all exercises of prosecutorial discretion, is made in the name of the DPP.¹¹

5.1. Process for granting immunity

Bureau officers conducting an investigation and approached by an applicant for immunity will formulate a recommendation to Crown counsel. This recommendation must set out in as much detail as possible all relevant considerations to enable counsel to exercise his or her discretion independently. When counsel agrees that immunity should be granted, he or she must obtain approval from the Team Leader of the CLS to enter into an immunity agreement, which sets out the terms by which the parties to the agreement will be bound.

To that end, Crown counsel should follow immunity agreement templates. These can be found in Appendices B (organization immunity) and C (individual immunity) of this guideline. Individuals covered by organization immunity (Appendix B) must sign a standard letter setting out the independent conditions for continuing or revoking the individual immunity coverage. An example of such a letter is provided in Appendix D. Any proposed deviation from these standard forms must be approved by the Team Leader of the CLS. Because an immunity agreement typically includes issues of interest to the Bureau, the relevant Deputy Commissioner of the Bureau should also be notified of any such deviations.¹²

5.2. Cooperation and disclosure by the immunity applicant

When Crown counsel, on behalf of the DPP, grants immunity and the parties enter into an agreement to that effect, the applicant for immunity must confirm in writing, as soon as possible, the content of the representations it has made within the application process and disclose all pertinent facts and documents of which it has knowledge and/or possession. Cooperation on the part of the immunity applicant is crucial and must be given completely and promptly.

As part of this process, Bureau officers will usually interview all involved parties, including an organization's senior executives or, if the immunity applicant is an

¹⁰ The Immunity Program sets out the practices of the Bureau, the respective roles of the Bureau and the PPSC with respect to the process of granting immunity, the conditions on which the Bureau will recommend that the PPSC grant immunity and the obligations of the applicant for immunity.

¹¹ See *Krieger v Law Society (Alberta)*, 2002 SCC 65, [2002] 3 SCR 372 at para 46; and *Director of Public Prosecutions Act*, SC 2006, c 9, s 9(1).

¹² See MOU, *supra* note 2 at para 3.11.

individual, that person. Bureau officers may have to interview witnesses before an immunity agreement can be implemented. In such cases, Crown counsel will provide an assurance in writing that the statements made by these witnesses and the information or documents they provide cannot be used directly against them. An example of a letter covering such a situation is included in Appendix E.

5.3. Revoking immunity

Under the terms of an immunity agreement, immunity is contingent upon immunity applicants fulfilling their obligations. The agreement also provides that immunity may be revoked. Like the decision to grant immunity, the decision to revoke rests with the PPSC. However, Crown counsel should take into account any representations made by the Bureau in that regard.

In consultation with the Team Leader of the CLS, Crown counsel in such cases must evaluate whether it is advisable to revoke immunity by referring to the factors set out in section 9 of the PPSC Deskbook guideline “[3.3 Immunity Agreements](#)”. Factors identified as relevant to possible revocation include when an immunity applicant:

- withdraws promised co-operation with the Crown;
- fails to be truthful when testifying;¹³
- has wilfully or recklessly misled the investigating agency or Crown counsel about material facts concerning the case including factors relevant to that person's reliability and credibility as a witness; or
- has sought immunity by conduct amounting to a fraud or an obstruction of justice.

A final decision to revoke immunity must be approved by the CFP of the NCRO.

6. PLEA AGREEMENT FOLLOWING A RECOMMENDATION OF LENIENCY

The Bureau's Leniency Program complements the Immunity Program and aims at encouraging other participants in an illegal cartel to acknowledge their actions and cooperate with the Bureau and the PPSC. In such cases, the Bureau recommends to the PPSC that the applicant receive lenient treatment in sentencing following a guilty plea. As with all plea negotiations, openness and fairness are crucial to the effective operation of the Leniency Program.

¹³ See e.g. [R v Ahluwalia \(2000\), 149 CCC \(3d\) 193, 39 CR \(5th\) 356, 138 OAC 154 \(ONCA\)](#), where the Crown was criticized for failing to fully investigate the lack of full disclosure of a witness's criminal record. See also the PPSC Deskbook guideline “[2.5 Principles of Disclosure](#)”, for Crown counsel's disclosure obligations.

6.1. Administration of the leniency program

Organizations or individuals may apply for leniency provided that they meet the criteria set out in the Leniency Program.

The Bureau's recommendations of leniency to the PPSC must set out all relevant considerations to enable Crown counsel to exercise their discretion independently and with full knowledge of the facts. Only Crown counsel has the discretion to enter into and conduct discussions leading to a resolution of the case and sentencing.

6.2. Cooperation and disclosure by the leniency applicant

Under the Leniency Program, a plea and sentencing agreement entered into between the DPP and a leniency applicant sets the conditions under which the applicant will benefit from leniency in sentencing. The agreement specifies the obligation upon the candidate for leniency to provide full, frank, timely and truthful disclosure and cooperation during any related investigation and resulting prosecution.

Failure by a leniency applicant to fulfill its obligations could lead to any leniency granted being revoked. In such circumstances, Crown counsel, in consultation with the Team Leader of the CLS, should evaluate whether to revoke leniency by having regard to the factors set out in section 9 of the PPSC Deskbook guideline "[3.3 Immunity Agreements](#)".

A final decision to revoke leniency must be approved by the CFP of the NCRO.

6.3. Plea and sentencing agreement

Generally speaking, plea and sentencing resolutions¹⁴ (including agreements pursuant to a leniency recommendation made by the Bureau under the Leniency Program) entered into with respect to an offence under the Act prior to charges being laid should be reduced to a written plea agreement in the form set out in Appendices F and G of this guideline.¹⁵ The agreement must include a statement of facts admitted by the accused.

When charges have already been laid, Crown counsel may decide to proceed without a written plea agreement if no permanent obligation to cooperate will be imposed on the pleading party as part of the proposed resolution.

It is the responsibility of each Crown counsel to ensure that the standard plea agreement is used in every case where counsel proposes to enter into such an agreement, when a permanent obligation to cooperate as well as immunity arrangements will be provided for in the agreement. Any proposed deviation from the standard plea agreements must be approved by the Team Leader of the CLS.

¹⁴ See also the PPSC Deskbook guideline "[3.7 Resolution Discussions](#)".

¹⁵ Appendices F and G, the plea agreement templates are currently being developed, and will be posted upon completion.

7. APPLICATIONS FOR PROHIBITION ORDERS UNDER S. 34(2) OF THE COMPETITION ACT

[Section 34\(2\)](#) of the *Competition Act* permits a superior court of criminal jurisdiction to prohibit or prevent the commission of an offence under [Part VI](#) of that Act. The court may prohibit the “commission of the offence or the doing or continuation of any act or thing by that person or any other person constituting or directed toward the commission of the offence”. Before the prohibition order can be made proceedings must have been commenced.

7.1. Considerations

The following factors, among others, are relevant when deciding whether a case should be the subject of a prohibition order, a prosecution or a more informal action:

1. any history of anti-competitive or other relevant behaviour by the respondent company, its principals or any associated company;
2. the seriousness of the conduct, including:
 - i. whether a prior order or undertaking has been contravened;
 - ii. the apparent effect of the conduct on consumers, competitors, etc.;
 - iii. whether the conduct violates corporate policy (and, if so, how effectively that policy is policed, and how quickly the conduct was terminated when senior officials became aware of it);
3. any remedial steps by the respondent; and
4. compliance policies of the Competition Bureau.

7.2. Procedure

The decision to pursue a prohibition order under [s. 34\(2\)](#) requires the approval of the CFP of the NCRO. The CFP will sign the information in support of the prohibition order.

The Deputy DPP, Regulatory and Economic Prosecutions and Management Branch, must approve the decision to pursue a s. 34(2) prohibition order in cases of significant public interest. A request for the Deputy DPP’s approval must be accompanied by a memorandum outlining the background of the matter and the reasons for the recommendation. A draft order, information, notice of application, consent, and an agreed statement of facts or affidavit must also be included.

APPENDIX A – MEMORANDUM OF UNDERSTANDING BETWEEN THE COMMISSIONER OF COMPETITION AND THE DIRECTOR OF PUBLIC PROSECUTIONS

May 13, 2010

With respect to the conduct of criminal investigations and prosecutions of offences under the [Competition Act](#), the [Consumer Packaging and Labelling Act](#), the [Textile Labelling Act](#) and the [Precious Metals Marking Act](#).

PREAMBLE

Whereas the Director of Public Prosecutions (DPP) and the Commissioner of Competition (Commissioner), the Parties to this Memorandum of Understanding (the Parties), have separate responsibilities within the criminal justice system of Canada, each Party recognizing the other's independence in performing their respective functions and duties;

Whereas the Office of the Director of Public Prosecutions, referred to as the Public Prosecution Service of Canada (PPSC), has a section composed of prosecutors (the Competition Law Section) specifically assigned to prosecutions of offences under the [Competition Act](#), the [Consumer Packaging and Labelling Act](#), the [Textile Labelling Act](#), and the [Precious Metals Marking Act](#) (the Acts);

Whereas the Commissioner carries out her responsibilities with the support of the Competition Bureau (Bureau), which is composed of authorized representatives, including managers, competition law officers (officers), and support staff;

Whereas the Parties recognize that their roles are interdependent and they need to work together in close consultation in support of one another's mandates;

Whereas it is understood that effective collaboration can be based only on a clear understanding of one another's roles, mutual respect, and trust;

Whereas federal prosecutors are guided by the principles articulated in the [Federal Prosecution Service Deskbook](#) (FPS Deskbook).

THEREFORE THE PARTIES AGREE AS FOLLOWS:

1. Purpose of the Memorandum of Understanding and Governing Principles

1.1 The purpose of this Memorandum of Understanding (MOU) is:

1. to provide a clear understanding of the Parties' respective roles and responsibilities at the investigative and prosecution stages of a case under the Acts; and,
2. to improve the efficacy of prosecutions and to implement strategies to enhance the quality of investigations and of the cases presented at trial.

1.2 As a best practice, each Party undertakes to consult the other regarding any decision that is likely to have an impact on a prosecution emanating from a Bureau investigation.

1.3 The Parties undertake to disseminate this MOU throughout their respective organizations so that prosecutors, paralegals, managers, officers and support persons are aware of the principles it establishes and the resolve of the Parties to achieve its purpose.

2. Roles and Responsibilities

2.1 In the exercise of their respective mandates the Parties respect one another's independence while recognizing the need to work together toward common goals.

2.2 The Bureau's responsibilities include the investigation of suspected offences under the Acts, the referral of evidence to the PPSC, and the making of recommendations on the charges to be laid, the appropriate sanction(s) to be imposed, and the granting of immunity and leniency.

2.3 The PPSC is responsible for: prosecutorial advice, both general and specific during the investigation; the decision, in accordance with [*FPS Deskbook*](#) principles, as to whether charges should proceed, the wording of charges, and the choice of persons to be charged; and the prosecution of charges laid.

Bureau: Roles and Responsibilities at the Investigative Stage

2.4 The primary mandate of the Bureau is to enforce and administer the Acts. The Acts are designed to – among other objectives – maintain and encourage competition in Canada, and to provide consumers with competitive prices and product choices.

2.5 Officers commence and conduct investigations pertaining to the Acts. They are responsible for identifying the object and targets of an investigation. They also determine the structure, scope, and duration of those investigations, and the means to be used to carry them out. Under the direction of the Commissioner, officers exercise full discretion with respect to the conduct of investigations.

2.6 The Bureau will assign a lead officer at the opening of an investigation. The lead officer and assigned counsel will be one another's primary point of contact on the file and will keep one another updated as to developments. Officers assigned to the file will keep one another updated as to developments.

2.7 Officers gather evidence, and ensure its preservation. They organize the information and evidence collected over the course of an investigation, in anticipation of litigation and with a view to the Crown's disclosure obligation in accordance with the Briefing Note on Disclosure and with any other directive or guideline of the DPP.

2.8 As may be reasonable, officers will seek the advice of counsel in the PPSC Competition Law Section, assigned counsel from a PPSC regional office or, where appropriate, designated agents of the DPP as defined in paragraph 2.17 of this MOU (counsel) on any legal issue likely to impact an investigation or any subsequent prosecution. Officers will also refer to the relevant Practice Notes issued by the Competition Law Section (PPSC).

2.8.1 More specifically, officers will consult counsel in relation to the following:

- When seeking a search warrant under [sections 15 and 16](#) of the *Competition Act*, or a search warrant, a general warrant, tracking warrant, or dialled-number recorded warrant under the [Criminal Code](#);
- When seeking judicial authorization for electronic surveillance pursuant to [Part VI](#) of the *Criminal Code*;
- When seeking an order under [section 11](#) of the *Competition Act*, or a production order under [sections 487.012 and 487.013](#) of the *Criminal Code*;
- When seeking a special search warrant or a restraint order pursuant to [sections 462.32 and 462.33](#) of the *Criminal Code*, dealing with suspected proceeds of crime;
- When seeking a sealing order pursuant to [section 487.3](#) of the *Criminal Code*;
- On matters relating to the granting of immunity or leniency;
- On matters involving undercover or surveillance operations;
- Regarding the preparation of a disclosure package;
- When drafting a Report to Crown Counsel (RTCC) that summarizes the evidence gathered during the investigation, to ensure that it addresses all applicable PPSC legal and policy requirements;
- On claims of solicitor-client privilege; and,
- When retaining an expert.

2.9 In seeking any legal advice, managers and officers will inform counsel of the existence of legal advice they have already received on a given matter from another counsel, of requests for advice on the same or related issues of which they are aware, and of all relevant facts. The above information should be provided to counsel in writing to prevent any misunderstanding.

2.10 When the Bureau formally refers matters together with an RTCC pursuant to [section 23](#) of the *Competition Act* for such action as warranted, it will endeavour to do so as expeditiously as possible, consistent with its enforcement priorities.

Bureau: Roles and Responsibilities at the Prosecution Stage

2.11 Officers are responsible for providing ongoing, timely support and assistance to counsel during the course of post-referral proceedings until the prosecution is completed. More specifically, they will:

- Preserve evidence and all inculpatory and exculpatory information obtained, and maintain continuity and security of all evidence;
- Provide and identify to counsel all relevant information pursuant to disclosure obligations. The ultimate determination of relevance is up to counsel;
- Be available to review with counsel the facts of the case and disclosure issues;
- Take all necessary steps to ensure the availability of witnesses;
- Attend pre-trial interviews of prospective witnesses by counsel, and keep notes of such interviews for disclosure purposes;
- Attend court proceedings, when required;
- Carry out additional investigative tasks that are reasonably required by counsel.

2.12 Officers will continue to provide all relevant evidence, reports and briefs discovered or produced throughout the prosecution phase.

2.13 Officers, when called as witnesses, shall bring with them all notes and evidence in their possession relevant to their anticipated testimony.

2.14 The Bureau is responsible for making arrangements for the attendance of all Crown witnesses in court, expert reports, witness fees, and all litigation expenses, in accordance with applicable Treasury Board guidelines and Rules of Court.

Plea and Resolution Discussions

2.15 The Bureau is responsible for fully briefing counsel of the results of its investigation and identifying available evidence prior to the commencement of any plea and sentence negotiations. The briefing must provide a synopsis of the available evidence, both documentary and testimonial. The Bureau is responsible for making recommendations indicating what it believes to be an appropriate sentence, together with its rationale based on the Bureau's Information Bulletin on Sentencing and Leniency in Cartel Matters.

Prosecutors: Roles and Responsibilities at the Investigative Stage

2.16 Pursuant to [subsection 3\(3\)](#) of the *Director of Public Prosecutions Act*, the DPP is responsible for carrying out varied duties, which either involve or are related to the prosecution of offences. Broadly speaking, federal prosecutors carry out the criminal litigation responsibilities on behalf of the DPP, namely, the prosecution of infractions and all prosecution-related functions. The PPSC acts as prosecutor in all matters prosecuted by the DPP on behalf of the Crown. The PPSC ensures that a consistent national approach is taken to issues arising in prosecutions under the Acts.

2.17 The DPP may delegate his or her duties to private sector counsel or to counsel in the Department of Justice, Competition Bureau Legal Services (CBLS), and these counsel may act as an agent of the DPP only when they have been designated as such by the DPP for a specific case.

2.18 A prosecutor's role is to provide assistance and timely and strategic legal advice at the outset and during the course of an investigation, in accordance with the [FPS Deskbook](#).

2.19 The PPSC, at the Bureau's request, will assign counsel to provide advice and assistance. The lead officer and assigned counsel will be one another's primary point of contact on the file and will keep one another updated as to developments. Where more than one counsel is assigned to the file, a lead counsel will be designated. Counsel assigned to the file will ensure that they update one another as to developments.

2.20 If requested, counsel may provide advice in the development of Bureau policies and programs in the criminal field (e.g., the Immunity Program) and on any related questions; draft and update practice and advisory notes (e.g., search and seizure, disclosure, immunity and plea agreements); and periodically provide information sessions and training programs to officers.

2.21 Counsel will help shape the investigation in the early stages by advising officers on the nature of the evidence required, and by providing input into the development of the case, the use of investigative powers, the adequacy of the evidence and the quality of the witnesses.

2.22 Counsel will assist the Bureau with any investigative procedure in a timely way. A refusal by a prosecutor to adopt a procedure, where approval by the PPSC is required, will be explained to the Bureau.

2.23 Counsel will provide assistance relating to:

- Any request of an officer on any legal issue likely to impact an investigation or any subsequent prosecution.
- Court applications made by officers. Counsel will review information to obtain search warrants, production orders, sealing orders and wiretap authorizations, among other applications. Counsel may also suggest modifications for the sake of clarity or accuracy, and assist in processing such applications.
- The preparation of the RTCC, at the earliest stage, to ensure that it meets all legal and policy requirements.
- The preparation of witness interviews. Counsel may attend witness interviews as needed.

2.24 Timely legal advice will be provided to officers or, alternatively, to their supervisors to ensure that investigation techniques and procedures are consistent with the rules of evidence and constitutional standards. Where such advice differs from that set out in the practice and advisory notes, counsel will explain any discrepancy, if requested.

2.25 When an officer seeks legal advice, counsel will consult with the officer to determine whether legal advice is necessary, the specific legal question to be answered, and the form that the advice should take. If the legal advice is to be provided in the form of a written legal opinion, counsel should consult with the officer before the opinion is finalized so as to ensure that all relevant facts have been set out and all relevant legal issues have been considered and answered.

2.26 Bearing in mind the independence of prosecutors and the need to assess cases on their own particular facts, counsel nevertheless recognizes the benefit of ensuring consistent advice and will strive to be consistent with that provided by other federal prosecutors.

Prosecutors: Roles and Responsibilities at the Prosecution Stage

2.27 Counsel is responsible for the authorization and the prosecution of charges in court and for the conduct of all plea and resolution discussions. Counsel are agents of the DPP and prosecute offences on behalf of the Crown; they are bound by the Constitution, statute law, jurisprudence, and the rules of the relevant provincial or territorial law societies.

2.28 Upon the referral of evidence by the Bureau to the PPSC, counsel will review the evidence in the case in accordance with the "Decision to Prosecute" policy of the [FPS Deskbook](#). This review is a crucial component of the exercise of independent prosecutorial discretion.

2.29 As far as reasonably possible, a decision to prosecute is to be taken by an arms-length counsel not originally assigned to the investigation who consults his or her colleagues assigned to the investigation before deciding independently whether or not to lay charges.

2.30 Counsel will, in a timely way, review all evidence referred, and in consultation with the officers, where applicable:

- Determine the charges to be sworn and the persons to be charged;
- Lay an information seeking a prohibition order pursuant to [subsection 34\(2\)](#) of the *Competition Act*;
- Make an application for the issuance of an interim injunction pursuant to [section 33](#) of the *Competition Act*;
- Make a recommendation of further investigation;
- Estimate the resources needed and the cost of the prosecution; and,
- In all events, inform the Bureau of his or her decision as soon as possible and provide an explanation in the case of a refusal to lay charges.

2.31 The decision to prosecute is an ongoing process that continues throughout the prosecution. Counsel shall determine the sufficiency of evidence and evaluate whether a prosecution is in the public interest. In doing so, counsel shall exercise independent judgment and should consult with the Bureau to determine whether the prosecution is in the public interest.

2.32 The prosecutor's role is not to obtain a conviction but to lay before a trier of fact credible evidence relevant to an alleged offence. This must be done fairly, excluding any notion of winning or losing. However, if counsel elects to pursue a prosecution, it is done vigorously and to the best of his or her ability, with due regard to the law, legal ethics, his or her role as an officer of the court, and the overriding obligation to act objectively and fairly in the public interest. Further, when exercising his or her discretion, counsel must act independently, fairly, objectively and impartially.

2.33 Counsel is responsible for the conduct of all plea and resolution discussions. Counsel must ensure that the conduct meets the standards articulated by the *FPS Deskbook*. Counsel will consult the Bureau to elicit its views as to the appropriateness of any proposed plea and sentence or other resolution, and will consider the Bureau's

comments. This consultation should be ongoing so that the Bureau fully appreciates how the negotiations have been conducted in order that it can make a more informed recommendation. If a plea agreement is reached, counsel will convey to the officers the substance of the agreement and the reasoning behind it. Usually officers are present and provide assistance to prosecutors at plea and sentencing negotiations.

2.34 Counsel will consult with the Bureau on questions of staying or withdrawing charges, and on decisions to appeal. Counsel will provide an explanation of these decisions to the Bureau, if requested.

2.35 Counsel has an obligation to ensure that witnesses, including officers, are prepared adequately prior to testifying and that notices required pursuant to the rules of evidence have been served in a timely manner.

3. Immunity — Leniency

3.1 To uncover and stop criminal activity pursuant to the [Competition Act](#), the Bureau has put in place the Immunity Program that sets out the Bureau's practices, its role and the role of the PPSC in the immunity process, the conditions under which the Bureau will recommend that the PPSC grant immunity and the responsibilities of the immunity applicant. The Immunity Program is one of the Bureau's most effective tools for detecting and investigating criminal activities prohibited by the *Competition Act*.

3.2 The Bureau and the PPSC recognize that, in respect of serious criminal activity under the *Competition Act*, it is in the public interest to offer immunity from prosecution to a participant who is willing to terminate its participation in the illegal conduct and fully cooperate with the Bureau and PPSC.

3.3 The Bureau's Leniency Program complements the Immunity Program and aims at encouraging other participants in an illegal cartel to acknowledge their actions and cooperate with the Bureau and the PPSC

3.4 The Bureau and the PPSC recognize that certainty, predictability of results and transparency are crucial to the effective operation of the Immunity and Leniency Programs.

3.5 The management of the Immunity and Leniency Programs, including such matters as acceptance of markers, taking of proffers, interviewing of witnesses and the collection of documentary evidence, is the responsibility of the Bureau.

3.6 A recommendation for immunity or leniency by the Bureau to the PPSC must fully set out the relevant considerations in order to permit counsel to exercise independent discretion while referencing as complete a record as possible.

3.7 The decision to grant immunity or leniency upon a recommendation by the Bureau, or otherwise, rests solely with counsel who exercises his or her independent discretion in accordance with the principles articulated in the [FPS Deskbook](#). However, the Bureau's recommendation to the PPSC is given due consideration.

3.8 Officers and counsel shall consult one another as necessary throughout the immunity or leniency processes to ensure that all criteria are satisfied and that the public interest may be served by granting immunity and leniency in appropriate cases.

3.9 When counsel agrees with the recommendations of the Bureau, he or she must obtain approval from his or her manager to enter into an immunity agreement, or plea agreement, that sets out the terms by which the participants to the immunity or plea agreement will be bound. A standard immunity agreement form or plea agreement form must be used in this regard. This process will be guided by the principles set out in paragraph 3.4.

3.10 All plea and sentence resolutions concluded prior to charges being laid, and where appropriate after charges are laid, shall be reduced to a written plea agreement in the approved form, which shall include a statement of admitted facts.

3.11 Any deviation from the standard immunity agreement form or plea agreement form must be approved by the Director of the CLS, and notification given to the relevant Deputy Commissioner.

3.12 The Bureau is responsible for assessing whether the immunity or leniency applicant is in compliance with the terms of an immunity or plea agreement and to provide counsel with the evidence supporting a recommendation that immunity or leniency be revoked.

3.13 The decision to revoke immunity or leniency rests solely with counsel who will give due consideration to the Bureau's recommendation for revocation. Counsel shall exercise independent discretion when considering revocation or any other appropriate remedy, in accordance with paragraph 35.8 of the [FPS Deskbook](#), after examining the terms of the agreement and the manner in which it was breached.

4. Disclosure Protocol

4.1 Prosecutors must act in accordance with the disclosure policies of the PPSC. In all prosecutions, the Bureau will be responsible for ensuring timely and complete disclosure in accordance with the Advisory Note on Disclosure.

4.2 A designated Bureau officer (the disclosure officer) will ensure that complete disclosure is available to each accused at the time of first appearance, in a form that is acceptable to PPSC counsel and in compliance with the Advisory Note on Disclosure.

4.3 The disclosure officer will provide supplementary disclosure to counsel as soon as reasonably practicable.

4.4 The disclosure officer will endeavour to bring to the attention of counsel any material that is subject to legal privilege, such as solicitor-client privilege or informer privilege. The final determination regarding whether a privilege applies with respect to disclosure is the responsibility of counsel.

4.5 Disclosure will generally be made electronically.

4.6 The Bureau is responsible for the costs of disclosure. However, counsel must consult the Bureau prior to making a determination that has an impact on the costs of disclosure

(e.g., software to be used). Counsel will consider the best way to structure disclosure from the outset of an investigation so as to minimize cost and the duplication of effort.

4.7 Counsel has an ongoing role to give advice and consult with the officers with respect to the nature of the evidence and information that is required as part of disclosure. The final responsibility for reviewing disclosure and determining the information to be disclosed lies with counsel.

5. Designated Officials

5.1 The following designated officials will have overall administrative responsibility for the implementation of this MOU.

For the Competition Bureau:

Senior Deputy Commissioner of Competition, Criminal Matters Branch

Deputy Commissioner of Competition, Fair Business Practices Branch

For the PPSC:

Director of the Competition Law Section, Public Prosecution Service of Canada

6. Confidentiality and Security of Information

6.1 Subject to the provisions of this MOU, the [Competition Act](#), the [Access to Information Act](#), the [Privacy Act](#), and any other applicable Act of Parliament, the information shared between the Parties under the terms of this MOU will be treated as confidential, and will be protected from further disclosure. The shared information can be used only for the specific purpose for which it is provided, and will not be passed on to any third party without the written consent of the Party from whom it originated. In the event of a request for disclosure of information under the *Access to Information Act* or the *Privacy Act*, the Party receiving the request agrees to consult with the other Party.

6.2 Each Party will ensure that its procedures for safeguarding information subject to this MOU comply with its operational standards and government security policy.

7. Dispute Resolution

7.1 Any dispute arising from this MOU shall be referred to the designated officials noted in Part 5 of this MOU for resolution. If these officials are unable to resolve the dispute, it shall be referred to the Commissioner of Competition, and the Deputy Director for resolution.

8. Review

8.1 The Parties agree to review this MOU as required.

9. Amendments

9.1 This MOU may be amended at any time with the consent of the Parties. Such amendments may be effected by an exchange of letters between the Commissioner of Competition and the Deputy Director.

10. Effective Date and Termination

10.1 This MOU shall come into effect on the date when it is last signed.

10.2 Either of the Parties may terminate this MOU upon six months written notice to the other Party. Such notice shall be given by either the Commissioner of Competition or the Deputy Director.

11. Nature of the MOU

11.1 This MOU is an administrative understanding between the Parties. It is not intended to be legally binding or enforceable before the courts, nor is it designed to alter the pre-existing obligations, responsibilities, duties, or entitlements of either Party as may be defined by statute, regulation, or otherwise.

In Witness Whereof, this Memorandum was signed in duplicate, each copy being equally authentic

For the Competition Bureau

Melanie L. Aitken
Commissioner of Competition
Date

For The Public Prosecution Service Of Canada

Chantal Proulx
Acting Deputy Director of Public Prosecutions

APPENDIX B – ORGANIZATION IMMUNITY AGREEMENT TEMPLATE



Service des poursuites
pénales du Canada

Public Prosecution
Service of Canada

[ORGANIZATION IMMUNITY AGREEMENT]

THIS AGREEMENT IS BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA,
as represented by the
DIRECTOR OF PUBLIC PROSECUTIONS

- and -

[X LTD.]

This document sets out the terms and conditions of an agreement between Her Majesty the Queen in right of Canada, as represented by the Director of Public Prosecutions [“DPP”], and [X Ltd., as defined below] governing the grant of immunity from prosecution under the *Competition Act* [“Act”].

This grant of immunity follows an application by [X Ltd.] to the Commissioner of Competition [“Commissioner”] in accordance with the Competition Bureau’s information bulletin entitled *Immunity Program under the Competition Act* [“Immunity Bulletin”], attached to this agreement as Appendix 1.

This grant of immunity relates only to anticompetitive conduct as defined below.

This agreement is conditional and depends upon [X Ltd.] satisfying all of the terms and conditions set out below.

The parties to this agreement agree and undertake as follows:

1. **Definitions:** In this agreement,

“anticompetitive conduct” means that [X Ltd.] [entered into an agreement to fix prices, rig bids, made false and misleading representations, etc.] relating to [insert precise description of the product(s) and geographic market(s)] [insert specific time period]. Specifically [X Ltd.] represents that it [describe particular conduct: description of alleged offence, including nature of illegal behaviour and provision(s) of the Act violated];

“cooperation” means complete, timely and ongoing cooperation, at [X Ltd.’s] own expense throughout, with the DPP and the Commissioner in connection with the

investigation of the anticompetitive conduct and in any proceedings that may be instituted by the DPP in relation to the anticompetitive conduct, as more fully described in paragraphs 3 through 5 of this agreement;

“confidential information” means this agreement and any information that in any way relates to the investigation of the anticompetitive conduct;

“record” has the same meaning as found in section 2 of the *Competition Act*, RSC, 1985, c C-34;

“[X Ltd.]” means [*as agreed by the parties to this agreement; here specify what other affiliates, etc. may be included*].

2. **Representations:** [X Ltd.] represents that:

- a) it has reported to the Commissioner and the DPP that it has engaged in the anticompetitive conduct;
- b) it has taken effective steps to terminate its participation in the anticompetitive conduct;
- c) it has not coerced others to be a party to the anticompetitive conduct; and
- d) it has revealed to the DPP and the Commissioner any and all conduct of which it is aware that may constitute an offence under the Act.

3. **Cooperation and Disclosure:** [X Ltd.] shall provide cooperation and full, complete, frank and truthful disclosure to the DPP and the Commissioner, including, but not limited to:

- a) providing all non-privileged information, records and things in its possession, under its control or available to it, wherever located, whether or not requested by the DPP or the Commissioner, that in any manner relate to the anticompetitive conduct. Before providing the information, records and things, [X Ltd.] will consult with the Commissioner with respect to the relevance and scope of such information, records and things and the form in which such information, records and things will be provided to the Commissioner;
- b) using all measures, lawful where taken, to secure the cooperation of the current [*and former (if appropriate)*] directors, officers and employees [*agents (if appropriate)*] of [X Ltd.], and encouraging such persons to provide voluntarily to the DPP and the Commissioner all of their non-privileged information, records and things that in any manner relate to the anticompetitive conduct;

- c) facilitating, in accordance with the conditions set out in the Immunity Bulletin, the ability of current [*and former (if appropriate)*] directors, officers and employees [*agents (if appropriate)*] to appear for interviews and to provide testimony in connection with the anticompetitive conduct as the DPP or the Commissioner may require, at the times and places designated by the DPP or the Commissioner; and
 - d) revealing any and all conduct of which it becomes aware that may constitute an offence under the Act.
- 4. **Corporate Immunity:** Having considered the recommendation of the Commissioner and after an independent review by the DPP, the DPP grants [*X Ltd.*] immunity from prosecution under the Act in respect of the anticompetitive conduct defined above conditional upon:
 - a) the veracity of the representations contained in paragraph 2 above; and
 - b) the cooperation of and disclosure by [*X Ltd.*] as required pursuant to this agreement.
- 5. **Immunity of Individuals Covered by Corporate Immunity Agreement:** Subject to the veracity of the representations contained in paragraph 2 above, the DPP grants to the current [*and former (if appropriate)*] directors, officers and employees [*agent, if appropriate*] [*indicate “carve-outs” from agreement, eg, “other than individual Y”*] of [*X Ltd.*] immunity from prosecution under the Act in respect of the anticompetitive conduct, conditional on their admission of their knowledge of and participation in the anticompetitive conduct and on their continuing cooperation with and disclosure to the DPP and the Commissioner. Such cooperation and disclosure shall include, but not be limited to:
 - a) providing all non-privileged information, records and things (including personal records), in their possession, under their control or available to them, wherever located, whether or not requested by the DPP or the Commissioner, and that in any manner relate to the anticompetitive conduct, without falsely implicating any person or withholding any information known to them. Before providing the information, records and things, individuals covered by this agreement will consult with the Commissioner with respect to the relevance and scope of such information, records and things and the form in which such information, records and things will be provided to the Commissioner;
 - b) making themselves available in Canada for interviews and to testify in judicial proceedings at times and places designated by the DPP or the Commissioner; and

- c) revealing any and all conduct which may constitute an offence under the Act.
6. **Revocation of Corporate Immunity Does Not Affect Individual Immunity:** If at any time the Commissioner or the DPP should determine that [*X Ltd.*] does not satisfy the terms and conditions of this agreement and its immunity under this agreement is revoked, individual protection under this agreement will continue so long as no grounds exist to revoke, and the DPP has not revoked, the individual's immunity pursuant to paragraph 14 of this agreement.
7. **Confidentiality of Identity:** The DPP and the Commissioner shall not disclose to any third party the identity of [*X Ltd.*] or the individuals covered by this agreement ["individuals"], except where:
- a) disclosure is required by law, including:
 - i. in response to an order of a Canadian court of competent jurisdiction; or
 - ii. to a person charged with an offence in Canada;
 - b) disclosure is necessary to obtain or maintain the validity of a judicial authorization for the exercise of investigative powers;
 - c) disclosure is necessary for the purpose of securing the assistance of a Canadian law enforcement agency in the exercise of investigative powers;
 - d) [*X Ltd.*] has agreed to disclosure;
 - e) there has been disclosure by [*X Ltd.*]; or
 - f) disclosure is necessary to prevent the commission of a serious criminal offence.
8. **Confidentiality of Information:** The DPP and the Commissioner shall not disclose to any third party information obtained from [*X Ltd.*] or the individuals, subject only to the exceptions listed above or where disclosure of such information is otherwise for the purpose of the administration or enforcement of the Act.
9. **Disclosure to Foreign Law Enforcement Agency:** The DPP and the Commissioner shall not disclose the identity of [*X Ltd.*] or the individuals, nor the information obtained from [*X Ltd.*] or the individuals, to any foreign law enforcement agency without the consent of [*X Ltd.*].

10. **Disclosure to Third Parties:** Unless made public by the DPP or the Commissioner, or as required by law, [X Ltd.] and any individual shall not disclose confidential information to any third party, without the consent of the DPP, which consent will not be unreasonably withheld. Where disclosure is required by law, [X Ltd.] or any individual shall give notice to and consult with the DPP prior to making any required disclosure.
11. **Notice of Disclosure to Third Parties:** If any third party seeks to compel disclosure of confidential information from any party to this agreement, or any individual, that party or individual shall give prompt notice to the parties to this agreement, and shall take all reasonable steps to resist disclosure unless all parties to this agreement consent to such disclosure.
12. **Failure to Comply with the Immunity Agreement:** The parties agree that full compliance with all of the terms and conditions in this agreement by any person granted immunity by it is a condition of and fundamental to the agreement. The parties also agree that the accuracy and veracity of all representations required by this agreement by any person granted immunity by it is a condition of and fundamental to the agreement. Non-compliance with any of the terms and conditions of this agreement by any person granted immunity by it constitutes a breach of the agreement by that person, which may result in revocation of immunity for that person.
13. **Revocation of Corporate Immunity:** If the DPP determines that [X Ltd.] has made misrepresentations with respect to any of the matters referred to in paragraph 2, failed to provide the cooperation and disclosure required under paragraph 3, or failed to comply with any other terms and conditions of this agreement, the DPP may revoke the immunity granted to [X Ltd.] upon fourteen (14) days prior written notice to counsel for [X Ltd.]. The DPP will provide counsel for [X Ltd.] with an opportunity to meet with the DPP regarding the potential revocation of immunity.
14. **Revocation of Individual Immunity:** If the DPP determines that an individual granted immunity by this agreement has not provided the cooperation and disclosure required under paragraph 5 or complied with any other terms and conditions of this agreement, or that the individual has caused [X Ltd.] to be ineligible for immunity, continued to participate in the anticompetitive conduct after [X Ltd.] notified the individual to cease doing so, or obstructed or attempted to obstruct justice, the DPP may revoke the immunity granted to the individual upon fourteen (14) days prior written notice to counsel for the individual and to counsel for [X Ltd.]. Absent exigent circumstances, the DPP will provide counsel for the individual with an opportunity to meet with the DPP regarding the potential revocation of immunity.

15. **Impact of Revocation of Immunity:** Following revocation of immunity for a breach of this agreement, as described in paragraphs 12 through 14 above, the DPP may take such action against the person whose immunity has been revoked as the DPP considers appropriate, including prosecution under the Act. In any such action the DPP may use, in any way, any information, evidence, record, statement or testimony provided by any person at any time after the application for immunity and any evidence of any kind derived directly or indirectly from such information, evidence, record, statement or testimony provided. For greater certainty, any privilege that may apply in respect of any information, evidence, record, statement or testimony provided is deemed waived upon revocation of immunity.
16. **Use in Evidence:** No information, evidence, record, statement or testimony provided during an interview by any person granted immunity pursuant to this agreement will be used in evidence against that person in any proceedings undertaken by or on behalf of the DPP, except where the person granted immunity:
 - a) subsequently gives in any trial, hearing or judicial proceeding (including any proceeding in which the person is an accused) evidence that is materially different from the statement given in an interview;
 - b) is charged with perjury, giving contradictory evidence, fabricating evidence or obstructing justice; or
 - c) has had its immunity revoked after a breach of this agreement.
17. **Use of Information:** Nothing in this agreement affects the right of the DPP or the Commissioner to use any information, evidence, record, statement or testimony provided by any person under this agreement in order to discover or acquire other information, evidence or records from another source.
18. **Privilege and Jurisdiction:** Nothing in this agreement, or any action taken pursuant to it, shall constitute:
 - a) except for the waiver mentioned in paragraph 15, a waiver of any privilege by any party to this agreement; or
 - b) except for the purpose of this agreement and proceedings related to the enforcement of this agreement, a submission to the jurisdiction of the Canadian courts by any person granted immunity by this agreement who is not present in Canada.
19. **Applicable Law:** This agreement shall be construed in accordance with the laws of Canada.

20. **Entire Agreement:** This agreement constitutes the entire agreement between the DPP and [X Ltd.], including the individuals covered by this agreement, and supersedes all prior understandings or agreements, if any, whether oral or written, relating to the subject matter of this agreement.
21. **Notices:** Any notice required to be given under this agreement is deemed to be validly given if in writing and by pre-paid registered mail, courier delivery, facsimile transmission or electronic mail (e-mail) transmission to:
- a) The Director of Public Prosecutions

[Insert appropriate address and fax number]

Attention: Public Prosecution Service of Canada, Competition Law Section
 - b) The Commissioner of Competition

Attention: Senior Deputy Commissioner

Criminal Matters Branch
20th Floor, Place du Portage, Phase I
50 Victoria Street, Gatineau, QC, K1A 0C9
Canada
Fax: (819) 997-3835
 - c) [X Ltd.]

[Insert appropriate address and fax number]

Attention:

With copy to:

Counsel for [X Ltd.]

[Insert appropriate address and fax number]

Attention:
22. **Execution in Counterparts:** This agreement may be executed in counterparts.

23. **The Commissioner Joins in this Agreement:** The Commissioner joins in this agreement solely for the purposes of giving effect to the Commissioner's rights and obligations as set out in paragraphs 7 to 11 and paragraph 17 above.
24. **Authority and Capacity:** The DPP, [X Ltd.] and the Commissioner each represent and warrant to the others that their respective signatories to this agreement have all the authority and capacity necessary to execute this agreement and to bind them to it. [X Ltd.] represents that it has had an opportunity to consult Canadian legal counsel in respect of this agreement.

The signatories acknowledge the full and voluntary acceptance of the foregoing terms and conditions.

Dated at _____
this _____ day of _____, 20____.
Prosecutions

Her Majesty the Queen in right of Canada as
represented by the Director of Public

Per:

*[insert name and title of counsel for the
Public Prosecution Service of Canada]*

Dated at _____
this _____ day of _____, 20____.

Commissioner of Competition

*[insert name of Commissioner of
Competition]*

Dated at _____
this _____ day of _____, 20____.

[X Ltd.]

Per:

[insert name and title of signing officer]

[insert name of counsel to [X Ltd]]

APPENDIX C – INDIVIDUAL IMMUNITY AGREEMENT TEMPLATE



Service des poursuites
pénales du Canada

Public Prosecution
Service of Canada

[INDIVIDUAL IMMUNITY AGREEMENT]

THIS AGREEMENT IS BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA,
as represented by the
DIRECTOR OF PUBLIC PROSECUTIONS

- and -

[INDIVIDUAL X]

This document sets out the terms and conditions of an agreement between Her Majesty the Queen in right of Canada, as represented by the Director of Public Prosecutions of Canada (“the DPP”) and ***[INDIVIDUAL X]*** governing the grant of immunity from prosecution under the *Competition Act* (the “Act”).

This grant of immunity follows an application by ***[INDIVIDUAL X]*** to the Commissioner of Competition [“Commissioner”] in accordance with the Competition Bureau’s information bulletin entitled *Immunity Program under the Competition Act* [“*Immunity Bulletin*”], attached to this agreement as Appendix 1.

This grant of immunity relates to anticompetitive conduct as defined below.

This agreement is conditional and depends upon ***[INDIVIDUAL X]*** satisfying the terms and conditions set out below.

The parties agree and undertake as follows:

1. **Definitions:** In this agreement,

“anticompetitive conduct” means that ***[INDIVIDUAL X.]*** *[entered into an agreement to fix prices, rig bids etc., made false and misleading representations, etc.]* relating to *[insert precise description of the product(s) and geographic market(s)]* *[insert specific time period]*. Specifically ***[INDIVIDUAL X]*** represents that he/she *[describe particular conduct: description of alleged offence, including nature of illegal behaviour and provision(s) of the Act violated]*;

“cooperation” means complete, timely and ongoing cooperation, at ***[INDIVIDUAL X’s]*** own expense throughout, with the DPP and the Commissioner in connection

with the investigation of the anticompetitive conduct and in any proceedings that may be instituted by the DPP in relation to the anticompetitive conduct, as more fully described in paragraph 3 of this agreement;

“confidential information” means this agreement and any information that in any way relates to the investigation of the anticompetitive conduct;

“record” has the same meaning as found in section 2 of the *Competition Act*, RSC, 1985, c C-34;

2. **Representations:** [INDIVIDUAL X] represents that he/she:
 - e) has reported to the Commissioner and the DPP that he/she has engaged in the anticompetitive conduct;
 - f) has taken effective steps to terminate his/her participation in the anticompetitive conduct;
 - g) has not coerced others to be a party to the anticompetitive conduct; and
 - h) has revealed to the DPP and the Commissioner any and all conduct of which he/she is aware that may constitute an offence under the Act.
3. **Cooperation and disclosure:** [INDIVIDUAL X] shall provide cooperation and full, complete, frank and truthful disclosure to the DPP and the Commissioner, including, but not limited to:
 - e) providing all non-privileged information, records and things in his/her possession, under his/her control or available to him/her, wherever located, whether or not requested by the DPP or the Commissioner, that in any manner relate to the anticompetitive conduct. Before providing the information, records and things, [INDIVIDUAL X] will consult with the Commissioner with respect to the relevance and scope of such information, records and things and the form in which such information, records and things will be provided to the Commissioner;
 - f) making him/herself available in Canada for interviews and to testify in judicial proceedings at times and places designated by the DPP or the Commissioner; and
 - g) revealing any and all conduct of which he/she becomes aware which may constitute an offence under the Act.
4. **Immunity:** Having considered the recommendation of the Commissioner and after an independent review by the DPP, the DPP grants [INDIVIDUAL X] immunity from prosecution under the Act in respect of the anticompetitive conduct defined above conditional upon:

- c) the veracity of the representations contained in paragraph 2 above; and
 - d) the disclosure and cooperation of [INDIVIDUAL X] as required pursuant to this agreement.
5. **Confidentiality:** The DPP and the Commissioner shall not disclose to any third party the identity of [INDIVIDUAL X.] except where:
- g) disclosure is required by law, including:
 - i. in response to an order of a Canadian court of competent jurisdiction; or
 - ii. to a person charged with an offence in Canada;
 - h) disclosure is necessary to obtain or maintain the validity of a judicial authorization for the exercise of investigative powers;
 - i) disclosure is necessary for the purpose of securing the assistance of a Canadian law enforcement agency in the exercise of investigative powers;
 - j) [INDIVIDUAL X.] has agreed to disclosure;
 - k) there has been disclosure by [INDIVIDUAL X.]; or
 - l) disclosure is necessary to prevent the commission of a serious criminal offence.
6. **Confidentiality of Information:** The DPP and the Commissioner shall not disclose to any third party information obtained from [INDIVIDUAL X.] subject only to the exceptions listed above or where disclosure of such information is otherwise for the purpose of the administration or enforcement of the Act.
7. **Disclosure to Foreign Law Enforcement Agency:** The DPP and the Commissioner shall not disclose the identity of [INDIVIDUAL X.] nor the information obtained from [INDIVIDUAL X.] to any foreign law enforcement agency without the consent of [INDIVIDUAL X.].
8. **Disclosure to Third Parties:** Unless made public by the DPP or the Commissioner, or as required by law, [INDIVIDUAL X.] shall not disclose confidential information to any third party, without the consent of the DPP, which consent will not be unreasonably withheld. Where disclosure is required by law, [INDIVIDUAL X.] shall give notice to and consult with the DPP prior to making any required disclosure.

9. **Notice of Disclosure to Third Parties:** If any third party seeks to compel disclosure of confidential information from any party to this agreement that party shall give prompt notice to the parties to this agreement, and shall take all reasonable steps to resist disclosure unless all parties to this agreement consent to such disclosure.
10. **Failure to Comply with the Immunity Agreement:** The parties agree that full compliance with all of the terms and conditions in this agreement by [INDIVIDUAL X] is a condition of and fundamental to the agreement. The parties also agree that the accuracy and veracity of all representations required by this agreement by [INDIVIDUAL X] is a condition of and fundamental to the agreement. Non-compliance with any of the terms and conditions of this agreement by [INDIVIDUAL X] constitutes a breach of the agreement which may result in revocation of immunity.
11. **Revocation of Immunity:** If the DPP determines that [INDIVIDUAL X] has made misrepresentations with respect to any of the matters referred to in paragraph 2, failed to provide the cooperation and disclosure required under paragraph 3, or failed to comply with any other terms and conditions of this agreement, the DPP may revoke the immunity granted to [INDIVIDUAL X.] upon fourteen (14) days prior written notice to counsel for [INDIVIDUAL X.]. The DPP will provide counsel for [INDIVIDUAL X] with an opportunity to meet with the DPP regarding the potential revocation of immunity.
12. **Impact of Revocation of Immunity:** Following revocation of immunity for a breach of this agreement, as described in paragraphs 10 and 11 above, the DPP may take such action against [INDIVIDUAL X] as the DPP considers appropriate, including prosecution under the Act. In any such action the DPP may use, in any way, any information, evidence, record, statement or testimony provided by [INDIVIDUAL X] at any time after the application for immunity and any evidence of any kind derived directly or indirectly from such information, evidence, record, statement or testimony provided. For greater certainty, any privilege that may apply in respect of any information, evidence, record, statement or testimony provided is deemed waived upon revocation of immunity.
13. **Use of Statements:** No information, evidence, record, statement or testimony provided by [INDIVIDUAL X] during an interview will be used in evidence against him/her in any proceedings undertaken by or on behalf of the DPP except where [INDIVIDUAL X]:
 - d) subsequently gives in any trial, hearing, or judicial proceeding (including any proceeding in which [INDIVIDUAL X] is an accused) evidence that is materially different from the statement given in an interview;

- e) is charged with perjury, giving contradictory evidence, fabricating evidence or obstructing justice; or
 - f) has had his/her immunity revoked after a breach of this agreement.
14. **Use of Information:** Nothing in this agreement affects the right of the DPP or the Commissioner to use any information, evidence, record, statement or testimony provided by [INDIVIDUAL X] in order to discover or acquire other information, evidence or records from another source.
15. **Privilege and Jurisdiction:** Nothing in this agreement, or any action taken pursuant to it, shall constitute:
- c) except for the waiver mentioned in paragraph 12, a waiver of any privilege by any party to this agreement; or
 - d) except for the purpose of this agreement and proceedings related to the enforcement of this agreement, a submission to the jurisdiction of the Canadian courts by [INDIVIDUAL X], who is not present in Canada.
16. **Applicable Law:** This agreement shall be construed in accordance with the laws of Canada.
17. **Entire Agreement:** This agreement constitutes the entire agreement between the DPP and [INDIVIDUAL X] and supersedes all prior understandings or agreements, if any, whether oral or written, relating to the subject matter of this agreement.
18. **Notices:** Any notice required to be given under this agreement is deemed to be validly given if in writing and by pre-paid registered mail, courier delivery, facsimile transmission or electronic mail (e-mail) transmission to:
- b) The Director of Public Prosecutions

[Insert appropriate address & fax number]

Attention: Public Prosecution Service of Canada, Competition Law Section
 - c) The Commissioner of Competition

Attention: Senior Deputy Commissioner

Criminal Matters Branch
20th Floor, Place du Portage, Phase I
50 Victoria Street, Gatineau, QC, K1A 0C9

Canada
Fax: (819) 997-3835

d) [INDIVIDUAL X]

[Insert appropriate address & fax number]

Attention:

e) With copy to:

Counsel for [INDIVIDUAL X]

[Insert appropriate address & fax number]

Attention:

19. **Execution in Counterparts:** This agreement may be executed in counterparts.
20. **The Commissioner Joins in this Agreement:** The Commissioner joins in this agreement solely for the purposes of giving effect to the Commissioner's rights and obligations as set out in paragraphs 7 to 11 and paragraph 17.
21. **Authority and Capacity:** The DPP, [INDIVIDUAL X.] and the Commissioner each represent and warrant to the others that their respective signatories to this agreement have all the authority and capacity necessary to execute this agreement and to bind them to it. [INDIVIDUAL X.] represents that he/she has had an opportunity to consult Canadian legal counsel in respect of this agreement.

The signatories hereto acknowledge the full and voluntary acceptance of the foregoing terms and conditions.

Dated at _____
this _____ day of _____, 20____.
Prosecutions

Her Majesty the Queen in right of Canada as
represented by the Director of Public

Per:

[insert name and title of counsel for the
Public Prosecution Service of Canada]

Dated at _____
this _____ day of _____, 20____.

Commissioner of Competition

Per:

*[insert name of Commissioner of
Competition]*

Dated at _____
this _____ day of _____, 20____.

[*INDIVIDUAL X*]

Per:

[insert name]

Dated at _____
this _____ day of _____, 20____.

Signature of [*INDIVIDUAL X*] witnessed by
counsel to [*INDIVIDUAL X*]

Per:

*[insert name of counsel to [*INDIVIDUAL*
X]]*

APPENDIX D – LETTER OF INDIVIDUAL COVERAGE ASSOCIATED WITH ORGANIZATION IMMUNITY



Public Prosecution
Service of Canada

Service des poursuites
pénales du Canada

Name of [X LTD.] director, officer or employee (company individual)
Address

Dear *company individual*:

Re: [X LTD.] – Immunity Agreement – Interview – Company Individual

This is to confirm that pursuant to the Competition Bureau’s information bulletin, entitled *Immunity Program under the Competition Act*, [X LTD.] has entered into an immunity agreement [“the agreement” – attached to this letter as an appendix] with the Director of Public Prosecutions and the Commissioner of Competition. The agreement, which governs the terms and conditions of your eligibility for immunity, covers you as a current director, officer or employee of [X LTD.] (as defined in the agreement) subject to your full disclosure and cooperation, as described in the agreement.

By signing this letter, you confirm that you have read and that you understand the agreement and that you have had an opportunity to consult with Canadian legal counsel in respect of the agreement.

By signing this letter you acknowledge your full and voluntary acceptance of the terms and conditions of the agreement pertaining to individuals and agree to be bound by them.

Dated at *city* this ____ day
of *month*, *year*

Her Majesty the Queen in right of
Canada as represented by the Director
of Public Prosecutions

Signature of PPSC counsel

I understand the content of this letter and agree to the terms and conditions of the agreement pertaining to individuals.

Company individual

Dated: _____

**APPENDIX E – LETTER GUARANTEEING NO DIRECT USE IN EVIDENCE
OF INFORMATION PROVIDED**

Address
Telephone:
Facsimile:
.@ppsc-sppc.gc.ca

PRIVILEGED and CONFIDENTIAL

[Date]

[Name/address]

Re: Inquiry Name

Dear *[witness' name]*,

This letter sets forth the basis upon which you will make yourself available on *[date]*, for an interview in connection with the Commissioner of Competition's investigation into possible violations of the *Competition Act* in the *[Inquiry Name or Industry Name]*.

1. You have had an opportunity to consult with legal counsel.
2. At your request, *[counsel's name]* counsel, may be present at the interview.
3. The Director of Public Prosecutions (DPP) agrees that no statement made by you, or any record that you or *[X Ltd.]* make available during the interview, will be used directly against you, in any legal proceeding brought by the DPP or the Commissioner of Competition, except that your statements or documents may be used in any such proceeding to impeach your testimony or to rebut evidence offered on your behalf. In addition, the DPP may use any statements made in the interview in a prosecution of you for perjury, obstruction of justice, or giving contradictory evidence.
4. Subject to paragraph 3 above, the Commissioner or DPP is free to use any information from the interview to pursue *[his/her]* investigation and any

information directly or indirectly derived from the interview in any subsequent prosecution of you or others.

This letter constitutes the entire understanding between the DPP and you. Please sign and date this letter to indicate your understanding of and agreement with the conditions for your interview.

Witness Name

Dated: _____

Yours truly,

X _____
[PPSC counsel]



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

5.3 PROCEEDS OF CRIME

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

Revised March 25, 2022

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1. INTRODUCTION

This guideline offers an overview of the practice and policies of the Director of Public Prosecutions regarding cases dealing with proceeds of crime, money laundering, offence-related property, and property associated with terrorist activities.¹ This guideline must be read and applied taking into account other chapters of the PPSC Deskbook, in particular, the chapters dealing with the decision to prosecute and resolution discussions.² In dealing with these matters, it is important for Crown counsel to also consider the *Seized Property Management Act* (SPMA),³ which is the statute governing seized, restrained and forfeited property.

¹ For all questions related to terrorism prosecutions, see [Chapter 5.1](#) of the Deskbook.

² See [Chapters 2.2, 2.3](#) and [3.7](#) in volume 1 in the Deskbook.

³ SC 1993, c 37.

2. INVOLVEMENT OF PUBLIC SERVICES AND PROCUREMENT CANADA (PSPC)

Under the SPMA, the Minister of Public Services and Procurement Canada (PSPC) is responsible for managing property when a management order has been issued and the Minister has been appointed by a Court order to manage:

- Property restrained or seized under Part XII.2 of the *Criminal Code*;
- Offence-related property restrained or seized under the *Controlled Drugs and Substances Act* (CDSA) or the *Criminal Code*;
- Property restrained or seized under s 83.13 of the *Criminal Code*; and
- Property seized under s. 487 of the *Criminal Code*.

In accordance with the provisions of the SPMA, PSPC has established the Seized Property Management Directorate (SPMD) located in Gatineau, Quebec, to manage these types of property.

Since PSPC is responsible for the payment of damages arising from all undertakings given by the Attorney General of Canada under the SPMA, SPMD must be consulted prior to the signing of any undertaking, seizure, restraint or forfeiture of property. Such consultation serves to notify the SPMD that a particular property will be put under its management, allows SPMD to make comments on draft orders and to have input as to the feasibility or advisability of the seizure, restraint or forfeiture.

Where terrorism-related property is involved, Crown counsel may forego consulting with the SPMD prior to obtaining an order to seize or restrain property under s 83.13 of the *Criminal Code* if they consider it appropriate in the circumstances. Once the order has been obtained, Crown counsel must immediately notify the SPMD, which can then take appropriate management measures if need be.

SPMD personnel must also be consulted before counsel agrees to the payment of legal costs out of seized or restrained property.

Consultation with the SPMD must continue after the seizure or restraint as circumstances require (e.g. prior to an amendment to the order) to ensure the implementation of the proposed amendment.

3. UNDERTAKINGS

As a prerequisite for the issuance of a search warrant or restraint order under s 83.13 (Terrorism) or Part XII.2 (Proceeds of Crime) of the *Criminal Code*, the Attorney General of Canada must undertake to pay any damages or costs that could arise from their issuance and execution. This undertaking must be filed with the application for the warrant or order under s 83.13 or Part XII.2 of the *Criminal Code*.

3.1. Authority to sign the undertaking

3.1.1. Prosecutions related to proceeds of crime

Where the property in question is neither a business nor a property whose seizure or restraint might reasonably affect the operation of a business, Crown counsel must obtain the approval of the Chief Federal Prosecutor (CFP) or the Deputy Chief Federal Prosecutor (DCFP) before signing the undertaking.

Where the property in question is a business, or a property whose seizure or restraint might reasonably affect the operation of a business, the undertaking must be approved by:

- a. The CFP or DCFP, where the estimated aggregate value of the business or the property is \$1,000,000 or less;
- b. A Deputy Director of Public Prosecutions (DDPP), where the estimated aggregate value of the business or the property exceeds \$1,000,000.

At the option of the approval authority, the undertaking may be signed by the approval authority themselves or by the Crown counsel handling the file.

3.1.2. Terrorism Prosecutions

In these prosecutions, the prosecutor must obtain the approval of a DDPP before signing the undertaking. At the option of the DDPP, the undertaking may be signed by the DDPP or the Crown counsel.⁴

3.1.3. Briefing note

Where approval is required, a briefing note must be submitted.

The briefing note must contain the following information:

1. **SUBJECT:** Provide an overview of what is being sought, e.g. approval of an undertaking;
2. **BACKGROUND:** Attach a detailed summary of the facts established in the supporting affidavit. Describe any anticipated significant problems and how it is proposed to address them;
3. **STATUS:** Describe the asset management considerations, including Seized Property Management Directorate consultations, the potential interim costs or damages in the particular seizure or restraint, and the harm, if any, to innocent third parties. In addition, describe the asset to be seized or restrained with the rights related to that asset and the evidence relating to the complicity or collusion of any third parties which would justify a

⁴ See chapter 3.5 of the Deskbook, Delegated Decision-making, as well as the [Delegation to Prosecutors](#), the [Delegation to Paralegals](#) and the [Delegation to Articling Students](#).

partial confiscation pursuant to the tests of proportionality or principal residency. Indicate when the police plan to lay charges and when a court order will be sought;

4. RECOMMENDATION: Outline the asset management options, select the preferred option and indicate briefly why that option is the best one for the case. If other options are available, they must be submitted for consideration.

A copy of the affidavit in support of the proposed application as well as the proposed order must be attached to the briefing note.

4. OFFENCE-RELATED PROPERTY

Approval for the restraint of offence-related property under the CDSA or the *Criminal Code* must be obtained in all cases from the CFP or the DCFP regardless of the estimated value and nature of the property involved. The briefing note described above for undertakings must also be prepared for any requests for approval of a restraint order.

As for a management order, its approval may be obtained from any Crown counsel. Before obtaining a management order, Crown counsel must be satisfied that an order of forfeiture is feasible in respect of the property.⁵

5. INTER-PROVINCIAL SPECIAL WARRANTS, RESTRAINT AND FORFEITURE ORDERS

As set out in ss. 462.32(2.1), 462.33(3.01) and 462.371 of the *Criminal Code*, a special warrant, restraint order or forfeiture order can be obtained for execution in another province.

Before obtaining such a warrant or order, Crown counsel from the regional office where the property is located must be consulted to ensure that its terms are consistent with the relevant provincial legislation so as to avoid any execution problems. Crown counsel from the regional office must also oversee the execution of the warrant or order.

It is also essential to coordinate obtaining and executing the warrant, or the restraint or forfeiture order, with Crown counsel from the regional office where the property is located so as to limit the delay between issuance of the instrument and its execution in the other province.

Last, Crown counsel who obtained the warrant or order continues to be responsible for the process and must therefore ensure that the document has been duly registered or renewed under s 462.35 of the *Criminal Code* as appropriate.

⁵ Some judges have refused to order forfeiture of property as offence-related property because its use was not determinative in the commission of the offence but incidental to it.

6. MOTION BY THIRD PARTY BEFORE AND AFTER FORFEITURE AND ROLE OF THE DEPARTMENT OF JUSTICE

One of the underlying principles of the offence-related property or proceeds of crime regime is protecting innocent third parties who have an interest in the property. Their rights may be recognized before or after forfeiture, depending on their nature.

Given that the rights claimed by third parties are civil in nature, Department of Justice counsel may be required to address the issues that arise. It is therefore important to contact the SPMD in your region as soon as possible to determine what steps to take to respond to these issues.

It is essential to keep a detailed account of all discussions in the file in relation to the rights of third parties and seized property due to the complexity of questions, the potential for many people to be involved and the multiple overlapping discussions that may arise.

Crown counsel must not take a third party's claim into account nor agree to reimburse them in resolution discussions. Only SPMD can decide whether to recognize a third party's claim after the forfeiture.

7. FORFEITURE ORDER

The briefing note described in section 3.1.3 must be updated and resubmitted before requesting the forfeiture of any property. This briefing note must specify the property being seized and any third party rights. If restraint is not being sought, a briefing note is required before any forfeiture.

In addition, in the context of resolution discussions, it is important to ensure that an agreement includes the facts which support, as much as possible, a future request for forfeiture. Without these facts, it can be difficult to proceed with forfeiture.

Once property is forfeited, it belongs to the federal Crown, subject to the 30-day appeal period. Forfeited property is governed by the SPMA. The procedure for selling forfeited property and using the proceeds of sale are set out in the Regulations adopted pursuant to the SPMA. It is important to consult the SPMD prior to obtaining a forfeiture order to ensure that it complies with the SPMA. If the order does not comply, Crown counsel will have to apply to the court, on behalf of SPMD, to amend the order so as to bring it into compliance.

7.1. Partial forfeiture

In *R v Craig*, the Supreme Court of Canada held that partial forfeiture of offence-related real property under the CDSA can be ordered. However, the forfeiture of the equity or part of the equity, the physical division of a property, or the partial forfeiture subject to conditions are not allowed.⁶

⁶ 2009 SCC 23, [2009] 1 SCR 762.

It is important to point out that partial forfeiture is not a negotiation tool. If the facts justify an application for total forfeiture, Crown counsel may not, as part of negotiations, suggest partial forfeiture.

When certain conditions are met, alternatives to partial forfeiture are possible, in particular, the immediate payment of a sum of money equivalent to forfeiture. This amount is not a fine but should be considered offence-related property in lieu of partial forfeiture. Another option is selling the property by way of judicial sale prior to forfeiture and considering the proceeds of sale in lieu of the real property. The proportionality criterion would then apply to the sum of money, and Crown counsel could request a partial forfeiture.

8. RELATIONSHIPS BETWEEN PROCEEDS OF CRIME (POC) COUNSEL AND HEADQUARTERS COUNSEL GROUP (HCG)

The HCG manages the Integrated Proceeds of Crime initiative. It decides on the strategic direction of the initiative within the PPSC, coordinates proceeds of crime matters and participates in the development of prosecution policies.

HCG counsel are also resource persons who provide advice on a range of proceeds of crime, money laundering, offence-related property and other related issues.

Crown counsel should contact the HCG⁷ on all matters pertaining to national policies, the current state of case law or legal issues with respect to proceeds of crime or money laundering. This will ensure that the PPSC's position on the matter is consistent across the country.

9. CIVIL FORFEITURE

In recent years, almost all provinces have enacted legislation on the civil forfeiture of criminal property. In *Chatterjee*, the Supreme Court of Canada recognized the validity of such a forfeiture scheme in Ontario.⁸ In cases where it is decided that seized or restrained property will be transferred to the province for civil forfeiture, it is incumbent on Crown counsel first to ensure that all orders obtained by the PPSC affecting the property are set aside. Orders that have been registered on title must be removed. If the management orders are not set aside, the SPMD will continue to be responsible for the property, and it cannot be turned over to the province.

⁷ See the PPSC Deskbook guideline "[2.6 Consultation within the Public Prosecution Service of Canada](#)."

⁸ 2009 SCC 19, [2009] 1 SCR 624.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

5.4 YOUTH CRIMINAL JUSTICE

**DIRECTIVE OF THE ATTORNEY GENERAL ISSUED
UNDER SECTION 10(2) OF THE *DIRECTOR OF PUBLIC
PROSECUTIONS ACT***

June 27, 2014

5.4 YOUTH CRIMINAL JUSTICE

APPENDIX B	20

1. INTRODUCTION

Young persons¹ who are charged with federal offences² generally must be prosecuted in accordance with the provisions of the [Youth Criminal Justice Act](#) (YCJA).³ The YCJA provides the philosophical and procedural framework for a distinct and separate criminal justice regime for young persons, which recognizes that the youth criminal justice system must be based on the principle of the diminished moral culpability of young persons.⁴

Crown counsel who are prosecuting young persons must be familiar with the YCJA provisions, including the guiding principles, enhanced procedural protections, extrajudicial measures,⁵ sentencing principles, available sentences, and the specific rules regarding the privacy of young persons as well as access to, and disclosure of, youth records. These rules differ, and often significantly, from those that apply to adults who are prosecuted in accordance with the [Criminal Code](#). Young persons have not only all of the rights guaranteed to adults by virtue of the [Canadian Charter of Rights and Freedoms](#), they have additional rights and protections under the YCJA.

2. GUIDING PRINCIPLES UNDER THE YCJA

The key guiding principles of the YCJA are found in both the Preamble and in [s. 3](#) of the YCJA, and are intended to guide Crown counsel and other youth justice system participants in the interpretation and application of the YCJA. The Preamble includes as one of the overarching principles of the YCJA: The youth criminal justice system is

¹ Young persons are defined in [s 2](#) of the YCJA as persons who are at least 12 but under 18 at the time of the alleged commission of the offence. Thus an adult can be charged with having committed an offence as a young person.

² The definition of an offence in [s 2](#) of the YCJA captures offences under Acts of Parliament and federal regulations.

³ [Youth Criminal Justice Act, SC 2002, c 1](#) (in force 1 April 2003). Crown counsel must be mindful of significant amendments to the YCJA, which came into force on October 23, 2012. This directive incorporates those amendments, however, a link to the precise wording of the amendments is included here because the annual annotated *Criminal Codes* do not always include the important transitional provisions contained at [Clause 195](#) of the *Safe Streets and Communities Act*, SC 2012 c1. Some versions of the *Criminal Code* also contain mistakes regarding the amendments. For example, the 2014 version of Martin's Annual *Criminal Code* wrongly retains a reference in [s 3\(1\)\(a\)](#) of the YCJA to the long-term protection of the public when in fact this wording was removed in the new version of [s 3\(1\)\(a\)](#) of the YCJA. See [online](#).

⁴ YCJA, *ibid* at [s 3\(1\)\(b\)](#).

⁵ Extrajudicial Measures are measures other than judicial proceedings used to deal with young persons alleged to have committed offences .

intended to reserve its most serious intervention for the most serious crimes and to reduce the over-reliance on incarceration for non-violent⁶ young persons.

[Section 3](#) of the YCJA provides detailed guiding principles regarding the youth criminal justice system, but does not prioritize those principles. Nevertheless, the first statement in s. 3 states that the youth criminal justice system is intended to protect the public by holding young persons accountable through proportionate measures, by promoting their rehabilitation and re-integration, and by referring them to community programs or agencies to address the circumstances underlying their offending behavior and thus help prevent crime. Crown counsel should also remain attuned to the fact that s. 3 states that measures against young persons are expected to respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and young persons with special requirements.⁷

3. EXTRAJUDICIAL MEASURES

3.1. Introduction

Similar to alternative measures for adults, extrajudicial measures are measures other than formal judicial proceedings designed to hold young persons accountable for the offending conduct. Unlike alternative measures for adults, however, the extrajudicial measures regime for young persons is detailed and directive; it identifies specific types of extrajudicial measures, states their objectives, and provides principles to guide decisions regarding their use.

Crown counsel can use extrajudicial measures to address offending behaviour by young persons provided the Crown is satisfied that it would be appropriate in the circumstances. Generally such measures will be most suitable for young persons with no record, who have committed less serious offences and are not likely to re-offend. Such measures may often be the most effective, and quickest response (in relation to the time of the offending conduct), to hold the young person accountable, to repair the harm done to the victim and the community, and to reduce recidivism, and thus serve the important goal of public protection.

3.2. Statutory guidelines for the use of extrajudicial measures

The YCJA sets out specific principles in [ss. 4 and 5](#) to guide police and Crown counsel in the use of extrajudicial measures.

⁶ A violent offence is defined in [s 2](#) of the YCJA and includes an offence in the commission of which a young person endangers the life or safety of another person by creating a substantial likelihood of causing bodily harm.

⁷ YCJA, *supra* note 3, [s 3 \(1\)\(c\)\(iv\)](#). This paragraph is not a complete encapsulation of the principles set out in [s 3](#).

Extrajudicial measures are expected to be proportionate to the seriousness of the offence. They are also presumed adequate to hold a young person accountable for a non-violent offence if the young person has not previously been found guilty of an offence.⁸ This presumption, albeit rebuttable, is a strong direction from Parliament that Crown counsel are expected to use extrajudicial measures rather than the court to deal with non-violent young persons who have not previously been found guilty of offences. However, Crown counsel may find that certain offences that have not generally been interpreted by the courts to fit the definition of a violent offence under the YCJA nevertheless require the Crown to conclude that extrajudicial measures may not be appropriate.⁹

Crown counsel should also be aware that extrajudicial measures can be used, even if the young person has previously been dealt with by extrajudicial measures, or has previously been found guilty of an offence, provided the use of the extrajudicial measure is consistent with the principles in s. 4 and is considered adequate to hold the young person accountable.¹⁰

3.3. Extrajudicial measures: options for Crown counsel

If a pre-charge screening program¹¹ is in place in the jurisdiction, Crown counsel can advise the police that, under [s. 6](#) of the YCJA, before laying a charge, police are obliged to consider whether any of the following options would be sufficient to address the offending conduct:

- take no further action;
- issue a warning;
- issue a police caution if a police cautioning program has been established in the jurisdiction; or
- with the consent of the young person, refer the young person to a community program or agency that may assist the young person not to commit offences.

Section 6 of the YCJA does not oblige the police to consider whether an extrajudicial sanction, which is the most severe type of extrajudicial measure, would be appropriate before proceeding with a formal charge. However, if the police advise the Crown prior to laying a charge that the police believe a sanction would be the best response in the

⁸ YCJA, *supra* note 3, at [ss 5 \(e\) and 4 \(c\)](#) respectively.

⁹ One example may involve a situation where a young person trafficks in Schedule I drugs, such as cocaine, heroin, ecstasy or methamphetamine. Historically, the courts have generally not found trafficking in serious drugs to meet the definition of a violent offence in the YCJA, but this jurisprudence generally dates from the period before the definition of violent in the YCJA was expanded in 2012 to capture conduct that endangers the life or safety of others. The amended definition supports an argument that trafficking in serious drugs meets the definition of a violent offence and thus the presumption of an extrajudicial measure does not apply.

¹⁰ YCJA, *supra* note 3, [s 4\(d\)](#).

¹¹ Pre-charge screening programs exist in British Columbia, Quebec and New Brunswick.

circumstances, Crown counsel must be satisfied that the conditions in [s. 10](#) of the YCJA have been met.¹²

If a pre-charge screening program is not in place in the jurisdiction, and, as a result, Crown counsel is not consulted until after the police lay the charge, Crown counsel has the following options once a charge has been laid and the police have forwarded the file to the Crown:

3.3.1. Withdrawal of the charge

Crown counsel may determine that, although there is sufficient evidence to proceed with the prosecution,¹³ withdrawal of the charge is appropriate. It may be clear, for example, that after considering the principles and objectives in [ss. 3, 4 and 5](#) of the YCJA, and the factors related to the seriousness of the offence, discussed below, that the process of apprehension, detention and charging has been a sufficient response from the youth criminal justice system, and no further action is required.

3.3.2. Referral to a community program or agency

A referral to a community program or agency, with the consent of the young person, may be appropriate in cases where it is clear that the young person needs assistance with a problem that may have contributed to the commission of the offence. Rather than prosecuting the young person, Crown counsel may conclude that the matter can be addressed more appropriately outside of the criminal justice system by such a referral. For example, the young person may require help from a substance abuse program. While the YCJA does not expressly codify this referral power for prosecutors within the extrajudicial measures regime, as it does for the police, [s. 3](#) of the YCJA states that the youth criminal justice system is intended to protect the public by supporting crime prevention through referrals of young persons to community programs or agencies to address the underlying causes of their criminality. It is within Crown counsel's discretion to make such referrals.

3.3.3. Crown cautions

3.3.3.1. Attorney General of Canada authorization for Crown cautions

Pursuant to [s. 8](#) of the YCJA, the Attorney General¹⁴ may establish a program authorizing prosecutors to administer cautions to young persons instead of starting or continuing

¹² The conditions required before an extrajudicial sanction can be imposed are similar to those that must be present in relation to Alternative Measures for adults under [s 717](#) of the *Criminal Code*. Before an extrajudicial sanction can be imposed, for example, [s 10\(2\)\(f\)](#) requires that the Attorney General be satisfied that there is sufficient evidence to proceed with a prosecution.

¹³ Crown counsel should also consider the factors listed in the PPSC Deskbook guideline "[2.3 Decision to Prosecute](#)".

¹⁴ In [s 2](#) of the YCJA, Attorney General means the Attorney General as defined in [s 2](#) of the *Criminal Code* and includes an agent or delegate of the Attorney General.

judicial proceedings. The Attorney General of Canada hereby authorizes the use of Crown cautions by federal prosecutors in accordance with this directive.

3.3.3.2. Definition of Crown cautions and general procedures regarding their use

A Crown caution¹⁵ is a formal warning from the prosecutor that, although there are sufficient grounds to prosecute the offence, the prosecutor will not be proceeding with the charge. The caution advises the young person to avoid involvement in crime in the future.

A Crown caution letter must be provided to the young person. Crown counsel should meet with young persons to provide these cautions to emphasize the importance of the message. A police officer or another appropriate witness must be present for this meeting; the presence of this witness is particularly important when Crown counsel meets with a young person of the opposite gender. The young person should be encouraged to be accompanied by a parent or another suitable adult. See Appendix A for the format and substance of a Crown caution letter. A notice that the young person has been cautioned, as well as a copy of the caution letter, must also be provided to the parent or guardian of the young person wherever possible. See Appendix B for the format and substance of a Crown notice to a parent or guardian.

Once Crown counsel has confirmed that the young person has been cautioned, and has documented the file accordingly, the charge or charges should be withdrawn.

3.3.3.3. Crown cautions: specific considerations

Crown cautions should be adequate to hold young persons accountable for less serious offences.

Crown counsel must not use Crown cautions in relation to matters in which the young person caused or attempted to cause bodily harm¹⁶ or should have reasonably foreseen that bodily harm would be caused by the offence.

A Crown caution is also unlikely to be adequate to hold a young person accountable for the following drug offences:

- possession of more than 30 grams of marihuana or more than one gram of cannabis resin, or possession of Schedule I drugs, such as cocaine, ecstasy, heroin or methamphetamine;
- trafficking in a controlled substance, or possession of the controlled substance for the purpose of trafficking.

¹⁵ YCJA, *supra* note 3, [s 8](#). See also Appendix A.

¹⁶ Crown counsel must keep in mind that bodily harm includes psychological harm. See [R v McCraw \[1991\] 3 SCR 72](#).

In some circumstances, Crown counsel may consider resolving the drug offences identified directly above by using an extrajudicial sanction, which is the most serious state response available within the range of extrajudicial measures, as discussed below.

The choice between using a Crown caution or an extrajudicial sanction depends on several factors, as discussed below.

3.3.4. Extrajudicial sanctions

3.3.4.1. Authorization of the Attorney General of Canada

Pursuant to [s. 10\(2\)\(a\)](#) of the YCJA, the Attorney General of Canada hereby authorizes the use by federal prosecutors of extrajudicial sanctions consistent with the principles of the YCJA and criteria in this directive.

For the purposes of s. 10(2)(a) of the YCJA, the range of acceptable sanctions that can form part of an extrajudicial sanctions program authorized by the Attorney General of Canada can include community service, restitution or compensation in cash or services, mediation, referrals to specialized programs for counselling, treatment or education, (e.g. life skills, drug or alcohol treatment, anger management), referrals to community, aboriginal or youth justice committees (which can recommend sanctions), victim-offender reconciliation programs and similar measures aimed at restorative justice, a letter of apology or essay, and other reasonable sanctions or measures that are consistent with the objectives of the YCJA and criteria in this directive. For greater certainty, a federal prosecutor can also refer an offender to an individual, committee or agency in a community that can recommend a sanction or sanctions provided the extrajudicial sanction falls within a program of extrajudicial sanctions authorized by the province or territory in accordance with s. 10(2)(a).

3.3.4.2. Statutory preconditions regarding extrajudicial sanctions

Extrajudicial sanctions can be used to deal with a young person alleged to have committed an offence only if the young person cannot be dealt with by a warning, caution or referral in [ss. 6, 7 or 8](#) because of the seriousness of the offence, the nature and number of previous offences committed by the young person or any other aggravating circumstances. Crown counsel should determine the seriousness of the offence by considering the factors discussed below at 3.3.4.4.

Unlike other types of extrajudicial measures, such as a police warning or a Crown caution, an extrajudicial sanction has specific conditions outlined in [s. 10](#), such as requiring the young person to accept responsibility for the act that forms the basis of the offence. The young person must also consent to the terms and conditions of the sanction. Failure to comply can result in the prosecution of the offence.

3.3.4.3. Extrajudicial sanctions: specific considerations

There is no limit to the number of times that a young person may be dealt with through extrajudicial sanctions.

Even if the Crown determines that a less serious extrajudicial measure, such as a Crown caution, is inappropriate, Crown counsel should consider whether an extrajudicial sanction would be adequate to hold the young person accountable for the offending behaviour.

It is unlikely that an extrajudicial sanction will be appropriate for offences in which the young person caused or attempted to cause bodily harm, or should have reasonably foreseen that bodily harm would be caused by the offence.

Extrajudicial sanctions may be appropriate to deal with some drug offences that are too serious to be dealt with by a Crown caution. However, it will generally be inappropriate to resolve the following drug offences or offences committed in the following circumstances by imposing an extrajudicial sanction rather than proceeding with a prosecution:

- using another person more than two years younger than the young person alleged to have committed the offence to commit or assist in the commission of a drug offence;
- trafficking or possession for the purpose of trafficking in Schedule I drugs, such as cocaine, heroin, ecstasy or methamphetamine (an exception may arise where the young person shares a very small quantity of the substance with a peer for little or no consideration);
- the conduct demonstrated sophisticated planning (for example, the offence was part of an ongoing criminal enterprise); or
- where weapons were involved.

When Crown counsel imposes an extrajudicial sanction on a young person, the young person's file must be documented accordingly.

3.3.4.4. Factors related to the seriousness of the offence, the history of previous offences or any other aggravating circumstances

The following factors are relevant to determining the seriousness of the offence, the history of previous offences or any other aggravating circumstances, for purposes of deciding if an extrajudicial sanction is appropriate:

- whether the offence is summary or indictable;
- whether the offence involved the use of, or threatened use of, violence reasonably likely to result in harm that is more than transient or trifling in nature;

- whether a weapon was used or threatened to be used in the commission of the offence. As youth cases have demonstrated (water balloons and spit-balls have been found to be weapons), it is important to consider the actual danger represented by the weapon;
- the potential or actual harm or damage to the victim (physical, psychological or financial) and/or to society;
- whether it was a sexual offence; if the offence is a drug offence, the nature and deleterious consequences of the drugs involved should be considered;
- whether a mandatory minimum penalty could be imposed for the offence if the young person were found eligible for an adult sentence;
- whether the offence is a property offence. If so, did the young person intentionally cause or attempt to cause substantial property damage or loss? Should the young person have reasonably foreseen that substantial property damage would be caused by the offence?;
- whether the offence is an administration of justice offence, such as breach of probation. If so, would the non-compliance (e.g., failure to attend school, violation of curfew) have been an offence outside the context of a probation order? If not, it should be considered less serious and more likely to be dealt with appropriately through extrajudicial measures or through a review of the original sentence to determine whether the conditions should be changed;
- the role of the young person in the incident. For example, if the young person was the leader who planned and directed the offence, then his/her degree of responsibility is greater. However, this factor is secondary to the seriousness of the offence;
- whether the young person was a victim in the commission of the offence (e.g., a sexually exploited juvenile prostitute, a young person committing a drug offence who is being directed or exploited by an adult drug dealer). If so, it is more likely that an extrajudicial measure should be used;
- whether the young person has a history of committing offences. If so, what is the nature and number of previous offences? Although a history of offences may indicate that a more serious consequence is required to hold the young person accountable, this factor is secondary to the seriousness of the current offence;
- whether the young person has displayed remorse (e.g., through voluntary reparation to the victim or to the community, or has agreed to make such reparation); and
- if the young person were to proceed through the court system, what is the likelihood that the sentence would be more severe than what is available through extrajudicial measures?

4. BAIL

Young persons can be detained in custody at the pre-trial stage only in the circumstances identified in [s. 29 \(2\)](#) of the YCJA. Crown counsel bears the onus of satisfying the youth justice court judge or the justice, on a balance of probabilities, that detention is required due to any of the grounds described in [s. 29 \(2\)\(b\)](#) and that no conditions of release would enable the risk to be managed in the community. Otherwise, the provisions in [Part XVI of the Criminal Code](#) regarding detention and release apply to young persons, unless these provisions are inconsistent with the specific provisions of the YCJA.¹⁷

4.1. When should the Crown consider opposing bail for a young person?

Crown counsel should be most concerned about violent and repeat offenders who pose a public safety risk if released. This is consistent with the principles in the bail regime in [s. 29 \(2\)](#), as well as the Preamble, which clearly states that the youth criminal justice system should reduce the over-reliance on jail for non-violent young persons.

If the Crown wishes to show cause, Crown counsel should be satisfied that the concern (failure to appear, protection of the public, or exceptional circumstances and maintaining confidence in the administration of justice) cannot be addressed and managed by conditions of release.

5. RIGHT TO COUNSEL

Crown counsel should be aware that, in certain situations, the youth justice court can direct that a young person be represented by counsel. When such direction is made, the Attorney General must appoint counsel, or cause counsel to be appointed.¹⁸ In these circumstances, Crown counsel should notify the Chief Federal Prosecutor (CFP) or a person designated by the CFP in the territory or province to discuss procedures.

6. SENTENCING

6.1. Sentencing principles

A young person who is found guilty of an offence will receive a youth sentence in accordance with the general principles in [s. 3](#), the purpose and principles of sentencing in [s. 38](#), and the available sentences in the YCJA. However, if a young person is found guilty of an offence, and the youth justice court judge orders an adult sentence pursuant to [s. 72](#) of the YCJA, as discussed below, the young person will be sentenced in accordance with the sentencing principles and sentences in the [Criminal Code](#). In these

¹⁷ YCJA, *supra* note 3, [s 28](#). In particular, Crown counsel should note [s 29\(1\)](#) (prohibition on detention as a social measure) and [s 31](#) (availability of a responsible person rather than pre-trial detention).

¹⁸ YCJA, *supra* note 3, [s 25\(5\)](#).

circumstances, mandatory minimum penalties available under the [Criminal Code](#) or the [Controlled Drugs and Substances Act](#) can be imposed on young persons provided the conditions for an MMP are satisfied in the particular case.¹⁹

6.2. When to seek a custodial youth sentence

Crown counsel can seek a custodial youth sentence for a young person only in certain situations, which are identified in [s. 39](#) of the YCJA. Under the YCJA, youth custodial sentences are designed so that a portion of the sentence is served in custody and a portion is served in the community. This approach is aimed at encouraging the rehabilitation and re-integration of the young person back into the community.

In considering whether to seek a custodial sentence, Crown counsel must consider the nature of the sentence that is required to hold the young person adequately accountable, that will have meaningful consequences for the young person, and that will also promote rehabilitation and re-integration into society, and thus contribute to the long-term protection of society.²⁰

Specific sentencing principles apply to a young person who is to receive a youth sentence under the YCJA.²¹ For example, the youth sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person.²² The sentencing principles of rehabilitation and re-integration, specific deterrence and denunciation, are all subject to proportionality.

Crown counsel must also bear in mind that [s. 38](#) directs the youth justice court to consider all available sanctions other than custody that are reasonable for all young persons, paying particular attention to the circumstances of aboriginal young persons.²³ Further, Crown counsel must remain alive to the fact that general deterrence is not a sentencing principle that applies to a young person who is receiving a youth sentence under the YCJA.²⁴

6.3. Adult sentences

Crown counsel can apply for an adult sentence for a young person in any case it considers appropriate, provided the young person meets the basic eligibility requirements: there must be a guilty finding against the young person in relation to an offence for which an

¹⁹ YCJA, *supra* note 3, [ss 50](#) and [74 \(1\)](#).

²⁰ YCJA, *supra* note 3, [s 38 \(1\)](#).

²¹ YCJA, *supra* note 3, [ss 3](#) and [38\(2\)](#).

²² YCJA, *supra* note 3, [s 38\(2\)\(c\)](#)

²³ YCJA, *supra* note 3, [s 38\(2\)\(d\)](#).

²⁴ As discussed in section 9 of this directive concerning transitional provisions, Crown counsel must remain mindful that the sentencing principles of specific deterrence and denunciation apply only to offences committed after October 23, 2012.

adult could receive more than two years in jail and the young person must have been at least 14 at the time of the offence.²⁵

However, if the offence is a serious violent offence,²⁶ committed by a young person who was at least 14 at the time of the incident, Crown counsel must consider whether it would be appropriate to apply for an adult sentence.²⁷ In such cases, prior to deciding whether to apply for the adult sentence, Crown counsel with carriage of the file must consult the CFP, the Deputy CFP or the General Counsel Legal Operations. If the Crown ultimately decides not to apply in such a case, the Crown must advise the youth justice court before the young person enters a plea or, with leave of the court, before the trial.²⁸ Crown counsel must ensure that the file is appropriately documented so that it is clear that Crown counsel considered the appropriateness of an adult sentence in all cases where it is now obliged to do so.

Otherwise, when the Crown intends to apply for an adult sentence, the Crown must give notice of that intention to the young person and the youth justice court before the young person enters a plea or, with leave of the court, before the start of the trial.

6.3.1. Factors relevant to whether Crown counsel should apply for an adult sentence

The YCJA does not explicitly identify the factors Crown counsel should consider in deciding whether to apply for an adult sentence.²⁹ However, given that Crown counsel is statutorily mandated to consider applying for an adult sentence any time a young person who was at least 14 at the time of the incident has committed a serious violent offence, the seriousness of the offence is obviously a factor to be considered.³⁰

Other relevant factors Crown counsel should consider when deciding whether to apply for an adult sentence, include the following:

- the age, maturity, character, background and previous record of the young person;
- the level of intelligence, sophistication, and dependency (including the capacity for moral judgment) of the young person;
- the role of the young person in the commission of the crime;

²⁵ YCJA, [s 64](#).

²⁶ Under [s 2](#) of the YCJA, a serious violent offence is defined as murder, attempt murder, manslaughter or aggravated sexual assault.

²⁷ YCJA, [s 64 \(1.1\)](#).

²⁸ *Ibid.*

²⁹ *R v DB, 2008 SCC 25* [*R v DB*] at paras 41, 44, 47, 54, 62-65 and 76-77 provides some guidance as to the factors during the discussion of diminished moral blame worthiness.

³⁰ YCJA, [s 64 \(1.1\)](#).

- the harm done to victims, and whether it was intentional or reasonably foreseeable;
- the adequacy of a youth sentence to hold the young person accountable, to protect the public and to serve the goal of rehabilitation;
- the availability of treatment and resources in the youth system versus the adult system;
- the fact that the identity of the young person will automatically be made public when a young person receives an adult sentence,³¹
- the importance of general deterrence, which is a sentencing principle only when a young person receives an adult sentence; and
- any other factors that the Crown considers relevant in a particular case.

6.3.2. Test for an adult sentence

Before imposing an adult sentence, the youth justice court must be satisfied that the presumption of the diminished moral blameworthiness of the young person has been rebutted.³² The youth justice court must also be satisfied that a youth sentence would not be of sufficient length to hold the young person accountable. The Crown bears the onus of satisfying the youth justice court in this regard.³³

7. PRIVACY, PUBLICATION AND RECORDS

7.1. Introduction

The privacy rights of young persons who are dealt with under the YCJA are set out in [s. 3](#) and [Part 6](#) of the YCJA;³⁴ the privacy of young persons is a theme throughout the YCJA.

7.2. Publication

The YCJA generally protects the identities of young persons who are dealt with under the YCJA, as well as the identities of children and young persons who are witnesses or

³¹ YCJA, *supra* note 3, [s 110 \(2\)\(a\)](#).

³² In [R v DB](#), *supra* note 29, the Supreme Court of Canada found at paras 59 and 70 respectively that the presumption of the diminished moral culpability of young persons is not only a longstanding legal principle but a principle of fundamental justice. [R v DB](#) also provides some guidance regarding the factors and evidence Crown counsel can adduce to rebut this presumption in a given case, such as the age, maturity and capacity for moral judgment of the young person in question. The factors the Crown may wish to raise in seeking to rebut the presumption of diminished moral blameworthiness will often be the same factors referred to above under “Factors Relevant to Whether Crown counsel Should Apply for an Adult Sentence”.

³³ YCJA, *supra* note 3, [s 72](#).

³⁴ YCJA, *supra* note 3, [s 3\(1\)\(b\)\(iii\)](#).

victims in relation to offences committed or alleged to have been committed by young persons. However, there are exceptions to these rules,³⁵ which include when a young person receives an adult sentence, or, in certain circumstances, when a young person receives a youth sentence for a violent offence.³⁶

The identity of a young person can be published when the young person receives an adult sentence. Regarding the second exception (when the young person receives a youth sentence for a violent offence), the publication ban can be lifted only if Crown counsel satisfies the youth justice court judge that the publication ban should be lifted because the young person poses a significant risk of committing another violent offence and lifting the ban is necessary to protect the public.³⁷ Thus, in cases where the Crown takes the position that the ban must be lifted, Crown counsel must ensure that it has placed before the court an adequate evidentiary record.

7.3. Access to and disclosure of youth records

The YCJA creates a regime for access to, and disclosure of, three types of youth records: court records, police records and records kept by government departments or agencies, which includes the Crown. It is an offence to disclose youth records, as defined in the YCJA, except in accordance with the YCJA.³⁸

Crown counsel, as a record-keeper, has discretion under [s. 119](#) of the YCJA as to whether to disclose a youth record in its possession to the parties identified in that section. When Crown counsel receives a request for a youth record, Crown counsel must be attuned to the fact that youth records generally remain accessible for only specified periods of time, which are spelled out in [s. 119\(2\)](#).

Crown counsel also has the discretion to disclose court or police records during proceedings under any federal act to a person who is a co-accused with the young person in relation to the offence for which the record is kept, and information to an accused in a proceeding that identifies a witness as a young person who has been dealt with under the YCJA.³⁹

In the event that a requesting party disagrees with the Crown's decision not to disclose a youth record in a given case, the party can apply to a youth justice court judge for the record under [s. 119\(1\)\(s\)](#) if the access period to the record has not expired. If the access period has expired, an application can be made under [s. 123](#).

³⁵ YCJA, *supra* note 3, [ss 110-111](#).

³⁶ YCJA, *supra* note 3, [s 75](#).

³⁷ YCJA, *supra* note 3, [ss 110\(2\)\(b\)](#) and [75 \(2\)](#) respectively (in terms of the examples cited).

³⁸ YCJA, *supra* note 3, [ss 118](#) and [138](#).

³⁹ YCJA, *supra*, note 3, [s 125\(2\)](#).

Once a party is granted access to a record, the party cannot further disclose the information in the record unless there is authority for such further disclosure in the YCJA.⁴⁰

When the Crown is preparing for sentencing in relation to a youth case, it is important for the Crown to be aware that the young person's youth record can be included in the pre-sentence report, provided access to the youth record is still open under [s. 119\(2\)](#).⁴¹

Crown counsel should also be aware that, unlike other types of extrajudicial measures, a young person's record of extrajudicial sanctions can be made available to various parties⁴² upon request, and the history of a young person's involvement in extrajudicial sanctions can be included in a pre-sentence report and raised during the young person's sentencing hearing for a subsequent offence, provided the access period to the record is still open.⁴³

It is also important for Crown counsel to be attuned to the fact that if a person is convicted of an offence committed after becoming an adult, while access to his or her youth record remains open, [Part 6](#) of the YCJA no longer applies and that person's youth record loses the protections of the YCJA and is to be treated like an adult record.⁴⁴ In addition, in certain circumstances, a guilty finding received under the YCJA can be considered a previous conviction for purposes of imposing a greater punishment on an adult under other Acts of Parliament, such as the [Criminal Code](#) or the [Controlled Drugs and Substances Act](#).⁴⁵

Access to police and government records are more strictly controlled when the record concerns an extrajudicial measure other than an extrajudicial sanction. Only the police, the Crown, or a person participating in a conference, is allowed to have access to these records for certain purposes, including in order to decide whether to use another extrajudicial measure. By contrast, youth records involving extrajudicial sanctions are more widely accessible.⁴⁶

⁴⁰ YCJA, *supra* note 3, [s 129](#).

⁴¹ YCJA, *supra* note 3, at [ss 40 \(2\)\(iii\) and \(iv\)](#).

⁴² YCJA, *supra*, note 3, [s 119\(2\)\(a\)](#)

⁴³ But by virtue of [ss 119\(4\)](#) and [s 40 \(2\)\(d\)\(iv\)](#), any extrajudicial measures used other than extrajudicial sanctions, such as a Crown caution, cannot be mentioned.

⁴⁴ YCJA, *supra* note 3, [s 119\(9\)\(b\)](#). See also [s 120 \(6\)](#) of the YCJA regarding a similar provision in relation to RCMP records concerning offences listed in the YCJA schedule (which include trafficking, importing and exporting, and production offences under the CDSA).

⁴⁵ While the Supreme Court of Canada has never ruled on this point, this is the combined effect of [ss 119\(9\)\(a\)](#) and [82\(4\)](#) of the YCJA as discussed in *R v Able* 2013 OJ No 2675; 2013 ONCA. See also the 2013-06-27 PPSC Memo titled: Youth Records and MMPs under the CDSA.

⁴⁶ YCJA, *supra* note 3, [ss 119\(4\) and 119\(2\)\(a\)](#).

Nevertheless, police forces must keep records of all extrajudicial measures that they use to deal with young persons.⁴⁷ Crown counsel should ensure police forces are aware of this obligation and check with the relevant police force in appropriate cases to ensure the Crown has the complete record.

8. CROWN OBLIGATION TO PARENTS AND VICTIMS

The YCJA expressly recognizes the interests of victims as well as those of the parents of accused young persons.⁴⁸

Thus, Crown counsel should:

- Verify that parents have been informed of measures or proceedings involving their children and encourage them to support their children in addressing their offending behaviour;⁴⁹
- If a young person receives an extrajudicial sanction, attempt to ensure that the program administrator is aware of the obligation to inform the parent of the young person of the sanction;⁵⁰
- Take into account the interests of victims,⁵¹ treat victims with courtesy, compassion and respect, and provide them with information about the proceedings so that they have an opportunity to participate and be heard;⁵²
- If a young person receives an extrajudicial sanction, inform the victim, upon request, of the identity of the young person and how the offence was dealt with.⁵³ In these circumstances, the Crown must also inform the victim that he or she is not permitted to further disclose that information unless provisions of the YCJA authorize it.⁵⁴

9. TRANSITIONAL PROVISIONS

Crown counsel must remain mindful of the transitional provisions that are contained in the [Safe Streets and Communities Act](#) because they clarify when and how the 2012

⁴⁷ YCJA, *supra* note 3, [s 115 \(1.1\)](#).

⁴⁸ See YCJA, *supra* note 3, [Preamble](#) and [ss 3 \(1\)\(d\)\(ii\),\(iii\) and \(iv\)](#), as well as [ss 11-12](#).

⁴⁹ YCJA, *supra* note 3, [s 3\(1\)\(d\)\(iv\)](#).

⁵⁰ YCJA, *supra* note 3, [s 11](#).

⁵¹ See YCJA, *supra* note 3, [Preamble, clause 5](#).

⁵² YCJA, *supra* note 3, [ss 3\(1\)\(d\) \(ii\) and \(iii\)](#).

⁵³ YCJA, *supra* note 3, [Preamble, clause 3](#), but more specifically [s 12](#).

⁵⁴ YCJA, *supra* note 3, [ss 118](#) and [129](#). Pursuant to [s 138](#) of the YCJA, it is an offence to further disclose youth records or information provided under the YCJA unless the YCJA permits it.

amendments to the YCJA apply. As discussed at note 3, annual annotated *Criminal Codes* do not always include these transitional provisions. For example, Crowns must remain cognizant that some of the 2012 amendments to the YCJA apply only to offences committed after the October 23, 2012 coming into force date of the amendments, such as the amendments relating to the sentencing principles and to the eligibility criteria for custodial sentences under [s. 39](#).⁵⁵ The other amendments, such as changes to the bail regime under [s. 29](#) of the YCJA, apply to young persons who committed offences before the coming into force of the amendments if proceedings had not commenced before October 23, 2012.

⁵⁵ As per [clause 195](#) of the *Safe Streets and Communities Act*, the following provisions do not apply to young persons who committed the offence before the coming into force of these amendments on Oct. 23, 2012:

- The broader definition of a violent offence in [s 2](#);
- The new [s 3\(1\)\(a\)](#) of the YCJA;
- The sentencing principles of denunciation and specific deterrence;
- The expanded eligibility for custody under [s 39\(1\)\(c\)](#) of the YCJA; and
- The new wording of [s 75](#) of the YCJA, which expands the circumstances where the identity of a young person who has received a youth sentence can be published.

APPENDIX A

CROWN CAUTION LETTERS

Consistent with the policy criteria set out in section 3.3.3 of this directive, federal prosecutors may administer Crown cautions under [s. 8](#) of the *Youth Criminal Justice Act*, in the format below, modified as necessary to fit the circumstances.

Section 8 Youth Criminal Justice Act

Crown Caution to a Young Person

To: (name of young person)

The Public Prosecution Service of Canada has received a report from {police agency}. In this report, police officers indicate that they have reasonable grounds to believe that you have broken the law by:

{set out offence(s)}.

While there is sufficient information to proceed with a prosecution, the Crown has decided, under [s. 8](#) of the *Youth Criminal Justice Act*, to issue a formal caution to you rather than proceeding with charges for this offence.

If you break the law in the future, more serious consequences, including charges and prosecution with potentially serious penalties, may follow.

If a future matter proceeds to prosecution, a youth record could result. Meanwhile, a record of this Crown caution remains on file.

You are required to contact the Crown's office, or your probation officer or youth worker, to confirm receipt of this caution letter.

(date)

(place)

{name of person signing on behalf of the Director of Public Prosecutions and Deputy Attorney General of Canada}

Contact # for further information _____

APPENDIX B

NOTICE TO PARENT OR GUARDIAN

Crown counsel should notify a parent or guardian of the young person that a Crown caution has been administered in the following format, modified as necessary to fit the circumstances.

Section 8 Youth Criminal Justice Act

Notice to the Parent or Guardian that a Young Person has been given a Crown Caution

To:{name of parent, guardian or adult with legal responsibility for young person}

This letter concerns {name of young person}.

The Public Prosecution Service of Canada has received a report from {police agency}. In this report, police officers indicate that they have reasonable grounds to believe that (name of young person) has broken the law by:

{set out offence(s)}

While there is sufficient information to proceed with a prosecution, the Crown has decided, under [s. 8](#) of the *Youth Criminal Justice Act*, to issue a formal caution to (the young person) rather than proceeding with charges for this offence.

Please understand that if (the name of the young person) breaks the law in the future, there may be more serious consequences, including charges and prosecution with potentially serious penalties. If a future matter proceeds to prosecution, a youth record could result.

A record of this Crown caution remains on file.

{date}

{place}

{name of person signing on behalf of the Director of Public Prosecutions and Deputy Attorney General of Canada}

Contact # for further information_____



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

5.5 DOMESTIC VIOLENCE

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

Revised January 31, 2022

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1. INTRODUCTION

This guideline highlights the importance of ensuring that the safety of complainants, and their families, is the paramount consideration at all stages of the prosecution.

A domestic violence case is one involving a physical or sexual assault, or threat of such violence, against an intimate partner. An intimate partner, with respect to a person, includes their current or former spouse, common-law partner and dating partner. The definition encompasses both opposite and same-sex partnerships.

2. APPLICATION OF THE GUIDELINE

The Public Prosecution Service of Canada (PPSC) has jurisdiction to prosecute domestic violence cases in Canada's three territories. It is therefore incumbent upon Crown counsel to take into account circumstances particular to the North, including its Indigenous people and their history. With respect to the prosecution of domestic violence cases in the North, Crown counsel must be informed about the present-day reality and history of remote Indigenous communities, as well as their impact on the rate of domestic violence. These circumstances include the fact that in many small northern communities, the options available to complainants of domestic violence may be limited because:

- a) complainants may not have access to the same types of support typically available in larger communities in southern Canada, such as emergency shelters or counselling services;

- b) absolute prohibitions on contact with the alleged abuser may be unrealistic in a small isolated community;
- c) complainants may still be committed to the relationship even though they would like the violence to cease;
- d) there are often financial or subsistence considerations that can impact a complainant and children in the family; and
- e) options for treatment of accused persons or couples may not be available.

3. THE COURT PROCESS

3.1. Evidentiary considerations and the decision to prosecute

Crown counsel must obtain the prior consent of the Chief Federal Prosecutor (CFP) or their designate in domestic violence prosecutions where there is a reasonable prospect of conviction, but Crown counsel proposes to terminate the prosecution on the basis that it is not in the public interest to proceed.

When considering whether a prosecution best serves the public interest, Crown counsel must consider the criteria set out in the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”. Crown counsel should also consider:

- a) the view of the complainant;
- b) the community supports available and being accessed by the complainant;
- c) any indication that the complainant has been directly or indirectly threatened or intimidated by the accused or the accused’s family or friends in connection with the present prosecution;
- d) any undue trauma that may be caused if the complainant is required to testify;
- e) any indication that the complainant may commit perjury if called to testify;
- f) the likelihood that similar offences will be committed in the future, particularly against the complainant or children in the home;
- g) the efforts of the accused to address the abusive behaviour through counselling or some other treatment or program, including culturally-based healing programs; and
- h) the accused’s prior convictions for domestic violence offences or other violent offences.

Where it is determined that the police investigation has not provided all the information or evidence that may be available in relation to these factors, Crown counsel should advise the police in writing at the earliest possible stage that the evidence is incomplete.

A record explaining the reasons of any decision to terminate a domestic violence prosecution must be placed on file and copied to the CFP or their designate.

In all cases where a domestic violence prosecution is terminated, Crown counsel must make all reasonable efforts to communicate their decision to the police and the complainant before terminating the prosecution. In exceptional cases where this is not possible, this should be done as soon as possible thereafter.

3.2. Judicial interim release

In some circumstances, victims of domestic violence may express wishes for reconciliation and to have the accused released from custody. In determining what position to take at the judicial interim release stage, Crown counsel must ensure that the victim's wishes do not outweigh serious objective concerns for the safety of the victim and members of the family.

Complainants in domestic violence cases may be reluctant to cooperate with the prosecution. While a complainant's views are relevant, the responsibility for the prosecution and decisions to be made at the stage of interim release rests with Crown counsel.

In assessing what position to take on the issue of interim release, Crown counsel must address the safety of the complainant and any children, regardless of whether the onus to show cause is on the Crown or the accused. When taking a position on release, Crown counsel must be mindful of the principle and considerations in section 493.1. Under this section, it is necessary to give primary consideration to the release of the accused on the least onerous conditions paying particular attention to the circumstances of both Indigenous accused and those from vulnerable populations. Section 515(3) obligates a justice to consider intimate partner violence when making a decision to release.

When necessary, Crown counsel should not hesitate to request additional relevant information from both the accused (through defence counsel or duty counsel) and the police. This information may assist in determining what terms of release are appropriate. Crown counsel should also request assistance in the preparation of submissions for a show cause hearing.

Crown counsel should oppose the accused's release if it creates an unreasonable risk to the complainant. Where the court is satisfied that the accused can be released, some restrictions will ordinarily be necessary to ensure the safety of the complainant and to preserve the integrity of the prosecution. As circumstances may require, Crown counsel should consider recommending the following conditions:

- a) non-communication with the complainant directly or indirectly;
- b) arrangements for access to children through a neutral third party (if the court is inclined to allow the accused to have contact with the children);
- c) prohibiting attendance at or near the residence or place of work of the complainant;
- d) surrender of all firearms, ammunition, explosives and firearms licence;
- e) where limits to the consumption of alcohol or drugs are considered, counsel should turn their mind to the connection of the substance use to the circumstances of the allegation and the ability of the accused to comply with such a condition; and

- f) in communities where access to domestic violence treatment programs is available, and the accused has expressly consented, attend all appointments required for treatment purposes and to comply with all related conditions.

Crown counsel should always seek to avoid situations which may have the effect of re-victimizing the complainant. Crown counsel should ensure that decisions or representations made at the interim release stage do not have the effect of forcing or pressuring the complainant and the children to leave the family home or community.

Where the accused is released from custody, a copy of any conditions should be provided to the complainant. In circumstances where the complainant has relocated to another community, Crown counsel or the Crown Witness Coordinator shall ensure that the police detachment nearest to the complainant is informed of the release terms. The police detachment in both the accused's and the complainant's communities should be provided with copies of the terms of release.

In some circumstances, the police may seek Crown counsel's advice on whether to release an accused person from custody before the formal laying of charges. It is also possible that the accused seeks changes to the terms specified by the police in the appearance notice or undertaking. In all these situations, Crown counsel must ensure that police provide all the particulars of the case and relevant information before providing advice on the issue of interim release or before determining whether the changes being sought should be consented to or opposed. If an accused has been arrested and then released by the police on an appearance notice or undertaking, Crown counsel should review and determine if the conditions are adequate to protect the complainant and the children, as the case may be. If necessary, Crown counsel should request a warrant or a variation of the conditions pursuant to ss. 502(1) or 512 of the *Code*.

Where the court decides to release an accused in circumstances where Crown counsel considers that the complainant or other family members may be at risk, immediate consideration should be given to making an application for bail review, after consultation with the CFP or their designate.

Crown counsel should always consider recommending an order prohibiting the accused from having contact with the complainant or other persons that may be necessary, pursuant to ss. 516(2) or 515(12) of the *Code*.

Throughout the interim release process, Crown counsel or the Crown Witness Coordinator must keep the complainant informed of the proceedings and any outcomes relevant to the complainant's safety. The Crown Witness Coordinator must advise Crown counsel of any information provided by the complainant that may be relevant to the interim release process or that may have other evidentiary implications.

3.3. Preparation of witnesses and the role of Crown Witness Coordinators

Witness preparation is an important function in domestic violence cases. Crown counsel and Crown Witness Coordinators should work together to prepare complainants for the criminal court process. Special attention should be paid to the background and context of the witness so that any

preparation process is sensitive to the needs of the witness. During this process, Crown counsel or a Crown Witness Coordinator should ensure that the following steps are taken:

- a) where possible, meet with the complainant as soon as possible after charges are laid and prior to any proceeding where the complainant may be called to testify;
- b) where possible, communicate with the complainant in the language of their choice or obtain the assistance of a person who is able to communicate in this language;
- c) explain the role of Crown counsel and defence counsel in criminal proceedings;
- d) explain the role of the Crown Witness Coordinator;
- e) explain the role of a witness in court;
- f) assess the complainant's reliability as a witness;
- g) tell the complainant or witness that they must testify truthfully;
- h) inform the complainant of any release conditions imposed on the accused, and determine if the complainant has any concerns with the accused's compliance with those conditions;
- i) confirm that the complainant has been made aware of available community services;
- j) attempt to answer any questions the complainant may have and discuss any continuing safety concerns; and
- k) ensure that the complainant has been informed of the opportunity to file a Victim Impact Statement.

Crown counsel or the Crown Witness Coordinator must review the complainant's police statement with them. In circumstances where a Crown Witness Coordinator reviews a statement with the complainant, the Crown Witness Coordinator must document the particulars of that meeting and inform Crown counsel of any new or inconsistent information provided by the complainant.

Crown counsel must inform defence counsel immediately if new information, or information inconsistent with the previous statement, is provided by the complainant or any other witness.

3.4. Issues at trial

Where a complainant fails to attend court, Crown counsel should make every reasonable effort to determine the reason(s) for the complainant's failure to appear. Crown counsel should generally seek an adjournment unless they are in a position to proceed to trial without calling the complainant as a witness.

In circumstances where Crown counsel considers seeking a witness warrant against the complainant, Crown counsel must obtain the prior permission of the CFP or their designate where practicable. Where prior consent is not feasible, Crown counsel must provide the CFP or their designate with a written memorandum explaining this decision and ensure the memo is placed on file.

In cases where a witness warrant is obtained, Crown counsel should inform the police about the circumstances surrounding the issuance of the warrant. Ordinarily, Crown counsel will advise the police to seek information from the complainant about the reason for not attending court and that the complainant should be released as soon as possible on terms that they attend court as required.

In domestic violence cases, it is quite common for complainants to demonstrate reluctance or unwillingness to participate in the criminal justice process. In order to maximize the prospect that the complainant will participate in the process, Crown counsel and Crown Witness Coordinators must work together and provide support and information to complainants throughout the process. It is particularly important to contact the complainant at the earliest possible opportunity.

In most, if not all cases, Crown counsel should seek an order restricting publication of any information that could identify the complainant in sexual offence cases pursuant to s. 486.4 of the *Criminal Code*.

In cases where the complainant raises concerns about testifying, Crown counsel should consider the following:

- a) seeking the early intervention of a Crown Witness Coordinator or other support person to assess the complainant's willingness to participate in the process and any reasons for their reluctance to participate;
- b) reviewing the case to determine if the police should be asked to obtain a sworn videotaped statement from the complainant; and
- c) applying to the court for a testimonial aid such as the following:
 - i. allowing a support person inside the courtroom pursuant to s. 486.1(2.1) of the *Criminal Code*;
 - ii. allowing the use of screen or closed-circuit television pursuant to s. 486.2(2.1) of the *Criminal Code*; or
 - iii. in rare cases, an order excluding the public from the courtroom while the complainant gives evidence pursuant to s. 486(1) of the *Criminal Code*.

If the complainant refuses to testify, Crown counsel should consider whether other admissible evidence is sufficient to prove the domestic violence offence. Crown counsel may consider excusing the complainant from testifying without further consequence.

If the complainant does testify but cannot recall details, or the testimony differs from previous statements given, Crown counsel should consider the various options available that may enable the presentation of credible and reliable evidence of the complainant before the court, such as:

- a) seeking leave to show the complainant a prior statement, for the purpose of refreshing their memory;

- b) seeking leave to cross-examine the complainant as an adverse witness, pursuant to s. 9(1) of the *Canada Evidence Act*;¹
- c) seeking leave to cross-examine the complainant on the prior inconsistent statement, pursuant to s. 9(2) of the *Canada Evidence Act*;
- d) seeking to introduce evidence of a prior inconsistent statement for the truth of its contents, pursuant to the Supreme Court's judgment in *R v KGB*;² and
- e) seeking to introduce evidence of prior out-of-court utterances of the complainant as *res gestae* evidence (e.g. police officer hearsay, 911 or police dispatch tapes).

4. SENTENCE

Where an accused pleads guilty or is found guilty of a domestic violence offence, Crown counsel's submissions on sentencing should include ensuring the long-term safety of the complainant and other family members. Section 718.2(a)(ii) of the *Code* makes abuse of one's spouse, common law partner or child an aggravating feature on sentence. Courts have found denunciation and deterrence to be important sentencing principles in cases of domestic violence. Section 718.04 states that these objectives are the primary consideration when the victim is part of a vulnerable population. Section 718.201 requires courts to consider the increased vulnerability of female victims with particular attention to be paid to the circumstances of Indigenous female victims when determining a sentence.

In cases involving Indigenous offenders, particular attention must be paid to the principle of restraint in s. 718.2(e) as explained by the Supreme Court of Canada in *R v Gladue*³ and *R v Ipeelee*.⁴ The principle requires that all available sanctions that are reasonable in the circumstances (other than imprisonment) be considered given: (a) the unique systemic or background factors which may have played a part in bringing the particular Indigenous offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of their particular Indigenous heritage or connection.

Where available in the three territories, Crown counsel are also encouraged to seek the engagement of community, professional and therapeutic resources that may assist in treating the accused and preventing a reoccurrence of violence between partners who choose to continue in their relationships. This includes seeking out culturally-based or Indigenous healing programs which may be locally available.

Crown counsel should also consider the following:

- a) Where an accused person has a prior conviction for violence against an intimate partner, counsel should refer to s. 718.3(8) for elevated maximum sentences. Counsel may need to seek additional information from the police or court records to determine whether a prior violent conviction was against an intimate partner as defined in s. 2.

¹ *Canada Evidence Act*, RSC 1985, c C-5.

² *R v KGB* [1993] 1 SCR 740.

³ *R v Gladue*, [1999] 1 SCR 688.

⁴ *R v Ipeelee*, 2012 SCC 13.

- b) In most circumstances, domestic violence cases are not suitable for conditional or absolute discharges unless extraordinary and compelling circumstances are present. This is because such dispositions do not adequately reflect public denunciation of domestic violence and the need to deter such offences.⁵ An accused who has successfully completed the treatment process of a specialized therapeutic court program is an example of extraordinary and compelling circumstances for a discharge. Whether a conditional or absolute discharge is appropriate must be determined on a case-by-case basis.
- c) Consideration should be given to seeking probation with conditions obliging the accused to participate in a therapeutic violence prevention program. Where necessary, conditions aimed at ensuring the safety of the complainant and other family members, including a no contact condition, should be sought.
- d) Crown counsel must ensure that the complainant is given a reasonable opportunity to prepare and submit a Victim Impact Statement, pursuant to s. 722 of the *Criminal Code*. In cases where a victim impact statement is not filed, counsel may need to seek additional information to provide to the Court about the personal circumstances of the victim to satisfy s. 718.04.
- e) Crown counsel should consider recommending an order prohibiting the possession of weapons or firearms, pursuant to ss. 109 (mandatory) and 110 (discretionary) of the *Criminal Code*. However, Crown counsel must be sensitive to the need for hunting for subsistence or cultural reasons which may justify lifting the prohibition order in accordance with s. 113 of the *Criminal Code*.
- f) Crown counsel should seek orders pursuant to ss. 114 and 115 of the *Criminal Code* directing that any firearms licence be surrendered and forfeited where a prohibition order has been imposed.
- g) Crown counsel should consider seeking an order for forfeiture of any weapon or ammunition used in the commission of a domestic violence offence.
- h) Crown counsel should consider seeking a DNA order, pursuant to s. 487.051 of the *Criminal Code*.
- i) When a custodial sentence is sought, Crown counsel should consider seeking an order pursuant to s. 743.21 of the *Criminal Code* prohibiting the accused from communicating directly or indirectly with the complainant or witness during the period of custody.
- j) Crown counsel should generally not consider recommending a conditional sentence pursuant to s. 742.1 of the *Criminal Code* in circumstances where an accused has in the past received a conditional sentence for domestic violence-related offence(s). Before seeking or agreeing to a conditional sentence for an accused in this circumstance, Crown counsel first must seek the approval of the CFP or their designate.

Crown counsel, with the assistance of a Crown Witness Coordinator, shall take reasonable steps to ensure that the complainant is informed of the sentence imposed and the status of any appeal proceedings undertaken.

⁵ *R v Shortt*, 2002 NWTJ 55.

5. ALTERNATIVES TO PROSECUTIONS

Crown counsel may only resort to diversion, alternative measures, or extrajudicial sanctions in cases involving domestic violence with the prior consent of the CFP or their designate.

Such alternatives to prosecutions should only be pursued in cases where there is a reasonable prospect of conviction. In addition, Crown counsel must consider ss. 2 and 3 of the PPSC Deskbook directive, “[3.8 Alternative Measures](#)”, the views of the complainant, the views of the police, and the views of other officials or treatment professionals who can assist in the assessment of the appropriateness of resolving by way of alternative measures. If the complainant expresses disagreement or reluctance to alternative measures, Crown counsel must inquire as to the reasons behind the complainant’s disagreement or concern. The reasons for such disagreement or concern are factors that Crown counsel must consider in determining whether it is in the public interest to terminate a prosecution in order to resolve a domestic violence case using alternative measures.

6. THE USE OF SECTION 810 RECOGNIZANCES

Before resorting to s. 810 of the *Criminal Code* in domestic violence cases, Crown counsel must obtain the consent of the CFP or their designate. Both counsel and the CFP should consider Indigenous concepts of justice in their analysis of whether a peace bond is appropriate in the circumstances.

Section 810 may be resorted to where there is no reasonable prospect of conviction on the evidence, but there is a reasonable prospect of meeting the threshold for a recognizance under s. 810. In this circumstance, Crown counsel must ensure that the defence counsel understands the withdrawal or stay of the domestic violence charge(s) is not because of the accused’s willingness to agree to abide by a s. 810 recognizance. Rather, it is on the basis that the complainant reasonably fears for their safety, the safety of other family members, or property.

Section 810 may also be resorted to where there is a reasonable prospect of conviction but a prosecution does not best serve the public interest. Before seeking the consent of the CFP, Crown counsel must seek the views of the complainant, police and other administration of justice officials or treatment professionals. Generally, a peace bond may be appropriate in the following circumstances:

- a) the complainant is agreeable to such a disposition;
- b) the violence involved was minimal;
- c) the accused has no history of violence with either this complainant or others;
- d) there is a realistic safety plan for ensuring that future violence is avoided;
- e) the available information about the accused’s treatment and rehabilitative steps is consistent with the prospect that future violence will be avoided; and
- f) there are resources in the community for the effective monitoring of compliance with the peace bond, for example by the police or probation services.

If the accused enters into a s. 810 recognizance, Crown counsel or a Crown Witness Coordinator must inform the complainant of the terms of the recognizance and the implications of non-compliance by the accused.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

5.6 VICTIMS OF CRIME

DIRECTIVE OF THE ATTORNEY GENERAL ISSUED UNDER SECTION 10(2) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

January 15, 2017

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1. INTRODUCTION

The views, concerns and representations of victims are an important consideration in the criminal justice system. The *Canadian Victims Bill of Rights*¹ (CVBR) provides victims of crime with rights in the criminal justice system.

Although Crown counsel do not represent victims in criminal proceedings, they must ensure that victims are properly informed about matters that affect them. Where appropriate, they must be provided the opportunity to participate in the criminal justice process. The *Criminal Code*² (Code) contains numerous provisions intended to increase the opportunities for victims to be heard before the courts, and to provide protection to victims' physical integrity as well as to their privacy.

¹ SC 2015, c 13.

² In relation to criminal prosecutions involving young persons, the *Youth Criminal Justice Act* (YCJA) contains similar provisions in the Preamble and ss 3(1)(d)(ii) and (iii).

This directive provides guidance to Crown counsel and Crown Witness Coordinators³ in their interactions with victims, including victims of crimes committed by young persons under the *Youth Criminal Justice Act* (YCJA).⁴

2. DEFINITION OF VICTIM

The term “victim” is defined in section 2 of the CVBR to include “an individual who has suffered physical or emotional harm, property damage or economic loss as the result of the commission or alleged commission of an offence.” The term is given a more specific definition in section 2 of the *Criminal Code* for the purpose of *Criminal Code* provisions where it is defined as “a person against whom an offence has been committed, or is alleged to have been committed, who has suffered, or is alleged to have suffered, physical or emotional loss, property damage or economic loss as a result of the commission of the offence.” The distinction between these definitions means that, while both natural persons and legal persons can benefit from the *Criminal Code* provisions, only natural persons have rights under the CVBR. The CVBR provides that no adverse inference shall be drawn against an accused person from the fact that an individual is identified as a victim.

The CVBR provides that, where a victim is dead or incapable of acting on their own behalf, the following individuals may exercise the victim’s rights on behalf of the victim: their spouse; their common-law spouse; a relative or dependant of the victim; an individual having custody or care of the victim or of their dependants.

3. STATEMENT OF POLICY

Crown counsel are bound to follow the letter and the spirit of the *Canadian Victims Bill of Rights*. In particular, counsel must be mindful of the principles contained in the preamble to the CVBR:

Whereas crime has a harmful impact on victims and on society;
Whereas victim of crime and their families deserve to be treated with courtesy, compassion and respect, including respect for their dignity;
Whereas it is important that victims’ rights be considered throughout the criminal justice system;
Whereas victims of crime have rights that are guaranteed by the *Canadian Charter of Rights and Freedoms*;⁵

³ Crown Witness Coordinators provide court-based support to victims and witnesses in the three Territories and are based in the PPSC regional offices in the Yukon, the Northwest Territories and Nunavut. Crown Witness Coordinators work with prosecutors in supporting victims and witnesses through the criminal justice process and providing information about the court process. Crown Witness Coordinators are required to travel to many small and remote communities, many of which are only accessible by air. The Crown Witness Coordinators locate and meet with victims and witnesses, and help them prepare for court appearances.

⁴ Note that the YCJA contains specific provisions concerning victims.

⁵ See, eg, *R v NS*, [2012] 3 SCR 726; *R v O’Connor*, [1995] 4 SCR 411.

Whereas consideration of the rights of victims of crime is in the interests of the proper administration of justice;

Whereas the federal, provincial and territorial governments share responsibility for criminal justice;

Whereas, in 1998, the federal, provincial and territorial governments endorsed the *Canadian Statement of Basic Principles of Justice for Victims of Crime* and, in 2003, the *Canadian Statement of Basic Principles of Justice for Victims of Crime, 2003*.

In dealing with victims, Crown counsel must be careful to ensure that victims understand the role of a Crown prosecutor. They must therefore inform victims at the outset that they do not represent them in the proceedings and that, as Crown counsel, they must be scrupulously fair in presenting the case and may, as a result, present evidence that is favourable to the accused.

Crown counsel and Crown Witness Coordinators must bear in mind the disclosure obligations that may arise as a result of their dealings with witnesses, for example the need to disclose to defence all statements made by the victim, particularly where the victim has given inconsistent versions of the relevant events. These obligations should be explained to victims and witnesses.

4. OPERATION OF THE POLICY

4.1. Rights of victims of crime

The CVBR creates a statutory obligation on the PPSC to recognize and respect several rights of victims of crime. The rights in the CVBR apply to individual persons who suffer physical or emotional harm, property damage or financial loss as a result of an offence or an alleged offence under the *Criminal Code*, the *Youth Criminal Justice Act* or the *Crimes Against Humanity and War Crimes Act*, a designated substance offence as defined under section 2(1) of the *Controlled Drugs and Substances Act* or an offence under section 91 and Part 3 of the *Immigration and Refugee Protection Act*. These rights apply to investigations, prosecutions, corrections and conditional release processes in Canada for which there is a victim of crime who is a Canadian citizen or permanent resident or who is present in Canada.

Sections 6-8 of the CVBR provide victims of crime with a right to general information about the justice system and their role, as well as specific case in which they are involved. Sections 9-13 provide victims with various rights to protection, including security, privacy and identity. Victims have specific rights which may arise during a prosecution, such as a right to request a testimonial aid, to present a victim impact statement or to request a restitution order. Section 14 provides victims with a right to convey their views about decisions which affect their rights. Finally, victims of crime have the right to complain to the Director of Public Prosecutions if they believe that their rights are not respected.⁶ Counsel have an obligation to consider these rights in their approach to a prosecution and are strongly encouraged to work closely with Crown Witness Coordinators in regard to these rights.

⁶ See the *PPSC Complaints Policy*, available at <http://www.ppsc-sppc.gc.ca/eng/cmp-pln/index.html>.

4.2. Special needs of some victims

In their dealings with victims, Crown counsel and Crown Witness Coordinators must take into account the circumstances of the victims (including their age and gender), the nature of the crime(s) and the harm or loss (emotional, financial or physical) that the victims sustained. Trauma may affect a victim's ability to process information about proceedings, particularly when that information concerns unknown or new terms or processes, which may require Crown counsel and Crown Witness Coordinators having to repeat information about the court process.

While the needs and circumstances of each victim will invariably be unique, Crown counsel should bear in mind certain considerations in specific types of cases.

Where the victim of a crime is a child, communication and protection take on special importance. Crown counsel must consider what measures are required to ensure the victim understands the information that is conveyed about the criminal justice system. Crown counsel should use language appropriate to the age, understanding and maturity of the child, and to the extent possible, should interview the child in a place and manner that is most likely to ensure the child's comfort and security. Specialized services, such as Child Advocacy Centres or Social Services, may be available to assist Crown counsel in proceedings involving child victims or witnesses.

Where the crime is one of domestic violence, Crown counsel should be aware of the dynamics commonly at play in respect of victims of such offences. To that end, Crown counsel must be familiar with the *PPSC Deskbook* guideline "[5.5 Domestic Violence](#)".⁷

Where the crime involved the violation of the victim's sexual integrity, the victim may find it difficult to participate in the proceedings. Crown counsel should attempt to ascertain the needs of the victim and respond accordingly.

In all crimes of violence, Crown counsel should be sensitive to a victim's sense of vulnerability and should consider appropriate measures to ensure the security and enhance the comfort of the victim. Such measures should include steps to ensure that victims are kept informed about the progress of the case, and about the types of issues that may arise: for example, applications to introduce evidence of prior sexual activity, or to obtain access to their personal, medical or other records.

In cases involving victims with special physical needs, Crown counsel must work to eliminate barriers that might impede the involvement of the victims in the proceedings. The same is true in cases where the first language of a victim is not the same as that of Crown counsel or the language in which proceedings are conducted.

Some victims may view court proceedings with suspicion; they may have concerns about bias or prejudice based on their race, ethnic origin, gender identity, or sexual orientation. Crown counsel should be aware of such concerns and seek to address them in an appropriate manner.

⁷ See the *PPSC Deskbook* guideline "[5.5 Domestic Violence](#)".

4.3. Alternative measures

Not all offences require criminal proceedings. In some cases, the interests of victims, offenders, and society may be properly addressed through the use of alternative measures programs.

In cases involving physical violence, the public interest normally requires that the offence be prosecuted. Crown counsel must consider the position of the victim and, where appropriate, seek input from the victim in deciding whether an alternative to prosecution is appropriate. Where an alternative to prosecution is appropriate, care must be taken to ensure that Crown counsel's decision is explained to the victim.

When considering an alternative measure for a criminal offence, Crown counsel must apply the *PPSC Deskbook* directive "[3.8 Alternative Measures](#)". Crown counsel should also be aware that the rights of victims to receive information provided in sections 6 and 7 of the CVBR may require that the victims be advised of the use of alternative measures.⁸

Crown counsel should also keep in mind that when such measures are being considered for a young person, they must consider relevant provisions under the YCJA.⁹

4.4. Bail hearings

On bail applications, Crown counsel must consider whether bail should be opposed in order to protect the victim. Even where bail is denied, Crown counsel must consider whether conditions of non-communication with the victim should be sought.

When considering the Crown position regarding interim release, Crown counsel must give particular attention to the provisions of the *Criminal Code* that allow the court to impose conditions aimed at protecting the victim: see sections 515(4-4.2), 515(12-14), 516(2), 522(2.1) of the Code. In particular, Crown counsel should be aware that the judge is required to note on the record that the security of the victim has been considered in making a bail order, and, on request of the victim, to provide a copy of the bail order to the victim.

Crown counsel or the Crown Witness Coordinator must communicate information related to bail proceedings and decisions made by the court to victims in a timely manner. In circumstances where the victim is difficult to contact, the assistance of police should be sought.

4.5. Peace bonds

Crown counsel should, in appropriate circumstances, consider other options for protecting victims. Sections 810 to 810.2 of the Code are designed to assist potential victims by seeking to prevent contact with them and persons who may commit violent acts.

⁸ See *Criminal Code*, ss 732.1(5)(a) and 742.3(3)(a) respectively.

⁹ See YCJA, ss 4-12.

4.6. Sentencing

The *Criminal Code* requires that the harm to victims and to society be considered by the Court in formulating an appropriate sentence.¹⁰ Crown Counsel must provide information to the Court on these two elements in their submissions on sentencing. Crown Witness Coordinators should work with victims to assist them in providing this information, as appropriate, as part of their victim impact statement.

In addition, Crown counsel must consider seeking measures aimed at preventing future criminal offences, for example, conditions in probation orders or conditional sentences that prohibit an offender from being in certain places or having contact with people of a certain age or gender. Crown counsel should be aware that the *Criminal Code* allows victims to request and be provided copies of probation orders and conditional sentence orders.¹¹

Crown counsel should also consider available sentencing approaches or processes available in their respective jurisdictions, including domestic violence treatment options, drug treatment, mental health treatment court processes. These may include other restorative sentencing approaches, such as sentencing circles, which may be available in certain Indigenous communities.

5. PROVIDING INFORMATION TO VICTIMS AND PARTICIPATION IN THE COURT PROCESS

Crown counsel and Crown Witness Coordinators must work together to provide information to victims and to assist in their preparation as witnesses in the court process. Once a Crown Witness Coordinator becomes involved in a case, he or she must make reasonable efforts to contact the victim as soon as possible, explain the role of the Crown Witness Coordinator, provide appropriate information about the case and remain a point of contact for the victim during the process.

In providing the victim with information about the case, Crown counsel and the Crown Witness Coordinator must be careful not to disclose other evidence in the case so as not to taint the victim's testimony. Crown Witness Coordinators should also provide the victim, as early in the process as possible, with information about victims' services available within the territory, either through the police, the community or territorial government services.

Once charges are laid, Crown counsel, in collaboration with the Crown Witness Coordinators or with local police, should:

- make every reasonable effort to ensure the victims are made aware of the release of the accused from custody if this occurs before the completion of proceedings, the terms of release, and any subsequent amendment to the terms of release;

¹⁰ See *Criminal Code*, ss 718(a), 718(f), 718.2(e).

¹¹ See *Criminal Code*, ss 732.1(5)(a) and 742(3)(a).

- make sure the victims know what to do if they have concerns about the accused's compliance with the terms of release, and who to call if there is a breach;
- ensure that the victims are informed of any conditions prohibiting contact with the victims while the accused is in custody;
- explain to the victims the roles of Crown counsel, defence counsel, the judge, and the jury and their role as witness;
- assess the victims' reliability as witnesses and ensure that the victims have been given the opportunity to review their statement, if any, before testifying;
- consider the need for and type of testimonial aid that may be helpful in helping victims to testify in the proceedings, and apply for these testimonial aids from the Court;
- ensure, to the extent feasible, that the victims are informed beforehand when proposing to make a significant amendment to the charges, or to terminate a prosecution;
- consider steps to prevent inappropriate use or dissemination of the disclosure materials where they contain information of a sensitive nature pertaining to the victim. In particular, Crown counsel must follow, as required, the *PPSC Deskbook* guideline "[2.5 Principles of Disclosure](#)";¹²
- apply, where appropriate, for an adjournment where an application is made by the accused for the production of records pertaining to a victim and the victim requests the opportunity to retain a lawyer;
- provide timely information regarding developments in the proceedings as well as information pertaining to plea and sentence negotiations;
- seek restitution orders where appropriate (consistent with the *PPSC Deskbook* guideline "Restitution");
- inform the victims about options to participate in the sentencing process by means of testimony, or a victim impact statement pursuant to section 722 of the Code (and inform the victims that this can be read aloud, if they so wish, or presented by other means, for example by using a testimonial aid);
- inform the victims of the right to notice and participation in various post-conviction processes, such as parole hearings, *Criminal Code* Review Board hearings and parole eligibility hearings; and
- inform the victims of any appeals made either by the Crown in case of an acquittal or by defence against a conviction or against the sentence, and ensure that the victims are informed of any decisions related to bail.

¹² See the *PPSC Deskbook* guideline "[2.5 Principles of Disclosure](#)".

5.1. Aids to trial testimony

The *Criminal Code* provides a number of measures that can be invoked to increase the comfort and security of victims obliged to testify in criminal proceedings. It is the responsibility of Crown counsel to consider if any of these measures are available and appropriate in a given case, and to apply to the court accordingly:

- Section 486 - the exclusion of the public from the courtroom;
- Section 486.1 - the presence of a support person;
- Section 486.2 - the use of a screen or closed circuit television;
- Section 486.3 - preventing cross-examination by self-represented accused;
- Section 486.31 – non-disclosure of witness’ identity;
- Sections 486.4 and 486.5 - orders restricting publication of identity of victims;
- Section 486.7 – any order necessary to protect the security of any witness;
- Section 715.1 - the use of pre-recorded video evidence;
- Section 657.1 - the use of affidavit evidence;
- Sections 278.1 to 278.91 - opposing production to the accused of a victim’s personal records;
- Sections 276 to 276.5 - opposing the admissibility of evidence of the victim’s prior sexual conduct; and
- Section 277 – opposing the admissibility of evidence of the victim’s sexual reputation for the purposes of challenging the credibility of the victim.

Crown counsel are to assess the needs of witnesses and victims with regard to the various testimonial aids available, in order to determine which aid or support to apply for, where appropriate. Crown counsel, with the assistance of a Crown Witness Coordinator when necessary, may need to seek additional information from witnesses and victims (for example, from the victim about their ability to testify or from the Court about the availability of testimonial aids) prior to the hearing in order to support an application for a testimonial aid.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

5.7 IMPAIRED DRIVING CASES: NOTICE TO SEEK GREATER PUNISHMENT

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

Revised June 27, 2025

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1. PURPOSE

This Guideline provides direction to prosecutors on when to engage the relevant mandatory minimum penalty for a second and subsequent impaired driving offence.

2. BACKGROUND

The *Criminal Code* prescribes mandatory minimum sentences of incarceration and driving prohibitions for a second and subsequent impaired driving offence.¹ These mandatory minimum sentences and driving prohibitions apply only if the prosecution proves, prior to any plea, that it notified the accused of its intention to seek a greater punishment because of their previous convictions (Notice). If the prosecution cannot prove that Notice was provided to the accused, the minimums do not apply, and the court may determine that a non-custodial sentence is appropriate.

Accordingly, prosecutors have a central role in determining whether an accused person will be incarcerated for a second or subsequent impaired driving offence. Prosecutors must carefully and thoughtfully consider all relevant circumstances when deciding whether to pursue mandatory minimum penalties. Prosecutors must be particularly mindful of competing considerations in this area, such as the serious public safety concerns posed by

¹ *Criminal Code*, section 320.19. Under section 320.26, only certain prior convictions qualify as earlier offences for the purpose of imposing a mandatory minimum sentence for impaired driving.

impaired driving, the overrepresentation of Inuit, First Nations, and Métis people in custody, and the significant health aspects of substance use disorders.

Public Prosecution Service of Canada prosecutors must recognize the negative impact that personal and institutional biases may have on their decisions. They must become aware of these biases, take active steps to set them aside, and maintain an open mind when considering alternative perspectives to ensure that their decision to seek greater punishment does not perpetuate any form of systemic discrimination or racism.

3. PROVING NOTICE

Prosecutors must verify whether the police have served the accused with a Notice of Intention to Seek Greater Punishment document prior to plea in all cases of impaired driving. Service of this document is required so that prosecutors can, at the appropriate stage in the prosecution, decide whether to prove Notice and engage the relevant mandatory minimum penalty.

Where the police have not served the document, the prosecutor must take steps to ensure that the accused is notified prior to plea that greater punishment will be sought, so that the option of proving Notice is preserved. While Notice may be provided orally in court and on the record prior to plea, the best practice is for prosecutors to notify defence counsel or the accused in writing. This practice allows for the written Notice to be marked as an exhibit at sentencing.

4. WHEN NOTICE MUST BE PROVEN

The decision to prove Notice must be determined by considering the circumstances of the offence, the offender, and the interests of the administration of justice, including the substantial threat that impaired driving offences poses to the safety of the public. Prosecutors must also consider the background and systemic circumstances of the accused when exercising discretion.

If additional information relevant to these considerations is required from the police, prosecutors must request and review the information prior to deciding whether to prove Notice. Prosecutors must also consider whether further information should be sought from defence counsel or a self-represented accused concerning the background and personal circumstances of the accused.

Subject to the exception described below in section 5, Notice must be proven if any of the following scenarios apply:

- the accused has previously been convicted of two or more impaired driving offences;
- any prior impaired driving offences occurred less than five years before the commission of the current offence;
- the accused has previously been incarcerated for an impaired driving offence;

- the concentration of alcohol in the blood of the accused at the time when the offence was committed was equal to or exceeded the level deemed aggravating under the *Criminal Code*;²
- the accused was subject to a driving prohibition order made under the *Criminal Code*;
- there have been a large number of impaired driving offences in the region, indicating a need to emphasize general deterrence;
- during or after the commission of the current offence, the offender attempted to flee from the police;
- the current offence involves a fatality, significant accident, or personal injury caused by the accused; or
- the degree of intoxication and the nature of the operation of the conveyance demonstrated a significantly enhanced risk of injury or property damage.

5. WHEN NOTICE MAY NOT BE PROVEN

If a scenario from the list above applies, but a prosecutor has assessed that the mandatory minimum penalty would not be an appropriate sentence, they may seek permission from their Chief Federal Prosecutor (CFP) to not prove Notice. In all matters where the consent of the CFP or their delegate is granted to not prove Notice, prosecutors must place written reasons for the decision on the file.

The CFP or their delegate may provide their consent to not prove Notice if exceptional or compelling circumstances exist. Exceptional circumstances are circumstances that are unusual or atypical, while compelling circumstances are circumstances that militate toward a particular outcome. The circumstances need not be exceptional and compelling for discretion to be exercised to not prove Notice; the presence of one or the other on its own will suffice.

In determining whether there are exceptional or compelling circumstances that may warrant not proving Notice, prosecutors and the CFP or their delegate may consider the following non-exhaustive factors:

- The degree of risk to the safety of the public that the accused poses, including:
 - o the existence of any aggravating factors in respect of the offence;
 - o the attitude of the accused towards the offence, including any acceptance of responsibility or remorse;
 - o any confirmed period of sobriety since the offence;
 - o any treatment programs taken by the accused since the offence that may assist in the accused's rehabilitation, including any culturally appropriate programming;

² *Criminal Code*, section 320.22(e).

- o the total number of previous convictions for related offences;
 - o the historical nature of the previous convictions and any intervening periods of sobriety;
 - o past sentences and their effect on the accused; and
 - o whether the risk to public safety can be appropriately addressed by a lengthy driving prohibition order rather than incarceration.
- The accused's personal circumstances, including their age, employment, and physical or mental health or their dependents and the consequences of the sentence on them.
 - A victim who will be particularly traumatized and potentially re-victimized by testifying in court.

While all relevant factors must be balanced by the CFP or their delegate in the course of making their decision, if the accused poses an unacceptable risk to the safety of the public, Notice must be proven.

6. CONSIDERATIONS IN RELATION TO INUIT, FIRST NATION, AND MÉTIS PEOPLE

Prosecutors must always consider the ongoing impacts of colonialism, residential schools, over-representation, and systemic discrimination in the criminal justice system when exercising their discretion whether to prove Notice in respect of a First Nations, Métis, or Inuk³ individual. Prosecutors should also consider any potential collateral consequences of proving Notice on the ability of a First Nations, Métis, or Inuk individual to practice cultural or subsistence activities.

In circumstances where the accused is Inuk, First Nations or Métis and proving Notice is expected, prosecutors and CFPs or their delegate must consider whether exceptional or compelling circumstances exist such that Notice should not be proven. This assessment must take account of the overrepresentation of Inuit, First Nations, and Métis people in the criminal justice system, the systemic and background factors affecting them in Canadian society, and the availability of culturally appropriate alternatives to custody, as set out by the Supreme Court of Canada in *R. v. Gladue* and *R. v. Ipeelee*.

Before determining that exceptional or compelling circumstances do not exist and that Notice should be proven, prosecutors and CFPs or their delegate must also consider whether additional information about the First Nation, Métis, or Inuk individual's background is necessary. If additional information is necessary, prosecutors must make

³ “A concern for reconciliation and inclusivity requires that, when referring to Indigenous persons, we use the terms preferred by the community. Thus, we refer to the traditional inhabitants of Canada's northern regions and Arctic coastline by the terms Inuk and Inuit. Inuk is the singular noun, used to refer to one person, regardless of gender. Inuit is the plural noun.” Government of Canada, *Inuk, Inuit (Linguistic recommendation from the Translation Bureau)*, online: [Inuk, Inuit \(Linguistic recommendation from the Translation Bureau\) – Writing Tips Plus – Writing Tools – Resources of the Language Portal of Canada – Canada.ca \(noslangues-ourlanguages.gc.ca\)](https://www.canada.ca/noslangues-ourlanguages.gc.ca).

reasonable efforts to engage with defence counsel, or the accused if self-represented, to gather such information.

Prosecutors must ensure that wherever possible and appropriate, the accused's identification as a First Nations, Métis, or Inuk individual and any *Gladue* factors are conveyed to the sentencing judge.

7. DELAYED SENTENCING

The *Criminal Code* permits a court, with the consent of the prosecutor and the offender, and after considering the interests of justice, to delay sentencing an offender who has been found guilty of an impaired driving offence. This delay is intended to allow the offender to attend a treatment program approved by the province or territory in which the offender resides. If the offender successfully completes the treatment program, the court is not required to impose a minimum punishment but cannot impose a discharge.

If an offender requests a delay of sentencing to attend an approved treatment program, the prosecutor should generally not object unless the delay is contrary to the public interest. Prosecutors should secure a waiver of the delay from defence counsel on the court record or in writing when consenting to a delay of the offender's sentencing hearing. Prosecutors should also ensure that the court imposes the mandatory interim driving prohibition order before the delay is granted.

8. APPLICATION OF THE YOUTH CRIMINAL JUSTICE ACT

As a general rule, this guideline does not apply to the sentencing of young persons pursuant to the *Youth Criminal Justice Act* (YCJA). The mandatory minimum sentences in the *Criminal Code* do not apply to youth offenders under the YCJA.⁴

Section 82(4) of the YCJA precludes the use of a guilty finding imposed under the YCJA as a previous "conviction" for the purpose of imposing a mandatory minimum sentence because of a previous conviction. However, where the circumstances in s. 119(9)(a) of the YCJA are satisfied, the guilty finding of a young person under the YCJA for a prior offence can be considered a previous conviction for the purposes of imposing a mandatory minimum penalty on that person, as an adult, under the *Criminal Code*.

⁴ *R. v. H. (R.)*, 1992 CanLII 7426 (ONCA).



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

5.8 CORRUPTION OF FOREIGN PUBLIC OFFICIALS

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

March 1, 2014

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1. INTRODUCTION

On December 17, 1997, Canada signed the [*Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*](#) (the *Convention*), an initiative arising primarily from work done by the Organization for Economic Co-operation and Development (OECD). Canada ratified the *Convention* on December 17, 1998.

To implement the terms of the *Convention*, Parliament passed the [*Corruption of Foreign Public Officials Act*](#) (CFPOA)¹ which came into force on February 14, 1999. The CFPOA essentially prohibits giving, offering or agreeing to give or offer any benefit, directly or indirectly, to a foreign public official for the purpose of obtaining or retaining an advantage in the course of business. For a detailed description of the CFPOA please refer to the document published by the Department of Justice entitled *The Corruption of Foreign Public Officials Act: A Guide, 1999*².

Significant amendments to the CFPOA were made in June of 2013,³ including:

- an increase in the maximum penalty for an individual convicted of a foreign bribery offence from 5 to 14 years imprisonment in addition to unlimited fines;
- creation of a new offence in relation to books and records kept to further or hide foreign bribery,
- expanded jurisdiction based on nationality⁴,
- removal of the concept of “for profit” from the definition of business; and

¹ SC 1998, c 34.

² Available on the [Government of Canada Publications internet site](#). Note that this document has not been updated to reflect the 2001 amendments and should be read with this in mind.

³ [*Fighting Foreign Corruption Act*](#), SC 2013, c 26.

⁴The Act deems acts of Canadian citizens, permanent residents, corporations, societies, firms or partnerships on a worldwide basis to be acts within Canada for the purposes of the [CFPOA](#). This provision essentially subjects all Canadian citizens and companies to global regulation by Canadian authorities under the CFPOA.

- the future removal of the facilitation payment⁵ exception under the Act.

Additionally, the RCMP will now have the exclusive authority to lay charges under the CFPOA.

2. PURPOSE OF THE GUIDELINE

The purpose of the guideline is to ensure the effective coordination of prosecutions under the [CFPOA](#) and to call attention to unique aspects of the Act and the [Convention](#).

3. APPLICATION OF THE GUIDELINE

3.1. Coordination

Given the inherent international dimension of prosecutions under the [CFPOA](#) and the potential impact on Canada's relationship with other states, it is essential to coordinate prosecutions under the Act at a national level. Accordingly, Chief Federal Prosecutors (CFP) shall notify the Deputy Director of Public Prosecutions (Deputy DPP) of the Regulatory and Economic Prosecution and Management Branch of all requests for advice in relation to investigations, any prosecutions initiated and all developments in relation to cases involving the CFPOA.

Headquarters counsel are available to provide support to Regional Offices in the form of subject matter expertise in relation to the interpretation of the CFPOA, sentencing considerations, comparable foreign statutes and consultation with other government departments as required.

3.2. The decision to initiate a prosecution or refuse to prosecute

Like any decision regarding whether or not to prosecute, prosecutions under the [CFPOA](#) must be instituted or refused on a principled basis and must be made in accordance with the PPSC Deskbook guideline "[2.3 Decision to Prosecute](#)". In particular, Crown counsel should be mindful of [s. 5](#) of the *Convention* which states:

5. Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

⁵ Facilitation payments are those made to foreign public officials to secure or expedite the performance of acts of a routine nature that are within the scope of the official's duties. The exception will be removed from the Act by way of an Order in Council at a date that is yet to be determined.

Crown counsel should record in writing the reasons for deciding or declining to institute proceedings. Such reasons may be highly relevant in dispelling any suggestion of improper political concerns influencing prosecutorial decision-making.

Where there is disagreement between the police and prosecutors over the merits of a particular prosecution based on the assessment of sufficiency or the evidence or the public interest criteria, Crown counsel should notify the Deputy DPP at the earliest opportunity in order to resolve the matter.

3.3. Annual report

A unique aspect of the [CFPOA](#) is the reporting requirement imposed by [s. 12](#) of the Act, which states:

12. Within four months of the end of each fiscal year, the Minister of Foreign Affairs, the Minister for International Trade and the Minister of Justice and Attorney General of Canada shall jointly prepare a report on the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and on the enforcement of this Act, and the Minister of Foreign Affairs shall cause a copy of the report to be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the report is completed.

Public Prosecution Service of Canada (PPSC) counsel must maintain information in prosecution files sufficient to enable the Minister of Justice and Attorney General to make such a report. To that end, on or before January 31st of each year, the CFP in each region, shall forward to the Deputy DPP a report on activities with respect to the provisions of the CFPOA covering the previous year. The report shall detail:

1. the nature and status of any prosecutions undertaken by the PPSC pursuant to the provisions of the CFPOA or the [Criminal Code](#);
2. the nature and status of any other proceedings taken pursuant to the CFPOA or the *Criminal Code* to which the Attorney General is a party, such as seizure of assets.

The Deputy DPP shall collate the information and provide it to the Senior General Counsel (Criminal Law Policy Section) in the Department of Justice to assist that section in preparing the Minister of Justice and Attorney General's contribution to the report.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

5.9 PRIVATE PROSECUTIONS

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

March 1, 2014

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1. INTRODUCTION

A private prosecution is a prosecution started by a private individual who is not acting on behalf of a law enforcement agency or prosecution service.

The right of a citizen to institute a prosecution for a breach of the law has been called "a valuable constitutional safeguard against inertia or partiality on the part of authority".¹ The private citizen, as prosecutor, and the Attorney General, who has exclusive authority to represent the public in court and to supervise criminal prosecutions, are both fundamental parts of our criminal justice system.² As a result, where the two roles conflict, the role of the Attorney General is paramount as the Attorney General may intervene and take over a private prosecution where in his or her opinion the interests of justice so require.

¹ *Gouriet v Union of Post Office Workers*, [1978] AC 435 at 477 (HL) [*Gouriet*]. For commentary on the inherent value of private prosecutions, see also Law Reform Commission of Canada, *Private Prosecutions* (Working Paper 52) (Ottawa: Law Reform Commission of Canada, 1986) at 28. Except where the Attorney General's consent is required, [s. 504](#) of the *Code* permits anyone to lay an information. The definitions of "prosecutor" in [ss. 2](#) and [785](#) make it clear that someone other than the Attorney General may institute proceedings. The 2002 addition to the *Code* of [s. 507.1](#) providing for a "pre-enquete" is the most explicit recognition of the ability of persons not involved in law enforcement to commence criminal proceedings.

² *Gouriet*, *supra* note 1 at 481; *Re Dowson and The Queen* (1981), 62 CCC (2d) 286 (Ont CA), approved unanimously by the Supreme Court of Canada: [1983] 2 SCR 144, (1983), 7 CCC (3d) 527 at 535-6.

This guideline explains when the Director of Public Prosecutions (DPP) should intervene either to stay a private prosecution or to take over conduct of such a prosecution.

2. AUTHORITY OF THE ATTORNEY GENERAL OF CANADA TO INTERVENE IN PRIVATE PROSECUTIONS

The DPP exercises the authority of the Attorney General of Canada respecting private prosecutions, including the authority to intervene and assume the conduct of – or direct the stay of – such prosecutions by virtue of [s. 3\(3\)\(f\)](#) of the *Director of Public Prosecutions Act*.³

The DPP has full authority to intervene, throughout the country, in private prosecutions of [Controlled Drugs and Substances Act](#) drug matters.⁴

[Section 2](#) of the *Criminal Code* (Code) provides that the Attorney General of Canada and the Attorneys General of the provinces share responsibility for conducting prosecutions.⁵ More particularly, provincial Attorneys General, and their lawful deputies have jurisdiction to prosecute [Criminal Code](#) offences in the provinces.⁶ The Attorney General of Canada is the Attorney General in respect of proceedings taken in the Yukon, the Northwest Territories and Nunavut. The Attorney General of Canada will also have authority to prosecute federally-enacted, non-*Criminal Code* offences in the provinces where the proceedings were commenced at the instance of the federal government.

Accordingly, the DPP has full authority to intervene in private prosecutions of *Criminal Code* offences brought in the Northwest Territories, the Yukon Territory, and Nunavut.

³ [Director of Public Prosecutions Act](#), SC 2006, c 9.

⁴ SC 1996, c 19. See definition of Attorney General in [s 2](#) of the *Controlled Drugs and Substances Act*.

⁵ [Section 2](#) of the *Criminal Code* assigns prosecutorial roles as follows:

“Attorney General”

with respect to proceedings to which this Act applies, means the Attorney General or Solicitor General of the province in which those proceedings are taken and includes his lawful deputy, and

with respect to

the Yukon Territory, the Northwest Territories and Nunavut, or

proceedings commenced at the instance of the Government of Canada and conducted by or on behalf of that Government in respect of a contravention of a conspiracy or attempt to contravene or counselling the contravention of any Act of Parliament other than this Act or any regulation made under any such Act, means the Attorney General of Canada and includes his lawful deputy.

⁶ See also *Constitution Act, 1867*, [s 92\(14\)](#) which assigns to provinces the following power: "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts."

Equally, the DPP has concurrent jurisdiction with provincial prosecuting authorities to prosecute the offences set out in [ss. 2\(b.1\) to \(g\)](#) of the Code:⁷

- extraterritorial offences in relation to cultural property (s. 2(b.1) and s. 7(2.01) of the Code;
- certain terrorism and national security offences as enumerated in s. 2(c) of the Code;
- frauds under [ss. 380, 382, 382.1](#) and [400](#) of the Code.

As already noted, the s. 2 definition limits the Attorney General of Canada's authority to prosecute offences under non-*Criminal Code* federal statutes to proceedings that are commenced at the instance of the federal government. This does not cover private prosecutions in the provinces because such proceedings are not "commenced at the instance of the Government of Canada". Nonetheless, the DPP has full authority to intervene in private prosecutions commenced under federal statutes other than the *Criminal Code* – either for the purpose of conducting or staying the proceedings – where the relevant provincial Attorney General has not intervened.⁸

3. THE PRE-ENQUETE – SECTION 507.1

[Section 507.1](#) governs pre-inquiry hearings in the case of private prosecutions.⁹ It requires that a justice receiving an information sworn by a private informant refer that information to a provincial court judge or, in Quebec, to a judge of the Court of Quebec or to a designated justice to consider whether to compel the appearance of the accused. The justice or judge conducts a pre-enquete to determine whether process should issue to compel the attendance of the person named in the information to answer to the charge, thus to determine whether a criminal prosecution will be commenced. These provisions were designed to provide a judicial screening process to avoid burdening the justice system with vexatious litigation, misuse of the criminal process in order to advance a civil dispute, and to protect innocent persons from the stigma of having to appear in court on such matters.¹⁰

⁷ [Sections 2\(b.1\) to \(g\)](#) of the Code provide concurrent jurisdiction for the Attorney General of Canada and the Attorneys or Solicitors General of the provinces to prosecute the offences set out in those sections.

⁸ *Criminal Code*, [s 579.1](#) was added in 1994 to give the Attorney General of Canada authority to intervene in private prosecutions commenced under federal statutes other than [Criminal Code](#), where the provincial Attorney General has not intervened.

⁹ By virtue of *Criminal Code*, [s 507.1 \(9\)](#), this process does not apply to [s 810](#) and [s 810.1](#) peace bonds.

¹⁰ [R v Friesen \(2008\), 229 CCC \(3d\) 97 \(Ont SC\)](#) at paras 9-11 [*Friesen*], cited in [Ambrosi v British Columbia \(Attorney General\), 2012 BCSC 1261](#) at paras 54-57 [*Ambrosi*].

This “pre-enquete” or process hearing¹¹ places the onus on the private informant to establish that a summons or warrant should issue to compel an accused to attend before the court to answer a criminal charge. The information must establish a *prima facie* case, requiring some evidence on all of the essential elements of the offence.¹²

The judge or designated justice may issue process compelling the appearance of the accused only after considering the allegations and evidence of the informant and being satisfied that the relevant Attorney General has received a copy of the information, has been given reasonable notice of the hearing and has had an opportunity to cross-examine, call witnesses and present evidence.

A criminal proceeding commences with the swearing of an information. A criminal prosecution commences with the issuance of process to compel the appearance of the accused. Crown counsel may intervene to take over the prosecution or withdraw a charge only *after* the court makes an order issuing process.¹³ Crown counsel may, however, enter a stay at any time after an information is sworn.

[Sections 507\(2\) to \(8\)](#) regarding compelling appearance in public prosecutions applies to the hearing under [s. 507.1](#). Unless expressly prohibited in a particular statute, the [Criminal Code](#) provisions permitting private prosecutions apply to other federal statutes.¹⁴ Thus, s. 507.1 applies to proceedings under the *Criminal Code* and all other federal acts.

If the pre-enquete justice does not issue process to compel the appearance of the accused, and the private prosecutor has not commenced proceedings to compel process within six months, the Information is deemed never to have been laid.¹⁵

4. CONDUCT OF THE PRE-ENQUETE

A [s. 507.1](#) hearing is to be held *ex parte* and Crown counsel should request that it be held in camera.¹⁶ Crown counsel may appear at the pre-enquete without being deemed to

¹¹ The [s 507.1](#) hearing may be referred to as a pre-enquete, a pre-inquiry, a referral hearing, or as a process hearing because it relates to the issuing of process.

¹² [Ambrosi](#), *supra* note 10 at 56.

¹³ [R v McHale 2010 ONCA 361](#) at paras 59-62 and 71-77.

¹⁴ [Lynk v Ratchford et al \(1995\), 142 NSR \(2d\) 399 \(CA\)](#), by virtue of [s 34\(2\)](#) of the *Interpretation Act*, RSC 1993 c I-21 provides:

All the provisions of the [Criminal Code](#) relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of that Code relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.

¹⁵ *Criminal Code*, [s 507.1\(5\)](#).

¹⁶ *R v Whitmore*, (1987), 41 CCC (3d) 555 (Ont H CJ) (aff’d 51 CCC (3d) 294 (Ont CA); [McHale](#), *supra* note 13 at para 48.

intervene in the proceeding.¹⁷ At the process hearing, Crown counsel, as an officer of the Court, are permitted (but not required) to assist the court in determining whether or not a case for issuing process is made out (i.e. whether there is a *prima facie* case) by cross-examining the informant or the informant's witnesses, calling witnesses, presenting any relevant evidence or making submissions.

Upon receiving notice of the pre-enquete, Crown counsel should contact the informant, ask for copies of the evidence in support of the charge(s) and attend the pre-enquete. At the same time, Crown counsel should contact the relevant investigative agency to ascertain whether or not they have been investigating the matter giving rise to the private prosecution. If it appears that Crown counsel's active participation at the pre-enquete, for example by cross-examining the informant's witnesses or by presenting evidence, will assist the presiding judicial officer in determining whether a *prima facie* case has been made out, Crown counsel should assume that role.

Even when a private investigation precedes a private prosecution, it may be difficult to assess whether there is sufficient evidence to justify continuing the proceedings. Thus, in most instances where no investigative agency investigation preceded the process hearing, Crown counsel may need to conduct follow-up steps after their initial charge assessment. If additional time is needed, Crown counsel may request an adjournment, and ask the appropriate investigative agency to review the evidence and to investigate further as needed. Crown counsel should request the views of the relevant investigative agency on the sufficiency of the evidence. It may be necessary to stay proceedings while the investigation is conducted. Once the investigation is complete, the assigned Crown counsel should assess whether to commence proceedings in accordance with the two-pronged test set out in the PPSC Deskbook guideline "[2.3 Decision to Prosecute](#)".

Where the pre-enquete has resulted in an issuance of process, Crown counsel should obtain a transcript of the process hearing.

5. THE DECISION WHETHER OR NOT TO INTERVENE IN A PROSECUTION

If process issues,¹⁸ Crown counsel assigned to review the case must assess (1) whether to assume conduct of the prosecution and terminate the proceedings by withdrawal or a stay; (2) whether to assume conduct of the prosecution and continue it or (3) whether to allow the private prosecution to run its course. In all cases, Crown counsel must consult with their Chief Federal Prosecutor (CFP) who, in cases of particular public interest or complexity, should confer with the Deputy Director of Public Prosecutions (Deputy DPP) before making a decision.

¹⁷ [Friesen](#), *supra* note 10 at para 11.

¹⁸ [R v McHale 2010 ONCA 361](#): A criminal proceeding commences with the swearing of an information. A criminal prosecution commences with the issuance of process to compel the appearance of the accused. The Attorney General may withdraw a charge only after process is issued but may issue a stay at any time after an information is sworn.

6. INTERVENTION IN A PRIVATE PROSECUTION IN ORDER TO STOP IT

Crown counsel shall apply the evidentiary standard and the public interest test that is applicable to all prosecutions as set out in the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”, namely, whether there is a reasonable likelihood of conviction and, if so, whether the prosecution best serves the public interest. A private prosecution should be taken over and stayed if, upon review of the evidence, either the evidential sufficiency test or the public interest test, as set out in the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)” is not met.

Where the evidentiary standard set out in the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)” is met, it nonetheless may be necessary to take over and stop the prosecution on behalf of the public where there is a particular “public interest” need to do so. Apart from the factors set out in the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”, examples of factors likely to damage the interests of justice that specifically may arise in the private prosecution context include cases where:

- the prosecution interferes with the investigation of another criminal offence;
- the prosecution interferes with the prosecution of another criminal charge;
- Crown counsel is satisfied that the private prosecution is vexatious or being undertaken on malicious grounds; and
- the prosecuting authorities have given the defendant a promise of immunity from prosecution.¹⁹ This does not include cases where the prosecuting authorities have merely informed the defendant that they will not be bringing or continuing proceedings.

Where Crown counsel decides that taking over a private prosecution in order to stop it is the appropriate course of action, unless there are exceptional circumstances, Crown counsel should write to the private prosecutor explaining the reasons for the decision.

7. INTERVENTION IN AND CONDUCT OF A PRIVATE PROSECUTION

If it is determined that the charge is well founded, Crown counsel must then decide whether to assume conduct of the prosecution. The issue must be decided on a case-by-case basis. Normally, there is nothing wrong in allowing a private prosecution to run its course through to a verdict. There is no requirement for the DPP to take charge of the prosecution.

The following considerations will help to inform Crown counsel’s decision whether or not to take charge of the prosecution:

¹⁹ See the PPSC Deskbook guideline “[3.3 Immunity Agreements](#)”.

1. the need to strike an appropriate balance between the right of the private citizen to initiate and conduct a prosecution as a safeguard in the justice system, and the responsibility of the Attorney General of Canada for the proper administration of justice;
2. the relative seriousness of the offence – generally, the more serious, the more likely it is that the DPP should intervene;
3. there are detailed or complex disclosure issues to resolve;
4. the prosecution requires the disclosure of highly sensitive material or the conduct of the prosecution involves applications for special measures or for witness anonymity;
5. there is a reasonable basis to believe that the private prosecutor lacks the capacity or the funding to effectively carry the case forward to its completion;
6. there is a reasonable basis to believe that the decision to prosecute was made for improper personal or oblique motives, or that it otherwise may constitute an abuse of the court's process such that, even if the prosecution were to proceed, it would not be appropriate to permit it to remain in the hands of a private prosecutor;
7. given the nature of the alleged offence or the issues to be determined at trial, it is in the interests of the proper administration of justice for the prosecution to remain in private hands.

If the reviewing Crown counsel recommends allowing the matter to proceed privately, he or she should advise the CFP in writing of the circumstances and, in cases of particular public interest or complexity, if the CFP agrees with the recommendation, the CFP must seek approval of the appropriate Deputy DPP. Similarly, Crown counsel must seek written approval of their CFP prior to intervening in a private prosecution to stop it or stay it.

Where new information or a change in circumstances comes to light that could reasonably impact the DPP's decision not to intervene in a private prosecution such that the DPP may want to take charge of and stop or conduct the prosecution, Crown counsel should be prepared to revisit the decision regarding intervention.

8. SCOPE OF PRIVATE PROSECUTOR'S AUTHORITY

In summary conviction proceedings, the private prosecutor controls the proceedings from start to finish unless the Attorney General intervenes. In indictable matters, a private prosecutor may conduct the preliminary inquiry and the trial. However, the private prosecutor requires a judge's written consent under [s. 574\(3\)](#) of the Code to prefer an indictment.

9. PROCEDURAL MATTERS

When drafting a written pleading in a private prosecution matter, Crown counsel should refer to the informant as “[Name of Informant] as Private Prosecutor”.

Challenges to the exercise of Crown discretion to take charge of or stay a private prosecution may be brought as a judicial review of DPP decision-making in the Federal Court. Such matters should be referred to the Department of Justice.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

5.10 PARENTAL CHILD ABDUCTION

**DIRECTIVE OF THE ATTORNEY GENERAL ISSUED
UNDER SECTION 10(2) OF THE *DIRECTOR OF PUBLIC
PROSECUTIONS ACT***

March 1, 2014

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1. INTRODUCTION

Parental child abduction occurs when one parent, without either legal authority or the permission of the other parent, takes a child from the parent who has lawful custody. There may be both international and domestic aspects to child abduction. Although children may not be in physical danger, their lives are nevertheless greatly disrupted. They are deprived by the abducting parent of security, stability and continuity in their lives. The purposes of [ss. 282 and 283\(1\)](#) of the *Criminal Code* are to prevent such outcomes and to encourage parents to settle child custody and access issues in court and to abide by any court orders that are made.¹

Section 282 of the *Criminal Code* prohibits parental child abductions in situations where there is a custody order made by a Canadian court. Section 283 applies to situations where parents continue to have joint custody of their child by operation of law, where there is a written agreement, where there is a foreign custody order, or where the abducting parent did not believe or know there was a valid custody order.

The Ontario Court of Appeal in [R v McDougall \(1990\) 62 CCC \(3d\) 174](#) at 189 cautioned that:

The offence created by s. 282 is a grave one and is intended to strike at conduct in the nature of child abduction. Care must be taken before a prosecution is launched under s. 282 to ensure that the events complained of truly amount

¹ Only the PPSC's Northern offices handle parental child abduction prosecutions under [ss 282 and 283](#) of the *Criminal Code*.

to criminal conduct. This care is evidenced by the requirement in [s. 283](#) (a companion section to [s. 282](#)) that the Attorney General or counsel instructed by him consent to proceedings under that section. It is very common in custody and access disputes that each parent feels terribly wronged and makes the most serious allegation against the other Criminal prosecutions cannot become a weapon in the arsenal of parties to acrimonious family disputes.

In October of 1998, the Federal/Provincial/Territorial Ministers responsible for Justice adopted model charging guidelines for use by police and Crown counsel to assist in the uniform application of the [Criminal Code](#) provisions and in particular in deciding when and how charges may be laid. The guidelines remain advisory only, since the decision on charging rests with investigative agencies and ultimately with Crown counsel. This directive reflects the principles set out in the model guidelines.

2. STATEMENT OF POLICY

The [Criminal Code](#) provisions send a clear message that unilateral actions by one parent that affect lawful care and control rights of the other parent respecting the child will not be tolerated. Such actions have a detrimental effect on the well-being of the children involved. Parents are to be discouraged from using “self-help” remedies to deal with custody disputes. Parents are to be encouraged to comply with existing orders or agreements and to resolve disputes with the other parent through civil processes.

Not all cases of parental child abduction will warrant criminal charges. As with any decision to prosecute, in addition to assessing the reasonable prospect of conviction, Crown counsel must consider whether a prosecution best serves the public interest.² Civil enforcement is another route that can be used as an alternative to the criminal response when criminal charges are not appropriate.

The federal [Family Orders and Agreements Enforcement Assistance Act](#) establishes procedures to ascertain the addresses of parents and children residing in Canada from federal information banks to facilitate the enforcement of custody orders.

The [Hague Convention on the Civil Aspects of International Child Abduction](#) (the *Hague Convention*), which has been adopted by all Canadian jurisdictions, is the main international treaty that can assist parents whose children have been abducted to another country.

[Article 3](#) of the *Hague Convention* states in part:

The removal or the retention of a child is to be considered wrongful where:

1. it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the

² See the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”.

child was habitually resident immediately before the removal or retention;
and

2. at the time of removal or retention, those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

[Article 5](#) of the *Hague Convention* states in part:

For the purposes of this Convention

- a. “rights of custody” shall include rights relating to the care of the child and, in particular, the right to determine the child's place of residence;

In addition, each jurisdiction should ensure the police, Crown counsel and others dealing with [s. 282](#) and [s. 283](#) of the *Criminal Code* are provided with information on the role of, and how to contact, the Central Authority for the Hague Convention in their jurisdiction.³ There may be civil proceedings for the return of the child underway or available under the Hague Convention. Crown counsel should consult with the Central Authority in their province/territory as international cooperation may be facilitated by understanding the relationship between civil and criminal actions.

3. WHERE CHARGES WARRANTED

Given the significance of charging a parent with abducting his or her child, Crown counsel must consult with their Chief Federal Prosecutor before proceeding. Additionally, consent of the Attorney General is a statutory prerequisite to commencing a prosecution under [s. 283\(1\)](#). This consent power may be exercised by the Director of Public Prosecutions (DPP) and a Deputy DPP⁴ as lawful deputies of the Attorney General.

The offence under [s. 282](#) and [s. 283](#) apply only where children under the age of 14 are involved.

3.1. Abduction in contravention of a custody order (s. 282 of the *Criminal Code*)

Charges under [s. 282\(1\)](#) of the *Criminal Code* may be warranted where:

1. A child under the age of 14 is involved; and
2. There is a court order establishing “custody rights” granted in Canada which is not being complied with.

³ The current contact information for the federal government Central Authority, as well as the provincial and territorial Central Authorities, can be found on the [Hague Conference on Private International Law website](#).

⁴ See Annex B of the PPSC Deskbook guideline “[3.5 Delegated Decision-Making](#)” which specifies that these decisions regarding consent can be made by the DPP or a Deputy DPP.

To establish an offence under [s. 282](#), the evidence must demonstrate that:

- a) the alleged abductor
 - i. is a parent, guardian (as defined in [s. 280\(2\)](#)) or other person having the lawful right to care for or charge of a child;
 - ii. takes, entices away, conceals, detains, receives or harbours the child;
 - iii. is in contravention of the custody provisions of a Canadian custody order; and
 - iv. intended to deprive the parent, guardian or person having lawful care or charge of the child of possession of the child contrary to a court order.
- b) The parent, guardian or other person whom the alleged abductor intended to deprive of possession of the child did not consent to the taking, of the child by the alleged abductor (see [s. 284](#)); and
- c) There is no reason to believe that the alleged abductor did not know of the existence or terms of the custody order.

In considering whether charges are warranted, Crown counsel must keep the following in mind:

- 1) Persons can have different types of “custody rights” under custody orders. For example, an order may grant a person sole custody, joint custody, periods of care and control (with custody remaining joint between the parents by virtue of provincial legislation) or guardianship. These are all types of “custody rights.”
- 2) There may be no reasonable prospect of conviction: (a) where the order is not clear on its face as to the terms of custody allegedly breached and the available evidence does not clarify the nature of the breach; or (b) where there are competing interim or final orders issued by different courts dealing with the custody of a child, which are both valid on their face.
- 3) It is not necessary to register an order of custody granted in one province before criminal charges can be laid in another. The investigating agency must be advised to ascertain whether the custody order relied upon is the most current order and is still in effect. The agency must obtain a copy of the order. This can be done by asking the complainant, calling the registrar/court staff where the order was issued, or otherwise.

3.2. Abduction in absence of a Canadian custody order (s. 283 of the *Criminal Code*)

No proceedings may be commenced under [s. 283\(1\)](#) of the *Criminal Code* without the consent of the Attorney General or counsel instructed by him or her for that purpose is obtained. Under the [Director of Public Prosecutions Act](#), the DPP and Deputy DPP’s are

lawful deputies and may consent on behalf of the Attorney General.⁵ The fact that consent has been given may be added to Informations under [s. 283\(1\)](#), as follows: “The Consent of the Director of Public Prosecutions and Deputy Attorney General of Canada (or Deputy Director of Public Prosecutions) has been obtained to lay this charge.”

Charges under [s. 283\(1\)](#) may be warranted where:

1. A child under 14 is involved; and
2. One of the following scenarios exists:
 - a) A Canadian custody order exists but the alleged abductor was unaware or did not believe that there was a valid order (see [s. 282\(2\)](#));
 - b) No Canadian custody order exists, but parental rights of custody under statute or common law exist (e.g. provincial family law legislation may indicate that parents have joint custody of their children unless the court orders otherwise);
 - c) No Canadian custody order exists, but custody rights under a separation agreement or a foreign order have been violated. Where the rights of the access parent are not so extensive, resort should be made to civil remedies;
 - d) There has been a permanent or indefinite denial of a right or access pursuant to an agreement that provides the access parent with a significant degree of care and control over a child with or without a provision permitting the child’s removal from the jurisdiction. Where the rights of the access parent are not so extensive, resort should be made to civil remedies; or
 - e) There has been a permanent or indefinite denial of right of access pursuant to a court order, which provides the access parent with a significant degree of care and control over a child. Where the rights of the access parent are not so extensive, resort should be made to civil remedies, which exist in the jurisdiction.

To establish an offence under [s. 283](#), the evidence must demonstrate that:

1. The alleged abductor
 - a. is a parent, guardian (as defined in [s. 280\(2\)](#)) or other person having the lawful right to care for or charge of a child;
 - b. takes, entices away, conceals, detains, receives or harbours the child;
 - c. intended to deprive the parent, guardian or person having lawful care or charge of the child of possession of the child; and
 - d. the parent, guardian or other person whom the alleged abductor intended to deprive of possession of the child did not consent to the taking of the child by the alleged abductor (see [s. 284](#) below).

⁵ *Ibid.*

4. THE PUBLIC INTEREST

On charge assessment for alleged offences under [s. 282\(1\)](#) or [s. 283\(1\)](#), the factors to be considered in deciding whether a prosecution best serves the public interest are described in the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”, but also include the following factors that are specific to this type of a prosecution.

4.1. Factors or circumstances favouring prosecution

1. A child has been taken from a situation where there has been some degree of permanency, contrary to a settled (written or otherwise) or ongoing arrangement.
2. Custody proceedings have been initiated or are anticipated, and the alleged abductor, in taking the child, is frustrating the proceedings. This may include, but is not restricted to, situations in which the court has stated that, pending a determination, the child is not to be removed from the jurisdiction.
3. There are reasonable grounds to believe that one parent has a foreign custody order and the alleged abductor is in breach of that order.
4. The child has been taken by the alleged abductor contrary to existing custody rights and a criminal charge is necessary to ensure protection of the child.
5. The alleged abductor takes the child surreptitiously and disappears with the child.
6. The alleged abductor takes the child where there is a provision in an order or agreement restricting the ability of a parent to remove the child from the jurisdiction.
7. The alleged abductor takes the child and in so doing has permanently or indefinitely frustrated the other parent’s rights, where such rights by their nature involve a significant degree of care and control over the child.
8. The offending party has previously breached [ss. 282\(1\) or 283\(1\)](#).
9. There are reasonable grounds to believe that the offending party is incapable of looking after the child (e.g. due to substance abuse or diminished capacity).

4.2. Factors or circumstances weighing against prosecution

1. A less onerous civil remedy is available and would be more appropriate in the circumstances.
2. The offending parent is merely late in returning a child from an access visit.
3. Although technically possible, a charge would not likely be laid in circumstances in which one party moves out of the home with the child while in the course of separating from the other party, if it appears that the parties are attempting to resolve custody either through the courts or by agreement.

5. DEFENCES

1. It is a defence if the alleged abductor establishes that the taking of the child was done with the consent of the parent, guardian or other person having the lawful possession, care or charge of the child ([s. 284](#)). However, the alleged abductor's consent is not sufficient for this defence.
2. It is a defence:
 - a. if the child was taken to protect the child from danger of imminent harm; or
 - b. if the alleged abductor was fleeing from imminent harm and taking the child as well. For example, protecting a child from child abuse would be a defence as would a parent escaping from a situation of spousal assault and removing the child at the same time ([s. 285](#)).
3. It is not a defence to any charge under [ss. 282 and 283](#) that the young person consented to or suggested any conduct of the accused ([s. 286](#)).



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

5.11 THE APPROACH TO THE PROSECUTION OF CERTAIN OFFENCES COMMITTED PRIOR TO THE COMING INTO FORCE OF THE *CANNABIS ACT*

GUIDELINE OF THE DIRECTOR UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

August 12, 2019

With the passage of Bill C-93, the *Criminal Records Act* streamlined the process for obtaining a pardon for *CDSA* simple possession charges, including the requirement that a sentence be expired according to the law before a pardon application can be made. The bill, as amended, received Royal Assent on June 21, 2019 and came into force by order of the Governor in Council on August 1, 2019. As of August 12, 2019, Chapter 5.11 of the Deskbook has been revoked and replaced with a new policy. A copy of the policy is available upon request.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

5.12 Prosecutions involving Non-Disclosure of HIV Status

**DIRECTIVE OF THE ATTORNEY GENERAL
ISSUED UNDER SECTION 10(2) OF THE
*DIRECTOR OF PUBLIC PROSECUTIONS ACT***

December 8, 2018

Directive

Whereas HIV is first and foremost a public health issue, and public health authorities' efforts to detect and treat HIV have resulted in significantly improved health outcomes for those living with HIV in Canada, as well as prevention of its onward transmission;

Whereas the Supreme Court of Canada has stated that the criminal law has a role to play in cases involving sexual activity and non-disclosure of HIV where public health interventions have failed and the sexual activity at issue poses a risk of serious harm;

Whereas persons from marginalized backgrounds such as, for example, Indigenous, gay and Black persons, are more likely than others to be living with HIV in Canada such that criminal laws that apply to HIV non-disclosure are likely to disproportionately impact these groups;

Whereas the criminal law applies to persons living with HIV if they are aware of their HIV positive status and that they are infectious, and they fail to disclose, or misrepresent, their HIV status prior to sexual activity that poses a realistic possibility of transmission of HIV;

Whereas the Supreme Court of Canada has clarified that the issue of whether sexual activity poses a realistic possibility of transmission is to be determined on the basis of the most recent medical science on HIV transmission;

Whereas the most recent medical science shows that the risk of HIV transmission through sexual activity is significantly reduced where: the person living with HIV is on treatment; condoms are used; only oral sex is engaged in; the sexual activity is limited to an isolated act; or, the person exposed to HIV, for example as a result of a broken condom, receives post-exposure prophylaxis;

Whereas it is not in the public interest to pursue HIV non-disclosure prosecutions for conduct that medical science shows does not pose a risk of serious harm to others;

Whereas the research, medical science and analysis presented in Justice Canada's 2017 Report on the Criminal Justice System's Response to HIV Non-Disclosure, as well as any future developments in the relevant medical science, should be considered before pursuing a criminal prosecution in HIV non-disclosure cases;

Whereas I have consulted with the Director of Public Prosecutions under subsection 10(2) of the *Director of Public Prosecutions Act*;

1. I direct the Director of Public Prosecutions as follows:
 - (a) The Director shall not prosecute HIV non-disclosure cases where the person living with HIV has maintained a suppressed viral load, i.e., under 200 copies per ml of blood, because there is no realistic possibility of transmission.
 - (b) The Director shall generally not prosecute HIV non-disclosure cases where the person has not maintained a suppressed viral load but used condoms or engaged only in oral sex

or was taking treatment as prescribed, unless other risk factors are present, because there is likely no realistic possibility of transmission.

- (c) The Director shall prosecute HIV non-disclosure cases using non-sexual offences, instead of sexual offences, where non-sexual offences more appropriately reflect the wrongdoing committed, such as cases involving lower levels of blameworthiness.
- (d) The Director shall consider whether public health authorities have provided services to a person living with HIV who has not disclosed their HIV status prior to sexual activity when determining whether it is in the public interest to pursue a prosecution against that person.

The Honourable Jody Wilson-Raybould
Attorney General of Canada



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

5.13 PROSECUTION OF POSSESSION OF CONTROLLED SUBSTANCES CONTRARY TO S. 4(1) OF THE *CONTROLLED DRUGS AND SUBSTANCES ACT*

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(C) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

August 17, 2020

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1. PURPOSE

The following provides guidelines to prosecutors in determining the appropriate approach to the prosecution of the possession of a controlled substance contrary to s. 4(1) of the *Controlled Drugs and Substances Act* (the “CDSA”).

2. CONTEXT

The purpose of the guideline is to articulate a principled prosecutorial litigation approach to the well-documented realities about the health impact of substance use while acknowledging that certain drug use may present particular public safety concerns, particularly when associated with other criminal conduct. The prosecution directives contained in the PPSC Deskbook already take into account health and public safety concerns in the assessment of the public interest in initiation, continuation and disposition of all charges, including simple possession under section 4(1) of the CDSA.

The approach set out in this guideline directs prosecutors to focus upon the most serious cases raising public safety concerns for prosecution and to otherwise pursue suitable alternative measures and diversion from the criminal justice system for simple possession cases.

The approach reflects the multiple tools Parliament has created, and prosecutorial policies incorporated over time. These include Drug Treatment Courts, alternative measures as well as judicial referral hearings.

It also reflects three realities: (i) substance use has a significant health component; (ii) in addition to the personal health component, substance use may be associated with conduct that poses separate serious public safety concerns requiring a criminal enforcement component; and, (iii) simple possession may result in a criminal record as well as a fine or a short period of incarceration. Criminal sanctions, as a primary response, have a limited effectiveness as (i) specific or general deterrents and (ii) as a means of addressing the public safety concerns when considering the harmful effects of criminal records and short periods of incarceration.

When public safety concerns arise from the substance use, it is often associated with other criminality, such as weapons possession and the threat of or commission of violent crime. Consideration must be given as to whether the public safety concerns associated with the substance use are more readily addressed through the prosecution of the other criminal activity.

3. APPLICABLE PRINCIPLES

PPSC prosecutors will be guided by the following principles:

1. Resort to a criminal prosecution of the possession of a controlled substance contrary to s. 4(1) CDSA should generally be reserved for the most serious manifestations of the offence (described in paragraph 3 below).
2. In all instances, alternatives to prosecution should be considered unless they are inadequate to address the concerns related to the conduct, including in the following circumstances:
 - a) The possession relates to a substance use disorder. In particular, alternatives to prosecution should be pursued where the offender is enrolled in a drug treatment court program or a course of treatment provided under the supervision of a health professional, including those involving Indigenous culture-based programming, peer counselling, and abstinence-based recovery centres;
 - b) The offender's conduct arises from a violation of a bail condition and can be addressed adequately through a judicial referral hearing;
 - c) The offender's conduct can be adequately addressed through an approved alternative measure or a measure that is consistent with the principles contained in [Chapter 3.8](#) of the PPSC Deskbook governing alternative measures;
 - d) The offender is an Indigenous person and their conduct can be addressed through an Indigenous restorative justice response; or
 - e) The offender's conduct can be addressed through a restorative justice response.
3. The following areas of concern will generally be considered to be the most serious manifestations of the harms justifying a criminal prosecution response:
 - a) Conduct that poses a risk to the safety or well-being of children or young persons, including simple possession:
 - i. committed in the vicinity of places frequented by children or young persons;
 - ii. committed by a person who is in a position of trust or statutory authority in respect of children or young persons;
 - b) Conduct that puts at risk the health or safety of others, including simple possession associated with impairment from substance use while preparing to drive, being responsible for supervision of a person driving, or driving a motor vehicle, operating machinery, possession of a weapon, or performing an activity posing a risk to public health or safety;
 - c) Conduct that poses a heightened risk to a community's efforts to address consumption of controlled substances in accordance with its own community approaches. This concern is often present in relation to isolated or remote communities;

- d) Conduct where there is a factually grounded basis to associate it with another offence contrary to the CDSA, including cultivation, production, harvesting, trafficking or possession for the purpose of trafficking, obtaining a prescription substance for the purpose of trafficking or the use of others, or importation of a controlled substance (for commercial gain) or another *Criminal Code* offence;
- e) Conduct in breach of the rules of a regulated setting such as a custodial facility, jail or penitentiary;
- f) Conduct committed by a peace officer or public officer, where it is relevant to the discharge of their duties.

4. CONCLUSION

Some regional flexibility will be permitted to reflect the different severities of the underlying situation being addressed, availability of health-based responses and the state of the consultative process with partners. Chief Federal Prosecutors (CFPs), Deputy Chief Federal Prosecutors (DCFPs) and General Counsel, Legal Operations (GCLOs) should undertake discussions with the police, provincial prosecution services and health care providers in order to assist with the establishment of the specific regional practices.¹ Chief Federal Prosecutors (CFPs) must consult with Deputy Directors in respect of any flexibility required to implement this guideline following those consultations.

¹The agreements and arrangements with provincial prosecution services entered into pursuant to subsection 3(7) of the *Director of Public Prosecutions Act* (referred to as “major-minor agreements”) should be addressed to ensure that all prosecutions of s. 4(1) CDSA offences that are delegated are prosecuted in accordance with this guideline.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

6.1 DRUG TREATMENT COURTS

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

Revised January 2, 2024

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1. OVERVIEW

Drug Treatment Court (DTC) is a judicially supervised treatment program that enables persons suffering from a substance use disorder to meaningfully address their substance use. The treatment program is a non-adversarial environment supported by a multidisciplinary team that includes judges, prosecutors, defence counsel, law enforcement, social service agencies, and health service professionals.

The objective of a DTC program is to reduce the likelihood that its participants will commit a criminal offence that is related to their substance use disorders, thereby breaking the cycle of recidivism.

Crown counsel exercise an important gatekeeping role when determining if an individual is eligible to participate in a DTC program. In addition to eligibility, Crown counsel make recommendations on the approach to adopt with each participant, depending on what stage of the proceedings the participant engages in DTC. A person can apply to DTC at any point in their criminal proceedings.

2. DRUG TREATMENT COURT (DTC) PROGRAMS

2.1 Nature of DTC Programs

DTC programs across the country vary in structure and design in accordance with the needs of the communities they serve and available resources. The components of individual DTC programs may be different from one jurisdiction to another. There is no program that will fit in all instances. Each region, in collaboration with all DTC partners, will determine the ultimate design of their respective DTC programs.

Despite these variations, DTC programs generally share the following characteristics:

- Considered and individualized screening for eligibility based on an assessment of the relationship between the participant's criminal conduct and the substance use disorder. The screening also takes other factors into account. This includes the participant's willingness and ability to undertake activities to address their substance use disorder and reduce recidivism.
- Courts remaining seized of the participant's criminal charges for a period of time sufficient for the provision of treatment.
- Multidisciplinary community assistance with the provision of health treatment and social services.
- Appropriate response measures that are individualized to each participant. These response measures encourage progress and respond to setbacks. Intentional breaches may result in a removal from the DTC program.

2.2 Approaches to Treatment

The PPSC supports an approach to DTC programs that recognizes abstinence from consumption of drugs as the optimal goal. However, abstinence is not always a realistic goal for some participants and may not be achievable by an individual participant within the cycle of a prosecution. The key measure is an individual participant's ability to address the factors underlying their substance use to break the cycle of criminality and to develop positive behaviours towards themselves and other members of the community.

2.3 Core Principles

Before a person charged with a criminal offence is considered for a DTC program, Crown counsel must ensure that:

- The decision to prosecute test is met;¹
- The accused has received sufficient disclosure unless there is a clear and informed waiver;
- The charges are within the jurisdiction of the Attorney General of Canada.

The Canadian Association of Drug Treatment Court Professionals has adopted a list of guiding principles that are nationally recognized. They include:

1. Drug Treatment Courts integrate addiction treatment services with justice system case processing.
2. Using a non-adversarial approach, prosecution and defence counsel promote public safety while protecting participants' *Charter* rights.
3. Eligible participants are identified early and placed in the Drug Treatment Court program as promptly as possible.
4. Drug Treatment Courts provide access to a continuum of drug, alcohol and other related treatments and rehabilitative services.
5. Compliance is objectively monitored by frequent substance testing.
6. A coordinated strategy governs Drug Treatment Court response to participants' compliance and non-compliance.
7. Swift, certain, and consistent sanctions or rewards for non-compliance or compliance.
8. Ongoing judicial interaction with each Drug Treatment Court participant is essential.
9. Monitoring and evaluation processes measure the achievement of program goals and gauge effectiveness.
10. Continuing interdisciplinary education promotes effective Drug Treatment Court planning, implementation, and operations.
11. Forging partnerships among courts, treatment and rehabilitation programs, public agencies and community-based organizations generates local support and enhances program effectiveness.
12. Ongoing case management providing the social support necessary to achieve social reintegration.
13. Appropriate flexibility in adjusting program content, including incentives and sanctions, to better achieve program results with particular groups such as women, Indigenous people and minority ethnic groups.²

¹ See Deskbook Guideline 2.3 "[Decision to prosecute](#)".

² Canadian Association of Drug Treatment Court Professionals, online: < <https://cadtc.org/dtc-program-title/> >.

These principles highlight the different roles that Crown counsel may play when involved in a file that is admitted to a DTC program.

2.4 Approval of a DTC program

DTCs do not require a formal designation to operate as a DTC. Pursuant to s. 10(4)(a) of the *Controlled Drugs and Substances Act* (CDSA), a DTC program must be approved by the Attorney General of Canada. Approval requires compliance with the principles mentioned below. This approval can be provided by the Chief Federal Prosecutor (CFP) in the appropriate province, territory or region when the CFP is satisfied that the DTC program complies with the relevant principles and signs the form at Annex A.

3. ELIGIBILITY CRITERIA FOR DTC PROGRAMS

3.1 General Principles

An application to a DTC program should only be considered in light of convincing evidence of the applicant's willingness and ability to commit to treatment. The treatment must be tailored to the individual participant, their criminal conduct, and the potential to reduce the risk of recidivism.

3.2 Specific Considerations

The interdisciplinary teams within a DTC program include PPSC prosecutors. PPSC prosecutors play an important role in recommending admission to a DTC program in a team environment. The factors that Crown counsel must consider in determining eligibility include, but are not limited to, the following:

- Whether the offence involves violence or raises issues of public safety;³
- Whether the offence involves drug-impaired driving;
- The participant's criminal record, including whether there is a recent or significant history of violence. If the participant used, or threatened to use, a weapon during the commission of an offence, this would be considered a crime involving violence;
- The offence involves conduct that poses a heightened risk to a community's efforts to address substance use disorders. This concern is often present in relation to smaller, isolated or remote localities and First Nations, Métis and Inuit communities.

These factors, which are meant to protect against risks to public safety, must not be used as barriers to limit the participation in a DTC program by Indigenous persons or members of racialized or marginalized groups who are overrepresented in the criminal justice system. Consideration must also be given to background and systemic factors,⁴ and the

³ A violent offence includes serious drug offences such as high-level commercial trafficking, exporting/importing and production. See, for example, *R v Hamilton*, 2004 CanLII 5549 (ONCA).

⁴ See AG Directive 3.8 "[Alternative Measures](#)" for a list of relevant background systemic factors of the accused.

personal circumstances of an applicant to determine if public safety risks can be mitigated to ensure fair and equal accessibility for all to DTC.

Crown counsel must also consider the region in which the DTC program operates. For example, a metropolitan setting may have medical and social services that are more elaborate and standardized versus those in a smaller population center.

PPSC prosecutors must seek the approval of their Chief Federal Prosecutor or Deputy Chief Federal Prosecutor to admit an accused into a DTC program where the alleged offence involves serious acts of violence. This includes offences where it is alleged that a weapon was used or intimate partner violence occurred. Prior consultation must also occur with the DTC program team members and the relevant law enforcement agencies.

3.3 CDSA Offences

For CDSA offences, an applicant will generally be ineligible for admission into DTC if:

- there is no evidence that the applicant suffers from a substance use disorder;
- the person has been charged with having a significant role in organized trafficking for commercial gain;
- the drug offence involved risk to a young person;
- the offence involves conduct in breach of the rules of a regulated setting such as a custodial facility, jail or penitentiary;
- the offence involves criminal conduct by peace officers or public officers related to the discharge of their duties, such as corruption or breach of trust; or
- the person is an associate or member of a criminal organization.

3.4 Readmission to a DTC Program

Readmission into a DTC program will generally be encouraged for any applicant who has previously graduated from a DTC program and suffered a relapse that resulted in new charges. Readmission will be encouraged if the eligibility criteria are met and there are no concerns about public safety. Persons who have previously participated in a DTC program and were expelled within the previous year are generally eligible for readmission upon demonstrating to the satisfaction of the DTC program team that they should be given another opportunity.

4. AVAILABLE DISPOSITIONS

4.1 Guilty Plea

An expression of responsibility, such as the willingness to plead guilty to one or more outstanding charges, will be an important element of the assessment of whether an accused should be admitted in a DTC program. Sections 10(4) and 10(5) of the CDSA allow a court

to delay sentencing if an offender is participating in a DTC program approved by the Attorney General or attends a treatment program approved by the province.⁵

4.2 Alternative Measures

In some cases, an accused may be eligible to participate in a DTC program without the requirement of a guilty plea to one or multiple charges. As provided by s. 717(1)(e) of the *Criminal Code*, a candidate seeking to participate in a DTC program as an alternative measure must accept responsibility for the commission of the actions that form the basis for the offence(s).

A candidate will be ineligible if they deny participation or involvement in the commission of the outstanding offence(s) or express a desire to have the charge(s) dealt with by the court in the traditional sense.⁶

The general principles and criteria outlined in AG Directive 3.8 “[Alternative Measures](#)” of the PPSC Deskbook apply where a DTC program operates as an alternative measure to prosecution. Instead of a conviction, graduates of a DTC program will have outstanding charges withdrawn or stayed.

All participants in a DTC program who do not plead guilty to outstanding charges will be required to waive any period of delay arising from their participation in it. Failure to complete the DTC program should result in the continued prosecution of charges.⁷ If a participant in a DTC program is charged with a new offence, PPSC prosecutors may consider measures such as reinstituting the original charges, removal from DTC, or having the participant continue in DTC if the new charges also relate to a substance use disorder. In the latter case, the circumstances of the new charge(s) must satisfy all preconditions for continued participation in DTC.

4.3 Post-Trial Dispositions

An individual suffering from a substance use disorder found guilty after trial may still be considered for entry into a DTC program provided that they meet all eligibility criteria and are prepared to waive all delay incurred from their participation in a DTC program.

5. SUCCESSFUL COMPLETION OF A DTC PROGRAM

The standard for the successful completion of a DTC program is to be determined by the DTC team. This standard must be individualized to the individual participant and be consistent with the requirements and objectives of the program.

⁵ *Controlled Drugs and Substances Act*, SC 1996, c 19, s 10(2), 10(4), and 10(5). The sentencing is delayed while the offender is under the supervision of the court as outlined in s 720(2) of the *Criminal Code*.

⁶ See s 717(2) of the *Criminal Code*.

⁷ A prosecution will resume where Crown counsel is satisfied that there is public interest in its continuation and there remains a reasonable prospect of conviction.

Some suggested criteria include:

- A realization of positive outcomes including management of, and insight into, an individual's substance use disorder.
- A substantial period of time having passed without further criminal convictions.
- Social stability indicators such as having obtained stable housing, ongoing attendance at community support programs, being employed, attending school, or participating in significant volunteer work.

Persons who satisfy a DTC program's successful completion criteria will graduate from the program and be eligible for special considerations regarding the outcome of their charges. This may include withdrawing or staying charges for persons who have not yet entered a plea, or to a reduced sentence for persons who have entered a plea. The range of sentences for the most serious offenders in a DTC program may include a suspended sentence along with a period of probation.

In any case, the DTC is not required to impose the mandatory minimum penalty (MMP) for the offence. In some situations, it may even be appropriate to allow a participant to strike their guilty plea and for PPSC prosecutors to seek a stay of proceedings or withdraw charges. This should only happen where a participant has gone above and beyond the satisfaction of all program requirements.

PPSC prosecutors may, where appropriate, consult with the DTC program team as part of the Crown's determination of its position on the sentence upon graduation.

APPENDIX A - ATTORNEY GENERAL'S APPROVAL

Section 10 of the *Controlled Drugs and Substances Act* provides, in part, as follows:

10(4) A court sentencing a person who is convicted of an offence under this Part may delay sentencing to enable the offender:

- a. to participate in a drug treatment court program approved by the Attorney General;
- b. to attend a treatment program under subsection 720(2) of the *Criminal Code*.

10(5) If the offender successfully completes a program under subsection (4), the court is not required to impose the minimum punishment for the offence for which the person was convicted.

I hereby approve the (name of the program) as a drug treatment court program approved by the Attorney General of Canada pursuant to paragraph 10(4)(a) of the *Controlled Drugs and Substances Act*. This approval is provided further to powers, duties, and functions that the Attorney General of Canada assigned to the Director of Public Prosecutions on February 18, 2019 (Assignment 5) and that the Director delegated to Chief Federal Prosecutors in the Guideline "Drug Treatment Courts".

Dated at the City of _____, _____, this ____ day of _____, 20____.

Chief Federal Prosecutor for the Region of _____



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

6.2 MANDATORY MINIMUM PENALTIES FOR CERTAIN DRUG OFFENCES UNDER THE *CONTROLLED DRUGS AND SUBSTANCES ACT*

**GUIDELINE OF THE DIRECTOR ISSUED UNDER
SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC
PROSECUTIONS ACT***

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1. PURPOSE

The purpose of this guideline is to provide direction to Crown counsel regarding the 2012 amendments to the *Controlled Drugs and Substances Act* (CDSA) that add mandatory minimum penalties (MMPs) for particular drug offences in certain circumstances.¹ The amendments are contained in the *Safe Streets and Communities Act* (Act). These amendments apply only to offences committed after the coming into force of this legislation.

2. IMPACT ON PROSECUTIONS

As noted below, there is a requirement that the Crown provide notice of the intention to seek the MMP and the intention to prove the aggravating factors. There is no time limit provided for the giving of notice, except that it be before the accused enters a plea; therefore it is recommended that Crown counsel review their files early-on in order to ensure that notice has been provided to the accused, and if not, provide one as soon as possible. Each regional office should coordinate with their local police forces the specific procedure to be followed for providing this notice to the accused, including the possibility of the police providing this notice as a matter of course at the time of arrest.

With the implementation of this MMP regime, Crown counsel may be under increased pressure from defence counsel to negotiate a plea agreement that would not require that an MMP be imposed in a particular prosecution. The guiding principle for Crown counsel during plea negotiations is not to undermine the MMP regime during the process. Crown counsel are reminded that they are obliged to present all available provable facts to the court, in a firm but fair manner,

¹ *Safe Streets and Communities Act*, SC 2012, c 1.

in order to ensure the integrity of the prosecution throughout the litigation process.² Crown counsel must also conduct plea and sentence negotiations in a manner consistent with the policies set out in the *PPSC Deskbook*. In particular, the Deskbook states that an agreement to withhold from the court facts that are provable and relevant, and that aggravate the offence is not acceptable.³

In keeping with the will of Parliament, it will generally be inappropriate to take a plea to a lesser offence, or to stay or withdraw a charge, when it is done with the intent of avoiding the imposition of an MMP where the evidence supports the original charge. In situations where the facts supporting the MMP are present and provable, counsel should generally prosecute that offence and the court will impose the MMP. Also, where there are two possible charges in a prosecution and one has an MMP and one does not, or both have an MMP but one is higher than the other, the one with the MMP or the one with the higher MMP should proceed.⁴ In cases where there are two charges, both of which are punishable by MMPs, counsel should not take a plea to one MMP charge, and stay the other charge, if the sentence for the remaining MMP charge is less than the sentence that would have been imposed following conviction on both charges.⁵

2.1. Stay, withdrawal or accepting plea to lesser offence

If counsel wishes to stay or withdraw a charge with an MMP, or to take a plea to a lesser offence, the prior consent of the Chief Federal Prosecutor (CFP) or his/her delegate is required. Counsel must provide the CFP with a written memorandum setting out the basis for the stay, withdrawal or plea and explaining why the proposed course of action is in the public interest. If the reason for the stay, withdrawal or plea to a lesser offence is due to the evidentiary threshold for prosecution not being met (i.e. no reasonable prospect of conviction), consent is not required.

2.2. Non-reliance upon notice

In situations in which Crown counsel intends to proceed with the prosecution of an offence with an MMP but considers that the imposition of an MMP would likely result in an unduly harsh consequence under the circumstances of a particular case, counsel may exercise discretion not to rely on the notice of intention to seek the MMP. For example, Crown counsel might consider exercising their discretion in proving the notice of intent in situations where the imposition of an MMP would be an unduly harsh consequence for someone who has special needs, such as a

² See *Boucher v The Queen*, [1955] SCR 16 at 23-24 : “It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly.”

³ See the *PPSC Deskbook* guideline “[3.7 Resolution Discussions](#)” at para 3.5 c).

⁴ Examples include: (A) Accused charged with ss 7(1) and 5(2) for a 300 plant grow operation, no criminal record, and plants grown in his or her own home. Section 7(1) has an MMP of 12 months and the s 5(2) has no MMP. Crown counsel shall not withdraw or stay the s 7(1) charge. (B) Accused charged with ss 7(1) and 5(2) of methamphetamine with the aggravating factors of the lab being in a rental home and using a 16 year old to operate it. The s 7(1) charge has a 3-year MMP while the s 5(2) charge has a 2-year MMP. The Crown shall not withdraw or stay the s 7(1) charge.

⁵ Example: If each offence is punishable by an MMP of two years and, based on the facts, the sentences would be consecutive rather than concurrent, counsel cannot take a plea for less than four years for the one MMP offence without the approval of the CFP.

medical condition that would make jail particularly onerous. In such cases, counsel may do so only with the prior consent of their CFP or his/her delegate. Counsel shall nonetheless still present the aggravating factor(s) to the court if they are relevant and provable.

2.3. Obtaining prior consent not feasible

In exceptional circumstances, where it is not feasible for counsel to obtain the CFP's consent beforehand, Crown counsel may stay, withdraw, or agree to a plea to a lesser offence on a charge with an MMP. In such circumstances, counsel must provide to the CFP, as soon as practicable after doing so, a written memorandum demonstrating how the proposed course of action was in the public interest and why it was not feasible to seek consent beforehand.⁶ Counsel must also ensure that the memorandum is placed on the file.

3. BACKGROUND

The Act amends the CDSA to provide for MMPs when an accused is convicted of certain serious drug offences including trafficking, possession for the purpose of trafficking, importing and exporting, and production. This is the case only when the charges involve drugs listed in Schedule I and Schedule II of the CDSA. It should be noted that GHB and Flunitrazepam (Rohypnol), most commonly known as the “date-rape drugs,” as well as all of the amphetamine drugs have been moved from Schedule III to Schedule I as a result of the Act. Also, the maximum penalty for production of Schedule II drugs has been increased from 7 to 14 years.

In general, the MMP will apply where there is an aggravating factor present, including where the production of the drug constituted a potential security, health or safety hazard. MMPs are also triggered by trafficking, exporting, importing or producing certain quantities of either Schedule I or Schedule II substances. For the production of between 6 and 200 marihuana plants, the Crown must prove by way of expert evidence that the production was for the purpose of trafficking.

The chart attached as Appendix A to this note sets out in detail, by quantity and other aggravating factors, the penalties mandated for both Schedule I and Schedule II drugs. In particular, the aggravating factors involve offences committed:

Aggravating Factors List A:

- for the benefit of, at the direction of, or in association with a criminal organization;
- involving use or threat of violence;
- involving use or threat of use of weapons;

⁶ Such circumstances must be understood as exceptional. Crown counsel are expected to make efforts to contact the CFP or his/her delegate in person, by email or by telephone, when necessary, to seek consent in all circumstances. Crown counsel may only stay, withdraw or agree to a plea on a change with an MMP in circumstances where, after making reasonable attempts to contact the CFP or his/her delegate and where obtaining an adjournment of the case in order to seek the consent would not be feasible and might otherwise jeopardize the prosecution.

- o by someone who has been previously convicted of a designated substance offence,⁷ or has served a term of imprisonment for a designated substance offence,⁸ within the previous ten years;⁹ and
- through the abuse of authority or position, or by abusing access to restricted area, to commit the offence of importation/exportation and possession to export.

Aggravating Factors List B:

- in or near a school, on or near school grounds, or in or near an area normally frequented by persons under the age of 18;
- in a prison;
- using the services of, or involving, a person under 18;
- in relation to a youth (e.g., selling to a youth).

In relation to the production offences, MMPs may be imposed where the following security, health and safety factors are:

- the accused used real property that belongs to a third party to commit the offence;
- the production constituted a potential security, health or safety hazard to children who were in the location where the offence was committed or in the immediate area;
- the production constituted a potential public safety hazard in a residential area; or
- the accused placed or set a trap.

It should be noted that a court is not required to impose an MMP unless it is satisfied that the offender, before entering a plea, was notified of the possible imposition of an MMP for the offence in question and of the Attorney General's intention to prove any factors in relation to the offence that would lead to the imposition of an MMP.¹⁰

The Act also allows a court to delay sentencing while an offender with a substance use disorder either participates in a drug treatment court program approved by the Attorney General, or attends a treatment program approved by the province under the supervision of the court as outlined in s 720(2) of the *Criminal Code*. If the person successfully completes the treatment program, the court is not required to impose the MMP for the offence.¹¹

⁷ Refers to a "designated substance offence" as defined in part 2 of the CDSA.

⁸ This is interpreted to mean the warrant expiry date.

⁹ This is to be interpreted as ten years preceding the commission of the offence.

¹⁰ See Bill C-10, s 42 which adds a new s 8 to the CDSA.

¹¹ See Bill C-10, s 43(2) which provided the amendment to s 10(2) and the new ss 10(4) and (5) of the CDSA.

4. CONCLUSION

Crown counsel must be aware of the facts in a given case that may give rise to the imposition of an MMP, ensure that notice has been given before the matter proceeds, and be prepared to prove the aggravating factors present in the case. Throughout this process, Crown counsel are duty bound to present to the court all provable aggravating facts that are relevant to the prosecution.

APPENDIX A - MANDATORY MINIMUM PENALTIES FOR SERIOUS DRUG OFFENCES

SCHEDULE I - DRUGS (COCAINE, HEROIN, METHAMPHETAMINE, ETC., AND DRUGS BEING MOVED FROM SCHEDULE III INCLUDING ECSTASY, GHB AND ROHYPNOL)					
OFFENCE	MANDATORY MINIMUM PENALTY				NOTES
		w/ <i>Aggravating Factor - List A¹</i>	w/ <i>Aggravating Factor - List B²</i>	w/ <i>Health and Safety Factors³</i>	
7(1) Production	2 YEARS	n/a	n/a	3 YEARS	
5(1) Trafficking		1 YEAR	2 YEARS	n/a	
5(2) Possession for the Purpose of Trafficking		1 YEAR	2 YEARS	n/a	
6(1) Importing Exporting	1 YEAR	n/a	n/a	n/a	1 year for Schedule I <u>under</u> 1 kg if (i) the offence is committed for the purpose of trafficking; (ii) the person abused a position of trust or authority; or (iii) the person had access to an area that is restricted to authorized persons and used that access.
	2 YEARS (if more than 1 kg)				

6(2) Possession For the Purpose of Exporting	1 YEAR	n/a	n/a	n/a	<i>1 year for Schedule I under 1 kg if</i> <i>(i) the offence is committed for the purpose of trafficking; (ii) the person abused a position of trust or authority; or (iii) the person had access to an area that is restricted to authorized persons and used that access.</i>
	2 YEARS (if more than 1 kg)				

SCHEDULE II DRUGS (CANNABIS MARIHUANA)					
OFFENCE	MANDATORY MINIMUM PENALTY				NOTES
		w/ <i>Aggravating Factors - List A¹</i>	w/ <i>Aggravating Factor - List B²</i>	w/ <i>Health and Safety Factors³</i>	
5(1) Trafficking		1 YEAR	2 YEARS	n/a	<i>Offence would have to involve more than 3 kg of cannabis marihuana or cannabis resin</i>
5(2) Possession for the Purpose of Trafficking		1 YEAR	2 YEARS	n/a	<i>Offence would have to involve more than 3 kg of cannabis marihuana or cannabis resin</i>
6(1) Importing Exporting	1 YEAR	n/a	n/a	n/a	<i>One year for Schedule II if (i) the offence is committed for the purpose of trafficking; (ii) the person abused a position of trust or authority; or (iii) the person had access to an area that is restricted to authorized persons and used that access.</i>
6(2) Possession for the Purpose of Exporting	1 YEAR	n/a	n/a	n/a	<i>One year for Schedule II if (i) the offence is committed for the purpose of trafficking; (ii) the person abused a position of trust or authority;; or (iii) the person had access to an area that is restricted to authorized persons and used that access.</i>
7(1) Production of	6 MOS	n/a	n/a	9 MOS	<i>Offence is committed for the purpose of trafficking.</i>

6 - 200 plants					<i>Maximum penalty will be increased to 14 years imprisonment</i>
7(1) Production of 201 – 500 plants	1 YEAR	n/a	n/a	18 MOS	<i>Maximum penalty will be increased to 14 years imprisonment</i>
7(1) Production of over 500 plants	2 YEARS	n/a	n/a	3 YEARS	<i>Maximum penalty will be increased to 14 years imprisonment</i>
*7(1) Production of substances in schedule II other than marihuana (i.e. resin/oil)	1 YEAR	n/a	n/a	18 MOS	<i>If offence is committed for the purpose of trafficking.</i>

¹ **Aggravating Factors List A**

The aggravating factors include offences committed:

- for the benefit of, at the direction of, or in association with a criminal organization;
- involving use or threat of violence;
- involving use or threat of use of weapons;
- by someone who was previously convicted of a designated drug offence or had served a term of imprisonment for a designated substance offence within the previous ten years; and
- through the abuse of authority or position or by abusing access to restricted area to commit the offence of importation/exportation and possession to export.

² **Aggravating Factors List B**

The aggravating factors include offences committed:

- in or near a school, on or near school grounds, or in or near an area normally frequented by persons under the age of 18;
- in a prison;
- using the services of, or involving, a person under 18;
- in relation to a youth (e.g. selling to a youth).

³ **Health and Safety Factors**

- the accused used real property that belongs to a third party to commit the offence;
- the production constituted a potential security, health or safety hazard to persons under the age of 18 who were in the location where the offence was committed or in the immediate area;
- the production constituted a potential public safety hazard in a residential area;
- the accused placed or set a trap, device or other thing that is likely to cause death or bodily harm to another person in the location where the offence was committed or in the immediate area, or permitted such a trap, device or other thing to remain or be placed in that location or area.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

6.2.1 SUPPLEMENTARY GUIDELINE ON MANDATORY MINIMUM PENALTIES FOR CERTAIN DRUG OFFENCES UNDER THE *CONTROLLED DRUGS AND SUBSTANCES ACT*

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

June 24, 2016

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1. OVERVIEW

In light of recent rulings that have found four trafficking-related mandatory minimum penalties (MMPs) unconstitutional, effective immediately, prosecutors must no longer seek the imposition of the following MMPs for trafficking or possession for the purpose of trafficking in Schedule I drugs or large quantities of Schedule II drugs:

- One year when the offender carried a weapon in committing the offence (s. 5(3)(a)(i)(C));
- One year when the offender has been convicted of a drug offence (other than simple possession) in the previous 10 years (s. 5(3)(a)(i)(D));
- Two years when the offence was committed in or near a school or other public place usually frequented by persons under 18 (s. 5(3)(a)(ii)(A));
- Two years when the offender involves a person under 18 in the offence (s. 5(3)(a)(ii)(C)).

Other *Controlled Drugs and Substances Act* (CDSA) MMPs, including those under ss. 6 and 7, are unaffected by this guideline. The Public Prosecution Service of Canada (PPSC) will continue to seek these MMPs where appropriate.

2. BACKGROUND

On April 15, 2016, in *R. v. Lloyd*,¹ the Supreme Court of Canada struck down the one-year MMP for an offender with a drug record in the previous ten years who trafficked or possessed Schedule I or large amounts of Schedule II drugs for the purpose of trafficking. As a consequence, this MMP has been of no force or effect since that ruling and federal prosecutors are no longer able to seek its imposition.

On April 25, 2016, in light of *Lloyd*, the British Columbia Court of Appeal struck down in *R. v. Dickey*² the two-year MMPs applicable when the offence is committed in or near a school or other public place usually frequented by persons under 18³ or when a young person is involved in the transaction.⁴

¹ 2016 SCC 13

² 2016 BCCA 177

³ S. 5(3)(a)(ii)(A)

⁴ S. 5(3)(a)(ii)(C)

The PPSC is not seeking leave to appeal the *Dickey* rulings to the Supreme Court of Canada. The PPSC is also abandoning an appeal to the British Columbia Court of Appeal from the provincial court ruling that struck down the one-year MMP for trafficking while *carrying* a weapon in *Jackson-Bullshields*.⁵

3. DIRECTION TO PROSECUTORS

Regarding the offences listed above, prosecutors should simply seek the appropriate sentence based on relevant sentencing principles, including the aggravating factors in s. 10 of the CDSA, and the case law. In some instances the appropriate sentence may exceed the MMP. Prosecutors must no longer file or rely on the s. 8 notices in the CDSA regarding the MMPs listed above.

However, regarding s. 5(3)(a)(i)(C), the Court struck down only the “carrying” aspect of the provision. Crown counsel must continue to file and rely on the s. 8 notice and seek the MMP in appropriate cases under this provision when the person used or threatened to use a weapon in committing the offence.

PPSC counsel must advise the courts and defence counsel of this position. Chief Federal Prosecutors (CFP) or their delegates must also advise the police forces in their jurisdictions of this position, since the police generally serve the s. 8 notices under the CDSA.

While PPSC counsel are directed to no longer seek the MMPs in the four circumstances identified above, absent binding appellate jurisprudence, counsel are not to concede the unconstitutionality of these MMPs. In any case, where defence counsel still wishes to argue the constitutionality of one or more of the MMPs listed above (despite the fact that the Crown is no longer seeking the MMP), counsel should notify the CFP to discuss next steps.

This guideline applies to all PPSC cases in the system where these MMPs are at issue, including appeals.

In all other respects, PPSC guidelines regarding MMPs continue to apply. In particular, the MMPs Guideline in [Chapter 6.2](#), of the *PPSC Deskbook*, at paragraph 2.2., provides for non-reliance on the notice in situations where the Crown determines that the imposition of the MMP would likely result in an unduly harsh consequence in a particular case.

⁵ *R. v. Jackson-Bullshields*, 2015 BCPC 411 and 2015 BCPC 414. See also CDSA, s. 5(3)(a)(i)(C)



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

6.3 STATUTORY RESTRICTIONS ON THE USE OF CONDITIONAL SENTENCES

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

March 1, 2014

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1. PURPOSE

The purpose of this guideline is to provide direction to Crown counsel regarding the key changes to the conditional sentence regime pursuant to [s. 742.1](#) of the *Criminal Code* (Code), as a result of the coming into force in 2012 of certain aspects of the [Safe Streets and Communities Act](#) (the Act). The effect of the amendments is to restrict the availability of conditional sentences. These amendments apply only to offences committed after the coming into force of the provisions, which are contained in [Part 2](#) of the Act.

Under the new regime, conditional sentences remain unavailable if the offence is punishable by a minimum term of imprisonment,¹ or if the offence is a terrorism offence or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is 10 years or more.

The new s. 742.1 of the Code no longer states that conditional sentences are unavailable in relation to serious personal injury offences as defined in [s. 752](#) of the Code. Under the new regime, conditional sentences are now unavailable in the following circumstances:

- In the case of all offences prosecuted by way of indictment for which the maximum term of imprisonment is either 14 years or life;²

¹ Existing mandatory minimum penalties (MMP) in the [Criminal Code](#) can be found in the Offence Grid, which appears at the back of the *Criminal Code*, before the Index. It is also important to read this guideline in conjunction with other PPSC guidelines concerning the Act, which concern new or increased MMP in relation to certain *Criminal Code* offences and particular drug offences committed in certain circumstances.

² The list of offences in the *Criminal Code* that fall in these categories can be found in the Offence Grid, located in the *Criminal Code*, as explained in note 1. See also the attached Appendices A and B of this guideline for examples of offences in other federal acts that fall into these categories.

- Offences prosecuted by indictment for which the maximum term of imprisonment is 10 years, that:
 - (i) resulted in bodily harm;
 - (ii) involved the import, export, trafficking or production of drugs, or
 - (iii) involved the use of a weapon.

In addition, a list of eleven offences, when prosecuted by indictment, are expressly excluded from eligibility for conditional sentences. This list includes prison breach ([s. 144](#) of the Code), criminal harassment ([s. 264](#) of the Code), sexual assault ([s. 271](#) of the Code), kidnapping ([s. 279](#) of the Code), trafficking in persons-material benefit ([s. 279.02](#) of the Code) and abduction of person under 14 ([s. 281](#) of the Code), but also includes a number of property offences:

- motor vehicle theft ([s. 333.1](#) of the Code);
- theft over 5,000 ([s. 334 \(a\)](#) of the Code);
- breaking and entering a place other than a dwelling house ([s. 348 \(1\)\(e\)](#) of the Code);
- being unlawfully in a dwelling-house ([s. 349](#) of the Code); and
- arson for fraudulent purpose ([s. 435](#) of the Code).

Thus, fewer offences are eligible for conditional sentences as a result of these changes to the CSO regime, and because of related amendments to the [Controlled Drugs and Substances Act](#) (CDSA) in the Act that include an increase in the maximum penalty for marihuana production from seven to 14 years and the introduction of mandatory minimum penalties (MMP) for certain CDSA offences committed in certain circumstances in relation to [Schedule I](#) and [II](#) drugs.³

As a practical matter, as far as CDSA offences are concerned, conditional sentences will remain available for [s. 4](#) offences. However, conditional sentences will no longer be available for any other Schedule I or Schedule II drug offence, except for [s. 5](#) offences of trafficking or possession for the purpose of trafficking in three kilograms or less of a Schedule II drug (marihuana).

2. IMPACT ON PROSECUTIONS

These amendments mandate no change in the general Crown approach and rationale regarding Crown elections, plea resolution and sentencing discussions. That said, Crown

³ See the PPSC Deskbook guidelines “[6.4 Mandatory Minimum Penalties under the Criminal Code](#)” and “[6.2 Mandatory Minimum Penalties for Certain Drug Offences under the Controlled Drugs and Substances Act](#)”.

counsel must follow the guidelines described below that relate to the exercise of discretion.

Regarding the Crown election, the same considerations should arise when the Crown is deciding whether to proceed summarily or by indictment. In other words, if the Crown would normally choose to proceed by indictment, due to the seriousness of the case, the criminal record of the accused or because of other relevant factors, the Crown should not elect to proceed summarily so that a conditional sentence would remain available to the accused.⁴

Likewise, concerning plea resolution and sentencing discussions, in keeping with the will of Parliament, it will generally be inappropriate to either agree to a plea to a lesser offence, or stay or withdraw a charge, where the evidence supports the original charge, so that the accused will remain eligible for a conditional sentence. For example, if the accused is charged with an offence that is punishable by an MMP, or that is an indictable offence punishable by 14 years or life, Crown counsel should not generally agree to a plea to a lesser offence so that a conditional sentence will be available to the accused.

2.1. Stay, withdrawal or accepting plea to a lesser offence

If Crown counsel wishes to stay or withdraw a charge, or take a plea to a lesser offence, so that a conditional sentence will remain available to the accused, the prior consent of the Chief Federal Prosecutor (CFP) or his or delegate is required. Counsel must provide the CFP with a written memorandum setting out the basis for the stay, withdrawal or plea and explaining why the proposed course of action is in the public interest. For example, there may be situations where the lack of availability of a conditional sentence would likely result in an unduly harsh consequence under the circumstances of a particular case, such as where the unavailability of a conditional sentence would result in young children being left with no caretaker. In such situations, Crown counsel might exercise discretion to reach a resolution that would permit a conditional sentence. However, if the reason for the stay, withdrawal or plea to a lesser offence, is due to the threshold for prosecution not being met (a reasonable prospect of conviction), the above-mentioned consent is not required.

2.2. Obtaining prior consent not feasible

In exceptional circumstances, where it is not feasible for Crown counsel to obtain the CFP's consent beforehand, Crown counsel may stay, withdraw, or agree to a plea to a lesser offence, which would enable the accused to remain eligible for a conditional sentence. In such circumstances, Crown counsel must provide to the CFP, as soon as practicable after doing so, a written memorandum demonstrating how the proposed

⁴ See the PPSC Deskbook guideline "[3.10 Elections and Re-Elections](#)" for the PPSC policy regarding Crown elections in relation to dual procedure offences.

course of action was in the public interest and why it was not feasible to seek consent beforehand.⁵ Crown counsel must also ensure that the memorandum is placed on the file.

During sentencing submissions, it will also be important for Crown counsel to remind the judiciary that the principles of sentencing for adults in the [Criminal Code](#) have not changed. Judges must continue to sentence in accordance with the sentencing principles and the jurisprudence, to the extent that the jurisprudence has established the applicable sentencing principles, sentence range, and overall sentence fitness in certain types of cases. Crown counsel can reasonably argue that Parliament has not altered the sentencing principles but merely restricted sentencing options in relation to certain kinds of offences. For example, probation will not be appropriate as a result of these amendments in situations where it was not appropriate before.

Finally, Crown counsel should never hesitate to consult senior colleagues of the Public Prosecution Service of Canada (PPSC) and their manager when engaged in resolution discussions and the preparation of sentencing submissions. Crown counsel should also remain mindful of their obligation to consult managers in appropriate circumstances as outlined in the PPSC Deskbook and in relevant guidelines.

3. CONCLUSION

Crown counsel continue to be bound by relevant PPSC Deskbook policies concerning Crown elections, plea resolution and sentencing discussions involving offences for which a conditional sentence will no longer be available.

It will generally be inappropriate for Crown counsel to take a plea to a lesser offence, or stay or withdraw a charge, when it is done with the intent of ensuring that a conditional sentence remains available to the accused, where the evidence supports the original charge. In exceptional circumstances deviating may be acceptable and must be done in accordance with the present guideline.

⁵ Such circumstances must be understood as exceptional. Crown counsel are expected to make every effort to contact the CFP or his/her delegate in person, by email or by telephone, when necessary, to seek consent in all circumstances. Crown counsel may stay, withdraw a charge, or agree to a plea, which would result in a conditional sentence being available to the accused only where it otherwise would not be, if reasonable attempts were made to contact the CFP or his or her delegate and where obtaining an adjournment of the case in order to seek the consent would not be feasible and might otherwise jeopardize the prosecution.

APPENDIX A – NON-CRIMINAL CODE OFFENCES PUNISHABLE BY A MAXIMUM SENTENCE OF 14 YEARS IMPRISONMENT

1. CONTROLLED DRUGS AND SUBSTANCES ACT OFFENCES

No offences punishable by a maximum sentence of 14 years imprisonment.⁶

2. CRIMES AGAINST HUMANITY AND WAR CRIMES ACT

#	SECTION	OFFENCE
1	s. 18	Bribery of judges and officials
2	s. 19(3)	Perjury
3	s. 20	Witness giving contradictory evidence
4	s. 21	Fabricating evidence

3. IMMIGRATION AND REFUGEE PROTECTION ACT

#	SECTION	OFFENCE
1	s. 117(2)(a)(ii)	Human smuggling and trafficking: Organizing entry into Canada (under 10 persons)
2	ss. 122 and 123(b)	Offences Related to Documents
3	ss. 119 and 120	Human trafficking

4. COMPETITION ACT

#	SECTION	OFFENCE
1	s. 45(2)	Conspiracies, agreements or arrangements between competitors
2	s. 47(2)	Bid rigging
3	s. 52(5)(a)	False representations
4	s. 52.1(9)(a)	Telemarketing
5	s. 53(6)(a)	Deceptive notice of winning a prize

⁶ As of the coming into force on November 6, 2012 of the changes to the CDSA by virtue of the Act, the maximum sentence for the production of marihuana has increased to 14 years.

5. SECURITY OF INFORMATION ACT

#	SECTION	OFFENCE
1	s. 3(1)	Prejudice to the safety or interest of the State
2	s. 4(1)	Wrongful communication, etc., of information
3	s. 4(2)	Communication of sketch, plan, model, etc.
4	s. 4(3)	Receiving code word, sketch, etc.
5	s. 4(4)	Retaining or allowing possession of document, etc.
6	s. 5(1)	Unauthorized use of uniforms; falsification of reports, forgery, personation and false documents
7	s. 5(2)	Unlawful dealing with dies, seals, etc.
8	s. 6	Approaching, entering, etc., a prohibited place
9	s. 7	Interference
10	s. 14(2)	Unauthorized communication of special operational information
11	s. 23	Conspiracy, attempts, etc.

APPENDIX B – NON-CRIMINAL CODE OFFENCES PUNISHABLE BY A MAXIMUM SENTENCE OF LIFE IMPRISONMENT

1. CONTROLLED DRUGS AND SUBSTANCES ACT OFFENCES

#	SECTION	OFFENCE
1	s. 5(3)(a) CDSA	Trafficking – Schedule I or II
2	s. 6(3)(a) CDSA	Import/export – Schedule I or II
3	s. 7(2)(a) CDSA	Production – Schedule I or II

2. CRIMES AGAINST HUMANITY AND WAR CRIMES ACT

#	SECTION	OFFENCE
1	s. 4(2)(a) and (b)	Genocide committed in Canada
2	s. 5(3)	Breach of responsibility by military commander or superior
3	s. 6(2)(a) and (b)	Genocide, etc., committed outside of Canada
4	s. 7(4)	Breach of responsibility by a superior

3. IMMIGRATION AND REFUGEE PROTECTION ACT

#	SECTION	OFFENCE
1	s. 117(3)	Human smuggling and trafficking: Organizing entry into Canada
2	ss. 118 and 120	Disembarking persons at sea
3	ss. 119 and 120	Human trafficking
4	s. 131	Counseling

4. SECURITY OF INFORMATION ACT

#	SECTION	OFFENCE
1	s. 16(3)	Communicating safeguarded information
2	s. 17(2)	Communicating special operational information
3	s. 20(3)	Foreign-influenced or Terrorist-influenced Threats or Violence



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

6.4 MANDATORY MINIMUM PENALTIES UNDER THE *CRIMINAL CODE*

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

March 1, 2014

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1. PURPOSE

The purpose of this guideline is to provide direction to Crown counsel regarding the certain amendments to the [Criminal Code](#) (Code) in 2012 that add mandatory minimum penalties (MMPs) for particular offences involving the sexual exploitation of children. The amendments are contained in the [Safe Streets and Communities Act](#) (Act), formerly Bill C-10. These amendments apply only to offences committed after the coming into force date of these provisions.¹

The Act also creates two new hybrid offences ([ss. 171.1](#) and [172.2](#) of the Code). Section 171.1 makes it an offence to provide sexually explicit material to a child. Section 172.2 creates an offence to agree or make arrangements with another person by means of telecommunications to commit a sexual offence against a child.

2. IMPACT ON PROSECUTIONS

Crown counsel are reminded that they are obliged to present all available provable facts to the court, in a firm but fair manner, in order to ensure the integrity of the prosecution throughout the litigation process.² Crown counsel must also conduct plea and sentence negotiations in a manner consistent with the policies set out in the PPSC Deskbook. In particular, the Deskbook states that an agreement to withhold from the court facts that are provable and relevant, and that aggravate the offence is not acceptable.³

¹ These provisions are contained in Part 2 of the Bill and came into force on August 9, 2012.

² See [Boucher v The Queen, \[1955\] SCR 16](#) at 23-24: “It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly”.

³ See the PPSC Deskbook guideline “[3.7 Resolution Discussions](#)”, in particular para 3.5c).

In keeping with the will of Parliament, it will generally be inappropriate to either agree to a plea to a lesser offence, or to stay or withdraw a charge, when it is done with the intent of avoiding the imposition of an MMP, where the evidence supports the original charge. Also, where there are two possible charges in a prosecution and one has an MMP and one does not, or both have an MMP but one is higher than the other, the one with the MMP or the one with the highest MMP should proceed.

If an offence with an MMP has a reasonable prospect of conviction, such an offence may be stayed or withdrawn under a plea agreement only with the consent of the Chief Federal Prosecutor (CFP) or his/her delegate. The consent of the CFP shall only be given where the basis for the plea is set out in a written memorandum that demonstrates, to the satisfaction of the CFP, how the proposed course of action is in the public interest.

If the reason for the stay, withdrawal or agreement to a plea to a lesser offence is due to the threshold for prosecution not being met (a reasonable prospect of conviction), such consent is not required. In such circumstances Crown counsel must provide a written memorandum to the CFP or his/her delegate that explains the decision and ensure that the memo is filed.

In exceptional circumstances, where it is not feasible to get consent, Crown counsel may stay, withdraw, or agree to a plea to a lesser offence on a charge with an MMP. In such circumstances Crown counsel must provide to the CFP, as soon as practicable after doing so, a written memorandum explaining the decision and why it was not feasible to get the consent.⁴ Crown counsel must also ensure the memo is filed.

3. CONCLUSION

It is important for Crown counsel to refer to the tables in Appendices A and B below, in order to know whether an MMP attaches to offences involving the sexual exploitation of children.

Under the new MMP regime it will generally be inappropriate for Crown counsel to take a plea to a lesser offence, stay or withdraw a charge, when it is done with the intent of avoiding the imposition of an MMP, where the evidence supports the original charge. In exceptional circumstances deviating may be acceptable and must be done in accordance with the present guideline.

⁴ Such circumstances must be understood as exceptional. Crown counsel are expected to make efforts to contact the CFP or his/her delegate in person, by email or by telephone, when necessary, to seek consent in all circumstances. Crown counsel may stay, withdraw or agree to a plea on a charge with an MMP in circumstances only where, after making reasonable attempts to contact the CFP or his/or her delegate and where obtaining an adjournment of the case in order to seek the consent would not be feasible and might otherwise jeopardize the prosecution.

APPENDIX A

NEW OFFENCES AND NEW MANDATORY MINIMUM PENALTIES FOR SEXUAL EXPLOITATION OF CHILDREN				
Offence		Criminal Code Section	New mandatory minimum penalties	
			On Summary Conviction	On Indictment
1.	Incest, against a person under 16 years of age (indictable offence)	155	n/a	5 years
2.	Bestiality	160 (3)	6 months	1 year
3.	New: Providing sexually explicit material to a child (hybrid offence)	171.1	30 days	90 days
4.	Internet luring (hybrid offence)	172.1	90 days	1 year
5.	New: Agreeing/making arrangements with another person, via telecommunication, to commit sexual offence against a child (hybrid offence)	172.2	90 days	1 year
6.	Exposure	173(2)	30 days	90 days
7.	Sexual assault, against a young person under 16 years of age (hybrid offence)	271	90 days	1 year
8.	Sexual assault with a weapon, ¹ against a young person under 16 years of age (indictable offence)	272	n/a	5 years
9.	Aggravated sexual assault, ² against a young person under 16 years of age (indictable offence)	273	n/a	5 years

¹ There is a mandatory minimum penalty for this offence if a restricted or prohibited firearm is used in connection with organized crime (5 years for first offence; 7 years for second or subsequent offence).

² There is a mandatory minimum penalty for this offence if a firearm is used (4 years).

APPENDIX B

INCREASED MANDATORY MINIMUM PENALTIES FOR EXISTING SEXUAL EXPLOITATION OF CHILDREN OFFENCES				
Offence		Criminal Code Section	On summary conviction	On indictment
			Increased Mandatory Minimum Penalty	Increased Mandatory Minimum Penalty
1.	Sexual interference (hybrid offence)	<u>151</u>	90 days	1 year
2.	Sexual touching (hybrid offence)	<u>152</u>	90 days	1 year
3.	Sexual exploitation (hybrid offence)	<u>153</u>	90 days	1 year
4.	Bestiality in the presence of or by a child	<u>160(3)</u>	6 months	1 year
5.	Making child pornography	<u>163.1(2)</u>	6 months	(No change)
6.	Distributing child pornography	<u>163.1(3)</u>	6 months	(No change)
7.	Possession of child pornography (hybrid offence)	<u>163.1(4)</u>	90 days	6 months
8.	Accessing child pornography (hybrid offence)	<u>163.1(4.1)</u>	90 days	6 months
9.	Parent/guardian procuring sexual activity where victim is under 16 (indictable offence)	<u>170(a)</u>	n/a	1 year
	Parent/guardian procuring sexual activity where victim is 16-17 (indictable offence)	<u>170(b)</u>	n/a	6 months
10.	Householder permitting sexual activity where victim is 16-17 (indictable offence)	<u>171(b)</u>	n/a	90 days



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

6.5 PROCESS FOR PRESUMPTIVELY ELIGIBLE STATUS FOR A DANGEROUS OFFENDER OR LONG TERM OFFENDER DESIGNATION

**GUIDELINE OF THE DIRECTOR ISSUED UNDER
SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC
PROSECUTIONS ACT***

March 1, 2014

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1. BACKGROUND

During initial file review, counsel should always be prepared to assess the feasibility of whether or not an offender could be declared a dangerous offender (DO) or long term offender (LTO), paying particular attention to the criteria needed by the court to make such a designation pursuant to [s. 752](#) of the *Criminal Code* (Code).

On July 2, 2008, Bill C-2 came into force imposing a new duty on prosecutors in some circumstances to advise the court as soon as feasible after the finding of guilt and before sentence whether the prosecutor intends to make an application under [s. 752.1](#) of the Code to have the offender remanded for an assessment for use as evidence in a DO or LTO application.

[Section 752.01](#) of the Code states:

“If the prosecutor is of the opinion that an offence for which an offender is convicted is a serious personal injury offence that is a designated offence and that the offender was convicted previously at least twice of a designated offence and was sentenced to at least two years of imprisonment for each of those convictions, the prosecutor shall advise the court, as soon as feasible after the finding of guilt and in any event before sentence is imposed, whether the prosecutor intends to make an application under subsection 752.1(1).”

2. SUGGESTED APPROACH

Crown counsel are required to identify all prospective files for a possible DO or LTO designation at the bail hearing or charge screening stage as considerable time is needed for adequate preparation and information gathering.

All files identified through the National Flagging System or identified through normal file review that meet the appropriate criteria for consideration must be brought to the attention of a member of the regional management team, or designate, as soon as practicable.

A member of the regional management team or designate will review the file in accordance with applicable PPSC policies or guidelines.

Management will then assign the file to designated counsel who will be responsible for gathering and reviewing all the relevant information and documentation needed.

The designated counsel then has an ongoing obligation to keep the Chief Federal Prosecutor (CFP) fully informed as to the progress with respect to the file and the decision whether to proceed or not must be made in consultation with the CFP.

If the decision is made to proceed, the designated counsel will make an assessment application under [s. 752.1](#) of the Code at the appropriate time after there has been a finding of guilt and before sentencing.

Once the Assessment Report has been received and reviewed, designated counsel will prepare a written memo to the CFP setting out the reasons for requesting a dangerous offender or long term offender designation.

The CFP will review the memo, sign off on it if appropriate and provide a copy of it, together with the completed Assessment Report to the appropriate Deputy Director of Public Prosecutions for his or her consideration pursuant to the PPSC Deskbook guideline “Delegated Decision-Making”.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

6.6 CHARITABLE DONATIONS

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

November 28, 2017

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1. PURPOSE

The purpose of this guideline is to provide direction to Crown counsel regarding the making of charitable donations to registered charities or non-registered benevolent organizations (“charitable donations”) by offenders as an aspect of diversion or sentence.

2. POLICY STATEMENT

Donations by individual offenders to registered charities or non-registered benevolent organizations are unacceptable, as an aspect of an alternative measure for an adult or an extrajudicial sanction¹ for a young person, in exchange for a withdrawal of charges or as an aspect of sentence.

In exceptional circumstances, donations by certain kinds of organizations to registered charities or non-registered benevolent organizations are acceptable as an aspect of sentence.

Charitable donations by offenders are not specifically mentioned in the *Criminal Code*, the *Controlled Drugs and Substances Act* or the *Youth Criminal Justice Act* (YCJA). Except to the extent provided in this policy, Crown counsel must not agree to an offender making a charitable donation as part of the resolution of a case.

Other federal statutes may permit the making of payments as a component of alternative measures or sentence, including to organizations that may have charitable status

¹ An extrajudicial sanction under s 10 of the *Youth Criminal Justice Act* is similar to an alternative measure under s 717 of the *Criminal Code*.

designations. This is discussed in the sections below on Prosecutions of Organizations and Offences Under Regulatory Statutes – Principles Governing Charitable Contributions.

3. BACKGROUND

A charitable donation may be a component of a diversion agreement², or as a condition of a probation order³ or of a conditional sentence order⁴. The common law regarding charitable donations by offenders is unsettled, and varies across Canada.⁵ The Supreme Court of Canada has not decided the issue.⁶

4. SUGGESTED APPROACH

In jurisdictions where binding legal authority permits such donations in certain contexts, Crown counsel should nevertheless indicate to the court that Crown counsel opposes charitable donations by individual offenders on policy grounds.

5. PROSECUTIONS OF INDIVIDUALS

Charitable donations by individual offenders may raise policy concerns, which have been identified in the Canadian jurisprudence and are summarized below.

Misperceptions when criminal justice system participants choose charities

As the Manitoba Court of Appeal said in *R v Choi*, ordering charitable donations has the potential for abuse, or at least, for the appearance of abuse, when the charity is selected by a criminal justice system participant, such as defence counsel, the Crown or the judge. “[T]he question may be asked: [W]hy did the judge pick charity X and not charity Y? Did the judge or counsel have some connection to the charity in question?”⁷

² *Criminal Code*, section 717(1).

³ *Criminal Code*, section 732.1(3)(h) or (3.1)(g).

⁴ *Criminal Code*, section 742.3(2)(f).

⁵ See for example *R v Choi*, 2013 MBCA 75 at paras 71-77, 12 WWR 711, where the five-member panel in *obiter* points to the inconsistency in the case law across Canada and suggests the matter is best addressed by Parliament. British Columbia, Manitoba and Northwest Territories Courts of Appeal have disapproved of charitable donations in sentences: see *Choi*, *R v DeKleric* (1968) 66 WWR 251 (BCCA), *R v McMeekin* (1991) NWTJ No 11 (QL), *R v Wisniewski*, 2002 MBCA 93, and *R v Grosso*, (2008) 79 WCB (2d) 198 (Sup Ct). However, Ontario and Quebec and Newfoundland have included charitable donations in sentences: *R v Burnside*, (2001) 54 WCB (2d) 122 (Sup Ct); *R v Penney* 2013 NJ No 340 (Nfld and Labrador Prov Ct); *R c Leduc*, 2016 QCCQ 2266 (CanLII). In Quebec, charitable donations are a regular practice of the Court, in particular when the donation is made to a CAVAC (Centre d’aide aux victimes d’actes criminels). Note that, in both *R v Prokos*, 1998 CanLII 12949 (QC CA) and *R v M.A.F.A. Inc.*, [2000] OJ No 1773 (QL) (CJ), the Courts ordered a charitable donation without commenting on it. Alberta courts do not have a clear practice on the issue: see *R v Russell*, [1982] AJ No 421 (QL) (CA) *contra R v Schell*, 2002 ABQB 439 (CanLII).

⁶ In *R v Ouellette*, 2009 SCC 24, [2009] 1 SCR 818, a \$2000 donation, divided between various charities, was an aspect of the offender’s sentence however the SCC did not comment on this aspect of the case. The focus of the SCC appeal was on the propriety of the forfeiture of the house.

⁷ See *Choi*, *supra* note 2 at para 76, point 2. See also *DeKleric*, *supra* note 2, where the appeal court deleted a trial judge’s probationary condition that the offender make a \$500 donation to a Vancouver police association. Such donations, it warned, at para 7, “can lead to the greatest of abuses.” But see *Burnside*, *supra*

It is not the role of criminal justice system participants to decide how public monies collected from offenders should be re-allocated. Parliament has created other statutory mechanisms for that purpose as discussed below.

A charitable donation may create a misperception about outcomes for impecunious offenders

Permitting the offender to make a charitable donation as a condition of diversion in lieu of proceeding with a prosecution creates a risk, or at least may foster the perception, that an offender who can afford to make a charitable donation can receive a more lenient outcome than an impecunious offender, and thus “buy” his or her way out of a prosecution.⁸

In addition, since an offender must consent to an alternative measure,⁹ a charitable donation would be considered a voluntary payment and thus be income tax deductible.¹⁰ The offender, then, would receive a benefit.

A charitable donation is not an acceptable condition of a discharge

Crown counsel should not agree to a donation as a condition attached to a conditional discharge for reasons similar to those discussed above regarding alternative measures. There is a risk that an offender who can afford to make a charitable donation could receive a conditional discharge while a similarly situated impecunious offender would receive a more onerous sentence, such as the imposition of community service.¹¹

note 2, where a \$300 donation to Crime Stoppers as a condition of a probation order was upheld on appeal regarding a conviction for possession of a small amount of marihuana. In the course of that ruling, Nadeau J noted with approval at paras 25 and 30 that imposing a donation as a condition of a probation order is an accepted practice in Ontario courts whether it is proposed by defence, Crown, a joint submission, or imposed by the trial judge (as was the case in *Burnside*). In Quebec, charitable donations are a regular practice of the Court, in particular when the donation is made to a CAVAC (Centre d’aide aux victimes d’actes criminels).

⁸ See *obiter* comments in the unanimous judgment of the five-member court in *Choi*, *supra* note 2 at para 76, point 1, regarding concerns about “unequal justice,” and the risk of fostering the perception “that a person who has the means to make a charitable donation may be able to obtain a discharge and no conviction or record...whereas someone without such means is not able to do so, and is therefore subject to a conviction and record.” This point was made regarding a donation as a probationary condition attached to a discharge but the same concern arises when an offender makes a charitable donation as partial or complete compliance with an alternative measure. Similar to a discharge, when the matter is resolved by way of an alternative measure, an offender avoids prosecution, a conviction and a criminal record. See also *Grosso*, *supra* note 2 at paras 14 and 15, where Langdon J expressed concern about the practice of charitable donations creating the perception of “buying justice.”

⁹ See s 717(1)(c) of the *Code*. Regarding the similar requirement for young persons under the YCJA, see s 10(2)(c).

¹⁰ A charity can issue an official donation receipt only for a voluntary donation. For this reason, individuals and corporations cannot claim court-ordered donations to charities for purposes of income tax credits or deductions because these donations are not considered voluntary. Court-ordered charitable donations as a condition of a probation order or conditional sentence order are more accurately characterized as penalties. In a case where the court orders the accused to make a charitable donation, despite Crown objections, Crown counsel should ask that the order include a term that the offender not claim a deduction for tax purposes. The court order should also require service of the order on the charity so that it will be aware that the donation is not voluntary.

¹¹ See the jurisprudential discussion referred to in note 5.

In addition, under the *Code*, it is illegal for a fine to be imposed in relation to a conditional discharge because a discharge is not a conviction. (A fine can be imposed only following a conviction.)¹² Thus, it is inappropriate and improper for a charitable donation to be ordered instead of a fine in these circumstances. This can be seen as circumventing the intent of Parliament by imposing a fine indirectly.¹³

A charitable donation is not subject to the fine regime

The objectives of a charitable donation can be more effectively satisfied through the imposition of a fine, an order of compensation, restitution, or community service.

The *Code* and other federal and provincial legislation provide for clear processes whereby court-ordered monies are to be collected and redistributed, a transparent process that ensures public accountability and oversight.¹⁴

A fine, for example, is a recognized sanction that is part of a statutory framework in the *Code*. The fine is paid to government. This permits the government to redistribute the monies based on its priorities.

The *Code* also provides a method of enforcing payment of fines and gives offenders time to pay, which can level the playing field among offenders of various means. There is no similar framework or oversight in the case of charitable donations by offenders.¹⁵

6. PROSECUTIONS OF ORGANIZATIONS

The principles governing individuals apply equally to for-profit organizations. However, for governments and not-for-profit organizations, a donation to a charitable organization may have a greater effect than a fine, in enhancing public confidence in the administration of justice by making apparent the direct and immediate link between the penalty and the contribution, by remedying the harm or reducing the likelihood of a similar offence by the offender or other offenders in the future.¹⁶

¹² *Criminal Code*, s 734.

¹³ See *Grosso*, *supra* note 2 at paras 14 and 15.

¹⁴ See the discussion in *Choi*, *supra* note 2 at para 76, points 1 and 3, outlining the statutory framework in the *Code* regarding fines.

¹⁵ See *Choi*, *ibid*.

¹⁶ The option to impose a charitable donation on these offenders does not raise the potential perception that arises in respect of individuals and for-profit organizations where the ability to pay may be perceived to be a factor in the Crown's position on the inclusion of a charitable donation in a sentence.

In exceptional circumstances, Crown counsel may propose a payment of money to a charitable organization as a condition of a probation order or an alternative measure provided that:

- 1) It is a prosecution of a government organization (sometimes known as an “*R v R*” prosecution) or a not-for-profit organization;
- 2) The statute under which the organization was charged or constituted has no restrictions on such a payment;
- 3) The appellate caselaw in the jurisdiction does not preclude such an option;¹⁷
- 4) The charitable recipient has been in existence for some time and has a track record as a responsible charitable endeavor;
- 5) The objectives of the charitable recipient are consistent with the objectives of the statute under which the charges were laid, e.g., occupational health and safety in the case of workplace safety offences;
- 6) There is no connection, personally or through family, between the Crown or any member of the investigating team, and the proposed recipient other than that of donor;
- 7) Prior approval is sought and obtained, in writing, from the DDPP or the DPP.

In all cases, this option should only be used when it is consistent with the principles of sentencing, the regulatory or legislative scheme at issue, and the interests of justice.

7. OFFENCES UNDER REGULATORY STATUTES – PRINCIPLES GOVERNING CHARITABLE DONATIONS

Some statutes, particularly those aimed at pollution control or wildlife protection, contain provisions allowing for the payment of money to an organization, as either an aspect of an alternative measure or as part of a sentencing order.¹⁸ In prosecutions under those statutes, it is appropriate for Crown counsel to join in a recommendation that a disposition by way of alternative measure include a payment to a charitable organization, where that organization’s purpose is in line with the goals of the particular statute or regulation. Similarly, it is appropriate for the Crown to support a recommendation for the payment of money to an organization as a term of an order made additional to the imposition of a fine or imprisonment, subject to the following conditions:

- The organizational recipient has been in existence for some time and has a track record as a responsible charitable endeavor;
- The objectives of the charitable recipient are consistent with the objectives of the statute under which the charges were laid e.g. conservation and protection of wildlife or the environment in the case of environmental offences; and

¹⁷ See footnotes 5 and 6.

¹⁸ For example: *Canadian Environmental Protection Act*, SC 1999, c 33, s 288, 289, 291(1)(o), (p) and 298; *Migratory Birds Convention Act*, SC 1994, c 22, s 16(1)(d.1) and (d.2); *Species at Risk Act*, SC 2002, c 9, ss 105(h) and (i), 108 and 109.

- There is no connection, personally or through family connection, between the Crown or any member of the investigating team, and the proposed recipient other than that of donor.

8. CONCLUSION

Crown counsel must engage in resolution discussions and conduct prosecutions in accordance with this policy.



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

6.7 RESTITUTION

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

February 8, 2017

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1. PURPOSE

This guideline offers an overview of the practice and policies of the Director of Public Prosecutions relevant to restitution, particularly in light of the *Canadian Victims Bill of Rights* (CVBR) and amendments to the *Criminal Code* made in 2015.

2. INTRODUCTION

Restitution orders are made by a criminal court for an offender to pay a victim of crime a set amount which is related to the offence for which the offender has been found guilty. Restitution forms part of the sentence given to an offender. Restitution orders are distinguished in law from compensation orders, from fines and from the victim surcharge. A compensation award is a decision from a provincial or territorial body to provide a sum of money to a victim for the harm or loss related to a criminal action. Fines may form part of the sentence of an offender, but are paid by the offender to the government. These fines become part of the general revenues of the government. Victim surcharges are also

paid by the offender to the government. These surcharges are directed to the provision of victim services.¹

Restitution can only be ordered when there is an identifiable victim, whether they are an individual, institution or organization. Where the loss or damage cannot be attributed to an individual or to a company and counsel is considering a monetary sanction, fines become the appropriate vehicle to include in a sentencing submission.²

3. RESTITUTION RIGHTS UNDER THE CANADIAN VICTIMS BILL OF RIGHTS

The *Canadian Victims Bill of Rights*³ created new statutory rights for victims of crime. Under this statute, a victim of crime has several rights⁴ relevant to restitution. Those rights are:

- the right to information about the criminal justice system and the case with which they are associated;
- the right to convey their views about decisions to be made to the appropriate authorities in the criminal justice system;
- the right to have the court consider making a restitution order against the offender; and
- the right to file such an order in a civil court.

The CVBR provides that these rights are brought to life by provisions of the *Criminal Code* which set out the criteria for obtaining a restitution order, the content of the order and the options for enforcing the order. The rights in the CVBR apply only to natural persons who have been victims of an alleged or proven offence in the *Criminal Code*, *Drugs and Controlled Substances Act*, *Youth Criminal Justice Act*, *Immigration and Refugee Protection Act* and *Crimes Against Humanities and War Crimes Act*.⁵

The restitution provisions of the *Criminal Code* apply to all *Criminal Code* offences and to individuals, organizations, municipalities and governments who are victims of crime. Therefore, while all victims (individuals, organizations, companies) can seek restitution orders and Courts must consider restitution orders for all offences, only natural persons

¹ See *Criminal Code*, section 737(7).

² Counsel should also be aware of the forfeiture provisions of the *Criminal Code* and consult [chapter 5.3 “Proceeds of Crime”](#) and the confidential legal memoranda section of the *PPSC Deskbook*.

³ Statutes of Canada 2015, c 13.

⁴ In considering these rights, it is important to note that the CVBR includes provisions (sections 21 and 22) that all other Acts are to be interpreted in a manner compatible with the provisions of the CVBR. This interpretative requirement does not apply to the *Privacy Act*, *Official Languages Act*, *Canadian Bill of Rights* and *Access to Information Act*, meaning that the CVBR is to be interpreted consistently with these four statutes but is superior to all other statutes.

⁵ See definition of victim and of offence in section 2 of the CVBR, SC 2015, c 13.

have a statutory right to a remedy if a restitution order is not considered by the Crown and the Court.

4. OBTAINING AN ORDER

4.1 Standing of Victims and Role of Crown Counsel

Restitution is sought by application made by Crown counsel, preferably using Form 34.1. As the use of this form is not mandatory by law, Crown counsel may also apply for restitution consistent with practices in a given jurisdiction. Restitution may also be ordered by the Court on its own motion or included in joint submissions on sentence to the Court.

The CVBR gives victims the right to have the court consider making an order for restitution. Victims of crime do not have standing to request restitution on their own motion and must work through Crown counsel to make a request for restitution. The CVBR has not changed the standing of victims to initiate a restitution application. Therefore, in order to give full effect to the victim's right to have the court consider making a restitution order as provided in the CVBR, Crown counsel must give due consideration to any request from a victim for restitution.

Amendments to the *Criminal Code* impose obligations on prosecutors and Courts to assist victims in exercising their rights to request restitution. Firstly, Crown counsel must be prepared to respond to the obligatory inquiry by the Court about whether a victim has been given the opportunity to request restitution.⁶ Secondly, where a victim has not been given such an opportunity, the Court may, on application of the prosecutor or on its own motion, adjourn sentencing to allow the victim to do so.

Counsel should be aware that, in large prosecutions such as frauds, law enforcement assistance or third party resources might be needed to identify and contact victims of the offence(s). These arrangements should be made at an early point in the prosecution.

4.2 Damages and Losses

The *Criminal Code* provides that a restitution order may be ordered in any of the following:

- (a) in cases of damage, loss or destruction of the property of any person as a result of the commission of the offence or the arrest or attempted arrest of the offender, for an amount not exceeding the value of damaged property (less the value of any property returned to the victim);
- (b) in cases of bodily or psychological harm to any person as a result of the commission of the offence or the arrest or attempted arrest of the offender, for an amount not exceeding all pecuniary damages incurred;

⁶ See *Criminal Code*, s 737.1(1) and (2).

- (c) in cases of bodily harm or threat of bodily harm to the offender's spouse or common-law partner or child, or any other person where the spouse or common-law partner, child or other person was a member of the offender's household at the relevant time, for an amount not exceeding reasonable moving expenses, including temporary housing, food, child care and transportation;
- (d) for expenses to replace identity documents and to correct credit history and credit rating in the case of an offence under section 402.2 or 403; and
- (e) for expenses to remove the intimate image from the Internet or other digital network in the case of an offence under subsection 162.1(1).⁷

Generally, restitution orders are sought for *Criminal Code* offences where there are victims named in the charge. However, Crown counsel must be mindful that restitution may be relevant to other types of cases such as offences under the *Controlled Drugs and Substances Act* or other crimes that do not identify victims in the charge. For example, dangerous driving charges will not normally name a victim even though property or physical damages may have resulted from the alleged offence. Trafficking or production of drugs may result in damages and losses to an identifiable victim, such property damage or destruction through a grow-op, or physical injury or death to a person who consumed an illicit drug.

In all cases, the amount claimed in the application for restitution must be readily ascertainable. The mere fact of a dispute of the amount or of the application for restitution does not constitute a reason to deny the application.⁸ However, incomplete or varying information, the necessity of complicated calculations, or a clear dispute on fundamental factual issues may be the basis for the court to reduce or deny a restitution order.⁹

A restitution order can be made for the total or a partial amount of the loss.¹⁰ Restitution orders cannot include amounts for pain and suffering nor actuarial or legal costs related to the determination of the loss.¹¹

4.3 Factors to consider

In deciding whether to include restitution in any submissions on sentencing, Crown counsel must be governed by the *Criminal Code* sections on restitution as well as sections 718, 718.1 and 718.2. These provisions were changed in 2015 to give new emphasis to the harm caused by crime to victims and to society. Courts have found that restitution

⁷ See *Criminal Code*, s 738(1).

⁸ See *R v Ghislieri*, 25 AR 465 (ABCA); *R v Bullen*, 2001 YKTC 504.

⁹ See *R v Semeniuk*, 2004 BCCA 233, *R v Dunlop* 2006 NSSC 311 (NSCA).

¹⁰ See *R v Rusanov*, 2006 SKQB 491, *R v Eizenga*, 2011 ONCA 113.

¹¹ See *R v Bullen* 2001 YKTC 504.

orders may give effect to many of the principles of sentence: denunciation, specific and general deterrence and rehabilitation.¹²

In addition, Crown counsel should consider the following factors in their decision to make an application for restitution:

- the severity of the offence;
- the degree to which the offender is responsible for the loss or damage;
- the connection between the offence and the loss of the victim;
- the blameworthiness of the offender;
- the offender's financial means or ability to pay now or at a reasonably ascertainable future date;¹³
- whether the amount of loss is entirely or partially readily ascertainable;
- the impact of the restitution order on the offender's rehabilitation;
- whether other sentencing options are paramount; and
- any aggravating factors, such as where a breach of trust was involved in the offence or where significant planning and deliberation were involved.¹⁴

In all cases, Crown counsel must ensure that their submissions on sentence respect the principles and objectives of sentencing.

4.4 Effect on other parts of a sentence

Appellate courts have consistently held that restitution orders are only one part of an appropriate sentence. However, these appellate courts have varied in their views about the effect of a restitution order on other parts of a sentence, usually incarceration. Generally, the effect of a restitution order will be to reduce the severity of other parts of the sentence (for example, to reduce a period of incarceration) except for the most serious offences.¹⁵

Crown counsel should consider any payment of restitution prior to sentence and the willingness to enter into a restitution agreement at sentence as factors that may lead the

¹² *R v Yates*, 2002 BCCA 583; *R v Fitzgibbon*, 1990 1 SCR 1005; *R v Spellacy*, (1995) 131 Nfld & PEIR 127; *R v Castro* 2010 ONCA 718.

¹³ See *Criminal Code*, section 739.2 which codified appellate court decisions that the offender's capacity to pay at the time of sentencing does not prevent the Court from making a restitution order.

¹⁴ See *R v Cadieux* 2004 ABCA 98; *R v Yates*, 2002 BCCA 583.

¹⁵ See *R v Dennis*, 2010 ABCA 36; *R v Quinlan*, 1999 CanLII 18952 (NFCA); *R v Veno*, 2012 NBCA 15; *R v Smolyar*, 2003 ONCA 4056; 27612; *R v Lord*, 2011 BCCA 47; *R v Zenari*, 2012 ABCA 279; *R v Green* 2013 NWTSC 20; *R v Siemens* 1999 CanLII 18651.

Court to limit the other parts of an appropriate sentence. Any applications by the Crown for restitution must be made on an evidentiary basis considering the facts of each case and the application of the principles of sentencing (totality, rehabilitation, specific and general deterrence).

4.5 Interplay with other Proceedings

The existence of pending or completed civil proceedings to recover the amount of the losses, as well as to seek pecuniary damages for pain and sufferings is not a bar to an application nor to the granting of a restitution order.¹⁶ Similarly, applications or awards from provincial compensation programs are not a bar to an application or a restitution order, but such awards could affect the quantum of a restitution order. Victims have obligations to report restitution orders or receipt of restitution funds to both civil processes and to compensation programs.

4.6 Multiple Victims

Where there are multiple victims, the *Criminal Code* provides that a restitution order may be made out to several victims, with an apportioning of the amounts due to each one. Furthermore, the order may contain a priority ranking to each amount due.¹⁷ In addition, various cases have clarified that restitution orders may be made against several offenders who participated in the same offence.¹⁸ Courts must ensure; however, that restitution orders in such cases are consistent with the principles of sentencing (for example, proportionality between offenders, blameworthiness of offenders, etc.).

5. CONSULTATIONS WITH VICTIMS OF CRIME

Consultations with victims of crime have taken a new importance with the enactment of the *Canadian Victims Bill of Rights*. Most justice system participants have new responsibilities in relation to the rights of victims under the CVBR.

In the territories, Crown counsel must work with Crown Witness Coordinators (CWCs) to provide information to victims about the prospect of restitution. CWCs also act as liaisons between Crown counsel and victims. They are available to help victims and witnesses to understand the court process, their rights and responsibilities in the process and the roles of the court participants. They provide court updates, accompany witnesses to court, provide support during and after testimony, and assist with trial preparation.

In the provinces, Crown counsel must take steps to provide victims with such information and may wish to work with provincial victim and witness services towards that end. All conversations with victims and Crown counsel or victims services undertaken to satisfy these requirements should be documented in the case file.

¹⁶ See *R v Zelensky*, 1978 2 SCR 940; *R v Perciballi*, 2001 CanLII 13394 (ON CA).

¹⁷ See *Criminal Code*, s 739.3.

¹⁸ See *R v Eizenga*, 2011 ONCA 113, *R v Siemens* (1999) 136 CCC (3d) 353, *R v Popert* 2010 ONCA 89.

As first responders, law enforcement has a role in assisting victims of crime to realize their CVBR rights. In addition, many police forces have integrated victim services or work with local or provincial victim service bodies to provide assistance to victims. Crown counsel should be aware of the collaborative arrangement in their area in order to be able to advise the Court of any assistance that has been offered to victims of crime throughout the criminal justice process. Crown counsel should request the collaboration of law enforcement, where necessary, to advise victims of their rights at an early point in the criminal justice process and to remind victims of the need for receipts, work orders or invoices that may substantiate and quantify future claims for restitution.

Courts also have new responsibilities regarding victims of crime following the 2015 *Criminal Code* amendments. In regards to restitution, the *Criminal Code* imposes several obligations: firstly, to consider including a restitution order in sentencing for all offences; and secondly, after a finding of guilty, to ask Crown counsel if reasonable steps have been taken to provide victims with an opportunity to indicate if they wish to seek restitution.¹⁹ Accordingly, Crown counsel or Crown Witness Coordinators should, at an early point in the prosecution, make reasonable efforts to find out if a victim of an offence desires information on restitution and whether they wish to seek restitution. This early discussion will have the benefit of encouraging a victim to compile the receipts, work orders or inventories that will support an application for restitution and assist Crown counsel in avoiding any delays or adjournments related to this information from a victim. It will also allow Crown counsel to include restitution in any resolution offers.

6. CROWN DISCRETION

The role of Crown counsel changes subtly after the presumption of innocence has been refuted by a finding of guilt after trial or a guilty plea. In making submissions on sentence, Crown counsel must be mindful of their role in articulating the principles of sentencing. Specifically, the sentence must reflect the impact of the offence on the community and the victim. Crown counsel must consult the PPSC Deskbook [chapter 3.7](#) on resolution discussions.

It is within Crown counsel's discretion to decide whether to apply for restitution based on the application of the factors mentioned above to the evidence. In all circumstances, Crown counsel should ensure that, during sentencing submissions, the court is proactively advised whether the victim had requested that restitution be sought by the Crown and, where restitution is not being sought, provide the Crown's reasons for not seeking restitution.

¹⁹ See *Criminal Code*, ss 737.1(1) and (2).

Tab 162

Crown Prosecution Manual

The Crown Prosecution Manual contains information on the criminal process and the role of Prosecutors in the criminal justice system. It is also used by the Attorney General to provide direction to Prosecutors.

Preamble to the Prosecution Manual

Prosecution Manual

The legal framework for decisions made by Prosecutors is provided by the *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>) , other federal legislation and legal decisions of courts. It is also necessary in the public interest to have uniform prosecution policies applicable across the province in order to assist and guide Prosecutors in the exercise of their discretion. Prosecution policies provide mandatory direction, advice and guidance to Prosecutors on the exercise of prosecutorial discretion.

In Ontario, prosecution policies are issued by the Attorney General through the issuance of Directives. The Directives, as a whole, constitute Ontario's Prosecution Manual. Directives provide consistency of approach to prosecutions across Ontario and typically relate to a particular category of cases (e.g. impaired driving or intimate partner violence) or to a specific prosecutorial issue (e.g. judicial interim release (bail)). The Directives also provide the public with an indication of the guiding principles for Prosecutors, enhancing accountability and transparency.

Prosecutors are required to familiarize themselves with the contents of the Prosecution Manual and must follow the mandatory direction, advice and guidance as set out in the Directives when making decisions in cases. The Directives are not intended to replace the sound judgement that Prosecutors exercise. Prosecutors are expected to exercise their discretion in accordance with the overall priorities in the Manual, keeping in mind the need to see justice done in individual cases. Directives which bind the discretion of the Prosecutor in the conduct of individual cases are few and far between. There will be decisions made daily by Prosecutors that are not specifically described in the Directives. In general, Prosecutors should exercise their discretion in keeping with the spirit of the Directives and their duties as local Ministers of Justice.

The role of the Attorney General

The Attorney General of Ontario occupies a unique dual position – as both the Minister of Justice for the provincial government and as the Chief Law Officer of the Crown. The Attorney General is a minister and member of Cabinet. The responsibilities of the Attorney General extend beyond those of other Cabinet ministers [Roles and Responsibilities of the Attorney General].

Under the Canadian constitution the federal government is responsible for the creation of criminal law, and the provinces are responsible for the administration of justice. As Chief Law Officer in Ontario, the Attorney General is responsible for the administration of justice, including the prosecution of individuals charged with criminal and regulatory offences. The Attorney General must carry out the prosecutorial responsibilities based on objective, legal criteria, independent of any political considerations that may arise in any particular criminal case or area of criminal policy.

It is extremely rare for an Attorney General to become involved in decision-making in individual prosecutions. Decisions in individual prosecutions are made by the Prosecutors who act as agents for the Attorney General. The Prosecutors are part of the Criminal Law Division under the Ministry of the Attorney General.

In the event that the Attorney General or Deputy Attorney General seeks to provide instructions to the Assistant Deputy Attorney General – Criminal Law Division on the conduct of a particular criminal prosecution or appeal that direction must be given in writing and must be published in a publicly accessible electronic forum. The publication of any such direction may be delayed by the Assistant Deputy Attorney General – Criminal Law Division, if the publication of the direction would interfere with the interests of justice.

Where the Attorney General or Deputy Attorney General provides their personal consent to a prosecution-related matter as required under the *Criminal Code*, that consent will be filed with the relevant court or tribunal and will thereby be publicly accessible.

As with a particular prosecution or appeal, it is equally important that the development of criminal policy that relates to the prosecution of a category of cases or to specific prosecutorial issues also be free from political influence. Where the Attorney General seeks to provide specific direction to the Deputy Attorney General and the Criminal Law Division as it relates to the prosecution of a category of cases, specific prosecutorial issues or criminal policy that specific direction will be in writing. The applicable Directive will be revised (or newly posted) and the 'new' content will be clearly identified.

The publication of any such direction promotes the paramount goals of openness and transparency. Transparency avoids allegations of improper political influence that, even unfounded, can have significant adverse implications for the Attorney General, the government and public confidence in the criminal justice system.

The role of the Prosecutor

Prosecutors are appointed to act as 'agents' for the Attorney General and in turn, make the vast majority of prosecution-related decisions. Prosecutors have significant discretion to conduct cases in a way that ensures justice is done and is responsive to the particular circumstance of a case. When exercised fairly and impartially, prosecutorial discretion is an essential component of the criminal justice system.

The independence of the Attorney General advances the public interest by enabling Prosecutors to exercise considerable prosecutorial discretion and properly fulfill their quasi-judicial role as ministers of justice without fear of political influence.

The Prosecutor must act with objectivity, independence and fairness in each case to ensure timely and principled decision making based on the circumstances of the accused and the alleged offence and an appropriate use of legal principles without outside pressure or considerations. Decisions made by Prosecutors in the proper exercise of their discretion will be supported by the Attorney General.

The Prosecutor should not consider the personal feelings of any official involved in the prosecution about the alleged victim or the accused, the potential political advantage or disadvantage that might flow from the decision to undertake or stop a prosecution, or the possible effect on the personal or professional circumstances of anyone connected to the exercise of prosecutorial discretion.

Prosecutors are dedicated to enhancing public safety and to promoting public confidence in the administration of justice and the rule of law. As representatives of the Attorney General, Prosecutors act with integrity to protect the interests of all Ontarians through fair, effective and efficient prosecutions.

Acting as "advocate"

Public confidence in the administration of criminal justice is strengthened by a system where Prosecutors are not only strong and effective advocates for the prosecution but also Ministers of Justice with a duty to ensure that the criminal justice system operates

fairly to all: the accused, victims of crime and the public. A Prosecutor's role excludes any notion of winning or losing. A Prosecutor's responsibilities are public in nature. As a Prosecutor and a public representative, demeanor and actions should be fair, dispassionate and moderate; show no signs of bias; and be open to the possibility of the innocence of the accused person.

Prosecutors have a responsibility to ensure that every prosecution is carried out in a manner consistent with the public interest. The Prosecutor must remain objective and be aware of the negative impact of stereotypes. In particular, stereotypes relating to race or ethnic origin, colour, religion, sex, sexual orientation, gender identity, gender expression, political association or beliefs of the accused or any person involved in the case must be rejected.

Relationship with the police

Police officers have a responsibility and discretion over the investigation of a criminal offence and the laying of criminal charges except where the consent of the Attorney General is required by statute. While both the police and the Prosecutors exercise discretion independently and objectively, the relationship between the investigative service and the prosecutorial service is one of cooperation and mutual reliance.

Relationship with victims

Prosecutors owe special duties of candour and respect to all victims. The Prosecutor is not, and can never, function as the victim's lawyer. Prosecutors must display sensitivity, fairness and compassion in their dealings with victims. In circumstances where the fair and impartial exercise of prosecutorial discretion is at odds with the victim's desires, the Prosecutor should be sensitive but realistic and candid with the victim.

Prosecutors must ensure that efforts are made that victims are provided with all relevant information that allows for full and fair participation in criminal proceedings. Prosecutors also have an important role to play in identifying victims who may require assistance to fully access the criminal justice system, or to communicate their evidence to the court.

Words and phrases

General Guidelines Concerning Interpretation

In the Manual, the following general guidelines apply:

- 1) a word importing a masculine gender includes the feminine gender, and a word importing a feminine gender includes the masculine gender
- 2) a word in the singular includes the plural, and a word in the plural includes the singular
- 3) where a word is defined, other parts of speech and tenses of the same word have corresponding meaning

Specific Definitions

In the Manual, except where the context requires otherwise, each of the following words and phrases has the corresponding meaning that is set out below:

“accused” refers to a person charged with an offence and alleged to have committed an offence

“approval” means receiving prior permission, absent exceptional circumstances

“Attorney General” means the principal law officer of “the Prosecution service”; the Minister of the provincial government responsible for the administration of justice

“Crown Attorney” means the Crown Attorney of a particular jurisdiction

“Director” means the Director of Crown Operations of a particular region, the Director of the Crown Law Office – Criminal or the Director of Guns and Gangs

“designate” means the approval function has been delegated to experienced counsel who were selected and approved by the appropriate supervisor

“exceptional circumstances” are those where public safety including that of specific victims or overall public interest is better served by departing from the recommended course of action and includes unusual or unique situations arising in criminal prosecutions, many of them unforeseeable; issues relating to expediency or complexity do not constitute exceptional circumstances

“may” indicates that there is an issue that must be considered or a discretion to exercise, and that decision or action may, or may not, be taken

“must” indicates a mandatory direction made by the Attorney General

“must, absent exceptional circumstances” means that the Attorney General’s policy strongly leans toward the suggested course of action, but takes into account the unique situations that arise in criminal prosecutions

“must obtain approval from...” signifies an action or decision that requires supervisory permission received prior to the action or decision being made, absent exceptional circumstances

“offender” means a person who has been determined by a court to be guilty of an offence, whether on acceptance of a plea of guilty or on a finding of guilt

“Prosecutor” means counsel responsible for criminal and quasi-criminal prosecutions and related matters on behalf of the Attorney General, and includes outside prosecutors and per diem prosecutors

“shall” reflects a legal requirement relating to a statutory obligation

“should” indicates that there is an expectation that a task will be carried out, but recognizes that it may not always be possible or desirable to do so in the particular circumstance

D. 1: Appeals

Type of document: Prosecution Directive

Effective date: November 14, 2017

The *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>) creates the rights of appeal to all levels of court, for both an accused and the Attorney General. Anyone convicted of an offence may appeal conviction and/or sentence. The *Criminal Code* also provides the Attorney General with a right to appeal acquittals, orders for stays, and sentences in certain circumstances.

The appeal process in each level of court is governed by rules created for that specific court. Appeals from summary conviction matters are first heard in the Superior Court of Justice. In some cases, there is a further right of appeal, from the Superior Court to the Court of Appeal of Ontario. Appeals from indictable matters are heard in the Court of

Appeal of Ontario. In limited circumstances, a decision of the Court of Appeal may be appealed to the Supreme Court of Canada.

When a case is being appealed, the appellate Prosecutor must notify the Prosecutor who conducted the trial (or who conducted the summary conviction appeal) of significant steps in the appeal proceedings before the case is heard in court. The appellate Prosecutor also must ensure that efforts are made to advise the victim of significant steps in the appeal proceedings before the case is heard in court. Reference should be made to the Victims Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-36-victims>) .

Crown appeals

The *Criminal Code* provides the Attorney General with a right to appeal in some circumstances, and sets out the legal criteria that shall be met. No Crown appeal may be approved unless it is in the public interest to fix the error and the legal basis for an appeal has been satisfied:

- in the case of indictable appeals to the Ontario Court of Appeal and the Supreme Court of Canada, the proposed appeal must involve an error of law alone
- in the case of summary conviction appeals, the proposed appeal can be based on a question of fact, or mixed fact and law, or an error of law alone
- the verdict would not necessarily have been the same if the error had not been made or
- in the case of a sentence appeal, the sentence that was imposed was demonstrably unfit, illegal or the result of an error in principle.

Prudence, restraint and a careful attention to the public interest are important principles that guide the Attorney General in reaching a decision whether or not to launch any appeal. Not every unfavourable ruling, judgment or sentence can or should be appealed. Even if the strict legal criteria for an appeal is met, a Crown appeal will not be commenced unless a thorough and considered review of the circumstances of the case, the state of the law, and the public interest has been conducted. The following factors inform such determinations:

1. the safety and security of the public, having particular regard to the seriousness of the offence and the future dangers posed by the offender
2. the importance of the legal issue raised

3. the current state of the law on the issue being raised
4. the importance of the factual issue(s), if raised on a summary conviction appeal, having regard for the impact of the finding in the particular jurisdiction
5. the effect of the legal error on public confidence in the criminal justice system if it is left to stand
6. deference to the jury's verdict and the recognition that it will not be lightly set aside by an appellate court
7. whether the trial record provides a suitable basis upon which to raise the issues on appeal
8. the strength of the Crown's case and whether it may have deteriorated by the time a new trial is ordered or whether the Crown intends to proceed with a new trial.
Generally, it will not be in the public interest to appeal an acquittal where there is no expectation that the Crown will proceed with a new trial
9. whether there is a reasonable prospect that the appeal will be successful.

Obtaining approval for crown appeals

As a general rule, summary conviction appeals are dealt with by the Crown Attorney's office in the jurisdiction where the trial took place. The Prosecutor who conducted the trial must obtain approval for an appeal to the Superior Court of Justice from her Crown Attorney or designate. In the case of trials of summary conviction matters that were prosecuted by counsel from the Crown Law Office – Criminal, approval for a summary conviction appeal to the Superior Court of Justice must be obtained from the Director or designate.

All requests for a Crown appeal to the Court of Appeal for Ontario must, absent exceptional circumstances have the approval of either the Crown Attorney or the Director for the jurisdiction where the trial took place, or their designate. The request must be made in writing to the Director of Crown Law Office – Criminal who will decide whether the proposed appeal should be launched.

Following an unsuccessful Crown appeal or a successful defence appeal, the Attorney General may seek a further appeal to the Supreme Court of Canada. The appellate Prosecutor who conducted the appeal in the Court of Appeal for Ontario must obtain the approval for an appeal to the Supreme Court of Canada from the Director of Crown Law Office - Criminal.

Timelines

Strict time lines that are set out in the rules govern all appeals. There are some differences in the timelines depending on the nature of the appeal, who is the appellant and the court to which the appeal is being filed. In limited circumstances, the Court may extend these timelines.

For Crown appeals to the Superior Court of Justice and the Court of Appeal for Ontario, from an acquittal, an order staying the trial, or a sentence, the appellate Prosecutor shall serve the notice of appeal within 30 days of the date of the decision being appealed.

All notices of appeal of a mental disorder disposition shall be served within 15 days of the date of receipt of the reasons for the disposition.

Publication bans

The appellate Prosecutor must ensure compliance with any publication bans imposed, whether by statute or otherwise, by court order.

Responding to defence appeals

The *Criminal Code* provides a broad right of appeal to an accused from conviction and sentence. Defence appeals can be brought with or without a lawyer. Each jurisdiction, or level of court, may have specific procedures and rules that govern appeals brought by unrepresented appellants who are in custody.

Judicial interim release pending an appeal

An appellant who has been sentenced to a period of custody may apply to be released from custody pending appeal, in accordance with the relevant legislation.

The appellate Prosecutor must ensure that efforts are made to notify the Prosecutor who conducted the trial (or the summary conviction appeal), when the appellate Prosecutor is notified of an application for judicial interim release pending appeal.

The appellate Prosecutor also must ensure that efforts are made to advise the victim when an application for judicial interim release pending appeal has been made and advised of the outcome of the hearing. The appellate Prosecutor should consider the directions set out in the Victims Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-36-victims>) .

Conceding appeals

The appellate Prosecutor may concede an appeal only where no reasonable argument can be made to sustain the verdict and/or sentence, after a comprehensive and rigorous analysis of the strengths and weaknesses of the case. In addition, the appellate Prosecutor must be satisfied that fairness and the interests of justice are best served by a concession. Although the Court will give the concession considerable weight, it is not bound to accept a concession.

In all cases, before conceding a defence appeal, the appellate Prosecutor must, absent exceptional circumstances, consult with the Prosecutor who had carriage of the trial or the summary conviction appeal.

In the case of a summary conviction appeal, the appellate Prosecutor must obtain the approval for the concession from the Director, or where delegated the Crown Attorney or the Supervisor of the Summary Conviction Appeals Office. For an indictable appeal, the appellate Prosecutor must obtain the approval for the concession from the Director of Crown Law Office - Criminal.

This requirement for approval to concede an appeal applies equally where the appellate Prosecutor concludes that there was a *Charter* violation and there is no reasonable argument that can be made against the granting of a *Charter* remedy.

Concessions of unconstitutionality

Striking down a piece of legislation (provincial or federal) or common law rule as unconstitutional has broad implications for the administration of justice. Only in rare circumstances will it be appropriate for the Prosecutor to concede that a statutory provision or common law rule is inconsistent with the *Constitution* and cannot be saved as a reasonable limit under the *Charter*.

In all cases whether trial or appeal, a Prosecutor must obtain the approval of the Deputy Attorney General before conceding that a statute or common law rule is unconstitutional, regardless of whether reliance will be made on section 1 of the *Charter*.

D. 2: Attorney General Consents and Delegations

Type of document: Prosecution Directive

Effective date: October 3, 2018

The *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>) directs that certain criminal proceedings or procedures can be commenced or undertaken only with the consent of the Attorney General. The Attorney General grants broad areas of discretion in criminal proceedings to Prosecutors, his agents, except in those specific circumstances where the law requires the personal consent of the Attorney General.

The *Criminal Code* defines the Attorney General as including his lawful Deputy. The Attorney General and his delegates exercise discretion in a fair and conscientious manner unaffected by irrelevant considerations, prejudice or partisan motives. Individual cases are assessed objectively and dispassionately. The public interest in the effective enforcement of the criminal law is the paramount consideration in making decisions to consent or refuse to consent.

Attorney General consent

The Attorney General's consent has not been delegated and is required in the following circumstances:

- initiating a dangerous offender or long-term offender application
- directing an indictment
- initiating a prosecution for advocating genocide
- initiating a prosecution for wilfully promoting hatred
- seizing hate propaganda
- providing an undertaking for suspected proceeds of crime, valued at greater than two million dollars
- the negotiation for a remediation agreement with an organization alleged to have committed an offence
- designating wiretap agents to obtain wiretap authorizations
- extending wiretap notification periods
- recommencing a prosecution where jurisdiction has been lost
- overriding an accused's election and directing a jury trial

Power to delegate

The Attorney General has the power to delegate his authority and, in certain instances, has delegated consent and power to the Assistant Deputy Attorney General, the Directors, Crown Attorneys or to Prosecutors in the Criminal Law Division.

In all instances where the Attorney General has delegated consent and power, the decisions are made in the same way, and on the same basis, that the Attorney General exercises this discretion. Once the Attorney General delegates authority, the delegate must exercise the power personally and must not delegate any further.

Where the consent of the Attorney General or delegate is required the Prosecutor must follow the process and procedures mandated by the relevant Directives (e.g. Direct Indictments (<https://www.ontario.ca/document/crown-prosecution-manual/d-9-direct-indictments>) , Hate Propaganda and Hate Motivated Offences (<https://www.ontario.ca/document/crown-prosecution-manual/d-16-hate-propaganda-and-hate-motivated-offences>) , Dangerous/Long-term Offenders (<https://www.ontario.ca/document/crown-prosecution-manual/d-8-dangerous-long-term-offenders>)).

Where the consent of the Attorney General or his delegate is received to initiate a prosecution, the Prosecutor must notify the Assistant Deputy Attorney General-Criminal Law Division in order to seek prior approval prior to withdrawing or staying the prosecution.

Delegation of Attorney General consents

The following delegations hereby replace all prior delegations as they relate to the specific legislative provisions referred to below. These delegations are to continue to apply in the event that these provisions may be amended or re-numbered in the future.

I hereby delegate my powers under:

Provisions under the *Criminal Code*

(Description/Delegation)

s. 7(4.3): Proceedings with offences listed in s.7(4.1) (e.g. sexual tourism offences)
Assistant Deputy Attorney General – Criminal Law Division.

ss. 83.24; 83.12: Proceeding with terrorism offence or an offence to terrorist property

Assistant Deputy Attorney General – Criminal Law Division.

s. 83.28(3): Application for the gathering of information relating to terrorism offence

Assistant Deputy Attorney General – Criminal Law Division.

s. 83.3(1): Laying an information for recognizance with conditions relating to terrorism

Assistant Deputy Attorney General – Criminal Law Division.

s. 136(3): Initiating prosecution for giving contradictory evidence

Assistant Deputy Attorney General – Criminal Law Division.

ss. 164(7); 164.1(8): Proceedings following court-ordered seizure, forfeiture and/or destruction of obscene materials, crime comics, child pornography or voyeuristic recordings

Assistant Deputy Attorney General – Criminal Law Division.

s. 172(4): Initiating prosecution for corrupting children

Assistant Deputy Attorney General – Criminal Law Division.

s. 174(3): Initiating prosecution for public nudity

Assistant Deputy Attorney General – Criminal Law Division.

s. 283(2): Prosecution for child abduction, whether or not there is a custody order

Assistant Deputy Attorney General – Criminal Law Division and, *only in emergency situations*, to Directors of Crown Operations, Director of CLO-Criminal.

s. 342(2): Initiating a prosecution for credit card offences in Ontario where offence occurs outside Ontario

Directors of Crown Operations, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 347(7): Prosecution for charging a criminal interest rate

Directors of Crown Operations, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 385(2): Prosecution for fraudulently concealing title documents

Directors of Crown Operations, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 402.2(4): Initiating a prosecution for identity theft/trafficking in identity information where offence occurs outside Ontario

Directors of Crown Operations, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 422(3): Prosecution for criminal breach of contract

Directors of Crown Operations, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 462.32(4.1): To permit a peace officer who has seized property via warrant to return same to the lawful owner

Director of Asset Management – Criminal, Deputy Directors of CLO-Criminal, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

ss. 462.32(6); 462.33(7): Providing undertakings for search warrants and restraint orders (i.e. seizing or restraining property believed to be proceeds of crime and subject to forfeiture)

Where undertaking is less than \$2 million: Director of Asset Management – Criminal, Deputy Directors of CLO-Criminal, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

Where undertaking is greater than \$2 million: Not delegated – personal consent of Attorney General or Deputy Attorney General required.

s. 462.331(1): To permit a person, other than the Attorney General, to apply to a judge for the appointment of a manager of seized property

Director of Asset Management – Criminal, Deputy Directors of CLO-Criminal, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 462.34(2)(a): With respect to any property seized or restrained, on application of the Attorney General or any other person with the written consent of the Attorney General is required to abridge the time for notifying of a review

Director of CLO – Criminal, Deputy Directors of CLO – Criminal, Director of Asset Management – Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 462.42(6): Return of property by judicial order declaring interest not subject to forfeiture

Director of CLO – Criminal, Director of Asset Management – Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 462.48(2): Affidavit for application under s. 462.48(1.1) (re. disclosure of income tax information)

Directors of Crown Operations, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 473(1): If the accused and the Attorney General consent, a trial for a s. 469 offence may be tried by a superior court judge alone

Directors of Crown Operations, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 473(2): Withdrawing consent provided under s. 473(1) to a trial by a superior court judge alone where an accused is charged with a s. 469 offence

Directors of Crown Operations, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 478(3)(b): Transferring charges to another province for a guilty plea

Crown Attorneys, Deputy Crown Attorneys, Deputy Directors of CLO-Criminal, Directors of Crown Operations, Director of CLO-Criminal and the Assistant Deputy Attorney General –

Criminal Law Division.

s. 479(b): Transferring a guilty plea to an offence not listed in s. 469 to another jurisdiction within Ontario

Crown Attorneys, Deputy Crown Attorneys, Deputy Directors of CLO-Criminal, Directors of Crown Operations, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 490.02902: SOIRA order for accused convicted outside Canada

Deputy Director of High Risk Offenders of CLO-Criminal, Director of CLO-Criminal, and the Assistant Deputy Attorney General – Criminal Law Division.

s. 579(1): Staying Proceedings (i.e. Crown stay)

All Crown counsel, Crown Attorneys, Deputy Crown Attorneys, Directors of Crown Operations, Deputy Directors of CLO-Criminal, Director of CLO-Criminal, and the Assistant Deputy Attorney General – Criminal Law Division.

Where an offence has resulted in death, Crown counsel must obtain the approval of the Crown Attorney, Director, or the Deputy Director, as the case may be.

s. 579(2): Recommencing proceedings within one year from the time of the stay under s.579(1) (i.e. Crown stay)

Directors of Crown Operations, Director of the CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

All Crown counsel only if reason is an accused's failure to comply with diversion, alternative measures or restorative justice.

s. 672.81(1.1): Extension of review periods for mandatory Review Board disposition reviews (from 12 to maximum of 24 months)

All Crown counsel, Crown Attorneys, Deputy Crown Attorneys, Directors of Crown Operations, Deputy Directors of CLO-Criminal, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 672.81(1.31): Extension of review periods for mandatory Review Board disposition reviews in cases of high-risk accused

All Crown counsel, Crown Attorneys, Deputy Crown Attorneys, Directors of Crown Operations, Deputy Directors of CLO-Criminal, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 672.86(1)(b): Interprovincial transfer of accused in custody or directed to attend hospital pursuant to court or Review Board order

Deputy Directors of CLO-Criminal, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 672.86(2): Authorized officer must sign warrant for interprovincial transfer of in-custody accused

Deputy Directors of CLO-Criminal, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 672.86(2.1)(b): Interprovincial transfer of out-of-custody accused

Deputy Directors of CLO-Criminal, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

ss. 725(1)(b); 725(1)(b.1): With the consent of the Attorney General and the offender, a sentencing judge may take into account other outstanding charges

All Crown counsel, Crown Attorneys, Deputy Crown Attorneys, Directors of Crown Operations, Deputy Directors of CLO-Criminal, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 733(1.1)(a): Interprovincial transfer of probation orders

Crown Attorneys, Deputy Crown Attorneys, Deputy Directors of CLO-Criminal, Directors of Crown Operations, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 733.1(2): Initiating a prosecution in Ontario for a breach of probation that took place in another province

Directors of Crown Operations, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 742.5(1.1)(a): Transferring a conditional sentence order to another province

Crown Attorneys, Deputy Crown Attorneys, Deputy Directors of CLO-Criminal, Directors of Crown Operations, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 742.6(3.2)(a): Initiating a prosecution in Ontario for a breach of a conditional sentence that took place in another province

Directors of Crown Operations, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 753.3(2): Initiating a prosecution in Ontario for a breach of a long-term supervision order that took place in another province

Directors of Crown Operations, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 803(3): Proceeding in prosecution for failing to appear where the original trial proceeded in the absence of the accused

Directors of Crown Operations, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 810.01(1): Initiating a recognizance where there is fear that a criminal organization or terrorism offence will be committed

Assistant Deputy Attorney General – Criminal Law Division.

s. 810.2(1): Initiating a recognizance where there is fear that a serious personal injury offence will be committed

Deputy Director of High Risk Offenders - CLO-Criminal, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 810.22(2)(a) Transfer of peace bond to another province made under s. 83.3 and 810 to 810.2

Deputy Director of High Risk Offenders – CLO-Criminal, Director of CLO-Criminal and the Assistant Deputy Attorney General.

Provisions under the *Youth Criminal Justice Act*

(Description/Delegation)

s. 14(3): Prosecution beyond limitation period prohibited without consent of accused and Attorney General

Crown Attorneys, Deputy Crown Attorneys, Deputy Directors of CLO-Criminal, Directors of Crown Operations, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 57(1): Transfer of youth sentence to another territorial division

All Crown counsel, Deputy Crown Attorneys, Crown Attorneys, Directors of Crown Operations, Deputy Directors of CLO-Criminal, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 57(3): Transfer of youth sentence of a young person to a province in which youth is an adult

Crown Attorneys, Deputy Crown Attorneys, Directors of Crown Operations, Deputy Directors of CLO-Criminal, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

s. 133: Transferring charges to another province for a plea

Crown Attorneys, Deputy Crown Attorneys, Directors of Crown Operations, Deputy Directors of CLO-Criminal, Director of CLO-Criminal and the Assistant Deputy Attorney General – Criminal Law Division.

Miscellaneous matters (related statutes)

(Description/Delegation)

s. 102.1(2) of the *Funeral, Burial and Cremation Services Act*: disinterment of a body ordered by the Attorney General, Solicitor General, or a delegate

Assistant Deputy Attorney General – Criminal Law Division.

s. 7 of the *Visiting Forces Act* (R.S.C. 1985, c.V-2) and s.3 of the *Visiting Forces Regulations* (C.R.C., c. 1598): Transferring jurisdiction to prosecute offences committed by foreign military personnel while on Canadian soil

Assistant Deputy Attorney General – Criminal Law Division.

s. 79(4) of the *Police Services Act*: prosecution for intimidating complainants, obstructing Independent Police Review Director, or providing false information

Assistant Deputy Attorney General – Criminal Law Division.

D. 3: Charge Screening

Type of document: Prosecution Directive

Effective date: November 14, 2017

A charge may only proceed if there is a reasonable prospect of conviction and it is in the public interest. The appropriate exercise of prosecutorial discretion is fundamental to the proper application of the charge screening standard. The community relies upon Prosecutors to pursue charges that can be proven while protecting individuals from the serious repercussions of a criminal charge where there is no reasonable prospect of conviction.

Deciding to continue or terminate a prosecution can be one of the most difficult decisions a Prosecutor can make. The Prosecutor must act with objectivity, independence and fairness in each case to ensure a principled decision is made. It requires a balancing of competing interests including the interests of the public, the accused and the victim.

The charge screening obligation is ongoing as Prosecutors receive new information in preparation for and during the conduct of bail hearings, pre-trials, preliminary hearings, trials and appeals. Any new information received during or after all appeals have been exhausted should be forwarded to the Director of Crown Law Office – Criminal.

Decisions made by Prosecutors about whether to continue or terminate a prosecution made in the proper exercise of their discretion will be supported by the Attorney General.

Reasonable prospect of conviction

When considering whether to continue the prosecution of a charge, the Prosecutor should determine if there is a reasonable prospect of conviction. This standard must be applied to all cases and at all stages. If at any stage of the proceeding, the Prosecutor determines there is no longer a reasonable prospect of conviction, the prosecution must be discontinued.

The reasonable prospect of conviction standard is higher than a prima facie case that merely requires that there is evidence whereby a jury, properly instructed, could convict. On the other hand, the standard does not require "a probability of conviction," that is, a conclusion that a conviction is more likely than not. The term reasonable prospect of conviction denotes a middle ground between these two standards. It requires the exercise of prosecutorial judgment and discretion based on objective indicators found in the case itself.

Applying the reasonable prospect of conviction standard requires a limited assessment of credibility based on objective factors, an assessment of the admissibility of evidence and a consideration of likely defences.

In applying the standard, Prosecutors should consider the following factors:

- the availability of evidence
- the admissibility of evidence implicating the accused
- an assessment of the credibility and competence of witnesses, without taking on the role of the trier of fact
- the availability of any evidence supporting any defences that should be known or that have come to the attention of the Prosecutor.

Public interest

If there is a reasonable prospect of conviction, the Prosecutor must then consider whether it is in the public interest to continue the prosecution. The public interest factors must only be considered after it is determined there is a reasonable prospect of conviction. No public interest, however compelling, can warrant the prosecution of an individual if there is no reasonable prospect of conviction.

When deciding whether to prosecute or discontinue the prosecution a number of public interest factors should be considered. No one factor is determinative when assessing the public interest, but consideration should be given to:

1. the gravity or relative seriousness of the incident
2. circumstances and views of the victim including any safety concerns
3. the age, physical health, mental health or special vulnerability of an accused, victim or witness
4. the prevalence of the type of offence and the actual or potential impact of the offence on the community and/or victim
5. the criminal history of the accused
6. whether the consequences of any resulting conviction would be unduly harsh or oppressive to the accused

7. whether the accused is willing to co-operate or has already co-operated in the investigation or prosecution of others
8. the degree of culpability of the accused, particularly in relation to other alleged parties to the offence
9. the likely outcome in the event of a finding of guilt, having regard to the sentencing options
10. the length and expense of a trial when considered in relation to the seriousness of the offence
11. the availability of any alternatives to prosecution such as diversion and civil remedies.

This is a non-exhaustive list and some cases will raise unique factors. Not all factors will be applicable to every case and in any particular case one factor may deserve more weight than it might in another case.

In determining whether there is a public interest to proceed or discontinue the prosecution, the Prosecutor must remain objective and be aware of the negative impact of stereotypes. In particular, stereotypes relating to race or ethnic origin, colour, religion, sex, sexual orientation, gender identity, gender expression, political association or beliefs of the accused or any person involved in the case must be rejected.

The Prosecutor should not consider the personal feelings of any official involved in the prosecution concerning the victim or the accused, any political advantage or disadvantage that might flow from the decision to undertake or stop a prosecution or the possible effect on the personal or professional circumstances of anyone connected to the prosecution decision.

There is no class of cases that are of necessity outside the public interest to prosecute.

Discontinuing the prosecution

Where there is no reasonable prospect of conviction or there is no public interest to proceed, the Prosecutor must withdraw the charge. Brief reasons should be provided on the record where the Prosecutor withdraws the charge unless such comments would breach a privilege or create a risk of harm.

A stay of proceedings is not appropriate where a charge does not meet the charge screening standard and there is no expectation that it will meet the standard within a

year. A stay is only appropriate where the proceedings are temporarily discontinued with an expectation of recommencing within one year.

Before discontinuing the prosecution, the Prosecutor must ensure reasonable steps are taken to inform the victim and the investigating officer that the charges will be withdrawn.

Reference should be made to the Victims Directive

(<https://www.ontario.ca/document/crown-prosecution-manual/d-36-victims>) , Sexual Assault

against Adults Directive ([https://www.ontario.ca/document/crown-prosecution-manual/d-34-](https://www.ontario.ca/document/crown-prosecution-manual/d-34-sexual-offences-against-adults)

sexual-offences-against-adults) , Intimate Partner Violence Directive

(<https://www.ontario.ca/document/crown-prosecution-manual/d-23-intimate-partner-violence>) .

D. 4: Community Justice Programs for Adults

Type of document: Prosecution Directive

Effective date: November 14, 2017

Community justice programs may provide an effective alternative to a formal prosecution. In some cases, the needs and interests of society can be better served through the exercise of prosecutorial discretion to withdraw or stay criminal charges upon an accused person's completion of a comprehensive diversion program.

Community based sanctions hold an accused person accountable for criminal conduct by requiring the completion of rehabilitative programs that effectively respond to the nature of the offence and accused, and the local needs of the community. An example is the Direct Accountability Program, in place in most jurisdictions across Ontario. Another example is the Indigenous Community Justice Program that provides an alternative for Indigenous adults.

Accused persons participating in one of the programs must be willing to assume responsibility for the actions that lead to the criminal charge and be prepared to make meaningful amends. Once in a program, a plan will be created for the accused that will address the underlying cause that lead to the offence. Prosecutors must only consider community based sanctions if a reasonable prospect of conviction exists and must not impose additional requirements on the accused person as a precondition to offering an alternative to diversion.

In circumstances where no formal programming options exist, Prosecutors may also exercise their discretion to consider informal modes of diversion. Where the alternative is a donation to charity, the amount donated must be approved by the Crown Attorney or designate, if it exceeds \$1000.

This directive addresses diversion for adult accused persons. For young persons, please see Youth Criminal Justice: Extrajudicial Sanctions (<https://www.ontario.ca/document/crown-prosecution-manual/38-a-youth-criminal-justice-extrajudicial-sanctions>) . For an adult suffering a mental illness, please see Mentally Ill Accused: Alternatives to Prosecution (<https://www.ontario.ca/document/crown-prosecution-manual/26-a-mentally-ill-accused-alternatives-prosecution>) . For an Indigenous accused, please see Indigenous Peoples Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-20-indigenous-peoples>) .

Ineligible offences

Prosecutors must not refer any of the following offences to a community justice program, regardless of the circumstances of the offence or the accused:

- murder, manslaughter, infanticide, criminal negligence causing death
- driving offences causing death or bodily harm
- aggravated assault
- simple impaired driving or driving with a prohibited blood alcohol concentration or refusing to provide a breath sample
- offences involving firearms
- criminal organization offences
- terrorism offences
- kidnapping
- voyeurism
- publication etc., of intimate images without consent
- child abuse and child luring
- offences involving child pornography
- home invasions

- human trafficking offences
- robbery
- sexual offences including sexual assault, sexual assault cause bodily harm, sexual interference and exploitation, invitation to sexual touching and incest
- any offences where the Attorney General's consent was obtained to initiate proceedings

Presumptively ineligible offence

In exceptional cases, the Prosecutor may refer the following presumptively ineligible offences to a community justice program with the prior approval of the Crown Attorney or designate:

- hate-motivated offences (Hate Propaganda and Hate Motivated Offences Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-16-hate-propaganda-and-hate-motivated-offences>))
- intimate partner violence offences (Intimate Partner Violence Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-23-intimate-partner-violence>))
- criminal harassment

Eligible offences

The Prosecutor may refer any other offence to a community justice program.

Factors to consider

In determining if a community justice program is an effective alternative to a formal prosecution for a presumptively ineligible offence or eligible offence for an adult accused, the Prosecutor and Crown Attorney or designate must consider the following factors:

Background of the accused person:

1. the age and health of the accused person
2. any prior findings of guilt or past involvement with community justice programs
3. the nature and number of any such previous offences

4. any outstanding charges
5. the role of the accused person and their corresponding degree of responsibility in relation to the offence
6. whether the accused person had been previously victimized
7. any remorse and willingness to engage in a community justice program
8. any prior restitution
9. if the accused person comes from a disadvantaged group
10. whether the accused self-identifies as Métis, Inuit or First Nations.

The circumstances and nature of the offence:

1. whether the offence is summary or indictable
2. whether the offence involves violence
3. whether the offence actually harmed the victim (physical, psychological or financial) and/or society
4. whether the incident affected the sexual integrity of a person
5. whether a weapon was used or threatened to be used
6. whether there was an intention to cause or attempt to cause substantial property damage or loss, and if so, whether the damage was reasonably foreseeable
7. whether the offence was against the administration of justice, such as breach of a court order, and, if so, the extent of non-compliance
8. whether the offence involved malice, extortion, exploitation or revenge
9. whether the offence involved a breach of trust
10. whether the offence was motivated by bias, prejudice, or hate
11. the age of the victim
12. the views of the victim and/or their parents or legal guardians (if victim is a child), if available.

Administration of justice considerations:

1. public confidence in the administration of justice
2. the length and expense of a trial when considered in relation to the seriousness of the offence
3. the likely sentence upon conviction
4. the availability of an appropriate sanction, including culturally relevant programming options, which will hold the accused person accountable and focus on correcting the offending behaviour
5. frailties in the prosecution e.g. staleness of the case, or the technical nature of the offence
6. whether the consequences of the prosecution would be unduly harsh to the accused person, the victim or any witnesses in the case, owing to such factors such as age, health or the relationship between the parties
7. whether a just result is accelerated by a referral to a community justice program.

D. 5: Confidential Informers

Type of document: Prosecution Directive

Effective date: November 14, 2017

Confidential informers play a vital role in law enforcement. The near absolute privilege attached to the identity of these individuals is premised on the duty of all citizens to aid in enforcing the law and is meant to protect them against retribution from those involved in crime and to encourage continued information sharing.

Confidential informer privilege applies to those who provide information about a crime to the police, or otherwise assist the police, on the understanding that their identities will not be revealed. In order for the privilege to apply, there must be an explicit or implicit offer of confidentiality.

Informer privilege

Prosecutors have a duty to protect the identity of confidential informers. Once informer privilege is found to exist the Prosecutor, police and Court are duty bound to protect the privilege.

Where the privilege applies, Prosecutors must ensure that no disclosure occurs of any information that might tend to reveal the identity of an informer, or their status as an informer. This obligation continues throughout every stage of the proceedings including the questioning of witnesses. In light of the serious consequences that could arise from a breach of this privilege, Prosecutors must alert their Crown Attorney to the existence of any case involving a confidential informer at the earliest opportunity.

Any issues regarding confidential informer privilege should be considered at the earliest possible stages in a prosecution.

Waiver

The privilege belongs jointly to the prosecution and the confidential informer. Neither can waive it without the consent of the other. Waiver is only valid where the informer has clearly and unequivocally waived the procedural safeguards associated with the privilege and is doing so with full knowledge of the rights that the privilege is designed to protect and of the effect, the waiver will have on those rights.

Waiver of an informer's privilege will only apply to the particular case and should never be assumed to mean an informer has waived any claims to privilege in past or future cases.

Disclosure obligations

A Prosecutor must not disclose any information that might tend to identify a confidential informer. It is the responsibility of the Prosecutor, together with the police, to comprehensively review and vet all disclosure materials.

Once it is determined that a case involves a confidential informer, that case must be brought to the attention of the Crown Attorney or designate for immediate assignment. The assigned Prosecutor is responsible for determining what material can be disclosed. No information that may tend to reveal the identity of the informer nor implicitly reveal their identity may be disclosed.

No disclosure in a criminal file involving an informer should be provided until the Prosecutor has been able to review and vet the entire file. Where possible, this should be done with the assistance of a confidential informer's assigned handler to ensure that no information is disclosed that may tend to identify a confidential informer.

The privilege continues to apply even if the informer's identity becomes known through notoriety or inadvertent disclosure.

Inadvertent disclosure

The Prosecutor must immediately inform the relevant police agency of any breach or potential breach of informer privilege so that appropriate steps can be taken.

In these circumstances, the Prosecutor must immediately notify her Crown Attorney of the breach. The Prosecutor must contact defence counsel, request the information be returned, along with any copies produced, and request that the information not be disclosed to any other person, including their client. The Prosecutor may be required to bring an application before the court for an order compelling the defence counsel to return the materials sought.

Innocence at stake exception

The privilege that is attached to a confidential informer's identity may give way when an accused person's innocence is at stake. "Innocence at stake" is the *only* justification to pierce informer privilege.

Confidential information protected by privilege may be disclosed by court order where an accused person establishes that their innocence is at stake. A claim of innocence at stake cannot be speculative and shall be supported by evidence. The application to establish innocence at stake is generally made at the close of the Crown's case.

If the judge determines that the evidence establishes that innocence is at stake, then the judge will order production of information only to the extent necessary.

If an order is granted requiring disclosure of confidential information that may tend to reveal the identity of an informer, a Prosecutor must inform her Crown Attorney of the ruling.

The Prosecutor must not reveal information that may tend to disclose the identity of an informer who has not waived the privilege, even where the exception is found to apply. If an order is made that innocence is at stake and the informer does not waive the privilege, the Prosecutor must reassess reasonable prospect of conviction and determine whether the prosecution can continue. The Prosecutor may also request an appeal of the judge's ruling under the *Canada Evidence Act* (<http://laws-lois.justice.gc.ca/eng/acts/C-5/>) .

D. 6: Contact with Media

Type of document: Prosecution Directive

Effective date: November 14, 2017

Public confidence in the administration of criminal justice is enhanced by the availability of appropriate and timely information about cases before the courts and the criminal process. Prosecutors have an important role to play as “Ministers of Justice” and have a responsibility to relate to the media and the public in a manner consistent with that role. Comments must be fair, factual, dispassionate and moderate and must be respectful of the court and all participants in the proceedings.

All communication with the media must be open and transparent and never “off the record”. The Prosecutor must not express personal opinions.

Prosecutors may confirm or provide factual information that is already in the public domain. They should also provide general information or explanations about the criminal process. Prosecutors must not provide information to the media prior to its presentation as evidence in court. Prosecutors must not initiate contact with the media without having obtained prior approval of the Crown Attorney or designate.

This policy applies to all methods of communication including traditional media, electronic news outlets, websites and social media.

Public discussions

Any public discussions which could prejudice ongoing proceedings are prohibited and this prohibition applies until the end of the appeal process. In all their dealings with the media, Prosecutors must bear in mind the presumption of innocence and the need to protect the integrity of the court process and the rights of all the participants in the court process. Prosecutors must not comment on:

- the possibility of charges being laid
- cases under review or investigations that are ongoing
- speculation as to what may happen during any stage of ongoing proceedings
- discussions held with colleagues or members of an investigative agency, whether or

not such advice or discussions are privileged

- any information the disclosure of which is prohibited by law or by a court-imposed publication ban
- policies, procedures or decisions of investigative agencies (such inquiries should be directed to the investigative agency)
- the wisdom or efficacy of federal or provincial policies, programs or legislation
- the existence of any plea negotiations or possibility of a plea of guilty or other disposition
- the strength or weakness of the prosecution or defence case including undisclosed elements of the prosecution's case or strategy
- the appropriateness of a judge's charge to the jury, particular rulings, the verdict of a jury, the sentence or any comments made by the judge
- whether a decision will be appealed or whether an appeal has been requested or not (however, the procedure for considering whether or not to appeal may be explained) or
- the guilt or innocence of an accused or anything that could jeopardize the accused's right to a fair trial.

Prosecutors should refrain from publicly elaborating on the reasons for the exercise of prosecutorial discretion beyond what was placed on the court record. When the Prosecutor is unsure how to respond to a media inquiry, Prosecutors should refer the media to the Ministry's media spokesperson at the Ministry of the Attorney General.

Publication bans and court exhibits

If a member of the media inquires about a restriction on publication, the Prosecutor should advise the media member about the existence of a publication ban. A Prosecutor must avoid providing legal advice to members of the media or the public respecting the propriety of publication or the breadth of any publication ban.

Judicial documents and court exhibits, including Victim Impact Statements, are generally accessible to the public (<https://www.ontario.ca/document/access-court-files-documents-and-exhibits>). The Prosecutor should seek to restrict access in any case where public access to court exhibits may undermine the right to a fair trial, violate privacy interests or interfere with the administration of justice.

Reference should be made to the Publication Bans and Sealing Orders Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-32-publication-bans-and-sealing-orders>) .

Communicating with the media in a personal capacity

Public statements by Prosecutors must not compromise their ability to function effectively as public servants nor diminish the public perception of impartiality necessary to fulfill a Prosecutor's quasi-judicial responsibilities. Prosecutors must also be mindful of their oath of loyalty and confidentiality and statutory restrictions on political comment by public servants. In their personal capacity Prosecutors must not make public statements that would:

- compromise their ability to function as a minister of justice by commenting publicly on the wisdom of a particular offence or specific law, a government policy, position or proposal
- discourage public respect for the administration of justice or weaken the public's confidence in legal institutions
- contravene professional codes of conduct or
- lecture on matters of public interest where their opinion is sought because they are a representative of the Crown.

If participating in external professional events, the Prosecutor must make it clear the oral or written views being expressed are personal views that do not necessarily represent the position of the Ministry.

This directive applies to Prosecutors who write, blog, participate in virtual communities or social networking sites outside of the scope of their employment. Prosecutors should also consider their safety and security when posting or providing information online.

Reference should also be made to the Publication Bans and Sealing Orders (<https://www.ontario.ca/document/crown-prosecution-manual/d-32-publication-bans-and-sealing-orders>) and Professionalism (<https://www.ontario.ca/document/crown-prosecution-manual/d-31-professionalism>) Directives.

D. 7: Criminal Asset Forfeiture

Type of document: Prosecution Directive

Effective date: November 14, 2017

Asset forfeiture plays an important role in deterring the commission of criminal offences. It is crucial that the profit motive from criminal offences is removed through the identification, restraint, seizure and forfeiture of proceeds of crime. It is equally important that property that is used to commit criminal offences be taken out of the hands of criminal organizations and individual offenders.

On occasion, police in the course of an investigation seize property used in the commission of an offence or obtained by proceeds of crime. This property may be tendered as evidence at a prosecution. The *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>) authorizes the return of property to its owner or the victim. It also authorizes the forfeiture of proceeds of crime and the forfeiture of property used to commit criminal offences (offence-related property).

The *Criminal Code* prioritizes the compensation of victims of crime over forfeiture. In determining whether an application for forfeiture should be made, Prosecutors must determine whether restitution to identified victims would be necessary in the circumstances of the offence.

Resolution discussions and sentencing

Seized property must be returned to its owner or the victim or be forfeited at the conclusion of the criminal case. The Prosecutor must ensure that an order is obtained to dispose of the property. The order sought must provide for forfeiture of the property or its return to its owner, or victim as appropriate. If forfeiture or return of property is not addressed at the conclusion of the proceedings by way of a forfeiture order or return order, the Prosecutor must bring an application to dispose of the property.

Prosecutors must ensure that notice is given to all parties who appear to have a valid interest in any proceeds of crime that the Prosecutor is seeking to have forfeited.

Other government bodies may have an interest in conducting legal proceedings to determine lawful entitlement to the property. Prosecutors must be mindful not to bind those interests during resolution discussions pertaining to the property.

Proceeds of crime

A Prosecutor is entitled to bring an application for forfeiture of proceeds of crime where it can be shown that the proceeds of crime derived from the commission of the offence that resulted in the conviction or discharge of the accused, or the property is nevertheless proceeds of crime from another offence.

Proceeds of crime is defined as:

- any property, benefit or advantage
- that is within or outside Canada
- that was derived directly or indirectly from the commission of an offence that may be prosecuted by indictment in Canada.

In the event that the property cannot be subject to forfeiture, for instance if it has been spent or hidden, the court may order a fine in lieu of forfeiture. The fine shall be of equal value to the property. In these circumstances, the court is obligated to impose a default consecutive jail sentence for failure to pay the fine in lieu of forfeiture.

Offence-related property

Where a prosecution has proceeded by way of indictment, a Prosecutor is entitled to apply for forfeiture of offence-related property where it can be shown that the property was used or intended to be used in the commission of an offence that resulted in the conviction of the accused, or in relation to some other offence.

Offence-related property is defined as:

- any property
- that is within or outside Canada
- that is used in any manner in connection with the commission of an offence prosecuted by indictment or that is intended to be used for committing an indictable offence.

D. 8: Dangerous/Long-term Offenders

Type of document: Prosecution Directive

Effective date: November 14, 2017

Protection of the public is the paramount consideration in dealing with potential dangerous and long-term offenders. The protection of the public requires Prosecutors to assess offenders who pose an ongoing risk to the safety of the public. While making this assessment, Prosecutors should determine whether an application is warranted for a court order declaring the offender to be a dangerous or long-term offender.

The consent of the Attorney General is required to initiate a dangerous or long-term offender application. It is for the Attorney General to determine whether an application will be made and whether it will be for a dangerous offender or a long-term offender designation. The Attorney General cannot be bound by any discussions or positions taken by Prosecutors.

After being declared a dangerous offender by a court, the offender shall receive an indeterminate prison sentence unless the court finds that a less severe measure will adequately protect the public. An offender who is declared a long-term offender shall be sentenced to an appropriate term of imprisonment and upon release be subject to a long-term supervision order for a period less than 10 years.

Each region has a designated Prosecutor known as Crown Counsel High-Risk Offender (CC-HRO), who has specialized expertise to assist in the prosecution of dangerous and long-term offenders and breaches of long-term supervision orders. Once a file is screened, and the possibility of a dangerous or long-term offender application is being considered, the Prosecutor must inform the CC-HRO of the case.

Resolution discussions

Where a case has been identified as a potential dangerous or long-term offender application, the Prosecutor must not negotiate a guilty plea in exchange for agreeing to forego a dangerous or long-term offender application without first consulting with the CC-HRO and her Crown Attorney.

It would rarely be appropriate for the Prosecutor to recommend a long-term offender designation, followed by a supervision order, for an offender who meets the statutory dangerous offender criteria because of the dramatically different consequences.

Any plea negotiations involving a dangerous or long-term offender application are subject to the Attorney General's approval as the Attorney General's consent is required to initiate

the application. The Prosecutor must not purport to bind the Attorney General regarding the type of designation that may be sought in any plea negotiations.

Any recommendation of the Prosecutor must be amenable to reassessment following the results of the psychiatric assessment. The Prosecutor retains the discretion to amend her recommendation as new information comes to light.

Psychiatric assessment

A psychiatric assessment is required in order to bring a dangerous or long-term offender application. The Prosecutor must consult with the CC-HRO and must obtain the approval of her Crown Attorney or designate prior to seeking an order from the court directing a psychiatric assessment.

The Prosecutor must ensure that a full assessment is requested and must not agree to restrict the scope of the assessment to either a dangerous offender or long term offender designation. The Prosecutor must be mindful that the psychiatric assessment is not determinative of the legal issues that the Court must decide. The Prosecutor must still determine whether the evidence satisfies the legal requirement that the offender's risk can reasonably be controlled in the community.

Attorney General consent

Upon receipt of the assessment, if the Prosecutor in consultation with the CC-HRO determines that a dangerous or long-term offender application is warranted, the Prosecutor must obtain the Attorney General's consent to initiate proceedings. The Prosecutor must have the approval of her Crown Attorney or designate and the Assistant Deputy Attorney General - Criminal Law Division prior to commencing the process to seek the Attorney General's consent.

The position taken by the Prosecutor will depend on the evidence and the demands of the interests of justice in each particular case. The Attorney General's authority to initiate a dangerous or long-term offender application and direction to seek a particular type of designation does not detract from the Prosecutor's obligation to make decisions based on the evidence, the facts of the case and the applicable law. If the evidence before the court, psychiatric or otherwise, is different than what was anticipated such that it does not support the original position, the Prosecutor should exercise her discretion appropriately. The Prosecutor must notify the Assistant Deputy Attorney General - Criminal Law Division of any significant change in the application.

Reference should be made to the Attorney General Consent and Delegation Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-2-attorney-general-consents-and-delegations>) .

D. 9: Direct Indictments

Type of document: Prosecution Directive

Effective date: November 14, 2017

The *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>) permits the Attorney General or the Deputy Attorney General to direct an indictment and send a criminal case directly to trial without a preliminary hearing in the following circumstances:

1. prior to an accused person making an election to have a preliminary inquiry
2. a preliminary inquiry has commenced but has not been concluded, or
3. after an accused has been discharged at a preliminary inquiry.

The Prosecutor should make a request for the consent of the Attorney General or Deputy Attorney General to direct an indictment where the interests of justice require that the matter be brought directly to trial.

Generally, full disclosure must be made prior to the Prosecutor's request for a direct indictment. If full disclosure has not been made prior to the request, the Prosecutor must ensure that disclosure allowing the accused to properly exercise their right to full answer and defence will be made prior to trial.

The Prosecutor must have concluded that there is a reasonable prospect of conviction and the continuation of the prosecution is not contrary to the public interest. The Prosecutor must also have the approval of her Crown Attorney and Director before requesting a direct indictment from the Attorney General or Deputy Attorney General.

Factors to consider

The factors that the Prosecutor should consider in determining whether to request a direct indictment include, but are not limited to, the following:

- delays in the trial that could deprive the accused of the right to be tried within a reasonable time

- the physical or psychological health of victims and witnesses
- difficulties involved in having victims and witnesses testify more than once including the victimization of vulnerable witnesses
- preservation of the integrity of evidence including the risk that evidence could be destroyed
- preservation of the integrity of related ongoing police investigations
- safety concerns for the victims, witnesses and public
- the need to avoid multiple proceedings
- the accused was wrongly discharged following the preliminary inquiry because of errors or new evidence that has been discovered
- a preliminary inquiry would be unreasonably costly, complex, long or inappropriate because of the nature of the issues or the evidence
- the need to maintain public confidence in the administration of justice
- the case is notorious or of particular importance to the public such that the case should be tried as soon as possible
- there are circumstances that require the case be expedited.

Reference should be made to the Attorney General Consent and Delegation

(<https://www.ontario.ca/document/crown-prosecution-manual/d-2-attorney-general-consents-and-delegations>) , Charge Screening (<https://www.ontario.ca/document/crown-prosecution-manual/d-3-charge-screening>) , Sexual Offences against Adults

(<https://www.ontario.ca/document/crown-prosecution-manual/d-34-sexual-offences-against-adults>) and Offences against Children (<https://www.ontario.ca/document/crown-prosecution-manual/d-27-offences-against-children>) Directives.

D. 10: Disclosure

Type of document: Prosecution Directive

Effective date: November 14, 2017

The Prosecutor must provide to the accused all information in her possession relating to the charges against the accused unless it is clearly irrelevant. Some information is exempt from disclosure because it is protected by privilege. The Prosecutor has discretion as to

the timing of disclosure and the form it will take [e.g. hard copy, electronic]. Disclosure of all relevant information is vital to ensuring that the trial process is fair to all those accused of criminal offences.

Any information that points to either guilt or innocence that could be used by the accused in meeting the case for the prosecution, advancing a defence, or otherwise determining how to conduct a defence must be disclosed. The Prosecutor's duty to disclose is ongoing throughout the trial and appeal process and continues after those processes have concluded.

Duty to inquire

Where a Prosecutor has a reasonable basis to believe that the police or other government entity may be in possession of material or information that could reasonably impact the result of the prosecution, the Prosecutor has a duty to make inquiries of these parties for the purpose of obtaining the material. If the police or other government entity declines to provide the material, the accused may seek a court order for the material to be provided. The Prosecutor does not have a duty to inquire where there is not a reasonable basis for the request or there is no likelihood of relevance.

Exceptions

The Prosecutor is not obliged to disclose information that is irrelevant, protected by privilege or that is recognized at common law or by statute as an exception to the duty to disclose. In those cases the Prosecutor must not disclose the information without a court order. The material that falls within this category includes, but is not restricted to:

1. information that may identify a confidential informer (see Confidential Informers Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-5-confidential-informers>))
2. information subject to solicitor-client privilege
3. information subject to work-product privilege
4. information that may jeopardize ongoing police investigations or reveal confidential police investigative techniques
5. information that may jeopardize the safety of a witness or another third party
6. private information i.e. medical records, personal diaries, cell phones or therapeutic records (e.g. see Sexual Offences against Adults Directive

(<https://www.ontario.ca/document/crown-prosecution-manual/d-34-sexual-offences-against-adults>)).

There may be occasions when information in the possession of the prosecution does not fall within its defined disclosure obligations or an existing judicially or statutorily-recognized exception. In those cases, prior to providing, withholding or delaying disclosure, the Prosecutor must consult with her Crown Attorney or designate, who must, in turn, consult with the Director.

Prosecutorial discretion

The Prosecutor has discretion as to the timing and form of disclosure. While the law provides for delayed disclosure in limited circumstances, such delays should be rare and should never be for tactical reasons. The Prosecutor should only delay providing disclosure after consultation with her Crown Attorney. The safety of witnesses, the protection of ongoing investigations or privacy concerns could justify a delay in disclosure or a variation in the form that the information is provided.

Child pornography

Possession of child pornography is a criminal offence. Police shall remain the custodians of all seized images of child pornography. Disclosure of these images is made by invitation to counsel to view the images in a secure, private location. Requests for electronic copies of the images must be declined. Those images may be provided electronically only pursuant to a court order with a corresponding sealing order.

Reference should be made to the Internet Child Exploitation Directive

(<https://www.ontario.ca/document/crown-prosecution-manual/d-22-internet-child-exploitation>) .

Audio or Video material depicting or recounting child abuse or a sexual offence

Audio or video material depicting or recounting a sexual offence or crime of child abuse warrants additional precautions with respect to its access.

This audio or video material may be disclosed only upon receipt of a signed undertaking by counsel to use the material for the purpose of making full answer and defence in the particular case. If counsel refuses to provide this undertaking, the Prosecutor may impose conditions on viewing the material.

Audio or video material depicting or recounting child abuse or a sexual offence must not be provided to an unrepresented accused without a court order. The court order should direct the Prosecutor to provide the material and impose conditions on its possession by the accused (e.g. no copying or disseminating the material). In absence of a court order, arrangements should be made to permit the unrepresented accused to review the audio or video material.

Youth Criminal Justice Act and Young Offender Act records

Access to records pertaining to youth involved in criminal justice is governed by the *Youth Criminal Justice Act* (<http://www.laws-lois.justice.gc.ca/eng/acts/Y-1.5/index.html>) and the *Young Offender Act*. These records should only be disclosed in accordance with the relevant legislation.

Reference should be made to the Youth Criminal Justice: Court Practices and Procedures Directive (<https://www.ontario.ca/document/crown-prosecution-manual/38-b-youth-criminal-justice-court-practices-and-procedures>).

D. 11: DNA Data Bank Orders

Type of document: Prosecution Directive

Effective date: November 14, 2017

A strong and effective DNA Data Bank benefits the criminal justice system by assisting law enforcement agencies to identify persons who have committed crimes. The collection and storage of DNA from convicted offenders has additional broader purposes including:

- to deter potential repeat offenders
- to promote the safety of the community
- to detect the presence of a serial offender
- to assist in solving old cases
- to streamline investigations
- to exclude innocent suspects
- to exonerate those wrongfully convicted.

The issuance of a DNA order will usually be in the best interests of the administration of justice. The greater the number of offender DNA profiles that are entered onto the Convicted Offenders Index of the National DNA Data Bank, the more effective the use of the Data Bank and its ability to fulfill its purposes.

Duty of the Prosecutor

For the purpose of DNA collections, the *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>) designates eligible offences as either compulsory primary offences, other primary offences or secondary offences.

Compulsory primary designated offences

The *Criminal Code* directs that the court shall make a DNA Data Bank order for an adult convicted or discharged or for a young person found guilty of a “compulsory primary designated offence”. The Prosecutor must remind the court of its obligation to make the order.

Other primary designated offences

The *Criminal Code* directs that the court shall make a DNA Data Bank order for “other primary designated offences”. However, the court is not required to make the order if it is satisfied the offender has established that the impact of such an order on their privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice. The Prosecutor must advocate for a DNA Data Bank order for “other primary designated offences”.

Secondary designated offence

The *Criminal Code* directs that upon application by the Prosecutor the court may make a DNA Data Bank order where it is in the best interests of the administration of justice for secondary designated offences. Given the number and nature of previously unsolved criminal investigations that were solved by samples taken on secondary designated offences, the Prosecutor should apply for a DNA Data Bank order for these offences. The Prosecutor should apply for an order in relation to each count even if an order was made on another count. In exceptional circumstances, the Prosecutor need not apply for the order where she determines that seeking a DNA Data Bank order is not in the interests of justice.

Not Criminally Responsible (NCR)

In the case of an accused found NCR, the *Criminal Code* directs that a court may make a DNA Data Bank order for compulsory primary, other primary or secondary offences, upon application of the Prosecutor, where it is in the best interests of the administration of justice. The Prosecutor must advocate for a DNA Data Bank order for compulsory primary or other primary offences when an accused is found NCR. For secondary offences, the Prosecutor should apply for a DNA Data Bank order if it is in the best interests of the administration of justice. Reference should be made to the Mentally Ill Accused Directives (<https://www.ontario.ca/document/crown-prosecution-manual/d-26-mentally-ill-accused>) .

Resolution discussions and sentencing

Given the importance of the DNA Data Bank in the investigation and prosecution of crime, Prosecutors must not agree to withdraw a DNA designated offence as part of the negotiation process solely for the purpose of avoiding a DNA order.

Where the Prosecutor becomes aware that a DNA order was not considered at the time of conviction or sentencing, the Prosecutor must, absent exceptional circumstances, either take steps to have the matter brought back before the court or bring it to the attention of the Crown Attorney or designate.

Where the Prosecutor becomes aware of any problems with or errors in a particular DNA Data Bank order, including any issues relating to the execution or endorsement of orders, the Prosecutor must, absent exceptional circumstance, bring this to the attention of the Crown Attorney or designate.

D. 12: Expert Evidence

Type of document: Prosecution Directive

Effective date: November 14, 2017

Expert evidence is admissible where the subject matter requires specialized knowledge that is likely outside of an ordinary person's knowledge or experience and is necessary in order for the court to reach a correct judgment about the issue.

When considering the use of expert evidence, Prosecutors should be guided by the general duty to see that justice is done in the circumstances of the particular case. The

Prosecutor who tenders expert evidence must ensure that it is presented to the court with no more, and no less, than its legitimate force and effect.

The role of an expert in the criminal justice system is a neutral one that requires independence and objectivity at all stages of her involvement.

Retaining an expert

Prosecutors should decide at the earliest possible opportunity whether expert evidence is required. This should be done early in the proceeding to minimize the delay occasioned by retaining an expert and in order to meet the notice and disclosure requirements set out in the *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>) .

The Prosecutor must obtain prior approval from the Director or designate before retaining and paying an expert for the purpose of giving evidence or assisting the Prosecutor in preparing for trial.

Disclosure

The Prosecutor must generally disclose all relevant information in her possession relating to the charges against an accused. This includes all expert reports, summaries of expert opinions and, if requested, any underlying material relied upon by the expert where it is practicable to do so.

The Prosecutor is not obliged to disclose information that is irrelevant, protected by privilege or that is recognized at common law or by statute as an exception to the duty to disclose.

The Prosecutor's duty to disclose is ongoing throughout the trial and appeal process and continues after those processes have concluded.

Reference should also be made to the Disclosure Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-10-disclosure>) .

Presenting expert evidence

In preparing experts for their testimony, Prosecutors should ascertain from the expert the limitations on the expert opinion including their qualifications and any limitations on the inferences that can be reliably drawn from the expert evidence. When presenting the

expert evidence in court, Prosecutors should make every effort to ensure that those limitations are fully impressed upon the court.

Where an expert expresses to the Prosecutor a concern that their evidence has left a misleading or inaccurate impression with the Court, the Prosecutor must immediately disclose this to the defence and in circumstances where the concerns are justified, it must be conveyed to the Court.

Reporting concerns

A Prosecutor must report to her Crown Attorney adverse judicial findings or comments about an expert or her own concerns about an expert's participation in the criminal justice system.

The Crown Attorney must forward any adverse judicial findings or comments about an expert or any concerns expressed by a Prosecutor regarding an expert's participation, to the Director, who will forward it onto the Assistant Deputy Attorney General - Criminal Law Division.

D. 13: Extradition

Type of document: Prosecution Directive

Effective date: November 14, 2017

Extradition is the diplomatic process where one country requests the return of a fugitive found in another country for the purpose of trial or punishment for the commission of an offence. Extradition may be requested for those accused of crimes and for those who have been convicted and have outstanding sentences. The Department of Justice Canada is responsible for responding to requests by foreign states for the return of fugitives found in Canada and for determining whether to seek the extradition of a Canadian from a foreign state.

Process

In Ontario, a request for the return of a fugitive to Ontario often begins with an inquiry by the police to a Prosecutor. The following factors inform the Prosecutor's assessment of whether to seek extradition:

- the strength of the case
- the seriousness of the allegations
- the dangerousness of the accused
- whether the offence warrants a substantial period of imprisonment upon conviction (usually a penitentiary term)
- whether there is a significant and pressing public interest in securing the return of the accused to Canada for prosecution or sentencing.

When a Prosecutor, with the approval of the Crown Attorney or designate, concludes that the request for extradition of the fugitive is warranted, the Prosecutor should work with Crown Law Office – Criminal in preparing the required materials. The request is forwarded to Department of Justice Canada where the determination is made whether to seek extradition.

A provisional arrest warrant permits a foreign state to secure the detention of a fugitive pending extradition. Department of Justice Canada determines whether it is appropriate for Canada to seek the diplomatic assistance of a foreign country to arrest and detain a fugitive pending extradition. The execution of a provisional arrest warrant triggers timelines for the formal extradition request to be transmitted to the foreign state.

Upon receipt, the foreign state will initiate its own internal process for extradition which may involve a hearing or a consent extradition. When the process is complete, the individual may be extradited to the requesting country.

D. 14: Firearms

Type of document: Prosecution Directive

Effective date: November 14, 2017

The illegal possession and use of firearms is a matter of grave public concern because of the potential for violence and serious physical harm including death. The protection of the public is the paramount consideration at all stages from judicial release to sentencing, in any prosecution involving firearms.

The term “firearm” refers to any barreled weapon from which a shot, bullet or other projectile can be discharged and that is capable of causing serious bodily harm and may

include a pellet gun or air gun.

Judicial interim release (bail)

In all cases involving firearms, the Prosecutor must seek a detention order, absent exceptional circumstances, to ensure the safety and security of the public. If exceptional circumstances exist, the Prosecutor must obtain prior approval of the Crown Attorney or designate before recommending or consenting to any form of judicial interim release. This decision should be made at the earliest reasonable opportunity having regard to the requirements of the *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>) .

The Prosecutor must advise the Crown Attorney or designate, when an accused charged with an offence involving firearms is granted judicial interim release. In these circumstances, the Crown Attorney or designate should consider whether a bail review is warranted.

Reference should be made to the Judicial Interim Release (Bail) Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-24-judicial-interim-release-bail>) .

Charge screening

There are certain firearms offences that are so serious and inherently dangerous as to warrant proceeding by indictment.

The Prosecutor must elect to proceed by indictment, absent exceptional circumstances, where an accused is charged with one of the following hybrid offences:

- possession of restricted or prohibited firearm with ammunition
- possession of firearm obtained by crime
- making automatic firearm
- carrying a concealed firearm
- possession of a firearm for purpose dangerous to the public
- unauthorized possession of a firearm
- possession of firearm at unauthorized place
- possession of firearm in motor vehicle

- transfer a firearm without proper authority
- unauthorized importing or exporting of firearms
- possession of a firearm contrary to a court order.

If exceptional circumstances exist, the Prosecutor must seek prior approval from her Crown Attorney or designate before electing to proceed summarily.

Regarding all other hybrid firearms offences, the Prosecutor should consider the circumstances of the offender and the circumstances surrounding the offence in determining whether to proceed summarily or by indictment, including the following:

- whether the accused has prior convictions or outstanding charges for weapons or violent offences
- whether the conduct of the accused posed a danger to the public
- whether the accused associates with or is a member of a criminal organization
- whether the accused engaged in other criminal conduct
- whether the offence is of a regulatory nature
- whether the firearms, weapons or ammunition have been seized and will be forfeited
- whether the accused is violating a prohibition order
- whether the sentence if prosecuted summarily would adequately reflect the gravity of the alleged offence.

Resolution discussions and sentence

The resolution of firearms offences should be premised on providing the greatest possible protection of the public.

Absent exceptional circumstances and then only with the prior approval of the Crown Attorney or designate, the Prosecutor must not:

- reduce or withdraw a charge involving a firearm to avoid a mandatory minimum term of imprisonment
- reduce or withdraw a charge of break and enter to steal a firearm, robbery to steal a firearm, possession of restricted or prohibited firearm with ammunition, any firearms trafficking offence, any importing or exporting firearms offence

- reduce or withdraw a charge of possession of firearm contrary to a court order.

Prosecutors should be aware that the Chief Firearms Officer has independent statutory authority and discretion under the Firearms Act and may seek a different regulatory remedy outside that agreed to by the Prosecutor.

Notice of Intention to Seek Increased Penalty

Notice of Intention to Seek Increased Penalty will be provided to an accused, where the Prosecutor seeks a higher range of sentence by reason of the accused's previous criminal record.

Absent exceptional circumstances, the Prosecutor must file a Notice of Intention to Seek Increased Penalty in all qualifying cases where the accused has a previous conviction for a firearms offence.

In exceptional circumstances where the Prosecutor is satisfied that the accused poses no future threat to public safety, the public interest may be served without filing the Notice of Intention to Seek Increased Penalty. In these circumstances, the Prosecutor must obtain the prior approval of the Crown Attorney or designate not to seek an increased penalty.

D. 15: Gaming and Betting

Type of document: Prosecution Directive

Effective date: November 14, 2017

The *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>) prohibits various gambling related activities involving betting, pyramid schemes and games of chance and lotteries. Backroom betting businesses, black market internet gambling websites, rigged midway games at a summer fair and video gambling machines in a bar are just a few examples of illegal gambling activities.

Exceptions

The *Criminal Code* provides for exemptions and exceptions to these prohibitions. Generally speaking, bets between private individuals who are not engaged in the business of betting are lawful. The provinces, charitable and religious organizations, horseracing associations and local fairs have been afforded exemptions to offer gaming and betting related activities, subject to strict controls.

Circumstances of the offence

What may appear as isolated gaming and betting related offences may in fact be linked to organized crime. Organized crime relies on gambling to raise money and to launder proceeds of crime. There is a high public interest in prosecuting organized crime. Criminal conduct in the regulated gaming and betting spheres – such as a fraud committed by an Ontario Lottery and Gaming Corporation (OLG) lottery ticket seller, or cheating by a patron or operator at an OLG casino - is also serious. Such conduct undermines the integrity and reputation of lawful gaming and betting operations. Even comparatively low level gambling related offences – for example, a corner store or bar owner offering a video gambling machine for customers - can encourage other criminal or anti-social behaviour potentially corrosive to the safety and security of the local community.

The Prosecutor reviewing gaming and betting related charges should confer with the investigating police agency. Information provided by the investigating police agency will include the circumstances of the offence.

Forfeiture

In gaming and betting related offences, the *Criminal Code* authorizes the restraint, seizure and forfeiture of the proceeds of crime and of the property used to commit the offence. The Prosecutor must ensure that notice is given to all parties who appear to have a valid interest in any proceeds of crime or property that the Prosecutor is seeking to have forfeited. Reference should be made to the Criminal Asset Forfeiture Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-7-criminal-asset-forfeiture>) .

Resolution discussions and sentence

Gaming and betting related offences are not victimless crimes. The resolution of gaming and betting related offences should be premised on providing protection to the public.

Several gaming and betting related offences are subject to mandatory minimum terms of imprisonment for second and subsequent convictions. The Prosecutor must not withdraw charges for such offences solely to avoid the imposition of the mandatory minimum sentence.

Absent exceptional circumstances, the Prosecutor must file a Notice of Intention to Seek Increased Penalty where an accused has a prior conviction for any of these offences. In exceptional circumstances where the Prosecutor is satisfied that the public interest could

be served without seeking an increased penalty, the Prosecutor must obtain prior approval from the Crown Attorney or designate not to file a Notice of Intention to Seek Increased Penalty.

Other government bodies have independent authority and discretion over aspects of gaming and betting. Prosecutors must be mindful not to bind those interests during resolution discussions.

D. 16: Hate Propaganda and Hate ***** Motivated Offences

Type of document: Prosecution Directive

Effective date: November 14, 2017

Hate propaganda and hate motivated offences involve the intentional selection of a victim based on the offender's prejudice toward a "group" characteristic of the victim such as race, ethnic background, religion, gender, physical or mental disability or sexual orientation.

There is a substantial public interest in the prosecution of these offences. These offences are particularly serious because of their potentially devastating impact not only on the individuals involved, but also on the target group, other vulnerable groups and the community as a whole. The impact of hate propaganda and hate motivated offences include the following:

- the psychological and emotional harm caused by hate crimes on the identity and feelings of self-worth of the victim can be severe and long-lasting
- the group members of a target group may feel vulnerable to future victimization
- negative impact on other vulnerable groups that share minority status or identify with the targeted group, especially if the hate crime is based on an ideology or doctrine that covers a number of the groups that live within the community
- they can be socially divisive and undermine our collective identity. In a multicultural society like Canada, where all groups strive to live together in harmony and equality, hate crime is an anathema to our shared values. Any occurrence of a hate crime can lead to the erosion of fundamental Canadian values.

Hate propaganda offences

The offences of advocating genocide, public incitement of hatred, and wilful promotion of hatred against an identifiable group are characterized as hate propaganda offences that are prohibited by the *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>) . An identifiable group is defined as “any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression or mental or physical disability.”

The Attorney General’s consent is required to initiate a prosecution for the offence of wilful promotion of hatred and the offence of advocating genocide.

Formal and informal requests by the police for the initiation of these proceedings must be brought immediately to the attention of the Assistant Deputy Attorney General -Criminal Law Division.

Once the consent of the Attorney General is received the hate propaganda proceedings are initiated. If new information comes to light the Prosecutor should apply the charge screening standard to the proceedings. If the Prosecutor concludes that the charge screening standard is no longer met, the Prosecutor must notify the Assistant Deputy Attorney General -Criminal Law Division in order to seek approval prior to withdrawing or staying the prosecution. Allegations of hate propaganda offences are not eligible for diversion.

Reference should be made to the Attorney General Consent and Delegation Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-2-attorney-general-consents-and-delegations>) .

Seizure and forfeiture of hate propaganda

In order to inhibit distribution of hate propaganda, the *Criminal Code* allows for the seizure and forfeiture of hate publications intended for public sale or distribution. In both circumstances, the Attorney General’s consent is required to commence proceedings for the seizure and/or forfeiture of hate propaganda.

The *Criminal Code* authorizes the court to issue a warrant to seize copies of publications where reasonable grounds exist for believing that the publication is hate propaganda and that copies are kept for sale or distribution. If the court is satisfied that the publication

constitutes hate propaganda, the court shall order the forfeiture of the offending material.

The *Criminal Code* also provides a procedure for removing hate propaganda from the Internet. If the court is satisfied that the material or data is available to the public and is hate propaganda, the court may order the material or data be deleted and the electronic copy destroyed.

Reference should be made to the Criminal Asset Forfeiture Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-7-criminal-asset-forfeiture>) .

Hate motivated offences

Attorney General consent is not required where the offence is motivated by hate or where hate is an aggravating factor.

Mischief to property

The *Criminal Code* specifically prohibits mischief to religious property where the mischief is motivated by bias, prejudice or hate. There is no requirement for the Attorney General's consent to initiate proceedings with this offence.

Diversion

Generally, diversion is not an appropriate resolution for a crime motivated by hate. In exceptional circumstances, however, the issuance of an apology and/or rehabilitative considerations may be a just resolution. Where such exceptional circumstances exist, the Prosecutor must seek the prior approval from the Crown Attorney or designate.

Sentencing

The *Criminal Code* directs courts to consider evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or gender identity or expression or any other similar factor as aggravating factors on sentence. If there is evidence that the motivation for a crime was hate, bias or prejudice, the Prosecutor should tender that evidence during the sentencing phase.

D. 17: High-Risk Offender National Flagging System

Type of document: Prosecution Directive

Effective date: October 4, 2021

The identification of violent offenders who pose an ongoing serious threat to society is an essential component of public safety. In Ontario, one of the ways that this is done is through participation in the National Flagging System. The National Flagging System is a Canada wide initiative that gathers and distributes information to interested prosecution services on violent offenders who have been identified and flagged as posing a high risk to violently re-offend. This information can be accessed by police and prosecution services. Each province has a Provincial Flagging Coordinator.

Duty of Prosecutor

Where an offender meets one or more of the following criteria, the Prosecutor, with the approval of her Crown Attorney or designate, must request that the offender be flagged by the Provincial Flagging Coordinator:

1. where the offender has previously been designated a dangerous or long-term offender or
2. where a review of the available information indicates that if the offender commits a further serious personal injury offence or a sexual offence, there is a reasonable prospect that they will be declared a dangerous or long-term offender (see Dangerous/Long-term Offender Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-8-dangerous-long-term-offenders>)).

When dealing with an offender who is known to have been flagged on the National Flagging System, a Prosecutor must request the offender's file from the Provincial Flagging Coordinator. At the conclusion of the prosecution, the Prosecutor must provide the Provincial Flagging Coordinator with the outcome of the prosecution and forward all new relevant material from the prosecution.

D. 18: Impaired Driving

Type of document: Prosecution Directive

Effective date: November 14, 2017

Individuals who drive under the influence of alcohol and/or drugs pose an unacceptable risk of harm to themselves and to the public. The *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>) and *Highway Traffic Act* (<https://www.ontario.ca/laws/statute/90h08>) (HTA) provide criminal sanctions and administrative measures, including the Ignition Interlock Program, to combat these offences. The protection of the public is the primary concern at every stage of the prosecution of impaired driving offences.

The following list sets out some aggravating features of an impaired driving offence. A Prosecutor should consider those features prior to making any significant decisions at all stages of the prosecution:

1. death, serious injuries and/or substantial property damage
2. a motor vehicle collision
3. driving conduct that poses a high risk to other motorists, pedestrians and/or police, such as excessive speed, racing or flight from police
4. whether the offence involves breach of a court order and frustrates the administration of justice, such as driving while prohibited or refuse breath sample
5. the presence of vulnerable people such as children
6. any prior criminal or HTA record for similar offences and/or fail to comply offences
7. high levels of blood alcohol concentration.

Charge screening

Ignition Interlock Program

The *Criminal Code* permits an offender to drive during a portion of the duration of the mandatory driving prohibition order, on certain conditions including installing the ignition interlock device in their vehicle. An ignition interlock device is an in-car alcohol breath screening device that prevents a vehicle from starting if it detects a certain blood alcohol concentration. The Ignition Interlock Program is administered by the Ministry of Transportation (<https://www.ontario.ca/page/ignition-interlock-program>) .

Where the Prosecutor intends to seek an increased absolute driving prohibition period, or an order that the offender not be permitted to drive with the interlock at all, the Prosecutor must convey that position to the offender prior to the plea being entered. In coming to this decision, the Prosecutor should consider the circumstances of the offence and the offender, any prior convictions under the *Highway Traffic Act* or *Criminal Code*, including those that are more than 10 years old.

Offenders convicted of drug impaired offences, or offences involving a combination of drugs and alcohol, are not eligible for the program.

Resolution discussions and sentence

Absent exceptional circumstances and then only with the prior approval of the Crown Attorney or designate, the Prosecutor must not:

1. withdraw a *Criminal Code* driving offence that relates to the impairment of the driver in exchange for a guilty plea to an offence under the Highway Traffic Act or a *Criminal Code* offence that does not address the impairment of the driver
2. withdraw charges of "Over 80" solely because the readings are low
3. withdraw fail to remain or drive while disqualified charge in exchange for a guilty plea to impaired or "Over 80" or vice-versa.

Notice of Intention to Seek Increased Penalty

Notice of Intention to Seek Increased Penalty will be provided to an accused, where the Prosecutor seeks a higher range of sentence by reason of the accused's previous criminal record.

Absent exceptional circumstances, the Prosecutor must file the Notice of Intention to Seek Increased Penalty in all cases where the accused has a previous conviction for a drinking and driving offence within a five-year period of the current offence date. If exceptional circumstances exist, where the previous conviction is within a five-year period and the Prosecutor is satisfied that the accused poses no future threat to the safety of the public, the Prosecutor may consider that the public interest is served without seeking an increased penalty. In these circumstances, the Prosecutor must obtain the prior approval of the Crown Attorney or designate not to seek an increased penalty. The Prosecutor must still advise the court of the existence and complete extent of any criminal record of the accused.

After the five-year period, the Prosecutor may exercise her discretion to file the notice. In any event, the Prosecutor must still advise the court of the existence and complete extent of any criminal record of the accused.

Victims

Where the impaired driving offence has resulted in serious injury or death Prosecutors should ensure that efforts are made to inform the victim of the Victim/Witness Assistance Program (V/WAP) or similar victim support services. For further direction reference should be made to Victims Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-36-victims>) .

D. 19: In-Custody Informers

Type of document: Prosecution Directive

Effective date: November 14, 2017

Experience has shown that the use of in-custody informers may pose a substantial risk to the proper administration of justice. Prosecutors must be aware of the dangers of calling in-custody informers as witnesses. Policies are in place to prevent an injustice that occurs when an in-custody informer falsely implicates another person.

An in-custody informer is someone who claims to have received one or more statements from an accused person while both are in custody about offences that occurred outside the custodial institution. The accused person need not be in custody for, or charged with, the offences to which the statements relate. Excluded from this definition are informers who claim to have direct knowledge of an offence independent of the statements provided by the accused person.

Because of the potential risks posed by reliance upon evidence of an in-custody informer, there must be a compelling public interest to tender evidence from an in-custody informer. A decision to seek to tender this evidence must be the product of a rigorous, objective assessment of the in-custody informer's account of the accused person's alleged statement, the circumstances in which that account was provided to the authorities and the in-custody informer's general reliability.

In circumstances where the Prosecutor becomes aware that an in-custody informer has the intent to mislead and make a false statement with respect to an accused person, the

case must be directed to the Crown Attorney. The case will then be investigated.

Calling an in-custody informer as a witness

Depending on the nature of the proceedings, a Prosecutor who seeks to tender the evidence of an in-custody informer must obtain the approval of the Crown Attorney, the Director, the In-Custody Informer Committee and/or the Assistant Deputy Attorney General - Criminal Law Division.

Preliminary inquiry

If the Prosecutor seeks to tender the evidence of an in-custody informer at a preliminary inquiry, the Prosecutor must bring the matter to the attention of her Director.

The Director must determine whether the in-custody informer's evidence can be used at the preliminary inquiry or if the case should be referred to the In-Custody Informer Committee for a decision.

An in-custody informer can only be called as a witness at a preliminary inquiry with the approval of a Director or the In-Custody Informer Committee.

Trial

A Prosecutor who forms the opinion that there is a compelling public interest in relying on the evidence of an in-custody informer at trial must refer the case to the In-Custody Informer Committee.

The Committee will consider the materials submitted by the Prosecutor, and absent exceptional circumstances, will meet with the Prosecutor to discuss the case before making its decision.

An in-custody informer can only be called as a witness at a trial with the approval of the In-Custody Informer Committee.

The deliberations of the Committee are privileged and will not be disclosed.

The existence of a public interest in proceeding with a prosecution based solely on the unconfirmed evidence of an in-custody informer is exceptional. In these circumstances,

approval to tender the evidence must be approved by the Assistant Deputy Attorney General – Criminal Law Division as well as the In-Custody Informer Committee.

Agreements to testify

An in-custody informer must never be given consideration that is conditional upon the accused's conviction.

Any agreements made with in-custody informers relating to consideration in exchange for information or evidence must, absent exceptional circumstances, be reduced to writing and signed by a Prosecutor (other than the Prosecutor assigned to the case), the informer and counsel (if represented). An oral agreement, fully recorded, may substitute for a written agreement. A videotape recording or other type of record, such as audiotape or affidavit, may also suffice.

A Director must approve any agreements respecting consideration and the agreement must be provided to the In-custody Informer Committee.

Restrictions

If the in-custody informer recants their evidence following a decision by the In-Custody Informer Committee and the Prosecutor determines that the evidence of the in-custody informer should be tendered, the matter must be referred back to the Committee and the Director.

Where the in-custody informer is charged with additional criminal offences and/or seeks additional consideration, the Prosecutor must notify her Director who reviewed the original file, who will then determine whether the In-Custody Informer Committee ought to reconsider the matter.

The In-custody Informer Registry

The Ministry of the Attorney General has established an In-custody Informer Registry. The Chair of the In-custody Informer Committee is responsible for updating the registry with information provided by Prosecutors and the police.

Prosecutors who become aware of individuals coming forward to act as in-custody informers must forward to the Committee the name of the potential in-custody informer and the result of any investigation into the statement of the informant regardless of

whether the Prosecutor seeks to use the informant's evidence. These names and this information will be included in the In-Custody Informer Registry.

The Prosecutor must forward to the Committee the outcome of a prosecution where an in-custody informer was permitted to testify at a preliminary inquiry or trial. These results will be noted in the In-Custody Informer Registry.

D. 20: Indigenous Peoples

Type of document: Prosecution Directive

Effective date: February 13, 2019

Canada has distinct legal and constitutional obligations to Indigenous peoples derived from the recognition and confirmation of Aboriginal and Treaty rights in The *Constitution Act, 1982* (<http://laws-lois.justice.gc.ca/eng/const/page-15.html#h-38>) . The *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>) , the *Youth Criminal Justice Act* (<http://www.laws-lois.justice.gc.ca/eng/acts/Y-1.5/index.html>) , and legal decisions of the Supreme Court of Canada, requires consideration of the unique circumstances of Indigenous peoples.

Indigenous peoples within Canada include status and non-status First Nation, Inuit and Métis peoples. Many Indigenous peoples may prefer to self-identify as members of a specific community.

Canada's history of colonialism towards Indigenous peoples has included harmful policies of forced assimilation, displacement and child apprehension. The intergenerational impact of policies such as the '60's scoop' and residential schools has fragmented and dislocated families and communities and has caused significant trauma to Indigenous peoples and communities.

Many Indigenous peoples view the Canadian justice system as a foreign system that has been imposed upon them without their consent. Indigenous communities may prefer to adopt restorative justice principles that reflect Indigenous values and laws. Restorative justice principles can include a focus on relationships, repairing harm, taking responsibility and taking personal and family history into account.

Prosecutors should be familiar with the history of Indigenous peoples and understand the impact of that history on Indigenous accused, victims and communities. Prosecutors

should also be aware of the value of restorative approaches to justice.

Relationships

A strong, positive working relationship based on mutual respect between Prosecutors and Indigenous communities, including police, advances the public interest. Prosecutors should work together with Indigenous leaders and Elders to build local relationships that ensure social harmony and community safety. Where feasible, the formation of a joint plan to promote safety in the community could be formulated through efforts by the community, police and the Crown Attorney.

Criminal proceedings

Indigenous peoples are overrepresented in virtually all aspects of the criminal justice system. There is widespread bias against Indigenous peoples within Canada and there is evidence that this widespread racism has translated into systematic discrimination in the criminal justice system.

The Prosecutor must maintain a flexible and open approach to criminal matters arising in Indigenous communities. The unique circumstances of an Indigenous accused, including their background, community history, and the effects of systemic discrimination should be considered at many stages of criminal proceedings, including bail and sentencing.

The Prosecutor should be aware of Indigenous programs and services in the courts and the community that are tailored and available to meet the unique needs of Indigenous persons in the criminal justice system, such as restorative justice diversion programs, Aboriginal Court Workers, Gladue Courts, Friendship Centres, and Indigenous Legal Services.

Diversion

For certain offences, diverting Indigenous accused to Indigenous Restorative Justice Programs may serve as an effective alternative to formal prosecution. Indigenous Restorative Justice Programs hold an Indigenous accused accountable for criminal conduct by bringing them before members of Indigenous communities with a focus on developing a plan that will allow the accused to take responsibility for their actions, address the root causes of the problem, and reintegrate into the community in a positive way.

Indigenous Restorative Justice Programs should be recommended where diversion is appropriate and the program is available. These programs may be meaningful to the Indigenous accused due in part to the fact that the consequence is imposed by community members often including respected Elders.

Prosecutors may consider the appropriateness of a community based sanction only if a reasonable prospect of conviction exists. A Prosecutor must not impose additional requirements on the accused person as a precondition to offering diversion.

When determining eligibility for diversion, Prosecutors should consider the background and systemic factors that brought an Indigenous accused in contact with the criminal justice system.

Reference should be made to the Community Justice Programs for Adults Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-4-community-justice-programs-for-adults>) , the Youth Criminal Justice: Extrajudicial Sanctions Directive (<https://www.ontario.ca/document/crown-prosecution-manual/38-a-youth-criminal-justice-extrajudicial-sanctions>) and the Mentally Ill Accused: Alternatives to Prosecution Directive (<https://www.ontario.ca/document/crown-prosecution-manual/26-a-mentally-ill-accused-alternatives-prosecution>) .

Judicial interim release (bail)

When determining a position on bail, the Prosecutor must apply the general principles set out in the Judicial Interim Release (Bail) Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-24-judicial-interim-release-bail>) and consider the background and unique circumstances of an Indigenous accused and their connections to the Indigenous community. The Prosecutor should also consider the distance and remoteness of many Indigenous communities and the barriers that this creates for access to bail hearings and forms of release. A significant disadvantage is created since the accused is unlikely to have established connections or supports in the community in which the bail hearing is taking place. In these circumstances, seeking the detention of an Indigenous accused should remain an exceptional measure unless the release of the accused would jeopardize the safety and security of the victim or the public. Although the Prosecutor should keep in mind the principles referred to by the Supreme Court in Gladue, a Gladue report should not be requested by the Prosecutor for a bail hearing.

As with all accused, conditions of release shall not be imposed to change an Indigenous accused's behaviour or to punish the accused. These conditions often relate to therapeutic or rehabilitative measures and are more appropriate following conviction. The Prosecutor must ensure that any conditions she recommends on a bail release are necessary and appropriate to the circumstances of the Indigenous accused and relate to the alleged offence. The Prosecutor should only request conditions that are necessary to ensure public safety or to ensure attendance, and with which an accused can realistically comply.

Reference should be made to the Judicial Interim Release (Bail) Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-24-judicial-interim-release-bail>) .

Sentencing

The Prosecutor must consider the unique systemic and background factors that may have played a part in bringing an Indigenous offender before the court in determining a position on sentencing. These factors may mitigate the Indigenous accused's moral blameworthiness. These factors are also relevant in assessing other principles of sentencing and to the types of sentencing options that may be appropriate because of the offender's particular Indigenous heritage or connection.

In determining a fit sentence, the court shall consider information provided by a Gladue Report, an enhanced Pre-Sentence Report and/or the submissions of defence counsel and the Prosecutor. This information could include a description of relevant community supports. The Prosecutor should provide the court with any relevant information that the Prosecutor is aware of about the Indigenous offender's background or unique circumstances.

Information about the offender and community in sentencing

Where the Prosecutor is seeking a significant custodial sentence, the accused, Prosecutor and/or judge may request that a Gladue Report be prepared following a finding of guilt or guilty plea.

A Gladue Report provides information to the court about the offender and their community including the unique systematic or background factor which may have played a part in bringing the particular Indigenous offender before the courts and may reduce the moral blameworthiness of the offender.

A Gladue Report contains information collected from research about the community and interviews conducted with the offender, family members, community leaders and others with relevant background information about the offender. The report also provides information of the types of sentencing procedures and sanctions that may be appropriate in the circumstances of the offender because of their particular Indigenous heritage or connection.

Although a Gladue Report is preferable, where one is not available, information about the offender and their community may be collected and provided to the court in an enhanced Pre-Sentence Report that would contain information about the offender's community obtained from research and interviews.

In addition, the Prosecutor may consider requesting a summary Gladue Report, use a past Gladue Report or work with defence counsel to introduce alternative sources of information (e.g. letters from family, friends, service providers and community members).

Victims

The Prosecutor should ensure that efforts are made to refer an Indigenous victim to Indigenous-specific Victim Services or, if Indigenous-specific services are not available, to Victim Witness Assistance Program or other victim services support.

The Prosecutor must ensure that efforts are made to advise an Indigenous victim of testimonial aids that are available and appropriate to the circumstances. Further, steps should be taken to ensure that the Indigenous victim has access to translation and interpretation services into the victim's first language so that the victim can fully participate in the criminal proceeding.

As soon as feasible after an accused person is found guilty, the Prosecutor must take reasonable steps to provide an Indigenous victim with the opportunity to prepare a Victim Impact Statement, and inform the victim of their right to present it in court and their other options.

Reference should be made to the Victims Directive

(<https://www.ontario.ca/document/crown-prosecution-manual/d-36-victims>) and the Testimonial Aids and Accessibility Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-35-testimonial-aids-and-accessibility>) .

D. 21: International Evidence Gathering

Type of document: Prosecution Directive

Effective date: November 14, 2017

Countries often seek the assistance of other countries in gathering evidence located in foreign jurisdictions for use in domestic criminal investigations and prosecutions. This assistance is provided by way of both informal and formal information-sharing processes.

Informal information-sharing processes typically involve police services in different countries working together to investigate offences allegedly committed in one or both countries. Informal police-to-police cooperation may take place where the requested assistance does not require a formal court process in the foreign jurisdiction. This assistance may include, for example, interviewing cooperative witnesses, conducting surveillance, gathering publicly-available information, and conducting coordinated joint investigations of cross-border offences. Informal police-to-police cooperation is performed by and in the discretion of the police.

The term “Mutual Legal Assistance” refers to the formal legal process through which countries cooperate in the investigation and prosecution of criminal offences. Mutual Legal Assistance does not replace existing means of informal cooperation. Informal police-to-police cooperation remains an important mechanism for international assistance, even where Mutual Legal Assistance is legally available.

When a search warrant, summons, production order or similar legal mechanism is necessary to obtain evidence in a foreign jurisdiction, a Mutual Legal Assistance request may be made. Mutual Legal Assistance requests typically involve confidential state-to-state communications governed by treaties and protocols. Where no treaty exists, assistance may still be provided pursuant to agreement between Canada and the foreign country.

Mutual Legal Assistance may include:

- gathering evidence, including documents and records
- compelling witnesses to give statements or testimony
- exchanging information and objects, such as exhibits

- locating and identifying persons
- transferring persons in custody
- executing requests for search and seizure
- serving documents
- enforcing fines and confiscation orders.

Seeking information/evidence in a foreign country

In Ontario, requests for Mutual Legal Assistance to obtain information in a foreign country in relation to criminal (and some provincial) investigations and prosecutions are made by the Crown Law Office – Criminal to the Department of Justice Canada, with input from the investigating police force and/or the assigned Prosecutor. The ultimate determination of whether Mutual Legal Assistance will be sought from the foreign country rests with the Department of Justice Canada.

Prosecutors requesting Mutual Legal Assistance should contact the Crown Law Office – Criminal as early on in the criminal process as possible, as Mutual Legal Assistance requests involve inherent delays and may be time-consuming. As noted above, informal means of cooperation may be more efficient and appropriate in certain cases.

Responding to requests for assistance by a foreign country

Mutual Legal Assistance requests by foreign countries for information and evidence located in Canada are reviewed by the Department of Justice Canada, and, if approved, forwarded to the appropriate province or territory for execution. In Ontario, Crown Law Office – Criminal is responsible for processing these requests with the assistance of local law enforcement.

If a Prosecutor is contacted directly by a foreign state seeking assistance, she should contact Crown Law Office – Criminal immediately. Crown Law Office – Criminal will advise whether the requested assistance can be provided through informal information-sharing processes or whether a formal Mutual Legal Assistance request must be made. If a formal Mutual Legal Assistance request is required, Crown Law Office – Criminal will refer the request to the Department of Justice.

D. 22: Internet Child Exploitation

Type of document: Prosecution Directive

Effective date: November 14, 2017

Internet child exploitation covers a number of offences including child pornography, voyeurism, luring a child, agreeing or arranging to commit a sexual offence against a child and making sexually explicit material available to a child. This may include the non-consensual distribution of intimate images. Child pornography exists in a variety of forms including written material, audio recordings, photographic, film, video or other visual representations. Like all crimes against children, offences relating to Internet child exploitation pose a serious threat of harm to children, the family and the community and must be prosecuted vigorously.

Prosecutions of Internet child exploitation offences raise a number of unique concerns in relation to victims, disclosure of sensitive or illegal materials, management of the courtroom and exhibits at trial, and ancillary orders at sentencing and wellness of those exposed to this evidence.

Sensitivity to the perspective of the child victims, their privacy interests, and their need to be protected from re-victimization must be considered at every stage of the prosecution. This is true even in cases where the specific identity or whereabouts of the child victims are unknown.

If the identity of victims is known, the Prosecutor should ensure that efforts are made to advise victims and/or where appropriate their parents or legal guardians of significant steps in the proceedings in advance of the case being heard in court, as appropriate. This includes meeting with victims in advance of the preliminary hearing and trial. Prosecutors should also ensure that efforts are made to inform the victims and/or where appropriate their parents or legal guardians of available specialized victims' services as facilitated by the Victim/Witness Assistance Program (V/WAP) or similar victims' support services.

Prosecutors dealing with cases involving Internet child exploitation should also consider the directions set out in the Offences against Children (<https://www.ontario.ca/document/crown-prosecution-manual/d-27-offences-against-children>) and the Victims Directives (<https://www.ontario.ca/document/crown-prosecution-manual/d-36-victims>) .

Prosecution

Charge screening

The Prosecutor should decide, at the charge screening stage, whether hybrid offences should be prosecuted by indictment or summary conviction. The Prosecutor should consider the directions set out in the Offences against Children Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-27-offences-against-children>) when determining whether to proceed summarily or by indictment. In addition, it is generally in the public interest to proceed by indictment where the offence involves making permanent recordings or distributing them on the Internet.

The Prosecutor should also consider the High Risk Offender National Flagging System (<https://www.ontario.ca/document/crown-prosecution-manual/d-17-high-risk-offender-national-flagging-system>) and Dangerous/Long-term Offenders (<https://www.ontario.ca/document/crown-prosecution-manual/d-8-dangerous-long-term-offenders>) Directives when prosecuting offences involving Internet child exploitation.

Disclosure

Prosecutions of child pornography offences raise unique disclosure concerns because access to child pornography is a criminal offence, there is potential trauma that may be caused by viewing such materials and the strong public interest in protecting the privacy and dignity of the children depicted in child sexual abuse materials.

In these unique circumstances, disclosure may be provided in two ways:

- by providing defence counsel with an opportunity to view the child pornography in a secure, private location
- by providing copies of the material pursuant to a court order with conditions sufficient to satisfy concerns that the material will be used for a legitimate purpose connected to the administration of justice, disclosure does not pose an undue risk of harm to children and the privacy interests of the children depicted in the child pornography will be adequately protected.

Reference should be made to the Disclosure Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-10-disclosure>) .

Protecting the privacy of child victims

Publication bans

The Prosecutor must employ the relevant statutory provisions to ensure that the privacy interests of the child victim, and that of other witnesses, are protected. The Prosecutor should have regard to the direction provided in the Publication Bans and Sealing Orders Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-32-publication-bans-and-sealing-orders>) .

In cases involving a child pornography offence, the *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>) directs that the judge impose a publication ban, even in the absence of a request by the prosecution. The Prosecutor must remind the court of its obligation to make the order.

Tendering child pornography evidence

In prosecutions related to Internet child exploitation, exhibits are often filed that contain material alleged to be child pornography. Prosecutors must seek to protect the privacy and dignity of those children who may be depicted in child sexual abuse materials, as well as others who may be impacted by inadvertent exposure to such materials.

Given these concerns, all precautions must be taken to ensure that child pornography evidence is presented to the Court in such a manner that only those who are required to view the material are able to do so. Ultimately, the manner in which this material may be accessed will be determined by the Court.

Sealing orders

Prosecutors must apply for a sealing order in respect of any exhibit containing material alleged to be child pornography. On appeal, Prosecutors must seek an order sealing any Appeal Books or exhibits containing child pornography and seek restrictive terms respecting the use and eventual destruction of the Appeal Books.

Resolution discussions and sentence

Prosecutors should consider the specific directions set out in the Offences Against Children Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-27-offences-against-children>) when entering into resolution discussions. As soon as feasible, the Prosecutor must take reasonable steps to ensure that the victims and/or where appropriate their parents or legal guardians are informed of a proposed resolution (e.g. a guilty plea or proposed sentence) or that the charges will be withdrawn.

Absent exceptional circumstances, and then only with the prior approval of the Crown Attorney or designate, the Prosecutor must not:

- reduce or withdraw a charge relating to Internet child exploitation
- accept a plea to a different offence, solely to avoid a mandatory minimum sentence
- accept a plea to a different offence, solely for the purpose of avoiding a DNA order or an order under the *Sex Offender Information Registration Act* (<http://laws-lois.justice.gc.ca/eng/acts/S-8.7/>) (SOIRA).

Victim impact statements

The *Criminal Code* directs the court to ask the Prosecutor if reasonable steps were taken to provide the victim with an opportunity to prepare a victim impact statement. As soon as feasible after a finding of guilt, the Prosecutor must take reasonable steps to provide the victim and/or where appropriate their parents or legal guardians with the opportunity to prepare a Victim Impact Statement, and inform the victim of their right to present it to the court and their other options.

Ancillary orders

All Internet child exploitation offences are “primary designated offences”, with the exception of voyeurism. The Prosecutor must remind the court that the DNA order is mandatory and must seek a DNA order regardless of whether the offender’s profile is already included in the DNA Data Bank. See DNA Data Bank Orders Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-11-dna-data-bank-orders>) .

All child exploitation offences are designated offences for which a SOIRA order is mandatory, with the exception of voyeurism. The Prosecutor must remind the court of this mandatory order and of the appropriate duration of the order.

In cases of voyeurism, the Prosecutor should make an application for both DNA and SOIRA orders where the Prosecutor is of the view that the voyeurism offence was committed with the intent of committing a designated sexual offence (such as making child pornography) or there is evidence supporting a legitimate concern that the offender’s behavior may be escalating or that the offender has a history of antisocial behavior.

Where appropriate, Prosecutors should apply for a prohibition order restricting the offender's ability to interact with children under the age of 16, either in person or over the Internet.

In all cases where an offender has been convicted of an offence involving Internet child exploitation, Prosecutors should apply for forfeiture of things used in child pornography or Internet luring, including computers. Prosecutors must seek forfeiture of any child pornography, the possession of which is illegal and all offence related property.

D. 23: Intimate Partner Violence

Type of document: Prosecution Directive

Effective date: November 14, 2017

Intimate partner (or domestic) violence involves the use of physical, psychological or sexual force, actual or threatened, as well as criminal harassment, in an intimate relationship. Intimate relationships vary in duration and legal formality, and include dating, living common law or married, whether current or former.

Intimate partner violence offences are often committed in a context where there is a pattern of assaultive and/or controlling behaviour. Violence may go beyond physical assault and may include emotional, psychological and sexual abuse that is intended to induce fear, humiliation and powerlessness. Intimate partner violence is not a private matter but is a serious criminal act. Intimate partner violence is a prevalent social problem with far ranging harmful effects.

The Prosecutor must be aware of the dynamics that exist in an intimate relationship that may affect the conduct of the prosecution. In addition to fear for their personal safety and that of their children, victims of these offences may be under considerable pressure on account of many factors, including financial considerations, the need for childcare, disapproval of family members, immigration consequences or fear of being ostracized by the community. In many cases, victims will also continue to feel an emotional bond to the accused.

Children are also directly affected by intimate partner violence. The Prosecutor must be aware of the risk that children often suffer lasting emotional and psychological harm when exposed to intimate partner violence. Prosecutors shall report to child protection

agencies any cases where they have reasonable suspicion that a child is, or may be, in need of protection.

At all stages of the prosecution, including bail hearings, the safety of victims and their families is a paramount factor for Prosecutors to consider in the exercise of their discretion.

Each Crown Attorney's Office has a designated "Intimate Partner Violence" Prosecutor, who is also a member of the local Domestic Violence High-Risk Committee and any Domestic Violence Court Advisory Committee.

Judicial interim release (bail)

In intimate partner violence offences, the Prosecutor must take a position on judicial interim release applying the same general principles set out in the Judicial Interim Release (Bail) Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-24-judicial-interim-release-bail>), including the requirement for ongoing assessment of the strength of the Crown's case. Prosecutors should be sensitive to the needs of the victim and to the dynamics that exist in families where a partner is allegedly abused. The Prosecutor must be conscious of the potential increased risk of harm in these cases and must seek a detention order where she considers it necessary for the safety and security of the victim or the public.

In determining whether to consent to or oppose release, the Prosecutor must consider the possibility of ongoing violence and its potential impact on the physical, emotional and psychological well-being of any children, including any child witnesses. The Prosecutor must also consider any risk assessment information before taking a position on judicial interim release. Risk factors can include but are not limited to history of violence, a pending or actual separation or substance abuse issues.

The Prosecutor must ensure that any conditions she recommends on a bail release are necessary and appropriate to the circumstances of the alleged offence and the accused. The Prosecutor should have regard to the existence of any family court orders.

The Prosecutor must ensure that efforts are made to notify the victim of any release order, the conditions of release, including non-communication and any order detaining the accused. In all cases where there is reason to have concern for a victim's safety, the

Prosecutor must ensure that victim notification occurs as soon as possible. On request, the victim must be provided with a copy of the court order.

Charge screening

When applying the Charge Screening Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-3-charge-screening>) the Prosecutor should keep in mind the factors unique to cases of intimate partner violence. The public interest factors in these cases must be considered with the predominant need to protect the victim. Given the prevalence and danger of intimate partner violence it will usually be in the public interest to proceed with these prosecutions. Ultimately, the decision to prosecute must be based on factors specific to each case.

In certain circumstances, the interests of justice may be best served by requiring a motivated, low-risk accused to complete domestic violence education and counselling. The Prosecutor may consider recommending counselling provided by an early intervention program only where:

- the accused pleads guilty [or agrees to enter into a s.810 Recognizance]
- the accused has no convictions for violence-related offences
- the accused did not cause serious injuries or harm
- no weapon was used in the offence
- the victim is consulted.

The Prosecutor must not withdraw charges solely based on the victim's request. The Prosecutor must consider all the circumstances. These victims may be reluctant to continue a prosecution and be under considerable pressure to seek the withdrawal of the charges.

Victim as witness

In cases where the victim recants or refuses to testify, the Prosecutor must consider the reasons for the recantation or refusal. The Prosecutor must consider whether the case can be proven using other evidence and the appropriateness of an adjournment.

Resolution discussions and sentencing

Section 810 recognizances (“Peace Bonds”)

There may be exceptional cases where the victim’s safety, their best interests and the interests of society could be served by employing an alternative to criminal prosecution. The Prosecutor may resolve the case by way of a section 810 recognizance after considering all the circumstances, including the victim’s views and public safety and the factors outlined in the Community Justice Programs for Adults Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-4-community-justice-programs-for-adults>) .

A decision to agree to a section 810 recognizance must be approved by the Crown Attorney or designate. In all cases where a Prosecutor decides a section 810 recognizance is appropriate, firearms and weapons prohibitions must be considered as conditions of the peace bond. A Prosecutor must not use a common law peace bond in intimate partner violence cases unless a section 810 recognizance is not available and even then only with the prior approval of the Crown Attorney or designate. The same considerations apply to the use of a common law peace bond as a section 810 recognizance.

Victim impact statements

As soon as feasible after a finding of guilt, the Prosecutor must take reasonable steps to provide the victim with the opportunity to prepare a Victim Impact Statement, and inform the victim of their right to present it to the court and their other options. The victim may be informed of these rights early in the process.

Restitution

The *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>) directs the court to consider making a restitution order and to ask the Prosecutor if reasonable steps have been taken to provide the victim with an opportunity to indicate whether they are seeking restitution i.e. compensation for counselling. As soon as feasible after a finding of guilt, the Prosecutor must take reasonable steps to provide the victim with an opportunity to indicate whether the victim is seeking restitution for their losses and damages.

Sentencing

In cases of high-risk offenders, the Prosecutor must refer the case to the High-Risk Offender National Flagging System (<https://www.ontario.ca/document/crown-prosecution-manual/d-17-high-risk-offender-national-flagging-system>) . In appropriate cases, the Prosecutor should consider whether to proceed with a Dangerous/Long-term Offender Application

(see High-Risk Offender National Flagging System Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-17-high-risk-offender-national-flagging-system>) and Dangerous/Long-term Offender Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-8-dangerous-long-term-offenders>)).

Where probation is imposed, the Prosecutor should consider whether the Partner Assault Program or other relevant counselling program is appropriate.

Reference should be made to the DNA Data Bank Order Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-11-dna-data-bank-orders>), the Weapons Prohibitions and Forfeiture Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-37-weapons-prohibitions-and-forfeiture>), the Firearms Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-14-firearms>) and the Indigenous Peoples Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-20-indigenous-peoples>).

D. 24: Judicial Interim Release (Bail)

Type of document: Prosecution Directive

Effective date: November 14, 2017

One of the fundamental presumptions in Canadian criminal law is that a person arrested and charged with an offence will be out of custody prior to trial. This is based on the presumption of innocence. The *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>) and legal decisions from the Supreme Court of Canada emphasize that liberty while awaiting trial is a basic principle underlying the judicial interim release process.

Upon arrest an accused may be released by police or brought before the court for a bail hearing. A bail hearing involves a balancing of potentially conflicting interests: the liberty interests of the accused and the Charter right to reasonable bail balanced against societal interests in public safety and confidence in the administration of justice. Where a hearing is held, the court determines whether the accused should be released with or without conditions and with or without sureties, or held in custody prior to trial.

An accused is presumed innocent and the Prosecutor must be aware of the impact of even a brief period of detention in custody upon an accused. Even a brief period of detention in custody affects the mental, social and physical life of the accused and their

family. An accused is presumed innocent and must not find it necessary to plead guilty to secure their release.

The decision whether to consent to or oppose bail is one of the most critical decisions in the criminal process. It requires a consideration of competing interests including the interests of public safety, the accused and the victim. This process is complicated by the challenges of accurately predicting future conduct.

The appropriate exercise of prosecutorial discretion is fundamental to the proper functioning of the bail process. The Prosecutor must act with objectivity, independence and fairness in each case to ensure early, timely and principled decision making based on the circumstances of the accused and the offence and an appropriate use of legal principles without outside pressures or considerations. Decisions made by Prosecutors about consenting to or opposing release made in the proper exercise of their discretion will be supported by the Attorney General.

The accused should be released or a bail hearing should be held at the earliest opportunity having regard to the requirements of the *Criminal Code*. The Prosecutor should consider the least restrictive form of release and should not request a release with a surety (the most onerous form) unless each lesser form of release has been considered and rejected as inappropriate. As noted by the Supreme Court of Canada, the default position is the unconditional release of the accused. Any conditions that are requested should be necessary and required in the interests of the accused and the safety and security of the victim or public and related to the commission of the offence.

Where the Prosecutor believes that the release of the accused would jeopardize the safety or security of the victim or the public and such risk cannot be appropriately mitigated by some form of community based release with conditions, the Prosecutor must seek the accused's detention.

Additional principles and directions that apply to specific circumstances are particularized in specific Directives. Reference should be made to the following Directives: Firearms (<https://www.ontario.ca/document/crown-prosecution-manual/d-14-firearms>) , Indigenous Peoples (<https://www.ontario.ca/document/crown-prosecution-manual/d-20-indigenous-peoples>) , Intimate Partner Violence (<https://www.ontario.ca/document/crown-prosecution-manual/d-23-intimate-partner-violence>) , Mentally Ill Accused: Court Practices and Procedures (<https://www.ontario.ca/document/crown-prosecution-manual/26-b-mentally-ill-accused-court-practices-and-procedures>) , Offences against Children

(<https://www.ontario.ca/document/crown-prosecution-manual/d-27-offences-against-children>) , Sexual Offences against Adults (<https://www.ontario.ca/document/crown-prosecution-manual/d-34-sexual-offences-against-adults>) , Victims (<https://www.ontario.ca/document/crown-prosecution-manual/d-36-victims>) , Weapons Prohibitions and Forfeiture (<https://www.ontario.ca/document/crown-prosecution-manual/d-37-weapons-prohibitions-and-forfeiture>) , YCJ: Court Practices and Procedures (<https://www.ontario.ca/document/crown-prosecution-manual/38-b-youth-criminal-justice-court-practices-and-procedures>) .

Bail hearing

The *Charter* guarantees the accused right not to be denied reasonable bail without just cause. The concept of “reasonable bail” relates to the terms of bail, including any monetary component and other restrictions that are imposed on the accused, and requires the least restrictive form of release available consistent with the public interest.

The concept of “just cause” is limited to three grounds for detention which are defined by the *Criminal Code*:

1. to ensure attendance in court
2. for the protection or safety of the public
3. to maintain confidence in the administration of justice.

Each of the three grounds is separate and independent from the others. There is no specific order in which the grounds are considered. The court decides which form of release to order and it is the court that determines and imposes conditions that are specific to the circumstances of the accused and the alleged offence and necessary to address the three grounds.

The Prosecutor should ensure that the bail hearing proceeds expeditiously and as effectively as possible. Wherever possible, the hearing should be conducted and completed on the first appearance of the accused in bail court. The Prosecutor should consider whether the hearing can be conducted by a factual summary and submissions without the necessity of calling evidence or by conducting a focused hearing dealing with only issues that are in dispute.

If the Prosecutor seeks an adjournment, it should be for as short a time as necessary. The reasons for the request should be stated in open court.

Factors to consider

The Prosecutor should consider whether there is a reasonable prospect of conviction and whether it is in the public interest to proceed with the prosecution of the charges (see Charge Screening Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-3-charge-screening>)). If the charge screening threshold is not met the charge should be withdrawn and the accused released. The Prosecutor should also consider whether a custodial sentence would be appropriate if the accused is subsequently found guilty. Detention should be rare if a custodial sentence is unlikely.

The Prosecutor must assess the circumstances of the alleged offence and the accused, including information relating to the victim, when determining a position on bail. This assessment must continue when new information is received. Information provided by the accused through counsel, may assist the Prosecutor in making a final determination on bail.

These factors must be considered by the Prosecutor regardless of whether the onus of showing why the accused must be detained, or not, is on the prosecution or the accused.

Circumstances of the accused

1. the age of the accused
2. the presence or absence of a criminal record, including any convictions for violence, related offences and breach of court orders
3. a concern that the accused will interfere with the administration of justice (e.g. coercion of witnesses, destruction of evidence)
4. the presence or absence of outstanding charges in any jurisdiction, together with their nature and circumstances
5. the need for and the availability of supervision of the accused while on bail
6. any ties to the community
7. the availability of community supports.

The Prosecutor must consider the unique circumstances of Indigenous Peoples when an accused self-identifies as Métis, Inuit or First Nation. The Prosecutor should also consider the distance and remoteness of many Indigenous communities and the barriers that this creates for access to bail hearings and forms of release. A significant disadvantage is

created since the accused is unlikely to have established connections or supports in the community in which the bail hearing is taking place. In these circumstances, seeking the detention of an Indigenous accused should remain an exceptional measure unless the release of the accused would jeopardize the safety and security of the victim or the public. Although the Prosecutor should keep in mind the principles referred to by the Supreme Court in Gladue, a Gladue report should not be requested by the Prosecutor for a bail hearing. Reference should be made to the Indigenous Peoples Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-20-indigenous-peoples>) .

When determining a position on bail, Prosecutors should recognize the circumstances of vulnerable and disadvantaged accused, including racialized populations, the homeless, the poor or those suffering from mental illness or addictions. These accused may not have access to the type of accommodation, resources, networks or supports that commonly exist for other members of the community. Pre-trial detention should never be used as a substitute for mental health or other social measures.

Circumstances and nature of the alleged offence

1. whether the offence involved violence or threats of violence
2. whether serious bodily harm was reasonably foreseeable
3. whether the offence harmed the victim (physical, psychological or financial) and/or community
4. whether the incident violated the sexual integrity of a person
5. whether the victim has provided input through police or a victim services agency
6. whether a weapon was used or threatened to be used
7. whether there was an intention to cause or attempt to cause substantial property damage or loss, and if so, whether the damage was reasonably foreseeable
8. the interests of the community, including the needs of the victim.

The Prosecutor should consider whether the offence involved a spouse/intimate partner. Spouse/intimate partner offences are often committed in a context where there is a pattern of assaultive and controlling behaviour. Violence may go beyond physical assault and may include emotional, psychological and sexual abuse that is intended to induce fear, humiliation and powerlessness. The same general principles of bail apply to these cases, including the requirement for ongoing assessment of the strength of the Crown's

case. Prosecutors should be sensitive to the needs of the victim and to the dynamics that exist in families where a partner is allegedly abused. The Prosecutor must be conscious of the potential increased risk of harm in these cases and must seek a detention order where she considers it necessary for the safety and security of the victim or the public. Reference should be made to the Intimate Partner Violence Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-23-intimate-partner-violence>) .

Where the charge is an offence against the administration of justice, such as a breach of a court order, the Prosecutor should consider the extent of non-compliance, the seriousness of the alleged breach and any apparent reasons for the breach in determining her position on bail. The Prosecutor should also consider the gravity of the administration of justice offence and the underlying facts in proportion to the consequences of proceeding with the criminal charge.

Where an accused is arrested for breaching a condition of a release order and/or committing a new offence, the decision to cancel the previous release order should not be automatic but subject to consideration of the same factors set out above.

Options for release

The *Criminal Code* permits a police officer to release an accused upon arrest. Where the police officer does not release the accused, the *Criminal Code* directs a court to release an accused on an undertaking without conditions unless the Prosecutor shows why a more onerous form of release or detention is warranted. There are certain offences for which the *Criminal Code* directs that the accused show why their detention in custody is not required pending trial.

There are several forms of release set out in the *Criminal Code*. The “ladder” principle requires that a justice not order a more onerous form of release unless the Prosecutor shows why a less onerous form of release is not appropriate. The “ladder approach” moves from the least restrictive to the most onerous form of release and permits the court to release in one of the following ways, with or without conditions:

1. an undertaking, with or without conditions
2. a recognizance without sureties with promise of money
3. a recognizance with sureties with promise of money
4. with Prosecutor’s consent, a recognizance without sureties with deposit of money

5. a recognizance with or without sureties, and a deposit of money where the accused does not live within 200 kilometres of place of arrest.

In determining her position on bail, the Prosecutor should apply the ladder approach. The Prosecutor should consider the least restrictive bail that still meets any concerns that have been identified. The Prosecutor shall consider each rung of the “ladder” individually and shall reject it before moving to a more restrictive form of release. This should be done by the Prosecutor whether the onus of showing why the accused must be detained, or not, is on the prosecution or the accused.

Although most accused persons will be released by the police or at a bail hearing, given the importance of the protection of the public, the Prosecutor must seek an order that the accused be detained in custody where she believes that the release of the accused would jeopardize the safety and security of the victim or public, and that such risk cannot be appropriately mitigated by some form of community-based release with conditions.

Supervision

In some circumstances, concerns about public safety or attendance in court could be addressed by supervision in the community rather than detention of an accused. Such supervision should only be considered where it is necessary and appropriate and where lesser forms of release would be inadequate to meet those concerns.

Supervision may be available through a Bail Verification and Supervision Program or by a surety. Community groups or organizations may also be able to perform a supervisory role.

The Bail Verification and Supervision Program may require the accused to report to the police or the program and assists the accused in abiding by any conditions set by the court. The program may also help in accessing other community services or support the accused person. The program should not be expected to ensure absolute compliance with the release.

A surety is a person who assumes responsibility for the accused's compliance with their conditions of release by promising to pay a sum of money if the accused breaches any of those conditions. A recognizance with a surety is one of the most onerous forms of release and should not be automatic. The Prosecutor should not request a surety unless all the less onerous forms of release have been considered and rejected as inappropriate. If the Prosecutor has determined that a surety release should be requested, the surety

approval process should be efficient, minimally intrusive and consistent with the principles of the *Criminal Code*. Although the surety approval process is ultimately up to the court, as a best practice the Prosecutor should generally use an affidavit of the surety and use an out of court approval process where available.

Monetary component

A surety or an accused may promise an amount of money (with or without deposit) that may be forfeited if the accused does not comply with the conditions of release, including not attending court.

The Prosecutor should not request a deposit of cash for the release of an accused if their surety has assets that can be promised. A recognizance with a promise of money is functionally equivalent to depositing money and has the same persuasive effect. Requiring a deposit of money should be relied on only in exceptional circumstances where a release on a recognizance with a surety is unavailable.

The amount of money promised must be within the means of the accused and their surety. The Prosecutor should not request an amount to be promised or deposited that is unattainable as that has the same effect as a detention order.

Conditions of release

A court determines whether the accused should be released, with or without conditions and with or without supervision. The accused, the Prosecutor, sureties and a Bail Verification and Supervision Program may propose conditions of release for the court to consider. The court imposes conditions that are necessary and required in the interests of the accused and the safety and security of the victim or public.

The Prosecutor must ensure that any conditions she recommends on a bail release are necessary and appropriate to the circumstances of the accused and the alleged offence. The Prosecutor should only request conditions that are necessary to ensure public safety or to ensure attendance, and with which an accused can realistically comply. The conditions recommended should:

1. be rationally connected to one of the three grounds for detention in custody
2. relate to the specific circumstances of the accused and the offence
3. be realistic (the accused will be able to comply with the conditions)

4. be minimally intrusive and proportionate to any risk.

There must always be a connection between bail conditions proposed and the circumstances of the alleged offence and the accused (for example, “no alcohol” or “no drug” condition is not appropriate where it is not connected to the offence). Where a connection exists, consideration must be given to crafting the least restrictive bail conditions that still meet public safety concerns (for example, no drinking outside your residence as opposed to a complete ban on alcohol consumption or possession). It is important to limit the number of conditions that are imposed to those that are necessary and appropriate. Any condition recommended should be specific to the case and none should be automatic.

Conditions of release shall not be imposed to change an accused’s behaviour or to punish an accused person. These conditions often relate to therapeutic or rehabilitative measures and are more appropriate following conviction. Conditions imposing a curfew or a condition “not to associate with unnamed persons having a criminal record” or a condition prohibiting attendance at a place may have the unintended consequence of preventing an accused seeing family, accessing support services or losing access to the area they normally lives. The Prosecutor should not request these conditions as a matter of routine.

Victims

The *Criminal Code* directs that the court shall include in the record of the proceedings a statement that the safety and security of every victim of the offence was considered. The Prosecutor must communicate any concerns about the safety or security of any victims to the court.

The Prosecutor must ensure that efforts are made to notify the victim of any release order, the conditions of release, including non-communication and any order detaining the accused. In all cases where there is reason to have concerns for a victim’s safety, the Prosecutor must ensure efforts are made for bail notification to occur as soon as possible. On request, the victim must be provided with a copy of the court order.

Similar notification should be made to victims when there is a bail variation or bail review.

Bail variation

The terms of a bail order may be varied on the consent of the accused and Prosecutor. In determining her position on a request to vary any condition in a bail order, a Prosecutor should consider whether there has been a change in circumstances that warrants a variation to the condition subject to consideration of the same factors set out above.

Bail review

The decision of a justice to release or detain an accused may be reviewed in the Superior Court of Justice if there is new evidence showing a significant change in circumstances, there has been an error in law or the decision is clearly inappropriate. The Prosecutor must obtain the prior approval of the Crown Attorney or designate to seek a bail review of a release order.

D. 25: Juries

Type of document: Prosecution Directive

Effective date: November 14, 2017

A jury must be independent, impartial and competent. Impartiality requires the exclusion of those persons who may have a personal interest or connection to the case. It also requires the exclusion of those persons who are unable to put aside any biases, prejudices and tentative opinions relating to the case. Impartiality is reinforced through a process of randomly selecting eligible persons from the general population for jury duty. Competency is determined by eligibility criteria set out in the *Juries Act* (<https://www.ontario.ca/laws/statute/90j03>) and the *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>) .

Serving as a juror is both a civic duty and an important opportunity to contribute to the community. It also ensures that decisions of the court are grounded in community values. The process by which eligible citizens are randomly selected for jury duty is governed by law and is described on the Ministry of Attorney General website (<https://www.ontario.ca/page/going-criminal-court>) . The random selection process promotes public confidence in the jury's verdict, and in the administration of criminal justice. It should also, to the extent possible, protect the legitimate privacy interests of prospective jurors.

It is important to protect actual impartiality and also maintain the appearance of an impartial jury during the course of a trial. The Prosecutor must seek to obtain a jury that is

impartial, not a jury that is favourable to her position. The Prosecutor must not directly or indirectly communicate with any member of the jury except as permitted by law.

Juror background checks

The pool of eligible persons from which a jury can be selected in court is called the jury panel. The Prosecutor must not request criminal record checks or other background checks on members of the jury panel. If the Prosecutor determines that criminal record checks or other background checks are necessary, the express written approval of the Crown Attorney and Director are required. Where criminal record checks or other background checks are conducted, the Prosecutor must disclose the results to defence counsel and the Director must notify the Assistant Deputy Attorney General- Criminal Law Division.

The Prosecutor must not conduct any informal inquiries (for example seeking input from the office staff or the police) into a prospective juror's background without judicial approval.

Where the Prosecutor obtains judicial approval to conduct an informal inquiry into a prospective juror's background, the Prosecutor must record the names of each person who is shown the panel list, and must disclose those names to the defence. The Prosecutor should advise each person who is shown the jury panel list that the sole reason the person is viewing the list is due to prior judicial authorization. The Prosecutor should also tell each person that their comments are to be reduced to writing on the jury panel list and that their comments will be disclosed to the defence.

Challenge of the jury roll or panel

The *Juries Act* requires that one jury roll be prepared every year for each judicial district in Ontario. Once the jury roll is created for the judicial district, and certified as accurate and complete, Ontario's Provincial Jury Centre then uses a computer program to randomly select jury panels from the jury roll.

The jury roll or panel may be challenged prior to the selection of jurors on the grounds that the roll or panel is not representative including partiality, fraud or wilful misconduct or was prepared using improper procedures.

If the accused challenges the propriety or representativeness of the jury roll or panel, the Prosecutor must inform the Crown Attorney and Director. The Director must then notify

the Assistant Deputy Attorney General-Criminal Law Division.

On the application, the Prosecutor should ensure that a proper evidentiary foundation for the challenge is placed before the court. This will require coordination and consultation with Court Services Division prior to proceeding with the application.

The Prosecutor must not challenge the propriety or representativeness of the jury roll or panel without the prior approval of the Crown Attorney and Director.

Safeguarding jury panel lists

Jury panel lists contain confidential information about prospective jurors and must be securely stored at all times. During the course of the trial, the Prosecutor must ensure that the list is not left in public view. After the trial, the Prosecutor must ensure that the confidentiality of the list is maintained.

The jury panel list should not be destroyed. The list must be placed in a sealed marked envelope, and must be stored with the contents of the Crown Brief. The jury panel list should be securely retained for a period of one year after its use.

D. 26: Mentally Ill Accused

Prosecution Directives

Mentally ill accused face unique challenges at each stage of the criminal justice process.

Mental disorders can take many forms and encompass any illness, disorder or abnormal condition that impairs a person's mind and its functioning. Mental disorders do not include temporary or self-induced states. The fact that a person has a mental disorder may be a relevant factor for consideration in a criminal proceeding.

In recognition of their particular circumstances, mentally ill accused may warrant special consideration within the criminal justice system, depending on the nature and circumstances of the offence and the background of the accused. The existence of a mental disorder may be relevant in determining whether an accused is eligible for diversion, determining a position on bail, whether a psychiatric assessment of the accused's mental condition is required, whether the accused may be exempt from

criminal responsibility and the dispositions available at the conclusion of the criminal proceedings.

Any consideration given by Prosecutors to an accused's mental disorder and mental condition must always be consistent with maintaining public safety and public confidence in the administration of justice. In these circumstances, Prosecutors must be guided by the relevant provisions of the *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>) , the governing law and any relevant legislation including the *Mental Health Act* (<https://www.ontario.ca/laws/statute/90m07>) .

In this section

- Mentally Ill Accused: Alternatives to Prosecution (<https://www.ontario.ca/document/crown-prosecution-manual/26-a-mentally-ill-accused-alternatives-prosecution>)
- Mentally Ill Accused: Court Practices and Procedures (<https://www.ontario.ca/document/crown-prosecution-manual/26-b-mentally-ill-accused-court-practices-and-procedures>)
- Mentally Ill Accused: Post Verdict Issues (<https://www.ontario.ca/document/crown-prosecution-manual/26-c-mentally-ill-accused-post-verdict-issues>)

26 (a): Mentally Ill Accused - Alternatives to Prosecution

Type of document: Prosecution Directive

Effective date: November 14, 2017

Community based sanctions may serve as an effective alternative to the prosecution of mentally ill accused. In some cases, the needs and interests of society can be better served through the exercise of prosecutorial discretion to withdraw or stay criminal charges upon an accused person's entry or completion of a comprehensive diversion program. A mentally ill accused is entitled to special consideration flowing from the fact that, their illness, disorder or impaired cognitive functioning may have played some role in the commission of the offence.

To the extent that it is consistent with public safety, accused persons suffering from a mental illness (including developmental disabilities and concurrent disorders) should have

the same access to community justice programs as all other accused. This may require an emphasis on restorative and remedial measures, such as specialized treatment options, supervisory programs or counselling programs, as alternatives to prosecution.

Prosecutors must only consider community based sanctions if a reasonable prospect of conviction exists and must not impose additional requirements on the accused person as a precondition to offering an alternative to diversion.

A community based program will hold the mentally ill accused accountable for criminal conduct by requiring the completion of rehabilitative programs that effectively respond to the nature of the offence, the accused, and the needs of the community. Once in a program, a plan will be created for the accused that will address the underlying causes that led to the commission of the offence.

In considering community based programs, Prosecutors should bear in mind that a purely medical approach (that may involve medication and/or psychiatric care) is not necessarily the preferred course for all mentally ill accused. Often, the provision of good housing and proper ongoing support in the community are, in themselves, an effective response.

Alternative sanctions for mentally ill accused may also include community service work, an apology, and restitution.

This directive addresses diversion for mentally ill persons. For young persons, please see Youth Criminal Justice: Extrajudicial Sanctions (<https://www.ontario.ca/document/crown-prosecution-manual/38-a-youth-criminal-justice-extrajudicial-sanctions>) . For adults, please see Community Justice Programs for Adults (<https://www.ontario.ca/document/crown-prosecution-manual/d-4-community-justice-programs-for-adults>) . For an Indigenous accused, please see Indigenous Peoples Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-20-indigenous-peoples>) .

Ineligible offences

Prosecutors must not refer any of the following offences to a community based program, regardless of the circumstances of the offence or the accused:

- murder, manslaughter, infanticide, criminal negligence causing death
- driving offences causing death or bodily harm
- aggravated assault

- simple impaired driving or driving with a prohibited blood alcohol concentration or refusing to provide a breath sample
- offences involving firearms
- criminal organization offences
- terrorism offences
- kidnapping
- voyeurism
- child abuse and child luring
- offences involving child pornography
- home invasions
- human trafficking offences
- robbery
- sexual assault cause bodily harm
- sexual interference and exploitation, invitation to sexual touching and incest
- any offences where the Attorney General's consent was obtained to initiate proceedings

Presumptively ineligible offences

In exceptional cases, the Prosecutor may refer the following presumptively ineligible offences to a community based program with the prior approval of the Crown Attorney or designate:

- hate-motivated offences [Hate Propaganda and Hate Motivated Offences Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-16-hate-propaganda-and-hate-motivated-offences>)]
- intimate partner violence offences [Intimate Partner Violence Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-23-intimate-partner-violence>)]
- criminal harassment
- publication etc., of intimate images without consent

- sexual assault

Eligible offences

The Prosecutor may refer any other offence to a community based program.

Factors to consider

In determining if a community based sanction is an effective alternative to the prosecution of a presumptively ineligible offence or eligible offence for a mentally ill accused, the Prosecutor and Crown Attorney or designate must consider the following factors:

Background of the accused person:

1. the age and health of the accused person including any mental health issues and psychiatric history
2. any prior findings of guilt or past involvement with community justice programs or specialized treatment
3. the nature and number of any such previous offences
4. any outstanding charges
5. the role of the accused person and their corresponding degree of responsibility in relation to the offence
6. whether the accused person has been previously victimized
7. any remorse and willingness to engage in community justice programs or an appropriate treatment program, including the likelihood of compliance
8. the degree that the mental illness can be said to have impacted the accused person's behavior and involvement in the offence
9. whether the accused person comes from a disadvantaged group
10. whether the accused person has been or is presently engaged with the mental health system
11. whether the accused self-identifies as Métis, Inuit or First Nation.

The circumstances and nature of the offence:

1. whether the offence is summary or indictable
2. whether the offence involves violence
3. whether the offence actually harmed the victim (physical, psychological or financial) and/or society
4. whether the incident affected the sexual integrity of a person
5. whether a weapon was used or threatened to be used
6. whether there was an intention to cause or attempt to cause substantial property damage or loss, and if so, whether the damage was reasonably foreseeable
7. whether the offence was against the administration of justice, such as breach of a court order, and, if so, the extent of non-compliance
8. whether the offence involved malice, extortion, exploitation or revenge
9. whether the offence involved a breach of trust
10. whether the offence was motivated by bias, prejudice, or hate
11. the age of the victim
12. the views of the victim and/or their parents or legal guardians (if victim is a child), if available.

Administration of justice considerations:

1. public confidence in the administration of justice
2. the length and expense of a trial when considered in relation to the seriousness of the offence
3. the likely sentence upon conviction
4. the availability of an appropriate sanction, including culturally relevant programming options, which will hold the accused person accountable and focus on correcting the offending behaviour
5. frailties in the prosecution e.g. staleness of the case, or the technical nature of the offence
6. whether the consequences of the prosecution would be unduly harsh to the accused person, the victim or any witnesses in the case, owing to such factors such as age,

health or the relationship between the parties

7. whether a just result is accelerated by a referral to a community justice program.

In this section

- Mentally Ill Accused: Alternatives to Prosecution
- Mentally Ill Accused: Court Practices and Procedures
(<https://www.ontario.ca/document/crown-prosecution-manual/26-b-mentally-ill-accused-court-practices-and-procedures>)
- Mentally Ill Accused: Post Verdict Issues (<https://www.ontario.ca/document/crown-prosecution-manual/26-c-mentally-ill-accused-post-verdict-issues>)

26 (b): Mentally Ill Accused - Court Practices and Procedures

Type of document: Prosecution Directive

Effective date: November 14, 2017

An accused's mental illness may influence whether they are able to meaningfully participate in the criminal proceeding or whether they understood fully what they were doing at the time of the offence. If a mental illness renders the accused unable to participate in conducting their defence or instructing counsel, an accused may be found 'unfit to stand trial.' If a mental illness affects the accused's actions at the time of the offence such that they did not understand what they were doing or did not know what they were doing was wrong, the accused may be found 'not criminally responsible (NCR).'

The *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>) sets out the legal requirements to determine fitness to stand trial and the finding of not criminally responsible.

Judicial interim release (bail)

When determining a position on bail, Prosecutors should recognize the unique circumstances and inherent vulnerability of an accused suffering from a mental illness. The accused should be released or a bail hearing held at the earliest opportunity having regard to the requirements of the *Criminal Code*.

The Prosecutor must be aware that even a brief period of detention can have a disruptive impact upon an accused dealing with a mental illness. These accused may not have access to the type of accommodation, resources, networks or supports that commonly exist for other members of the community. Pre-trial detention should never be used as a substitute for mental health or other social measures. If a psychiatric assessment is being sought at the bail stage, detention in custody may be necessary while the accused waits for space in a hospital.

Conditions of release shall not be imposed to change a mentally ill accused's behavior or to punish the accused. These conditions often relate to therapeutic or rehabilitative measures and are more appropriate following conviction. The Prosecutor must ensure that any conditions she recommends on a bail release are necessary and appropriate to the circumstances of the accused and the alleged offence. Any conditions recommended should be specific to the case and none should be automatic. The Prosecutor should only request conditions that are necessary to ensure public safety or to ensure attendance, and with which an accused can realistically comply. The accused's mental illness may impede the ability to understand and comply with conditions of release.

Reference should be made to the Judicial Interim Release (Bail) Directive

(<https://www.ontario.ca/document/crown-prosecution-manual/d-24-judicial-interim-release-bail>) .

Appointment of counsel

A mentally ill accused may require the assistance of counsel in the criminal proceedings yet not have the capacity to select and retain counsel. The *Criminal Code* and common law mandates a court to appoint counsel to assist an accused in these circumstances.

Psychiatric assessments

A psychiatric assessment may be requested if there are reasonable grounds to believe that an assessment is necessary to determine an accused's ability to meaningfully participate in the criminal proceedings or to determine if the mental illness might have affected the accused's actions at the time of the offence. The psychiatric assessment will assist the court in determining fitness to stand trial or criminal responsibility. As the issue of fitness and criminal responsibility are distinct, a psychiatric assessment should be ordered to address each individually.

In requesting a court ordered psychiatric assessment of the mentally ill accused, Prosecutors should consider the following factors:

- the purpose of the assessment:
 - an assessment should be conducted for a stated purpose linked to the prosecution. An assessment must not be conducted for a purpose extraneous to the criminal law, such as placing the accused in a more favorable environment
- the time required to conduct the assessment:
 - an assessment ought to be concluded within a fixed and reasonable amount of time which is specified in the order
- the location of the assessment:
 - an assessment can be conducted in or out of custody.

Fitness to stand trial

An accused person is presumed fit to stand trial. If a mental illness impedes an accused capability to conduct a defence due to an inability to communicate with counsel or to understand the nature, object or consequences of the proceedings, the proceedings will be halted until such time that the accused is mentally fit to stand trial.

The issue of fitness to stand trial can be raised at any time during the criminal proceedings. The Prosecutor or defence counsel who believes the accused may be unfit must bring this matter to the court's attention. The Prosecutor's ability to raise the issue of fitness is subject to limitations set out in the *Criminal Code*.

When the issue of fitness arises, the court must conduct an inquiry and render a decision on the accused's fitness.

Treatment disposition orders

Upon an accused being found unfit, a Prosecutor may make an application to the court for a treatment order if there is evidence that the accused could return to a fit state within a short period of time. Only a Prosecutor can request a treatment order. The accused's consent to be treated is not a prerequisite for a treatment order. It is necessary to have the consent of the hospital or the person assigned responsibility by the court for the treatment prior to the court making the order. Prosecutors should consider the appropriateness of an out-of-court treatment order where public safety would not be compromised.

If a court is satisfied that the statutory criteria set out in the *Criminal Code* is met, an order directing that treatment be carried out for a specified period may be issued. If the accused becomes fit to stand trial following treatment, the criminal proceedings continue. If the accused remains unfit following treatment, jurisdiction over the accused will transfer to the Ontario Review Board.

“Keep Fit” orders

Where an accused is found fit to stand trial and is detained in custody pending trial and there is a concern they may become unfit, an order may be made that the accused be detained in hospital rather than a correctional facility. In all cases where a “keep fit” order is made, Prosecutors should consider measures to expedite the trial, including bringing the trial date forward where feasible.

Unfit accused

An accused that remains unfit to stand trial falls under the jurisdiction of the Ontario Review Board until the accused becomes fit to stand trial or until the court directs a stay of proceedings. Reference should be made to the Mentally Ill Accused: Post Verdict Issues Directive (<https://www.ontario.ca/document/crown-prosecution-manual/26-c-mentally-ill-accused-post-verdict-issues>) .

The Information containing the charges laid against the accused remains in court. Every two years, the Prosecutor shall establish the continued existence of evidence to support the elements of the offence that the accused would face at trial. If there is insufficient evidence, the accused shall be acquitted.

Not Criminally Responsible (NCR)

An accused that satisfies the test for a verdict of not criminally responsible on account of a mental illness shall not be convicted or acquitted. The verdict of not criminally responsible recognizes the criminal act was a product of the accused’s mental illness such that the accused should be treated, not punished. The *Criminal Code* recognizes that punishment is inappropriate and ineffective in these circumstances as the criminal act was not a product of any rational choice by the accused.

The Prosecutor’s ability to raise this issue during the trial is limited to those cases where the accused has made his mental capacity an issue in the trial. Where the Prosecutor has reason to believe that an accused may be not criminally responsible, the Prosecutor must

raise this issue following a finding of guilt. If an accused is found not criminally responsible and the court does not grant an absolute discharge, the accused falls under the jurisdiction of the Ontario Review Board. Reference should be made to the Mentally Ill Accused: Post Verdict Issues Directive (<https://www.ontario.ca/document/crown-prosecution-manual/26-c-mentally-ill-accused-post-verdict-issues>) .

Ancillary orders

Upon a finding of not criminally responsible, the Prosecutor must consider whether a request should be made and make the application to the court for any of the following:

- weapons prohibition
- high-risk accused designation
- DNA Databank Order

- Sex Offender Information Registration Order
- forfeiture order
- High Risk Offender Flag.

The Ontario Review Board does not have the jurisdiction to make ancillary orders.

Reference should be made to the Weapons Prohibitions and Forfeiture Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-37-weapons-prohibitions-and-forfeiture>) , the DNA Data Bank Orders Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-11-dna-data-bank-orders>) , the Criminal Asset Forfeiture Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-7-criminal-asset-forfeiture>) and the High-Risk National Flagging System Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-17-high-risk-offender-national-flagging-system>) .

In this section

- Mentally Ill Accused: Alternatives to Prosecution
(<https://www.ontario.ca/document/crown-prosecution-manual/26-a-mentally-ill-accused-alternatives-prosecution>)
- Mentally Ill Accused: Court Practices and Procedures
- Mentally Ill Accused: Post Verdict Issues (<https://www.ontario.ca/document/crown-prosecution-manual/26-c-mentally-ill-accused-post-verdict-issues>)

26 (c): Mentally Ill Accused - Post-Verdict Issues

Type of document: Prosecution Directive

Effective date: November 14, 2017

An accused found either unfit to stand trial or not criminally responsible becomes subject to a comprehensive statutory process that determines when and under what conditions the accused person may be returned to the community. The process is aimed at protecting the public and treating the accused's mental illness. In Ontario, the Ontario Review Board (ORB) generally makes these decisions.

Ontario Review Board (ORB)

Once a person is found unfit to stand trial or not criminally responsible the court may hold a disposition hearing or refer the matter directly to the ORB. The ORB is an independent specialized provincial tribunal with jurisdiction to make and review dispositions whose members are appointed by the lieutenant governor in council. The ORB consists of legal, medical and lay members. Its mandate is to make and review orders referred to as "dispositions" in respect of accused persons found unfit to stand trial or not criminally responsible. A "disposition" determines the terms and conditions of an accused's supervision by a psychiatric hospital and the accused's return to the community. The ORB has a legal duty to seek out all evidence it believes is necessary to make its decision and must treat public safety as the paramount factor of consideration.

The *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>) sets out timelines for when disposition hearings shall occur following a verdict of unfit to stand trial or not criminally responsible. The Attorney General is a party to the disposition hearings, and any appeals, and is represented by a Prosecutor.

The court or the ORB may conduct the initial disposition hearing. Thereafter and until the accused is absolutely discharged, the ORB conducts the annual disposition hearings.

In serious, lengthy and complex cases, the Prosecutor with carriage of the trial should when feasible attend the initial disposition hearing.

Appointment of counsel

Where an unrepresented accused has been found unfit to stand trial or it is otherwise in the interests of justice, the court or ORB shall assign counsel to act for the accused either before or at the time of the hearing.

Victim notification

The ORB is required to notify victims whenever a psychiatric assessment indicates a change in mental status of the accused that could provide grounds for an absolute or conditional discharge. The victim is also required to be notified, upon request, of any ORB hearing, any disposition of an ORB hearing and any escape of the accused from custody.

The victim is permitted to submit a Victim Impact Statement at any disposition hearing or a review of disposition order.

It is important that victims appreciate the process and purpose of the ORB. The Prosecutor should ensure that victims are informed of available victim services as facilitated by the Victim/Witness Assistance Program (V/WAP) or similar victim support services.

Reference should be made to the Victims Directive
(<https://www.ontario.ca/document/crown-prosecution-manual/d-36-victims>) .

Not Criminally Responsible (NCR) disposition hearings

A verdict of not criminally responsible triggers an administrative process that is aimed at protecting the public and treating the accused's mental illness. This process involves regular disposition hearings to determine what further control over the accused is required. Public safety is always the paramount factor of consideration. An accused found not criminally responsible is subject to a period of indefinite detention regardless of how minor or serious the alleged offence. The gravity of the offence does not determine how long an accused remains under the control of the ORB. The ORB also considers the mental condition of the accused and the reintegration of the accused into society.

The following three dispositions are available at the initial disposition hearing and/or the annual disposition hearing for an accused who is not criminally responsible:

1. absolute discharge – where an NCR accused is found not to be a significant threat to the safety of the public, the person is no longer under the jurisdiction of the ORB and not subject to any conditions.

2. conditional discharge – where an accused is discharged from the hospital and given conditions to do (or not do) certain things. An accused on a conditional discharge cannot be forced to return and remain at the hospital unless the hospital applies to the ORB to conduct a new disposition hearing.
3. hospital detention order – where an accused is under the supervision of the hospital with conditions to do (or not do) certain things. An accused may reside at the hospital or in the community with the permission of the hospital. An accused on a hospital detention order is required to return to the hospital upon the request of the hospital.

Unfit disposition hearings

The trial of an accused found “unfit to stand trial” cannot proceed until they become fit to stand trial or until the charges are terminated in court by a stay of proceedings, a withdrawal of the charges or an acquittal. The *Criminal Code* requires that disposition hearings be conducted to determine where and under what conditions an accused should be held who is found “unfit to stand trial”.

The following findings are available at the initial disposition hearing and/or the annual disposition hearing for an accused that is unfit to stand trial:

1. fit to stand trial – the accused shall be sent back to court where the court will determine if the accused is fit to stand trial. If the accused is fit to stand trial, the trial may proceed.
2. unfit to stand trial – the accused can receive a disposition of either a conditional discharge or a Hospital Detention Order.
3. permanently unfit to stand trial – if the permanently unfit accused is determined not to pose a significant threat to society and it is in the interests of the proper administration of justice, a court may enter a stay of proceedings. Otherwise, the accused can receive a disposition of either a conditional discharge or a Hospital Detention Order.

Once the Review Board is of the opinion that the accused has returned to a fit state, the accused is returned to court. The court will hold another fitness hearing to determine the issue of fitness. If the court determines that the accused is fit to stand trial, the trial will recommence. The Prosecutor must notify the Ontario Review Board that the accused has been found fit to stand trial.

In this section

- Mentally Ill Accused: Alternatives to Prosecution
(<https://www.ontario.ca/document/crown-prosecution-manual/26-a-mentally-ill-accused-alternatives-prosecution>)
- Mentally Ill Accused: Court Practices and Procedures
(<https://www.ontario.ca/document/crown-prosecution-manual/26-b-mentally-ill-accused-court-practices-and-procedures>)
- Mentally Ill Accused: Post Verdict Issues

D. 27: Offences Against Children

Type of document: Prosecution Directive

Effective date: November 14, 2017

Offences against children include crimes of abandonment, abduction, neglect, physical abuse, sexual abuse and Internet child exploitation. These offences have devastating effects on the physical and psychological well-being of victims, their families and the community.

The Prosecutor must ensure that efforts are made, at all stages of the criminal proceedings, to provide the victim and/or where appropriate their parents or legal guardians, with whatever information or assistance is required to ensure full and fair participation in the criminal justice system. This includes the availability of the following:

- specialized victim's services facilitated by the Victim/Witness Assistance Program (V/WAP) or other similar victims' support services
- interpreters to assist the victim in communicating
- testimonial aids to assist the victim in providing evidence
- appointment of counsel to cross-examine the victim where the accused is self-represented
- access to independent legal representation for victims or witnesses on applications to access their private records under the *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>)

Reference should be made to the following directives: Internet Child Exploitation (<https://www.ontario.ca/document/crown-prosecution-manual/d-22-internet-child-exploitation>), Victims (<https://www.ontario.ca/document/crown-prosecution-manual/d-36-victims>),

Publication Bans and Sealing Orders (<https://www.ontario.ca/document/crown-prosecution-manual/d-32-publication-bans-and-sealing-orders>) , DNA Data Bank Orders (<https://www.ontario.ca/document/crown-prosecution-manual/d-11-dna-data-bank-orders>) , Weapons Prohibitions and Forfeiture (<https://www.ontario.ca/document/crown-prosecution-manual/d-37-weapons-prohibitions-and-forfeiture>) , High-Risk Offender National Flagging System (<https://www.ontario.ca/document/crown-prosecution-manual/d-17-high-risk-offender-national-flagging-system>) , Judicial Interim Release (Bail) (<https://www.ontario.ca/document/crown-prosecution-manual/d-24-judicial-interim-release-bail>) , Testimonial Aids and Accessibility (<https://www.ontario.ca/document/crown-prosecution-manual/d-35-testimonial-aids-and-accessibility>) .

Judicial interim release (bail)

In offences against children, the Prosecutor must take a position on judicial interim release applying the general principles set out in the Judicial Interim Release (Bail) Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-24-judicial-interim-release-bail>) including the requirement for ongoing assessment of the strength of the Crown's case. The Prosecutor must be conscious of the potential risk of harm in these cases and must seek a detention order where she considers it necessary for the safety and security of the victim or the public.

Where the accused is remanded in custody pending a bail hearing, detained or released on conditions, the Prosecutor should seek an order from the Court prohibiting the accused from having any contact with the victim, or where appropriate, any witnesses. The Prosecutor must ensure that any conditions she recommends on a bail release are necessary and appropriate to the circumstances of the alleged offence and the accused.

In all cases involving a victim under the age of eighteen, the Prosecutor must seek a publication ban directing that the identity of the victim and any information that could disclose the identity of the victim not be published or transmitted in any way. Reference should be made to the Publication Bans and Sealing Orders Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-32-publication-bans-and-sealing-orders>) .

The Prosecutor must ensure that efforts are made to notify the victim and/or where appropriate their parents or legal guardians of any release order, the conditions of release, including non-communication and any order detaining the accused. In all cases where there is reason to have concern for a victim's safety, the Prosecutor must ensure

that bail notification occurs as soon as possible. On request, the victim and/or where appropriate their parents or legal guardians must be provided with a copy of the court order.

Reporting Concerns to the Children's Aid Society

Prosecutors have a statutory obligation to report to child protection agencies any case where they have reasonable suspicion that children are, or may be, in need of protection.

Child homicide investigation and prosecution

The death of a child under the age of 12 in suspicious circumstances raises many complex issues. The Child Homicide Resource Team provides advice during the investigation and prosecution of these cases. The assigned Prosecutor must consult with The Child Homicide Resource Team at the earliest opportunity.

Prosecution

Charge screening

The Prosecutor should determine whether the full gravity of the criminal act is reflected in the offence charged and recommend a more appropriate charge be laid if necessary.

The following factors should be considered when determining the offence charged is appropriate to the circumstances and whether to proceed summarily or by indictment:

- the circumstances of the offence e.g. protracted sexual abuse; significant physical, emotional or psychological harm to the victim
- whether the offence is alleged to have occurred within 6 months of reporting
- the circumstances of the offender e.g. history of similar offences, position of trust/authority in relation to victim
- the circumstances of the victim including the impact on the victim of testifying twice (at a preliminary inquiry and trial) and special vulnerabilities (disabilities, age of victim)
- the potential range of sentence.

The Prosecutor should consider whether the accused should be flagged as a High Risk Offender or the subject of a Long Term Offender or Dangerous Offender Application. In

those cases, the Prosecutor should consult with her Regional High Risk Offender Crown.

Reference should be made to the Charge Screening Directive

(<https://www.ontario.ca/document/crown-prosecution-manual/d-3-charge-screening>) ,

Dangerous/Long-term Offenders Directive ([https://www.ontario.ca/document/crown-](https://www.ontario.ca/document/crown-prosecution-manual/d-8-dangerous-long-term-offenders)

prosecution-manual/d-8-dangerous-long-term-offenders) and High-Risk Offender National

Flagging System Directive ([https://www.ontario.ca/document/crown-prosecution-manual/d-17-](https://www.ontario.ca/document/crown-prosecution-manual/d-17-high-risk-offender-national-flagging-system)
high-risk-offender-national-flagging-system) .

Protecting the privacy of child victims

Prosecutors must be sensitive to the privacy interests and needs of child victims at every stage of the prosecution.

The Prosecutor should consider the directions set out in the Disclosure Directive

(<https://www.ontario.ca/document/crown-prosecution-manual/d-10-disclosure>) concerning the disclosure of sensitive materials.

Publication bans and other restrictions on public access

In all cases involving a victim under the age of eighteen, the Prosecutor must seek a publication ban directing that the identity of the victim and any information that could disclose the identity of the victim not be published or transmitted in any way.

Where a concern exists that testifying publicly about a traumatic event may risk causing further trauma to a child victim, may inhibit testifying or may raise an issue respecting a victim's safety, the Prosecutor may apply for an order excluding the public. The Prosecutor should have regard to the direction provided in the Publication Bans and Sealing Orders Directive ([https://www.ontario.ca/document/crown-prosecution-manual/d-32-publication-bans-](https://www.ontario.ca/document/crown-prosecution-manual/d-32-publication-bans-and-sealing-orders)
and-sealing-orders) .

Production of private records (third party records)

In order to gain access to a victim's private information, such as their medical, psychiatric or personal records, the *Criminal Code* provides that the accused must establish that the private records are likely relevant to an issue at trial or to the competence of a victim to testify. The Prosecutor should engage V/WAP to assist the victim and/or where appropriate their parents or legal guardians in obtaining independent legal counsel to

provide advice and represent their interests on the third party records application. The Prosecutor must not disclose victim's records absent a court order.

Sexual abuse and/or activity

The *Criminal Code* provides that evidence that a victim has been sexually abused or engaged in prior sexual activity is not admissible. This evidence cannot be used to assess the victim's credibility nor support an inference that the victim consented to the sexual activity.

Should the accused bring an application to have evidence of the victim being previously sexually abused or engaged in prior sexual activity admitted, the Prosecutor must advise the victim and/or where appropriate their parents or legal guardians that the victim is not required to testify at the hearing to determine the admissibility of the evidence. The Prosecutor must also advise the victim and/or where appropriate their parents or legal guardians that the *Criminal Code* prohibits publication of information provided on the application.

Cross-examination by a self-represented accused

In cases where an accused person is self-represented, the Prosecutor must seek an order appointing counsel to conduct the cross-examination of the victim.

Expert evidence

Before engaging an expert witness, the Prosecutor must obtain the prior approval of the Crown Attorney. Reference should be made to the Expert Evidence Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-12-expert-evidence>) .

Testimonial aids

Prosecutors should ensure that victims and witnesses under the age of 18 years, or their parents/legal guardian are informed of the availability of testimonial aids to assist them to communicate their evidence. Where appropriate, Prosecutors should apply for an order permitting the use of a testimonial aid. Reference should be made to the Testimonial Aids and Accessibility Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-35-testimonial-aids-and-accessibility>) .

Resolution discussions and sentence

The Prosecutor must ensure reasonable steps are taken to inform the victim and/or where appropriate their parents or legal guardians of a proposed resolution (e.g. guilty plea or proposed sentence) or that the charges will be withdrawn.

The Prosecutor must not negotiate a guilty plea in exchange for agreeing to forego a dangerous or long-term offender application without first consulting with the Regional High-Risk Offender Crown and her Crown Attorney.

Except with the prior approval of the Crown Attorney or designate, the Prosecutor must not:

- withdraw or stay proceedings in cases involving sexual abuse
- in cases involving sexual abuse, accept a plea to a lesser charge or non-sexual offence
- reduce a charge or elect summarily solely to allow for the imposition of a conditional sentence
- reduce or withdraw charge solely to avoid a mandatory minimum sentence or any ancillary orders.

Victim impact statement

As soon as feasible after a finding of guilt, the Prosecutor must ensure reasonable steps are taken to provide the victim and/or where appropriate their parents or legal guardians with the opportunity to prepare a Victim Impact Statement, and inform the victim of their right to present it to the court and their other options.

Restitution

The *Criminal Code* directs the court to consider making a restitution order and to ask the Prosecutor if reasonable steps have been taken to provide the victim and/or where appropriate their parents or legal guardians with an opportunity to indicate whether they are seeking restitution i.e. compensation for counselling. As soon as feasible after a finding of guilt, the Prosecutor must ensure reasonable steps are taken to provide the victim and/or where appropriate their parents or legal guardians with an opportunity to indicate whether the victim is seeking restitution for their losses and damages.

Ancillary orders

The Prosecutor must seek the following orders if applicable and remind the court of all mandatory orders:

- DNA order

- *Sex Offender Information Registration Act* (<http://laws-lois.justice.gc.ca/eng/acts/S-8.7/>)
(SOIRA)

- Weapons Prohibition.

Depending on the circumstances of the offence and the offender, Prosecutors should consider making an application for a prohibition order that would restrict the offender's ability to interact with children under the age of 16, either in person or over the Internet.

Reference must be made to the following directives: DNA Data Bank Orders

(<https://www.ontario.ca/document/crown-prosecution-manual/d-11-dna-data-bank-orders#>) ,

Weapons Prohibitions and Forfeiture (<https://www.ontario.ca/document/crown-prosecution-manual/d-37-weapons-prohibitions-and-forfeiture>) .

D. 28: Ontario's Witness Protection Program

Type of document: Prosecution Directive

Effective date: November 14, 2017

The Ministry of the Attorney General operates Ontario's Witness Protection Program in cooperation with the Ontario Provincial Police and municipal police services in Ontario. The program represents one of the Ministry's most significant initiatives in the battle against serious and organized crime. It plays an important role in fulfilling the Ministry's commitment to improving support for victims of crime. The purpose of the program is to assist in protecting witnesses who have been (or may be) exposed to danger as a result of their cooperation in the investigation and prosecution of criminal offences in Ontario.

The need for witness protection often arises on an emergency basis. In such situations, police services have funds available to provide interim safety measures for the witness under the Police Services Act. Police services can apply to the program to receive reimbursement for protective measures implemented on behalf of a witness.

If there is an immediate concern for a witness's safety, the witness should call 911.

The disclosure of witness protection information is governed by a statutory privilege under the *Crown Witnesses Act* (<https://www.ontario.ca/laws/statute/90c52>). The privilege pertains only to witness protection programs designated by regulation under the Act. The inappropriate disclosure of confidential witness protection information puts protected witnesses at risk and compromises the program's integrity. A person who discloses confidential witness protection information is guilty of a provincial offence.

All applications for admission to Ontario's Witness Protection Program must be made to the Ministry of the Attorney General, Crown Law Office – Criminal.

Criteria for admission

Ontario's Witness Protection Program provides time-limited funding to assist in the protection, maintenance and relocation of a witness and/or family members where doing so is in the best interests of the administration of justice. Such an unusual measure may be appropriate where:

1. the life or health of the witness and/or family members is judged by the police to be in real danger as a result of the involvement of the witness in a prosecution
2. the case in which the witness is involved is a case of significance to the administration of justice e.g. murder, robbery, serious crimes of violence, organized crime
3. the witness is cooperating with the police and has agreed to provide truthful testimony that is a key element of the Crown's case
4. the witness's and/or their family members' circumstances allow them to freely participate in the program (e.g. not incarcerated, no longer an undercover agent etc.) and their behavior (e.g. ability and willingness to comply with program discipline) is such that they can benefit from protective measures without themselves posing a danger to the public while in the program.

As reflected in the criteria, the program exists to respond to the most serious of circumstances in very serious cases. It is designed as a last resort. Where alternatives are available, they should be utilized.

What the program provides

Ontario's Witness Protection Program does not provide long-term financial assistance. It is a temporary relocation and assistance program only. The program also does not provide rewards or benefits in return for testimony. Depending on the circumstances of the

witness and/or family members, the program may provide security advice as well as the following:

1. funding to cover the costs of relocation to a safe environment
2. funding for temporary rent, utilities, food and maintenance
3. assistance in obtaining social assistance benefits under the new name and in the new locale
4. funding to cover the costs of specifically approved security measures
5. where appropriate, funding to cover exceptional medical expenses including, where appropriate, psychological counselling
6. where appropriate, assistance in changing names and obtaining new identification documents
7. where appropriate, funding for time-limited and specifically approved upgrades to employment skills or education.

Application process

Issues respecting the acceptance of a witness into the program, the determination of the nature and amount of assistance provided and the management of the witness are dealt with in an impartial and independent fashion by a local senior independent Prosecutor. The Prosecutor assigned to the prosecution must not be involved in this assessment and process except that she must confirm that the witness is willing and able to testify and that their anticipated testimony is a key element of the Crown's case.

The Prosecutor must not discuss witness protection matters with the witness except to the extent necessary to prepare them for their testimony. The level and type of assistance provided to the witness must not form part of any plea resolutions or other arrangements.

The senior independent Prosecutor will ensure that the Prosecutor and investigators have provided the witness protection officer with all of the information needed to complete an application for program assistance must review a witness protection application. The senior independent Prosecutor must certify, if appropriate, that the use of witness protection is in the best interests of the administration of justice.

The preparation of applications and handling of witnesses accepted into Ontario's Witness Protection Program, including the implementation of protective measures, is the responsibility of specialized provincial and municipal witness protection officers who are independent of the investigator of the underlying offence. Counsel in the Crown Law Office – Criminal with expertise in witness protection matters are assigned to review witness protection applications independent of the prosecution team. The approval of the Deputy Attorney General is required to enter the program.

The officer conducting an investigation involving a witness in need of protection will refer the witness's safety concerns to a designated witness protection officer within their police service. The witness protection officer will make an independent assessment of the witness's security needs.

Acceptance into program

A witness who has been accepted in the program must sign a standard Letter of Acknowledgement (describing the general nature of the financial and other assistance approved for the witness) before any funds (interim protection assistance funds excepted) are disbursed by the police. The Prosecutor will be advised by letter from the reviewing counsel in the Crown Law Office – Criminal that the witness has been accepted into the program and a copy of the Letter of Acknowledgement will be made available in the event that it is required as an exhibit.

D. 29: Police

Type of document: Prosecution Directive

Effective date: November 14, 2017

Public safety and effective prosecution are best achieved by a close working relationship between Prosecutors and police that recognizes the independence of each organization. Police officers have sole responsibility and discretion over the investigation of a criminal offence and the laying of criminal charges except where the consent of the Attorney General is required by statute. Prosecutors have sole responsibility and discretion over the prosecution of criminal offences, including deciding whether to continue with criminal proceedings.

While independence is of fundamental importance, there is also a need for co-operation at all stages of an investigation and court proceedings. Prosecutors should encourage the

police to seek advice concerning legal issues or the sufficiency of evidence relating to a criminal offence. Prosecutors may require the assistance of police in conducting further investigations.

This cooperative relationship of mutual respect and professionalism recognizes the distinct functions of the police and the Prosecutor. Both parties exercise discretion independently and objectively. This independence and objectivity are essential elements of the Prosecutor's role as "Minister of Justice" which is fundamental to the proper administration of justice.

Advice to the police

General legal advice

Police often seek legal advice from Prosecutors in relation to general police investigative practices that could impact upon the admissibility of evidence in future prosecutions. In order to ensure consistence of advice, where the police seek a legal opinion on an issue that may have general application, the request for advice must be forwarded to the Crown Attorney, who may direct the request to the Director.

Case specific legal advice

Police often seek legal advice from Prosecutors concerning a specific investigation or an ongoing prosecution. It is appropriate for Prosecutors to provide this legal advice. Prosecutors should ensure they have received sufficient information before providing advice. Prosecutors should take care not to dictate to the police or purport to direct the police investigation. Generally speaking, legal advice provided to the police is not binding.

Prosecutors should avoid any conduct that blurs the distinction between the investigative and prosecutorial functions of the Prosecutor and the police, such as direct involvement in statement taking or attending a crime scene, in order to supervise the gathering of evidence. Prosecutors should avoid attending a crime scene until the investigation is complete.

Disclosure of advice provided to the police

As a general rule, the Prosecutor has an obligation to disclose all information in its possession or control unless that information is irrelevant or privileged. This rule includes communications between the Prosecutor and the police.

Legal advice provided by the Prosecutor to the police may not be disclosed based on a public interest privilege, solicitor-client privilege or other privilege. Therefore, care should be taken in vetting disclosure to ensure that privileged information is not inadvertently disclosed.

Any request or application to obtain disclosure of privileged information should be brought to the attention of the Crown Attorney.

Police as witness

Allegations of dishonesty

It is critical to the administration of justice that police officers' statements made under oath be truthful. The vast majority of police officers testify in an honest and straightforward manner and it is rare for judges to make negative comments about the truthfulness of a police officer's testimony. However, where concerns about the truthfulness of a police officer's statement arise, the Prosecutor has a responsibility to take action.

Where the Prosecutor becomes aware of credible and reliable information that an officer has been deliberately untruthful under oath, the Prosecutor must direct the matter to the Crown Attorney. Additionally, the Prosecutor must alert the Crown Attorney where there is a judicial finding or comment that an officer has been deliberately untruthful under oath.

The Crown Attorney must forward all cases where there has been a judicial finding or comment that an officer has been deliberately untruthful under oath to the Director within 30 days, unless the issue is under appeal. In circumstances where the Prosecutor has advised the Crown Attorney of credible and reliable information to believe an officer has been deliberately dishonest under oath, in cases other than those involving judicial comments, the Crown Attorney must assess the circumstances to determine if there are grounds to believe the officer has been deliberately untruthful under oath. If so, the matter should be forwarded to the Director.

The Director must consider all the circumstances in reviewing the information and decide whether the matter should be forwarded to the police. In that case, a copy of relevant transcripts and materials relied upon must be forwarded to the Chief of Police for the relevant police service. The Director may delegate to the Crown Attorney the ability to refer the matter directly to the police. The Crown Attorney must advise the Director prior

to referring the matter to a police service. Whether or not a referral has been made to the police, the Director must advise the Assistant Deputy Attorney General - Criminal Law Division who will track the number of referrals and non-referrals.

Allegations of other police misconduct

The above reporting regime also applies where the Prosecutor becomes aware of credible and reliable information that the officer has engaged in criminal misconduct, such as excessive use of force or there has been a judicial finding or comment that an officer has engaged in criminal misconduct.

The Prosecutor must not herself conduct an investigation but may engage an independent officer to investigate the criminal misconduct. In some circumstances it will be appropriate for the Director to refer or have the file referred to the Special Investigations Unit (SIU) for investigation.

Disclosure of police disciplinary records

The police have an obligation to provide and the Prosecutor has a duty to disclose:

- findings or allegations of police misconduct that relates to the subject matter of the offence for which the accused is charged, and/or
- findings or allegations of serious police misconduct that could reasonably bear on the case against the accused.

Serious police misconduct that is not related to the incident for which the accused is charged or has no bearing on the case against the accused should be reviewed by the Prosecutor to determine whether it should be disclosed.

Police training

The involvement of Prosecutors in police training can best assist the police in their efforts to produce high quality investigations, to lay appropriate charges and to prepare thorough briefs. Prosecutors are encouraged to assist the police in their training on investigative procedures and emerging issues and developing areas of the law. Providing this guidance and training is beneficial to the administration of justice as a whole.

Prosecutors who receive requests to assist in police education and training should advise the Crown Attorney or Director of the request.

D. 30: Private Prosecutions

Type of document: Prosecution Directive

Effective date: November 14, 2017

A person has the right to have criminal process issued from a Justice of the Peace by swearing an Information alleging reasonable and probable grounds that another person committed a criminal act.

The Crown Attorney's Act directs that the Crown watch over private criminal prosecutions and where necessary, assume the conduct of the proceedings, to ensure that they are pursued in the interests of the administration of justice. The statutory right of a person to lay an Information and the right and duty of the Attorney General to supervise a criminal prosecution and to intervene and take over a private prosecution are fundamental parts of the criminal justice system.

Process for private information

Step 1: receipt of the Information

A person who has reasonable grounds to believe that another person has committed a criminal offence may provide that information to a Justice of the Peace in order to have the person brought to court. A standard form is available for anyone to fill out and submit to the Justice of the Peace.

The person who completes the form should provide details of the alleged offence and the names, addresses, and telephone numbers of any witnesses whose evidence will be relied upon.

It is important that the person indicate if the police have been involved and if there were prior attempts made to commence related criminal proceedings.

The Justice of the Peace will review the completed form and determine whether it satisfies the statutory requirements. Where the Justice of the Peace is satisfied that these requirements have been met, they shall direct the preparation of the Information. The "Information" is a document that sets out the allegations of criminal conduct. The person laying the information will be asked to swear an oath or affirm the truth of the contents of

the Information. Where the allegations of the person do not meet these requirements, an Information will not be prepared.

If an Information is prepared and sworn or affirmed, a Justice of the Peace will select a date for an *ex-parte* hearing, known as a *pre-enquete*. At the *pre-enquete*, the Justice of the Peace or a Judge of the Ontario Court of Justice will determine whether a summons or a warrant will issue to compel the appearance of the persons named in the information to answer the charge.

Step 2: notice of Pre-enquete Hearing

The *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>) provides that in order for process to issue, or criminal proceedings to commence, the Crown Attorney's Office must receive a copy of the private Information and reasonable notice of the *pre-enquete* hearing. Further, a Prosecutor shall have an opportunity to attend the hearing. The Prosecutor does not have jurisdiction to withdraw an Information before the *pre-enquete* hearing.

Step 3: The *pre-enquete* Hearing

At the *pre-enquete*, the presiding Justice of the Peace or Judge of the Ontario Court of Justice shall hear and consider the allegations of the person, as well as the evidence of any witnesses. The court shall give the Prosecutor an opportunity to cross-examine the person's witnesses, to call witnesses and to present any relevant evidence at the hearing. The Prosecutor's appearance at the hearing does not mean that the Attorney General has intervened in the proceeding.

At the end of the *pre-enquete* hearing, the presiding justice will determine whether there was sufficient evidence for the case to proceed. If there is sufficient evidence for the case to proceed, the justice will issue a summons or warrant to compel the appearance of the accused to answer to the charge. If there is insufficient evidence for the case to proceed, the proceedings will be concluded.

Role of the Prosecutor at the *pre-enquete* hearing

Absent exceptional circumstances, the Prosecutor must attend the *pre-enquete* hearing. The Prosecutor's attendance is required for several reasons, including the following:

- preventing proceedings that are not in the interest of the administration of justice

- preventing the use of criminal proceedings for malicious or unfair purposes
- preventing potential abuses of the court system
- ensuring the efficient allocation of court resources
- to identify countercharge situations, where the police in a separate proceeding have criminally charged an individual and now that same person wishes to bring privately laid charges against the victim from the initial case
- to become aware of justice prosecutions, where the allegations are against a police officer, a Crown, or other justice official or public figure
- to identify intimate partner violence cases, whether as a new charge or as a charge related to an existing police laid charge
- to ensure that in cases where disclosure of the privately alleged information could cause irreparable harm to a person's reputation or livelihood, an appropriate publication ban is sought
- to identify cases that raise significant legal or policy issues
- to prevent cases proceeding where the law requires the Attorney General's consent to the laying of an Information, such as the laying of charges against a young person. A list of those offences may be found in the Attorney General Consent and Delegation Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-2-attorney-general-consents-and-delegations>) .

Carriage of the prosecution

If the justice issues Process, the Prosecutor must screen the charge according to the Charge Screening Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-3-charge-screening>) . The Prosecutor should contact the police prior to screening the charge to determine if there was a police investigation and if so whether the Prosecutor has all the material in the police's possession. The Prosecutor should determine whether further investigation is required. Once any further investigation has been completed, if the Prosecutor is of the view that there is no reasonable prospect of conviction, or that the prosecution is not in the public interest, the Prosecutor must withdraw the charge.

If the Prosecutor is of the view that the prosecution should continue, a decision should be made as to whether the prosecution should be conducted by the person who brought forward the proceeding or the Prosecutor. The Prosecutor must intervene if the

prosecution involves allegations of intimate partner violence, allegations against a young person and indictable offences.

In all other cases, the Prosecutor may exercise discretion to take over the prosecution, having regard to the following factors:

- public interest
- interests of individual victims, witnesses and accused parties
- the need to make the best use of the valuable time and resources of all parties involved and courts
- the need for timely and ongoing disclosure to the accused person.

If the Prosecutor intervenes, the Prosecutor should follow the obligations set out in the Disclosure Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-10-disclosure>). The Prosecutor should remind the private prosecutor that the accused is entitled to disclosure of the evidence to be used against them including the evidence outlined during the *pre-enquete hearing*.

Charges laid against Crown agencies

Any allegations by private citizens of misconduct against Crown Ministries, agencies and their employees for violations of occupational health and safety, environmental protection and similar legislation must be referred to the Director who must advise the Assistant Deputy Attorney General – Criminal Law Division.

D. 31: Professionalism

Type of document: Prosecution Directive

Effective date: January 2, 2018

Prosecutors are local Ministers of Justice and as such have an obligation to discharge their responsibilities with honour and integrity. A Prosecutor must act fairly and dispassionately. Prosecutors must make decisions in a manner that is objective and consistent with the highest standards of professionalism. A Prosecutor shall be courteous, civil, and act in good faith with all persons with whom she has dealings in the course of her professional responsibilities. The conduct of the Prosecutor should always reflect

favourably on the administration of justice, and inspire the confidence, respect and trust of the community.

All Prosecutors in the province of Ontario are subject to the *Rules of Professional Conduct of the Law Society of Ontario*.

The independence of the prosecution service is fundamental to the justice system. It is important that Prosecutors avoid circumstances where the perception of their independence is undermined. Prosecutors must avoid real or perceived conflicts of interest. Conflicts may arise as a result of a connection to a person or entity, either in their personal life or at work.

Conflict of interest

A conflict of interest may arise in any situation where a Prosecutor's private interests are actually or may be reasonably perceived to be in conflict with her public service responsibilities. Prosecutors must not undertake any actions that would reasonably appear to be inconsistent with their professional obligations or the exercise of their prosecutorial discretion. Prosecutors must disclose to the ethics executive (Deputy Attorney General), any situation of actual or potential conflict of interest. Visit the Office of the Integrity Commissioner website. (<http://www.oico.on.ca/home/public-sector-ethics/conflict-of-interest>)

There may be times where a Prosecutor has a relationship with a participant in a case that may reasonably undermine the public's perception of the Prosecutor's independence. It is important to avoid any reasonable perception that a person being investigated or prosecuted might receive preferential treatment because of the relationship that person has with a Prosecutor or her office.

The Ministry of the Attorney General may retain independent counsel on a case-by-case basis when the administration of justice and public confidence in the administration of justice requires it. Where a Prosecutor becomes aware of a conflict or a reasonably perceived conflict involving a person being investigated or prosecuted or a witness in any such proceeding, the Prosecutor must bring the case to the attention of her Crown Attorney. The Crown Attorney must determine whether there is a conflict, and if so, whether the case will be prosecuted by another member of the office, a Prosecutor in another office from the same region, or whether to contact the Director to determine the most appropriate course of action. In some instances the Assistant Deputy Attorney

General-Criminal Law Division will make arrangements for an independent Prosecutor to assume carriage of the case.

Complaints process

A member of the public who wishes to make a complaint about the conduct of a Prosecutor may write her Crown Attorney (or Director if the complaint is about the Crown Attorney). Upon receipt of the complaint about a Prosecutor's conduct, the Crown Attorney must record the information received and should acknowledge receipt within 5 business days. The complaint will be reviewed as soon as practicable. A full response should be provided in a timely manner. If the response cannot be provided in a timely way, a written explanation for the delay should be provided to the complainant.

Law Society complaints

A Prosecutor who is notified that a formal complaint has been made against her to the Law Society of Ontario must inform her Crown Attorney without delay. The Crown Attorney must inform the Director, who in turn must notify the Assistant Deputy Attorney General – Criminal Law Division. A formal response to the Law Society of Ontario should be provided by the Assistant Deputy Attorney General – Criminal Law Division. Prosecutors must keep their Crown Attorney apprised of the status of the complaint including the final disposition.

Conduct of defence counsel

If a Prosecutor believes that a formal complaint to the Law Society of Ontario is warranted in respect of conduct of a defence counsel, she must immediately inform the Crown Attorney who in turn must notify the Director. The Director must bring the matter to the attention of the Assistant Deputy Attorney General – Criminal Law Division. In appropriate circumstances, a formal complaint may be forwarded to the Law Society of Ontario by the Assistant Deputy Attorney General – Criminal Law Division.

Counsel as a witness

A Prosecutor who receives a subpoena, or has been asked to testify in any case, should immediately inform her Crown Attorney.

A circumstance may arise where a Prosecutor determines that the interests of justice require that counsel for the accused provide evidence. In these circumstances, the

Prosecutor must obtain the prior approval of the Crown Attorney and Director before seeking that evidence.

Civil lawsuits or charges

Prosecutors who are the subject of a lawsuit, a charge under the *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>) , other federal legislation, or a serious provincial offence (e.g. Part III offences under the *Provincial Offences Act* (<https://www.ontario.ca/laws/statute/90p33>)) must inform their Crown Attorney without delay. The Crown Attorney must inform the Director, who must notify the Assistant Deputy Attorney General – Criminal Law Division. Prosecutors must keep their Crown Attorney apprised of the status of the proceedings including the final disposition.

D. 32: Publication Bans and Sealing Orders

Type of document: Prosecution Directive

Effective date: November 14, 2017

Public access to the justice system is a hallmark of a democratic society. Open courts allow everyone to see that justice is administered in a principled manner in accordance with the rule of law.

The use of publication bans and sealing orders is an exception to the open court principle. Publication bans prevent information from being published in any document, broadcast or transmitted in any way. Sealing orders restrict access to courts and court documents in limited circumstances.

The appropriate use of publication bans, applications to prohibit or restrict access to court exhibits and to exclude the public may be necessary to maintain integrity of the process, ensure security, protect privacy or prevent trauma or intimidation of witnesses. A sealing order may be necessary to protect interests essential to the administration of justice such as the integrity of ongoing police investigations or confidential information.

Publication bans may be automatic, mandatory upon application or ordered at the discretion of the court. Sealing orders may be automatic or made at the discretion of the court.

Factors to consider

The Prosecutor should consider all the circumstances when determining whether to seek a publication ban, sealing order, or exclusion of the public. Relevant factors may include the following:

- encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice system
- safeguarding the interests of witnesses under 18 years of age
- enabling witnesses to give a full and candid account when testifying
- protecting witnesses from intimidation or retaliation
- whether there are effective alternatives to making the order
- potential negative effects of an order.

Publication bans

Sexual offences

Identity of the victim

The *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>) directs that in sexual offences the court shall make an order prohibiting the publication of any information that could identify the victim (or witness under the age of 18) upon application of the Prosecutor, the victim or any witness.

The Prosecutor must seek an order prohibiting the publication of any information that could identify a victim (or a witness under the age of eighteen) at the earliest opportunity. If the victim of a sexual offence wishes to have their identity known, the issue of revoking the publication ban can be revisited at any stage in the proceedings.

Sexual history

The *Criminal Code* prohibits publication of information and evidence tendered on an application to admit evidence of a victim's sexual history in cases involving sexual offences. Publication of the decision and reasons of the court is also prohibited unless the judge orders that they may be published, after taking into account the victim's right to privacy and the interests of justice or if the evidence is found to be admissible.

Production of private records (third party records)

The *Criminal Code* prohibits publication of information and evidence tendered on an application for production of records containing private information in relation to a victim or witness in cases involving sexual offences. Publication of the decision and reasons of court is also prohibited unless the judge orders that they may be published, after taking into account the interests of justice and the privacy interests of the person to whom the record relates.

Reference should be made to the Sexual Offences against Adults Directive

(<https://www.ontario.ca/document/crown-prosecution-manual/d-34-sexual-offences-against-adults>)

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Child pornography

The *Criminal Code* directs that the court shall make an order prohibiting the publication of any information that could identify a witness who is under the age of eighteen years or any person who is the subject of a representation, written material or a recording that constitutes child pornography. Prosecutors must apply for a sealing order in respect of any exhibit containing material alleged to be child pornography. Reference should be made to the Internet Child Exploitation Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-22-internet-child-exploitation>) .

Youth Criminal Justice

The Youth Criminal Justice Act prohibits the publication of any information that could identify any accused young person under 18 years of age. The Youth Criminal Justice Act also prohibits the publication of any information that could identify a person under 18 years of age who was a victim of, or appeared as a witness in connection with, an offence allegedly committed by a young person. Reference should be made to the Youth Criminal Justice: Resolution Discussions and Sentencing Directive

(<https://www.ontario.ca/document/crown-prosecution-manual/38-c-youth-criminal-justice-resolution-discussions-and-sentencing>) .

Victim under age eighteen

The *Criminal Code* directs that in all offences involving a victim who is under the age of 18 the court shall make an order prohibiting the publication of any information that could identify the victim, upon application of the Prosecutor or the victim.

The Prosecutor must seek a court order prohibiting the publication of any information that could identify a victim who is under the age of eighteen at the earliest opportunity.

Reference should be made to the Offences against Children Directive

(<https://www.ontario.ca/document/crown-prosecution-manual/d-27-offences-against-children>) .

Judicial interim release (bail)

Upon application of the accused, the *Criminal Code* directs that the court shall make an order prohibiting the publication of evidence taken, representations made and the decision of the court, until the accused has been discharged at a preliminary inquiry or the trial of the accused has ended.

Upon application of the Prosecutor, the *Criminal Code* directs that the court may make an order prohibiting the publication of evidence taken, until the accused has been discharged at the preliminary inquiry or the trial of the accused has ended.

Preliminary inquiry

The *Criminal Code* prohibits the publication of evidence pertaining to the existence or nature of any admission or confession tendered at a preliminary inquiry until an accused has been discharged after the preliminary inquiry or the trial has ended.

Upon application of the accused, the *Criminal Code* directs that the court shall make an order prohibiting the publication of evidence taken, until the accused has been discharged at the preliminary inquiry or the trial of the accused has ended.

Upon application of the Prosecutor, the *Criminal Code* directs that the court may make an order prohibiting the publication of evidence taken, until the accused has been discharged at the preliminary inquiry or the trial of the accused has ended.

Jury trials

The *Criminal Code* prohibits the publication of evidence heard in the absence of the jury prior to the commencement of the jury's deliberations.

Upon application by the Prosecutor or on its own motion, the court may prohibit publication of the identity of a juror or any information that could disclose the juror's identity.

Discretionary publication bans

In all other offences, the *Criminal Code* permits the court to consider banning publication of any information that could identify a victim over 18 years of age and a witness of any age at any stage of the prosecution. Further, publication bans may also be ordered in relation to justice system participants in cases involving criminal organization, terrorism, and certain Security of Information Act offences.

Prior to seeking a discretionary publication ban under the provisions of the *Criminal Code*, the Prosecutor should consider the open court principle and the factors as set out in the *Criminal Code*. Discretionary publication bans are only sought in exceptional circumstances where the grounds can be clearly articulated.

The Prosecutor, victim or witness shall make written application, with notice to the accused, the media and any other affected person. The court may make the order if the court is of the opinion that the order is in the interest of the proper administration of justice.

Similarly, with notice to the media and any other affected person, written applications for publication bans can also be made under the common law.

Requests by victim to revoke the publication ban

There may be occasions when a victim over the age of eighteen seeks to revoke the publication ban. A judge has the authority to lift the publication ban only when the Prosecutor and victim both consent to revoke the ban. Prior to consenting to revoke a publication ban, the Prosecutor should consider all the circumstances including the following:

- nature of the publication ban and circumstances of the case
- the wishes of the victim
- whether the victim has had an adequate opportunity to assess all of the ramifications of the publication of their identity
- publication of the victim's name might tend to identify other victims or witnesses, who want protection of the publication ban
- publication of the victim's identity might prejudice the prosecution or might otherwise have an adverse effect on the administration of justice.

Sealing orders

A sealing order prohibits access to information by anyone other than the parties identified in the order. A sealing order may be mandated by the *Criminal Code* or imposed at the discretion of the court.

The *Criminal Code* provides that all documents relating to an application for a wiretap authorization are subject to a mandatory sealing order. The *Criminal Code* provides that the court issuing a search warrant or other judicial order may seal the supporting material.

In determining if a sealing order should be requested or an existing sealing order lifted, the Prosecutor must consider if the order is necessary to:

- protect an ongoing police investigation
- protect the identity of a confidential informer (see: Confidential Informers Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-5-confidential-informers>))
- protect intelligence-gathering techniques
- protect the interests of innocent parties
- protect privacy interests.

The Prosecutor must also consider whether a partial or time limited sealing would be appropriate.

Court exhibits

Judicial documents and court exhibits, including Victim Impact Statements, are generally accessible to the public (<https://www.ontario.ca/document/access-court-files-documents-and-exhibits>) . The Prosecutor should seek to restrict access in any case where public access to court exhibits may undermine the right to a fair trial, violate privacy interests or interfere with the administration of justice. A sealing order must be sought to restrict access to exhibits containing child pornography.

Exclusion of the public

The *Criminal Code* permits the court to order the exclusion of the public from the courtroom for all or part of criminal proceedings. In determining if the public should be excluded from the courtroom, the court shall consider all the circumstances including

society's interest in encouraging the reporting of offences and the participation of victims and witnesses in criminal proceedings and the ability of the witness to give a full and candid account.

Prior to seeking an order to exclude the public, the Prosecutor should consider whether effective alternatives to seeking the order are available in the circumstances. Reference should be made to the Testimonial Aids and Accessibility Directive

(<https://www.ontario.ca/document/crown-prosecution-manual/d-35-testimonial-aids-and-accessibility>) .

D. 33: Serious Violent Crime Directive

Type of document: Prosecution Directive

Effective date: January 31, 2024

Serious violent crime is a matter of grave public concern because of its devastating effects on victims, their families and their communities. In any prosecution involving serious violent crime, the protection of the public is the paramount consideration at all stages, from judicial interim release (bail) to sentencing.

This Directive applies to the following serious violent crimes:

- offences involving death
- attempt murder
- aggravated sexual assault
- robbery with a firearm
- home invasion robbery
- carjacking

When applying this Directive, the Prosecutor must also consider the direction and factors provided in the following Directives, where applicable: Firearms

(<https://www.ontario.ca/document/crown-prosecution-manual/d-14-firearms>) , Intimate Partner Violence (<https://www.ontario.ca/document/crown-prosecution-manual/d-23-intimate-partner-violence>) , Sexual Offences against Adults (<https://www.ontario.ca/document/crown->

prosecution-manual/d-34-sexual-offences-against-adults) and Offences Against Children (<https://www.ontario.ca/document/crown-prosecution-manual/d-27-offences-against-children>) .

For young persons, reference should also be made to the Youth Criminal Justice Directives (<https://www.ontario.ca/document/crown-prosecution-manual/d-38-youth-criminal-justice>) . For adults with a mental illness, reference should also be made to the Mentally Ill Accused Directives (<https://www.ontario.ca/document/crown-prosecution-manual/d-26-mentally-ill-accused>) . For Indigenous peoples, reference should also be made to the Indigenous Peoples Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-20-indigenous-peoples>) .

Judicial interim release (bail)

In all cases to which this Directive applies, the Prosecutor must seek a detention order, absent exceptional circumstances, to ensure the safety and security of the public. If exceptional circumstances exist, the Prosecutor must obtain prior approval of the Crown Attorney or designate before recommending or consenting to any form of judicial interim release. This decision should be made at the earliest reasonable opportunity having regard to the requirements of the *Criminal Code* (<https://laws-lois.justice.gc.ca/eng/acts/c-46/>) .

Where the Prosecutor seeks a detention order and the accused person is granted judicial interim release, the Prosecutor must advise the Crown Attorney or designate. In these circumstances, the Crown Attorney or designate must consider whether a bail review is warranted.

Reference should be made to the following Directives, where applicable: Judicial Interim Release (Bail) (<https://www.ontario.ca/document/crown-prosecution-manual/d-24-judicial-interim-release-bail>) , Firearms (<https://www.ontario.ca/document/crown-prosecution-manual/d-14-firearms>) and Indigenous Peoples (<https://www.ontario.ca/document/crown-prosecution-manual/d-20-indigenous-peoples>) .

Estreatment proceedings

The *Criminal Code* (<https://laws-lois.justice.gc.ca/eng/acts/c-46/>) provides that where an accused person has failed to appear in court or failed to comply with the conditions of a release order, and a surety and/or an accused person promised or deposited an amount of money, the Prosecutor may seek to have all or some of the money forfeited.

In all cases to which this Directive applies, if an accused person has failed to appear in court or has been convicted of failing to comply with the conditions of a release order, absent exceptional circumstances, the Prosecutor must seek the forfeiture of all or some of the amount promised or deposited by any surety and/or the accused person. If exceptional circumstances exist, the Prosecutor must obtain prior approval of the Crown Attorney or designate not to seek forfeiture.

Charge screening

In all cases to which this Directive applies, the Prosecutor must consider whether the accused person should be flagged as a high-risk offender or, where applicable, whether a long-term offender or dangerous offender application should be pursued. In cases where the Prosecutor believes that such a step may be appropriate, they should consult with their Regional High-Risk Offender Crown.

In such cases, the Prosecutor should refer to the following Directives: Charge Screening (<https://www.ontario.ca/document/crown-prosecution-manual/d-3-charge-screening>) , Dangerous/Long-term Offenders (<https://www.ontario.ca/document/crown-prosecution-manual/d-8-dangerous-long-term-offenders>) and High-Risk Offender National Flagging System (<https://www.ontario.ca/document/crown-prosecution-manual/d-17-high-risk-offender-national-flagging-system>) .

Where applicable, the Prosecutor should consider the following Directives: Firearms (<https://www.ontario.ca/document/crown-prosecution-manual/d-14-firearms>) , Intimate Partner Violence (<https://www.ontario.ca/document/crown-prosecution-manual/d-23-intimate-partner-violence>) , Sexual Offences against Adults (<https://www.ontario.ca/document/crown-prosecution-manual/d-34-sexual-offences-against-adults>) , Offences Against Children (<https://www.ontario.ca/document/crown-prosecution-manual/d-27-offences-against-children>) , Indigenous Peoples (<https://www.ontario.ca/document/crown-prosecution-manual/d-20-indigenous-peoples>) and Direct Indictments (<https://www.ontario.ca/document/crown-prosecution-manual/d-9-direct-indictments>) .

Resolution discussions and sentence

The Prosecutor must ensure that reasonable steps are taken to inform the victim of a proposed resolution (for example, guilty plea or proposed sentence) or that the charges will be withdrawn or stayed.

In all cases to which this Directive applies, except with the prior approval of the Crown Attorney or designate, the Prosecutor must not:

- withdraw or stay proceedings
- advocate for, or agree to, a conditional sentence
- reduce or withdraw a charge to avoid a mandatory minimum term of imprisonment

Reference should be made to the following Directives, where applicable: Firearms (<https://www.ontario.ca/document/crown-prosecution-manual/d-14-firearms>) , Intimate Partner Violence (<https://www.ontario.ca/document/crown-prosecution-manual/d-23-intimate-partner-violence>) , Sexual Offences against Adults (<https://www.ontario.ca/document/crown-prosecution-manual/d-34-sexual-offences-against-adults>) and Offences against Children (<https://www.ontario.ca/document/crown-prosecution-manual/d-27-offences-against-children>) .

Support for victims

The Prosecutor must ensure that efforts are made, at all stages of the criminal proceedings, to provide the victim with whatever information or assistance is required to ensure full and fair participation in the criminal justice system.

As soon as feasible after a finding of guilt, the Prosecutor must ensure that reasonable steps are taken to provide the victim with the opportunity to prepare a Victim Impact Statement and inform the victim of their right to present it to the court and their other options.

Reference should be made to the Victims Directive. In all cases involving Indigenous victims, reference should also be made to the Indigenous Peoples Directive.

Ancillary orders

The Prosecutor must seek the following orders if applicable and remind the court of all mandatory orders:

- DNA orders

- Weapons prohibitions
- *Sex Offender Information Registration Act (SOIRA)* (<https://laws-lois.justice.gc.ca/eng/acts/S-8.7/>)

Reference should be made to the following directives: DNA Data Bank Orders
(<https://www.ontario.ca/document/crown-prosecution-manual/d-11-dna-data-bank-orders>) and
Weapons Prohibitions and Forfeiture (<https://www.ontario.ca/document/crown-prosecution-manual/d-37-weapons-prohibitions-and-forfeiture>) .

D. 34: Sexual Offences against Adults

Type of document: Prosecution Directive

Effective date: December 1, 2017

Sexual offences involve violations of sexual integrity, privacy and autonomy that can have enduring and substantial effects upon victims. These crimes pose a serious threat to individual and public safety and must be prosecuted vigorously.

Rape myths, misogyny and stereotypes about the nature of sexual offences and of victims of sexual offences must not influence any aspect of the criminal case. Prosecutors play an important role in preventing those distortions and harmful effects on victims and the integrity of the administration of justice. Each region has a designated “Sexual Violence Crown”, who is also a member of the Sexual Violence Advisory Group. The work of this group includes education, training, mentorship and enhanced community outreach.

The Prosecutor must ensure that efforts are made, at all stages of the criminal proceedings, to provide the victim with whatever information or assistance is required to ensure full and fair participation in the criminal justice system. This includes the availability of the following:

- specialized victim’s services facilitated by the Victim/Witness Assistance Program (V/WAP) or other similar victims’ support services
- interpreters to assist the victim in communicating
- testimonial aids to assist the victim in providing evidence
- appointment of counsel to cross-examine the victim where the accused is self-represented

- access to independent legal representation for victims or witnesses on applications to access their private records under the *Criminal Code*.

Reference should be made to the following directives: Victims

(<https://www.ontario.ca/document/crown-prosecution-manual/d-36-victims>) , Publication Bans

and Sealing Orders ([https://www.ontario.ca/document/crown-prosecution-manual/d-32-](https://www.ontario.ca/document/crown-prosecution-manual/d-32-publication-bans-and-sealing-orders)

publication-bans-and-sealing-orders) , DNA Data Bank Orders

(<https://www.ontario.ca/document/crown-prosecution-manual/d-11-dna-data-bank-orders>) ,

Weapons Prohibitions and Forfeiture ([https://www.ontario.ca/document/crown-prosecution-](https://www.ontario.ca/document/crown-prosecution-manual/d-37-weapons-prohibitions-and-forfeiture)

manual/d-37-weapons-prohibitions-and-forfeiture) , High-Risk Offender National Flagging

System ([https://www.ontario.ca/document/crown-prosecution-manual/d-17-high-risk-offender-](https://www.ontario.ca/document/crown-prosecution-manual/d-17-high-risk-offender-national-flagging-system)

national-flagging-system) , Intimate Partner Violence ([https://www.ontario.ca/document/crown-](https://www.ontario.ca/document/crown-prosecution-manual/d-23-intimate-partner-violence)

prosecution-manual/d-23-intimate-partner-violence) , Judicial Interim Release (Bail)

(<https://www.ontario.ca/document/crown-prosecution-manual/d-24-judicial-interim-release-bail>) ,

Testimonial Aids and Accessibility ([https://www.ontario.ca/document/crown-prosecution-](https://www.ontario.ca/document/crown-prosecution-manual/d-35-testimonial-aids-and-accessibility)

manual/d-35-testimonial-aids-and-accessibility) .

Sexually transmitted infections and HIV exposure cases

This section was added on December 1, 2017.

Cases dealing with sexually transmitted infections like HIV raise many complex and sensitive medical and legal issues. With diagnosis and treatment, HIV is a chronic, manageable condition.

Prosecutions for HIV exposure are guided by the law and the medical science. The Supreme Court of Canada has said that in certain circumstances a failure to disclose one's HIV status will be a criminal offence. The Supreme Court of Canada held that a person living with HIV has a legal obligation to disclose to their sexual partner their HIV status if there is a realistic possibility of transmission. Whether there is a realistic possibility of transmission will depend on the facts of the case. For example, there is no realistic possibility of transmission in cases where a condom is used and there is a low HIV viral load. In addition, according to a review by the Public Health Agency of Canada, if a person living with HIV is on antiretroviral therapy and has maintained a suppressed viral load for six months, there is also no realistic possibility of transmission. In these circumstances a failure to disclose does not result in criminal liability for exposure to HIV, and charges will not proceed.

The ministry has a group of experienced Prosecutors who are available to provide advice in this area. The STI Advisory Group is up-to-date on developments in the medical science and the risk of transmission. A Prosecutor assigned to a case involving HIV exposure must consult with the STI Advisory Group at the earliest stage possible.

Judicial interim release (bail)

In sexual offences against adults, the Prosecutor must take a position on judicial interim release applying the general principles set out in the Judicial Interim Release (Bail) Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-24-judicial-interim-release-bail>) including the requirement for ongoing assessment of the strength of the Crown's case. The Prosecutor must be conscious of the potential risk of harm in these cases and must seek a detention order where she considers it necessary for the safety and security of the victim or the public.

Where the accused is remanded in custody pending a bail hearing, detained or released on conditions, the Prosecutor should seek an order from the Court prohibiting the accused from having any contact with the victim, or where appropriate, any witnesses. The Prosecutor must ensure that any conditions she recommends on a bail release are necessary and appropriate to the circumstances of the alleged offence and the accused.

At the bail stage, the Prosecutor must seek a publication ban directing that the identity of a victim or a witness and any information that could disclose the identity of the victim or witness not be published or transmitted in any way. If the victim wishes to have her identity known, the issue of lifting the publication ban can be revisited at any later stage in the proceedings. Reference should be made to the Publication Bans and Sealing Orders Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-32-publication-bans-and-sealing-orders>) .

The Prosecutor must ensure that efforts are made to notify the victim of any release order, the conditions of release, including non-communication and any order detaining the accused. In all cases where there is reason to have concern for a victim's safety, the Prosecutor must ensure that bail notification occurs as soon as possible. On request, the victim must be provided with a copy of the court order.

Prosecution

Charge screening

The Prosecutor should determine whether the full gravity of the criminal act is reflected in the offence charged and recommend a more appropriate charge be laid if necessary.

The following factors should be considered when determining the offence charged is appropriate to the circumstances and whether to proceed summarily or by indictment:

- the circumstances of the offence e.g. protracted sexual abuse; significant physical, emotional or psychological harm to the victim
- whether the offence is alleged to have occurred within 6 months of reporting
- the circumstances of the offender e.g. history of similar offences, position of trust/authority in relation to victim
- the circumstances of the victim including the impact on the victim of testifying twice (at a preliminary inquiry and trial) and special vulnerabilities (disabilities, health, age of victim)
- the potential range of sentence.

The Prosecutor should consider whether the accused should be flagged as a High Risk Offender or the subject of a Long Term Offender or Dangerous Offender Application. In those cases, the Prosecutor should consult with her Regional High-Risk Offender Crown.

Reference should be made to the Charge Screening Directive

(<https://www.ontario.ca/document/crown-prosecution-manual/d-3-charge-screening>) ,

Dangerous/Long-term Offender Directive ([https://www.ontario.ca/document/crown-](https://www.ontario.ca/document/crown-prosecution-manual/d-8-dangerous-long-term-offenders)

prosecution-manual/d-8-dangerous-long-term-offenders) and High-Risk Offender National

Flagging System Directive ([https://www.ontario.ca/document/crown-prosecution-manual/d-17-](https://www.ontario.ca/document/crown-prosecution-manual/d-17-high-risk-offender-national-flagging-system)
high-risk-offender-national-flagging-system) .

Protecting privacy

Prosecutors must be sensitive to the privacy interests of victims at every stage of the prosecution. Privacy of victims of sexual offences is protected by publication bans and laws restricting access to their private records and sexual history.

The Prosecutor should consider the directions set out in the Disclosure Directive

(<https://www.ontario.ca/document/crown-prosecution-manual/d-10-disclosure>) concerning the disclosure of sensitive materials.

Publication bans

The *Criminal Code* directs that the court shall prohibit the publication of any information that could identify the victim or witness, upon application. Reference should be made to the Publication Bans and Sealing Orders Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-32-publication-bans-and-sealing-orders>) .

Production of private records (third party records)

In order to gain access to a victim's private information, such as their medical, psychiatric or personal records, the *Criminal Code* provides that the accused must establish that the private records are likely relevant to an issue at trial or to the competence of a victim to testify. The Prosecutor should engage V/WAP to assist the victim in obtaining independent legal counsel to provide advice and represent their interests on the third party records application.

The Prosecutor must not disclose victim's records absent a court order unless the victim has expressly waived her right to privacy over those records. The victim is entitled to independent legal advice about their right to privacy. The validity of any waiver will depend on the circumstances.

If the victim chooses not to be represented by counsel, the Prosecutor should make the victim aware that the *Criminal Code* prohibits publication of information provided on the application.

Sexual history

The *Criminal Code* provides that evidence that a victim has engaged in prior sexual activity with the accused or with any other person is not admissible. This evidence cannot support an inference that the victim consented to the sexual activity nor can it be used to assess the victim's credibility.

Should the accused bring an application to have evidence of the victim's sexual history admitted, the Prosecutor must advise the victim that they are not required to testify at the hearing to determine the admissibility of their sexual history. The Prosecutor must also advise the victim that the *Criminal Code* prohibits publication of information provided on the application.

Cross-examination by a self-represented accused

In cases where an accused person is self-represented, the Prosecutor must seek an order appointing counsel to conduct the cross-examination of the victim.

Expert evidence

Before engaging an expert witness, the Prosecutor must obtain the prior approval of the Crown Attorney. Reference should be made to the Experts Evidence Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-12-expert-evidence>) .

Testimonial aids

Prosecutors should consider whether a victim's ability to communicate their evidence would be facilitated by the use of testimonial aids or other means that enable the evidence to be better understood. Where appropriate, Prosecutors should apply for an order permitting the use of a testimonial aid. Reference should be made to the Testimonial Aids and Accessibility Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-35-testimonial-aids-and-accessibility>) .

Resolution discussions and sentence

The Prosecutor must ensure reasonable steps are taken to inform the victim of a proposed resolution (e.g. guilty plea or proposed sentence) or that the charges will be withdrawn.

The Prosecutor must not negotiate a guilty plea in exchange for agreeing to forego a dangerous or long-term offender application without first consulting with the Regional High-Risk Offender Crown and her Crown Attorney.

Except with the prior approval of the Crown Attorney or designate, the Prosecutor must not:

- withdraw or stay proceedings
- accept a plea to a lesser charge or non-sexual offence
- reduce or withdraw charge solely to avoid a mandatory minimum sentence or any ancillary orders.

Victim impact statement

As soon as feasible after a finding of guilt, the Prosecutor must ensure reasonable steps are taken to provide the victim with the opportunity to prepare a Victim Impact Statement, and inform the victim of their right to present it to the court and their other options.

Restitution

The *Criminal Code* directs the court to consider making a restitution order and to ask the Prosecutor if reasonable steps have been taken to provide the victim with an opportunity to indicate whether they are seeking restitution i.e. compensation for counselling. As soon as feasible after a finding of guilt, the Prosecutor must ensure reasonable steps are taken to provide the victim with an opportunity to indicate whether the victim is seeking restitution for their losses and damages.

Ancillary orders

The Prosecutor must seek the following orders if applicable and remind the court of all mandatory orders:

- DNA order

- *Sex Offender Information Registration Act* (<http://laws-lois.justice.gc.ca/eng/acts/S-8.7/>)
(SOIRA)

- Weapons Prohibition.

Reference should be made to the following directives: DNA Data Bank Orders

(<https://www.ontario.ca/document/crown-prosecution-manual/d-11-dna-data-bank-orders>) ,
Weapons Prohibitions and Forfeiture (<https://www.ontario.ca/document/crown-prosecution-manual/d-37-weapons-prohibitions-and-forfeiture>) .

D. 35: Testimonial Aids and Accessibility

Type of document: Prosecution Directive

Effective date: November 14, 2017

The justice system strives to foster the participation of victims and witnesses in the court process. Prosecutors have an important role to play in identifying those witnesses who may require assistance to fully access the criminal justice system, or to communicate their evidence to the court. Assistance may be provided to victims and witnesses who may not be able to fully access the criminal justice system, or to understand it or be understood by

the other participants, due to language, age, or any impairment of an intellectual, emotional, physical or sensory nature.

Accessibility

Prosecutors must ensure that efforts are made so that victims and witnesses are provided with full and fair access to, and participation in, criminal proceedings. Prosecutors should be alive to barriers that may impede the involvement of victims or witnesses. Barriers might include:

- attitudinal barriers about people with disabilities
- communication barriers that occur because of a lack of accommodation
- informational barriers making available accommodations difficult to access or find
- physical barriers preventing people with physical disabilities from accessing the courthouse or courtroom
- sensory barriers preventing people who are blind or deaf, or who have a severe vision or hearing impairment from accessing court proceedings.

Prosecutors should consider whether victims and witnesses require assistance to communicate or otherwise participate in the court process. Where appropriate, the Prosecutor should ensure the victim or witness is informed about accommodations that are available at the earliest opportunity.

Prosecutors must bring accessibility and accommodation needs relating to criminal prosecutions and witnesses to the attention of the Accessibility Lead in their office. The Accessibility Lead is responsible for responding to accessibility requests and will facilitate contact with the Court Services Division Accessibility Coordinator.

Prosecutors should also ensure that interpreters are requested where appropriate. In all cases Prosecutors should seek to use language appropriate to the age and understanding of the victim or witness.

Testimonial aids

Victims have the right to request testimonial aids and publication bans. Prosecutors should consider whether a victim or witness's ability to communicate their evidence would be facilitated by the use of testimonial aids or other means that enable the

evidence to be better understood. Where appropriate, Prosecutors should apply for an order permitting the use of a testimonial aid.

The *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>) provides a number of measures that can be invoked in particular cases to increase the ability of a witness in a criminal proceeding to provide evidence. Depending on the circumstances of the offence, and the circumstances of a witness, including their age and ability, the measures may include:

- the services of a support person
- the use of a screen or closed circuit television
- the use of pre-recorded video evidence
- the use of affidavit evidence
- holding proceedings in camera
- an order banning publication that might identify the victim
- an order enabling witnesses to testify using a pseudonym
- preventing cross-examination by self-represented accused.

Reference should also be made to the Directives on Publication Bans and Sealing Orders (<https://www.ontario.ca/document/crown-prosecution-manual/d-32-publication-bans-and-sealing-orders>) and Victims (<https://www.ontario.ca/document/crown-prosecution-manual/d-36-victims#>)

D. 36: Victims

Type of document: Prosecution Directive

Effective date: November 14, 2017

Victims of crime should be treated with courtesy, candour, respect and dignity. The rights of victims to information, protection, participation and restitution are recognized by the *Canadian Victims Bill of Rights* (<http://laws-lois.justice.gc.ca/eng/acts/C-23.7/page-1.html>) and the *Ontario Victims' Bill of Rights* (<https://www.ontario.ca/laws/statute/95v06>). Prosecutors must display sensitivity, fairness and compassion in their dealings with victims.

A victim is a person who has suffered physical or emotional harm, property damage or economic loss as a result of the commission of a criminal offence. In cases where, the victim is deceased or incapable of acting on their own, the Prosecutor should deal with the individual who is acting on the victim's behalf.

The Prosecutor must ensure that efforts are made to inform victims of available victim services. The Ministry of the Attorney General Victim/Witness Assistance Program provides information, assistance, and support to the most vulnerable victims of crime. The providing of information enhances their understanding of, and participation in, the criminal court process.

Victims have the right to convey their views about decisions to be made that affect their rights under the Canadian Victims Bill of Rights and to have those views considered.

Reference should also be made to the Sexual Offences against Adults (<https://www.ontario.ca/document/crown-prosecution-manual/d-34-sexual-offences-against-adults>) , Offences against Children (<https://www.ontario.ca/document/crown-prosecution-manual/d-27-offences-against-children>) and Intimate Partner Violence (<https://www.ontario.ca/document/crown-prosecution-manual/d-23-intimate-partner-violence>) and Indigenous Peoples (<https://www.ontario.ca/document/crown-prosecution-manual/d-20-indigenous-peoples>) Directives.

Information provided to the victim

Sensitivity to the perspective of victims, the nature of their victimization, their privacy interests, and their personal security must be considered at every stage of the prosecution.

Where necessary, the Prosecutor should be available to discuss the case with the victim. If the victim is required to testify, the Prosecutor should prepare the victim and determine whether any testimonial aids or accommodations are needed.

The Prosecutor must ensure that efforts are made to advise the victim of significant information throughout the proceedings. This will include:

- the judicial interim release of an accused including the conditions of release
- the detention of the accused and any non-communication order
- the availability of publication bans to protect the victim's privacy

- the availability of testimonial aids to assist the victim in providing evidence
- the availability of interpreters
- a proposed resolution (e.g., a guilty plea and proposed sentence)
- that the charges will be withdrawn
- the availability of counsel to cross-examine the victim where the accused is self-represented
- an application brought by the accused to obtain the victim's private records and the victim's right to independent legal advice
- an application brought by the accused to admit evidence of the victim's previous sexual activity
- any appeals brought by the accused or the Prosecutor and the progress of those appeals.

Resolution discussions and sentencing

As soon as feasible, the Prosecutor must ensure reasonable steps are taken to inform the victim of a proposed resolution (e.g. a guilty plea or proposed sentence) or that the charges will be withdrawn.

Victim impact statements

The *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>) directs the court to ask the Prosecutor if reasonable steps were taken to provide the victim with an opportunity to prepare a victim impact statement. As soon as feasible after a finding of guilt, the Prosecutor must ensure reasonable steps are taken to provide the victim with the opportunity to prepare a Victim Impact Statement, and inform the victim of their right to present it to the court and their other options.

Community impact statements

The *Criminal Code* provides that in determining sentence the court must consider any statement prepared by an individual on a community's behalf describing the harm or loss suffered by the community as the result of the commission of the offence and the impact of the offence on the community.

Restitution

The *Criminal Code* directs the court to consider making a restitution order and to ask the Prosecutor if reasonable steps have been taken to provide the victim with an opportunity to indicate whether they are seeking restitution. As soon as feasible after a finding of guilt, the Prosecutor must ensure reasonable steps are taken to provide the victim with an opportunity to indicate whether the victim is seeking restitution for their losses and damages.

D. 37: Weapons Prohibitions and Forfeiture

Type of document: Prosecution Directive

Effective date: November 14, 2017

The *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>) prohibits the possession of certain weapons including firearms that are so inherently dangerous that their prohibition is mandatory and absolute. In addition to this general prohibition, the *Criminal Code* authorizes a court to specifically prohibit a person from possessing certain identifiable weapons, in certain circumstances. The Prosecutor should seek the imposition of terms and conditions necessary to protect public safety.

Reference should be made to the Firearms (https://www.ontario.ca/document/crown-prosecution-manual/d-14-firearms) and Criminal Asset Forfeiture (https://www.ontario.ca/document/crown-prosecution-manual/d-7-criminal-asset-forfeiture) Directives.

Judicial interim release (bail)

A weapons prohibition may be imposed as a condition of a judicial interim release. The *Criminal Code* directs that in certain circumstances the court shall prohibit the accused from possessing any weapons while on a release order unless the court considers the condition is not required in the interests of the safety of the accused, the victim or the public. This is a presumptively mandatory condition and where it is not imposed, the Prosecutor must remind the court of its obligation in these circumstances to provide reasons for not adding the condition.

In any case where there is a concern for the safety and security of the victim or of any other person or the public, the Prosecutor must seek a condition prohibiting the accused

from possessing any weapons.

Reference should be made to the Judicial Interim Release (Bail) Directive

(<https://www.ontario.ca/document/crown-prosecution-manual/d-24-judicial-interim-release-bail>) .

Section 810 recognizances (“Peace Bonds”)

The Prosecutor should determine whether the public interest requires the imposition of a separate weapons prohibition in addition to the conditions outlined in the section 810 recognizance.

Sentencing

Mandatory orders

The *Criminal Code* directs that the court shall make a mandatory prohibition order for an adult sentenced or discharged of certain offences. In these circumstances, the Prosecutor must remind the court of its obligation to make the order.

Discretionary orders

The *Criminal Code* directs that for some offences the imposition of a weapons prohibition order is discretionary. In these circumstances, the court shall consider if it is desirable in the interests of the safety of the accused or any other person to make a prohibition order. The Prosecutor must seek a discretionary prohibition order where concerns exist regarding the safety of the victim or the public.

Conditional sentence and probation orders

The *Criminal Code* directs that the court may make a condition prohibiting the possession of weapons in a conditional sentence or probation order. Prosecutors should also consider requesting a stand-alone prohibition order.

Exemptions to prohibition orders

The *Criminal Code* permits a court to vary a prohibition order where appropriate for employment or sustenance hunting. The offender who applies for this exemption is required to establish on a balance of probabilities that the weapons are necessary for one of these purposes.

The Prosecutor should request a police investigation of applications for exemption to weapons prohibition orders. The Prosecutor should consider the fruits of the investigation and all relevant circumstances in arriving at a position on the application. Ultimately, the court is required to consider the offender's application and criminal record, the circumstances of the offence and the safety of the public or any person.

Forfeiture or return of weapons

Upon the conclusion of a criminal case, property (including firearms, weapons or ammunition) may be returned to its lawful owner or be forfeited. The Prosecutor must seek the disposal of weapons, either by an order of forfeiture (and eventual destruction) or lawful return, to the appropriate person. If forfeiture or return of property is not addressed at the conclusion of the proceedings, the Prosecutor must seek an order to dispose of the weapons as soon as practicable.

Preventive prohibition orders

The *Criminal Code* allows a provincial court judge to issue a preventive weapons prohibition order where evidence discloses reasonable grounds to believe that public safety requires that a person should be prohibited from possessing firearms, other weapons or ammunition. The provincial court judge may issue the prohibition order whether or not an offence has been committed and whether or not the person currently possesses firearms, other weapons or ammunition.

Applications for preventive prohibition orders may be commenced by a peace officer, firearms officer or Chief Firearms Officer. The Prosecutor must assume carriage of these applications.

D. 38: Youth Criminal Justice

Prosecution directives

The *Youth Criminal Justice Act* (<http://www.laws-lois.justice.gc.ca/eng/acts/Y-1.5/index.html>) (YCJA) governs the prosecution of young persons aged 12 to 17 who are alleged to have committed criminal offences. The youth criminal justice system is intended to protect the public by:

1. holding young persons accountable through measures that are proportionate to the

seriousness of the offence and the degree of responsibility of the young person

2. promoting the rehabilitation and reintegration of young persons who have committed offences
3. supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behavior

Further the principles of the *YCJA* require that the criminal justice system for young persons be distinct from that of adults and must acknowledge a presumption of diminished moral blameworthiness or culpability of youth.

Prosecutors must ensure that all decisions taken at every stage of the youth justice system, from diversion to sentencing, conform to these and other principles in the *YCJA* and legal requirements of the *YCJA*.

In this section

- Youth Criminal Justice: Extrajudicial Sanctions (<https://www.ontario.ca/document/crown-prosecution-manual/38-a-youth-criminal-justice-extrajudicial-sanctions>)
- Youth Criminal Justice: Court Practices and Procedures (<https://www.ontario.ca/document/crown-prosecution-manual/38-b-youth-criminal-justice-court-practices-and-procedures>)
- Youth Criminal Justice: Resolution Discussions and Sentencing (<https://www.ontario.ca/document/crown-prosecution-manual/38-c-youth-criminal-justice-resolution-discussions-and-sentencing>)

38 (a): Youth Criminal Justice - Extrajudicial Sanctions

Type of document: Prosecution Directive

Effective date: November 14, 2017

The *Youth Criminal Justice Act* (<http://www.laws-lois.justice.gc.ca/eng/acts/Y-1.5/index.html>) includes extrajudicial sanctions (EJS), which are non-court measures used to hold a young person accountable for criminal conduct. These are post-charge programs designed to provide a timely method for young persons charged with a criminal offence to admit

responsibility for their criminal behaviour and participate in meaningful interventions that hold them accountable. Young persons are entitled to different considerations flowing from the fact that, because of their age, they have heightened vulnerability, less maturity and a reduced capacity for moral judgment.

A notation of completion of EJS remains on a young person's youth court record for two years, and may be considered by a youth justice court in future proceedings including when assessing the appropriateness of a custodial disposition.

The local Youth Justice Committee or the Ministry of Children and Youth Services administers EJS programming. The programming will address the young person's offending behavior through the imposition of individually tailored meaningful consequences. In appropriate cases, young persons will make restitution or reconcile with the victims, without the necessity of formal judicial proceedings. Prosecutors must only consider EJS if a reasonable prospect of conviction exists and must not impose additional requirements on the accused person as a precondition to offering EJS.

This directive addresses diversion for young persons. For adults, please see Community Justice Programs for Adults (<https://www.ontario.ca/document/crown-prosecution-manual/d-4-community-justice-programs-for-adults>) . For an adult suffering a mental illness, please see Mentally Ill Accused: Alternatives to Prosecution (<https://www.ontario.ca/document/crown-prosecution-manual/26-a-mentally-ill-accused-alternatives-prosecution>) . For an Indigenous young person, please see Indigenous Peoples Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-20-indigenous-peoples>) .

Ineligible offences

Prosecutors must not refer any of the following offences for extrajudicial sanctions, regardless of the circumstances of the offence or the offender:

- murder, manslaughter, infanticide, criminal negligence causing death
- driving offences causing death or bodily harm
- aggravated assault
- simple impaired driving or driving with a prohibited blood alcohol concentration or refusing to provide a breath sample
- offences involving firearms

- criminal organization offences
- terrorism offences
- kidnapping
- voyeurism
- child abuse and child luring
- home invasions
- human trafficking offences
- robbery
- sexual assault cause bodily harm
- sexual interference and exploitation, invitation to sexual touching and incest
- any offences where the Attorney General's consent was obtained to initiate proceedings.

Presumptively ineligible offence

In exceptional cases, the Prosecutor may refer the following presumptively ineligible offences for extrajudicial sanctions with the prior approval of the Crown Attorney or designate:

- hate-motivated offences [Hate Propaganda and Hate Motivated Offences Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-16-hate-propaganda-and-hate-motivated-offences>)]
- intimate partner violence offences [Intimate Partner Violence Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-23-intimate-partner-violence>)]
- criminal harassment
- offences involving child pornography
- publication etc., of intimate images without consent
- sexual assault.

Eligible offences

The Prosecutor may refer any other offence to extrajudicial sanctions.

Factors to consider

In determining if extrajudicial sanctions is an appropriate non-court measure to hold a young person accountable for a presumptively ineligible offence or eligible offence, the Prosecutor and Crown Attorney or designate must consider the following factors:

Background of the young person

1. the age of the young person
2. any prior findings of guilt or past involvement with EJS
3. the nature and number of any such previous offences
4. any outstanding charges
5. the role of the young person and their corresponding degree of responsibility in relation to the offence
6. whether the young person had been previously victimized
7. any remorse and willingness to engage in EJS or an appropriate treatment program
8. any mental health concerns, and the degree that the concerns can be said to have impacted the young person's behaviour
9. whether the young person comes from a disadvantaged group
10. whether the young person has been or is presently engaged with the child welfare system
11. whether the young person self-identifies as Métis, Inuit or First Nation.

The circumstances and nature of the offence

1. whether the offence is summary or indictable
2. whether the offence involves violence
3. whether the offence actually harmed the victim (physical, psychological or financial) and/or society
4. whether the incident affected the sexual integrity of a person

5. whether a weapon was used or threatened to be used
6. whether there was an intention to cause or attempt to cause substantial property damage or loss, and if so, whether the damage was reasonably foreseeable
7. whether the offence was against the administration of justice, such as breach of a court order, and, if so, the extent of non-compliance
8. whether the offence involved malice, extortion, exploitation or revenge
9. whether the offence involved a breach of trust
10. whether the offence was motivated by bias, prejudice or hate
11. whether the offence involved any type of bullying including cyber-bullying
12. the age of the victim
13. the views of the victim and/or their parents or legal guardians (if victim is a child), if available.

Administration of justice considerations

1. public confidence in the administration of justice
2. the length and expense of a trial when considered in relation to the seriousness of the offence
3. the likely sentence upon a finding of guilt
4. the availability of an appropriate sanction, including programming options, to hold the young person accountable for their offending behaviour and focus on correcting the offending behavior
5. frailties in the prosecution e.g. staleness of the case, or the technical nature of the offence
6. whether the consequences of the prosecution would be unduly harsh to the young person, the victim or any witnesses in the case, owing to such factors such as age, health or the relationship between the parties
7. whether a just result is accelerated by a referral to EJS.

In this section

- Youth Criminal Justice: Extrajudicial Sanctions
- Youth Criminal Justice: Court Practices and Procedures
(<https://www.ontario.ca/document/crown-prosecution-manual/38-b-youth-criminal-justice-court-practices-and-procedures>)
- Youth Criminal Justice: Resolution Discussions and Sentencing
(<https://www.ontario.ca/document/crown-prosecution-manual/38-c-youth-criminal-justice-resolution-discussions-and-sentencing>)

38 (b): Youth Criminal Justice - Court Practices and Procedures

Type of document: Prosecution Directive

Effective date: November 14, 2017

Judicial interim release (bail)

The *Youth Criminal Justice Act* (<http://www.laws-lois.justice.gc.ca/eng/acts/Y-1.5/index.html>) contains a unique bail regime, distinct from the *Criminal Code* regime for adults that recognizes the special circumstances and inherent vulnerability of youth.

Pre-trial detention should never be used as a substitute for child protection, mental health or other social measures. While protection of the public remains a paramount concern in any bail decision made by the Prosecutor, wherever possible, young persons should be managed in the community. At the same time, young persons who pose a risk to public safety may be detained.

The YCJA directs that a detention order may be lawfully imposed in only two situations:

1. the young person has been charged with a serious offence or
2. the young person has a history that indicates a pattern of conduct evidenced either by outstanding charges or by findings of guilt.

A young person is presumed innocent and the Prosecutor must be aware of the impact of even a brief period of detention in custody upon a young person. Even a brief period of detention in custody affects the mental, social and physical life of a young person and their family. The Prosecutor must consider the following additional factors when determining a position on bail:

1. the nature and seriousness of the offence
2. the young person's prior youth court record and/or any outstanding charges (or other relevant conduct)
3. whether the victim was a child
4. the safety of any witnesses or victims
5. concern that the young person will not appear in court if released in the community
6. evidence of a "substantial likelihood that the young person will, if released from custody, commit a serious offence"
7. public confidence in the administration of justice
8. the adequacy of the proposed plan of release, including the suitability of any proposed community support programs, a surety, or a responsible person
9. whether the Prosecutor will seek a custodial sentence if the young person is found guilty after trial
10. the needs of Indigenous young persons
11. young persons with special requirements and
12. the unique vulnerabilities of young persons presently engaged with the child welfare system, including their inability to access sureties or responsible persons, through no fault of their own.

The Prosecutor must ensure that efforts are made to notify the victim of any release order, the conditions of release, including non-communication and any order detaining the accused. In all cases where there is reason to have concern for a victim's safety, the Prosecutor must ensure that victim notification occurs as soon as possible. On request, the victim must be provided with a copy of the court order.

Reference should be made to the Judicial Interim Release (Bail) Directive

(<https://www.ontario.ca/document/crown-prosecution-manual/d-24-judicial-interim-release-bail>) for further direction on Options and Conditions for Release.

Bail de novo

The YCJA provides that either the defence or the Prosecutor may bring an application for a new bail hearing before a youth justice court judge only if the original order was made by

a justice of the peace. This application, for a bail de novo, is distinct from an application for a bail review. No new information is required and there is no deference to the justice of the peace.

The Prosecutor may bring an application for a bail de novo hearing before a youth justice court judge only with the prior approval of the Crown Attorney or designate.

Referral to child welfare agencies

Prosecutors have an obligation under the Child and Family Services Act that directs them to immediately contact a Children's Aid Society when they have reasonable grounds to suspect a child has been or is likely to be a victim of physical, sexual or emotional harm.

In addition to this obligation, the Prosecutor should bring concerns about a young person's need for child protection to the court's attention at the earliest opportunity. The YCJA provides for the court at any stage of the proceedings to refer the young person to a child welfare agency for an assessment to determine whether the young person is in need of child welfare services.

Election as to mode of trial

In cases involving homicide or where an adult sentence is sought, the YCJA directs that a young person shall elect the mode of trial and have the option to have a trial in the Ontario Court of Justice before a judge without a jury or in the Superior Court of Justice with a judge alone or with a judge and jury.

The YCJA directs that if a young person elects to be tried by in the Ontario Court of Justice before a judge without a jury or in the Superior Court of Justice with a judge alone, the Attorney General may require the young person to be tried by a court composed of a judge and jury in the Superior Court of Justice. If a Prosecutor determines a jury trial would be appropriate the Attorney General's consent must be obtained.

The Prosecutor must have the approval of her Crown Attorney or designate and the Assistant Deputy Attorney General - Criminal Law prior to commencing the process to seek the Attorney General's consent.

Appointment of counsel by court order

The YCJA states that a young person “has the right to retain and instruct counsel without delay, and to exercise that right personally, at any stage of proceedings against the young person.” It is important that young persons retain counsel as early as possible to ensure their rights are protected.

In addition to obtaining private counsel, there are three avenues for a young person to access publicly funded representation. First, they may utilize the services of duty counsel. Second, they may apply to Legal Aid Ontario for representation. Third, they may apply to a youth justice court judge for an order appointing publicly funded counsel if Legal Aid Ontario has denied their application.

When determining whether to accept an offer of extrajudicial sanctions, young persons are not entitled to court ordered publicly funded counsel and so may rely on the services of duty counsel. Prosecutors must oppose applications for court ordered publicly funded counsel when a decision on whether or not to accept an offer of EJS remains outstanding.

Prosecutors should remind the youth justice court of the following factors that should be considered when an application is made for court ordered publicly funded counsel:

- The financial circumstances of the young person and their parents or guardians and
- Whether the Prosecutor is seeking a custodial disposition if the young person is found guilty of the offences before the court.

Prosecutors should ensure that issues relating to the appointment of counsel are resolved quickly.

Mental health concerns

Where Prosecutors have concerns about the mental health needs of a young person, they should refer the young person to the local Youth Mental Health Court Worker or some other similar service at the earliest opportunity. These workers provide specialized support to young persons and their families and will assist them in connecting to community-based mental health resources and services.

Prosecutors should also consider whether a court-ordered mental health assessment is appropriate and request it without delay. These assessments are prepared by qualified medical professionals and provide the youth justice court with a comprehensive assessment of mental health needs that may be relevant to the young person’s offending behaviour. They assist Prosecutors and the youth justice court to identify the most

appropriate resources available to foster the young person's rehabilitation and reintegration into society.

Accessing youth records

Youth records are protected by the privacy regime set out in Part VI of the YCJA. That regime establishes basic rules for protecting the identity of young persons, has prohibitions for the disclosure of records except as authorized by the YCJA. It also establishes timelines within which youth records may be accessed. Youth records may be disclosed only in accordance with these timeline provisions, to persons authorized by the YCJA.

Where the access period has expired, a formal application shall be brought before a youth justice court judge to access the records.

If within the access period a party requests youth records in the possession of the Prosecutor, the Prosecutor must determine if the records could be released if redacted. In determining whether to provide the documents requested the Prosecutor must also have regard to the following factors:

1. if the requester is lawfully entitled to access under the YCJA
2. the purpose for which the records are being requested
3. whether the records relate to an ongoing prosecution or a completed prosecution
4. whether disclosure of the records might adversely affect the ability of the Crown's office to continue an ongoing or pending prosecution
5. whether the records are necessary to make full answer and defence
6. the privacy interests of the affected parties contained in the records
7. safety concerns for any persons named in the records and
8. the nature of the offences to which the records relate.

In this section

- Youth Criminal Justice: Extrajudicial Sanctions (<https://www.ontario.ca/document/crown-prosecution-manual/38-a-youth-criminal-justice-extrajudicial-sanctions>)
- Youth Criminal Justice: Court Practices and Procedures

- Youth Criminal Justice: Resolution Discussions and Sentencing
(<https://www.ontario.ca/document/crown-prosecution-manual/38-c-youth-criminal-justice-resolution-discussions-and-sentencing>)

38 (c): Youth Criminal Justice - Resolution Discussions and Sentencing

Type of document: Prosecution Directive

Effective date: November 14, 2017

Resolution discussions and sentencing

The sentencing regime for young persons in the *Youth Criminal Justice Act* (<http://www.laws-lois.justice.gc.ca/eng/acts/Y-1.5/index.html>) , including specific sentencing principles, is distinct from that of adults. The YCJA places a general emphasis on community-based dispositions for young persons and adult sentencing provisions such as mandatory minimum sentences do not apply.

The YCJA further directs that a youth justice court shall not commit a young person to custody unless:

1. the young person has committed a violent offence
2. the young person has failed to comply with non-custodial sentences
3. the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of either extrajudicial sanctions or of findings of guilt or both under this Act or
4. in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would inconsistent with the purpose and principles of sentencing under the YCJA.

Where lawfully available, Prosecutors may seek a custodial sentence for a young person where a non-custodial sentence would be inadequate to hold the young person accountable for their actions. Prosecutors must consider the background of the young person and the circumstances and nature of the offence.

Other factors to be considered include the availability of appropriate programming options, both in the community and in custodial centres and the location of open and secure custody facilities and their proximity to the young person's family and support network.

Reference should be made to the Victims Directive

(<https://www.ontario.ca/document/crown-prosecution-manual/d-36-victims>) .

Adult sentences

Young persons' found guilty of an offence committed when they were at least 14 years of age are eligible to be sentenced as an adult for offences punishable by a sentence of at least two years' incarceration.

The Prosecutor must seek an adult sentence for those serious violent offences defined in the YCJA as murder, attempted murder, manslaughter and aggravated sexual assault. If, in the opinion of the Prosecutor, a youth sentence would be appropriate, the Prosecutor must obtain the approval of the Crown Attorney and Director prior to agreeing to the youth sentence.

The Prosecutor may seek an adult sentence, with the prior approval of the Crown Attorney, for all other cases where the Prosecutor determines the maximum youth sentence would be insufficient to hold the young person accountable for their actions.

DNA orders

DNA orders are applicable to young persons' found guilty of criminal offences. For the purpose of DNA collections, the *Criminal Code* designates eligible offences as either compulsory primary offences, other primary offences or secondary offences.

Prosecutors must remind the youth justice court of its obligation to make a DNA order for each primary designated offence.

Prosecutors should request a DNA order for each secondary designated offence. In determining whether to seek a DNA order for these offences, the Prosecutor must consider the principles of the YCJA.

Weapons prohibition orders

A weapons prohibition order for a period not exceeding two years is mandatory for young persons' found guilty of certain offences in the *Criminal Code*. The Prosecutor must request such an order when the young person is found guilty of any of these offences.

A weapons prohibition order for a period not to exceed two years may be imposed if the young person is found guilty of some offences in the *Criminal Code*. The Prosecutor may request such an order when the young person is found guilty of any of these offences.

Lifting the ban on publication of a young person's identity

The YCJA prohibits the publication of information that would identify a young person dealt with under the act. However, the ban may be lifted in certain circumstances.

First, if the young person receives an adult sentence, the ban on publication is lifted automatically pursuant to the legislation.

Secondly, in exceptional circumstances, when a young person is found guilty of a violent offence, and is sentenced as a youth, Prosecutors may request the lifting of the ban on publication. The exception to lifting the ban on publication is available only where the young person is deemed a high risk to re-offend violently and lifting the ban is necessary to protect the public.

If, in the opinion of the Prosecutor, such exceptional circumstances exist, the Prosecutor must obtain the prior approval of the Crown Attorney or designate to request the lifting of the publication ban.

Reference should be made to the Victims Directive

(<https://www.ontario.ca/document/crown-prosecution-manual/d-36-victims>) .

In this section

- Youth Criminal Justice: Extrajudicial Sanctions (<https://www.ontario.ca/document/crown-prosecution-manual/38-a-youth-criminal-justice-extrajudicial-sanctions>)
- Youth Criminal Justice: Court Practices and Procedures (<https://www.ontario.ca/document/crown-prosecution-manual/38-b-youth-criminal-justice-court-practices-and-procedures>)
- Youth Criminal Justice: Resolution Discussions and Sentencing

D. 39: COVID-19 Recovery

Type of document: COVID-19 Recovery

Effective date: October 7, 2021

COVID-19 Recovery

The effects of the COVID-19 pandemic, including a necessary reduction in court operations, have caused unprecedented challenges in the criminal justice system. These challenges have resulted in a substantial backlog of criminal cases in the courts. Balancing this backlog against incoming prosecutions means that Prosecutors must take steps to reduce the number of cases in the criminal justice system to ensure that priority is given to the prosecution of serious offences.

The Prosecutor must review each case in accordance with the overall direction of the Manual and make principled decisions that also address the backlog of cases in the courts due to the COVID-19 pandemic. In reviewing each case, the Prosecutor must:

- determine whether the prosecution is viable and appropriate, including whether it is in the public interest to proceed given the impact of the COVID-19 pandemic on the criminal justice system
- consider all available and appropriate sanctions, consistent with public safety, to resolve cases as early as possible
- make every effort possible to minimize delays caused by the COVID-19 pandemic, their impact on victims, witnesses and accused, and reduce the risk of cases being stayed for unreasonable delay

The community relies upon Prosecutors to pursue charges that enhance public safety and promote public confidence in the administration of justice and the rule of law.

Prosecutors must act with objectivity, independence and fairness in each case to ensure principled decisions are made. Decisions made by Prosecutors in the proper exercise of their discretion will be supported by the Attorney General.

Charge Screening

A charge may only proceed if there is a reasonable prospect of conviction and it is in the public interest. This standard must be applied to all cases and at all stages. Where there is

no reasonable prospect of conviction or there is no public interest to proceed, the Prosecutor must withdraw the charge.

Reference should be made to the Charge Screening Directive

(<https://www.ontario.ca/document/crown-prosecution-manual/d-3-charge-screening>) .

Reasonable prospect of conviction and the impact of the COVID-19 pandemic

In accordance with the Prosecutor's continuing obligation to assess reasonable prospect of conviction at all stages of the prosecution, the Prosecutor must consider any frailties in the prosecution that may have been exacerbated by the COVID-19 court restrictions or any other COVID-19 impacts.

For example, the Prosecutor must consider the impact of any lengthy delays, the ability of witnesses to participate in a hearing in-person or remotely and access to appropriate technology.

If there is a reasonable prospect of conviction, the Prosecutor must then consider whether it is in the public interest to continue the prosecution.

Public interest and the impact of the COVID-19 pandemic

Not all prosecutions that have a reasonable prospect of conviction will be in the public interest to continue. No one factor is determinative when assessing the public interest, but consideration must be given to both the seriousness of the offence including the harm done to victims and public balanced against the significant pressures on the criminal justice system caused by the COVID-19 pandemic.

The Prosecutor must also consider the following:

1. the length, delay and expense of a trial, and any COVID-19 court restrictions and limitations on court operations, and the need to reduce the number of cases in the criminal justice system, so that resources are available for the prosecution of serious offences
2. the impact of the COVID-19 pandemic on an accused, victim or witness or a segment of the community in light of their age, physical health, mental health or special vulnerability (e.g. the frequency of intimate partner violence during the COVID-19 pandemic)

3. the disproportionate impact of the COVID-19 pandemic on racialized, marginalized, and Indigenous communities (e.g. an increase in the frequency of discriminatory or hate-related offences during the COVID-19 pandemic)
4. the disproportionate impact of the COVID-19 pandemic on vulnerable accused persons, including racialized, marginalized and Indigenous accused (e.g. not having access to accommodations or supports that normally exist or barriers aggravated by living in a remote First Nations or fly-in community)
5. whether the offence was motivated by the COVID-19 pandemic (e.g. taking advantage of closed businesses or people's fear of infection)
6. whether the charge is an offence against the administration of justice, such as a fail to comply offence, where the restrictions imposed by the COVID-19 pandemic impacted an accused's ability to comply with the court order
7. whether the experience of being arrested and charged (possibly held in custody pending release) with a criminal offence can, in itself, deter the accused person from being further involved in the criminal justice system
8. the public interest factors in the Charge Screening Directive, including the gravity or relative seriousness of the offence, the prevalence of the type of offence in the community, the criminal history of the accused and the circumstances and views of the victim including any safety concerns

Reference should be made to the Charge Screening Directive

(<https://www.ontario.ca/document/crown-prosecution-manual/d-3-charge-screening>) .

Public Interest Factors to Consider in Fail to Comply Offences

In determining whether it is in the public interest to proceed with a prosecution of a fail to comply offence, the Prosecutor must also consider the following public interest factors:

1. how long the accused was compliant with the terms of the release order, before and after failing to comply with the order, especially given the impact of the COVID-19 pandemic on the accused
2. any apparent reasons for failing to comply with the order, including whether the personal circumstances of the accused made it more challenging for them to understand the court order, or to comply with it
3. whether there are new criminal charges and whether the resolution of those charges can sufficiently hold the accused accountable without the need to proceed with the

prosecution of the fail to comply offence

4. whether the accused failed to comply with a non-communication condition with a victim including a history of failing to comply with a non-communication condition or whether the accused initiated contact
5. whether the nature of the fail to comply impacts the appropriateness of the continued release of the accused in the community (e.g. failing to comply with a weapons prohibition)

Where it is in the public interest to proceed, the Prosecutor must consider all available and appropriate sanctions, including whether it would be appropriate to refer the accused to a community justice or Indigenous Restorative Justice program.

Reference should be made to the Charge Screening

(<https://www.ontario.ca/document/crown-prosecution-manual/d-3-charge-screening>) and Indigenous Peoples (<https://www.ontario.ca/document/crown-prosecution-manual/d-20-indigenous-peoples>) Directives.

Community Justice or Indigenous Restorative Justice Programs

In some cases, the public interest can be better served through the exercise of prosecutorial discretion to withdraw or stay criminal charges after the completion of a community justice or Indigenous Restorative Justice program. Such programs allow the accused to take responsibility for their actions, address the root causes of the problem, and reintegrate them into the community in a positive way. A referral to one of these programs may be appropriate even for an accused who has previously completed one of these programs or been convicted of a criminal offence.

The following Directives identify offences that are ineligible and presumptively for community justice or Indigenous Restorative Justice programs, and set out factors the Prosecutor must consider in assessing the appropriateness of such programs for eligible offences: Community Justice Programs for Adults

(<https://www.ontario.ca/document/crown-prosecution-manual/d-4-community-justice-programs-for-adults>) , Indigenous Peoples (<https://www.ontario.ca/document/crown-prosecution-manual/d-20-indigenous-peoples>) , Mentally Ill Accused: Alternatives to Prosecution (<https://www.ontario.ca/document/crown-prosecution-manual/26-a-mentally-ill-accused-alternatives-prosecution>) and Youth Criminal Justice: Extrajudicial Sanctions (<https://www.ontario.ca/document/crown-prosecution-manual/38-a-youth-criminal-justice-extrajudicial-sanctions>) .

Offences to be Presumptively Referred

Taking into account the impact of COVID-19 on the criminal justice system, and the need to reduce the number of cases in the courts to ensure that priority can be given to the prosecution of serious offences, the following offences are presumptively referable to a community justice or Indigenous Restorative Justice program:

- theft and possession under \$5,000
- mischief under \$5,000
- fraud under \$5,000
- food, travel and accommodation frauds
- take motor vehicle without consent
- utter forged document
- possession of identity document
- causing a disturbance

Other Eligible Offences

In determining whether a referral to a community justice or Indigenous Restorative Justice program for other eligible offences is an effective alternative to a formal prosecution, the Prosecutor must consider the impact of COVID-19 on the criminal justice system and the need to reduce the number of cases in the courts to ensure that resources are directed to the prosecution of serious offences.

The Prosecutor must also consider the following factors:

1. the impact of the COVID-19 pandemic on the accused, including loss of job, health consequences, additional child-care and education responsibilities, working from home or significant financial constraints
2. the disproportionate impact of the COVID-19 pandemic on vulnerable accused persons, including racialized, marginalized and Indigenous accused (e.g. not having access to accommodations or supports that normally exist or barriers aggravated by living in a remote First Nations or fly-in community)
3. whether the offence was motivated by the COVID-19 pandemic (e.g. taking advantage of closed businesses or people's fear of infection)

4. frailties in the prosecution (e.g. staleness of the case, availability of witnesses, or the ability of witnesses to participate in-person in an in-person or remote hearing)
5. whether a just result is accelerated by a referral to a community justice or Indigenous Restorative Justice program taking into particular consideration any delays caused by the COVID-19 pandemic

Position on Sentence in Resolution Discussions

In determining a position on sentence in resolution discussions, the Prosecutor must consider all relevant factors, including the circumstances of the accused and alleged offence, the principles and purposes of sentencing, and the safety and security of the victim or public. The Prosecutor must also consider the impact of COVID-19 on the criminal justice system and the need to reduce the number of cases in the courts to ensure that resources are directed to the prosecution of serious offences.

The Prosecutor must consider, all available and appropriate sanctions, consistent with public safety, to resolve cases as early as possible. In some cases, the public interest can be better served by resolving a case for a sentence that will not result in a criminal conviction or a custodial sentence. Even for an accused who has previously been convicted of a criminal offence or received a custodial sentence, a sentence that will not result in a criminal conviction or a custodial sentence may still be appropriate.

Given the impact of the COVID-19 pandemic on the criminal justice system:

1. Where the established sentencing range would ordinarily support a suspended sentence, the Prosecutor must consider resolving the case for a discharge or referring the accused to a community justice or Indigenous Restorative Justice program unless the safety and security of the victim or public cannot be addressed by the proposed sanction or the proposed sanction would not adequately reflect the circumstances of the offence or offender.
2. Where the established sentencing range would ordinarily support a sentence up to 6 months in custody, the Prosecutor must consider resolving the case for a non-custodial sentence or a custodial sentence served in the community unless the safety and security of the victim or public cannot be addressed by the proposed sentence, the proposed sentence is not available in law, or the proposed sentence would not adequately reflect the circumstances of the offence or offender.

Reference should be made to the Indigenous Peoples

(<https://www.ontario.ca/document/crown-prosecution-manual/d-20-indigenous-peoples>) , Intimate Partner Violence (<https://www.ontario.ca/document/crown-prosecution-manual/d-23-intimate-partner-violence>) , Offences Against Children (<https://www.ontario.ca/document/crown-prosecution-manual/d-27-offences-against-children>) , Sexual Offences Against Adults (<https://www.ontario.ca/document/crown-prosecution-manual/d-34-sexual-offences-against-adults>) and the Victims Directives (<https://www.ontario.ca/document/crown-prosecution-manual/d-35-victims>) .

Alcohol Impaired Driving Resolutions

In reviewing alcohol impaired driving cases, Prosecutors must consider the impact of the COVID-19 pandemic as an exceptional circumstance justifying the withdrawal of the *Criminal Code* driving offence in exchange for a guilty plea to the *Highway Traffic Act* (<https://www.ontario.ca/laws/statute/90h08>) (*HTA*) offence of careless driving.

Where the exceptional circumstance justifying a careless driving resolution is the impact of the COVID-19 pandemic, an accused is ineligible for the resolution if any of the following deemed aggravating factors under the *Criminal Code* (<https://laws-lois.justice.gc.ca/eng/acts/C-46/index.html>) and other factors are present:

- bodily harm or death resulted
- the accused's blood alcohol concentration is equal to or more than 120 mg within two hours after operating a vehicle
- the accused has a prior criminal or *HTA* record for similar offences
- the accused is prohibited or suspended from driving under a federal or provincial act
- a collision or significant bad driving was reported
- the accused has a prior *HTA* 'warn' or 'ADLS' licence suspension
- the accused was being paid for driving at the time
- a person under the age of 16 years was a passenger in the vehicle
- the accused refused to provide a breath or blood sample
- the accused was driving a large motor vehicle
- the impairment was caused by drugs or a combination of drugs and alcohol

A decision to accept a careless driving resolution must be approved by the Crown Attorney or designate. The protection of the public is the primary concern at every stage of the prosecution of impaired driving offences.

Where a careless driving resolution is approved, the Prosecutor should consider seeking a \$1000 fine and a *Provincial Offences Act* (<https://www.ontario.ca/laws/statute/90p33#BK44>) (POA) probation order with a condition requiring that an ignition interlock device be installed in the offender's vehicle or other driving restrictions. The Prosecutor should also consider as a term of a probation order a condition requiring the accused to complete the Back on Track Program (<http://www.remedial.net/index.html>) remedial measures program.

Reference should be made to the Impaired Driving Directive (<https://www.ontario.ca/document/crown-prosecution-manual/d-18-impaired-driving>) .